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**Comptroller General
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Decision

Matter of: Daisung Company

File: B-294142

Date: August 20, 2004

Robert K. Tompkins, Esq. and Michael J. Nardotti, Jr., Esq., Patton Boggs, and Byoung Kook Min, Esq., First Law Offices Of Korea, for the protester.

Maj. Gregg A. Engler, Department of the Army, for the agency.

Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer's determination that protester was not a responsible prospective contractor was reasonable where the determination was based on audit and criminal investigation that resulted in specific findings of improper conduct by protester under recent contract for same requirement.

DECISION

Daisung Company protests the determination that it was not a responsible prospective contractor due to an unsatisfactory record of integrity and inadequate operational controls, under request for proposals (RFP) No. DABP01-03-R-0061, issued by the Department of the Army, Army Contracting Command, Korea, for inspection, cleaning and renovation of government-owned mattresses and box springs. The Army determined that Daisung was nonresponsible, and rejected its offer, based on Army Audit Agency (AAA) and Army Criminal Investigation Division (CID) findings.

We deny the protest.

In February 2003, the AAA in Korea initiated a performance audit on Daisung under its contract for mattress renovation services. During an April 22 unscheduled visit to the protester's mattress repair facility, the auditors observed that Daisung was not fulfilling its renovation responsibilities. Agency Report (AR), Tab 5, Final CID Report, exh. 12, at 1, exh. 14, at 1; AR, Factual Summary, at 2-5. Specifically, while the contract required Daisung to "renovate" each mattress by inspecting the inside of the mattress, and, if necessary, removing and replacing the old felt material with new material, the auditors observed Daisung's workers simply replacing the old mattress

covers with new covers, without inspecting or renovating the mattresses. To confirm these observations, the auditors examined a mattress the workers had presented to them as fully renovated, and found that the inside of the mattress was filled with old material that should have been replaced. AR, Tab 5, Final CID Report, exh. 14, at 1; AR, Factual Summary, at 3-4. The auditors found that only the mattress cover had been changed. AR, Tab 5, Final CID Report, exh. 14, at 1.

Additionally, the auditors discovered that Daisung was renovating cheaper mattresses to look like more expensive mattresses and then improperly charging the agency the rate for the more expensive mattress renovation. AR, Factual Summary, at 4. Specifically, the price to renovate a twin “blue and white striped” mattress under contract line item number (CLIN) 9AA was approximately \$27 lower than the price to renovate a twin “yellow-flowered” mattress under CLIN 9AM. AR, Tab 5, Final CID Report, exh. 12, at 1. The auditors reported that Daisung was replacing the 9AA striped mattress covers with 9AM flowered covers, returning the 9AA striped mattresses to the units as 9AM flowered mattresses, and improperly charging the agency for the renovation at the higher 9AM price. The auditors noted that this improper activity was facilitated by the Daisung supervisor’s picking up mattresses for renovation directly from individual Army units, rather than through the installation’s property book office, as required under the contract. AR, Tab 5, Final CID Report, exh. 14, at 1. Additionally, the auditors found that the contracting officer had not been “monitoring the performance of the contract correctly, if at all,” and that Daisung was “taking advantage” of this lack of government oversight. AR, Tab 5, Final CID Report, exh. 12, at 1; AR, Factual Summary, at 4-5.

On September 18, CID initiated a criminal investigation based on the information obtained from the AAA auditors. The CID agents collected sworn statements and physical evidence, which were found to substantiate Daisung’s improper actions under the contract. CID found that Daisung’s improperly substituting 9AM mattress covers for less expensive 9AA covers resulted in overcharges to the Army of approximately \$93,000. AR, Tab 5, Final CID Report, exh. 12, at 1; AR, Factual Summary, at 5. The results of the CID investigation were reviewed by legal counsel who determined that probable cause existed to believe Daisung had committed the criminal offenses of false claim, false official statement, fraud and larceny of government funds. AR, Tab 5, Final CID Report, exh. 16, at 1.

The RFP at issue here was issued on November 20, 2003, during the course of the investigations. It contemplated the award of a fixed-price requirements contract for a base year, with four 1-year options, and provided for award to the offeror submitting the lowest-priced, technically acceptable proposal.

The agency received nine proposals, including Daisung’s, by the December 8 closing date. Following proposal evaluation and review of the AAA and CID findings, the contracting officer (CO) determined that Daisung was not a responsible prospective contractor and, by letter dated March 22, 2004, notified Daisung that its proposal had

been eliminated from consideration for award. The letter stated that Daisung was determined to be nonresponsible because of its “unsatisfactory record for integrity and inadequate operational controls,” and explained that the AAA and CID investigations had found that

[Daisung employees had] merely replaced the mattress covers without refurbishing, cleaning and sanitizing the mattresses as required by contract specifications. In addition, you failed to correct the identification code on delivery orders for different types of mattresses submitted by various U.S. Army units, which inflated the cost to repair the mattresses and made them look like more costly mattresses.

AR, Tab 12, Nonresponsibility Letter, at 1. After a debriefing, the protester filed an agency-level protest, which the agency denied, and on June 2 filed this protest with our Office.

Daisung challenges the agency’s factual findings, arguing that the record does not support the determination, and concludes that the nonresponsibility determination lacks a rational basis.

The Federal Acquisition Regulation (FAR) provides that, in order to be found responsible, a prospective contractor must have, among other things, a satisfactory performance record; a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible unless the contracting officer determines that the circumstances were properly beyond the contractor’s control or that the contractor has taken appropriate corrective action. FAR §§ 9-104-1(c), 9-104-(c); Soft Am., Inc., B-270111, Feb. 7, 1996, 96-1 CPD ¶ 134 at 4-5. A nonresponsibility determination may be based upon the agency’s reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default, and the contractor disputes the agency’s interpretation of the facts or has appealed a contracting officer’s adverse determination. MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431 at 4. Nonresponsibility determinations are matters where the contracting officer is vested with broad discretion in exercising his or her business judgment. Accordingly, our review is limited to considering whether such a determination was reasonable when it was made, given the information the agency had before it at the time. Kilgore Flares Co., B-292944 et al., Dec. 24, 2003, 2004 CPD ¶ 8 at 8.

We find that the CO’s negative determination of Daisung’s responsibility was reasonable. The CO based his determination on the findings from the detailed, year-long AAA and CID investigations, including, for example, sworn statements by the AAA auditors, dated February 10 and 18, 2004, interviews with Daisung repair shop personnel, dated May 13 and 14, 2003, an interview with the president of Daisung, affirmed by him as true on November 4, 2003, and photographs taken during the unscheduled visit to the Daisung facility. AR, Tab 5, Final CID Report, exhs. 8, 12, 14, and 2G. We have reviewed these documents, and find they contain

information from which the CO reasonably could conclude that Daisung's conduct under its recent contract raises serious doubt as to the company's integrity. Specifically, as noted above, the investigators found that Daisung, among other things, did not properly renovate mattresses by inspecting and replacing worn filling with new filling, improperly switched mattress covers, and improperly billed at the higher price work performed on the lower-priced mattresses. Additionally, the record contains more than one statement by Daisung representatives confirming that Daisung employees replaced the blue-striped mattress covers with the more expensive flowered covers. AR, Tab 5, Final CID Report, exh. 2G, Interviews with Repair Shop Personnel, at 4, 9. For example, when one Daisung representative was asked what happened to the "old, blue and white striped mattresses that the units turn in," the auditors reported that he responded, "the mattress contractor takes and renovates them into the yellow-flowered kind" AR, Tab 5, Final CID Report, exh. 2G, at 4. CID report information such as this properly may be used as the basis for a nonresponsibility determination, without the need for the contracting officer to conduct an independent investigation to substantiate the accuracy of the report. Energy Mgmt. Corp., B-234727, July 12, 1989, 89-2 CPD ¶ 38 at 4; Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235 at 4. The contracting officer's determination was reasonable given the information provided by AAA and CID.

Daisung cites several of our prior decisions for the proposition that we should examine the validity of the AAA and CID findings and documents in determining the reasonableness of the agency's determination here. However, the facts of the cited cases are materially different from those here. In one case, R. J. Crowley, Inc., B-229559, Mar. 2, 1988, 88-1 CPD ¶ 220, for example, the nonresponsibility determination was based on a pre-award survey finding that the protester had not met a definitive responsibility criterion contained in the solicitation. We determined that the agency had misinterpreted the criterion, finding that there was no reasonable basis for the agency to conclude that the protester had not met the criterion as properly read, and that the nonresponsibility determination therefore was unreasonable. The case here involves no definitive responsibility criteria, and there is nothing in the record—aside from Daisung's denial of wrongdoing—that calls into question AAA's and CID's basic findings that the protester failed to properly renovate the mattresses, switched mattress covers, and overcharged the government. Thus, as stated above, our review in cases such as this is limited to determining whether the contracting officer's nonresponsibility determination was reasonable given the information provided by AAA and CID; we will not question that information. Kilgore Flares Co., *supra*, at 8.

The protester alleges certain factual errors in the AAA and CID documentation, including, for example, that Army personnel, rather than its employees, initiated the pick-up and delivery of the mattresses directly from and to the individual units, and that Army personnel in the various units preferred the 9AM mattresses, and Daisung

was simply complying with their requests. Protester's Supplemental Comments at 5-6. These arguments focus on facts or discrepancies in the record not related to the relevant investigative findings, and thus do not establish that the agency's nonresponsibility determination was unreasonable. Specifically, as noted above, the agency's determination rested on the findings that the protester did not properly renovate the mattresses, improperly replaced the less expensive white and blue striped mattress covers with the more expensive flowered covers, and overcharged the agency. These findings are not affected by the protester's disputing which party initiated the change in the pick-up and delivery locations, or by Army personnel's expressed preference for the 9AM mattresses.

Daisung also contends that numerous delivery orders and inspection reports indicate that authorized Army personnel "asked for, received and accepted the AA to AM mattress exchange," *id.* at 5, suggesting that this shows that the agency essentially approved the conversion of AA mattresses into AM mattresses. However, the work orders, delivery orders and inspection reports merely reflect requests that CLIN 9AM mattresses be renovated; nothing in these documents instructed the contractor to replace 9AA mattress covers with 9AM covers. AR, Tab 5, Final CID Report, exh. 2C, at 7-9; Supplemental Agency Report, at 14. Moreover, one of the AAA/CID findings was that the delivery orders and inspection reports were simply being signed by agency personnel, without verification of the type of mattress being sent for renovation, AR, Tab 5, Final CID Report, exh. 2A, at 9; Supplemental Agency Report, at 15; thus, there is no support in the record for Daisung's suggestion that the Army knowingly had it cover less expensive mattresses with the more expensive covers.

Finally, Daisung argues that the agency failed to consider mitigating circumstances, including, for example, that the incumbent contract was "hopelessly vague" and that the agency failed to properly monitor the contract. However, the protester has pointed to no contract provisions that arguably allowed it to recover mattresses without renovating them, replace the less expensive white and blue striped mattress covers with the more expensive flowered covers, and improperly charge the agency for work on more expensive mattresses. The Army's failure to monitor the contract properly in no way altered Daisung's contractual responsibilities, and thus is irrelevant here.

We conclude that the Army had a reasonable basis to determine Daisung nonresponsible for a perceived lack of integrity and inadequate operational controls based on the AAA and CID investigation report information.

The protest is denied.

Anthony H. Gamboa
General Counsel

