Responsibility Determinations and Offeror Certifications at the GAO

**BLUF:** While a Contracting Officer (KO) has broad discretion when making a responsibility determination, the KO is reliant on the representations of the offeror. When the offeror misrepresents itself, then the responsibility determination is undermined.

**I. Responsibility Determinations**

* *Responsibility, Generally*
  + Definition: Bidders apparent ability and capacity to perform.
  + Policy: Contracts may only be awarded to a “responsible” contractor.
  + Criteria: See FAR § 9.104. KO makes the determination. Contractor/offeror ***must*:**

a. Have adequate financial resources or ability to obtain them;

b. Be able to comply with contract performance schedule;

c. Have a satisfactory performance record (although a lack of a record does not eliminate contractor from being deemed responsible);

d. Have a **satisfactory record of integrity and business ethics;**

e. Have the necessary organization, experience, accounting, and technical skills; and

f. Have the necessary equipment or facilities; and

g. Be otherwise qualified.

* + Contractor is considered non-responsible until KO can affirmatively establish responsibility.
* *GAO review of “Responsibility” Determination*
  + KO’s are given wide discretion. Standard of review is abuse of discretion. Judicial/GAO review is limited to when KO acts with fraud, bad faith, or misapplication of criteria. GAO will also review when a protestor presents specific evidence that a KO may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee is found responsible. *Southwestern Bell Telephone Co*., B-292476 (2003).
  + The focus of the inquiry is whether the record shows that: (1) the KO was generally aware of responsibility issues and ignored them, or (2) if the KO was not aware, whether the information was readily available? *Engility Corp*, B-413202 (2016).
  + Parent/Subsidiary Relationships**:** When the offeror discloses a parent/subsidiary relationship, KO should consider, at minimum, the following:

1. The organizational structure of the parent/subsidiary;
2. The parent’s involvement in performance;
3. Whether the subsidiary would operate independently. *FCi Federal Inc.*, B-408558 (2014)

* Integrity and Business Ethics**:**

1. Review is not “task specific” – integrity and business ethics in the performance of different services is relevant to the determination. *FCi Federal Inc.*, B-408558 (2014)
2. Protest sustained when KO was aware of a DOJ investigation, but relied on media reports rather than considering the indictments and investigation. *Southwestern Bell*, B-292476 (2003)
3. Allegations, by themselves, do not automatically render an offeror non-responsible. The GAO upheld a KO’s responsibility determination when the record showed: (1) the awardee was investigated, but not indicted or debarred; (2) the KO questioned the awardee and did not ignore the matter; and (3) the KO cited to recent dealings with the awardee for support. *FN Manufacturing,* B-297172.2 (2005).
4. Past criminal activities by a corporate officer do not automatically establish non-responsibility, it just must be considered. *Impresa Contruzioni Geom. Domenico Garufi v. U.S.*, 238 F.3d 1324 (Fed. Cir. 2001).

**II. Certifications**

* *Certifications, Generally*
  + Among other things, FAR Par 52 requires offerors to disclose certain information essential to making a proper award. Regarding responsibility determinations, offerors must comply with FAR § 52.209-5 & 52.209-7.
  + FAR 52.209-5 applies to acquisitions above the simplified acquisition threshold. It requires offerors to disclose whether it or any of its “principals” were subject to the following:
  1. Debarment, suspension, proposed for debarment, or declared ineligible for procurement;
  2. Within a 3 year period, any criminal or civil convictions related to government procurements and other integrity related crimes (fraud, bribery, falsification of documents, false claims, etc), and Federal and State Anti-trust violations;
  3. Presently Indicted or otherwise criminally/civilly charged for a crime related to government procurements and other integrity related crimes;
  4. Within a 3 year period, any tax delinquencies;
  5. Within a 3 year period, any terminations for default.
  + FAR 52.209-7 applies to acquisitions above $550,000.00. It requires offerors who have current active federal contracts in excess of $10M to certify its entries in FAPIIS are accurate. In doing so, the offeror is certifying that, in the last 5 years, neither it nor any of its “principals” were subject to the following:

1. Criminal conviction;
2. A civil judgment of $5,000.00 or more, and resulting in a finding of fault and liability;
3. An administrative fine of $5,000.00 fine or more, or damages of $100,000.00 or more, and resulting in a finding of fault and liability;
4. Any consent or settlement with an acknowledgment of fault if the proceeding could have led to a criminal, administrative, or civil proceeding.

* “Principal” is defined as an officer, director, owner, partner or a person having primary management or supervisory responsibilities within a business entity.
  1. Extends to prior employees, regardless of when they departed from the company.
  2. GAO and COFC have expanded the definition to include parent companies because they are “owners” of the subsidiary. *Algese 2 s.c.a.r.l. v. U.S.*, 125 Fed Cl. 431 (2016); *Southwestern Bell*, B-292476 (2003).
* *Judicial/GAO Review of Certifications* 
  + Material, intentional misrepresentations in a proposal may disqualify an offeror from competing for a contract award.
  + A misrepresentation is material when it is made intentionally and a KO uses it in forming an opinion.

**III. Remedies**

* + KO reconsider responsibility determination and find that awardee not responsible;
  + Set aside award, reevaluate or resolicit;
  + If awardee acted in bad faith or materially misrepresented itself, then exclude awardee from competition.