Contractor Responsibility Determinations
Contract Specialist  Responsibility

Ensure Awards are made to contractors who are:

➢ Responsive to our requirements
  ✔ Technical, administrative

➢ Qualified
  ✔ licensed, experience, SB classification, debarred

➢ Responsible
  ✔ Financial resources, accountable, reliable, dependable, ethics
Definition: Experienced Buyer

Someone who has been around long enough to...

- Imagine everything that can go wrong in a contract and...
- Knows that things will go wrong and...
- Is wise enough to avoid or mitigate the problems before they arise
Responsibility Determination
FAR 9.103

- (a) ... contracts shall be awarded to, responsible prospective contractors only.
- (b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.
- SBA help for small business determination
- (c) ...While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.
...Because prospective contractors must establish their responsibility, contracting officers may consider contractor inability or unwillingness to provide this information in making determinations...

A LAWYER’S VIEW OF RESPONSIBILITY

May 15, 1990

RESPONSIBILITY

by Bruce H. Segal

Contracting officials must make thorough investigations of prospective contractor financial and operational capabilities, not only to get highly qualified contractors, but to avoid potential default termination and problems during performance. Contracting officers not only must know the regulations but also what financial and operational information is available for use and where to get that information before making responsibility determinations. This edition of A Lawyer’s View discusses the subject and gives some practical advice.

judgments, determinations are not susceptible to judicial review in the absence of fraud or bad faith. See Reo Industries v. US, 492 F.2d 1200 (1974). Because prospective contractors must establish their responsibility, contracting officers may consider contractor inability or unwillingness to provide this information in making determinations. See Wallace & Wallace, Inc., B-206859.2, 83-2 CPD ¶142 (1983).

Information: What You Want and Where to Get It

A excellent instructional booklet, "How To Read A Financial Statement", is available from Merrill Lynch & Co. to understand the business standards used in making responsibility determinations. FAR Subpart
Acquisition Guide 9.4

Contracting Officers (CO) were not always conducting responsibility determinations properly. In particular, the IG found that for sole source awards, including 8(a) awards, the CO was not documenting reviews of past performance.

or suspended firms). Determinations of prospective subcontractor responsibility may affect the Government’s determination of the prospective prime contractor’s responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor’s responsibility.
...COs were not always conducting responsibility determinations properly...

CO not documenting reviews of past performance
What is a Responsible Contractor?

- Adequate financial resources
- Able to comply with performance schedule
- Performance record
- Ethics & integrity
- Skilled workforce
- Business processes
- Technical acumen
- Equipment & facilities
- Qualified to receive an award
- Consistent public record
- Stable management
Realistic Proposal

- **GAO decision B-406625**
  - “...In this regard, with respect to the price realism analysis, the RFP provided that the agency could: [r]eject any proposal, at any time during the evaluation, which is unrealistic in terms of performance commitments or based on unrealistically high or low price. Such proposals may be deemed to reflect a lack of technical competence, a lack of understanding of the requirements, an inability to perceive the complexity of the requirement, or a lack of sound business judgment....”

  - “...The fundamental purpose of discussions is to afford offerors the opportunity to improve their proposals "to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation."
Financially Capable of Performance

How much does it cost to perform?
1. G & A - overhead costs of running a business
2. Labor to do the work, payroll & fringe benefits
3. Materials, equipment, tools
4. Financing & cost of money
5. Govt. documentation & rules (e.g.: e-verify)
6. Hanford rqmts. (e.g.: training, badging)
7. Subcontractor payments
8. Taxes, insurance, licenses, permits
The goal is to determine whether financial “Impairments” and/or “Impediments” exist which could adversely affect a contractor’s ability to perform the contract.
Impairment

..past or current problems..

Some Examples of impairment:
- Liabilities exceed assets
- Credit is impaired from payment history
- Liens or lawsuits
- Bankruptcy

How to determine impairment do not exist:
- D&B report
- Web Search (Vendor Name News)
- Review of audit reports
- Review of financial statements.
**Impediments**

.. _future problems_

Some examples of Impediments

- Insufficient capital
- Non compliant accounting system
- Labor disputes or expiring union agreements

How to determine Impediments do not exist:

- History of recently & successfully completing similar contracts under similar circumstances
- Bonding Capacity determination
- Review of audit reports
- Review of financial statements.
Buyer’s Role = Document Analysis

- GAO Case B-406990, Kollsman Inc., Oct 2012
  ✓ ... the source selection decision did not discuss the past performance evaluation...
  ✓ ...Given the lack of documentation and support... we find no basis to conclude the agency reasonably evaluated....
  ✓ ...protest... is sustained where the record does not support the...rating...
Sound Business Judgment

- Understands solicitation requirements
- Realistic proposal
  note: Doesn’t have to be profitable
- Rational and coherent proposal
- Capable personnel
  or a plan to obtain them
- Related and positive business history
- Adequate accounting system
- Demonstrated capability to perform
Discussions & Clarifications

- Raise responsibility questions
- Provide offerors an opportunity to
  - “improve” the proposal
  - Clear and convincing evidence of qualifications
- Negotiate an assurance
  - SB certification
  - Bond
  - Retention
  - Incentive
Buyer’s Role = Command of the Facts

- U.S. Federal Claims Court 01-634C, Orlosky Inc. v. U.S. Navy
- “…For their part the Navy witnesses were marginal, at best. At one point the court was constrained to advise defense counsel that the Navy’s (now fortuitously retired) Contract Manager, Mr. Smith, was showing himself insufficiently coherent to be allowed to continue to testify. The court could not credit Mr. Smith with being other than derelict in contract coordination duties. …”
- Determinations based on facts
- Rigorous, logical & documented
Warning Flags

- Omissions in data provided
- Inconsistencies in the proposal documents
- Inconsistencies with the public records
- Obscured identity of company or principle personnel
- Unwillingness to describe company qualifications or experience
- Assumptions by both contractor and buyer
Reality Check -
How Do I Do That?

- Let the contractor present evidence
- Request references – and then check them
- Search government & regulatory web sites
- Search the Internet
- Perform an audit
- Hire a due-diligence investigator
D & B = Basic financial information + cross check for legal identity
SEC Edgar = *Public disclosures*
BBB = Reported problems
SAM.GOV = Fed Registration & SBA size
Watchdog Web Sites = Leads to more questions (watch for grinding axes)
DOL = Workers comp coverage
Due Diligence Investigation

FACT: Fewer than 10% of financial crimes of less than $100k are prosecuted
FACT: Less than 5% of court-ordered restitution is ever collected
FACT: Less than 2% of these con artists and criminals go to jail

Don’t become a statistic. Call us before the contracts are signed!

Whenever YOU are about to enter into a personal or business relationship, even with someone you know, call Commercial Business Intelligence. We will uncover the facts you need to know to feel secure about your decision.
Due Diligence Investigation

CONTRACTOR RISK ASSESSMENT
BETTER EVALUATE CONTRACTORS AND SUPPLIERS

Reduce Procurement Fraud and Risk:
Less Risk, More Confidence, Better Results
Experian® gives agencies confidence throughout the contractor evaluation process.
From proposed due diligence on suppliers to expanded monitoring and supplier portfolio management, we help you combat procurement fraud, waste and abuse.

Depth, Breath and Quality Only Available from Experian:
Experian helps you accurately vet contractors and suppliers by leveraging:
- Only unlisted, third-party verified data — we do not accept unverified data
- Insights on more than 27 million businesses, including small businesses
- The industry’s strongest commercial collections data, from exclusive sources
- A depth ability into a business owner’s business interests

Contact Us:
Call 1 800 461 1136

Risk Assessment Products:
- Business Profile Report
- Business Owner Profile
- Business Credit Reconciliation Report
- Corporate Filings
- Experian Press Releases
EPA = Compliance enforcement
CIA = Good to know
Web Search Tips

- Google search = SITE: *.gov + keywords
- Bing.com will show different results
- Search by phone number “800 869 4499”
- Search by key name "Joseph J. Hazelwood”
- Search by address “P.O. Box 7500 Trenton, NJ”
- Search in Linked-in, Facebook, You Tube
References

- Responsibility Checklist & references
- GAO Case Study:
  www.mltweb.com/tools/articles/responsible.htm
- GAO Case: Buyer Loses in Court
- Evaluating Past Performance
  www.mltweb.com/tools/articles/pastperform.htm
References

- DAU – Ask a Professor
- GAO Legal Decisions
- DOE Acquisition Guide – Chapter 9.4 Contractor Responsibility Determinations