

Memorandum

To: Interested Parties
From: National Employment Law Project
Date: September 6, 2018
Re: Authority of Federal Contracting Officers to Consider Labor and Employment Law Violations When Making Legally Required Responsibility Determinations

Summary

When making responsibility determinations, federal contracting officers have the authority and the obligation to consider labor and employment law violations and may base non-responsibility findings on persuasive evidence of those violations. This power stems from their broad regulatory authority to make contracting decisions and from the deference they enjoy from reviewing agencies and courts in making those decisions. Contracting officers must deny contracts to offerors they deem non-responsible.

In making a responsibility determination, contracting officers must determine if the offeror has a "satisfactory record of integrity and business ethics."¹ This inquiry involves consideration of whether an offeror has a record of trustworthiness and reliability such that the government can be confident of its performance in a timely, efficient, responsible fashion. Quite properly, this includes analysis of an offeror's record of compliance with the law, on the theory that the government's interest is best protected when it does business with companies that respect their legal obligations. It has long been understood that labor and employment law compliance is part of this inquiry and that contracting officers may base findings of non-responsibility on an offeror's labor and employment law noncompliance.² Further, federal regulations require responsibility determinations precisely because a "[low] price alone can be a false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative cost."³ In contrast, contractors that consistently adhere to labor and employment laws are more likely to have workplace practices that enhance productivity, delivering goods and services in a timely, predictable, and satisfactory manner.⁴

Therefore, it is rational and reasonable to conclude that a violator of labor and employment laws is non-responsible. Contracting officers must decide on a case-by-case basis whether

¹ Federal Acquisition Regulation 9.104-1. 41 U.S.C. § 403(7)(D).

² *Pittman Mechanical Contractors, Inc.*, B-242499 (May 6, 1991), 91-1 CPD P 439, 1991 WL 156287, at *1; *Clyde G. Steagall, Inc. d/b/a Mid-valley Electric*, B-237189 (Jan. 10, 1990), 90-1 CPD P 43, 1990 WL 277530, at *1-2; *Techo Engineering & Construction, Ltd. -- Reconsideration*, B-233606.3 (Sept. 11, 1989), 89-2 CPD P 225, 1989 WL 241099, at *1; *Harvey M. Goldstein, Esq.*, B-158343 (Oct. 10, 1966), 1966 WL 2093, at *1-2. Each of these involved unsatisfactory performance evaluations regarding compliance with labor and safety standards.

³ Federal Acquisition Regulation 9.103.

⁴ Karla Walter and David Madland, *At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers*, (Washington, DC: Center for American Progress Action Fund, 2013), accessed Aug. 25, 2018, <https://www.americanprogressaction.org/issues/economy/reports/2013/12/11/80799/at-our-expense/>

the violations are serious or pervasive enough to warrant a finding that the offeror is not responsible due to its unsatisfactory ethics or integrity. Reviewing agencies and courts will likely uphold the resulting determinations if contracting officers act on relevant information.

Legal Background: Basis for Contracting Authority and Responsibility Determinations

Federal procurements are governed by the Federal Property and Administrative Services Act, commonly known as the Procurement Act.⁵ Federal law further provides the Administrator for Federal Procurement Policy and the Federal Acquisition Regulatory Council the authority to issue regulations⁶ – collectively, the Federal Acquisition Regulation (FAR) – and to ensure that each agency’s procurement regulations are consistent with the FAR.⁷

Executive agency heads delegate "broad authority" to contracting officers (career civil servants) to "manage the agency's contracting functions."⁸ Agency heads appoint contracting officers "in writing," noting "any limitations on the scope of authority to be exercised."⁹ They may also terminate these appointments.¹⁰

Contracting officers hold broad authority to "enter into, administer, or terminate contracts and make related determinations and findings."¹¹ They are "responsible for ensuring performance of all necessary actions for effective contracting."¹² Only "clear instructions in writing" from the agency head or applicable laws or regulations can limit their contracting authority.¹³

Contracting officers are responsible for making responsibility determinations. Because agencies may only award contracts to "responsible prospective contractors,"¹⁴ contracting officers must make an "affirmative determination of responsibility" before awarding a contract.¹⁵ There is a presumption against finding an offeror responsible. Absent information "clearly indicating" responsibility, the contracting officer must make a "determination of non-responsibility."¹⁶ The onus is on the offeror to demonstrate responsibility.¹⁷

⁵ 40 U.S.C. §§ 101 *et seq.*

⁶ 41 U.S.C. § 1303(a)(1).

⁷ 41 U.S.C. § 1303(a)(3).

⁸ Federal Acquisition Regulation 1.601 (a).

⁹ Federal Acquisition Regulation 1.603-3 (a).

¹⁰ Federal Acquisition Regulation 1.603-4.

¹¹ Federal Acquisition Regulation 1.602-1 (a).

¹² Federal Acquisition Regulation 1.602-2.

¹³ Federal Acquisition Regulation 1.603-3 (a).

¹⁴ Federal Acquisition Regulation 9.103 (a).

¹⁵ Federal Acquisition Regulation 9.103 (b).

¹⁶ *Id.*

¹⁷ Federal Acquisition Regulation 9.103 (c).

Few responsibility determinations are successfully challenged in part because the Government Accountability Office (GAO) and federal courts only grant standing to protesters involving such determinations in limited circumstances.¹⁸ For instance, protestors only have standing before the GAO when they "allege[] that definitive responsibility criteria were not met or 'identify evidence raising serious concerns that ... the contracting officer unreasonably failed to consider available relevant information or otherwise violated a statute or regulation.'"¹⁹

Even when adjudicators do hear protests, they often defer to the judgment of the contracting officer.²⁰ As the United States Court of Appeals for the Federal Circuit has held "contracting officers are 'generally given wide discretion' in making responsibility determinations and in determining the amount of information that is required to make a responsibility determination."²¹ Determinations that "have a rational basis and are supported by the record ... will be upheld."²² Similarly, the GAO will generally uphold responsibility determinations absent a showing that the decision was "clearly unreasonable given the record before the contracting officer."²³ As some adjudicators have explained, responsibility determinations are "practical ... not legal determination[s]"²⁴ and are "not readily susceptible to judicial review."²⁵

Analysis

Contracting officers have the authority to deny contracts, which is inherent in the power to "enter into" contracts and "make related determinations and findings."²⁶ Further, federal regulations require contracting officers be afforded "wide latitude to exercise business judgment"²⁷ and "authority to the maximum extent practicable and consistent with the law,

¹⁸ Kate M. Manuel, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, Congressional Research Service, p. 3 (Jan. 4, 2013), available at <https://fas.org/sgp/crs/misc/R40633.pdf>.

¹⁹ *Id.* (quoting GAO, Office of General Counsel, *Bid Protests at GAO: A Descriptive Guide* 39 (9th ed. 2009), available at <https://www.gao.gov/decisions/bidpro/bid/d09471sp.pdf>).

²⁰ *Id.*

²¹ *Vintage Autoworks, Inc. v. United States*, 132 Fed. Cl. 143, 154 (2017) (quoting *Impresa Construzioni Geom. Domenico Garufi v. U.S.*, 238 F.3d 1324, 1334-5 (2001)).

²² *Bender Shipbuilding & Repair Co. v. United States*, 297 F.3d 1358, 1362 (Fed. Cir. 2002).

²³ Manuel, *supra* note 18, at 3; see also *Impresa Construzioni Geom. Domenico Garufi v. U.S.*, 238 F.3d 1324, 1333 (2001) (rejecting an unsuccessful bidder's protest because the bidder "failed to show the contracting officer's decision to exclude it from the competitive range was not rational." The Court reasoned that the procurement official's decision needed to have a "rational basis" and considered whether "the contracting agency provided a coherent and reasonable explanation of its exercise of discretion." It also noted that protestors bear a "heavy burden" in showing the award decision had no "rational basis.").

²⁴ *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'r*, 714 F.2d 163, 167 n. 18 (D.C. Cir. 1983).

²⁵ *YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366, 394 (1993).

²⁶ See *supra* note 11. In order to enter into a contract in a competitive bidding system, a contracting officer must choose between competing offerors. Awarding the contract to one offeror necessitates denying the contract to others.

²⁷ Federal Acquisition Regulation 1.602-2.

to determine the application of rules, regulations, and policies, on a specific contract."²⁸ Thus, absent any "clear instructions in writing" from the agency head or any applicable laws or regulations limiting their authority, contracting officers have discretion to deny contracts.

Moreover, contracting officers are required to make "affirmative responsibility determinations" before awarding a contract and deny contracts to non-responsible offerors.²⁹ Among the criteria for responsibility is for the offeror to have a "satisfactory record of integrity and business ethics."³⁰

Further, contracting officers are afforded "... [a]most unfettered discretion as to the nature and quantity of information considered" in making these responsibility determinations.³¹ Federal regulations require contracting officers to "possess or obtain information sufficient to be satisfied that a prospective contractor [] meets the applicable standards,"³² but "the contracting officer is the arbiter of what, and how much information he needs."³³ The only source a contracting officer is required to consult is the Federal Awardee Performance and Integrity System (FAPIS).³⁴ "[W]hat other information, if any, contracting officers consider remains within their discretion."³⁵

Contracting officers should exercise this discretion to consider an offeror's labor and employment law violations in making a responsibility determination. Contracting officers have done so previously, denying contracts to offerors they deemed non-responsible because their employment law violations demonstrated a lack of integrity and business ethics.³⁶ Other times, contracting officers have considered a lack of labor and employment law compliance on previous contracts as a past performance problem—another basis for finding non-responsibility.³⁷

²⁸ *Id.*

²⁹ Federal Acquisition Regulation 9.103 (b).

³⁰ Federal Acquisition Regulation 9.104-1.

³¹ Manuel, *supra* note 18, at 11.

³² Federal Acquisition Regulation 9.105-1 (a).

³³ *John C. Grimberg Co. v. United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999).

³⁴ Federal Acquisition Regulation 9.104-6 (a)(1).

³⁵ Manuel, *supra* note 18, at 11-12.

³⁶ See *Greenwood's Transfer & Storage Co., Inc.*, B-186438, Aug. 17, 1976, 76-2 CPD ¶ 167, 1976 WL 9857, at *1 (holding that failure to pay the prevailing wage rate in six previous contracts was a reasonable basis for determining that the offeror was non-responsible); *Wash. Moving & Storage Co.*, B-175845, Aug. 17, 1976, 1973 WL 8012, at *2 (Comp. Gen. Mar. 9, 1973) (upholding NASA's non-responsibility finding of a contractor who had violated the Service Contract Act based on an integrity analysis, even though the DOL ultimately decided not to pursue debarment); *S. Kane & Son, Inc.*, B-151269, 1963 WL 3007, at *1-2 (Comp. Gen. May 21, 1963) (denying a bid protest where the contracting officer found the offeror lacked integrity and was non-responsible based on criminal violations of the Fair Labor Standards Act). See also *Gen. Painting Co.*, B-219449, Nov. 8, 1985, 85-2 CPD ¶ 530, 1985 WL 53542, at *3 (noting that evidence of a "willful disregard of labor standards laws" provides a reasonable basis for finding an offeror lacked integrity and was non-responsible).

³⁷ See, e.g., *Pittman Mech. Contractors, Inc.*, B-242499, 91-1 CPD ¶ 439, 1991 WL 156287, at *1, *2-3 (May 6, 1991) denying bid protest where the contracting officer based the non-responsibility finding on a pre-award survey that revealed the offeror's past performance on eight contracts had been unsatisfactory, including its

Because a contracting officer should consider an offeror's labor and employment law violations to make a determination of non-responsibility, and because a contracting officer must deny contracts to non-responsible offerors, a contracting officer can therefore deny a contract based on the labor and employment law violations of the offeror. Moreover, contracting officers are obligated to deny contracts absent information "clearly indicating responsibility." Given that the onus is on the offeror to demonstrate responsibility, contracting officers with knowledge of an offeror's labor and employment law violations ought not award them contracts because the offeror failed to meet this burden.

Moreover, courts and reviewing agencies are unlikely to overturn responsibility determinations based on labor and employment law violations. Courts defer to contracting officers' judgment in deciding what information to consider,³⁸ and they have previously upheld determinations based on labor and employment law violations (and even on non-final violations of federal law).³⁹ Reviewing agencies will do the same where the decision was "reasonable" given the record.⁴⁰ For instance, the Comptroller General has held that records of underpaying employees or violations of applicable labor laws were both a reasonable basis for non-responsibility determinations.⁴¹

It is rational and reasonable for a contracting officer to conclude that an offeror lacks a record of "integrity and business ethics" because the offeror has violated labor and employment laws, at least when those violations are non-trivial. Any plausible definition of a "record of integrity and business ethics" surely includes obeying the law, particularly in the labor and employment context. Moreover, even non-final violations of labor and employment laws may be considered because persuasive evidence of serious violations can form the basis of a non-responsibility determination. The FAR does not restrict the sources of information that may be used for the responsibility inquiry, and clearly does not limit the inquiry regarding business integrity issues to adjudicated cases. To the contrary, the FAR specifies that, prior to making a contract award, the contracting officer must "possess or obtain information sufficient to be satisfied that a prospective contractor currently meets the [responsibility] standards."⁴² The FAR requires contracting officers to ensure that there is "information clearly indicating that the prospective contractor is responsible."⁴³ Contractors who adhere to employment laws are more likely to deliver on contracts

compliance with labor and safety standards); *Clyde G. Steagall, Inc. d/b/a Mid Valley Elec.*, B-237184 et al., 90-1 CPD ¶ 43, 1990 WL 277530 *2 (Jan. 10, 1990) (denying bid protest where the contracting officer found a contractor non-responsible based on, among other things, several performance evaluations revealed violations of safety practices); *Gen. Painting*, 1985 WL 53542, at *3 (holding a contracting officer was reasonable in finding the offeror non-responsible because of its "unsatisfactory performance" in complying with its contractual prevailing wage requirements and noting that it was unnecessary to decide in this matter whether these underpayments represented a "willful disregard of the labor standards laws" such that the offeror's integrity was called into doubt).

³⁸ See *supra* note 31 and accompanying text.

³⁹ See *supra* notes 36 and 37.

⁴⁰ Manuel, *supra* note 18.

⁴¹ Manuel, *supra* note 18, at 11-12.

⁴² Federal Acquisition Regulation 9.105-1(a).

⁴³ Federal Acquisition Regulation 9.103(b).

economically and avoid unneeded costs because they are responsible. Therefore, it would be rational and reasonable to conclude that a violator of labor and employment laws is non-responsible.

Moreover, the federal litigation over the Executive Order 13673 (the Fair Pay and Safe Workplaces Executive Order) does not limit the authority or relieve the duty of contracting officers to consider labor and employment law violations in making responsibility determinations.⁴⁴ In October 2016, a single federal judge in the Eastern District of Texas preliminarily enjoined the mandatory "reporting and disclosure requirements regarding labor law violations" in Executive Order 13673 (the Fair Pay and Safe Workplaces Executive Order).⁴⁵ However, the court did not question the underlying basis of contracting officers' authority to make responsibility determinations or to use knowledge of labor and employment law violations in making those determinations.⁴⁶ Furthermore, the litigation never proceeded beyond the preliminary injunction stage to full and final consideration on the merits.

Conclusion

Federal contracting officers have the authority to consider employment law violations when making responsibility determinations and to base non-responsibility findings on those violations. Contracting officers have broad power to deny contracts based on their judgment and must do so when they deem an offeror non-responsible. Because contracting officers may base findings of non-responsibility on an offeror's employment law violations or alleged violations and because they must deny contracts to non-responsible offerors, contracting officers may deny contracts on the basis of employment law violations or allegations. If they do so, federal courts and administrative tribunals will likely uphold the resulting determinations. These determinations would not be impacted by the preliminary injunction issued against the mandatory disclosure provisions of Fair Pay and Safe Workplaces Executive Order.

⁴⁴ *Id.*

⁴⁵ *Associated Builders and Contractors of Southeast Texas v. Rung*, No. 1:16-CV-425 (E.D. Tex. Oct. 24, 2016), available at <https://jaffirmativeactionlawadvisor.lexblogplatformthree.com/wp-content/uploads/sites/602/2016/10/order-granting-pi.pdf>.

⁴⁶ Note that Congress enacted a provision of the National Defense Authorization Act for 2018 that included a provision requiring a report on how the defense department considers safety and health violations in making those responsibility determinations. See Pub. L. No. 115-91 at § 814, <https://www.congress.gov/115/plaws/publ91/PLAW-115publ91.pdf>. In addition, there is report language "direct[ing] the Secretary of Defense to ensure that contracting officials award contracts consistent with federal acquisition regulations, including those required safety elements." Conference Report to Accompany HR 2810, National Defense Authorization Act for Fiscal Year 2018, H.R. Rep. No. 115-__ 1916 (Conf. Rep.), available at <https://docs.house.gov/billsthisweek/20171113/HRPT-115-HR2810.pdf>.