

**September 16, 1994**

**P.S. Protest Nos. 94-29; 94-30**

## **NORTH AMERICAN MANUFACTURING CORPORATION**

**Solicitation Nos. 198525-94-A-0369; 198525-94-A-0464**

### **DIGEST**

Protests against nonresponsibility determinations are denied where contracting officer acted reasonably based on substantial information about offeror's past performance record and lack of sufficient quality control system.

### **DECISION**

North American Manufacturing Corporation (North American) timely protests the contracting officer's determinations that it was a nonresponsible offeror for two supply contracts.

Solicitation 198525-94-A-0369, issued on February 14, 1994, by the Topeka, KS, Purchasing Center, sought proposals for web door assemblies for mail containers. Award was to be made "to the responsible offeror(s) who submits an acceptable offer in compliance with solicitation terms and conditions and the lowest offer price." The solicitation stated, at section E.5, Quality Assurance: "The contractor's inspection system must be in accordance with Specification MIL-I-4208, INSPECTION SYSTEM REQUIREMENTS, of the issue in effect on the solicitation date. . . ."

Of the eight offerors which responded to solicitation -0369 on March 28, North American submitted the lowest price. However, after a preaward survey was conducted of North American's facility on April 14<sup>1</sup>, the contracting officer determined, on May 24,<sup>2</sup> that North

<sup>1</sup> The preaward survey was conducted by a material logistics specialist who filled out a form which discussed North American's facility and apparent capabilities in terms of whether they were satisfactory, marginal, or unsatisfactory.

The surveyor deemed the following areas satisfactory: Technical capability, production capability, purchasing and subcontracting, transportation, and ability to meet schedule. He listed as marginal plant facilities and equipment. Quality Assurance capability was deemed unsatisfactory. The surveyor made the following observations:

-- "MIL-C-45662 (Calibration System) not maintained properly." The surveyor "saw no In-Process or Inspection performed on lock boxes being manufactured by this vendor."

American was a nonresponsible offeror<sup>3</sup> and awarded the contract to D.V. Industries. North

-- The protester's three inspection tools were last calibrated on February 15, 1993; one which was required to be calibrated every six months was last calibrated on April 20, 1993. "No inspection tools have any calibration stickers on them."

The surveyor wrote that the offeror did not furnish a letter of commitment to initiate a compliant system, and he also observed:

Although Plant Safety isn't applicable, the working conditions at this Vendor[']s facility are poor. Inadequate heating, poor ventilation at the plating station, cold and high humidity inside plant, floor area is dirty, broken floor boards and etc. North American has a poor working facility. . . .

The surveyor described North American's past performance record as unsatisfactory and wrote:

This Vendor has had previous rejections on present contracts. In fact one rejection is presently in house awaiting disposition action. This vendor has a poor history of past performance at least the last year. [sic]

The surveyor concluded that North American was a nonresponsible contractor. He stated:

This is based on poor past performance, rejections within past 6 months[,] MIL-C-45662 calibration requirements, poor working facility, plant safety. . . . No setup for the manufacturing of web doors assembly of In-Process Manufacturing, plus this vendor hasn't ever fabricated this type of work process before, including sewing and etc. [sic]

<sup>2</sup> The record contains no explanation for the lapse of time between the April 14 preaward survey and the May 24 nonresponsibility determination.

<sup>3</sup> A May 24 letter (misdated as March 24) to North American explained why it had been found nonresponsible for solicitation -0369. It stated as reasons North American's poor performance record on "past and present Postal Service contracts", citing Procurement Manual (PM) 3.3.1 b.3, which states that prospective contractors must "[h]ave a good performance record"; and North American's "failure to have a quality control system that meets the requirements of MIL-I-45208", citing PM 3.3.1 b.5., which states that prospective contractors must "[h]ave a sound quality control program that complies with solicitation requirements or the ability to obtain one".

The contracting officer wrote that "[p]ast failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility" and that his decision was based "in part on substantial information found in your company's performance file and a review of recent contracts. . . ." The letter cited the following contracts:

Contract No.	Performance Record
197101-91-P-1518	Late Delivery
197101-92-B-0674	Rejected
197101-92-B-0922 (3 deliveries)	Rejected/Late Deliveries
197101-93-P-1574	Rejected/Late Delivery

American's protest followed.

198525-94-P-0327  
198525-94-X-0522

Late Delivery  
Late Delivery

Finally, the contracting officer stated:

The contracting officer's decision is based in part on a pre-award survey performed on April 14, 1994, in your plant. The inspection found no evidence of a quality control system that meets the requirements of MIL-I-45208. The solicitation . . . states the contractor's inspection system *must* be in accordance with Specification MIL-I-45208. [Emphasis in original.]

Solicitation 198525-94-A-0464 was issued under simplified purchasing procedures by the Topeka Purchasing Center on March 22, seeking proposals for four items, only one of which--8,000 shelf retaining brackets--is the subject of North American's protest.<sup>4</sup> Solicitation -0464 stated that award would be made "to the responsible offeror whose proposal conforming to the solicitation offers the best value to the Postal Service, considering price, price-related factors, and/or other evaluation factors specified elsewhere in this solicitation." Since no other factors were specified in the solicitation, award was to be based on price.<sup>5</sup> There was no provision for quality assurance plans.

Nine offers were received April 21. North American offered the lowest price for the shelf retaining brackets. However, the contracting officer determined that North American was a nonresponsible offeror for this solicitation based in part on the preaward survey which had been done for solicitation -0369.<sup>6</sup> Award of a contract for the brackets was made to AEG Sorting Systems on June 2; North American's protest followed.

North American's two protests contain substantially the same allegations and arguments, including the following:

-- The determination of nonresponsibility was "based on highly subjective and erroneous information" and was arbitrary and capricious because the contracting officer "failed to exercise reasonable care in validating the past performance data" on which he based his determination.

-- North American has neither been terminated for default nor has it received any cure notices related to its past performance.<sup>7</sup>

<sup>4</sup> The solicitation contemplated the possibility of multiple awards if they were deemed advantageous to the Postal Service. The award to another offeror of a contract to supply the remaining three items is not contested here.

<sup>5</sup> See, e.g., *Electro-Test, Inc.*, P.S. Protest No. 94-26, August 5, 1994; *Circle Spring Company and Packaging Accessories Company*, P.S. Protest Nos. 91-86; 91-91, January 21, 1992.

<sup>6</sup> The contracting officer's notification to North American that it had been found nonresponsible for solicitation -0464 was dated June 2 and was substantially the same as the nonresponsibility notification letter for solicitation -0369 (footnote 3, *supra.*).

<sup>7</sup> Contrary to this assertion, the record indicates that the following five cure notices were issued to North American:

March 8, 1994	Contract No. 198525-94-X-0522 (nondelivery).
February 24, 1994	Contract No. 197101-93-P-1574 (nondelivery).
February 22, 1994	Contract No. 198525-94-P-0327 (nondelivery).
August 17, 1992	Contract No. 197101-92-B-0922 (nondelivery).
May 6, 1992	Contract No. 197101-92-B-0674 (nondelivery).

The notices stated that North American could be subject to a default termination if the problem(s) identified in the notices were not corrected within 10 days.

The record also contains copies of rejection notices for contract 197101-92-B-0674 (drainage holes controversy); for one shipment under contract 197101-92-B-0922 involving 900 items (corrosion; rough edges; incorrect dimensions); and for contract 197101-93-P-1574 (vendor did not comply with specifications).

-- The contracting officer's allegation that North American lacks a compliant quality control system is "particularly outrageous since North American has been authorized by the Postal Service since 1976 to self certify its shipments." Such a "privilege" is granted only to contractors with acceptable quality control systems.

-- Although the April 14 preaward survey "revealed four . . . operation issues which required clarification," North American "quickly addressed each of the perceived problems in writing to the quality control inspector on April 19. . . ."<sup>8</sup> Subsequent verbal discussions with both the [quality] inspector and the contracting officer gave no indication that North American's response was unacceptable or that it would lead to a nonresponsibility determination."

The protester "strongly objects" to references in the letters informing it of the nonresponsibility determinations to a "lack of tenacity or perseverance . . . in performance on any Postal Service contract" and disputes the contracting officer's view of its performance on the six previous contracts cited in the nonresponsibility determinations.<sup>9</sup>

<sup>8</sup> Its April 19 letter "explain[ed] North American's position" regarding its calibration system ("The tools . . . are not out of calibration" and "[w]e will make sure we maintain, update and check our calibration due dates on time."); its building ("old but well maintained"); its past performance (the only problem "that we are aware of is the . . . capillary action [problem with respect to contracts 197101-92-B-0674 and 197101-92-B-0922] . . ."); and its quality assurance system ("We feel that our quality assurance program is adequate to meet the requirements but we are continually trying to improve our program through in process procedures."). The letter contained no documentation demonstrating the existence of specific procedures designed to improve the problem areas identified in the survey.

<sup>9</sup> North American has submitted its version of the circumstances involved in the six previous contracts which were cited in the nonresponsibility determinations (footnote 3,*supra*.) because of late deliveries, product rejections, or both. North American's explanations and the contracting officer's responses to them are as follows:

1) 197101-91-P-1518 (late delivery): The protester contends that the products actually were shipped two days earlier than the due date. The contracting officer asserts that the delivery arrived 19 days late.

2) 197101-92-B-0674 (rejection): The protester states that the reason that the product was defective is that the Postal Service specifications were defective--a conclusion that was verified by the Postal Service engineers at Merrifield, VA. The contracting officer's position was arbitrary "since it failed to include all the facts." The contracting officer counters that the more than 500 pieces of shelving assembly had three defects: corrosion and lack of proper zinc plating; rough edges along the sides which could be hazardous to workers; and incorrect dimensions. Although the protester is correct that a design flaw caused the corrosion, the contracting officer asserts that North American "has no excuse for the rough edge and incorrect dimension."

3) 197101-92-B-0922 (rejections and late deliveries): The protester asserts that these problems also were related to the defective postal specifications, and the protester states that its personnel met with postal engineers in an effort to solve them. Asserting that it met the criteria for excusable delays, the protester complains that the contracting officer "failed to acknowledge that North American was delayed because it was exercising due diligence in trying to resolve the problem." Finally, even with the problems, "no delivery exceeded 15 days beyond the required date," which the protester claims "falls within reasonable parameters." The contracting officer responds that the protester waited until three days after the due date to notify the Postal Service

The protester claims that it met the terms of the solicitations at prices which would have meant substantial savings to the Postal Service; therefore, it should have the contracts.

In response to both of North American's protests,<sup>10</sup> the contracting officer states that in

of delay; delivered products with defects other than that caused by the design flaw; and not only were all three shipments late, but option quantities also were late.

North American[s] delays in notifying USPS at least [10] calendar days as called for [by] Modification M02 before shipping date made two of the above shipments delinquent . . . . The first shipment was delinquent by 29 days. The second shipment was delinquent by 23 days partial shipment and 27 days partial shipment. These delinquent receipt dates are certainly not within "reasonable parameters."

4) 197101-93-P-1574 (late delivery and rejection): The protester contends that in this case, the contracting officer's representative changed his position and accepted the delivery. The contracting officer's use of this example is capricious because it is "inconsistent . . . with [that fact]." The contracting officer responds:

Essentially, in this contract North American contends that it delivered a non-conforming pedestal and then convinced the Postal Service to accept it as functionally equivalent. . . . Even accepting North American 's version of this incident, it represents another example of [its] repeated failure to deliver quality, conforming products [which caused] a 26-day delay to the Postal Service.

5) 198525-94-P-0327 (late delivery): The protester claims that the Postal Service caused the late delivery by delaying the on-site inspection required prior to shipment. The contracting officer counters that there were two deliveries for which the protester was required to give the Postal Service 10 days notice of the intended shipping dates. The protester did not notify the Postal Service that the items were ready for the first shipment until three days prior to the delivery date, making on-time completion of inspection impossible. The items were delivered 26 days late. For the second shipment, the protester failed to call the Postal Service until the actual delivery date, resulting in approximately a three week delay of delivery.

6) 198525-94-X-0522 (late delivery): North American states that this delivery was one day late, even though it had been "shipped in sufficient time." The protester "offers no excuse for this delivery delay other than to state that, while not acceptable, it falls within reasonable parameters." The contracting officer asserts that the delivery was actually nine days late, not one. The Postal Service "cannot tolerate any delays at all and close is not good enough for Postal Service work."

<sup>10</sup> The contracting officer submitted separate statements in response to the two protests which were virtually identical except that for his report on Protest 94-30, the contracting officer stated that he based his determination "upon the same information" as the determination which is the subject of Protest 94-29, explaining:

Although I recognize that the same unfavorable pre-award survey and the same incidents of late delivery and poor quality products may not be the basis of indefinite findings of non-responsibility, I believe my actions are reasonable because these two findings occurred within nine days of each other. No significant change in North American's condition could reasonably occur in so short a time.

addition to reviewing the results of the April 14 preaward survey, "I reviewed the past performance of this offeror and found it to be poor." The contracting officer states that since 1991, the protester has had 12 postal contracts, two of which have not yet reached delivery due dates. Of the remaining 10, however, "six were either late or had quality problems." The contracting officer states:

North American has a poor performance record demonstrating repeated failures to deliver quality products as well as repeated failures to deliver on time. In addition, North American does not have a quality control program which complies with MIL-I-45208, as required by Section E.5 of the solicitation. In particular, North American failed to demonstrate any systematic method of calibrating . . . tools and recording the calibrations.

In response to what he terms the protester's "excuses" for late delivery and poor quality products, the contracting officer asserts:

-- It is not true that North American was not informed that its performance was poor. "I sent . . . letters on five . . . recent contracts complaining of . . . late delivery and threatening possible termination for default if delivery was not made within ten days." (Footnote 7, *supra*.)

-- He knows of no agreement, written or verbal, that allows North American to "self certify its shipments" to Topeka. Although in some instances the protester has been given permission to ship without an origin inspection "for Postal Service convenience," an inspection in those cases was performed at destination.

-- The contracting officer "directed members of my staff to confer with the person who performed the preaward survey [who] denies that he gave any verbal assurance that North American's problems were minor. He assured my staff that he stands by his written recommendation of non-responsibility."

-- The contracting officer does not agree that North American's "numerous correspondence providing excuses for its failings [is] evidence of its diligence. I agree that it has shown tenacity in providing correspondence and excuses. I wish it would harness that energy to produce quality, conforming products and deliver them on-time instead."

The contracting officer concludes:

North American is a non-responsible contractor. Its performance record is poor. It fails to deliver on-time and the products it delivers often are of poor workmanship. In addition, it has failed to demonstrate that it possesses the required quality control system. Therefore, its protest should be denied.

In reply to the contracting officer's statements, the protester asserts that "[t]he quality system in place at the time of the preaward survey has been upgraded and now is in strict compliance with MIL-I-45208." Also, according to North American, the contracting officer did not "access all delivery performance information that was readily available." He should have reviewed North American's performance under contracts nationwide rather than just in the Topeka area.

The protester "continues to maintain that a significant number of delays referenced in the

contracting officer's statement were directly attributable to the [defective specifications] issue" which was not the protester's fault. Also, the protester argues that it relied on "verbal instructions" from postal personnel to the effect that delivery date changes would be acceptable and states:

[P]ostal officials have in the past advised North American during telephone discussions that we should not "be so concerned about the late notices" but should instead work toward resolving any outstanding issues. They implied that the time we were using to rectify these issues would be reflected in added time to the delivery schedule. Trying to resolve these issues is what caused the late notices to be generated in the first place[.]

The protester states that had it known that "this good faith action" would lead to a nonresponsibility determination, "we would have stopped work immediately until those late notices were retracted and all outstanding issues resolved." Additional points made by the protester:

-- North American has performed in a "highly acceptable manner" in the postal contracts it has in other geographical areas. "In those areas, North American . . . had been placed on a self certification program."

-- North American addressed the problems noted in the preaward survey "in accordance with . . . the PM" by a letter dated April 19. (Footnote 8, *supra*.)

-- Referring to the preaward survey report's reference to fabrication experience, the protester asserts that the solicitation did not require "actual experience with the fabrication portion, only the ability to manufacture, produce, or obtain that capability." The protester claims that the surveyor "gave verbal concurrence" to its plan to automate the assembly process, and asserts that technical support for the new equipment was "readily accessible."

-- The protester has a full time quality control manager "to ensure that all quality standards meet the requirements set forth in MIL-I-45208."

-- The contracting officer's assertion that on contract 198525-94-P-0327 North American did not request inspection until the delivery date of May 20 is not accurate, citing an internal memorandum dated May 12 in which one postal official informed another that North American had requested inspection.

In rebuttal, the contracting officer answers the protester's allegations that he relied, improperly, on its performance record in contracts in his geographical region instead of its record nationwide, stating:

Obviously, my greatest concern is with North American's performance on my contracts. In addition, I have far greater information concerning contract[s] awarded and administered at my facility. Based upon that information . . . North American has developed a record of poor performance. Specifically, my office has awarded North American twelve contracts since February 1991, two not yet due for delivery. Of the remaining ten, six had late deliveries and/or rejects. In other words, North American failed in some way on 60% of its contracts with my office. This is unacceptable performance.

The contracting officer rebuts the protester's other contentions as follows:

-- It is not true that North American received "verbal authority" to deliver products late. He concedes that North American did contact the Postal Service on May 12 regarding inspection for a delivery that was due May 20; however, he maintains that the protester did not arrange for delivery until May 20. "This is unacceptable as well . . . because the product will, at best, be shipped on the date [it] should have been delivered" and "delivery will again be late."

-- It is not true that North American's poor performance was largely due to the capillary action design defect. The contracting officer reemphasizes that the protester's products were defective for other reasons, as he explained in his statement.

-- "North American should know that a change in delivery dates is not official until agreed to in writing by both parties and that late delivery notice which threatens termination should not be ignored."

-- North American has failed to verify that it has corrected the quality control problems discovered during the preaward survey. Such verification "could be done, for example, by submitting a statement from the calibration company."

-- The preaward survey findings related to protest 94-29 are valid for 94-30 "[w]ith regard to the quality problems . . . North American merely asserts that everything is now corrected, but has presented no evidence of that fact."

Finally, the contracting officer asserts that a majority of the occurrences which formed the basis for the contracting officer's judgment about North American's performance record were within the past year, "with three occurring within approximately the last four months. All but one of the instances occurred within the last two years. These instances of recent poor performance, even without any consideration of North American's quality control problems, are a sufficient basis for my finding of nonresponsibility," citing *Pamela J. Sutton*, P.S. Protest No. 87-110, February 9, 1988 (upholding a nonresponsibility determination based on poor performance 13 months earlier).

In surrebuttal, the protester "continue[s] to assert that applying a parochial view toward our performance record and the information contained in the preaward survey is a poor foundation from which to base such an important decision." Considering only the Topeka area contracts is "unreasonable since it represents a limited and distorted view of the 'big picture.'" North American asserts that the contracting officer should have called the contracting officers who administer North American's contracts in other regions to obtain information "from which to make a reasonable, balanced decision." The protester claims that it performed 70% of its Topeka contract work in a satisfactory manner. "[I]t is difficult to argue a 70% performance rating is less than the satisfactory level of performance required by the PM." North American restates its position that its post-survey letter evidenced compliance with quality standards.

In specific surrebuttal to the determination relevant to solicitation -0464, the protester contends that the contracting officer "minimizes the significant developments that occurred between his determinations" and the problem of defective specifications, which the protester claims was a significant cause of the past performance problems which influenced the contracting officer's decision.

North American "has never agreed with the preaward survey determination that our Quality Assurance capability was unsatisfactory. That determination was based on the fact that the calibration system was not properly maintained." The protester asserts that it had a calibration procedure, which, "although weak," nevertheless demonstrates that parts of the MIL-I-45208 system were in place and therefore "we have met the solicitation requirement" to have the ability to attain a sufficient quality control system. The protester expresses disagreement with the conclusions of the preaward surveyor and the contracting officer as follows:

-- The protester asserts that the surveyor's "assertions about plant safety were not true. If the surveyor wanted to know about our safety record he should have asked. There has not been a lost time accident in this facility since October 1993."

-- The temperature in working areas is 60 degrees, which "is not inadequate." Also, the Occupational Safety and Health Administration "found no ventilation problems" in a 1992 visit.

-- The other product deficiencies which the contracting officer cites have been correctable, and "in every instance North American has cooperated fully with the [P]ostal [S]ervice in rectifying the problems."

-- The protester "acknowledges that some late deliveries have occurred," but asserts that the delays were largely beyond its control. "The latest of all deliveries was 27 days late. We disagree that these delays are outside reasonable parameters considering the facts stated previously."

In conclusion, the protester reiterates its belief that the contracting officer's determination was based on a "limited view of the facts." North American cites its 18 years of "superior service" which it states "should not be canceled out by four months of marginal performance," and asserts that it should not be found nonresponsible because it "has always tried to solve the problems as they occur."

## DISCUSSION

"To be determined responsible, a prospective contractor must:

1. Have financial resources adequate to perform the contract;
2. Be able to comply with the required or proposed delivery or performance schedule . . .;
3. Have a good performance record;
4. Have a sound record of integrity and business ethics;
5. Have a sound quality control program that complies with solicitation requirements or the ability to obtain one;
6. Have the necessary organization, experience, accounting and operational controls, technical skills, and production and property controls, or the ability to obtain them;
7. Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
8. Be otherwise qualified and eligible to receive award under applicable laws and regulations."

PM 3.3.1 b.<sup>11</sup>

The standard for our review of a contracting officer's finding of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement[s of the contract] with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

*OSM Corporation*, P.S. Protest Nos. 91-59; 91-61; 91-67, December 29, 1991; see also *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993; *Wetler Corporation*, P.S. Protest

<sup>11</sup> Procurement Manual (PM) 3.3.1 a. sets forth the reasons for responsibility determinations as follows:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility . . . .

No. 89-12, April 26, 1989.<sup>12</sup>

As stated at PM 3.3.1 e.1, in the absence of information clearly showing that a prospective contractor meets standards of responsibility, the contracting officer must make a determination of nonresponsibility. See *Illinois Lock Company*, P.S. Protest No. 89-35, September 26, 1989; *Innovative Sales Brokers, Inc.*, P.S. Protest No. 89-41, August 31, 1989.

Here, the contracting officer based his determinations of nonresponsibility on two factors, which we will address in turn: the April 14 preaward survey showing an insufficient quality control system and poor performance on recent postal contracts.

"When the decision of the contracting officer is based on the judgment of technical personnel, the protester must show that such judgment was fraudulent, prejudiced, or arbitrary and capricious." *Wetler Corporation, supra; Year-A-Round Corporation*, P.S. Protest No. 87-12, June 12, 1987. "The contractor bears the heavy burden of proving that either the pre-award survey was inaccurate or the resulting responsibility determination was unreasonable." *Fairfield Stamping Corporation*, P.S. Protest No. 88-04, June 3, 1988.

North American has not met its burden of proof. It did not submit evidence that its quality control system is or would be adequate. *Year-A-Round Corporation, supra*. The letter it submitted after the survey (footnote 8, *supra*.) is insufficient proof because it merely makes unsupported statements to the effect that North American would have a compliant system.<sup>13</sup> We cannot grant relief based on the protester's unsupported assertion of responsibility. *Id.*

While a contracting officer should consider information as current as possible in making his responsibility determination, *Automated Business Products, Inc.*, P.S. Protest No. 91-16, June 12, 1991, the contracting officer here fulfilled his affirmative duty to seek out responsibility information by requesting the preaward survey of North American. It is the offeror which must bring changed circumstances to the contracting officer's attention, and North American failed to do so. *Year-A-Round Corporation, supra*. North American offers no evidence that the technical personnel who judged its quality control system acted in a fraudulent, prejudiced, or arbitrary and capricious manner. Given the state of the evidence before him, the contracting officer's conclusion that there were doubts regarding North American's quality control system was reasonable. *Fairfield Stamping Corporation*, P.S.

<sup>12</sup> PM 3.3.1 e.3. states:

Before making a determination of responsibility, the contracting officer must possess or obtain information sufficient to be satisfied that a prospective contractor currently meets applicable standards of responsibility.

The PM goes on to state that "[s]ources of information include" the list of debarred, suspended, and ineligible contractors; records and experience data, "including verifiable knowledge of personnel in purchasing offices . . . "; the prospective contractor itself; and other customers of the prospective contractor including other government agencies.

<sup>13</sup> North American's statement that it has a quality control manager is similarly insufficient as proof of an adequate quality control system. Cf. *American Bank Note Company*, P.S. Protest No. 94-02, May 11, 1994.

Protest No. 88-04, June 3, 1988.<sup>14</sup>

The failure of an offeror to perform in a timely manner under prior contracts may provide a reasonable basis for a nonresponsibility determination. *Year-A-Round, supra*; see also, *Lithographic Publications, Inc.*, Comp. Gen. Dec. B-217263, March 27, 1985, 85-1 CPD 357.

The protester complains that the contracting officer did not access all information nationwide about its performance. The protester thus appears to understand the requirement that a determination be reasonably based on substantial information to mean that the contracting officer must consider all possible information. Such an interpretation is neither realistic nor reasonable. *A-1 Transmission, supra*. For simplified purchases, PM 4.2.3 e. states that while general responsibility standards apply, "the extent of review may be limited to readily available information." In neither instance at issue here was it unreasonable for the Topeka contracting officer to draw conclusions based on Topeka performance records. The contracting officer based his conclusions upon a documented history of North American's performance deficiencies in six of its prior contracts in the contracting officer's geographic area. That was substantial evidence. *A-1 Transmission, supra*. It is also reasonably recent evidence, since the cure notices were issued through the spring of 1994. See *Pamela J. Sutton, supra*, and cases cited therein. Overall, the record evidences sufficient doubt about North American's present responsibility to permit the contracting officer to find it nonresponsible for the solicitations at issue here. *Innovative Sales Brokers; Illinois Lock Company, supra*.

In its submissions, North American has disputed not only the conclusions of the preaward surveyor but also the contracting officer's version of the events which occurred under the six prior contracts. The record is rife with disagreement between the parties.

It is well settled, however, that in any factual dispute we accept as true the statements made by the contracting officer absent sufficient evidence to overcome the presumption of correctness which attaches to the contracting officer's statements. *OSM, supra*. Although North American has voiced strong disagreement with the preaward surveyor's conclusions and with the contracting officer's assessment of its past performance, it has not documented its contentions.<sup>15</sup> It is the protester's burden to show that the contracting officer's determination was not supported by substantial evidence. *Lobar, Inc./Marroquin, Inc.; Benchmark/Hercules Limited*, P.S. Protest Nos. 92-49 and 53, October 14, 1992. The protest file in this case, when viewed as a whole, evidences at most a strong difference of opinion,<sup>16</sup> which is insufficient to warrant overturning the contracting officer's

<sup>14</sup> *Compare Automated Business Products, supra*. That protest was sustained because the record showed that the protester brought changed circumstances to the contracting officer's attention with evidence, including schematics, that was detailed and thorough enough to resolve doubts about the protester's responsibility.

<sup>15</sup> "A nonresponsibility determination may be based upon the contracting 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. . . ." *A-1 Transmission, supra*, quoting *Applied Power Technology Company and Contract Services Company, Inc.*, Comp. Gen. Dec. B-227888, 87-2 CPD 376, October 20, 1987.

<sup>16</sup> For example, it is not arbitrary or unreasonable for the contracting officer to disagree with the protester

determinations. *D.V. Industries*, P.S. Protest No. 87-81, August 19, 1987; *Robertson & Penn, Inc.*, P.S. Protest No. 87-68, July 28, 1987.<sup>17</sup>

The protests are denied.

William J. Jones  
Senior Counsel  
Contract Protests and Policies

that performing satisfactorily 70% of the time is sufficient.

<sup>17</sup> Although North American's recent poor performance is sufficient "readily available information" (PM 4.2.3 e., *supra*.) to sustain the nonresponsibility determination for the simplified purchase covered by solicitation -0464, we nonetheless point out that the contracting officer should not have used the lack of a quality control system meeting specification MIL-I-45208 in his nonresponsibility determination for solicitation -0464 because that solicitation did not require that specification to be met. PM 3.3.1 b. 5., footnote 3, *supra*.