

Court of Federal Claims Overturns Nonresponsibility Determination: Contracting Officer Rushed to Judgment in Relying on Unsupported Fraud Allegations

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The U.S. Court of Federal Claims (COFC), in a protest decision issued on September 20, 2012, revived Afghan American Army Services Corporation's (AAA) bid to perform trucking services under the U.S. Army's National Afghan Trucking (NAT) Contract. *Afghan American Army Services Corp. v. United States*, No. 11-520C (Fed. Cl. Sept. 20, 2012). In this case, AAA protested the contracting officer's nonresponsibility finding on several grounds, including the contracting officer's reliance on unsupported allegations that AAA had forged transportation movement requests (TMRs) under the predecessor Host Nation Trucking (HNT) Contract. In an opinion by Judge Mary Ellen Coster Williams, the COFC held that the contracting officer should have investigated the underlying basis for these allegations before finding AAA nonresponsive. This case thus marks a rare decision in which the COFC vacated a nonresponsibility finding, declaring it "null and void." The decision has the potential to create a more rigorous standard for reviewing responsibility determinations at the Court.

During the responsibility evaluation, the contracting officer received a referral for proposed debarment of AAA as a result of allegations that AAA had forged TMRs under the HNT Contract. The contracting officer notified AAA that forgery allegations had been made, but because this was the first time AAA was notified about the allegations, AAA requested additional information so that it could undertake its own investigation and provide a meaningful response. The contracting officer failed to respond to AAA's request and, one week later, found AAA nonresponsive in part based on the forgery allegations. AAA subsequently challenged the contracting officer's nonresponsibility finding before the COFC.

In the middle of briefing the protest, the Department of Justice notified AAA that it had been proposed for debarment. The protest was put on hold pending conclusion of the debarment proceedings. During the debarment proceedings, AAA received the record regarding the alleged forgeries and was able to provide the Army Suspension and Debarment Officer (SDO) with information rebutting the allegations. The SDO subsequently lifted the proposed debarment, finding that there was "neither direct nor circumstantial evidence to prove that AAA or any of its employees had actually forged unit signatures."

Thereafter, back at the COFC, AAA moved to supplement the court record with the record before the SDO, including AAA's submissions to the SDO substantively responding to the forgery allegations. Judge Williams granted AAA's motion, holding that "the record would be erroneous and misleading" without this information: **"Refusing to permit supplementation here would perpetuate error by allowing what the Government admitted was an unsupported allegation to form a predicate for AAA's nonresponsibility determination."**

This decision is significant in light of the U.S. Court of Appeals for the Federal Circuit's opinion in *Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009). In *Axiom*, the Federal Circuit created a standard that allows parties to supplement the record only "in cases in which the omission of extra-record evidence precludes effective judicial review." The Federal Circuit in *Axiom* noted that "[t]he focus of judicial review of agency action remains the administrative record, which should be supplemented only if the existing record is insufficient to permit meaningful review consistent with the APA."

Judge Williams acknowledged the *Axiom* standard, recognizing that "admitting a post hoc agency determination into the record in a bid protest is highly unusual[.]" but ultimately supplemented the record because failing to do so would perpetuate error. In particular, Judge Williams was concerned that the **"contracting officer assumed the veracity of allegations in the notice of proposed debarment, but the Government itself later concluded that such assumptions were unwarranted when it terminated the proposed debarment."** The record before the SDO was thus necessary to determine whether the contracting officer considered all the relevant factors in finding AAA nonresponsible. Although the Court did not fault the contracting officer for failing to predict that the proposed debarment would be withdrawn, Judge Williams nevertheless refused to "ignore this significant development in adjudicating this bid protest at this point in time."

Upon reaching the merits of the protest, Judge Williams held that the contracting officer unreasonably relied on the forgery allegations in finding AAA nonresponsible. The Judge noted that AAA denied the allegations when they were raised by the contracting officer during AAA's responsibility evaluation and requested details so that it could respond. However, "[i]nstead of granting AAA's request and obtaining a fuller picture of an anomalous situation, the contracting officer proceeded apace with her nonresponsibility determination and issued that determination just seven days after AAA requested that the Army provide some basis for the forgery allegation." Moreover, the contracting officer, in her nonresponsibility determination, somehow concluded that AAA's corrective actions regarding the forgeries were inadequate when AAA was never aware of the forgery allegations—and thus did not implement corrective actions. According to the Court, **"this rush to judgment without obtaining a more complete picture of what transpired was arbitrary and capricious."**

This case, which is the first decision in which the COFC has overturned a nonresponsibility determination on the merits (the closest analog being *Lion Raisins, Inc. v. United States*, 51 Fed. Cl. 238 (2001), concerning contractor suspensions), suggests that there may be situations in which contracting officers are required to further investigate the underlying bases for a nonresponsibility determination. The Court particularly faulted the NAT contracting officer for ignoring the fact that officials on the previous HNT contract had monitored AAA's performance for two years but never brought any forgery allegations to AAA's attention. "[I]t was odd that the

HNT contracting officer had never identified even a single instance of alleged forgery over a two-year period nor attempted to recoup over \$3.6 million from AAA under the HNT contract” attributed to the forgeries. According to the Court, these facts should have raised a “red flag” and prompted the contracting officer to at least allow AAA to investigate and respond to the allegations.

Judge Williams also accepted AAA's legal argument that a contracting officer's responsibility determination could be overturned on the ground that two offerors were treated in an unequal and disparate manner. This argument derives from the fundamental principle in Federal Acquisition Regulation (FAR) 1.602-2(b) that contracting officers have a duty to “[e]nsure that contractors receive impartial, fair, and equitable treatment” Judge Williams' decision is the first known opinion to recognize an “unequal treatment” protest ground in the responsibility context. Acknowledging that “responsibility determinations must be tailored to the unique situation of a given offeror,” Judge Williams nevertheless accepted the legal basis for a comparison between the two offerors in this case because both performed the same HNT contract, “which was exclusively used to measure responsibility for the NAT procurement.” Thus, while Judge Williams found no unequal treatment on factual grounds, her opinion establishes unequal treatment as a viable protest ground in the responsibility context.

Overall, this case represents a unique addition to the case law governing the judicial review of responsibility determinations. While it is still too soon to determine what effect this case will have on the ability of offerors found to be nonresponsible to challenge that finding before the COFC, the opinion does demonstrate that the discretion of contracting officers in making these findings is not unlimited. AAA was represented by Wiley Rein attorneys Philip J. Davis, Paul F. Khoury, Brian G. Walsh and William M. Novak.