

THE CONTRACTOR AND THE CONTRACTING OFFICE-A TALE OF FRAUD AND RESPONSIBILITY

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The Federal Acquisition Regulation (“FAR”) states that “purchases shall be made from, and contracts shall be awarded to, responsible contractors only...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.” FAR 9.103(a) & (b).

The FAR general standards for responsibility states that to be determined responsible, a prospective contractor must be able to comply with the required delivery schedule and shall have a satisfactory performance record. FAR 9.104-1(b) & (c).

An Arlington, VA businessman, Robert S. Stewart, Jr., President of Federal Government Experts LLC, was sentenced on June 16, 2021 to 21 months in prison, after his conviction for making false statements more than 30 times to multiple federal agencies in order to fraudulently obtain more than \$38 million in government contracts to provide Personal Protective Equipment (“PPE”) including N95 masks to the Department of Veterans Affairs (“VA”) and the Federal Emergency Management Agency. None of the PPE was ever delivered.

A memorandum to the members of the U.S House of Representatives Select Subcommittee on the Coronavirus Crisis explained the basis of the convictions and also indicated that VA officials failed to perform the due diligence required by the FAR in awarding contracts to Mr. Stewart’s company. The memo notes that:

“VA [] performed several searches of government contractor databases [and] there are no records of you having done any federal contracts.” The official further required references for other work and verification that Mr. Stewart was getting business from FEMA for the masks. Mr. Stewart replied “We are a new company (incorporated) in September 2018 [] I have been award[ed] one prime contract (small contract) and the rest of our work is sub k [contract]. Mr. Stewart attached a copy of his driver’s license. (However, it was unclear whether VA received the other information requested or whether the VA performed any other due diligence to confirm the information that Mr. Stewart provided.

The VA’s Office of General Counsel reviewed this matter, after which a VA contracting official acknowledged in a May 20, 2021 email that there were “areas we could have addressed differently” during the contracting process.

The VA terminated Mr. Stewart’s contract for convenience, and never converted it to a termination for cause, despite the failure to deliver the contracted-for PPE. It should be noted that no taxpayer dollars were actually paid to Mr. Stewart under the VA and FEMA contracts (no deliveries were made), although considerable taxpayer dollars to pay VA and FEMA officials were spent on a supplier who could not perform, and should have been spotted as such by the contracting officials.

Takeaway. Fraud in government contracting is not new, and contracting officers must zealously guard against it. This requires due diligence on the part of contracting officers *and the requirement to follow the demands in the FAR, especially in making a proper affirmative determination of responsibility before awarding a contract.* The VA and FEMA contracting offices failed miserably in not recognizing that, even in a time of an emergency like COVID-19, the regulations must be followed and the contractor vetted to ensure that it was responsible before awarding a contract, especially ones that amounted to \$35 million from the VA and \$3.5 million from FEMA. This case is a testimonial to the importance of proper training of contracting officials, and the need for care in making responsibility determinations by those contracting officials.

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