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United States General Accounting Office  
Washington, DC 20548

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## Decision

**Matter of:** Global Crossing Telecommunications, Inc.

**File:** B-288413.6; B-288413.10

**Date:** June 17, 2002

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### DIGEST

Agency reasonably determined that the protester was nonresponsible, even though the agency had determined the firm to be responsible before it filed for bankruptcy, where the updated pre-award survey, on which the contracting officer relied in making her nonresponsibility determination, included a detailed financial analysis reasonably concluding that the firm's poor financial condition made the firm a high financial risk and that the bankruptcy action created unacceptable contract performance risks.

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### DECISION

Global Crossing Telecommunications, Inc. protests an award to MCI WorldCom Communications, Inc. under request for proposals (RFP) No. DCA200-01-R-5008, issued by the Department of Defense, Defense Information Technology Contracting Organization (DITCO), for the Defense Research Engineering Network (DREN).<sup>1</sup> Global Crossing challenges the agency's determination that it is not a responsible prospective contractor.

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<sup>1</sup> The DREN is a telecommunications network that enables over 6,000 scientists and engineers at laboratories, test centers, universities and industry sites throughout the United States to use the computer resources of the High Performance Computing Modernization Office.

We deny the protest.

The RFP, issued January 5, 2001, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for a 3-year base period with 7 option years. The RFP stated that award would be made on a “best-value” basis, considering technical, management, price, and past performance factors. DITCO received and evaluated proposals from five offerors, all large companies in the long-distance telecommunications industry. After discussions and the submission of revised proposals, the agency determined that Global Crossing’s proposal was the highest-rated and lowest-priced. On July 9, DITCO awarded the contract to Global Crossing.<sup>2</sup>

Protests of the award were then filed by all of the other offerors. The agency took corrective action in response to the protests. It amended the solicitation, canceled the award to Global Crossing, and reopened the competition. After the recompetition, Global Crossing’s proposal was again evaluated as the highest-rated and lowest-priced.<sup>3</sup>

In December 2001, while contemplating re-award of the contract to Global Crossing, the contracting officer became aware of news reports reflecting negatively on the firm’s financial position, as well as of other adverse financial information, such as a drop in the firm’s Standard & Poor’s (S&P) credit rating to the lowest non-default rating. As a result, the contracting officer requested that the Defense Contract Management Agency (DCMA) conduct a pre-award survey of Global Crossing’s financial capability. Agency Report, Tab 17, Determinations of Responsibility, at 000107-08.

DCMA’s first pre-award survey, issued January 10, 2002, consisted of a review of financial statements dated September 30, 2001 submitted by Global Crossing.<sup>4</sup>

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<sup>2</sup> When the agency awarded a contract to Global Crossing in July 2001, the contracting officer did not prepare a specific determination of responsibility; rather, pursuant to Federal Acquisition Regulation (FAR) § 9.105-2(a)(1), her signature on the contract constituted an affirmative determination of responsibility.

<sup>3</sup> Global Crossing’s price was significantly lower than the others submitted.

<sup>4</sup> Global Crossing submitted the consolidated financial statements for its parent corporation, Global Crossing, Ltd. In order to permit DCMA to base the pre-award survey on this information, it requested and received a corporate guarantee from the parent company whereby the parent corporation agreed to provide the necessary resources, including financial support, for the satisfactory performance of the contract, if awarded to its subsidiary. Agency Report, Tab 17, Determinations of Responsibility, at 000085.

The review included consideration of the firm's working capital from its own resources, net worth, current assets, current liability, current ratio (i.e., ratio of current assets to current debt), "acid test" ratio (an indicator of immediate liquidity), and debt to equity ratio. DCMA determined that the financial ratios reviewed "are satisfactory and fall between the median and low range of industry standards when compared to other businesses in the same industry." Id. at 000085, 000088. The survey also stated that the firm had a large line of secured credit that it had drawn down completely, and that this was reflected in the firm's liquidity under cash assets on its balance sheet. Id. at 000087. The survey rated Global Crossing's financial capability as "satisfactory," and concluded:

The analyst's evaluation has determined that Global Crossing has the financial resources to perform this solicitation based on having sufficient working capital on hand and the signed Corporate Guaranty from the parent company. As a result, an award is recommended. However, considering that they have a large amount of long term debt . . . and a shortage of liquid funds to offset that debt, it may be prudent to request another financial capability review, perhaps from [the Defense Contract Audit Agency (DCAA)], in the future and prior to award of any option years. This area of liquidity could make them a moderate financial risk in the out years of the contract, but overall, for the present, the analyst considers them a low risk in regards to cost.

Id. at 000083, 000088. On January 14, the contracting officer made an affirmative determination of responsibility based on DCMA's pre-award survey. Id. at 000080-81. The agency then notified Global Crossing that it would be awarded the contract.

On January 23, prior to the planned award, the agency received a letter from Global Crossing stating that the firm was about to announce a material development with respect to its financial condition and suggested that the agency may want to delay award until after that announcement. Id. at 000079. On January 28, Global Crossing announced that it was filing for reorganization under Chapter 11 of the Bankruptcy Act. Id. at 000076-78.

On January 29, the contracting officer requested from DCMA an updated pre-award survey in light of the bankruptcy proceedings. The contracting officer notified Global Crossing of her request.

DCMA prepared an updated pre-award survey. Id. at 000039-72. The updated pre-award survey was based on a detailed financial assessment performed by a team from DCMA's Industrial Analysis Center consisting of a financial analyst, an economist, an industrial analyst, a lawyer and contracting personnel. The review examined Global Crossing's quarterly and annual revenue figures from the second quarter of 1998 through the third quarter of 2001 (i.e., the quarter ending

September 30, 2001), and also identified the unaudited revenue estimates for the fourth quarter of 2001.<sup>5</sup> This analysis included consideration of the financial indicators that were the focus of the first pre-award survey, as well as a detailed analysis of the firm's corporate financial health over the prior 3 years, including analyses in the areas of profitability, debt management, cash flow, liquidity, shareholder value, and bankruptcy potential. The analysis determined that the firm was in a "critical plus" financial condition and had a "high" financial risk, and concluded:

All financial indicators are weak with negative trends. The Sales trend is unfavorable with declining demand, multiple competitors, and a large overcapacity throughout the industry resulting in declining prices. The Company has been unprofitable throughout its existence. Their balance sheet is weak with long-term debt that doesn't appear to be manageable. Operating cash flow is not sufficient to meet the current cash requirements and pay down debt. Access to credit and equity markets appears to have been exhausted with a current S&P Issuer Credit rating of "D" which is a "default" rating. Industry comparisons for profitability and debt management are unfavorable. The Company has sought bankruptcy protection.

Id. at 000061.

In addition, the review identified risks to the government in awarding the contract to Global Crossing after Chapter 11 bankruptcy had commenced. Among the identified risks was that, should the agency need to terminate the contract during the proceedings, delays in termination were likely. Also, in the event the firm's attempts to reorganize are unsuccessful and the firm is forced into Chapter 7 liquidation, the agency risks not receiving performance under the contract, not being able to terminate the contract without permission from the bankruptcy court, and not being able to recover overpayments made to the firm prior to liquidation. Id. at 000062.

The review also identified other adverse considerations, including possible opposition to the proposed reorganization plan by current shareholders, an investigation by the Securities and Exchange Commission (SEC) of Global Crossing's accounting practices, unofficial reports of an investigation by the Federal Bureau of Investigation (FBI), numerous post-bankruptcy class-action suits against Global Crossing and its auditors, an S&P "Relative Strength Rank" of 1 (lowest rating

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<sup>5</sup> The updated survey stated that Global Crossing had intended to release fourth quarter and year-end financial results for 2001 in February 2002, but instead the firm only released unaudited estimates of revenue due to continued review of the financial statements by its auditor, Arthur Andersen, LLP. Id. at 000040.

on a scale of 1-99), a report of cost-cutting measures being implemented that could reduce the firm's U.S. employees, and concern that the company's bankruptcy status would adversely affect the firm's ability to retain and attract employees. Id. at 000063-64. The stated conclusion of the review was as follows:

Poor financial performance, unfavorable trends of key financial indicators and legal consequences associated with bankruptcy and possible liquidation exposes the Government to significant risks in entering into any contracts with Global Crossing.

Id. at 000065.

On March 6, DCMA issued the updated pre-award survey. It restated the conclusion of the review team (quoted above) and recommended against making an award to Global Crossing. Id. at 000044. On March 7, the contracting officer issued a determination of nonresponsibility that adopted and briefly summarized the DCMA financial review findings as the basis for her determination. Id. at 000037-38.

Also on March 7, the contracting officer received a letter from Global Crossing. The letter stated that, for the purposes of affirmatively demonstrating the firm's financial responsibility and in light of the firm's recent Chapter 11 bankruptcy proceedings, Global Crossing was proposing to deposit \$6 million in an escrow account to fund the working capital needs of the contract. Id. at 00035. Attached to the letter was a letter from the financial institution that agreed to act as the escrow agent. Id. at 00036. The agency subsequently analyzed whether \$6 million would be sufficient to cover initial performance costs. Id. at 00021-26. The analysis relied on certain assumptions and concluded that \$6 million was sufficient. Id. at 000021, 000024. The contracting officer concluded, after consulting with DCMA, that the findings of DCMA's latest pre-award survey, and the nonresponsibility determination that relied upon it, were not changed by the creation of the escrow account. Agency Report at 26-27; Contracting Officer's Statement at 4.

On March 26, DCAA issued an audit report on Global Crossing's parent and its affiliates, which had been previously requested by DCMA. Agency Report, Tab 17, Determinations of Responsibility, at 000001-19. The report stated that, due to significant uncertainties arising from the bankruptcy proceedings, DCAA was not able to, and did not, express an opinion on whether the company had adequate financial resources to perform government contracts in the next year. Id. at 000003. The report included a response from Global Crossing dated March 22, stating that it was performing government contracts and had sufficient resources to continue to perform in the near-term, that it had prepared an operating plan that reduces the risk of liquidation of its assets, and that the \$6 million escrow account demonstrated that the firm has the necessary working capital to perform the DREN contract. Id. at 000017-19. The firm's response concluded by requesting that the contracting agency delay action under the RFP in order to observe developments of the firm's

recent actions. Id. at 000019. DCAA's report and Global Crossing's response had no impact on the contracting officer's nonresponsibility decision. Agency Report at 28.

Concurrent with finding Global Crossing nonresponsible, the contracting officer requested DCMA to conduct a pre-award survey on MCI, the offeror whose proposal was next in line for award. On March 19, DCMA recommended award to MCI based on a satisfactory finding of financial capability. Agency Report, Tab 17, Determinations of Responsibility, at 000124. The pre-award survey was based on the same financial assessment model used for the latest financial review of Global Crossing.<sup>6</sup> Though shorter than the review for Global Crossing, and performed by a single analyst rather than a team, the assessment reviewed and analyzed the same basic financial information for MCI over the past 3 years, including profitability, debt management, cash flow, liquidity, shareholder value, and bankruptcy potential. Id. at 000130-35. The assessment found that the firm was in a generally sound financial position within the industry, and stated the following conclusion:

Satisfactory financial performance, generally favorable trends of key financial indicators and very unlikely chance of bankruptcy does not expose the Government to significant risks in entering into any contracts with [MCI], with the parent company . . . serving as Guarantor.

Id. at 000135.

On March 25, the contracting officer made an affirmative determination of responsibility for MCI. Id. at 000141-42. The determination referenced the DCMA pre-award survey, as well as other information, including an S&P rating for MCI of "BBB+ in its capacity to meet its financial commitments, which means the company has adequate capacity to meet financial commitments, but may be subject to adverse economic conditions." Id. at 000141. After the agency prepared and documented a revised source selection, MCI was awarded the contract on April 4. Global Crossing's protest, challenging the nonresponsibility determination and the award to MCI, followed.<sup>7</sup>

A contract may only be awarded to a responsible prospective contractor. FAR § 9.103(a). No award can be made unless the contracting officer makes an

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<sup>6</sup> As with Global Crossing, MCI submitted the financial statements of its parent corporation, WorldCom, Inc., and DCMA received a corporate guarantee from the parent corporation permitting it to consider the financial status of the parent corporation for MCI's pre-award survey. Id. at 000126.

<sup>7</sup> Two other competitors also protested the award to MCI. However, after the agency submitted a report, these protests were withdrawn.

affirmative determination of responsibility; in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer is required to make a determination of nonresponsibility. FAR § 9.103(b). A finding of responsibility requires, among other things, that the potential contractor have adequate financial resources to perform the contract or the ability to obtain them. FAR § 9.104-1(a). In making a responsibility determination, the contracting officer may rely on the results of a pre-award survey, and we will consider the accuracy of the survey information in judging whether a contracting officer's determination of nonresponsibility was reasonable. Harvard Interiors Mfg. Co., B-247400, May 1, 1992, 92-1 CPD ¶ 413 at 3. Since the agency must bear the brunt of any difficulties experienced in obtaining the required performance, contracting officers have broad discretion and business judgment in reaching nonresponsibility determinations, and we will not question such a determination unless a protester can establish that it lacked any reasonable basis or was made in bad faith. Id. at 3-4; Computervision Corp., B-257141, Aug. 12, 1994, 94-2 CPD ¶ 73 at 3. Here, the protester has not established that the nonresponsibility determination was unreasonable or made in bad faith.

The protester does not challenge the accuracy of the facts presented in the updated pre-award survey, which concludes that there are unacceptable risks to the government because of the firm's poor financial condition, and on which the contracting officer relied in making her nonresponsibility determination. Instead, the protester asserts that this determination was unreasonable because it was based on the same information upon which the earlier pre-award survey and the contracting officer previously determined Global Crossing to be responsible. It is true that both surveys considered and analyzed much of the same information and factors, with both recognizing that Global Crossing had a liquidity problem and ultimately reaching opposite conclusions about Global Crossing's financial capability to perform this contract. It is also true that not much time separated the first and second pre-award surveys.

However, between the two surveys Global Crossing had commenced bankruptcy proceedings. While the mere fact that a bidder files a petition in bankruptcy under Chapter 11 of the Bankruptcy Act does not require a finding of nonresponsibility, bankruptcy may nevertheless be considered as a factor in determining that a particular bidder is nonresponsible. Wallace & Wallace, Inc.; Wallace & Wallace Fuel Oil, Inc.-Recon., B-209859.2, B-209860.2, July 29, 1983, 83-2 CPD ¶ 142 at 5. Indeed, while not required, a contracting officer may reasonably view bankruptcy as something other than a favorable development. Id. at 5, n.1; see Harvard Interiors Mfg. Co., supra, at 6 (proposed reorganization plan that is unapproved at the time of award, and financial projections based on the plan, do not necessitate an affirmative responsibility determination). The risks to the government arising from the firm's bankruptcy proceedings were a significant part of the contracting officer's stated justification for her nonresponsibility determination. The protester has not shown

that these risks were not significant or that the agency's consideration of the risks associated with the protester's bankruptcy proceedings was unreasonable.

In addition, the second DCMA survey analysis, upon which the contracting officer based her nonresponsibility determination, was more extensive, considered additional information not previously available, and examined risks more critically. For example, DCMA had Global Crossing's estimates of its fourth quarter revenue figures and information about the firm's bankruptcy proceedings, neither of which was previously available. Also, the detailed financial review in the final pre-award survey produced much more information analyzing the firm's financial position, including unfavorable trends over several years. While the previous pre-award survey assessed the financial risk for Global Crossing as moderate at that time, and judged the risk low in comparison to the contemplated contract cost, DCMA qualified its assessment as being subject to change on future review, which was recommended. Here, the additional information and analysis in the second pre-award survey was significant and supported the agency's actions. In addition to the firm's financial indicators placing the firm at the bottom of a distressed industry, there were now uncertainties associated with bankruptcy that posed unacceptable risks to the agency as outlined above. Since the updated pre-award survey provided the contracting officer with a reasonable basis to change her judgment about whether the firm is responsible, her prior determinations that Global Crossing was responsible cannot be viewed as precluding the subsequent nonresponsibility determination. See Microdyne Corp., B-171108, Apr. 6, 1971, at 2 (a determination of responsibility is not necessarily defective because it is inconsistent with a contrary determination concerning the same firm); see also Harvard Interiors Mfg. Co., *supra*, at 9; Firm Erich Bernion GmbH, B-234680, B-234681, July 3, 1989, 89-2 CPD ¶ 1 at 6.

Global Crossing also contends that the agency did not properly consider the \$6 million escrow account in making its nonresponsibility determination--indeed, it was not mentioned in the determination because it was submitted after the determination was made.<sup>8</sup> We disagree. Contrary to the protester's contentions, the record shows that the escrow account was specifically considered prior to rejecting Global Crossing's proposal and making award to MCI. While the agency's analysis of the account indicated that it would be sufficient to cover the firm's initial working capital needs, that analysis was based on several assumptions due to insufficient information. Agency Report, Tab 17, Determinations of Responsibility, at 000021-26; Tab 19, Addendum to Narration of Procurement (Mar. 28, 2002), at 1-2 (approved by contracting officer). Due to the unsupported assumptions, the contracting officer considered the analysis inconclusive. Moreover, the establishment of the account

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<sup>8</sup> If the contracting officer is presented with new information prior to award that would make a nonresponsibility determination unreasonable, the agency can and should change the earlier determination. American Tech. & Analytical Servs., Inc., B-28277.5, May 31, 2000, 2000 CPD ¶ 98 at 3.

did not offset the factors prompting the nonresponsibility determination in that it did not assuage the impact of the firm's poor financial performance with unfavorable trends identified by the financial review. Also, the contracting officer did not know whether the escrow account would be protected under a future bankruptcy reorganization plan. Moreover, even if the account is protected, the contracting officer found that the other risks to the agency associated with the firm's bankruptcy and possible liquidation would remain. Agency Report, Tab 19, Addendum to Narration of Procurement, at 2. On this record, we find the contracting officer adequately considered the proposed escrow account in determining that Global Crossing was not responsible.<sup>9</sup>

The protester also alleged that the nonresponsibility determination for Global Crossing and the affirmative determination of responsibility for MCI reflect unequal treatment by the agency. We disagree. The record shows that the long distance telecommunications industry is in a general state of economic distress and all of the offerors responding to this RFP have financial indicators that reflect distressed circumstances. Agency Report, Tab 17, Determinations of Responsibility, 000065, 000069-72. However, the record shows that Global Crossing's indicators reflected the worst financial position of all the offerors. Id. at 000065.

The protester contends that the agency treated Global Crossing and MCI unequally by considering information adverse to Global Crossing, such as investigations by the SEC and the FBI, in reviewing its responsibility, while not considering similar information for MCI. However, in making this allegation, the protester shows neither that the unique information considered for Global Crossing was inaccurate, nor that similar information exists for MCI (and that the agency knew or should have known of such information). Nor does the record otherwise evidence unequal treatment. Rather, the record shows that the pre-award surveys of both firms considered similar types of information and the conclusions were based on similar analyses. These analyses show that MCI maintains a significantly stronger financial position without the same risks arising from bankruptcy that exist for Global Crossing. Thus, the

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<sup>9</sup> We note that the DCAA audit report on Global Crossing was also issued after the contracting officer's nonresponsibility determination. The report stated that, due to significant uncertainties associated with the bankruptcy proceedings, DCAA could not express an opinion on whether Global Crossing had adequate financial resources to perform government contracts in the next year. The contracting officer considered this to corroborate the conclusions of the updated pre-award survey. Agency Report, Tab 19, Addendum to Narration of Procurement, at 2. Thus, the DCAA report did not affect the contracting officer's nonresponsibility determination.

agency had a reasonable basis to make differing responsibility determinations for these two offerors; the difference is not evidence of unequal treatment. See Acquest Dev. LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 4-5.

The protest is denied.

Anthony H. Gamboa  
General Counsel