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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20541

B-177942

31195
July 18, 1973

Sellers, Conner & Cunco
1625 K Street, N. W.
Washington, D. C. 20006

Attention: Robert L. Ackerly, Esquire

Gentlemen:

This is in reply to your telegram of February 2, 1973, and subsequent correspondence, protesting on behalf of Drexel Industries, Incorporated, against the award of a contract to any other firm by the Defense Supply Agency under invitation for bids (IFB) No. DSA700-73-B-1446, issued by the Defense Construction Supply Center, Columbus, Ohio.

The solicitation was for 13 forklift trucks to be used for shipboard missile handling by the United States Navy. At bid opening on January 31, 1973, it was found that Western Gear Corporation bid \$36,893 per truck while Drexel, the only other bidder, bid \$48,500 per truck. Drexel protested any award to Western Gear, however, because of Western Gear's failure to submit a first article test report under a previously awarded contract for 62 forklift trucks similar to those called for by the instant IFB. Award has not been made.

Contract No. DSA700-71-C-8662 was awarded to Western Gear on June 3, 1971, and required the submission of a first article test report by February 29, 1972. Drexel protested this award, alleging, inter alia, that Western Gear would not be able to perform and would not meet the date for first article testing. Although Western Gear did not submit a first article test report by the required date, we closed our file on the protest because we viewed the matters in issue as primarily involving contract administration responsibilities. B-173195, May 4, 1972.

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On July 10, 1972, DSA issued a modification to the contract which noted Western Gear's failure to submit the test report, recited the necessity "for the contractor to redesign the truck," reduced the contract price by \$10,000.60, added liquidated damages provisions, and established March 8, 1973, as the new final date for submission of the first article test report. Western Gear submitted the report on February 26, 1973, but the report was not approved. The company subsequently submitted a revised test report, which was approved on May 7, 1973.

You claim that the above facts indicate that Western Gear "is not a responsive and responsible offeror" under the current IFB. You also express doubt that Western Gear was able to correct the deficiencies contained in the original first article test report in the short period of time between rejection of the first report and approval of the revised report. The essence of your position, as stated at a meeting held in our Office on June 20, 1973, is that Western Gear has proven that it lacks both the experience and the ability to perform, and therefore, as a matter of law, it must be regarded as nonresponsible.

The record in the instant case reveals that Western Gear was initially unable to perform in accordance with the requirements of contract No. DSA700-71-C-8662, but that it has now furnished a first article test report which is acceptable to DSA and to the Navy and which the Navy reports "shows compliance with the subject contract." There is nothing in the record, aside from your expression of doubt, which suggests that the Navy is not correct in this regard. DSA also reports that Western Gear has received a favorable pre-award survey and that the company has been determined to be a responsible bidder.

ASPR 1-902 provides that contracts shall be awarded to "responsible prospective contractors only." ASPR 1-903.1, which sets forth minimum standards for a finding of responsibility, includes the following:

(iii) have a satisfactory record of performance (contractors who are seriously deficient in current contract performance, when the number of contracts and the extent of deficiency of each are considered, shall, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, be presumed to be unable to meet this requirement). * * *

We have always regarded the determination of a bidder's responsibility, in accordance with the standards of ASPR 1-903 et seq., to be primarily a matter within the broad discretion of contracting officials, and we have consistently declined to question the validity of that determination in the absence of a showing of bad faith or a reasonable basis therefor. 43 Comp. Gen. 228 (1963); 46 id. 371 (1966). As we explained in the former case:

* * * Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast * * * a matter of judgment. Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the contracting officers involved who should be in the best position to assess responsibility, who must bear the major brunt of any difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the Government's behalf. 39 Comp. Gen. 705, 711. * * *

We do not believe that there has been a showing in this case that the determination as to Western Gear's responsibility was unreasonable or the result of bad faith. What is indicated here is that Western Gear initially had significant difficulty in meeting contract requirements and that the contract was modified as a result. However, this fact does not automatically render the company nonresponsible for future procurements, since "the failure to perform satisfactorily under one prior contract is an insufficient basis for rejection of a bid." B-166465, April 23, 1969. See also B-176077(1), January 26, 1973. The finding of responsibility in the instant procurement reflects DSA's belief that Western Gear is capable of performing in accordance with the provisions of the IFB. The record affords us no basis for disagreeing with that determination.

In our earlier consideration of this matter, we noted our "ongoing interest" in contract No. D A700-71-C-8662 and Western Gear's performance thereunder. B-173195, supra. In view of DSA's acceptance of Western Gear's revised first article test report, we do not plan to maintain further active interest in the matter.

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For the reasons stated above, your protest is denied.

Sincerely yours,

Paul G. Deabling

For the Comptroller General
of the United States