



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-178637

October 26, 1973 40104

Texas Aerospace Services Incorporated  
3081 Vine Street  
Abilene, Texas 79602

Attention: Mr. Bernard J. Cunningham  
President

Gentlemen:

We refer to your letter dated September 17, 1973, and prior correspondence, protesting the award of a contract to another firm under request for proposals (RFP) F34601-73-R-7088, issued on December 22, 1972, at Tinker Air Force Base, Oklahoma.

The solicitation was a negotiated procurement for the overhaul, repair and/or modification of 297 selectors, ISN 1660-516-2096, P/N 966F8-01 applicable to G-118 Aircraft. Texas Aerospace Services Incorporated (Texas Aerospace) submitted a price proposal in the amount of \$6,511 which was the lowest of the best and final proposals from six sources.

Due to the urgency of meeting the required delivery schedule, on January 22, 1973, a preaward survey was requested of Texas Aerospace. Section C-32 entitled "PRE-AWARD SURVEY OF PROSPECTIVE CONTRACTOR" specifically indicated that the fourteen areas to be investigated and evaluated included production capability, labor resources and ability to meet delivery schedules. In this regard, the report dated February 6, 1973, recommended that no award be made to Texas Aerospace primarily because it did not satisfactorily demonstrate production capability to meet the delivery schedule of 133 units per month beginning 30 days after receipt of the equipment as specified in the solicitation. On the basis of the survey, the contracting officer made a determination of nonresponsibility. Since the award was for less than \$10,000, pursuant to ASPR 1-705.4(c), the determination of nonresponsibility was not coordinated with the Small Business Administration. Thereafter, a preaward survey was made on the next lowest offeror, Artko Corporation (Artko). After receiving a favorable survey report, the contracting officer found Artko to be responsible.

You have challenged the contracting officer's failure to find your company responsible. In this regard it is alleged that the actions of

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the Department of the Air Force and the Defense Contract Administration Services were arbitrary and capricious, and not supportable by fact. You assert that a representative of the survey team stated that no one could produce the item on schedule and therefore, Texas Aerospace was given a negative survey recommendation in an attempt to bring about a more reasonable delivery schedule. Further, you argue that the Government's actions were inconsistent because Artko, while in the process of declaring bankruptcy, was found to be responsible and awarded the contract which it failed to perform.

In making his determination, the contracting officer relied upon the survey report which indicated that the decision regarding Texas Aerospace was based upon the following reasons:

"(x) failure of contractor to have a prepared flow chart indicating the production schedule to meet delivery requirements (ii) lack of trained personnel to perform the work without additional training (iii) no quote and delivery schedule was available from vendors to manufacture necessary Jig (drilling fixture) (iv) no quote or delivery schedule was available from a vendor to furnish the metal bar required for the modification in accordance with T.O. 'K' Symbol Supplement (v) lack of plans to use additional personnel on this work indicated that contractor intended to use current employees which would adversely affect other contracts in house where a delinquency in delivery already exists."

We have consistently held that it is the duty of the contracting officer to determine the responsibility of a bidder. In making the determination the contracting officer is vested with a considerable degree of discretion. We will not substitute our judgment in such cases and will uphold the contracting officer's determination of responsibility unless it is shown to be arbitrary, capricious or not supported by substantial evidence. See 46 Comp. Gen. 371 (1966). On the present record, we find no basis to question the determination of nonresponsibility. Further, the fact that your firm was rejected as nonresponsible for the immediate procurement does not reflect in any way upon your firm's eligibility for future contracts, since determinations of responsibility are required to be made on "as current a basis as feasible with relation to the date of contract award." See ASPR 1-905.2.

There is no evidence indicating that your firm was given a negative survey recommendation in an attempt to bring about a more reasonable delivery schedule. Therefore, we would not be justified in reaching

such conclusion merely on the basis of your unsupported statement. Although Arko subsequently declared bankruptcy and did not perform the contract, we cannot conclude from the information that the contracting officer had before him at the time of award that there was no basis for the determination of responsibility.

You have requested that Texas Aerospace be allowed to recover a nominal sum to cover its administrative and bidding costs. The Federal courts have recognized that bidders are entitled to have their bids considered fairly and honestly for award and the recovery of bid preparation expenses is possible if it can be shown that bids were not so considered. However, the courts have held in the foregoing type of action, arbitrariness or capriciousness must be established as a prerequisite to recovery. See Continental Business Enterprises, Inc. v. United States, 452 F.2d 1016 (Ct. Cl. 1971). Since the record does not establish that this standard of administrative misconduct is present here, there is no basis to allow your claim.

Accordingly, the protest is denied.

Sincerely yours,

Paul G. Dembline

For the Comptroller General  
of the United States