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DECISION



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

40988

FILE: B-180268

DATE: July 29, 1974

MATTER OF: Radiation Systems, Incorporated

- DIGEST:
1. Although present GAO policy is not to develop protests against affirmative determinations of prospective contractor's responsibility absent showing of fraud, since initial decision discussed that issue on the merits, it will be reexamined pursuant to request for reconsideration.
 2. While individuals' opinions may differ, a basis existed whereupon the contracting officer could reason to a judgment that the low offeror was responsible.
 3. Information as to possible inability of contractor to adhere to terms of contract, which appears after contract has been awarded, cannot affect reasonableness of preaward determination of responsibility.
 4. Low offeror's furnishing of information relating to its responsibility, after receipt of best and final offers, did not constitute the conduct of negotiations, in the absence of an opportunity to modify its proposal. 51 Comp. Gen. 479, 481 (1972).

Radiation Systems, Incorporated (RSI) requests reconsideration of our decision B-180268, June 11, 1974, which denied RSI's protest against the award of a negotiated contract to Ainslie Corporation. Briefly, the facts pertinent to this request for reconsideration are that Ainslie, the low offeror, received a negative preaward survey. However, as the result of inquiries to Ainslie after best and final offers had been submitted, the contracting officer determined that Ainslie had resolved the supply problems which had originally led to the unfavorable preaward survey report and could meet its contractual obligations. The contract was subsequently awarded to Ainslie.

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*add
neg. cont.*

*C/A
reconc.
Bidder
Cont. resp.*

RSI's first allegation was that the contracting officer arbitrarily and capriciously determined Ainslie to be a responsible prospective contractor. Subsequent to our development of RSI's protest, we reviewed the efficacy of our consideration of protests wherein an affirmative determination of the low bidder's responsibility is questioned. We concluded that in view of the considerable discretion committed to the contracting officer, protests against affirmative determinations of responsibility were generally futile, and that absent a showing of fraud, such protests would no longer be developed by our Office. Therefore, we would not consider this basis for protest had RSI first asserted it at the time of its request for reconsideration. However, since the merits of this contention were discussed in our initial decision, we shall reexamine our conclusions.

The principal reason for the negative preaward survey report on Ainslie was that firm's inability to demonstrate that it had a source of supply for certain aluminum tubing. Ainslie subsequently obtained a quotation from a supplier, upon the basis of which the contracting officer determined that Ainslie could perform satisfactorily. We upheld this determination.

In its request for reconsideration, RSI observes that the supplier's quotation contains several qualifications which could possibly result in Ainslie's not receiving the tubing on time. There is some merit to this observation, and we believe that individuals may hold differing business judgments as to the value of the supplier's commitment. Nevertheless, since the quotation provides some basis upon which the contracting officer could reason to a judgment that Ainslie could satisfactorily perform the contract, we remain of the opinion that his determination cannot be characterized as arbitrary or capricious.

RSI also suggests that this Office reconsider its decision in light of possible current indications that Ainslie may not adhere to its contract terms. However, even if correct this information could not affect the validity of the decision of the contracting officer which of course was based solely on information available to him at the time of the award.

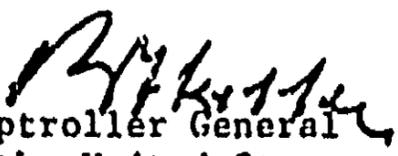
As discussed above, the contracting officer's doubts as to Ainslie's ability to timely perform--that is, its responsibility--were satisfied through Ainslie's furnishing of a quotation from

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a manufacturer of aluminum tubing. This occurred after submission of best and final offers. RSI states that we have failed to address its contention that the submission of this information constituted the conduct of negotiations with Ainslie, to the exclusion of RSI, in contravention of Armed Services Procurement Regulation (ASPR) 3-805.1(b).

The record does not indicate that Ainslie took exception to the delivery schedule nor does it support RSI's position that after receipt of best and final offers, Ainslie's technical proposal was found to be unacceptable. It appears that the contracting officer was concerned not with Ainslie's compliance with the terms of the solicitation, but with its ability to perform the proposed contract, which is a matter of responsibility.

We have often stated, as a general rule, that a prospective contractor's responsibility should be measured with respect to the information of record at time of award rather than at an earlier time. See, e.g., 51 Comp. Gen. 443, 452 (1972). Further, we have observed that "Information regarding responsibility can be furnished by an offeror after the submission of offers despite any language to the contrary in the solicitation." B-178852, August 30, 1972. That decision involved a contract awarded on the basis of initial proposals, and we did not regard the low offeror's furnishing of information relating to its responsibility, after receipt of initial offers, as the conduct of negotiations. Additionally, we do not believe that Ainslie was given an opportunity to revise or modify its proposal, which we have identified as the standard for determining whether discussions occurred. 51 Comp. Gen. 479, 481 (1972). We therefore regard this aspect of RSI's protest as without merit. Accordingly, we conclude that there is no legal basis to question the propriety of the award of the contract to Ainslie and our decision of June 11 is affirmed.


Deputy Comptroller General
of the United States