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**DECISION**



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

*M. Esten  
Proc I*

**FILE: B-187062**

**DATE: December 22, 1976**

**MATTER OF: Fairburn Marine Aviation**

**DIGEST:**

Neither use of Master Ship Repair Contract to prequalify bidders nor denial of master contract on finding of nonresponsibility unduly restricts competition, so long as prospective contractor is not prevented from bidding on future contracts which it may be qualified to perform. Armed Services Procurement Regulation requires that prospective contractors, as well as those holding master contracts, be solicited and that determination of responsibility be obtained "on as current a basis as feasible."

Fairburn Marine Aviation (Fairburn) protests the denial by Military Sealift Command (MSC), Department of the Navy, of its application for a Master Contract for Repair and Alteration of Vessels (Master Ship Repair Contract) on grounds of insufficient marine capabilities and experience in ship repair work.

Fairburn contends that this action unlawfully restricts competition for repair and maintenance of ships in the Port Canaveral, Florida, area by denying it an opportunity to bid on contracts which it is competent to perform.

A Master Ship Repair Contract, issued pursuant to Armed Services Procurement Regulation (ASPR) § 16-503 (1976 ed.), establishes in advance the terms upon which a contractor will make repairs, alterations, and additions to vessels under job orders issued by MSC area commanders. The regulations state that such a contract "shall be entered into with all prospective contractors located within the United States who request ship repair work and who possess the organization and facilities to perform such work satisfactorily."

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According to Commander Military Sealift Instruction 4330.218 (COMSCINST), § 1-301, use of the Master Ship Repair Contract establishes "a source of competition for repair jobs among commercial shipyards whose qualifications from the standpoint of physical capability, financial ability, insurance, and safety standards are predetermined." Currently, 118 firms in the United States hold Master Ship Repair Contracts, and MSC states that these normally are the firms from whom bids are solicited.

Standards for awarding Master Ship Repair Contracts are contained in the Naval Sea Systems Command Repair Manual § 4-2.2(b) (1976 ed.), cited by MSC. As a minimum, it states, the contractor must have berthing facilities or management control of such facilities so that they will be generally available. The manual emphasizes that master contracts should not be awarded to firms which are able to perform only limited or specialized repairs to component parts of vessels, although such firms may perform as subcontractors.

Procedures for awarding Master Ship Repair Contracts, spelled out in COMSCINST § 1-301.2, include an on-site inspection. Facilities of Fairburn and four of his prospective subcontractors, in Melbourne Beach and Merritt Island, Florida, were inspected by a representative of the area command, Military Sealift Command, Atlantic (COMSCLANT), on May 4 and 5, 1976. According to the inspection report, Fairburn's shop consisted of a small area clustered with miscellaneous equipment and spare parts. The seeming lack of experience of key personnel in ship repair and Fairburn's almost complete dependence upon subcontractors, whose preoccupation with their own work might cause delay and inconvenience to the Government, led the inspector to conclude that Fairburn could not adequately support repairs to MSC ships and to recommend that a Master Ship Repair Contract not be awarded. By letter dated June 23, 1976, Fairburn was informed that MSC could not act favorably upon its application; this decision was reconsidered and affirmed on July 23, 1976. Fairburn's protest by mailgram was received in this Office on July 27, 1976.

The threshold question is whether MSC's use of Master Ship Repair Contracts to prequalify bidders unduly restricts competition. A Master Ship Repair Contract is not, of itself, an integrated contract. By its own terms, it is complete only upon execution of a job order specifying the price for work to be performed in accordance with a particular invitation for bids or, in urgent

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cases upon issuance of a written order with price to be negotiated as soon as practicable. Master Contract for Repair and Alteration of Vessels, Clause 3. It is clear, however, that it is a method for prequalifying bidders. We have held that:

"\* \* \* Any system for prequalification of offerors, or otherwise limiting the number of offers, is to some degree in derogation of the principle tenet of the competitive system that bids or proposals be solicited in such a manner as to permit the maximum amount of competition consistent with the nature and extent of the services or items being procured. \* \* \* The inquiry pertinent to determining the validity of any procedure limiting the extent of competition is not whether it restricts competition per se, but whether it unduly restricts competition." Department of Agriculture's use of Master Agreement, 54 Comp. Gen. 606, 608 (1975), B-182337, 75-1 CPD 40.

See 10 U.S.C. § 2304(g) and 2305(a) (1975); ASPR § 1-300.1 and 2-102.1 (1976 ed.); Offman Electronics Corporation, 54 Comp. Gen. 1107, 1112 (1975), B-182577, 75-1 CPD 395; Department of Health, Education, and Welfare's use of basic ordering type agreement procedure, 54 id. 1096, 1099 (1975), B-183629, 75-1 CPD 392; 53 id. 209, 211 (1973).

Neither the Armed Services Procurement Regulation nor COMSCINST requires a Master Ship Repair Contract as a condition precedent to bidding. ASPR § 16-503.2 (1976 ed.) states that bids

"\* \* \* will be solicited from prospective contractors who have previously executed a master contract, and also from prospective contractors, who possess the necessary qualifications and agree to execute a master contract before issuance of a job order."

Moreover, ASPR specifically states that award of the master contract does not constitute approval of the contractor's facilities for any particular job. ASPR § 16-503.1 (1976 ed.). Before issuing a job order, the contracting officer is required to make a general determination of the prospective contractor's responsibility, and may make a preaward survey of the contractor's operations to:

"\* \* \* insure the adequacy and suitability of facilities, including safety standards and devices, adequacy of facilities for the health,

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comfort and welfare of the crew and vessel, and adequate plant protection to safeguard the vessel and other Government property." Id., § 16-503.3; see also COMSCINST § 1-301.1.

In a 1973 decision, our Office upheld award of a Master Ship Repair Contract to a "specialty firm" which generally performed under subcontract. Commenting on the requirements contained in the Naval Ship Systems Command Repair Manual (now Naval Sea Systems Command Repair Manual, supra), we stated that we did not read ASPR § 16.503.1 as restricting the use of Master Ship Repair Contracts only to firms which were capable of performing all types of ship repair work. Such an interpretation would be:

"\* \* \* inconsistent with statutory and regulatory requirements for obtaining competition to the maximum practicable extent. \* \* \* Generally, the Government may procure only for its actual minimum needs so as to encourage maximum competition and eliminate, insofar as possible, requirements which might limit acceptable offers or bids to a relatively few sources. \* \* \* We do not believe it would be proper to preclude firms capable of performing particular ship repair or related work from competing for such work or to restrict the field of competition only to firms having complete shipyard facilities when such facilities are not necessary for the particular job to be accomplished." B-179108, September 17, 1973.

More recently, in an analogous case involving use of a qualified products list, we found that absent specific requirements in an IFB with which a bidder does not comply:

"\* \* \* a particular bidder's inability to meet the contract requirements is a matter of contractor responsibility, which must be determined on the facts and circumstances of the specific case and the abilities and capabilities of a specific bidder, and which should not be determined by a 'blanket' presumption of product unacceptability and a preclusion of a class of bidders from competition." D. Moody & Co., Inc.; Astronautics Corporation of America, 55 Comp. Gen. 1, 12 (1975), B-180732; B-181971; B-182091, 75-2 CPD 1 at 16.

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Our Office has sustained prequalification of bidders and offerors when it has been shown to be in the best interest of Government or when competition actually would be enhanced. For example, we approved proposed use of Basic Ordering Agreements when limited to exigency situations and when a noncompetitive award might otherwise be made. Department of Health, Education, and Welfare's use of basic ordering type agreement procedures, supra. We upheld the proposed use of a qualified products list for microcircuits by the National Aeronautics and Space Administration in view of the extremely high level of quality and reliability required and the impossibility of testing before acceptance or use. 50 Comp. Gen. 542 (1971). We also approved a modified plan for use of master agreements by the Department of Agriculture which incorporated procedural safeguards designed to enable small firms to compete. Department of Agriculture's Use of Master Agreements, B-182337, November 9, 1976, 76-2 CPD \_\_\_\_. In each of these cases, however, this Office reserved the right to consider the programs further should their effect be to restrict competition beyond the legitimate needs of the agency involved. In general, we have sustained prequalification in cases where no producer or manufacturer was necessarily precluded from competing for a procurement. Id.

On the other hand, we consistently have refused to sanction prequalification of bidders in cases where the only justification was administrative convenience or the desire to limit the number of solicitations. Department of Agriculture's Use of Master Agreement, 54 Comp. Gen. 606, supra; 53 id 209, supra; see generally D. Moody & Co., Inc.; Astronautics Corporation of America, supra; Hoffman Electronics Corporation, supra, and cases cited therein; 52 Comp. Gen. 569 (1973); D. Moody & Co., Inc., B-185647, September 1, 1976, 76-2 CPD 211; Logicon, Inc., B-181816, November 8, 1974, 74-2 CPD 250.

Military Sealift Command's desire to obtain scheduled and emergency repairs by responsible marine companies with a minimum of delay appears to justify prequalification of bidders. For the foregoing reasons, we do not find that MSC's use of the Master Ship Repair Contract to prequalify bidders unduly restricts competition.

The remaining question is whether the denial of Fairburn's application for a Master Ship Repair Contract unduly restricts competition. The determination that Fairburn does not qualify for a master contract because of lack of sufficient marine capabilities and experience is a matter of bidder responsibility.

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As a rule, this Office will not review affirmative determinations of responsibility except for actions by procurement officials which are tantamount to fraud or which involve misapplication of definitive criteria in the solicitation. We will, however, consider protests against nonresponsibility to insure against arbitrary rejection of bids. The Everett Conklin Companies, B-186593, June 4, 1976, 76-1 CPD 362; Randall Manufacturing Company, Inc. (Reconsideration), B-185363, January 26, 1976, 76-1 CPD 44; Great Lakes Dredge and Dock Company, B-185493, January 15, 1976, 76-1 CPD 32.

The decision as to a prospective contractor's probable ability to perform, we have stated, involves a forecast which is of necessity a matter of judgment, based on fact and reached in good faith. It is only proper that it be left largely to the sound administrative discretion of the contracting officer, who should be in the best position to assess responsibility, who must bear the brunt of any difficulties in obtaining the required performance, and who must maintain day to day relations with the contractor on the Government's behalf. Our Office will not make an independent determination as to a bidder's responsibility unless it is shown that the contracting officer's determination of nonresponsibility was made in bad faith or lacked any reasonable basis, Consolidated Airborne Systems, Inc.--Reconsideration, B-183293, June 3, 1976, 76-1 CPD 356, citing 43 Comp. Gen. 228, 230 (1963), or that the finding of nonresponsibility was not based on substantial evidence. McAlister and McQuinn Construction Company, Inc., B-185518, April 15, 1976, 76-1 CPD 255.

After a careful examination of the entire record, including the on-site inspection report and Fairburn's response to it, we are of the opinion that it has not been shown that the contracting officer's determination of nonresponsibility, e.g. that Fairburn could not adequately support repairs to MSC ships, was the product of bad faith or lacked a reasonable basis. See Western Ordnance, Inc., B-182038, December 23, 1974, 74-2 CPD 370; RIOCAR, B-180361, May 23 1974, 74-1 CPD 282; see generally Alaska Barge & Transport, Inc., B-182345, March 4, 1975, 75-1 CPD 128.

We therefore do not find that the denial of Fairburn's application for a Master Ship Repair Contract unduly restricts competition, so long as Fairburn is not precluded from bidding on future MSC ship repair contracts which it believes it is qualified to perform. (As evidence of its capability in ship repairs, Fairburn has furnished this Office with a list of eight IFB's issued by Military Sealift Command on which it or one of its inspected subs has worked during

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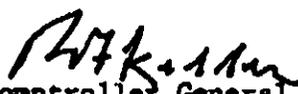
the past year.) In future solicitations, we recommend that MSC contracting officers strictly observe ASPR § 16-503.2 and .3 (1976 ed.), which require them to solicit quotations for job orders from prospective contractors, as well as from those holding master contracts, and to perform indicated preaward surveys.

Moreover, it should be noted that ASPR § 1-905.2 (1976 ed.) requires determinations of responsibility to be obtained "on as current a basis as feasible with relation to the date of contract award." Western Ordnance, Inc., supra. Interpreting this section, we recently held that a determination of nonresponsibility based on a 5-month old negative preaward survey was without any reasonable basis. D. Moody & Co., Inc.; Astronautics Corporation of America, supra.

Finally, in protesting denial of its application for a Master Ship Repair Contract, Fairburn cites as an example invitation for bids (IFB) No. N62381-76-0061, issued by COMSCLANT on March 16, 1976, for electrical repairs to the USNS WYMAN. The record shows that only the three most active yards in the Port Canaveral area holding master contracts were solicited. Fairburn states that it attempted to discuss submission of a bid with MSC personnel but was told that it could not bid. While we cannot review this procurement, since under our Bid Protest Procedures, 4 C.F.R. § 20.2 (1976), the protest is untimely, our findings here should prevent a repetition of this situation.

We will not address the numerous other issues raised by the protester relating to small business, labor surplus areas, value engineering incentives, negotiated and sole source procurements, and closing dates for receipt of bids. These also must be raised in connection with a particular procurement and within the 10-day time limit of our Bid Protest Procedures.

To the extent indicated, the protest is denied.

  
Deputy Comptroller General  
of the United States