

DOCUMENT RESUME

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[Determination of Nonresponsibility Due to Lack of Tenacity and Perseverance]. B-187980. May 31, 1977. 8 pp.

Decision re: Boiler Services; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of the Air Force:
Rickenbacker AFB, OH; Lieb Jackson, Inc.

Authority: A.S.P.R. 1-705.4(c)(iv). A.S.P.R. 1-905 et seq.
A.S.P.R. 1-902. A.S.P.R. 2-408.1. 4 C.F.R. 20.2(l)(1).
B-179723 (1974). B-181751 (1974). Keco Industries, Inc. v.
United States, 492 F. 2d 1200 (Ct. Cl. 1974). McCarty Corp.
v. United States, 499 F. 2d 633 (Ct. Cl. 1974).

The protester challenged the award of a contract by the Air Force on numerous grounds. The finding that the low bidder was nonresponsible for lack of tenacity and perseverance was not unreasonable. There is no requirement that preaward notice of bid rejection be given. Objection to the use of an allegedly restrictive specification was untimely since this protest was made after bid opening. The record contained no basis for the award of bid preparation costs since it had not been established that the agency acted arbitrarily or with a lack of good faith when considering the protester's bid. (Author/SC)

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P. Sherry
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DECISION

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

FILE: B-187080

DATE: May 31, 1977

MATTER OF: Boiler Services

DIGEST:

1. Determination by contracting officer that low bidder, small business concern, was nonresponsible for lack of tenacity and perseverance was proper since record indicated that contracting officer's finding was not unreasonable.
2. Fact that protester was not given preaward notice of its bid rejection provided no basis for protest since notification was mailed three days after award and there is no requirement that preaward notice should have been given.
3. Since protester did not object to use of allegedly restrictive specification until after bid opening, protest is untimely.
4. Record contains no basis for award of bid preparation expenses since it has not been established that agency acted arbitrarily or with lack of good faith when considering protester's bid.

Boiler Services, a small business concern, was the low bidder under invitation for bids (IFB) No. F33617-76-09027, issued by the Department of the Air Force (Air Force), Rickenbacker Air Force Base, Columbus, Ohio, for repairing combustion controls, instrumentation, and a coal silo temperature sensing system, and the retubing of high temperature hot water generators. However, a determination was made that Boiler Services was nonresponsible due to a lack of tenacity and perseverance in the performance of prior contracts. Following a determination that award should be made without delay, a contract was awarded to Lie / Jackson, Inc., the next low bidder. Boiler Services has challenged the Air Force's award on numerous grounds.

Following the opening of bids on June 11, 1976, the contracting officer, in addition to requesting a preaward survey to determine the financial capability of both Boiler Services and Lieb-Jackson, reviewed the past performance of both companies. Based on Boiler

Services' apparent financial capability the preaward survey team recommended award of the contract to Boiler Services. However, the review of past performance indicated to the contracting officer that the protester had not applied the necessary tenacity and perseverance in the performance of three prior Air Force contracts. In his Determination of Nonresponsibility, the contracting officer stated that each of three Air Force contracts awarded to Boiler Services since 1973 had been "* * * plagued with the evident results of unprofessional work application to the tasks required within the scope of each contract * * *". The contracting officer found that in each of the following contracts--F33617-74-C0075 (C0075), F33617-74-90028 (90028), and F33617-75-90050 (90050)--Boiler Services performed in an unsatisfactory manner and had not completed any of these contracts at an acceptable level.

For each of the above mentioned contracts the contracting officer compiled a chronological listing of specific incidents evidencing the protester's unsatisfactory performance. In connection with Contract C0075, awarded to the protester on November 26, 1973 for replacement repairs to the Air Force's central heating plant at Lockbourne Air Force Base, Ohio, the following deficiencies were listed: failure to provide and install required materials; failure to timely submit equipment schedules; unnecessary delays in the performance of required work as well as instances of poor planning and management; failure to exercise proper follow-up procedures on the status of delivery dates provided by suppliers; use of inferior tubing material; failure to replace missing bolts on an elevator "hook chain" resulting in a broken chain; failure to bring necessary material to the job site; instances of poor workmanship and laxity in quality control; lack of adequate work force and unsatisfactory managerial control.

With regard to Contract 90028, awarded June 27, 1974 for replacement of boiler tubing and replacement of refractory tiles, at Rickenbacker Air Force Base, Ohio, the contracting officer found the following with respect to Boiler Services' performance: delays in completion of work due to inadequate work effort and misplaced materials and working tools; failure to make necessary repairs and delay in submitting required letters certifying that tubing was in compliance with Air Force standards. In connection with Contract 90050, awarded to Boiler Services on October 7, 1974, for replacement of boiler tubes and refractory and insulation tiles, at Rickenbacker Air Force Base, Ohio, it was noted that failure of the protester to deliver required materials to the contract site as agreed upon necessitated a suspension of work on January 30, 1975. Additionally, Boiler Services was found inexcusably late in meeting an emergency repair requirement contained in the contract, failed to comply with plans and specifications, refused to submit tubing certification, and inadequately prepared a progress schedule.

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The protester has responded to the contention that it failed to exercise proper follow-up procedures with respect to delivery of materials under Contract C0075 by asserting that late deliveries were due to circumstances beyond its control. Specifically, Boiler Services has referenced an agency memorandum of October 27, 1974, and a notation attached thereto which contains the statement that there was "no way to get a better delivery date on materials". The protester has also indicated that delivery of castings to be used in the subject contract was delayed for more than one year because of the inability of the source supplier to deliver this product.

On the other hand, an Air Force memorandum of September 30, 1974 notes with respect to Contract C0075:

"The work for the master control station was scheduled for completion during the month of August 1974, and the starting date on the project was 14 Jan 74. The contractor had ample time to order all the materials and parts for the project. It appears that the contractor only recently attempted to order the materials or failed to follow up on a previous requisition. Currently, the work on the master control station is 30 days behind schedule."

Further, the record with respect to Contract C0075 also indicates that the contractor failed to exercise tenacious follow-up on the status of delivery dates provided by its suppliers.

Moreover, the record evidences numerous instances of poor workmanship by Boiler Services notwithstanding the protester's statements to the contrary. For example, the protester has referred to statements contained in the record to show that it was not the cause of boiler tube deformities. However, the statements cited by Boiler Services are contradicted by an Air Force memorandum of October 16, 1975, which contained the results of a detailed inspection into this very problem. This memorandum, having application to Contracts C0075 and 90050 stated in part as follows:

"6. The inspection revealed that several major discrepancies existed, all of which were attributed to poor workmanship on the part of the contractor. For example, the contractor substituted field manufactured orifice strainers in lieu of using the proper orifice strainers fabricated by the generator manufacturer. The contractor's orifice sleeves were manufactured from an inferior grade of steel pipe to which steel

nuts were welded to create the orifice disc. These nuts do not provide the proper orifice diameter nor flow characteristics because their outside surfaces are not sharp and clean, nor free of unbroken corners and threads. Additionally, the orifice sleeves and discs should be a specific grade of stainless steel to minimize the erosive effects of the high velocity high temperature water flow. A visual inspection of the contractor's orifice strainers revealed that the diameter of the nut openings had been enlarged while the diameter of the orifice sleeves had been significantly reduced due to erosion caused by the high velocity water flow. In numerous instances, the nut had been obliterated from the end of the orifice sleeve. Additionally, the contractor's weld penetrated the orifice opening of some of the orifice strainers. The weld penetration reduced the effective orifice cross-section as much as seventy percent.

"7. The contractor also failed to replace, in the proper order and header, those orifice strainers which he removed during the tube replacement. As a consequence of the latter condition, several tubes warped and/or ruptured in Generators No. 1 and 3. His failure to replace the orifice strainers correctly, combined with other discrepancies, adversely affected the water flow rate through our generators.

"8. During the tube replacement process, the contractor generated a significant amount of debris which collected in the generator headers. The contractor failed to remove the debris from the headers prior to commencing tube replacement. During our latest inspection we have found a considerable number of old tube ends, solidified metal droplets, and other metallic fragments in the headers of three of our generators (the remaining units will be inspected as soon as the other units are cleaned and returned to service). The tube ends and other debris were found in both the top and bottom headers of all those generators which were inspected. They were lodged in the headers in such a

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manner that they severely restricted the flow of water in several tubes of each generator. In addition to the tube ends, the metallic shavings created during the contractor's chipping operation plus some metal droplets from his burning operation were found wedged in some of the orifice sleeve openings, a feature which further restricted the water flow through the generators.

* * * * *

"It is obvious that the net effect of the discrepancies previously discussed adversely restricted the water flow through the generator tubes, headers and blowdown system, causing numerous tube ruptures and warping. Every effort must be taken by the Government to correct the current tube problem prior to the peak of the next heating season. * * *"

Additionally, the record supports the contracting officer's statement that a June 6, 1976, inspection by Air Force engineer revealed numerous instances of poor workmanship by Boiler Services on Contract C0075.

With respect to Contract 90050, an Air Force memorandum of December 26, 1974 states in part that:

"This letter is to inform you that the contractor for subject project has again failed to comply with the plans and specifications. Paragraph TP-16 of the project specifications describes the work which is to be done to the metal frame structure on the rear bridgewall and refers to the project drawing for a more detailed description of the work involved. Contractor has failed to install the inconel angles as described on the plans and in the specifications. At this time, the installation of angles is impossible because contractor has constructed the castable rear bridgewall."

The record further indicates both a failure of the protester to comply with contract standards and a reluctance on the part of Boiler Services to correct the deficiencies. In this connection an Air Force memorandum of June 24, 1974 notes the following with respect to contract C0075:

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"The contractor has not complied with paragraph TP-05 of the technical provisions regarding submittal of material and equipment schedules for subject contract. The contractor was required to make his submittal of proposed material and equipment within ten days after receipt of notice to proceed, which was 7 Jan 74. We have requested this information verbally numerous times, but to no avail. To date, the contractor has not submitted any material or equipment literature for approval. Request you insist that the contractor comply with material and equipment submittal immediately."

The record does not provide a clear indication of unsatisfactory work performance by Boiler Services for all of the incidents listed by the contracting officer. For example, while the record with respect to Contract 90028 supports the Air Force's assertion that Boiler Services submitted a letter of certification from a tube manufacturer only when the contract was more than 50 percent complete it is not clear from the record that the protester had been requested or was required to submit this letter of certification beforehand. However, the above-cited examples of poor workmanship in the performance of contractual duties, noncompliance with contractual provisions, and inability to meet delivery schedules represent a few of the numerous instances of unsatisfactory performance documented on the record. In view thereof there is no basis for our Office to object to the agency's determination.

With regard to the Air Force's decision to make award immediately to Lieb-Jackson, ASPR § 1-705.4(c) (iv) (1976 ed.) provides that a referral of nonresponsibility need not be made to the Small Business Administration (SBA) where, as here, the contracting officer certifies his determination in writing, and his certification is approved by the chief of the purchasing office that award must be made without delay. We have stated that our Office will not question the administrative determination of urgency of a procurement unless the contracting officer's determination of urgency was unreasonable or unjustified. Cal-Chem Cleaning Company, Incorporated, B-179723, March 12, 1974, 74-1 CPD 127. The instant determination was not unreasonable as a prompt award was necessary. (The work had to be accomplished prior to winter.)

We note also that Boiler Services has taken issue with the fact that the nonresponsibility determination was not based on the first hand information of the contracting officer. Additionally, the protester states that the nonresponsibility finding was made by a

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recently appointed contracting officer. Boiler Services also points out that it has performed contracts other than those cited by the contracting officer.

Since the information obtained in the instant case was germane to the subject inquiry the contracting officer could properly consider such information, even though the contracting officer was not personally involved with the prior contracts. See ASPR § 1-905 et seq. (1976 ed.). Moreover, while the contracting officer in the instant case may have been recently appointed, the record supports the contracting officer's nonresponsibility finding. Also, while Boiler Services states that it has performed contracts other than those cited by the contracting officer we note that this would not affect the nonresponsibility determination. In this connection we emphasize that ASPR § 1-902 (1976 ed.) provides in part that a determination of nonresponsibility is required when the record does not indicate clearly that the prospective contractor is responsible.

Boiler Services also has asserted that it was unable to submit a protest before award of the subject contract because the Air Force did not advise it of the nonresponsibility finding until after award had been made to Lieb-Jackson. In this regard ASPR § 2-408.1 (1976 ed.) requires prompt notification to unsuccessful bidders that their bids have not been accepted. The Air Force has informed our Office that notification was mailed to Boiler Services on July 23, 1976, three days after award. There is no requirement in ASPR that bidders be notified in advance of award as to the rejection of their bids. Gary Construction Company, Inc., B-181751, December 17, 1974, 74-2 CPD 357.

The protester also has argued that the specifications contained in the subject IFB were written so as to specifically favor one source of supply and to prevent "legitimate boiler-makers" from submitting bids.

Boiler Services' protest concerning allegedly restrictive specifications is untimely raised. 4 C.F.R. § 20.2(b)(1)(1976) of our Bid Protest Procedures provides, in part:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals."

Since Boiler Services' protest in this regard was not filed prior to bid opening it is not for consideration.

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In its correspondence the protester has also alleged numerous instances of improper and illegal activity on the part of the Air Force. Specifically, the protester asserts that the entire project was a "rigged set up" for restricting competition and excluding Boiler Services. The protester has further indicated that perjury and "doctoring" of documents may have taken place in the instant procurement. In this connection Boiler Services asks that our Office undertake an investigation through issuance of subpoenas and submission of sworn testimony.

Our Bid Protest Procedures do not authorize the action requested by the protester. Moreover, since the record of the Air Force's action provides no indication of any criminal wrongdoing we find no reason to forward any information to the Department of Justice.

Finally, Boiler Services also requests that a claim be entertained for "* * * its expenses in the proceeding to date * * *". We note that this request had been conditioned upon allowance of the instant protest. In any event the ultimate standard for recovery of bid preparation costs is whether this procuring agency's actions were arbitrary and capricious toward the bidder-claimant. Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). See Mc Carty Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1974). In view of our finding that the actions of the contracting officer in finding the protester nonresponsible were justified, Boiler Services' request for expenses in connection therewith must be denied.

In view of the foregoing the protest is denied.


Deputy Comptroller General
of the United States