

Proc I

DECISION



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

Bid Rejection Resulting From 9971

FILE: B-193030 DATE: April 25, 1979

MATTER OF: Roger J. Au & Son, Inc. *DLG 01360*

[Protest of Nonresponsible Determination]

DIGEST:

Protester alleges that its rejection as nonresponsible was based on erroneous specification requirement in prior contract which resulted in "unsatisfactory performance" finding. Protest will not be considered where district court denied protester's motion for preliminary injunction which questioned contracting officer's determination of nonresponsibility, court did not expect, request or otherwise express interest in receiving GAO decision, and action was not dismissed without prejudice. Also, propriety of specification requirement is being processed under disputes clause pursuant to claim filed by protester under a prior contract raising same issue concerning specification as protest.

Roger J. Au & Son, Inc. (Au), protests the award of a contract to Great Lakes Dredge and Dock Company (Great Lakes) under invitation for bids (IFB) No. DACW49-78-B-0035, issued by the Buffalo District, Corps of Engineers (Corps). The subject IFB called for dredging and disposing of 700,000 cubic yards of material from the Cuyahoga and Old Rivers, Cleveland, Ohio, during the fall of 1978 and the spring of 1979. *DLG 01362*

Au's bid was determined to be the low responsive bid. However, the contracting officer determined Au to be nonresponsible because of unsatisfactory performance under the firm's prior contract for the same work, in the same area and with the same equipment it proposed to use if awarded another contract. For this reason, the contracting officer advised Au that its bid was rejected and that award had been made to Great Lakes. *DLG 01361*

205-105

Au contends that the determination of nonresponsibility was unreasonable and would not have been made if the contracting activity had not relied upon an erroneous specification for the measurement of production and payment under the prior contract. Au timely protested a similar provision in the instant IFB.

For the following reasons, Au's protest will not be considered by our Office.

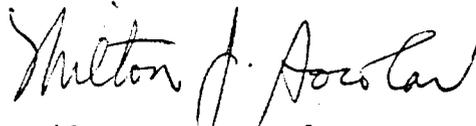
First, the award to Great Lakes was the subject of litigation before a court of competent jurisdiction. Au initiated a suit in the United States District Court, Western District of New York (Roger J. Au & Son Inc. v. Colonel Daniel D. Ludwig and Great Lakes Dredge and Dock Company, Civil Action No. 78-628). Au filed a complaint and motion for preliminary injunction seeking to enjoin Great Lakes' performance of the contract--relief similar to that sought here. In the complaint, Au contended that its firm is a responsible firm and that the contracting officer's determination of nonresponsibility was arbitrary and capricious. There was no specific reference to the alleged erroneous specification in the complaint or motion for preliminary injunction. The district court denied Au's motion for a preliminary injunction. The Army reports that the court found there was sufficient documentation to conclude that Au was a nonresponsible prospective contractor and that the contracting officer had properly applied the provisions of the Defense Acquisition Regulation. The Army states that the court did not decide the erroneous specification issue. The record does not indicate whether Au has pursued its court action although we have been informally advised that the court has not dismissed the litigation.

It is the policy of our Office not to decide matters where the material issues involved are before a court of competent jurisdiction unless the court expects, requests or otherwise expresses interest in receiving our views, or the matter is first dismissed without prejudice. See section 20.10 of our Bid Protest Procedures, 4 C.F.R. part 20 (1978); The

George Sollitt Construction Company, B-190743, January 9, 1978, 78-1 CPD 17; Vito's Trucking and Excavating Co., B-190117, January 24, 1978, 78-1 CPD 62. Au did not request injunctive relief pending a determination by our Office, the court did not indicate an interest in our views, and the matter is still pending. While Au argues that the court did not rule on the erroneous specification matter, the eventual court decision on the merits would be conclusive not only as to matters which were decided, but also as to all matters which might have been decided. See Frontier Science Associates, Inc.--Reconsideration, B-192654, December 26, 1978, 78-2 CPD 433. Furthermore, Au has continually contended that the nonresponsibility determination was based on the erroneous specification. This, in our view, might very well result in the court's consideration of the matter. See Cincinnati Electronics Corporation, et al., B-175633, January 25, 1974, 74-1 CPD 29; Financial Analysis Service, B-191325, March 29, 1978, 78-1 CPD 244.

The second reason for the above conclusion is the fact that the question of the proper measurement and payment factor to be applied is presently under review by the contracting agency pursuant to a claim filed by Au under its previous contract. The claim raises the same issue concerning the specification as the protest. The review is being undertaken with a view toward a decision to be rendered by the contracting officer under the disputes clause of Au's prior contract which, if unfavorable, may be appealed to the Armed Services Board of Contract Appeals. In this regard, we have declined to consider the merits of a protest where the protester challenged contract provisions which were collaterally the subject of disputes clause proceedings. See Union Carbide Corporation, B-188692, B-191319, B-191491, May 18, 1978, 78-1 CPD 380.

Accordingly, Au's protest is dismissed.



Milton J. Socolar
General Counsel