

DECISION

11982 *Citon Proc II*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-193283

DATE: November 9, 1979

MATTER OF: American Athletic Equipment Division,
AMF Incorporated--Reconsideration*[Protest Alleging Nonresponsibility of Awardee]*
DIGEST:

1. GAO will not review affirmative determination of responsibility, alleged to have been "carelessly and negligently" made; prior decision on this point is affirmed.
2. Mere fact that allegation of nonresponsibility is made after award does not change question of responsibility into one of contract administration.

American Athletic Equipment Division, AMF Incorporated (AMF), requests reconsideration of our denial of its protest of the award of two contracts for military stopwatches by the Defense Logistics Agency's (DLA) Defense General Supply Center, Richmond, Virginia.

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AMF had alleged that the awardee, the Z.A.N. Co. (ZAN), either could or would not deliver a Qualified Products List (QPL) product, as required by the specifications. AMF also alleged that ZAN was not an authorized distributor of the qualified product.

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In our decision, American Athletic Equipment Division, AMF Incorporated, 58 Comp. Gen. 381 (1979), 79-1 CPD 216, we reaffirmed an earlier holding that QPL procurements may not be restricted to QPL manufacturers and their authorized distributors. See D. Moody & Co., Inc. et al., 55 Comp. Gen. 1 (1975), 75-2 CPD 1. We stated that ZAN had not taken exception to the specifications requiring a qualified product, and was therefore bound to deliver such a product. We indicated that AMF's protest otherwise involved questions of ZAN's responsibility or of contract administration and did not meet the criteria for review by our Office.

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In requesting reconsideration, AMF argues that our decision did not accurately reflect its basis of protest, in that we stated:

" * * * AMF has submitted an affidavit to the effect that ZAN's subcontractor quotation from its proposed supplier, submitted to DLA during the preaward surveys conducted, specified delivery of a non-QPL product. * * *" (Emphasis added by AMF.)

In its protest, AMF states, it pointed out that a preaward survey report included a quotation from Lemania, a Swiss manufacturer and ZAN's proposed supplier, for a stopwatch identified as "Calibre number 6200." According to AMF, this watch had not been tested or qualified, and was different and less expensive than the Lemania 28260, conforming to Military Specification 14823, as required by the solicitation.

AMF argues that this evidence that ZAN intended to supply nonconforming goods, rather than the affidavit, should have been the determining factor in our decision. The contracting officer's affirmative determination of ZAN's responsibility was "so carelessly and negligently" made that it should have been challenged by our Office, AMF concludes, pointing out that the protested contracts, as well as two prior ones held by ZAN, have now been terminated for default.

DLA has terminated the protested contracts for default because ZAN failed to make timely deliveries. The agency acknowledges that the Army
AGC00911 - Armament Research and Development Command has now tested the stopwatches furnished by ZAN under a previous contract and found that they do not comply with the Military Specification. DLA states that it suspects that 1,000 stopwatches accepted under one of the protested contracts also are nonconforming.

Nevertheless, the contracting officer argues that he neither knew nor should have known that the stopwatch referred to in Lemania's quotation was not the qualified product. He states that "calibre" is not an accepted usage for the word model, and that he assumed that it related in some way to the diameter of the stopwatch. The first preaward survey, the contracting officer continues, was primarily concerned with Lemania's ability to supply ZAN with watches in time for the firm to meet the delivery schedule specified in the solicitation; due to a mistake-in-bid claim, delivery was advanced and it appeared that ZAN would have no problem meeting the new schedule. A second preaward survey, performed a month after the first, recommended complete award.

The threshold issue raised by AMF's request for reconsideration is whether our Office should extend its scope of review of affirmative determinations of responsibility. Since 1974, it has been our policy not to review such determinations except in cases where actions by procuring officials are tantamount to fraud, Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64, or where the determination of responsibility has been made contrary to the solicitation's provisions. Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376.

In the latter situation, we review the responsibility determination to assure that the terms of the solicitation are being applied. If, for example, the solicitation requires that bidders must have a certain degree of experience, our review would be limited to determining whether the awardee has submitted evidence from which the contracting officer could reasonably conclude that the specified experience requirement would be met.

In the absence of definitive responsibility criteria, the contracting officer's determination of responsibility involves primarily business

judgment. We continue to review these judgments, in appropriate cases, where negative determinations of responsibility are protested, in order to assure that bids are not arbitrarily rejected. We discontinued our review of protests involving affirmative determinations of responsibility (with the exceptions noted above) because our experience indicates that contracting officers are strongly motivated to make affirmative determinations of responsibility correctly.

Moreover, the criteria for determining whether a bidder is responsible are "not readily susceptible to reasoned judicial review" and, as a practical matter, protesters lack the firsthand knowledge and access to the low bidder's plant and records needed to enable them to prove that alleged arbitrary actions did in fact occur. Central Metal Products, Incorporated, supra, quoting Keco Industries, Inc. v. United States, 492 F. 2d 1200, 1205 (Ct. Cl. 1974).

Upon reconsideration, we do not believe it appropriate to extend the scope of review to cases in which the contracting officer's affirmative determination of responsibility is allegedly negligent and/or careless. Our prior decision on this point is affirmed.

We are, however, somewhat concerned by the apparently routine acceptance by the preaward survey team and the contracting officer of the supplier's quotation which identified the stopwatches being furnished to ZAN as Calibre 6200. Calibre, in connection with watches, has a specific meaning.

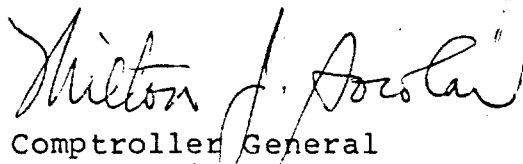
"The model number given to a watch movement by the factory." Webster's New International Dictionary of the English Language 316, col. 3 (3d ed. 1971).

Obviously, neither the survey team nor the contracting officer was aware of this definition. While DLA

procures a broad range of military goods and supplies, and its procurement personnel may not be immediately familiar with all the terminology for a given item, we believe they should be alert to and inquire as to the meaning of unusual terms, such as calibre. We are not aware of any unit of measurement--metric or U.S.--of which 6200 would be a logical diameter for a stopwatch.

In any case, when AMF protested approximately one week after award, we believe DLA should have attempted to determine whether there was any basis for its allegation that ZAN did not intend to supply a qualified product. Instead, the agency argued that ZAN's bid was responsive and that the difference between the qualified product and the Calibre 6200 was irrelevant or, alternatively, a matter of contract administration. The fact, however, that the allegation was made after the award does not change the question of the contractor's responsibility into one of contract administration since the protest allegation went to what the agency should have known prior to award.

By letter of today, we are advising the Director, DLA, of our views.



For The Comptroller General
of the United States