

**DECISION**



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

FILE: B-196386

DATE: December 19, 1979

MATTER OF: Davidson Optronics, Inc. *D3567*

**DIGEST:**

1. Purpose of responsibility determination is to ascertain prospective contractor's capability and capacity to perform particular contract. Refusal in preaward survey to consider advice of imminent granting of aid under Pub. L. 85-804 as evidence of financial capacity is reasonable when there is no evidence that aid, if granted, might be available in time to support particular contract.
2. Absent bad faith or fraud, GAO will not review second finding of nonresponsibility where it appears that new information has been considered and initial finding of nonresponsibility affirmed.
3. Protester has not met burden of proving its allegations where only evidence consists of contradictory statements of protester and contracting agency.

*Contract*

Davidson Optronics, Inc. (Davidson), *INvolving* protests *the* award of a contract to another bidder under a small business set-aside procurement of an interferometer by the White Sands Missile Range (WSMR). For the reasons stated below, the protest is denied. *NO 000706*

The facts are not in dispute. Davidson was experiencing financial difficulties at the time of this procurement which Davidson attributes to an earlier contract with the Government for which Davidson was seeking extraordinary relief under the provisions of Public Law 85-804. Davidson was the low bidder. The contracting officer determined Davidson to be nonresponsible for lack of financial capacity, based on the results of a preaward survey,

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and referred the matter to the Small Business Administration (SBA) for consideration of issuance of a certificate of competency (COC). In August, Davidson declined to pursue a COC before the SBA, but on September 5, 1979, requested instead that a second preaward survey be performed. WSMR granted this request with substantial confidence that Davidson would now be found responsible based on the expectation of a bank's guarantee of performance. An informal contact on September 20 by the contracting officer with survey officials, however, resulted in advice that the prospect of a bank guarantee was now uncertain and that no new information had been provided which would change the negative recommendation of the initial survey. On this advice, the contracting officer determined Davidson to be nonresponsible. Award was made to the second-low bidder on September 26, 1979.

Davidson states that it advised survey officials of the impending favorable resolution of its Public Law 85-804 claims and contends that their refusal to consider this information in its survey until the refinancing was completed was arbitrary and capricious. In support of this argument, Davidson states that it was advised on November 13 of the approval of its Public Law 85-804 request and that the paperwork is now in progress which, Davidson argues, would make its responsibility irrefutable. Davidson suggests that in these circumstances, the decision not to consider this information in its preaward survey, effectively denying Davidson the contract, directly conflicts with the then ongoing efforts of the Army and Air Force Contract Adjustment Boards to implement more fundamental policy considerations by aiding Davidson under Public Law 85-804.

Davidson's arguments ignore the basic purpose of a responsibility determination which is to ascertain the capacity and capability of a prospective contractor to perform a particular contract. During the conduct of a preaward survey we regard it as eminently reasonable not to consider as an asset aid which may well not be available until after completion of the contract, however strong the assurances that the assistance will be provided eventually. The solicitation here contemplated delivery/completion within 35 days

of award and there was no evidence that Davidson's anticipated aid would be available to it to perform this contract. Consequently, we see nothing unreasonable in the refusal to consider Davidson's expected assistance during the preaward survey for this contract.

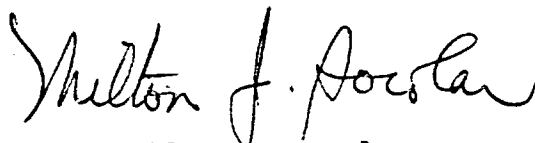
The failure of a small business to pursue a COC after a finding of nonresponsibility is analogous to a refusal by the SBA to issue a COC, which we regard as an affirmation of the contracting officer's finding of nonresponsibility. Arsco, Inc., B-187050, September 1, 1976, 76-2 CPD 214. Such action is not necessarily conclusive, however, since we have recommended reassessment of a bidder's responsibility where new information, not previously considered, has come to light. See, e.g., Inflated Products Company, Incorporated, B-188319, May 25, 1977, 77-1 CPD 365; Harper Enterprises, 53 Comp. Gen. 496 (1974), 74-1 CPD 31. Where it has appeared that the new information has been considered and the original assessment of nonresponsibility not changed, we have declined to consider the question on the merits absent bad faith or fraud. West Electronics, Inc., B-190173, February 10, 1978, 78-1 CPD 118.

Davidson has provided no evidence of any information which should have been considered in its survey, but was not, and we find no evidence of bad faith or fraud. Consequently, we will not review the contracting officer's finding of nonresponsibility.

Davidson also argues that award of the contract to the other bidder, Zygo Corporation, required a waiver of the specifications. Davidson has provided no details whatsoever in support of this allegation. The agency found that Zygo's interferometer met all of the salient requirements of the solicitation. D16  
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Where, as here, the only evidence before us consists of contradictory statements by the protester and the contracting agency, the protester has not met the burden of affirmatively proving its allegations. Downtown Copy Center -- Reconsideration, B-193157.2, August 21, 1979, 79-2 CPD 137; Ikard Manufacturing Company, 58 Comp. Gen. 54 (1978), 78-2 CPD 315.

Accordingly, the protest is denied in part and dismissed in part.

A handwritten signature in cursive script, reading "Milton J. Forster". The signature is written in dark ink and is positioned above the typed name.

For the Comptroller General  
of the United States