

DECISION

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

FILE: B-204719

DATE: July 6, 1982

MATTER OF: Keco Industries, Inc.

DIGEST:

Protest questioning responsibility determination is dismissed because GAO does not review affirmative determinations of responsibility in absence of showing of fraud or showing that definitive responsibility criteria in solicitation were misapplied, circumstances not present here.

Keco Industries, Inc. (Keco), protests the award of a contract to Fiesta Corporation (Fiesta) under invitation for bids (IFB) No. DAAJ09-81-B-1007 issued by the United States Army Troop Support and Aviation Command (Army), St. Louis, Missouri, for 1,119 air conditioners plus associated technical data.

Seven bidders responded to the solicitation by the bid opening date on July 31, 1981. The apparent low bidder withdrew its bid after bid opening, leaving Fiesta and Keco as the low and second low bidders, respectively. A preaward survey completed on September 1, 1981, recommended award to Fiesta; thereafter, the contracting officer determined that Fiesta was responsible, and the company was awarded the contract on September 11, 1981.

In its protest, Keco alleges that the members of the preaward survey team and the contracting officer failed to apply definitive responsibility criteria when evaluating Fiesta's capabilities. Keco also contends that the survey was incomplete primarily because it failed to identify or disclose a Federal tax lien and lawsuits pending against Fiesta. Additionally, Keco argues that Fiesta should have provided this information even in the absence of an inquiry from the procuring agency.

We dismiss the protest because it essentially challenges the procuring agency's affirmative determination of responsibility, a matter which our Office generally does not review.

Because of the essentially subjective business judgments involved, GAO does not review affirmative determinations of bidders' responsibility unless there is a showing of fraud on the part of the procuring officials or the solicitation contains definitive responsibility criteria which the procuring officials have allegedly failed to apply. Domar Industries, Inc., B-202735, September 4, 1981, 81-2 CPD 199. ..

Definitive responsibility criteria are specific and objective responsibility factors established by an agency for a particular procurement to measure an offeror's ability to perform the contract. National Ambulance and Escort Services, Inc., B-196511, November 8, 1979, 79-2 CPD 342.

Keco contends that the "general and additional minimum" responsibility standards set forth in Defense Acquisition Regulation (DAR) §§ 1.903.1 and 1.903.2 (1976 ed.) are definitive responsibility criteria and that the contracting officer failed to properly apply these standards--especially those concerning financial resources and the capacity of meeting the required performance schedule. We disagree. The standards in those DAR sections are not in the nature of definitive or objective responsibility criteria, the application of which our Office will review. See E-Systems, Inc., B-190693, March 28, 1978, 78-1 CPD 236. The DAR standards are not readily susceptible to reasoned review but, rather, are based in large measure on the general business judgment of the contracting officer. See Patterson Pump Company, B-204694, March 24, 1982, 82-1 CPD 279. Since the solicitation here contained no definitive responsibility criteria, a showing of fraud is necessary before we can review the responsibility determination.

For fraud the protester must show more than a mere allegation of fraud or a suspicion of wrongdoing. A protester must submit evidence establishing a prima facie case of fraud or of such wilful disregard of the

facts or such misconduct as to be tantamount to fraud on the part of the contracting officials. Courier-Citizen Company, B-192899, May 9, 1979, 79-1 CPD 323. Generally, a prima facie case requires presentation of evidence sufficient to establish the cause of action if the evidence were to remain uncontradicted. An offer to prove a fact or an allegation of fact is not sufficient. The burden is on the proterecer to present evidence necessary to substantiate its case. Courier-Citizen Company, supra.

Keco contends that it was improper to make the award without consideration of Fiesta's current financial condition. Keco's allegation that the preaward survey group did not require and examine a current financial statement is not supported by the record. The record shows that current financial data of Fiesta as of June 30, 1981, was analyzed, although all financial data was not disclosed to Keco. The preaward survey rated Fiesta's financial condition satisfactory.

Keco also contends that it was improper and negligent to make award without consideration of lawsuits pending against Fiesta and a Federal tax lien filed against Fiesta.

The Army states that its usual procedure of inquiry into suits, judgments and liens against a prospective contractor is to rely on Dun & Bradstreet reports. According to the Army, the latest available Dun & Bradstreet report at the time of award, dated June 26, 1980, disclosed no lawsuits, liens or judgments. After award, the Army states a more recent report dated September 18, 1981, showed a small claims court judgment against Fiesta for \$121. Keco states that an even more recent Dun & Bradstreet report revealed a Federal tax lien against Fiesta. There is no indication that other suits, which Keco alleges were filed against Fiesta, were noted on the above Dun & Bradstreet reports.

The record indicates that the procuring officials made a good faith determination of Keco's responsibility based on the information available at the time. Information regarding the tax lien and one of the lawsuits against Fiesta did not become available from Dun & Bradstreet until after award. It is well-established

that the propriety of a contracting officer's affirmative determination of responsibility must be made on the basis of information available at the time the determination was made without the benefit of hindsight. Hunter Outdoor Products, 54 Comp. Gen. 276 (1974), 74-2 CPD 207. Additionally, we note that the mere existence of a lawsuit against a prospective contractor is not determinative of its responsibility since until a judgment is entered there is no debt liability.

Thus, the allegations of Keco do not constitute a showing of fraud or such misconduct as to be tantamount to fraud on the part of the procuring officials.

Additionally, Keco alleges possible misrepresentation amounting to fraud on the part of Fiesta in not disclosing information relevant to Fiesta's "imminent bankruptcy." Keco also claims that Fiesta may have added to its financial resources by improperly receiving progress payments on a separate contract.

To the extent that these allegations are criminal in nature, they are properly for referral by the protester to the Department of Justice and not for consideration by our Office. See Gillette Industries, Inc., B-204232, August 13, 1981, 81-2 CPD 139. In any event, we are not aware of any statutory or regulatory requirement that would oblige a bidder to disclose information relating to possible bankruptcy in the absence of inquiries from the procuring agency. We also note that even if Fiesta had made a filing under chapter XI of the Bankruptcy Act before award, that, in itself, would not have required a finding of nonresponsibility. Domar Industries, Inc., supra.

We dismiss the protest.

Harry R. Van Cleve
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Acting General Counsel