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DECISION



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

FILE: B-210663

DATE: February 22, 1983

MATTER OF: J. F. Barton Contracting Co.

DIGEST:

1. GAO does not review an affirmative determination of responsibility unless the protester shows fraud or bad faith on the part of procurement officials or the solicitation contains definitive responsibility criteria that allegedly have not been applied. To show fraud or bad faith, the protester must submit virtually irrefutable proof that procurement officials had a malicious and specific intent to harm the protester.
2. GAO does not review whether an offeror is a regular dealer or manufacturer under the Walsh-Healey Act, since by law the matter is for the contracting agency's determination subject to final review by the Small Business Administration (if a small business is involved) and the Secretary of Labor.

J. F. Barton Contracting Co. protests the Army Corps of Engineers' awarding a contract to Southern Concrete Services, Inc. under invitation for bids No. DACW29-83-B-0009. According to Barton, the contract requires the specialized manufacture of 240,000 articulated concrete mattresses. Alleging that Southern Concrete never has manufactured these items before and lacks the necessary expertise and skill to do so now, the protester argues that the contracting officer lacked information sufficient to demonstrate Southern Concrete's responsibility (the ability to perform the contract). The protester contends the contracting officer's affirmative responsibility determination therefore was arbitrary and capricious. The protester also contends that Southern Concrete is not a manufacturer or regular dealer of these items as required by the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1976).

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We dismiss the protest.

The determination of whether a firm can meet its legal obligations if its bid is accepted necessarily is a subjective business judgment for the procuring officials, who must bear the consequences of contract performance deficiencies, and thus is not readily susceptible to our review. Mayfair Construction Company, 58 Comp. Gen. 105 (1978), 78-2 CPD 372; ConDiesel Mobile Equipment Division, B-201568, September 29, 1982, 82-2 CPD 294. We therefore do not review affirmative responsibility determinations unless there is a showing of possible fraud or bad faith on the part of procurement officials, or the solicitation contains definitive responsibility criteria that allegedly have not been applied. Sunair Electronics, Inc., B-208385, August 18, 1982, 82-2 CPD 154. The protester has not shown that either exception applies here.

The mere fact that a protester disagrees with a contracting officer's determination of responsibility, or alleges that the contracting officer lacked sufficient information to determine a bidder responsible, does not show that the contracting officer acted fraudulently or in bad faith. Contracting officials are presumed to act in good faith, and in order to show otherwise the protester must submit virtually irrefutable proof that they had a malicious and specific intent to harm the protester. Arlandria Construction Co., Inc.--Reconsideration, B-195044; B-195510, July 9, 1980, 80-2 CPD 21. Barton's protest submission does not suffice to meet the high standard of proof required to show fraud or bad faith, and since there are no definitive responsibility criteria involved here, we will not consider the protest as it relates to the awardee's responsibility.

Furthermore, our Office does not consider questions about whether a bidder is a regular dealer or manufacturer within the meaning of the Walsh-Healey Act. By law, such matters are for determination by the contracting agency in the first instance, subject to final review by the Small Business Administration (if a small business is involved) and the Secretary of Labor. Sunair Electronics, Inc., supra; see Defense Acquisition Regulation § 12-604 (1976 ed.).

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The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel