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DECISION



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

FILE: B-212624
MATTER OF:

DATE: December 5, 1983

System Development Corporation

DIGEST:

1. Negative responsibility determination based on a negative preaward survey report and the purchasing activity's subsequent review of supplemental information the protester submitted responding to questions raised by the survey team, was proper where there was reasonable doubt about the protester's ability to meet the delivery schedule.
2. There is no requirement that contracting officials discuss preaward data with an offeror prior to making a determination of nonresponsibility. Since responsibility determinations are administrative in nature, they do not require the procedural due process otherwise necessary in judicial proceedings.

System Development Corporation (SDC) protests the Department of the Army's rejection of its offer under request for proposals (RFP) No. DAAK-10-83-R-0084, and the Army's award to another offeror. The RFP was issued by the Army Armament Research and Development Center to acquire M74 anti-personnel mine body assemblies and certain M75 anti-tank mine electronic assemblies. While SDC submitted the lowest priced offer, the Army determined that it was not a responsible offeror, that is, that the offeror had not demonstrated the ability to perform the contract in a timely manner at its offered price. The protest basically challenges this determination.

We deny the protest.

Because SDC was in line for award based on its low price, the contracting activity requested the Defense Contract Audit Agency (DCAA) to perform a preaward survey, and asked that a technical staff from the activity participate in the survey. The DCAA and the activity's

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technical representatives visited SDC's plant on May 12 and 13, 1983, after which the DCAA issued a negative preaward survey report, dated May 31, recommending that no award be made to SDC.

SDC was found unsatisfactory as to its demonstrated plant facilities and equipment, subcontracting, ability to meet the required schedule, and safety. The primary basis for the negative responsibility determination, however, was SDC's failure to present written confirmation of supplier's and subcontractor's commitments to deliver items and equipment with long lead-times. The survey team therefore was concerned about SDC's ability to meet the solicitation's delivery schedule, which required the successful contractor to deliver first article samples 12 months from the date of award and to commence production deliveries 2 months later. Regarding an apparently critical group of equipment in particular (a conveyor encapsulation system), SDC proposed a source who, when contacted by the survey team, stated that SDC had never asked it for a quote and that it would require at least 12 months to furnish a functional system. Based on the long lead-times SDC would need to acquire this system and certain other items, the preaward survey team estimated that the earliest date SDC could provide a first article would be 510 days.

The record is not clear as to what extent the survey team communicated its concern about the firm's ability to meet the delivery schedule to SDC during the survey, but an SDC letter to the contracting activity, dated June 9, states, "Questions arose regarding delivery and availability of necessary capital equipment in performance of the potential contract." The letter forwarded data that SDC hoped would resolve the team's questions, including input from proposed suppliers and subcontractors.

The contracting activity's technical representatives who participated in the preaward survey reviewed SDC's supplemental information and determined that SDC still had not presented quotes from suppliers of several pieces of the equipment needed to perform the contract. Concerning the critical conveyor encapsulation system, SDC presented a communication from its supplier indicating that the most optimistic forecast of the time required to provide a functional system would be 31 weeks, but that the job could require as long as 57 weeks. The activity therefore made its negative responsibility determination, rejected SDC's proposal and, on June 28, made an award to another

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offeror. At that time, it also gave SDC a copy of the preaward survey report.

The protester argues that the preaward survey results and the contracting officer's negative responsibility determination were unreasonable and unfounded; the contracting officer should have appreciated that SDC could qualify as a responsible offeror, and he therefore should have conducted discussions with SDC to give it an opportunity to do so; and the disqualification process did not comport with constitutional due process requirements.

As a general matter, this Office will not question a contracting agency's nonresponsibility determination unless the protester demonstrates bad faith by the agency or a lack of any reasonable basis for the determination. See S.A.F.E. Export Corporation, B-208744, April 22, 1983, 83-1 CPD 437. The determination of a prospective contractor's responsibility is the duty of the contracting officer, who in making the determination is vested with a wide degree of discretion and business judgment. Id. We therefore defer to such judgment and discretion unless the protester, who bears the burden of proving its case, shows that it was abused. See John Carlo, Inc., B-204928, March 2, 1982, 82-1 CPD 184. The protester has failed to make the necessary showing here. We believe the record provides a reasonable basis for the preaward survey team finding; the subsequent technical staff review; and the contracting officer's decision.

(1) The preaward survey team:

We believe that the preaward survey team had a reasonable basis, derived from information it received from SDC's proposed source, to doubt SDC's ability to obtain at least one equipment system--a conveyor encapsulation system--that would be critical to the timely performance of the contract. In this regard, we point out that procurement regulations expressly place the burden on the offeror to demonstrate his responsibility, Defense Acquisition Regulation (DAR) § 1-902 (1976 ed.); Lou Ana Foods, Inc., 61 Comp. Gen. 385 (1982), 82-1 CPD 484, including his ability to comply with the required delivery or performance schedule. DAR § 1-903.1. The regulations also provide that where the procurement involves production, a prospective contractor must have the necessary production and technical equipment and facilities, or the ability to obtain them. DAR § 1-903.2(a)(ii).

According to the Army, timely delivery was especially important in this case to prevent the government from sustaining significant damages, apparently arising from related procurements. The Army explains that this procurement covers some items necessary for the Ground Enplaced Mine Scattering System Program, and the contractor's failure to make deliveries as scheduled (first articles are due on June 29, 1984, and initial production models on August 31, 1984) would result in the government incurring damages of at least \$50,000 per month.

The survey team also found SDC unsatisfactory regarding safety. The report states that SDC had not sufficiently developed safety programs and plans, had not obtained certain licenses, did not adequately define testing equipment and locations, and had not demonstrated an extensive experience with handling explosives. While the record does not disclose whether SDC was advised of these deficiencies prior to the award, the firm obtained a copy of the report afterwards and has not submitted evidence to contradict these findings. We therefore are compelled to accept the survey team's conclusion as being reasonable.

(2) The post-survey review:

The data SDC submitted after the survey team visited its plant and questioned its ability to meet the delivery schedule still did not establish SDC's responsibility since SDC failed to submit subcontractor's and suppliers' quotes or commitments for several items. In particular, the data still indicated that SDC might need about 1 year to obtain a functional conveyor encapsulation system. The data also failed to elaborate on SDC's safety capabilities. We therefore believe that the contracting activity's technical representatives acted reasonably in affirming the recommendation that the contract not be awarded to SDC.

(3) The contracting officer's decision:

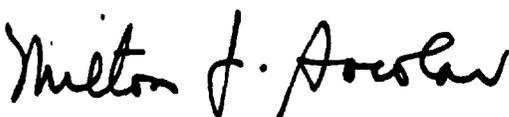
These recommendations--the negative preaward survey report and subsequent review of data submitted by SDC--gave the contracting officials a reasonable basis for determining SDC nonresponsible. Contrary to the protester's contention, contracting officials may rely on the results of a preaward survey, and they have no obligation to make an independent evaluation or to discuss the negative preaward survey report with the offeror. Alaska Barge & Transport, Inc., B-182345, March 4, 1975, 75-1 CPD 128. Applicable procurement regulations (DAR § 1-907)

permit, but do not require, preaward data to be discussed with a prospective contractor as determined necessary by the purchasing office prior to making a determination of responsibility. Id.; RIOCAR, B-180361, May 23, 1974, 74-1 CPD 282. While the protester cites DAR § 3-805.3 as imposing such a duty, that section concerns the conduct of discussions with offerors included in the competitive range of a negotiated procurement, and does not concern determinations of responsibility. See Noble Pine Products Co., B-189420, July 24, 1978, 78-2 CPD 65.

SDC also argues that the due process clause of the fifth amendment of the Constitution requires that, in conjunction with an offeror's right to have its offer fairly considered, the government must give the offeror notice of specific deficiencies and an opportunity to respond to them.

There is no merit to SDC's argument. Since responsibility determinations are administrative in nature, they do not require the procedural due process otherwise necessary in judicial proceedings. Mayfair Construction Company, B-192023, September 11, 1978, 78-2 CPD 187. The protester cites two court cases it purports hold otherwise: Related Industries, Inc. v. United States, 2 Cl. Ct. 517 (1983), and Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980). These cases, however, concern an agency's summary determination of an offeror's ineligibility for a number of procurements. They do not involve a nonresponsibility determination, based on a firm's failure to demonstrate its ability to acquire sufficient supplies and equipment to meet a particular delivery schedule, pertinent to just a single procurement, as here. In any event, SDC did know of the preaward survey team's reservations regarding SDC's ability to obtain necessary critical equipment and to meet the solicitation's delivery schedule, and had an opportunity to submit supplemental information, but failed to present sufficient data to allay the Army's concerns. See Mayfair Construction Company, supra.

The protest is denied.


Comptroller General
of the United States