

DECISION



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

FILE: B-213619

DATE: February 13, 1984

MATTER OF: Computer Microfilm International Corporation

DIGEST:

1. Protest that short period between bid opening and scheduled commencement of performance of contract was an unnecessary restriction on competition is dismissed. IFB set forth both the bid opening date and the performance schedule and, therefore, this issue should have been apparent to protester from a reading of the IFB. Since this issue was not protested until after bid opening, it is untimely under section 21.2(b)(1) of GAO Bid Protest Procedures which requires protests based on alleged improprieties which are apparent prior to bid opening to be filed prior to bid opening in order to be considered. 4 C.F.R. § 21.2(b)(1) (1983).

2. GAO will not disturb contracting agency's determination that protester was nonresponsible where protester could not perform at levels required by IFB immediately upon award of contract. Protester admitted to preaward survey team that it needed to obtain some equipment and make some personnel changes in order to perform at IFB-specified levels and to complete work within time schedules set forth in IFB. Moreover, protester was about to move from one facility to another shortly after preaward survey was conducted and agency had work backlog which might cause work orders to be placed immediately after award. In these circumstances, agency determination was reasonable.

Computer Microfilm International Corporation (CMIC) protests the Government Printing Office's (GPO) determination that it was nonresponsible and ineligible for award of a requirements contract for production of microfiche and related operations in connection with GPO Program

No. B-154-S. In a related matter, CMIC charges that the invitation for bids (IFB), which required performance to begin just 1 week after bid opening, was unnecessarily restrictive of competition.

We dismiss the protest in part and deny it in part.

GPO issued the subject solicitation on September 26, 1983. Bids were opened on October 24 and performance was scheduled to begin on November 1. When bids were opened, CMIC's bid was the second lowest. However, the low bidder was determined to be nonresponsible and CMIC was next in line for award.

A GPO preaward survey team visited CMIC's facility on November 1 and talked with CMIC's general manager about the performance capabilities of CMIC. The survey team recommended that CMIC not be awarded the contract because CMIC would be in the process of moving to new quarters in approximately 2 weeks and because CMIC "can only accept about 50 to 60% of the orders right now." The survey team noted that GPO had a "huge backlog of orders and can place 80 [orders] a day as of Nov. 1." The contracting officer adopted the survey team's recommendation on November 1 and determined that CMIC was nonresponsible. In support of her determination, the contracting officer found that "CMIC would not be able to produce even an average day's orders for at least two weeks [after the start of the contract] due to their lack of equipment and personnel." The contracting officer also stated her belief that the Superintendent of Documents would have orders to place under the contract as soon as it was awarded.

CMIC argues that the contracting officer should have examined its financial capacity as well as its ability to perform immediately upon award of the contract. CMIC also contends that, since bidders do not ordinarily have idle capacity available and ordinarily have to hire new personnel and purchase new equipment to fully perform a contract of this size, GPO should have allowed it a reasonable period of time in which to achieve the capability to perform the amount of work required by the IFB. CMIC also charges that the IFB was overly restrictive because, by requiring full performance only 1 week after bid opening, all firms except the contractor who had been doing the bulk of this work for

GPO previously or contractors with excess capacity were effectively eliminated from consideration.

To the extent that CMIC protests the short period of time allowed between bid opening (October 24) and the required start of performance (November 1), the protest is untimely. The IFB, as initially issued, scheduled bid opening for October 17; by amendment, however, bid opening was rescheduled for October 24. The IFB at all times stated that performance would commence on November 1. Thus, this alleged impropriety should have been apparent to CMIC from a reading of the IFB and, under section 21.2(b)(1) of our Bid Protest Procedures, CMIC had to protest this matter prior to bid opening. See 4 C.F.R. part 21 (1983). Since this protest issue was not filed in our Office until November 4, it is untimely. See Somervell & Associates, Ltd., B-192426, August 18, 1978, 78-2 CPD 132. Moreover, insofar as CMIC may have been satisfied with the original October 17 bid opening date, but not with the amended October 24 bid opening date, the protest had to be filed within 10 days after CMIC knew that bid opening had been postponed in accord with section 21.2(b)(2) of our Procedures. Since CMIC did not protest until more than 10 working days after the initial bid opening date, this portion of the protest is untimely and will not be considered. See Red Ball Transfer & Storage, B-190255, December 21, 1977, 77-2 CPD 492.

Concerning CMIC's charge that the contracting officer improperly determined CMIC to be nonresponsible, we have recognized that a contracting officer is vested with a considerable degree of discretion in determining a prospective contractor's ability to perform a contract. See Pope, Evans and Robbins, Inc., B-200265, July 14, 1981, 81-2 CPD 29. Of necessity, such determinations are matters of judgment which must be based on fact and reached in good faith. The procuring agency logically is in the best position to assess responsibility and must bear the brunt of any difficulties experienced in obtaining required performance. Accordingly, we will not disturb a contracting officer's nonresponsibility determination unless it was made in bad faith or lacked a reasonable basis. See Pope, Evans and Robbins, Inc., supra; Armor Elevator Company-Memphis, Inc., B-209775, April 15, 1983, 83-1 CPD 415. We cannot conclude that

the contracting officer's determination was made in bad faith or lacked a reasonable basis in the present case.

The record shows that CMIC's representative told the preaward survey team that CMIC would not be able to produce microfiche in accord with the maximum order requirement and time schedule set forth in the IFB. The IFB stated that as of November 1, the contractor would have to handle 40 to 80 orders (usually 60) each day and that orders would have to be completed within 8 workdays. The protester's representative told the preaward survey team that his firm could not perform at these required levels immediately after award of the contract. In its submissions to our Office, the protester admits that it did not have in its possession all of the equipment necessary to do the work; the protester argues that it needed time to have new equipment delivered and to make appropriate personnel arrangements in order to "reach full production without the possibility of any delivery delays." At a conference on this protest, the protester initially argued that approximately 2 weeks' notice would have been needed in order to achieve full production capability on this contract; later in the conference, the protester suggested that even 1 week's notice might have been sufficient.

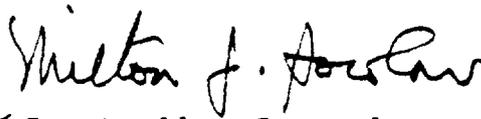
In these circumstances, we are of the opinion that it was not necessary for the preaward survey team to evaluate the financial capacity of CMIC since a negative finding was justified on the basis of the inability of the firm to perform in accord with the specifications alone.

As we indicated in Pope, Evans and Robbins, Inc., supra, the bidder has a duty to clearly establish that it can perform a contract. Moreover, it is within the contracting officer's discretion not to discuss negative preaward survey findings with the bidder before making a responsibility determination. Pope, Evans and Robbins, Inc., supra. Here, CMIC could not demonstrate its capability to perform the work at the required levels immediately. Rather, CMIC had to obtain some equipment and make certain personnel changes. Furthermore, CMIC was about to move its facilities and this apparently caused the preaward survey team some concern that there would be potential delays in reaching full production and meeting delivery

schedules. The contracting officer determined that GPO's backlog might cause orders to be placed with the contractor immediately after award and decided to hold potential contractors to the work levels agreed to in their bids.

We note that award was not made until December 16. Apparently CMIC's protest, which was filed in our Office on November 4, prevented GPO from awarding the contract and placing orders thereunder until GPO determined that it would make award notwithstanding the protest. GPO made such a determination on December 14 and notified our Office that it would make award as required under section 21.4 of our Procedures. In such circumstances, we believe the contracting officer's negative determination should be upheld if it had a reasonable basis at the time it was made. See Pleion Corporation, B-210790, July 6, 1983, 83-2 CPD 61. Moreover, in view of CMIC's admission that it would need at least 1 or 2 weeks after award to reach the capacity levels specified in the IFB and because nothing in the record shows that the contracting officer knew or expected that award would be delayed for approximately 6 weeks after her responsibility determination was made, we believe the requirement that a proposed contractor have all necessary equipment and personnel to perform the work at the time of the survey was reasonable. See Armor Elevator Company-Memphis, Inc., supra. Accordingly, the protest is denied on this point.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States