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DECISION



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

FILE: B-212173

DATE: May 30, 1984

MATTER OF: Manufacturing Systems International, Inc.

DIGEST:

1. Financial capability is one of the factors to be evaluated by the contracting officer in making a determination of a prospective contractor's responsibility and the specific financial qualifications to be considered in this determination are within the contracting officer's discretion and business judgment.
2. Contracting officer reasonably determined that protester was nonresponsible because it lacked the necessary financial strength to perform the contract where firm did not provide evidence of credit availability from a bank or Small Business Administration and its financial statements did not accurately reflect its financial condition.
3. The nature and extent of a preaward survey needed to assure the contracting officer that a firm will meet its contractual obligation are for the contracting officer's judgment and GAO therefore will not question the contracting officer's acceptance of a desk survey, as opposed to an on-site survey, where the protester has not shown that the contracting officer or the surveying agency acted fraudulently or in bad faith.
4. A procuring agency is not required to delay award while an offeror attempts to cure the causes for the firm being found nonresponsible. Thus, where offeror fails to provide required information after having been given adequate time to do so, an agency may reasonably find the offeror nonresponsible.
5. Protest that solicitation does not contain a performance bond requirement, filed after the closing date for receipt of proposals,

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is untimely since it involves an alleged impropriety apparent prior to the closing date and therefore must be filed prior to closing.

Manufacturing Systems International, Inc. (MSI) protests the rejection of its offer under request for proposals (RFP) No. DAJB03-83-R-4008, a total small business set-aside, issued by the U.S. Army Contracting Agency, Korea for the application of polyurethane foam on roofs and walls of quonset-type buildings throughout Korea. MSI essentially alleges that the Army acted improperly in determining it to be nonresponsible. The protest is denied in part and dismissed in part.

The Army received seven proposals in response to the RFP and determined that six of the proposals were within the competitive range. Preaward surveys were then conducted on those six offerors.¹ The Defense Contract Administration Services Management Area (DCASMA) branch office located in San Bruno, California conducted the preaward survey of MSI and recommended that award not be made to that firm because it lacked the necessary financial strength. This conclusion was based on MSI's failure to furnish the following items during the survey: fiscal year 1982 financial statements; evidence of credit availability from a bank or the Small Business Administration (SBA); an analysis of its long term liabilities; and information on the status of litigation mentioned in its financial statements for fiscal years 1979 and 1980. According to the Army, MSI subsequently requested that the survey be reopened and additional financing data--personal credit guarantees and lines of credit from suppliers--be considered, but DCASMA stated that it had received this

¹ The protester's price was the sixth lowest received; three firms whose prices were below the protester's were found to be responsible and all those firms lowered their prices following negotiations. The protester was excluded from negotiations since it had been determined to be nonresponsible. Because the protester was not requested to submit a best and final offer, we do not know with certainty what its final competitive position would have been. In view of the other firms' prices, however, we doubt that the protester would have been in line for award of this contract even if it had been found to be responsible.

information prior to issuing its "no award" recommendation and consequently the contracting officer denied MSI's request to reopen the survey. Based on the findings of the preaward survey as well as a determination that the financial statements submitted by MSI did not reflect the true financial condition of the offeror because the firm misrepresented its assets and liabilities, the contracting officer rejected MSI as nonresponsible.² The contracting officer then conducted negotiations with the offerors determined responsible, received best and final offers, and awarded the contract to Universal Coating on June 7, 1983.

MSI challenges the nonresponsibility determination on two grounds. First, it states that the solicitation did not establish the financial qualifications required of offerors and left offerors to determine on their own how much capital they are required to possess. Second, MSI states that it is financially qualified to perform this contract and it can obtain any additional resources that are required during performance of the contract, and it could have better demonstrated this had it been given the proper opportunity to do so. MSI asserts, for example, that because the preaward survey was conducted by the DCASMA branch office in San Bruno instead of the branch office in Guam, the survey was conducted through the mail and as a result its corporate office, which is located in Guam, was never visited by a preaward survey team.

MSI further asserts that the agency's request for financial information spent 17 days in the mail in transit from San Bruno to Guam and arrived at its office only 1 day before it was due back in San Bruno, and thus it was provided insufficient time to arrange for a letter of credit from its bank or to obtain financial statements and commitments from its suppliers. MSI states that due to the late arrival of the request for information, it telephoned the Army and answered the required questions and provided

²The contracting officer did not refer the question of MSI's responsibility to the Small Business Administration for consideration under the Certificate of Competency (COC) procedures. Since this contract is to be performed entirely in Korea, this action was consistent with Defense Acquisition Regulation (DAR) § 1-700, which provides that the COC program does not apply to procurements that will be performed entirely outside any state, territory, or possession of the United States. See S.A.F.E. Export Corporation--Request for Reconsideration, B-209491.2, B-209492.2, Oct. 4, 1983, 83-2 CPD ¶ 413.

the name of its banker in order to establish its financial capability, and arranged for oral statements on its behalf to be made to the Army by the director of the Guam SBA and another company. It argues that many of these oral statements were not made a part of the written record and that the agency did not keep its promises to wait for additional requested information. MSI also argues that the financial statement it provided was prepared by a reputable certified public accounting firm and if the agency had questions concerning the information provided or required different categories of information, it should have asked MSI for clarification and given it the opportunity to present the required information.

In response to the agency's report on its protest, MSI contended for the first time that the solicitation was defective in that it failed to require a performance bond.

The responsibility of an offeror refers to whether a prospective contractor is able to perform a particular contract for the government. An offeror is not eligible for the award of a government contract unless the contracting officer affirmatively determines that the offeror is responsible. DAR § 1-902. In making the determination of a prospective contractor's responsibility, the contracting officer is vested with a wide degree of discretion and business judgment. Generally, we will not question a nonresponsibility determination unless the protester can demonstrate bad faith by the agency or lack of any reasonable basis for the determination. S.A.F.E. Export Corporation, B-209491, B-209492, Aug. 2, 1983, 83-2 CPD ¶ 153.

DAR § 1-903.1 provides that adequate financial resources or the ability to obtain such resources are among the minimum responsibility standards a prospective contractor must meet. Pursuant to this regulation, the RFP set forth "financial capability" as one of the factors which may be examined by a survey team as part of a determination of an offeror's ability to perform. The RFP also advised offerors that a survey team may contact the offeror and "[c]urrent financial statement and other pertinent data should be available at that time." Thus, the RFP put offerors on notice that they might have to demonstrate their financial capability. We are aware of no requirement that offerors be advised in the solicitation exactly what financial qualifications they must show in order to obtain a favorable recommendation from the preaward survey team,

nor has the protester identified any such requirement. In fact, the financial capability required to perform a contract will vary with the unique circumstances of each firm and each procurement, so that a hard-and-fast rule for each procurement would be impossible to formulate. As we indicated above, whether the capability exists for a given procurement is properly within the discretion and business judgment of the contracting officer making the responsibility determination.

MSI has failed to show that the contracting officer lacked a reasonable basis for finding the firm financially incapable of performing the contract. MSI failed to furnish the necessary written evidence of credit availability from a bank or the SBA despite oral and written requests for such evidence by the agency during the preaward survey and it did not even offer to furnish this evidence in its request that the preaward survey be reopened. The personal credit guarantees and lines of credit from suppliers offered by MSI could reasonably be viewed by the contracting officer as insufficient since those sources may not be as financially reliable as a bank or the SBA. Further, the oral statements made by the director of the Guam SBA or another company on MSI's behalf and MSI's provision of the name of its banker do not provide any enforceable commitment and thus do not satisfy the requirement for credit availability either. In addition, MSI failed to respond to requests to furnish its fiscal year 1982 financial statements, an analysis of its long term liabilities, and information on the status of certain litigation. MSI must suffer the consequences of that failure. See Wallace & Wallace, Inc.; Wallace & Wallace Fuel Oil, Inc.--Reconsideration, B-209859.2, B-209860.2, July 29, 1983, 83-2 CPD ¶ 142.

We note that even if the Army promised to wait for more financial information as alleged, it was not required to delay award while MSI attempted to remedy the finding of insufficient financial strength. Roarda, Inc., B-204524.5, May 7, 1982, 82-1 CPD ¶ 438. As it was, MSI received the Army's request for financial information on April 18 and it was not until 10 days later, April 28, that the part of the preaward survey concerning financial capability was completed, thus leaving MSI adequate time to provide evidence of credit availability and the other information necessary to establish its financial capability. Moreover, award was not made until June 7, thus giving MSI more than a month to remedy the findings of insufficient financial strength, yet it still failed to furnish the necessary information.

Furthermore, the contracting officer has no duty to request additional information to resolve his doubts created by the financial data submitted. The offeror has the duty to clearly establish that it can perform the contract. DAR § 1-902. Thus, while the contracting officer could have contacted MSI to advise the firm that he did not believe its financial statements indicated adequate financial strength, there is no legal requirement that he have done so. See Pope, Evans and Robbins, Inc., B-200265, July 14, 1981, 81-2 CPD ¶ 29. Moreover, the protester merely claims that its financial statements were prepared by a reputable firm without making any showing as to why the contracting officer's evaluation of its financial statements was unreasonable. We therefore have no reason to believe that the Army did not act reasonably in determining that MSI lacked the necessary financial strength to perform this contract.

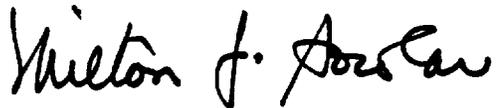
With regard to DCASMA's decision to obtain this information by mail instead of an on-site visit and the contracting officer's acceptance of such a "desk" survey, we have held that the nature and extent of a preaward survey needed to assure the contracting officer that a firm will meet its contractual obligations are for the contracting officer's judgment since he is in the best position to assess responsibility and he must bear the consequences of any difficulties experienced on account of the contractor's inability to perform in the time and manner required. Certified Testing Corporation, B-212242, Nov. 8, 1983, 83-2 CPD ¶ 542; Freund Precision, Inc., B-208455, Aug. 18, 1982, 82-2 CPD ¶ 155. There is no indication in the record that DCASMA's decision to conduct the survey by mail was the result of fraud or bad faith: the record indicates that a desk preaward survey was conducted because of travel restrictions. Furthermore, it is not clear, nor has MSI shown, what benefit an on-site inspection of MSI's facilities would have had since it was the firm's financial capability that was being questioned and not its technical capability. We also note that it is not necessary that an on-site inspection of the facilities be conducted as part of the preaward survey. DAR § 1-905.4(a). Since the protester has not shown that the contracting officer or DCASMA acted fraudulently or in bad faith, we will not question the manner chosen for conducting the preaward survey.

Finally, MSI's allegation that the solicitation failed to require a performance bond is untimely. Our Bid Protest Procedures require that protests based on solicitation

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improprieties apparent prior to the closing date for the receipt of proposals must be filed in our Office prior to that date. 4 C.F.R. § 21.2(b)(1) (1984). The solicitation clearly provided that a performance bond would not be required and thus any protest on this matter would have to had been filed before the time for receipt of proposals. Since MSI's protest was not filed until more than 5 months thereafter, we will not consider the merits of this issue. See Portland Mailing Services, Inc., B-213321, Nov. 7, 1983, 83-2 CPD ¶ 535.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States