

11/20/1985
FILE

DECISION



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

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FILE: B-218343; B-218343.2 **DATE:** June 10, 1985

MATTER OF: Omneco, Inc.; Aerojet Production Company

DIGEST:

1. To be considered an "interested party" so as to have standing to protest under the Competition in Contracting Act of 1984 and GAO's implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A potential subcontractor on a direct federal procurement cannot be considered an actual or prospective bidder or offeror.
2. When a prospective contract involves substantial subcontracting, the contracting officer may directly determine the proposed subcontractor's responsibility. GAO generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or a lack of any reasonable basis for the determination.
3. Even if one aspect of a firm's capability may have been incorrectly evaluated by a preaward survey team, this does not necessarily impair the agency's ultimate determination that the firm is nonresponsible. Rather, it is only where the record shows that the ultimate negative determination is based upon unreasonable or unsupported conclusions in many areas that GAO will recommend that the determination be reconsidered.
4. A contracting officer may base an initial determination of nonresponsibility on the evidence of record without affording offerors an opportunity to explain or otherwise defend

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against the evidence. The requirement for procedural due process enunciated in recent court decisions is only applicable where the government's nonresponsibility determination involves the offeror's perceived lack of integrity, thus affecting the protectible constitutional interest to be free from a governmental defamation of reputation.

Omneco, Inc. and Aerojet Production Company (Aerojet) protest the award of a contract to Emerson Electric Company under request for proposals (RFP) No. N00163-84-R-0156, issued by the Department of the Navy. The procurement is for the modification of government-furnished computer control groups and airfoil groups to be used in the reconfiguration of the Paveway II laser-guided bomb to the AGM-123 A Skipper air-to-ground missile specification. Omneco is a major subcontractor of Aerojet. The parties principally assert that the Navy improperly determined that Aerojet was not a responsible prospective contractor as the result of an erroneous conclusion by the Navy's preaward survey team that another major subcontractor, Thermal Electronics, Inc. (Thermal), lacked the technical and production capability to perform satisfactorily its portion of the effort in a timely manner. We dismiss Omneco's protest and deny Aerojet's protest.

Background

Aerojet's proposal provided that Omneco would modify the airfoil groups and that Thermal would modify the computer control groups, with Aerojet retaining the ultimate responsibility as the prime contractor to satisfy the government's requirements within the specified performance schedule. The RFP stated that the award would be made to that responsible offeror whose proposal was totally acceptable in all areas, and which represented the lowest overall cost to the government, price and other factors considered. The RFP additionally provided that the government would conduct on-site visits of acceptable offerors' facilities, and that the government reserved the right to visit proposed major subcontractors.

Aerojet's revised technical proposal was deemed to be acceptable, and the firm's revised cost proposal was low. In accordance with the RFP, the Navy conducted a preaward

survey of Thermal's production facilities. The results of the survey were negative, and the survey team recommended that no award be made.

Of greatest significance in the Navy's view, the survey team concluded that Thermal did not presently have a quality assurance plan established in accordance with MIL-Q-9858A, as required by paragraph 3.2.1 of the RFP, and that the firm could not implement one and have it approved by the local Defense Contract Administration Services Management Area (DCASMA) in time to meet the contract performance schedule. The survey team also concluded that there was no evidence that Thermal had ever fabricated printed wiring board assemblies of the complexity and at the rate that would be needed to satisfy the computer control group modification requirements, and that it lacked the capability to test these assemblies for vibration. The team likewise determined that Thermal lacked the in-house capability to perform failure analyses, and that it lacked machining capability. The survey team concluded as well that Thermal had not demonstrated any significant planning for modification of the computer control group's detector assembly, that Thermal had no experience in wave soldering, evidenced by fact that the firm had just purchased a wave solder machine, and that Thermal's employees were not certified in accordance with soldering specification WS6536D.

As the result of this negative preaward survey of Thermal's technical and production capability, the contracting officer determined that Aerojet as the prospective prime contractor was nonresponsible to perform the contract. The Navy then awarded the contract to Emerson Electric, the next low responsible offeror.

Analysis

The Navy urges as a threshold matter that we should dismiss Omneco's protest because the firm, as a potential subcontractor, is not an "interested party" within the meaning of our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1985). We agree.

Our regulations implement 31 U.S.C. § 3551, et seq., as added by section 2741(a) of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175, 1199. Under this new law, an "interested

party" is defined as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." This statutory definition of an "interested party" is expressly reflected in section 21.0(a) of our regulations. Accordingly, with respect to all bid protests filed on or after January 15, 1985, the effective date of section 2741 of the CICA, only protests involving a direct federal procurement filed by a party that comes within the statutory definition of an "interested party" can be considered. Thus, our Office will not consider subcontractor protests except where the subcontract is by or for the government. See 4 C.F.R. § 21.3(f)(10). Omneco, as a subcontractor to Aerojet, is not an "interested party," and its protest against the Navy's negative determination of Aerojet's responsibility, a determination based upon the perceived lack of capability of another subcontractor, thus will not be considered. See PolyCon Corp., B-218304, et al., May 17, 1985, 85-1 CPD ¶ _____.

Aerojet asserts that the Navy's determination of the firm's nonresponsibility was improper because it was based upon the erroneous conclusion of the preaward survey team that Thermal lacked the technical and production capability to perform the computer control group modification satisfactorily.

A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors. See the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103(c) (1984). When a prospective contract involves substantial subcontracting, the contracting officer may directly determine a prospective subcontractor's responsibility using the same standards to determine a prime contractor's responsibility. FAR, 48 C.F.R. § 9.104-4(b).

We have consistently held that the determination of an offeror's responsibility is the duty of the contracting officer, who, in making that determination, is vested with a wide degree of discretion and business judgment. PAE GmbH, B-212403.3, et al., July 24, 1984, 84-2 CPD ¶ 94. A contracting officer may rely upon the results of a preaward survey in determining an offeror's responsibility, and is not obligated to make an independent evaluation. System Development Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644. Although any determination should be based on fact and reached in good faith, it is only proper that the ultimate

decision be left to the administrative discretion of the contracting agency involved, since it must bear the major brunt of any difficulties experienced in obtaining required performance. Costec Associates, B-215827, Dec. 5, 1984, 84-2 CPD ¶ 626.

Therefore, we generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part, or a lack of any reasonable basis for the determination. Amco Tool & Die Co., 62 Comp. Gen. 213 (1983), 83-1 CPD ¶ 246. Aerojet has not alleged bad faith by the Navy, and, upon examination of the record, we find the firm has not demonstrated that the nonresponsibility determination lacked a reasonable basis.

The survey team concluded that Thermal did not have an existing quality assurance program plan in accordance with MIL-Q-9858A, as required by the RFP, and could not establish one and have it approved in the time frame required for satisfactory contract performance. The survey team believed that it would take at least 30 days for Thermal to generate a MIL-Q-9858A plan, and another 60 days for the local DCASMA to review and approve it, leaving only 90 days for the manufacture of the preproduction units, which was unacceptable. According to the Navy, some of the material and subassemblies to be procured under the contract have a lead time in excess of 90 days, and Thermal could not make any such purchases until its quality assurance plan had been approved.

To the contrary, Aerojet contends that it stated at the preaward survey that Thermal's quality assurance system satisfied the requirements of MIL-Q-9858A in all substantive aspects, and that Thermal's procedures only required certification by the local DCASMA. According to Aerojet, Thermal's procedures were offered for review by the survey team, but were refused. Aerojet asserts that it has extensive experience in the requirements of MIL-Q-9858A, and that it would ensure that its subcontractors adhered to those requirements.

With respect to the Navy's contention that Thermal's quality assurance program plan could not be implemented and approved within an acceptable period of time, Aerojet asserts that the local DCASMA assured the firm that Thermal's MIL-Q-9858A plan could be approved within

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3-4 weeks after Thermal's notification of its implementation. In any event, Aerojet points out that paragraph 3.2.1 of the RFP only required the contractor to "prepare and keep current" a program plan in accordance with MIL-Q-9858A, therefore clearly indicating that implementation and approval of the plan could take place after award. Aerojet refers to the Contract Data Requirements List, attached to the RFP, which, according to the firm, provides that the plan must receive preliminary approval 60 days after the date of contract award, and final approval 30 days after preliminary approval. Thus, Aerojet contends that, under the very terms of the RFP, the Navy cannot reasonably argue that Thermal's plan could not be implemented and approved in a manner to allow for timely contract performance. We are not persuaded by Aerojet's arguments on this issue.

The Navy states that Thermal's quality assurance plan in existence at the time of the preaward survey only conformed to the less stringent requirements of the MIL-I-45208 inspection system, a point of fact which Aerojet admits. Although the Navy acknowledges that the survey team declined to review Thermal's existing plan, the Navy states that this was so because the local DCASMA, and not the survey team, had the specific responsibility to conduct such a review.

With respect to Aerojet's assertion that the Contract Data Requirements List provided for preliminary approval of the MIL-Q-9858A plan 60 days after award, the Navy responds that this time frame did not pertain to approval of an offeror's overall quality assurance plan, but rather to the generation of a quality program plan document specifically designed for the Skipper modification effort, involving the identification of equipment by part number and procedures by document number. The Navy points out that this particular document was to be approved by the Naval Avionics Center, whereas the overall MIL-Q-9858A plan, in contrast, was to be approved by the local DCASMA. The Navy believes that Aerojet is confusing the two concepts, in that the contracting officer's ultimate determination was based upon Thermal's lack of an approved overall MIL-Q-9858A quality assurance plan, and not upon its ability to generate a specific document at some point after award. Further, the Navy states that, irrespective of Aerojet's assertion that representatives of the local DCASMA indicated to the firm that Thermal's quality plan

could be approved in a shorter period of time, the contracting officer's determination was based upon the information obtained by the survey team from the local DCASMA at the time of the survey that 60 days would be required.

In our view, the essential point is that the survey team concluded that the process for implementation and approval of Thermal's MIL-Q-9858A quality assurance plan would have adversely affected the contract's performance schedule, and we see nothing in the record to suggest that this conclusion was erroneous. To the extent Aerojet now asserts that representatives of the local DCASMA indicated that Thermal's plan could be approved more expeditiously, the contracting officer's negative determination was based upon the contrary information before him at the time he made the determination, and, therefore, cannot be said to have lacked a reasonable basis. See John Carlo, Inc., B-204928, Mar. 2, 1982, 82-1 CPD ¶ 184. Clearly, Aerojet bore the responsibility to ensure that its chosen subcontractor complied with the requirement of paragraph 3.2.1 to prepare and maintain a MIL-Q-9858A plan, and to have this done in a manner that would not jeopardize timely contract performance.

The survey team further concluded that Thermal lacked the capability to fabricate printed wiring board assemblies of the complexity and at the rate needed to satisfy the Navy's requirements. According to the survey team, the hardware that the firm presently fabricates at a rate equivalent to the contract's monthly rate is less complex than the systems needed for the computer control group modification, and that the systems that Thermal fabricates of equivalent complexity are fabricated at significantly lower rates.

On the same issue, the Navy's survey team concluded that Thermal lacked the capability to test the printed wiring board assemblies for vibration. According to the Navy, the vibration testing will be done by a subcontractor of Thermal, and that movement of the assemblies to accomplish this will require excessive handling, leading to their possible degradation.

Aerojet asserts that, during the site visit, the survey team's chairman stated that the printed wiring board

assemblies needed for the computer control group modification were not complex systems, and that more complex fabrications were offered as evidence of Thermal's technical capability. The firm also notes that Thermal fabricated identical printed wiring board assemblies for the Skipper under a prior contract. With respect to the required monthly production rate, Aerojet asserts that Thermal already has in place the necessary technical and managerial staff skilled in the work, and that personnel expansion, if required, would not be a problem given Thermal's location in a labor-surplus area.

Aerojet states that the testing of these assemblies will be done by an independent laboratory, and that it is specious for the Navy to argue that movement of them may be harmful, since the assemblies as configured in the Skipper will be subjected to intense vibration during actual flight and carrier launch conditions.

Essentially, what we see at issue here are the differing judgments of Aerojet and the Navy as to Thermal's capability, and although a protester may disagree with certain conclusions, such challenges to the agency's exercise of its discretion and business judgment do not meet its burden of proving that the agency's ultimate negative determination of the firm's responsibility was unreasonable. See C.W. Girard, C.M., 64 Comp. Gen. 176 (1984), 84-2 CPD ¶ 704. In our view, the fact that Thermal may have manifested technical skill in fabricating a limited number of identical printed wiring board assemblies under a prior contract, in the absence of certain testing, quality and reliability requirements, does not establish the firm's capability to perform satisfactorily under the accelerated monthly rate for the present acquisition. See Products Research and Chemical Corp., B-214293, July 30, 1984, 84-2 CPD ¶ 122.

The Navy does not dispute that the printed wiring board assemblies in question are not complex in nature, but points out that although the survey team recognized Thermal's limited prior experience, the assemblies fabricated under that contract were hand-soldered at a lower rate, and that Thermal has never fabricated a printed wiring board assembly with the burn-in requirements (temperature cycling and vibration) as mandated by the present contract. Therefore, we believe that the survey

team reasonably concluded that Thermal lacked the capability for successful performance in this area.

Furthermore, we have no basis upon which to question the Navy's position that Thermal lacked the capability for vibration testing of these assemblies, where Aerojet's own submissions establish that such testing was to be conducted by an outside laboratory. With regard to the possible degradation of the assemblies during testing, the Navy's position is that the assemblies would not in fact be housed in the protective missile casings as they would be during actual shipboard and flight operations. In the Navy's view, Thermal's lack of in-house vibration testing capability would therefore subject the assemblies to potentially detrimental handling during transportation to and from the testing laboratory. We do not believe that the Navy's concern is at all unreasonable.

Similarly, since the record clearly establishes that Thermal did not have the in-house capability to conduct failure analyses, and did not have machining capability, but rather that the firm would have to obtain outside assistance for these efforts, we see nothing to call into question the survey team's negative conclusions with respect to these aspects of the firm's potential for satisfactory performance.

The survey team also concluded that Thermal had not shown any significant operational planning for modification of the computer control group's detector assembly. According to the Navy, this is a delicate part, and its modification requires various operations to incorporate electromagnetic interference (EMI) protection. During the survey, Thermal could not describe in any detail either the processes that it planned on using or its sequence of operations.

Aerojet counters by urging that Thermal had concluded that several different methods could be used to incorporate EMI protection, and that the proper methodology could only be verified after the government-furnished units were received from the Navy for modification. Aerojet contends that the Navy's interpretation of the requirements in this area is too simplistic.

Aerojet's contrary view does not meet its burden of proving that the Navy's ultimate determination of

nonresponsibility was unreasonable, but rather reflects a difference of opinion on a technical issue affecting the agency's needs in the computer control group modification effort. In technical disputes, a protester's mere disagreement does not invalidate the agency's opinion. See Stryker Corp., B-208504, Apr. 14, 1983, 83-1 CPD ¶ 404. The Navy states that although it is true that the correct methodology could only be verified after receipt of the units, Thermal should have been able to describe its proposed processes and sequence of operations, and that this was accordingly identified as a high-risk area by the survey team. On these facts, we find no basis to question the survey team's conclusion that Thermal was deficient in operational planning for this aspect of the requirement.

Aerojet also contends that the preaward survey team's conclusion that Thermal had no experience in wave soldering due to its recent purchase of a wave solder machine, and that its employees were not certified to solder in accordance with soldering specification WS6536D, was clearly erroneous. According to Aerojet, a wave solder machine that had been purchased two years earlier was displayed to the survey team, and a wave soldering log and a list of program components that had utilized the wave solder machine were offered as evidence that Thermal had the necessary operational experience. Furthermore, Aerojet asserts that, during the site visit, evidence of the current certification of seven Thermal employees to soldering specification WS6536D was prominently displayed at these employees' work stations.

The Navy denies that the wave solder log was ever offered for examination during the survey, and states that the facility tour did not include the wave solder machine. The Navy further states that Thermal employees in any event indicated that the machine had not yet been used for production. The Navy contends that the fact that not all Thermal employees were certified in accordance with WS6536D was not a ground for the nonresponsibility determination, but rather was an indication of another high-risk area with respect to Thermal's satisfactory performance.

The record is inconclusive on this issue, but even if we were to accept Aerojet's assertions, the fact that one aspect of a firm's capability may have been incorrectly evaluated does not necessarily impair the agency's ultimate determination that

the firm is nonresponsible. See Coastal Striping & Painting Corp., B-214869, Dec. 26, 1984, 84-2 CPD ¶ 697. Rather, it is only where the record shows that the agency's ultimate negative determination is based upon unreasonable or unsupported conclusions in many areas that this Office will recommend that the determination be reconsidered. See Dyneteria, Inc., B-211525, Dec. 7, 1983, 83-2 CPD ¶ 654.

Given the totality of the evidence in this matter, we conclude that the Navy's negative determination of Aerojet's responsibility, based on perceived deficiencies in its subcontractor's technical and production capability, did not lack a reasonable basis. Amco Tool & Die Co., 62 Comp. Gen. 213, supra.

Aerojet also asserts that it was improper for the Navy to determine that the firm was nonresponsible as the result of the preaward survey without affording the firm the opportunity, through "meaningful discussions," to explain or correct any perceived deficiencies in Thermal's technical and production capability. Aerojet contends that this failure was a clear violation of FAR, 48 C.F.R. § 15.610(c)(2), which provides that the contracting officer shall advise the offeror of deficiencies in its proposal in order to give the firm an opportunity to meet the government's requirements. Aerojet relies upon recent court decisions in Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F. 2d 953 (D.C. Cir. 1980), and Related Industries, Inc. v. United States, 2 Cl. Ct. 517 (1983), as support for its argument that procedural due process must be afforded an offeror before it can be precluded from obtaining a government contract on the basis of a negative responsibility determination. We find no legal merit in the firm's position.

We point out that FAR, 48 C.F.R. § 15.610(c)(2), supra, only relates to discussions concerning proposal deficiencies, and is inapplicable with respect to an agency's determination of a firm's responsibility. Here, Aerojet's initial technical proposal was deemed to be deficient in certain areas, these deficiencies were brought to the firm's attention, and the firm was given the opportunity to correct them by means of its submission of a revised proposal. The procedures for determining the firm's responsibility in relation to the capability of its

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proposed subcontractors only arose after the Navy had concluded its evaluation of the revised proposals of the various offerors.

With regard to Aerojet's due process argument, we have held that a contracting officer may base an initial determination of nonresponsibility upon the evidence of record without affording offerors an opportunity to explain or otherwise defend against the evidence. 43 Comp. Gen. 140 (1963); United Aircraft and Turbine Corp., B-210710, Aug. 29, 1983, 83-2 CPD ¶ 267. In the latter case, where the protester likewise relied upon Old Dominion Dairy Products, Inc., supra, and Related Industries, Inc., supra, we emphasized that those court decisions are clearly distinguishable from situations involving a negative determination of responsibility on the basis of lack of capability, as here, because those decisions dealt with the plaintiff's constitutional interest to be free from a governmental defamation of reputation (a perceived lack of integrity) having an immediate and tangible effect on the ability to do business. United Aircraft and Turbine Corp., B-210710, supra, 83-2 CPD ¶ 267 at 3. In the present matter, the Navy's nonresponsibility determination is unrelated to any concern regarding Aerojet's integrity as it is based wholly upon the perceived lack of capability of one of Aerojet's chosen subcontractors, and, therefore, there is no protectible constitutional interest that would trigger due process requirements. Id.

The protests are respectively dismissed and denied.

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