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DECISION



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

FILE: B-221815 **DATE:** January 30, 1986
MATTER OF: Fujinon, Inc.

DIGEST:

1. Fact that bidder did not make timely deliveries under a prior contract does not require a finding that the bidder is nonresponsible to perform a subsequent contract.
2. The General Accounting Office will not review a challenge to a contracting agency's affirmative determination of responsibility absent a showing of possible fraud on the part of contracting officials or that definitive responsibility criteria were not applied. Moreover, delinquent deliveries under a prior contract do not alone require a finding of nonresponsibility.
3. Protest alleging that the brand name equipment called for in a solicitation does not represent an agency's minimum needs is untimely when filed after bid opening.

Fujinon, Inc., protests the award of a contract for gyro-stabilized binoculars^{1/} to Fraser-Volpe Corporation under invitation for bids (IFB) No. DTCG23-85-B-32034, issued August 2, 1985, by the United States Coast Guard, Washington, D.C. Fujinon contends that Fraser-Volpe was improperly determined to be a responsible firm. Fujinon also contends that the Coast Guard failed to state its minimum needs in calling for daylight-only binoculars, which more advanced technology now renders inferior or obsolete.

We dismiss the protest.

^{1/} According to the protester, these binoculars have optics that are internally stabilized by a mechanism which includes a gyroscope, so that the user can obtain a steady image despite motion of the user, for example, while observing from a ship at sea.

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The protester contends that Fraser-Volpe should have been determined nonresponsible because of an unsatisfactory record of performance. Fujinon refers to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-3(c) (1984), which provides that a contractor that is or has been seriously deficient in contract performance "shall be presumed to be nonresponsible." The protester contends that Fraser Volpe's alleged failure to make timely delivery on a much smaller prior contract means that the presumption is un rebutted and hence requires a finding of nonresponsibility. Specifically, Fujinon alleges that Fraser failed to comply with the delivery requirements of a Federal Bureau of Investigation (FBI) contract where the number of binoculars being procured was substantially less than the number being obtained under the protested contract.

A contracting officer must make an affirmative determination of a bidder's responsibility before awarding a contract. FAR, 48 C.F.R. §§ 9.103(a) and (b). Here, in denying an agency level protest by Fujinon, the contracting officer stated that he considered Fraser-Volpe's past performance, including deliveries under its FBI contract, before making his determination that Fraser is a responsible firm.

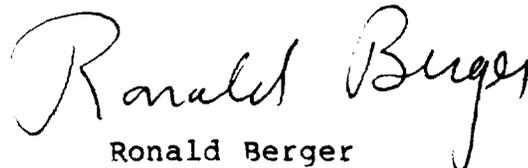
Recent unsatisfactory performance does not have to automatically result in a determination that a bidder is nonresponsible; in each case the contracting officer must make a business judgment as to whether the delinquent performance under the prior contract is such that it indicates that problems will be encountered during performance of the contract about to be awarded. See GAVCO Corp.--Request for Reconsideration, B-207846.2, Sept. 20, 1982, 82-2 CPD ¶ 242. Here, it appears that the contracting officer found the information that he obtained from the FBI sufficient to rebut the FAR presumption of nonresponsibility.

Moreover, our Office will not review an affirmative determination of responsibility unless the protester shows either possible fraud on the part of contracting officials or that the solicitation contains definitive responsibility criteria that have not been applied. Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403. The protester has not alleged fraud. As for definitive responsibility criteria, these are specific and objective qualifications, for example, a certain number of years or a particular type of experience, that are considered necessary for adequate contract performance. Id. The question of the adequacy of

Fraser-Volpe's deliveries under a prior contract does not involve a definitive responsibility criterion. AT&T Information Systems, Inc., B-216386, Mar. 20, 1985, 85-1 CPD ¶ 326. We therefore find no basis to question the determination that Fraser-Volpe is a responsible firm.

Fujinon's remaining basis of protest, that the solicitation contained other than the Coast Guard's minimum needs, is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), protests based upon alleged improprieties apparent on the face of an IFB must be filed before bid opening. Since Fujinon's protest concerns the availability of gyro-stabilized night vision devices, and since the solicitation clearly called for daylight-only Fujinon binoculars or equal, this alleged impropriety was apparent on the face of the IFB. However, Fujinon did not protest to either the contracting agency or our Office before the September 3, 1985, bid opening. We therefore find the matter untimely, and we will not consider it on the merits. See Sellers Engineering Co., B-217527, Jan. 17, 1985, 85-1 CPD ¶ 51.

The protest is dismissed.



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General Counsel