

Harrington

**DECISION**



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

**FILE:** B-220935.2 **DATE:** February 26, 1986  
**MATTER OF:** Nations, Inc.

**DIGEST:**

1. Protest against an affirmative responsibility determination, based on an allegation that "corporate experience" definitive responsibility criterion was not met, is denied. "Corporate experience" was a proposal evaluation criterion to be used by the agency in assessing the merits of individual proposals, not a responsibility criterion, and the protester has not shown that the agency's proposal evaluation was unreasonable.
2. Allegations that agency's affirmative determination of responsibility was based on fraud or bad faith because the agency knew the awardee, a newly incorporated firm, was totally lacking in experience and adequate financial resources are without merit where record shows contracting officer considered firm's pre-incorporation experience and reliance on proposed subcontractor experience and had basis for viewing the adequacy of the firm's financial resources as he did.

Nations, Inc. protests the Department of the Army's award of a contract to International Mobile Machines Institute, Inc. (IMMI) under request for proposals (RFP) No. DABT60-85-R-0031, a total small business set-aside. The solicitation was for updating and developing courses of instruction relating to the support of satellite communication equipment for the U.S. Army Signal Center at Fort Gordon, Georgia. The protester challenges the contracting officer's affirmative responsibility determination with respect to IMMI.

We deny the protest.

The RFP provided that proposals would be evaluated, in accordance with specified criteria, to determine technical and management acceptability, and that award would be made

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to the acceptable offeror with the lowest evaluated price. The proposal submitted by IMMI received the highest technical score, and offered the lowest price. The Army conducted a review of IMMI's performance of four other contracts, three of which had been completed and one which was ongoing. This review revealed no basis for questioning the firm's responsibility. The contracting officer therefore proposed to award the contract to IMMI.

Nations protests that "Corporate Experience" was specified in the RFP as a definitive responsibility criterion and that the agency's determination that IMMI was responsible is inconsistent with that criterion. In support of this contention, Nations alleges that IMMI had only been in existence for 3 days prior to the closing date for receipt of proposals and could not possibly have had sufficient corporate experience to satisfy the criterion. The protester also alleges that IMMI was not responsible financially, and that the agency's determination to the contrary was fraudulent. In addition, Nations protests the contracting officer's failure to require a preaward survey of the proposed awardee or to refer the question of the firm's responsibility to the Small Business Administration for determination.

Under our Bid Protest Regulations, section 21.3(f)(5), our Office does not review affirmative responsibility determinations unless it is shown that definitive responsibility criteria stated in the solicitation may not have been met or that the determination may have been made fraudulently or in bad faith. 4 C.F.R. § 21.3(f)(5) (1985). Here, the protester asserts that both of these exceptions apply.

Regarding the first of these exceptions, we do not agree that any definitive responsibility criterion was involved here. A definitive responsibility criterion is a standard established by an agency for a particular procurement for measuring a bidder's ability to perform the contract. Clausing Machine Tools, B-216113, May 13, 1985, 85-1 CPD ¶ 533. In effect, the criterion represents the agency's judgment that a bidder's ability to perform in accordance with the specifications for that procurement must be measured not only against the traditional and subjectively evaluated factors, such as adequate facilities and financial resources, but also against a more specific requirement, compliance with which at least in part can be determined objectively. Id. Where a definitive responsibility criterion involves corporate experience, it typically

requires a particular type of experience or a certain level of experience, which can be measured objectively. Id.

In this case, however, "Corporate Experience" was simply listed among the evaluation factors that would be applied by the agency to assess the merits of individual proposals.<sup>1/</sup> These assessments, made during proposal evaluation, are not responsibility findings, which are made after proposal evaluation has been completed. See Numax Electronics, Inc., B-210266, May 3, 1983, 83-1 CPD ¶ 470. Thus, the corporate experience criterion here was a proposal evaluation criterion to be used by the technical evaluation board to judge the technical merits of the offers received, and not a responsibility criterion (definitive or otherwise). Accordingly, we find no merit to the protester's argument that the agency's affirmative responsibility determination was inconsistent with the corporate experience criterion in the RFP.

To the extent Nations' protest against IMMI's lack of corporate experience constitutes a challenge to the agency's evaluation of the firm's technical proposal, we find no merit in it. In considering protests against an agency's evaluation of proposals, we will not evaluate the proposals anew and make our own determinations as to their acceptability or relative merits. See Technical Services Corp., B-216408.2, June 5, 1985, 85-1 CPD ¶ 640. However, we will examine the record to determine whether the evaluation was fair and reasonable and consistent with the evaluation criteria. See Deuel and Assocs., Inc., B-212962, Apr. 25, 1984, 84-1 CPD ¶ 477.

Here, the record indicates that while IMMI was newly incorporated, the firm itself was not new and had successfully performed several contracts before the firm was incorporated. We have held that an agency may consider a firm's experience prior to its incorporation when evaluating the firm's experience under an evaluation criterion. Data Flow Corp., et al., 62 Comp. Gen. 506 (1983), 83-2 CPD ¶ 57. Although the record indicates that IMMI also relied on a subcontractor's experience in its proposal, the RFP does not contain restrictions on subcontractor participation. Unless there is a restriction in the RFP against subcontracting, there is no prohibition on the government's

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<sup>1/</sup> We have recognized that in a negotiated procurement, matters such as experience, that traditionally bear on responsibility, may be used as technical evaluation criteria. C.M.P., Inc., B-216508, Feb. 7, 1985, 85-1 CPD ¶ 156.

right to accept a proposal that proposes substantial subcontractor participation. Energy and Resource Consultants, Inc., B-205636, Sept. 22, 1982, 82-2 CPD ¶ 258. Moreover, Nations has not alleged that IMMI's own prior experience was deficient, claiming only that it should not be considered in evaluating the firm's corporate experience because it was obtained prior to the firm's incorporation.

We turn, then, to Nation's contention that the agency's affirmative determination of responsibility was made in such disregard of IMMI's alleged lack of experience and financial responsibility as to constitute fraud or bad faith. The protester asserts that since IMMI was formed as a corporation only a few days prior to the closing date for receipt of proposals, IMMI could not have performed any work sufficient to demonstrate responsibility, and consequently, that the award decision demonstrated "a willful and malicious intent to defraud the procurement system and other offerors."

The Army responds that because IMMI had existed as a contracting entity prior to its incorporation, the contracting officer surveyed contracts that had been performed by IMMI in its unincorporated form. The Army asserts that the resources and experience of the entity remained the same after its incorporation, and that only the legal form of the firm was changed.

Nations also points out that the financial statements for IMMI's parent company, International Mobile Machines Corp. (IMMC), that were submitted to the Securities and Exchange Commission for 1984 showed significant losses. The protester argues on this basis that IMMI is not financially responsible and should therefore be ineligible to receive the award. The Army responds that the financial situation of IMMC as reflected on its 10-K form is inapplicable to IMMI and its operations, and that the agency is not required to consider the financial responsibility of a parent corporation.

The protester offers these two allegations--that IMMI lacks the requisite corporate experience and is not financially responsible--to support the contention that the responsibility determination was made fraudulently or in bad faith. However, to make this showing the protester has a heavy burden of proof; contracting officials are presumed to act in good faith and in order to show otherwise the protester must demonstrate by virtually irrefutable proof that they had a specific and malicious intent to injure the

protester. See J.F. Barton Contracting Co., B-210663, Feb. 22, 1983, 83-1 CPD ¶ 177. We do not believe the protester has made this showing.

The record clearly reflects that the agency surveyed IMMI's past performance and considered whether IMMI had the necessary managerial, technical and financial capabilities to perform the contract. The mere fact that a protester disagrees with a contracting officer's determination of responsibility, or contends that the contracting officer lacked sufficient information to determine an offeror responsible, does not suffice to show that the contracting officer acted fraudulently or in bad faith. Id. Moreover, the protester has not alleged--much less demonstrated--any specific or malicious intent on the agency's part, as required to support the claim of fraud or bad faith. In these circumstances, we have no basis to object to the Army's affirmative determination that IMMI is responsible.

Nations also contends that the contracting officer abused his discretion by neither conducting a preaward survey nor referring the matter of IMMI's responsibility to perform the contract to the Small Business Administration. However, a preaward survey is not a legal prerequisite to an affirmative determination of responsibility. Freund Precision, Inc., B-216620, Oct. 23, 1984, 84-2 CPD ¶ 456. It is within the contracting officer's discretion not to conduct a preaward survey and we have no basis to question the contracting officer's exercise of discretion in this regard. Furthermore, the Certificate of Competency procedures to which the protester refers are used only when a small business has been found nonresponsible, not, as here, where there has been an affirmative determination. Jenkins Equipment Co., B-207512, June 2, 1982, 82-1 CPD ¶ 531.

The protest is denied.

*for*   
Harry R. Van Cleve  
General Counsel