

DECISION

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

FILE: B-221298

DATE: March 13, 1986

MATTER OF: Martin Electronics, Inc.

DIGEST:

1. Contracting officer has broad discretion in determining bidder's responsibility and GAO will not question a negative determination absent a showing of bad faith or lack of any reasonable basis for the determination.
2. Contracting officer may base nonresponsibility determination on pre-award survey showing contractor's delinquent past performance and inadequate production facilities, and his own familiarity with contractor's delinquent performance under a contract for the same item, without affording the contractor an opportunity to explain or discuss the evidence.

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Opinion by Defense Contract Administration Services Management Area (DCASMA), which conducted preaward survey, based on events occurring and information provided by the contractor after award, that reevaluation was appropriate if the preaward survey was the only basis for the contracting officer's negative determination is without effect. The contracting officer is empowered to make this determination and considered information besides the pre-award survey, and the information sent to DCASMA by the protester was not provided until after the award was made.

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Martin Electronics, Inc. (Martin), protests the rejection of its bid under solicitation No. DAAA09-85-R-1065 issued by the United States Army Armament, Munitions and Chemical Command (Army), Rock Island, Illinois, for MK-46-1 flare decoys. Martin asserts that it was improperly determined nonresponsive by the Army.

We find the protest without merit.

The low bidder under the solicitation, Maryland Assemblies, Inc. (MAI), a small business, was found non-responsive by the Army and the matter was referred to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures on September 30, 1985. Martin, other than a small business, was the next low bidder and a preaward survey conducted by Defense Contract Administration Services Management Area (DCASMA), Orlando, resulted in a September 20 recommendation to the Army of no award on the basis of Martin's unsatisfactory production capability. Martin states that when it was made aware of this negative recommendation, it contacted the contracting officer to object to the preaward survey and was told that COC consideration was in process for the low bidder. Martin also states that it was advised by the contracting officer not to take any action to contact DCASMA on the negative recommendation because, if MAI did not obtain a COC, Martin would have the opportunity to address the preaward survey at that time. The contracting officer states that he did not make this latter representation.

On October 30, SBA declined to issue a COC for MAI and, on October 31, the Army requested DCASMA to reevaluate its preaward survey of Martin on the basis of current information. On November 5, DCASMA again recommended against award on the basis of Martin's past poor performance record (75 percent of deliverable contracts and 44 percent of completed contracts delinquent over the past year), and that poor current performance remained unchanged. This included the fact that two MK-46 flare decoys submitted by Martin under another Army contract for first article testing had failed a leak test and Martin was building more units in order for tests to continue. In addition, two buildings necessary for the flare decoy production which were listed as behind schedule in construction in the first preaward survey were still not finished, and the production line was still being

set up. In addition to this information provided by DCASMA, the contracting officer was personally aware that Martin was delinquent in the production of an approved first article on this item under another contract for which he was also the contracting officer. Based both on the information provided by the DCASMA preaward survey and on the contracting officer's familiarity with Martin's poor contract performance, on November 27, the contracting officer determined Martin to be nonresponsible and award was made to Kilgore Corporation, the third low bidder, on November 29.

The determination of a prospective contractor's responsibility rests with the contracting officer and, in making that determination, he is vested with a wide degree of discretion and business judgment. Venusa, Ltd., B-217431, B-217432, Apr. 22, 1985, 85-1 C.P.D. ¶ 458. A contracting officer may rely upon the results of a preaward survey in determining the bidder's responsibility and is not obligated to make an independent evaluation. System Development Corp., B-212624, Dec. 5, 1983, 83-2 C.P.D. ¶ 644. However, a contracting officer also has broad discretion as to whether or not to conduct a preaward survey and the degree of reliance to be placed on the survey. Newport Offshore Ltd., B-219031, B-219031.2, June 13, 1985, 85-1 C.P.D. ¶ 683. While any determination should be based on fact and reached in good faith, it is appropriate that the ultimate decision be left to the administrative discretion of the contracting agency involved since it must bear the brunt of any difficulties experienced in obtaining required performance. Omneco, Inc.; Aerojet Production Co., B-218343, B-218343.2, June 10, 1985, 85-1 C.P.D. ¶ 660.

Therefore, 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. Amco Tool & Die Co., 62 Comp. Gen. 213 (1983), 83-1 C.P.D. ¶ 246. Martin has not alleged bad faith by the Army, nor has it demonstrated that the nonresponsibility determination lacked a reasonable basis.

First, regarding Martin's assertion that it was advised by the contracting officer not to pursue Martin's disagreement with DCASMA regarding the preaward survey until after MAI's COC had been processed, the contracting officer states that he provided no such advice. Where, as here, the only

evidence concerning an issue of fact is the conflicting statements of the protester and a contracting official, the protester has not provided our Office with a basis for giving greater weight to the protester's version of the facts than to that of the contracting officials'.

In any event, the DCASMA preaward survey was but one item to be considered by the contracting officer in determining Martin's responsibility and the contracting officer's familiarity with Martin's deficiencies in its only other contract to produce the same item standing alone provided a reasonable basis for the determination. While Martin asserts that it was entitled to an opportunity to participate in the process by discussing the preaward survey with DCASMA and correcting what it perceived to be DCASMA errors in the preaward survey, there is no requirement that a protester be afforded such an opportunity. Camel Manufacturing Co.--Request for Reconsideration, B-218473.4, Sept. 24, 1985, 85-2 C.P.D. ¶ 327. The contracting officer properly may base a nonresponsibility determination on the evidence of record without affording the contractor an opportunity to explain or otherwise defend against the evidence. Omneco, Inc., B-218343, supra.

Martin also asserts that it received a letter from DCASMA dated January 22, 1986, in which DCASMA states that in view of material submitted by Martin, Martin should be reevaluated if the sole basis of the nonresponsibility finding was the negative DCASMA preaward survey. This letter is of no significance because the DCASMA preaward survey was not the sole basis for the contracting officer's responsibility determination, and it is the contracting officer, not DCASMA, who is responsible for making the determination. Bellevue Bus Service, Inc., B-219814, Aug. 15, 1985, 85-2 C.P.D. ¶ 176. Moreover, DCASMA's recommendation is based on evidence submitted by Martin subsequent to the date of award. The contracting officer was entitled to make his determination on the basis of the facts at hand immediately prior to the award, and this determination is not affected by status changes which occur and information which surfaces after the date of award. See Camel Manufacturing Co.--Request for Reconsideration, B-218473.4, supra; Camel Manufacturing Co., B-218473.3, July 11, 1985, 85-2 C.P.D. ¶ 40.

The protest is denied.

for Seymour E. Ross
Harry R. Van Cleve
General Counsel

