



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Numax Electronics Incorporated
File: B-227925
Date: October 22, 1987

DIGEST

Contracting officer's nonresponsibility determination based on the protester's prior performance and the lack of a radiometric test range is supportable where record indicates that protester's prior performance was deficient and protester does not show that prior performance deficiencies were beyond its control and the record shows that the protester had incomplete plans for the necessary range.

DECISION

Numax Electronics Incorporated protests the rejection of its bid because of the Army's determination that the firm is nonresponsible under invitation for bids (IFB) No. DLAB07-87-B-U016, issued by that agency for modulator assemblies and transmitters for the AN/ALQ-144 countermeasure system. We deny the protest.

The IFB contained five special standards of responsibility which bidders had to meet in order to be eligible for award. One of the standards was the availability of a radiometric range for testing the equipment.

Numax and AUL Instruments, Inc. submitted bids in response to the IFB. The contracting officer requested a preaward survey of the low bidder, Numax. The preaward survey dated May 18, 1987 recommended against award based primarily on the firm's recent performance record and its failure to demonstrate that it had a radiometric range available to it. Specifically, the survey team found that Numax was delinquent on three of nine contracts it currently held, and that Numax was responsible for the delinquencies in all three cases: contract Nos. DAAB07-86-C-U419, DAAL01-85-C-0833, and DAAB07-81-C-0560,TD-660. It also found that although Numax had indicated that it intended to obtain access to a radiometric range by contracting with AUL for

040347

use of their test range or, if an agreement with AUL could not be reached, by constructing its own range, Numax had not obtained a commitment from AUL, nor had it arranged to procure its own testing equipment.

After the survey was completed, Numax by letter dated May 19, notified the contracting officer that it had decided to construct its own radiometric range. With its letter, Numax enclosed copies of quotations that it had received from vendors of the equipment needed for the range. Representatives from Numax also met on June 23 with the contracting officer to present further information regarding the deficiencies in current performance noted by the preaward survey team. Numax advised the contracting officer that the contracting agency had agreed to revise the delivery schedules under two of the three reportedly delinquent contracts. The contracting officer nevertheless determined that Numax was nonresponsible and made award to AUL on June 29.

Numax challenges the contracting officer's determination of nonresponsibility, arguing that due to revision of the contract delivery schedules, it was truly delinquent on only one contract, and had demonstrated in its May 19 letter that it would have its own radiometric range available in time for contract performance. Numax contends that the contracting officer based his determination solely on the negative recommendation of the preaward survey and ignored the protester's updated information regarding the delinquent contracts and plans to establish its own radiometric range. The contracting officer denies that this was the case. He indicates that he was aware of the additional information, including that presented to him in the May 19 letter and at the June 23 meeting, regarding Numax' current performance and its proposed radiometric range and considered this information in reaching his decision.^{1/}

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer, who in making that decision must of necessity rely primarily on his or her business judgment. Firm Reis GmbH, B-224544 et al., Jan. 20, 1987, 87-1 CPD ¶ 72. We will not question such a determination unless

^{1/} In its initial protest, Numax also argued that it was found nonresponsible in part because it was not a current producer of the item, a standard not set forth in the solicitation. In the protest report, the agency stated that the fact that Numax was not a current producer was not a basis for its determination. Numax has not responded to the agency's explanation so we consider the issue abandoned.

the protester demonstrates bad faith by the agency or a lack of any reasonable basis for it. Decker and Co., et al., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100. Since Numax has not alleged bad faith on the part of the agency, the question for our review is whether the determination that Numax was nonresponsible was reasonable based on the information known to the contracting officer at the time the determination was made. Brussels Steel America, Inc., B-225556 et al., Apr. 16, 1987, 87-1 CPD ¶ 415.

The contracting officer's determination of nonresponsibility here rested in large part on his concerns regarding Numax's prior performance.^{2/} With regard to contract No. 0833, the contracting officer considered that although prior to award of the contract, Numax had stated that it would install an in-house radiometric testing range within 7 months of award, it still had not done so 14 months later nor had it entered into a subcontract for testing services. In addition, Numax failed to deliver a first article test plan on time. With regard to contract No. U419, the contracting officer found that as of the date of his determination, neither the electronic test fixture nor the first article testing had been completed as required. The record also shows that Numax was late in delivery under contract No. 0560,TD-660.

Numax contends that circumstances beyond its control contributed to its deficient performance under the first two contracts. Numax argues that the Army contributed to the delay in its performance under contract No. 0833 by failing to provide it with a copy of an acceptable test plan. Numax does not contend, however, that the Army was solely responsible for the delays. Moreover, the protester has not suggested that the Army was in any way responsible for its delay in obtaining radiometric testing services.

Regarding contract No. U419, Numax argues that delays in its performance were in part attributable to deficiencies in the government technical data package. The contracting officer does not dispute that the technical data package contained errors, but indicates that the fact that none of Numax's 11 engineering change proposals were submitted until a year after award implied that Numax had not promptly reviewed the data package or ordered parts in time to meet the contract delivery requirements.

^{2/} In fact, the contracting officer states that either of the two grounds--prior performance or lack of a radiometric test range--standing alone would support the nonresponsibility determination.

The regulations provide that a prospective contractor that recently has been seriously deficient in contract performance must be presumed to be nonresponsible unless the contracting officer determines that the circumstances were beyond the contractor's control or that the contractor has taken appropriate corrective action. Federal Acquisition Regulation, 48 C.F.R. § 9.104-3(c) (1986). In reviewing a nonresponsibility determination based on prior performance deficiencies, we need not decide whether the deficiencies were beyond the contractor's control but rather the question is whether the contracting officer's conclusion was reasonably based. Decker and Co., et al., B-220807 et al., supra.

Although Numax argues that its performance under two of the reportedly delinquent contracts was not deficient since the delivery schedule in each of the two had been revised, the fact that the government has decided to allow a contractor to continue performance does not indicate that the contractor's performance has been satisfactory. The Aeronetics Division of AAR Brooks & Perkins, B-222516 et al., Aug. 5, 1986, 86-2 CPD ¶ 151. Here, we find that the contracting officer's concerns regarding Numax's prior performance on three of the protester's nine current contracts provided a reasonable basis for his determination of nonresponsibility. In each of the two instances where Numax contends that the delivery delay was in fact the government's fault, there is, as shown above, sufficient information in the record to support the contracting officer's view that Numax contributed significantly to the problem. Further, the protester does not dispute the late delivery under contract No. 0560, TD-660.

As far as the lack of a radiometric range is concerned, the contracting officer was not convinced by the information set forth in Numax's letter of May 19 that Numax would in fact be able to set up the range in time for contract performance. In this regard, the contracting officer points out that quotations submitted for the necessary equipment were not firm and there were no definite plans or time table for completion of the range. The contracting officer further notes that Numax indicated the range would be constructed in its new facility, but failed to indicate where that new facility would be located and had not at the time of the preaward survey contracted to build the facility. Further, as previously noted, Numax had in the past stated that it would set up its own radiometric range in connection with contract No. 0833, but the range was not in fact built.

that it also provided the agency with a schedule for the development of its own range. The protester contends that it was prepared to supply further information but discussion of the matter was dropped at the June 23 meeting because the contracting officer said he was "satisfied on the test range issue."

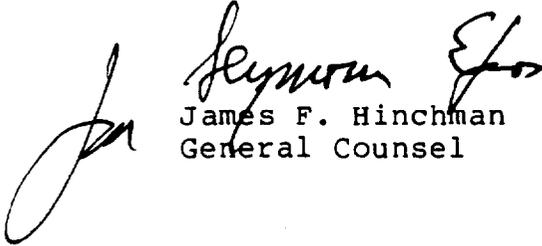
We think that based on the information in the record the contracting officer could reasonably doubt whether Numax would be able to have available its own radiometric range. The quotations for the equipment submitted by the protester were for the most part not fixed and were termed by the vendors, "budgetary." Further, although Numax refers often to its plan for the range, there is nothing in the record other than a rather cryptic "schedule," the May 19 letter stating that the "plan" to build the range would be implemented, and the quotations referred to above. Although the protester argues that it could have submitted additional information, it is clear from the record that this matter had been discussed with the preaward survey team prior to the June 23 meeting and a significant amount of information had already been provided in the protester's May 19 letter. Since a 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, Firm Reis GmbH, B-224544 et al., supra, we see nothing improper in the contracting officer's decision not to entertain Numax's additional submissions.

It is our view that based on the record before him concerning both Numax's prior performance and the lack of an available range the contracting officer's judgment that Numax was not a responsible prospective contractor was reasonable.

Finally, we see no merit in the protester's argument that the contracting officer's written finding, which mentions only the preaward survey as a basis for his nonresponsibility determination, shows that the contracting officer failed to consider any subsequent information. The contracting officer states that he in fact considered all of the information presented by Numax in its May 19 letter and at the June 23 meeting. We have no basis to doubt the contracting officer, especially in view of the detailed treatment of the later-submitted information included in the protest report. Also, it seems hardly reasonable to conclude that the contracting officer would ignore information provided in a meeting that the agency held for the express purpose of discussing responsibility matters. It seems to us that what happened was not that the Numax's

information was ignored but that the contracting officer found it unconvincing.

The protest is denied.

A handwritten signature in cursive script, appearing to read "James F. Hinchman".

James F. Hinchman
General Counsel