



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Haz-Tad, Inc.; Hazeltine Corporation;  
Tadiran, Ltd.  
**File:** B-232025  
**Date:** November 17, 1988

### DIGEST

1. Where step one technical proposal and step two bid are submitted by an entity that certifies itself as a corporation, are signed by the president of the corporation, indicate that corporation will be prime contractor, while two other corporations engaged in a joint venture will be subcontractors, and do not indicate that bidder is part of a joint venture, the General Accounting Office concludes, from the record as a whole, that bid was submitted by corporation and not by joint venture.

2. General Accounting Office does not consider whether a bidder qualifies as a manufacturer or regular dealer under the Walsh-Healey Act. By law, such matters are for determination by the contracting agency in the first instance, subject to review by the Secretary of Labor, if a large business is involved.

### DECISION

Haz-Tad, Inc., Hazeltine Corporation and Tadiran, Ltd. protest the rejection of a bid submitted by "Haz-Tad, Inc." under invitation for bids (IFB) No. DAAB07-88-B-J101, issued by the U. S. Army Communications-Electronics Command as the second step of a two-step procurement.

The contracting officer initially considered Haz-Tad, Inc. as the bidding party. After bid opening, as a result of post-bid opening assertions by the protesters that the bid was in fact submitted by a joint venture comprised of all three protesting corporations, the contracting officer rejected the bid as nonresponsive. Specifically, the contracting officer determined that the identity of the legal entity submitting the bid was uncertain, rendering the bid ambiguous. We agree with the contracting officer's initial position that Haz-Tad, Inc. submitted the bid, and sustain the protest on this ground.

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On July 1, 1987, the agency issued request for technical proposals (RFTP) No. DAAB07-87-R-J042 for production and delivery of digital group multiplexer (DGM) equipment.<sup>1/</sup> The solicitation was issued as a two-step procurement in accordance with Federal Acquisition Regulation (FAR) subpart 14.5 (FAC 84-12). In step one, offerors submitted technical proposals but did not submit prices or cost estimates; in step two, each firm that had submitted an acceptable technical proposal in step one was invited to submit a sealed bid for a contract.

Six offerors submitted step one proposals by October 16, 1987, the closing date for receipt of technical proposals. One of these technical proposals was submitted by "Haz-Tad, Inc."<sup>2/</sup> and was signed by the president of that corporation. In a cover letter to its technical proposal dated October 15, 1987, Haz-Tad, Inc., by its president, stated as follows:

"The enclosed proposal, submitted by Haz-Tad, Inc., is fully compliant with the requirement of the U.S. Army CECOM Solicitation Number DAAB07-87-R-J042.

"Hazeltine and Tadiran have executed a preincorporation and shareholders agreement and have subsequently formed a corporation pursuant thereto called Haz-Tad, Inc. This corporation has been carefully structured to meet the security requirements necessary to maintain critical control of all classified information under the contract and to receive the necessary U.S. Government security clearances.

. . . . .

"The Corporation will be the prime contractor and will award subcontracts to Hazeltine principally for system integration and Tadiran principally for modular assembly, capitalizing on the strengths of each party

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<sup>1/</sup> Such equipment is used as an element of the Army's TRI-TAC tactical communications system; the DGM equipment links field units with larger shelter-mounted units to create a secure communication network.

<sup>2/</sup> Haz-Tad, Inc. is a corporation formed and owned by Hazeltine Corporation and an Israeli corporation, Tadiran, Ltd. The nature of the relationship of these three firms to the solicitation is at issue here.

by having each perform those activities in which it has expertise.

. . . . .

"Please note that because of their major roles Tadiran Electronic Industries, Inc. and Hazeltine Corporation, are signing this proposal in their individual capacities. These signatures in the individual capacities represent each company's guarantee running to Haz-Tad, Inc. and the United States Government to perform their portion of the effort to be subcontracted by the Corporation to them and a secondary guarantee by Hazeltine to the United States Government for Tadiran's performance of its subcontracted efforts."

Clause K.8 of the RFTP required a certification regarding the type of business organization submitting the offer. Haz-Tad, Inc. identified itself as a New York corporation and did not check the "joint venture" block. Further, in the text of its proposal, Haz-Tad, Inc. explained that Hazeltine Corporation and Tadiran, Ltd. "have formed" a joint venture for the purpose of manufacturing DGM equipment and that "the joint venture corporation will be the prime contractor and will award subcontracts to Hazeltine and Tadiran for the technical and manufacturing portions of the work." While the proposal did state that the "joint venture" would have a board of directors comprised of five individuals from Hazeltine and Tadiran, and referred to other cooperative and structural arrangements among the three firms, the proposal also specifically stated that "the name of the joint venture is 'Haz-Tad, Inc.," and that the "DGM contract award will be taken in the name of and on the basis of the joint venture."

On March 18, 1988, the agency asked five offerors, including Haz-Tad, Inc., all of whose proposals had been determined technically acceptable, to submit bids for a firm fixed-priced contract no later than April 18. Haz-Tad, Inc. submitted the low bid, \$69,120,064, nearly half a million dollars less than the second low bid of \$69,618,646 submitted by Honeywell, Inc. In its step two bid, Haz-Tad, Inc., at clause K.4, again certified itself as a New York corporation and not as a joint venture. The name of the bidder was again "Haz-Tad, Inc.," signed by its president, the same individual who had signed the step one proposal. Further, Hazeltine and Tadiran did not sign the step two bid as subcontractors.

On May 11, 1988, Honeywell alleged to the contracting officer that the low bidder, Haz-Tad, Inc. did not qualify

as a regular dealer or manufacturer under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982). Honeywell argued that the bid should be rejected as nonresponsive because the step one proposal allegedly demonstrated that Haz-Tad, Inc. was not a regular dealer or manufacturer but intended to subcontract all manufacturing to Hazeltine and Tadiran. In accordance with FAR, § 22.608-3 (FAC 84-7), the contracting officer notified Haz-Tad, Inc. of the protest and invited both Haz-Tad, Inc. and Honeywell to submit evidence concerning the matter. On June 3, the protesters responded to the agency's inquiries by arguing that the bid was submitted on behalf of a joint venture among Hazeltine, Tadiran, and Haz-Tad, Inc., and that with the resources of two major corporations behind it, the joint venture possessed sufficient manufacturing capability to qualify as a manufacturer under the Walsh-Healey Act.<sup>3/</sup>

After reviewing various submissions and rebuttals among the firms, the contracting officer on July 6, 1988, rendered a decision rejecting the Haz-Tad, Inc. bid as nonresponsive because of his alleged inability to determine the identity of the real party in interest in Haz-Tad, Inc.'s bid. The contracting officer found it unclear whether the entity that submitted the bid was the corporation, Haz-Tad, Inc., or whether the corporation was submitting a bid as part of a joint venture which included Hazeltine and Tadiran. In the former case, the contracting officer also determined that Haz-Tad, Inc. could not qualify as a regular dealer or manufacturer under the Walsh-Healey Act; in the latter, he also determined that a joint venture involving a foreign corporation such as Tadiran would not meet the solicitation security requirements. This protest followed the rejection of Haz-Tad Inc.'s bid as nonresponsive.

The test for responsiveness is whether a bid as submitted represents an unequivocal offer to provide the requested supplies or services at a firm-fixed price. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, the bid is responsive. Coastal Industries, Inc., B-230226.2, June 7, 1988, 88-1 CPD ¶ 538. The determination as to

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<sup>3/</sup> Alternatively, the protesters now argue that the bid was submitted by Haz-Tad, Inc., the corporation and sole legal entity, and request that the contract be awarded on that basis.

whether a bid is responsive must be based solely on the bid documents themselves as they appear at the time of bid opening. See Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Further, an award to an entity other than that named in the bid constitutes an improper substitution of bidders. Griffin Construction Co., B-185790, July 9, 1976, 76-2 CPD ¶ 26. Additionally, in a two-step procurement, the purpose of step two is to solicit firm bids only from the specific firms which have submitted acceptable technical proposals during the first step. G&C Enterprises, Inc., B-186748, Oct. 28, 1976, 76-2 CPD ¶ 367, aff'd on reconsideration, Mar. 2, 1977, 77-1 CPD ¶ 155.

The agency generally concedes that on its face, the bid was submitted by Haz-Tad, Inc. and not by a joint venture. Indeed, Honeywell, the next in line for award, refers to the evidence as "overwhelming" that the bid was submitted only by Haz-Tad, Inc., the corporation. We agree.

The agency, in rejecting Haz-Tad, Inc.'s bid, apparently was persuaded by post-bid opening submissions by counsel for the protesters in which it was claimed that the bid was submitted by Hazeltine, Tadiran, and Haz-Tad, Inc. as a joint venture. Much of these submissions by the protesters to the contracting officer relied on evidence outside the bid: (1) that there was a manifestation of intent to form a joint venture in the preincorporation and shareholders agreements that formed Haz-Tad, Inc.; (2) that letters and correspondence between Hazeltine and Tadiran prior to bid opening show an intent to establish a joint venture; (3) that there was a memorandum to the agency's security branch management referring to a joint venture; and (4) that there is a structural pooling of resources among the firms. However, the record shows that there is no formal written joint venture agreement in existence and that the existence of such an agreement was alleged to have been based on oral understandings, written communications among the protesters, and by some references to "joint venture" in the step one proposal. We reject these arguments.

We think that the bid documents (step one and step two) establish the identity of the bidder as Haz-Tad, Inc., the corporation, which was formed as a result of a joint venture between Hazeltine and Tadiran for the purpose of bidding on this solicitation. We also think that the contracting officer should not have relied upon post-bid opening explanations to reject the bid as nonresponsive since the bidder's identity was clear on the face of the bid documents. Based on the record before us, Haz-Tad, Inc. appears to be a duly formed corporation, willing to perform in accordance with the terms of the solicitation.

As stated above, the technical proposal submitted on October 15 was submitted by Haz-Tad, Inc. and signed by its president. The cover letter to the technical proposal advised the agency that Hazeltine and Tadiran had executed a preincorporation and shareholders agreement and had formed a corporation called Haz-Tad, Inc. The letter specifically explained that the corporation was formed to avoid the problems of obtaining a secret facility clearance for Tadiran and advised that Haz-Tad, Inc. would be the prime contractor and would award subcontracts to Hazeltine for system integration and to Tadiran for modular assembly. Representatives of Hazeltine and Tadiran signed the proposal as a "guarantee running to Haz-Tad, Inc. and the United States Government to perform their portion of the effort."

The technical proposal contained a 12-page "Description of Joint Venture" which (1) stated that Hazeltine and Tadiran had agreed to form a joint venture, (2) described the "joint venture corporation" as the prime contractor, with Hazeltine and Tadiran as subcontractors, (3) stated that "the name of the joint venture is Haz-Tad, Inc.," and that a contract would be taken in the name of and on the basis of the joint venture, and (4) proposed that the DGM contract be signed by authorized signatories of both companies, to signify their acknowledgment and acceptance of their responsibilities for the terms and conditions of the contract. The Haz-Tad, Inc. second step bid contained the same signature and certification as its technical proposal, with the additional identification of Hazeltine as the bidder's parent company and majority stockholder.

We therefore believe that the technical proposal described a joint venture between Hazeltine and Tadiran, with the corporation Haz-Tad, Inc. created as a vehicle to implement the agreement between the two corporations. Neither the step one proposal nor the step two bid contained evidence that the protester had entered into an agreement with Hazeltine and Tadiran to be part of a joint venture. We believe that based upon the bid as submitted, the identity of the bidder was established as Haz-Tad, Inc., a corporation owned and controlled by Hazeltine and Tadiran. We therefore sustain the protest on this ground.

Because he considered the bid to be ambiguous, the contracting officer did not address Honeywell's other contention. Honeywell argued that Haz-Tad, Inc.'s bid was nonresponsive because Haz-Tad, Inc.'s proposal to subcontract the work to Hazeltine and Tadiran precluded the firm from qualifying as a manufacturer or regular dealer under the Walsh-Healey

Act.4/ Where, as here, a bidder properly certifies compliance with the Walsh-Healey Act, its bid is responsive in that respect. Antenna Products Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297. Under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(9) (1988), our Office does not consider the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act; the responsibility for applying the "manufacturer or regular dealer" criteria of the Walsh-Healey Act to a large business bidder is vested in the contracting officer subject to final review by the Department of Labor and not GAO. Products Engineering Corp., 55 Comp. Gen. 1204 (1976), 76-1 CPD ¶ 408. In this regard, the protesters state that they have reached agreement with the contracting officer that the Walsh-Healey eligibility question will be referred to the Department of Labor if we find, as we do, that Haz-Tad, Inc., the corporation, is the bidder. Thus, we think this entire matter, including Honeywell's assertions, should be so referred to the Department of Labor.

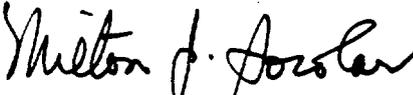
Accordingly, by separate letter of today, we are recommending to the Secretary of the Army that the contracting officer forward the determination and record to the Department of Labor for a determination of Haz-Tad, Inc.'s status as a regular dealer or manufacturer. If that determination is affirmative, and if otherwise appropriate, the contract should be awarded to Haz-Tad, Inc.

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4/ Honeywell also asserts that Haz-Tad, Inc.'s bid is nonresponsive because it did not promise to obtain competition in subcontracting as allegedly required by FAR, § 52.244-5, incorporated by reference in the solicitation. This clause requires selection of subcontractors "on a competitive basis to the maximum practical extent consistent with the objective and requirements of the contract." However, this clause is applicable to negotiated procurements and only for other than firm fixed-priced contracts. Id. Consequently, it is apparent that this clause was inadvertently referenced in the solicitation and may be waived by the agency. Also, contrary to the further assertions of Honeywell, the solicitation only required the submission of a plan for subcontracting with small and disadvantaged bidders by the successful bidder if requested by the contracting officer; compliance with this requirement is clearly a matter of responsibility, not responsiveness. Devcon Systems Corp., B-197935, July 18, 1980, 80-2 CPD ¶ 46.

A protester may be awarded the reasonable costs of filing and pursuing its protest, including attorneys' fees, where our Office determines that a solicitation, proposed award, or award does not comply with a statute or regulation. 4 C.F.R. § 21.6(d)(1) (1988). For the reasons that follow, we do not think award of protest costs is appropriate here. As noted above, the contracting officer initially considered Haz-Tad, Inc. as the bidding party. Moreover, the bid documents (step one and step two) firmly established the identity of the bidder as Haz-Tad, Inc., the corporation. The ambiguity as to the identity of the bidding party first arose when the protesters, in post-bid opening submissions, maintained that the bid was submitted on behalf of a joint venture among Hazeltine, Tadiran, and Haz-Tad, Inc. As a result, the contracting officer concluded that the identity of the bidding entity was uncertain, and he then rejected the bid on that basis. Thus, the record shows that the protesters' actions contributed to (and even caused) the contracting officer's uncertainty concerning the identity of the bidding entity. We conclude that under these circumstances award of protest costs is not warranted.

The protest is sustained.

*for*   
Comptroller General  
of the United States