



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Krug International

File: B-232291.2

Date: February 6, 1989

DIGEST

Protest of an award to an offeror under investigation for alleged procurement-related unethical conduct, on the basis that an affirmative determination of the awardee's responsibility could not reasonably have been made in good faith, is denied where awardee had not been suspended or debarred and where pursuant to department-wide policy guidelines establishing special preaward requirements for such contractors, awardee conducted an internal investigation and certified that improper conduct had not occurred with respect to this procurement, which information was reviewed and found acceptable by procuring officials prior to award.

DECISION

Krug International protests the award of a contract to Unisys Corporation under request for proposals No. DABT60-88-R-0044, issued by the Department of the Army for an Instrumentation System to be used for the testing of prototype weapons at the Advanced Combat Rifle (ACR) Range at Fort Benning, Georgia. Krug challenges the award to Unisys on the basis that the affirmative determination of Unisys' responsibility was made in bad faith because the contracting officer knew or should have known, prior to award, that various investigations were underway concerning Unisys' lack of integrity and ethics. Had this information been reviewed, Krug argues, the firm should have been found nonresponsible. We deny the protest.

The solicitation, issued April 13, 1988, requested proposals to design, develop, test, evaluate and install a computer controlled test system for the ACR field test on a cost-plus-incentive fee basis. The Army received three proposals and found those submitted by Krug and Unisys to be in the

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competitive range. After conducting discussions and evaluating best and final offers, the Army made award to Unisys on August 10. This protest followed.

Krug does not contend that Unisys is not capable of satisfactorily performing this contract. The protester's sole assertion is that the contracting officer could not in good faith have found Unisys responsible because Unisys is currently the subject of several on-going federal investigations into various government contract-related improprieties. According to Krug, Unisys is one of several government contractors which are the subjects of an investigation of defense procurement practices known as Operation Ill Wind. In addition, Krug has provided this Office with a copy of Unisys' quarterly "10-Q" report to the Securities and Exchange Commission for the quarter ending June 30, 1988, wherein Unisys indicated that the company is the subject of three other federal investigations into alleged government contract improprieties. One involves allegations of labor mischarging on a Sperry^{1/} contract with the Army at Fort Huachuca, Arizona, during 1985-1986. A second investigation in Montgomery, Alabama, concerns the administration of a contract with the Air Force; a third involves an inquiry into the pricing practices by a now divested former Sperry unit in Albuquerque, New Mexico.

Under these circumstances, the protester argues that award to Unisys is prohibited by the Federal Acquisition Regulation (FAR), § 9.104-1(d), since the firm does not possess a satisfactory record of integrity and business ethics required for a prospective contractor to be determined responsible. Either the failure to consider this information, Krug maintains, or the making of an affirmative finding of responsibility with knowledge of it constitutes bad faith.

The record shows that the contracting officer assured himself prior to award that Unisys had not been suspended or debarred, and determined that Unisys met each of the standards listed in FAR § 9.104-1 governing responsibility. In addition, he took into account Department of Defense (DOD) policy guidelines adopted as a result of the on-going Ill Wind investigation to protect the interests of the government and permit the resumption of awards. The Army's implementation of those policy guidelines, contained in a series of Acquisition Letters, requires contracting officers to obtain from certain prospective contractors, including

^{1/} In 1986 the Sperry Corporation merged with the Burroughs Corporation to form Unisys Corporation.

Unisys, a Certificate of Contractor Business Ethics and Integrity and to include in contracts with those contractors a clause permitting recapture of profits for improper or illegal activities. The contracting officer obtained the required certification from Unisys and had it reviewed for legal sufficiency. Unisys did not execute this certificate until its own internal investigation, which included an examination of its files and personal interviews, indicated that none of the improper conduct described in the certificate had occurred in conjunction with this procurement.

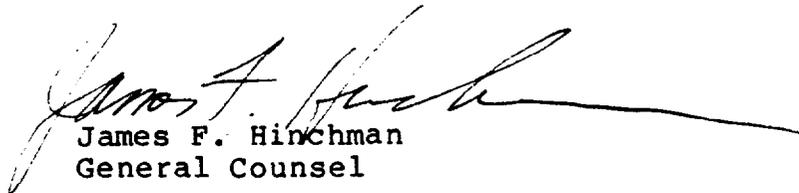
A contracting officer's responsibility determination must be based on fact and reached in good faith. When a protester contends that contracting officials were motivated by bad faith, we require it to submit evidence thereof since contracting officials are presumed to act in good faith. Under the circumstances here, we are unable to conclude that contracting officials acted other than in good faith.

Prior to award Unisys not only advised the Army of the details of the company's internal investigation which preceded its execution of the required certificate for this specific procurement but also provided an account, supported by internal memoranda, of the other steps it was taking to avoid unethical conduct. These steps included the institution of a comprehensive ethics awareness program providing special training of all employees as to their ethical obligations, the imposition of internal reviews to oversee and enforce the company's ethical code, the establishment of a corporate ombudsman/hotline for the reporting of ethics violations and the tightening of corporate controls on the use of consultants.

In addition, we note that the Under Secretary of Defense for Acquisition had promulgated special department-wide guidelines for dealing with certain contractors under investigation, such as Unisys, who are in line for contract awards. Under these DOD guidelines effective at the time the contracting officer made his award decision Unisys was required as a condition of award to describe the steps it took to determine that it had not engaged in unethical conduct with respect to that procurement and to contractually agree to the recapture by the government of the profits anticipated under the contract should it later be found that Unisys had engaged in illegal or improper activity relative to that contract. Here, the contracting agency obtained the required information from Unisys, and reviewed and found it legally sufficient prior to award.

In light of the contracting officer's adherence to the guidelines promulgated by DOD, we see no basis to conclude that he acted in bad faith in finding Unisys to be responsible. Moreover, while the protester asserts that in view of the "integrity violations" Unisys "should have been suspended from receiving any contracts while the investigations were ongoing," this concerns a matter to be resolved at a level higher than the contracting officer. Whether past conduct ultimately will lead to the suspension or debarment of Unisys is a matter to be resolved by those officials. The protester has presented absolutely no evidence that as of the time of award DOD's failure to suspend or debar Unisys was the result of bad faith on the part of any higher-level Army or DOD official.

Accordingly, the protest is denied.



James F. Hinchman
General Counsel