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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Israel Aircraft Industries Ltd.

File: B-242552

Date: May 10, 1991

Janice M. Bellucci, Esq., for the protester.
Matthew S. Simchak, Esq., Ropes & Gray, for Orbital Sciences Corporation, an interested party.
Judith L. Richardson, Esq., and John Pettit, Esq., Department of the Air Force, for the agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency reasonably determined that offeror was not a responsible prospective contractor where contracting officer concluded that offeror may not be able to meet proposed delivery schedule since it had been denied import license necessary to perform in the manner which it proposed. It was incumbent upon the offeror to obtain the import license necessary to perform the contract in the manner proposed and the contracting agency was not obligated to obtain the import license for the firm or to inform the firm that it needed a license.

DECISION

Israel Aircraft Industries Ltd. protests the rejection of its proposal under request for proposals (RFP) No. F04701-90-R-0001, issued by the Air Force for launch services for the Air Force's Space Test Program. The Air Force excluded Israel Aircraft's proposal from the competitive range when the Bureau of Alcohol, Tobacco and Firearms (BATF) denied the firm a license to import its launch vehicles. Israel Aircraft argues that the exclusion was unreasonable.

We deny the protest.

This acquisition is part of the Air Force's Small Launch Vehicle program which requires the capability to launch up to 40 small payloads for the United States and foreign governments. The successful contractor will furnish all supplies, facilities, personnel and services to produce, test, integrate and launch the vehicles and insert the payloads into orbit.

The solicitation, which the Air Force released on June 27, 1990, did not specifically require that offerors proposing to use foreign launch vehicles have an import license.

The Air Force received proposals on August 24, including one from Israel Aircraft, which proposed to use a launch vehicle manufactured in Israel. The Air Force included Israel Aircraft in the competitive range and held discussions with the firm. On October 1, Air Force contracting officials became aware of a September 5, "National Space Policy Directive" released by the White House. That directive, which was developed by the National Space Council, stated that "U.S. government satellites will be launched on U.S. manufactured launch vehicles unless specifically exempted by the President."

On October 29, during a preaward survey, the Air Force asked Israel Aircraft whether it had an import license that would allow it to perform the contract. On November 5, the firm responded that BATF had issued an import license to TRW Space and Defense which planned, but later declined, to propose Israel Aircraft's launch vehicle for a National Aeronautics and Space Administration acquisition.

In a December 4 letter, the Air Force asked Israel Aircraft to "provide evidence that you have the appropriate import/export licenses required to perform the proposed effort." Israel Aircraft provided to the Air Force the BATF import license issued to TRW for Israel Aircraft's launch vehicles. Upon examining the license, agency officials discovered that it had expired in June 1990 and, after further investigation, they determined that BATF import licenses of this type generally expire after 6 months.1/

On December 11, the Air Force again asked Israel Aircraft about import licenses and when the firm stated that they thought that the Air Force would take care of the matter, agency officials explained that Israel Aircraft was responsible for all required permits and licenses. Israel Aircraft indicated that they would apply for an import license and, in fact, the firm applied to the BATF for a license that same day.

By letter dated December 20, BATF denied the firm's application for an import license for its small launch vehicle. That letter stated that in enforcing the BATF's regulations,

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1/ Under BATF regulations, Importation of Arms, Ammunition and Implements of War, 27 C.F.R. § 47.43(a) (1990), such import licenses are valid for 6 months from their issuance date unless a different period is stated on the license.

27 C.F.R. Part 47, BATF is guided by the Departments of State and Defense on matters affecting world peace and the external security and foreign policy of the United States. BAFT also stated that it had been advised by the above agencies that importation of the Israel Aircraft launch vehicle was not in the interests of foreign policy. The Air Force was informed of the license denial on December 20. Israel Aircraft appealed and BATF affirmed the denial on February 12, 1991.

On December 21, 1990, the contracting officer informed Israel Aircraft that she had excluded the firm from the competitive range. In a letter of that date, the contracting officer explained that, pursuant to Federal Acquisition Regulation § 15.609(b), she determined that Israel Aircraft's proposal "has no reasonable chance of being selected for contract award and will no longer be considered for selection." The letter listed two factors on which the determination was based. First, the letter referred to the National Space Policy Directive which requires United States government agencies to launch government satellites on United States manufactured launch vehicles. Second, the letter stated that it had recently come to the contracting officer's attention that "the Bureau of Alcohol, Tobacco and Firearms is denying an import license to [Israel Aircraft]. Without an import license, it is clear to me that your firm cannot reasonably perform the contract requirements." The letter also advised the firm that a revision of its proposal would not be considered.

Israel Aircraft protested to this Office on January 8, 1991, arguing that the National Space Policy Directive did not apply to the Air Force small launch vehicle acquisition and that its proposal was wrongfully excluded from the competitive range based on evaluation factors not listed in the solicitation. Also, according to Israel Aircraft, the Air Force failed to conduct meaningful discussions with the firm regarding its proposal and should have amended or canceled and reissued the RFP to reflect the agency's changed requirements.

The Air Force reported that, although it had characterized the elimination of Israel Aircraft from the competition as an exclusion from the competitive range, the basis for the contracting officer's action was the BATF's denial of an import license for the firm's launch vehicles, which relates to the firm's ability to perform and is a matter of responsibility. According to the agency, by excluding Israel Aircraft from the competition, the contracting officer had in fact determined that the firm was nonresponsible. The agency states that, even though an import license was not required by the solicitation, the contracting officer had determined that there was a high probability that Israel Aircraft would not be able to obtain a license and, under the circumstances, since the firm would not be able to perform the contract, she had

reasonably found it to be nonresponsible and eliminated it from the competition. Finally, the Air Force explained that because of the lack of guidance as to the applicability of the National Space Policy Directive, it does not rely on that Directive to support its exclusion of Israel Aircraft from the competition.

Since the agency no longer relies on the National Space Policy Directive as a reason to reject the firm's proposal, Israel Aircraft has withdrawn its arguments relating to the Directive. Israel Aircraft still argues, however, that the Air Force's rejection of its proposal was unreasonable. First, the protester maintains that "responsibility is not at issue in this case" since the agency "raised the issue of responsibility in an untimely manner," and has not yet made a written determination regarding Israel Aircraft's responsibility.

Alternatively, the protester argues that the determination of nonresponsibility was unreasonable because the contracting officer did not take into account the fact that the firm would not need the import license until 20 months after starting performance, when it proposed to bring its launch vehicles into this country. Further, the protester argues that the contracting officer did not consider that an import license granted by BATF at this time would not be valid by the time the firm imports its launch vehicles into this country because the licenses are valid only 6 months. Also, according to the protester, although the Air Force argues that the firm's ability to obtain a license in December 1990 would provide some assurance of its ability to obtain a license when it is required, this argument ignores the fact that BATF granted the firm an import license in December 1989.

We first address the protester's contention that responsibility is not an issue in this protest. Responsibility relates to a potential contractor's apparent ability and capacity to perform all contract requirements and it may be determined at any time prior to award, based on any information received by the agency up to that time. Gardner Zemke Co., B-238334, Apr. 5, 1990, 90-1 CPD ¶ 372. This includes whether the offeror lacks or will have difficulty obtaining a specific permit or license without which performance will not be possible or will likely be delayed. Recyc Sys., Inc., B-216772, Aug. [illegible] 1985, 85-2 CPD ¶ 216.

Although not initially designated as such, the contracting officer's determination that Israel Aircraft could not perform the contract because it does not have an import license for its launch vehicle is a matter of responsibility since it relates to the firm's apparent capability to perform if it is awarded the contract and does not concern the

solicitation evaluation factors. See Moog Inc., B-237749, Mar. 19, 1990, 90-1 CPD ¶ 306; Dynamic Energy Corp., B-235761, Oct. 6, 1989, 89-2 CPD ¶ 325. The Air Force's initial failure to correctly label the rejection as a nonresponsibility determination, and the lack of a written determination of nonresponsibility, does not change the substance of the rejection, which related to the firm's ability to perform, a matter of responsibility. See Recyc Sys., Inc., B-216772, supra. Moreover, the Air Force's report clearly stated that the agency had determined the firm to be nonresponsible and set forth the reasons for that determination. Israel Aircraft was able to respond to the agency's position at the informal conference on the protest and in its written comments on the agency's report and the conference. Under the circumstances, we do not see how the protester was prejudiced by the agency's "untimely" assertion of nonresponsibility as the basis for rejection. See Hardie-Tynes Mfg. Co.--Request for Recon., B-237938.2, June 25, 1990, 90-1 CPD ¶ 587.

With respect to the merits of the nonresponsibility determination, it is a matter of business judgment, which is vested in the discretion of the contracting officer and we 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. Intera Technologies, Inc., B-228467, Feb. 3, 1988, 88-1 CPD ¶ 104. To be reasonable (Israel Aircraft has not alleged bad faith), a discretionary decision must reflect a reasoned judgment based on the investigation and evaluation of the evidence available at the time the decision was made. Id.

Here, when she excluded Israel Aircraft from the competitive range, the contracting officer knew that BATF, the licensing authority, had denied that firm's application for a license to import its launch vehicles. The contracting officer also knew that the State Department had recommended that the application be denied. In a letter to BATF, the State Department stated that it "remains firm in its policy of not contributing to the development of ballistic missiles," and "we do not consider it appropriate to grant licenses for activities which would further the ongoing development of the launch vehicle proposed by [Israel Aircraft]."

The contracting officer concluded, and the protester does not dispute, that to perform the contract the way it proposed, using imported launch vehicles, Israel Aircraft would need an import license from BATF. Where the lack of a license or permit could preclude performance, a contracting officer legitimately may inquire into an offeror's ability to obtain that license or permit in determining the offeror's responsibility. Intera Technologies, Inc., B-228467, supra. Further, the Air Force was entitled to rely on BATF's

representations as the agency charged with responsibility for import licenses. Id. We do not believe that this conclusion is dependent on the solicitation containing a provision pertaining to the license requirement. If a license or permit happens to be a prerequisite to performance of the contract requirements, then the offeror's inability to obtain that license or permit is a valid basis for a nonresponsibility determination. See Nor-Cal Sec., B-208296, Aug. 3, 1982, 82-2 CPD ¶ 107.

Although, as the protester maintains, an import license would be valid only 6 months and, if issued now, would no longer be valid 20 months after award--at the time Israel Aircraft proposed to import its launch vehicles--we think it was reasonable for the contracting officer, in determining Israel Aircraft nonresponsible, to consider the firm's present inability to obtain the required license. In fact, given the State Department's opposition to BATF's issuance of a license to Israel Aircraft, we think it would have been unreasonable for the Air Force to ignore the firm's present inability to obtain a license. It is possible that at some later date the BATF may issue a license to Israel Aircraft; nonetheless, we do not think the Air Force was required to gamble that the firm would be able to perform its contract in a timely manner, or at all, in the event that it could not obtain an import license. See Pathlab, P.A., B-235380, Aug. 4, 1989, 89-2 CPD ¶ 108. In our view, the Air Force's inquiry into Israel Aircraft's ability to obtain an import license was appropriate, and on the basis of the information obtained, we cannot contest the reasonableness of the contracting officer's conclusion that there was a significant risk that Israel Aircraft might not be able to perform the contract or the reasonableness of the resultant negative responsibility determination.2/

2/ In addition to arguing that the agency's nonresponsibility determination was "untimely," the protester, in our view, inconsistently maintains that the nonresponsibility determination was "premature." It states that if given the opportunity, it would submit "additional information" to demonstrate its ability to obtain the required license. As explained above, the BATF affirmed its denial of the firm's license application on February 12. Moreover, the protester has not explained what additional information it would have submitted to demonstrate its ability to obtain the license in time to perform the contract. There is no requirement that the agency wait until the time of award to determine responsibility; rather, responsibility can be determined at any time prior to award. Gardner Zemke Co., B-238334, supra.

Finally, since the Air Force rejected Israel Aircraft's proposal based on the firm's lack of responsibility, the agency was not obligated to discuss the matter with Israel Aircraft. Intera Technologies, Inc., B-228467, supra. Since Israel Aircraft proposed to perform the contract using a launch vehicle imported into this country, and such a launch vehicle cannot be imported without a license from BATF, it was incumbent upon the firm to obtain the import license. The Air Force was not obligated to obtain the import license for Israel Aircraft or to inform the firm, either when it issued the solicitation, or at any other time, that it would need an import license. Intera Technologies, Inc., B-228467, supra. Moreover, our review of the record indicates that the agency raised the matter of an import license with Israel Aircraft on at least three different occasions before rejecting the firm's proposal.3/

The protest is denied.

for James F. Hinchman
General Counsel

3/ Although Israel Aircraft argues that the Air Force should be required to amend or cancel and reissue the solicitation to reflect its actual needs, the protester's proposal was rejected based on the firm's lack of responsibility and not on the failure of its proposal to meet the requirements set forth in the solicitation. Under the circumstances, and since a determination of responsibility is not limited to matters set forth in a solicitation, see Moog Inc., B-237749, supra, there is no reason to require the agency to change the solicitation requirements.