



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Engineered Fabrics Corporation
File: B-244566
Date: October 29, 1991

Terry L. Lindsey for the protester,
Milton D. Watkins and Rilla M. Maritt, Department of the Air
Force, for the agency,
Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest of negative responsibility determination need not be filed within 10 working days of being notified of a negative pre-award survey, on which the nonresponsibility determination was based, in order to be considered timely under the Bid Protest Regulations, since the contracting officer is not bound by the pre-award survey in making his responsibility determination.
2. Contracting officer reasonably based the nonresponsibility determination upon the protester's recent delinquent contract performance, notwithstanding the protester's contention that the delinquencies were excusable.
3. The General Accounting Office will not review a procuring agency's affirmative determination of responsibility absent a showing of possible fraud, bad faith, or the misapplication of definitive responsibility criteria.

DECISION

Engineered Fabrics Corporation (EFC), a large business concern, protests the award of a contract to American Fuel Cell and Coated Fabrics Company (Amfuel) under request for proposals (RFP) No. F34601-91-R-58814, issued by the Department of the Air Force, Tinker Air Force Base, Oklahoma, for 72 fuel cells. EFC contends that the Air Force improperly determined EFC to be nonresponsible. EFC also challenges the Air Force's affirmative responsibility determination of Amfuel.

We deny the protest in part and dismiss it in part.

On the March 4, 1991, closing date for the receipt of proposals, the Air Force received proposals from EFC and Amfuel. EFC submitted the lowest-priced offer and was apparently in line for award. On March 14, the Air Force initiated a pre-award survey of EFC. On March 21, in connection with the survey, the Air Force requested EFC to furnish financial data and additional information regarding the status of its current contracts. On April 17, the Air Force's pre-award survey of EFC recommended no award to EFC based upon an unsatisfactory performance history. By letter dated June 3, the Air Force rejected EFC as nonresponsive. On June 4, the Air Force awarded the contract to Amfuel based upon a positive pre-award survey of the firm. On June 24, EFC filed this protest against the Air Force's nonresponsibility determination.

The Air Force initially argues that the protest is untimely because the protester indicates it unofficially learned of the negative pre-award survey on April 26, yet it did not protest until June 24. However, a negative pre-award survey is but one factor for the contracting officer to consider along with other information in determining the responsibility of a contractor. The contracting officer is not bound to follow the pre-award survey in making a responsibility determination and a pre-award survey generally is not intended to be used as a basis for challenging a nonresponsibility determination prior to award. See Camel Mfg. Co.--Recon., B-218473.4, Sept. 24, 1985, 85-2 CPD ¶ 327; Engineering and Prof. Servs., B-219657; B-219657.2, Dec. 3, 1985, 85-2 CPD ¶ 621. Therefore, we find EFC's learning of the negative pre-award survey on April 26 did not give rise to a protest. Since EFC received notice of the contracting officer's nonresponsibility determination on June 10 and protested to our Office 10 working days thereafter, we consider the protest to be timely filed. See Elliot Co., B-224887.3, May 4, 1987, 87-1 CPD ¶ 465.

EFC contends that the nonresponsibility determination was unreasonable because the Air Force did not consider EFC's corrective actions with regard to its delinquent contracts and because the information in the pre-award survey was not current. EFC maintains that the Air Force was in part responsible for the delinquent delivery under certain contracts due to the Air Force's acceleration of delivery under other EFC contracts, which it agreed to perform in return for modification of the delivery schedules under these contracts, and the Air Force failed to consider those factors.

Responsibility determinations are essentially a matter of business judgment and encompass a wide degree of discretion in the contracting officer. Martin Widerker, Eng'r, B-219872 et al., Nov. 20, 1985, 85-2 CPD ¶ 571. In reviewing a nonresponsibility determination based upon prior performance, we will consider only whether the determination was reasonable based on the available information. MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431.

With regard to a prospective contractor's prior performance, the Federal Acquisition Regulation (FAR) provides that in order to be found responsible the firm must have a satisfactory performance record, FAR § 9.104-1(c), and that a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. FAR § 9.104-3(c). A nonresponsibility determination may be based upon the contracting agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default and the contractor disputes the agency's interpretation of the facts. MCI Constructors, Inc., supra.

Based upon the evidence contained in the record, we find that the Air Force's nonresponsibility determination of EFC reasonably was based upon EFC's delinquent delivery record. The survey team found that, as of March 31, EFC had 7 delinquent Air Force contracts out of 26, of which all were contractor caused, and that in the last 12 months EFC also was delinquent on 4 of 18 completed Air Force contracts.

EFC does not dispute these figures but claims that its proposed corrective actions on the delinquent contracts and certain contract modifications were not considered in the pre-award survey. EFC has not identified the proposed corrective actions other than proposed recovery dates on the delinquent contracts. In any case, the record indicates that the contracting officer contacted the pre-award officials and confirmed that these matters were considered and that there was no documentation to justify reversing the negative pre-award survey.

In its comments on the agency report on the protest, EFC submitted information to indicate the delinquent deliveries, upon which the nonresponsibility determination was based, were caused by an acceleration of deliveries under other contracts by agreement with the Air Force. None of the allegedly accelerated contracts were the identified delinquent contracts. Since EFC made no such claim in its input to the pre-award survey, we do not find this claim

negates the reasonableness of the contracting officer's nonresponsibility determination.

EFC also challenges the delivery record of Amfuel and asserts that Amfuel should have been found nonresponsive. The Air Force, however, determined that Amfuel was responsible. Where, as here, the contracting officer has affirmatively determined a firm to be responsible, we will not review the responsibility determination absent a showing of possible fraud or bad faith or that definitive responsibility criteria have been misapplied. Louisville Cooler Mfg. Co., B-243546, June 13, 1991, 91-1 CPD ¶ 568. Since EFC has not alleged any of these exceptions, we will not consider the merits of this aspect of its protest.

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel