



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Martech USA, Inc.

File: B-244714

Date: November 12, 1991

Andrew L. Ehrlich, Esq., O'Connor & Hannan, for the protester.
Paul M. Fisher, Esq., Department of the Navy, for the agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably found the protester nonresponsible on solicitation for an indefinite-quantity construction contract where the firm has no current contract of this type, the firm's past experience did not establish that it could successfully perform a contract of this type and magnitude with its own resources, and the firm's other contract work is not readily transferable; notwithstanding the fact that, after the negative preaward survey, the protester submitted letters from subcontractors indicating a willingness to work for the protester if the protester received award, the agency reasonably found this arrangement insufficient since the protester expressly retained the right to perform the entire contract with its own resources.

DECISION

Martech USA, Inc. protests the rejection of its bid under invitation for bids (IFB) No. N62470-90-B-7457, issued by the Department of the Navy for the purposes of awarding an indefinite-quantity construction contract covering the maintenance, repair, and alteration of various buildings at the Guantanamo Bay Naval Base, Cuba. Martech's bid was rejected after it had been determined to be a nonresponsible bidder. Martech contends that the determination lacked a reasonable basis because it was based on inaccurate and incomplete information.

We deny the protest.

Bidders were required to submit prices on all the line items set forth on the 65 IFB pages containing the agency's estimated requirements. These requirements included floor finishing, fencing, concrete work, masonry work, carpentry, metal work, ceramic tile work, wiring and plumbing.

Five bids were received by the April 10, 1991, bid opening date. The agency subsequently rejected the lowest-priced bid as nonresponsive. The agency advised Martech, the second low bidder, that preparatory to a possible award, personnel from the Defense Contract Administration Services Management Area (DCASMA), New Orleans, would visit Martech's facilities to conduct a preaward survey as part of the process of determining whether Martech had the capability to perform the contract. The contracting officer informed Martech that the primary concern would be Martech's management capability to direct technical and production efforts toward timely and effective contract completion and that any subcontracting effort proposed would also be reviewed to determine Martech's capability. Martech was requested to provide DCASMA, prior to its visit, with an organization chart for the company, certain information regarding the bidder's physical plant facilities, a list of the production and major handling equipment required for contract performance, a list of all major materials and purchased parts (and their sources and delivery dates) required for contract performance, a list of Martech's key personnel (with resumes), and the total number of persons Martech employed in four specified construction trades needed to perform this contract. Martech was also requested to provide the names of three commercial customers as references, a list of all current government contracts and any government contracts performed during the past year, and a list of current and projected commercial and government construction contracts that would utilize the same equipment and/or personnel that Martech would require to perform this contract.

DCASMA determined, based on its site visit and the information submitted by Martech, that Martech did not have "the building renovation/repair or facilities maintenance experience required of the proposed contract," having never had a facilities maintenance/repair contract, and that except for repairs incident to asbestos abatement projects, it was not involved in building construction/renovation. Instead, Martech's business was primarily concerned with providing marine and environmental services. DCASMA further determined that, although Martech has a general idea as to how they would approach the project, the bidder had not developed a plan for performance. DCASMA reported that the qualifications of the skilled personnel to be assigned to the contract were questionable and that a breakdown of personnel by trades was not made available. Further, DCASMA

found that Martech did not have a material control system or a production control system that was applicable to the work to be done under this contract. No subcontractors had been proposed by Martech that might alleviate any of these shortcomings. Based on its survey of Martech's capability, DCASMA determined Martech to be deficient in the technical, production, and quality areas and recommended that no award be made to Martech.

The contract specialist subsequently offered Martech an additional opportunity to submit new information that might result in its being found responsible. After the additional information submitted by Martech was determined to be inadequate to establish that Martech by itself had adequate experience in performing an indefinite-quantity construction contract, the agency requested that Martech submit a "definite subcontractor commitment, jobs performed & name of person to be contacted"; the name (along with the person's pertinent experience) of a superintendent to be assigned to the contract if it were awarded to Martech; and work flow procedures that would be used to accomplish the multitude of projects that would be simultaneously performed under any resultant contract. In response, Martech submitted both a "clarification" of its previous submittal and statements from various subcontractors showing their willingness to provide equipment and services should Martech receive the award. In its submission, Martech also stated that "A decision as to what portion, if any, of the work on this project will be subcontracted has not and can not be made" until after the award and a subsequent determination of the scope and magnitude of the contract. Martech advised that the list of subcontractors that Martech might use would not be limited to those whose commitments Martech submitted to the agency. Martech also stated "that [while] we may use subcontractors because of immediate availability or savings in time or money, Martech is fully capable of completing all of the work on this project with our own forces."

The contract specialist was not convinced by the additional Martech submissions that the recommendation against award to Martech because Martech's in-house capabilities were inadequate was incorrect. The contract specialist was concerned specifically with Martech's unwillingness to agree to rely on subcontractors in areas where Martech's capabilities were lacking. At the request of the contracting office, a further review of the DCASMA recommendation and the additional submissions by Martech was performed by a technical representative of the agency. He concluded that Martech lacked the experience needed to perform a contract of this type which involved managing many on-going projects where daily resource allocation of personnel and materials changes significantly. He concluded that it was thus doubtful that Martech would be able to perform the contract

in a successful manner. He also noted that while some work somewhat similar to that required here had been performed (for example, through a subcontractor on a contract performed in New Orleans) on Martech's asbestos removal contracts, the work had been only incidental to the overall contracts and was small in value. On July 12, the contracting officer determined Martech to be nonresponsible and rejected its bid.

Martech contends that the determination of nonresponsibility lacked a reasonable basis since DCASMA and the agency failed to consider all the available information and inaccurately interpreted or represented other information. It also states that the site survey was so cursory as to be meaningless and that DCASMA was not really interested in Martech's capabilities and was so unfamiliar with what was required of it that it asked Martech to complete forms relevant to manufacturing, rather than construction, contracts. It also notes that one of the agency's personnel even expressed concern that DCASMA was not fully acquainted with construction contracts. Martech also contends that the post-DCASMA reviews of Martech's responsibility were simply adoptions of the DCASMA recommendation without any valid, independent investigation. Basically, Martech believes it has the technical, production and quality control capability to perform this work.

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. Saxon Corp., 69 Comp. Gen. 303 (1990), 90-1 CPD ¶ 230. While the determination should be based on fact and reached in good faith, it ultimately will be left to the discretion of the contracting agency, which must bear the responsibility for any difficulties during performance. Id. Because of this broad discretion, our Office generally will not question a negative determination of responsibility unless the protester can demonstrate that the agency acted in bad faith or lacked a reasonable basis for the determination. Id.

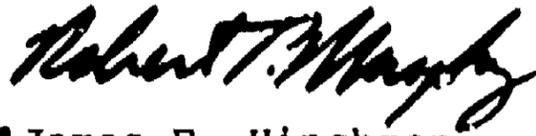
While the protester has provided detailed arguments as to why it believes the contracting officer's determination of nonresponsibility was erroneous, in our view, the contracting officer's determination of nonresponsibility was reasonable and supported by the record. First, Martech's past experience did not establish that it had the requisite capability to perform the types of repair and maintenance work solicited. Although Martech argues that it has performed 22 of 27 categories of required work on its past contracts, the work involved appears to have been incidental--and thus minor--to the contracts involved, and

in many cases was subcontracted. These contracts primarily involved basic marine and environmental matters, for example, asbestos removal, oil spill response, and fire damage clean-up, not the construction, renovation, and facilities repair work solicited here. Martech has not identified any past contract that the agency failed to consider in its responsibility determination, the consideration of which would require the reversal of the determination. The references furnished by Martech predominately described work unrelated to the work to be performed under this contract. The agency's reference checks confirmed the lack of direct experience in the work solicited. Martech's references confirmed that where it had performed this type of work, the work was in small and minor amounts in comparison to what will be required under the Navy's contract. For example, Martech had to subcontract the incidental construction work when it removed asbestos from a New Orleans museum, one of the projects it referenced, even though the company has offices in Louisiana.

Second, Martech failed to show that it currently had personnel with the requisite skills to perform the types of repair and maintenance work required and repeatedly declined to commit itself definitively to using subcontractors to alleviate the agency's concerns regarding lack of in-house expertise. Martech repeatedly stated that it planned to use employees currently working in its marine and environmental operation and failed to establish that these employees had the requisite experience in the building trades required. The record shows that the work Martech generally performs is not readily transferable to this Navy contract.

Regarding the use of subcontractors, at the time DCASMA made its survey Martech had not proposed to use subcontractors to perform the contract. We do not believe that Martech's subsequent submission of some subcontractor statements of willingness to work for Martech if Martech received the award remedied the reasonable doubt that existed as to Martech's capability to perform the contract in a satisfactory manner. Martech indicated that it retained the right to do all the work on the contract itself, except five divisions of labor that it said it had not performed in the past, inasmuch as it believed itself capable of such performance. In any event, it did not provide any plan for the use and management of subcontractors.

Accordingly, we find reasonable the contracting officer's determination that Martech was nonresponsible and Martech's protest is denied.



for James F. Hinchman
General Counsel