



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aviation Systems and Manufacturing, Inc.

File: B-250625.3

Date: February 18, 1993

Joseph G. Billings, Esq., Elliott, Vanaskie & Riley, for the protester.

John A. Dodds, Esq., Department of the Air Force, for the agency.

Robert C. Arsenoff, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency has no authority to independently make an affirmative or negative determination of responsibility of an 8(a) firm but must refer "substantial doubts" that it has concerning the firm's responsibility to the Small Business Administration (SBA) for its consideration. The General Accounting Office will review an agency's failure to refer to the SBA a firm's capability deficiencies, but only to the extent of determining whether the failure to refer was motivated by bad faith or fraud.

2. Protest that award was predicated on a relaxed delivery schedule is denied where record contains no evidence that the award was made in contemplation of a contract modification and any such relaxation would not have prejudiced the protester.

3. Protest that awardee is not performing in accordance with its contract requirements is dismissed since it involves a matter of contract administration.

DECISION

Aviation Systems and Manufacturing, Inc. (ASM) protests the award of a contract to Sentel Corporation under request for proposals (RFP) No. F44560-92-R-0015, issued by the Department of the Air Force for training flight services at Tyn-dall Air Force Base, Florida. ASM challenges the affirmative determination allegedly made by the agency of Sentel's responsibility, contends that the award violated the terms of the RFP, and argues that Sentel is not performing in accordance with the terms of the contract as awarded.

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

The RFP was issued on July 28, 1992, with a closing date of September 1, and contemplated the award of a requirements-type contract to provide aircraft, pilots, maintenance and engineering personnel to fly test missions to be scheduled by Tyndall officials for a base year commencing on October 1 (or date of award if later) and for 4 option years. The procurement was conducted competitively pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 and Supp. III 1991).¹

The RFP provided that award would be made on the basis of initial proposals to the low-priced, technically acceptable offeror. Sentel was the low offeror at \$14,602,299; ASM offered to perform for \$15,402,567. Sentel's proposal was accompanied by a listing of eight specific aircraft attached to a letter from Corporate Air, Inc., dated August 21, with a firm offer to lease the aircraft to Sentel; the proposal also contained the resumes of a number of pilots and engineers.

On September 11, the contracting officer, in a written determination, found Sentel to be responsible. Award was made to Sentel on September 28. On September 30, the contracting officer issued a stay of performance in light of a protest filed with this Office by ASM on September 29.²

In a September 30 letter to Sentel, the contracting officer advised the awardee that he was in the process of requesting permission to continue performance notwithstanding the protest and that he expected an authorization to continue contract performance by October 7. On October 8, an authorization to continue performance in the face of a protest was issued. During this period, Sentel was apparently negotiating a lease with Corporate Air for the aircraft listed in its proposal. These negotiations were eventually unsuccessful, and Sentel thereafter consummated a lease agreement for the same type of aircraft with another firm on October 8 or 9. Sentel began flying missions under its contract on

¹Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to provide for the performance through subcontracts designed to assist "developing" small business concerns which are owned and controlled by designated disadvantaged individuals. See 13 C.F.R. Part 124 (1992); New Life Group, Inc., B-247080.2, May 22, 1992, 92-1 CPD ¶ 463.

²This protest, docketed as B-250625, was subsequently dismissed.

October 13 upon the issuance of orders from Tyndall officials.

ASM principally alleges that the contracting officer acted irrationally and in bad faith on September 28 by awarding the contract because he knew that Sentel would not have aircraft in place by October 1; more specifically, ASM argues that the contracting officer's award constituted an improper affirmative determination of Sentel's responsibility which was motivated, in part, by the contracting officer's animosity towards the protester. In support of this assertion, ASM states that on September 28, two unnamed Sentel employees at Tyndall told unnamed ASM representatives that performance had been delayed to October 10, and that, after award, agency officials at Tyndall stated that delays in performance requirements of various lengths had been necessitated by Sentel's inability to fly starting October 1.

The authority to administer the 8(a) program is vested in the SBA by statute, 15 U.S.C. § 637(a), and SBA has promulgated regulations to implement its authority in 13 C.F.R. Part 124. Under those regulations, while the selection of program participants for award under the 8(a) competitive procedures is primarily the responsibility of procuring agencies, see 13 C.F.R. § 124.311(f)(1), (3), (7), and (8), the SBA alone is authorized to certify itself as competent to perform the requirement based on its determination that the particular 8(a) concern with which it intends to subcontract is responsible to perform the requirement. 13 C.F.R. § 124.313. If a contracting officer has "substantial doubts" as to a particular 8(a) firm's ability to perform, the matter is to be referred to the SBA, which decides whether or not to certify itself as competent to perform using the 8(a) concern in question. Federal Acquisition Regulation § 19.809. Thus, the contracting agency has no authority to independently make an affirmative or negative determination of responsibility of an 8(a) firm or to withhold award from such a firm for reasons of responsibility. At most, the agency can refer the "substantial doubts" it has concerning an 8(a) firm's responsibility to the SBA.

The agency here did not make a referral to the SBA, in effect treating Sentel as responsible. Thus, the protester's challenge is analogous to a challenge to an affirmative determination of responsibility. Just as we limit our review of such determinations in most cases to the question of whether bad faith or fraud was involved, so we will review this type of challenge to determine whether the failure to refer was motivated by bad faith or fraud. See generally United States Elevator Corp., B-241772, Mar. 5, 1991, 91-1 CPD ¶ 245.

We do not find that ASM has established its claim of bad faith on the part of the contracting officer. The contracting officer has provided an affidavit which states that, as of the September 28 award date, he had no knowledge of any circumstances which would prevent Sentel from performing on October 1. The contracting officer states that Sentel's expected performance schedule was only delayed on September 30 as a direct consequence of ASM's then-pending protest. The "evidence" supplied by the protester is simply not convincing in the face of the contracting officer's affidavit. The fact that unnamed Sentel employees at Tyndall may have believed on September 28 that a performance delay to October 10 had been approved is not probative of what the contracting officer, who was located at Langley Air Force Base, Virginia, then knew about any prospective inability of the firm to perform beginning October 1, and the contracting officer states under oath that he was unaware on the date of award of any problems with Sentel's ability to timely perform. There is also no evidence in the record showing that a stay of performance had been issued by the contracting officer prior to September 30. Further, ASM's reported post-award conversations with Tyndall officials concerning a delay in performance are not probative of what the contracting officer knew on the date of award.

Based on this record, we have no basis upon which to question the contracting officer's belief on September 28 that his original determination of Sentel's responsibility reached on September 11 was valid or to otherwise question his motives in making an award on September 28. In short, we find no bad faith or fraud in the agency's award to Sentel without referring the matter of Sentel's responsibility to the SBA.

ASM also alleges that the September 28 award to Sentel is inconsistent with the terms of the RFP because it was predicated on a relaxed performance schedule--i.e., a schedule which did not require Sentel to begin flying on October 1.

According to the protester, on September 28, Sentel employees informed ASM that they believed that they would not have to begin performance on October 1; the contracting officer, however, states under oath that he did not make the award in contemplation of a relaxed delivery schedule and that the only delay in performance was occasioned by ASM's filing a protest with this Office on September 29. Sentel began performance on October 13, after the stay of contract performance was lifted and as soon as delivery orders were issued. In our view, no substantive performance obligations arose until the delivery orders were issued. We do not believe that this record establishes that the award was made in contemplation of a later contract modification as alleged by ASM. Even if the protester were correct that the deliv-

ery schedule was relaxed for the benefit of Sentel, we would have no basis for sustaining the protest because ASM, having offered a price \$800,000 higher than Sentel's for the 5-year contract effort, has not established that its competitive position was prejudiced as the result a minor relaxation in the delivery schedule amounting to no more than 12 days. Labrador Airways Ltd., supra.

Finally, ASM alleges that Sentel started performance with an insufficient number of aircraft and with aircraft other than those listed in its proposal and that Sentel has been performing with aircraft which otherwise do not comply with the RFP's requirements for proper certification. There was no requirement in the RFP to list specific aircraft in a proposal or to perform with any aircraft that were listed in a proposal. The only requirement for contractors was to identify the aircraft being used in contract performance 30 days after contract performance began. The record does not show that Sentel failed to meet this requirement. In any event, whether Sentel is performing in accordance with the various terms of its contract is a matter of contract administration which we do not review. Berkshire Computer Prods., B-241393, Feb. 11, 1991, 91-1 CPD ¶ 145.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel