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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-186956

DATE: December 9, 1976

MATTER OF: IN-TROL Division of Aeseco Corporation

DIGEST:

1. Although record does not support finding of nonresponsibility based on lack of tenacity and perseverance protest is nevertheless denied since agency based nonresponsibility finding on ASPR § 1-903.1 (1975 ed.) and record supports determination of nonresponsibility pursuant to ASPR 1-903.1(11) (1975 ed.).
2. On-site survey of protester's facilities was not required as part of preaward survey since sufficient information was on hand and on-site survey not required.

IN-TROL Division of Aeseco Corporation (IN-TROL), a small business concern, has protested the rejection of its bid under invitation for bids (IFB) No. N00140-76-B-6744, issued by the Naval Regional Procurement Office, Philadelphia, Newport Division, Newport, Rhode Island (NRPO).

The subject IFB sought bids on two generator sets for NRPO's Newport, Rhode Island laboratory. Following the opening of bids on June 8, 1976, NRPO requested the Defense Contract Administration Services (DCASD), Los Angeles, to perform a preaward survey of IN-TROL. DCASD, on June 29, 1976, recommended that "no award" be made to IN-TROL primarily on the basis that the survey revealed IN-TROL was unsatisfactory in its past performance and its ability to meet the delivery schedule of the contemplated contract. On June 30, 1976, following a determination by the contracting officer that the subject contract should be placed without delay, award was made to the second low bidder, William I. Horlick Co.

With respect to IN-TROL's past performance record, the survey revealed that the protester was performing on five contracts which were in a delinquent status, and that the amount of effort IN-TROL would have to expend to satisfy its outstanding contractual obligations would not allow sufficient leadtime for timely completion of the subject contract. The survey asserted that in view of the protester's record of poor performance and inability to perform satisfactorily on current contracts with a much longer leadtime, award could not be recommended from a production standpoint.

B-186956

The contracting officer's June 29th Determination of Nonresponsibility referenced the negative findings of the preaward survey and IN-TROL's record of delinquency as evidenced by the latter's failure to meet revised delivery schedules on five contracts. The following record of delinquency was listed by the contracting officer:

Contract	N00027-74-C-0098	Delinquent 2 months
	N00228-76-C-4039	First Article delinquent 30 days
	N00123-75-C-1278	Delinquent 28 days
	N00140-76-C-6058	Delinquent 90 days
	DACW17-75-C-00081	Delinquent 60 days

The contracting officer also found that in view of the fact that the protester had been delinquent on contracts for similar items with a longer leadtime, IN-TROL lacked the tenacity and perseverance to perform the subject contract prior to the required delivery date, October 15, 1976.

The protester contends that the contracting officer's finding that IN-TROL lacked the necessary tenacity and perseverance to effect timely delivery under the subject contract was erroneous. First, the protester contends that the partial preaward survey consisted of an examination of incomplete records at DCA3D and that an on-site preaward survey would have demonstrated IN-TROL's ability to meet the requirements of the solicitation. In this connection IN-TROL asserts that the awardee of the contract, William I. Horlick Co., is in a delinquent status and that a properly conducted preaward survey of this contractor would have so revealed that fact. Next, IN-TROL argues that each prospective contract must be judged on its own merit; accordingly, the contracting officer erred in assuming that IN-TROL would be delinquent based upon past difficulties. Finally, IN-TROL has provided a listing of its contracts completed in the last 18 months to support its contention that it does not lack tenacity and perseverance.

IN-TROL also references each of the five contracts listed in the contracting officer's Determination of Nonresponsibility. Specifically, the protester indicates that First Article Testing of motor generator sets under contract-4039 was completed within 13 days of the required date, that 19 other production units were shipped prior to the original contract date, and that on May 7, 1976, IN-TROL was awarded a contract for 10 additional units. With respect to contract-0098, which also concerned the production

B-186936

of generator sets, IN-TROL contends that difficulties and delays were consistently and adequately reported to the contracting officer. Additionally, the protester notes that Contract-0081 was modified to permit delivery on July 23, 1976, and that the required units were shipped July 15th. IN-TROL also states that delays in meeting obligations under Contracts -1278 and -6058 were attributable to material shortages and delays of control components.

Before award of a contract, the contracting officer must make an affirmative determination that the prospective contractor is responsible. ASPR § 1-904.1 (1975 ed.). If the information available to the contracting officer "does not indicate clearly that the prospective contractor is responsible", a determination of nonresponsibility is required ASPR § 1-902 (1975 ed.).

ASPR § 1-903.1 (iii) (1975 ed.) stipulates that a contractor must have a satisfactory record of performance and that past unsatisfactory performance, due to failure to apply the necessary tenacity and perseverance to do an acceptable job is sufficient to justify a finding of nonresponsibility. However, the contracting officer found IN-TROL to be nonresponsible pursuant to ASPR § 1-903.1 (1975 ed.) which, in addition to referencing nonresponsibility due to lack of tenacity and perseverance, also provides in pertinent part that a prospective contractor must:

"(ii) be able to comply with the required or proposed delivery schedule, taking into consideration all existing business commitments, commercial as well as governmental. * * *"

If a bid of a small business concern such as IN-TROL is rejected because of a finding of lack of tenacity or perseverance a copy of the documentation supporting the determination is required to be sent to the Small Business Administration (SBA) which may appeal the determination to the head of the procuring activity ASPR 1-705.4(c)(vi) (1975 ed.). The decision of the head of the procuring activity is final. Further, if a bid of a small business concern is rejected on the basis that it lacks capacity and credit, that is, factors going to whether a bidder can rather than will perform, then the matter must be sent to SBA for its determination whether to issue a Certificate of Competency (COC). ASPR § 1-705.4(c) (1975 ed.). In either situation, however, a referral of nonresponsibility need not be made to SBA where the contracting officer certifies his determination in writing, and his certification is approved by

B-186956

the chief of the purchasing office, that award must be made without delay. See ASPR § 1-705.4(c)(iv)(1975 ed.).

The contracting officer has indicated that IN-TROL was found to have an unsatisfactory performance record as well as an inability to meet the required delivery schedule. The pre-award survey report shows that the finding that IN-TROL would be unable to meet the specified delivery date of October 15, 1976 was based in large part on the protester's commitment to satisfy and complete its existing contractual obligations. In our view the finding falls within the stated definition of "capacity." See Environmental Tecronics Corporation, B-183616, October 31, 1975, 75-2 CPD 266. In this regard ASPR § 1-705.4(a)(1975 ed.) defines "capacity" as:

"* * * the overall ability of a prospective small business contractor to meet quality, quantity and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know-how' technical equipment and facilities or the ability to obtain them."

As we indicated in Leasco Information Products, Inc., 53 Comp. Gen. 932 (1974), 74-1 CPD 314, it is not the function of this Office to determine whether a prospective contractor has demonstrated a capability to perform the contract, but rather our function is to review the record to determine whether the contracting officer's exercise of judgment and discretion in finding the prospective contractor nonresponsible was reasonable under the circumstances. In these matters, this Office will not substitute its judgment for that of the contracting officer unless the contracting officer's determination of nonresponsibility is without a reasonable basis. American Safety Flight Systems, Inc., B-183679, August 5, 1975, 75-2 CPD 83, Raycomm Industries, Inc., B-182170, February 3, 1975, 75-1 CPD 72; see Development Associates, Inc., B-187826, January 27, 1975, 75-1 CPD 51.

We think that the record in this case provides reasonable basis for the contracting officer's negative determination of IN-TROL's responsibility. In arriving at this conclusion we note first that determinations by a contracting officer that a small business concern is not responsible pursuant to ASPR § 1-902.1 (iii)(1975 ed.) must be supported by substantial evidence. Here the administrative report does not clearly

B-176956

indicate that a lack of tenacity and perseverance was the cause for IN-TROL's unsatisfactory rating. IN-TROL, as already noted, has asserted that in two outstanding contracts delays were due to circumstances beyond its control. However, the contracting officer's finding that IN-TROL's outstanding contract commitments would prevent it from timely completion of the subject contract is established on the record and supports a determination of nonresponsibility pursuant to ASPR § 1-903.1(ii) (1975 ed.). In this connection we note that IN-TROL has admitted that at the time of preaward survey it was delinquent on 5 contracts for similar items with a longer leadtime. In these circumstances we think a reasonable basis existed to find IN-TROL nonresponsible pursuant to ASPR § 1-903.1 (1975 ed.).

We note also that in the instant case a determination was made in accordance with ASPR § 1-705.4(c)(iv) (1975 ed.) that award of the subject contract should be made to the next low bidder William I. Horlick Co., Inc., without delay. We have stated that our Office will not question the administrative determination of urgency of a procurement where a review of the entire record affords no basis for concluding that the contracting officer's decision to make award without referral to SBA was unreasonable or unjustified. Cal-Chem Cleaning Corporation, Incorporated, B-179723, March 12, 1974, 74-1 CPD 127. Here the record indicates that the determination to make award without referral to SBA was not unreasonable. At the time the Certificate of Urgency was signed, NRPO indicated that delay in furnishing the equipment sought under the subject contract would detrimentally affect the Navy's TRIDENT Program.

In addition, DCASD was not required to perform an on-site preaward survey of IN-TROL's facilities. ASPR § 1-905.4(2) (1975 ed.) provides in part as follows:

"(a) General. A pre-award survey is an evaluation by a contract administration office of a prospective contractor's capability to perform under the terms of a proposed contract. Such evaluation shall be used by the contracting officer in determining the prospective contractor's responsibility. The evaluation may be accomplished by use of (i) data on hand, (ii) data from another Government agency or commercial source, (iii) an on-site inspection of plant and facilities to be used for performance on the proposed contract or (iv) any combination of the above * * *."

B-186956

Moreover, ASPA Appendix K-302 (1975 ed.) indicates that an on-site survey shall be performed when required by ASPR § 1-905.4(a) (1975 ed.) or when sufficient information is not available or has not been developed. In the instant case the record indicates that sufficient information was on hand for DCASD to conduct its survey without an on-site visit to IN-TROL's facility.

Finally, IN-TROL has asserted that the contract awardee, William I. Horlick Co., is in a delinquent status and that a properly conducted preaward survey would have revealed that possibility. We note first that IN-TROL has provided no information to show that NRPO acted improperly in evaluating Horlick's capability to perform under the terms of the instant contract. In any event since the awardee's performance under the subject contract concerns a matter of contract administration it is not appropriate for consideration in a bid protest.

IN-TROL's protest is therefore denied.

Deputy


Comptroller General
of the United States