

DECISION



12563
WASHINGTON
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-194496

DATE: January 17, 1980

MATTER OF: Arrowhead Linen Service *DLG 036 36*

DIGEST: [*Protest Against Contract Award*]

1. Protest filed more than 10 days after bid opening, but within 10 days of initial adverse agency action on protest filed with agency is timely.
2. Protest filed after bid opening is untimely where it involves alleged improprieties in solicitation apparent prior to bid opening.
3. GAO will not review protests against affirmative determination of responsibility unless either there is showing that procuring officials may have committed fraud or solicitation contains definitive responsibility criteria which allegedly have not been applied.
4. Although Federal procurement statutes and regulations do not apply per se to procurements by prime operating contractor they will apply to extent prime contract or prime contractor's approved procurement manual incorporates them.
5. Determination of nonresponsibility, which is largely judgmental matter, will not be disturbed unless there is no reasonable basis for determination. However, bidder may be found nonresponsible on basis of what agency reasonably perceives as recent inadequate performance even if contractor disputes agency's position and dispute is unresolved.
6. Nonresponsibility determination based on recent unsatisfactory performance does not preclude bidder from receiving future awards.

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7. Nonresponsibility determination based on prior unsatisfactory performance is not precluded by fact that prior contract was not terminated for default or because prior contract was extended for 30 days.
8. Failure to acknowledge amendment which merely corrected obvious typographical error in specification may be waived since amendment merely clarifies requirements of IFB and has no effect on price.
9. Where invitation amendment extends bid opening date, submission of bid on new date may constitute constructive acknowledgment of amendment.

Arrowhead Linen Service (Arrowhead) protests the award of a contract under invitation for bids No. 79-FW-79 issued by Reynolds Electrical & Engineering Co., Inc. (Reynolds), which is the operating contractor for the Department of Energy's (DOE) Nevada Test Site (NTS). The invitation was for a requirements-type contract for laundry and cleaning services, and in some instances, the supply of uniforms at NTS. DLG03637

Reynolds determined that Arrowhead, the incumbent subcontractor and apparent low bidder, was nonresponsible (incapable of performing the contract) and awarded the contract to the second low bidder, Western Linen Rental Co. (Western). DLG03638

Arrowhead protests Reynolds' determination of non-responsibility as arbitrary and not supported by the facts. In addition Arrowhead raised the following allegations in its initial protest letter to our Office:

1. Reynolds awarded the contract to a non-responsive and nonresponsible bidder, which does not have the facilities required by the invitation.

2. Reynolds should have conducted negotiations because one bidder was determined nonresponsible and the bid of the only other competitor was nonresponsive.
3. The specifications in the RFP were improper as they tended to "inflate" the cost to the Government.

Timeliness

DOE and Reynolds contend that Arrowhead's protest is untimely because it was not filed until more than 10 days after Arrowhead learned of the determination of nonresponsibility and award. In this regard, Reynolds states that it informed Arrowhead in a meeting on March 16 that Arrowhead had been determined nonresponsible and that award had been made to Western on March 15. Reynolds notes that Arrowhead's protest was not filed with our Office until April 2. Arrowhead insists that it was not informed in the March 16 meeting that Reynolds had determined it nonresponsible or that the award had been made to Western but only that such actions were contemplated. In any event, Arrowhead informed Reynolds by letter dated March 19 of its objections to Reynolds' actions or proposed actions and requested that it be awarded the contract as the low responsible bidder. Reynolds did not reply to Arrowhead's letter until April 17, after Arrowhead filed its protest with this Office.

Our Bid Protest Procedures (4 C.F.R. Part 20 (1979)) urge protesters to seek resolution of their complaints initially with the contracting agency (or here, the operating contractor). If a protest has been filed initially with the operating contractor (it is reasonable to interpret Arrowhead's March 19 letter as a protest) any subsequent protest to this Office filed within 10 days of actual or constructive knowledge of initial adverse action will be considered provided the initial protest to the operating contractor was timely filed. 4 C.F.R. § 20.2(a). Since Arrowhead filed its protest with our Office before it received a formal response from Reynolds, the majority of its protest is timely.

Nevertheless, in one respect the protest is untimely. Arrowhead's allegation that the specifications were defective, which concerns the propriety of the solicitation and which was apparent prior to bid opening, should have been filed before bid opening. 4 C.F.R. § 20.2(b)(1). Since it was not, that issue will not be considered.

Responsibility of Western

We dismiss Arrowhead's allegation that Western is nonresponsible because our Office does not review protests of affirmative determinations of responsibility absent a showing that procuring officials may have committed fraud or that the solicitation contains definitive responsibility criteria which have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Data Test Corporation, 54 Comp. Gen. 449 (1974), 74-2 CPD 365. The protester has shown neither in connection with this issue.

Standard of Review of Subcontractor's Responsibility

The standard for reviewing the propriety of awards made by prime contractors acting as purchasing agents for the Government is the "Federal norm", which means that the prime contractor's procurements must be consistent with and achieve the same policy objective as Federal statutes and regulations. Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10. Federal statutes and regulations which apply to direct procurement by Federal agencies may not apply per se to procurements by prime operating contractors. However, Federal law will be applied to the extent that the terms of the prime contract or the prime contractor's Government-approved procurement manual specifically incorporate particular Federal statutes and regulations Piasecki Aircraft Corporation, supra.

Reynolds' procurement handbook, which was approved by DOE, provides in pertinent part:

"Bids may be rejected for any of the following reasons or as further detailed in FPR [Federal Procurement Regulations] 1-2.404-2 and FPR 1-2.404-4.

* * * * *

"b. Cases in which the bidder's past record of performance shows his inability to perform."

The FPR provisions cited above state that low bids from nonresponsible firms shall be rejected and provide that contractors who are or have been seriously deficient in current or recent contract performance shall be presumed nonresponsible in the absence of either evidence to the contrary or circumstances beyond the control of the contractor.

Given the broad discretion of procuring officials in this area and the judgmental nature of the determination they must make, we will not disturb a determination of nonresponsibility under these regulations unless there is no reasonable basis for the determination. Decision Sciences Corp., B-188454, September 14, 1977, 77-2 CPD 188.

Responsibility of Arrowhead

Reynolds cites several reasons for its determination that Arrowhead, which had been performing laundry services under two successive contracts with Reynolds, is not a responsible bidder for these services. In this regard, Reynolds maintains that Arrowhead repeatedly delivered fewer items than had been sent to it for laundering. Reynolds also states that Arrowhead substituted other linens for those owned by the Government and argues that Arrowhead failed to meet required increases for inventory items and often supplied items of poor quality or in soiled condition. It appears that these alleged performance deficiencies continued through the performance of the second contract which expired in February 1979.

Both parties seem to view delivery shortages as the most significant issue. Arrowhead explains that some weekly shortages did in fact take place, but these resulted from (1) stain-treating extra heavily soiled linens in a once a week special process to extend the life and

usefulness of the Government property; (2) mending to similarly extend the life of the articles; and (3) discarding worn and torn linens which had reached the end of their useful lives. Arrowhead further contends that Reynolds was losing articles as opposed to Arrowhead "shorting" them. Although Reynolds reports that when it individually counted the articles shipped and delivered to NTS it still found shortages, Arrowhead alleges that Reynolds refused to sign invoices at the time of delivery and later fabricated the shortages.

It is clear that there were shortages in the laundry deliveries from Arrowhead. In most cases, as the protester admits, the contract contemplated that clean articles would be delivered the week following their shipment for laundering. If Arrowhead was taking more than one week for delivery for the purpose of performing special services for the Government, this purpose was not communicated to Reynolds. Furthermore, the contract is silent as to the disposal of worn and ragged Government property, and Reynolds contends that Arrowhead should not have disposed of such articles but should have returned them to NTS for disposal at the site.

This situation may have been compounded by Reynolds' decision to keep a large inventory of clean uniforms at NTS. Reynolds determined the inventory was necessary unless laundry deliveries were to be made more frequently than on a weekly basis. Arrowhead, which under the contracts supplied the uniforms to Reynolds as required, felt that Reynolds was overstocking uniforms and placing a greater burden on Arrowhead to supply them than was necessary.

Since the contract was a requirements-type contract, Arrowhead was obligated to fulfill the needs of Reynolds which were determined in good faith. Shader Contractors, Inc. & Citizens National Bank of Orlando v. United States, 276 F.2d 1 (Ct. Cl. 1960). Although the protester has alleged bad faith on the part of Reynolds in overstocking uniforms and overstating

shortages, it has not offered any evidence supporting these allegations. The burden is on the protester to affirmatively prove its allegations. M&H Mfg. Co., Inc., B-191950, August 18, 1978, 78-2 CPD 129. The protester has not met this burden.

We find that the determination that Arrowhead is not a responsible contractor based on its performance under the prior contracts to be reasonable. Reynolds has produced documentation which supports its position that there have been delivery shortages and other performance problems under the prior contracts. Although Arrowhead disputes Reynolds' conclusions, it has not denied that the shortages existed nor has it produced evidence refuting Reynolds' other grounds. In this regard, we have held that where a contractor disputes the agency's determination of nonresponsibility, we will not disturb that determination if it is based on what the agency reasonably perceives as the contractor's prior inadequate performance. Howard Electric Co., 58 Comp. Gen. 303 (1979), 79-1 CPD 137.

Arrowhead contends that since Reynolds did not terminate the prior contract for default, and, in fact, asked Arrowhead for a 30-day extension, we should infer that Arrowhead's performance was satisfactory. However, the lack of a default determination cannot be construed as affirmative evidence of satisfactory performance. Universal American Enterprises, Inc., B-185430, November 1, 1976, 76-2 CPD 373. Nor does an extension of Arrowhead's existing contract necessarily imply satisfactory performance; it merely indicates that Reynolds needed the laundry services.

Arrowhead has expressed concern that the nonresponsibility determination will preclude it from receiving an award in future procurements. Arrowhead's unsatisfactory performance under the prior contracts which led to the present nonresponsibility determination will not necessarily prevent a future award to that firm. The determination is valid only for the present procurement. In the event Arrowhead is eligible

for a subsequent award on a procurement by Reynolds, Arrowhead's responsibility for that procurement will have to be determined at that time. Cal-Chem Cleaning Co., Inc., B-183147, July 23, 1975, 75-2 CPD 74.

Regarding Arrowhead's allegation that it was not informed until after award that it was nonresponsible, we have held that there is no requirement that formal notice be given prior to a determination of nonresponsibility. Mayfair Construction Co., B-192023, September 11, 1978, 78-2 CPD 187.

Responsiveness of Western's Bid

Arrowhead alleges that Western's bid was nonresponsive as it contained several defects. First, the protester states Western failed to acknowledge amendment Nos. 1 and 2 of the invitation prior to bid opening. Amendment No. 1 clarified the statement in the solicitation which provides:

"A joint inventory every six months will be required unless significant differences occur. If differences are sizeable, a quarterly frequency may be specified at the purchasers option." (Underlining added.)

The amendment substituted the word "inventory" for "frequency." Amendment No. 2 extended the bid opening date to February 2 and changed the pick-up point for some of the laundry.

Reynolds admits that neither amendment was acknowledged prior to bid opening but argues that this omission does not render Western's bid nonresponsive because the matters covered by the amendments "are not substantive and do not impact upon price, quantity, quality, delivery" and were both acknowledged by Western after bid opening but prior to award.

We agree with Reynolds that amendment No. 1, which corrects what appears to be a typographical error, merely clarified existing requirements and did not in any way increase the cost or scope of work specified. Therefore, the failure to acknowledge amendment No. 1 could be waived. Dependable Janitorial Service and Supply Company, B-188812, July 13, 1977, 77-2 CPD 20.

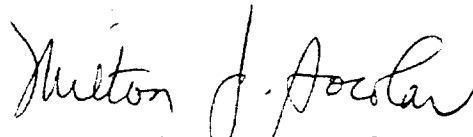
We believe, however, that amendment No. 2 does have a substantive impact on the performance requirements. Nevertheless, we have recognized that where an amendment extends the bid opening date, the submission of a bid on the new date which is subsequent to the original bid opening date may constitute constructive acknowledgment of the amendment. Aetna Ambulance Service, Inc.; G&L Ambulance Service, B-190187, March 31, 1978, 78-1 CPD 258. In this instance since Reynolds indicates that Western submitted its bid on the revised opening date specified in amendment No. 2, we believe Reynolds acted properly in accepting Western's bid.

Arrowhead's claim that Western's bid is nonresponsive because it failed to submit a "Disclosure Statement-Cost Accounting Practices and Certification", as required by the solicitation is without merit as the solicitation clearly provides that the requirement is only applicable to certain negotiated procurements. Likewise, the protester's allegation that Western falsely claimed it was a small business is irrelevant since Western's status as a small business was not a factor in the award.

Miscellaneous Contentions

Since we find that Western's bid was properly viewed as responsive we need not consider Arrowhead's allegation that Reynolds should have considered negotiation. The protester raises various other matters regarding bid evaluation and Reynold's administration of the prior contract. We find they either are without legal merit or are not germane to the propriety of the award to Western.

The protest is denied.



For The Comptroller General
of the United States