

12772 PL-1
Mr. Fitzmaurice

DECISION



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

FILE: B-196163

DATE: February 6, 1980

MATTER OF: SAI Comsystems Corporation

DIGEST:

1. GAO will not review contracting agency's affirmative determination of responsibility since protester has not shown any fraud on part of agency or alleged that definitive responsibility criteria have not been properly applied.
2. GAO will not question agency decision to make award prior to resolution of protest where decision to do so was made in accordance with applicable regulations.

SAI Comsystems Corporation (SAI) protests the award of a contract to Vanguard Technologies Corporation (Vanguard) under invitation for bids (IFB) No. FCC-79-29 issued by the Federal Communications Commission (FCC).

The IFB solicited bids from offerors who would assume full responsibility for the management of the FCC computer facility. SAI, which managed the facility under the prior contract, claims that Vanguard is not a responsible bidder. However, after completion of a preaward survey, the contracting officer concluded that Vanguard was responsible and subsequently awarded Vanguard the contract while the SAI protest was pending before our Office.

SAI protests both the responsibility determination and the decision to award the contract prior to our decision. However, for the reasons indicated below, we find no legal basis to object to the conduct of this procurement.

SAI states that, shortly before the IFB was issued, the president of Vanguard requested that SAI consider Vanguard as a potential subcontractor or team member on future contracts which SAI might be bidding on--such as the FCC contract. SAI then conducted an independent investigation of Vanguard and concluded: (1) Vanguard's

[Protest Involving Awardee Responsibility]

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capabilities did not meet any of the usual qualifications of a subcontractor or team member on such a prime contract; (2) Vanguard did not have any experience in managing or operating a third generation large scale computer facility; and (3) Vanguard did not appear to have the financial stability necessary to finance itself on any significant procurement. According to SAI, at the time of its investigation, Vanguard was a three-man operation with no contracts of any size or complexity and no experience in operations such as the FCC support contract. In light of this, SAI concludes that Vanguard could not be a responsible bidder.

The record indicates that, after evaluating the bids received, the FCC determined that Vanguard was the low bidder. The FCC conducted a preaward survey of Vanguard to determine its responsibility. The survey team found that Vanguard had been awarded similar contracts by other Government agencies and by private companies. All these customers indicated that they had been pleased with the service they had received and would contract with Vanguard again if the occasion arose. As to Vanguard's financial condition, the survey team found that it was very good for a small business in its first year of operation and that Vanguard was financially capable of performing the contract. In conclusion, therefore, the survey team held that Vanguard was technically and financially capable of performing the proposed contract and recommended that Vanguard receive the award.

When SAI learned that the FCC intended to award the contract to Vanguard, it filed a protest with our Office on the grounds set out above. However, the FCC later determined that it was critical to maintain uninterrupted operation of its computer facility and awarded the contract to Vanguard despite the pending protest. In making this determination, the FCC listed 12 specific reasons why it believed it was necessary

to award the contract while the protest was pending. These 12 reasons were considered sufficient to permit the award as authorized by Federal Procurement Regulations (FPR) § 1-2.407-8(b) (1964 ed. amend. 68). This regulation provides that an agency may award a contract while a protest is pending before our Office if the action is approved at "an appropriate level above that of the contracting officer" and prior to this that the contracting officer has determined and documented that:

"(i) The items to be procured are urgently required; or

"(ii) Delivery or performance will be unduly delayed by failure to make award promptly; or

"(iii) A prompt award will otherwise be advantageous to the Government."

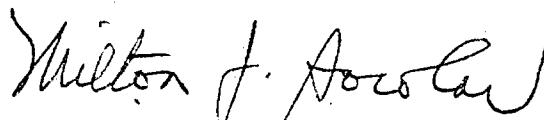
SAI, however, disputes each of the 12 reasons that the FCC relies on for its decision.

As a general rule, our Office does not review protests concerning a determination, as here, that a prospective contractor is responsible. Affirmative determinations of responsibility are largely a matter of subjective judgment within the sound discretion of an agency's contracting officials since it is the contracting agency that will have to bear the brunt of any difficulties experienced by reason of a contractor's inability to perform. Therefore, we will only review such determinations if there is a showing of fraud on the part of the agency or if it is alleged that the agency did not properly apply definitive responsibility criteria. Snowbird Industries Inc., B-193792, June 28, 1979, 79-1 CPD 468; Johnson Controls, Inc., B-191262, April 27, 1978, 78-1 CPD 442.

Here, SAI has not made any allegation of fraud nor has it claimed that there are any definitive responsibility criteria that the FCC has failed to apply. Accordingly, our Office has no basis to question the FCC's affirmative responsibility determination in this matter.

Also, we find no basis to question the FCC decision to award the contract while the protest was pending. The contract was awarded on the basis of urgency as authorized by FPR § 1-2.407-8(b)(4). Prior to making the award, the contracting officer obtained approval from a higher level (the Executive Director) as required by FPR § 1-2.407-8(b)(3). Finally, as required by FPR § 1-2.407-8(b)(4), the contracting officer notified both SAI and our Office of the decision to make the award. Therefore, since the contracting officer acted in accordance with the applicable regulations, the decision to proceed with the contract award is not subject to objection by our Office. See Airwest Helicopters, Inc., B-193277, June 7, 1979, 79-1 CPD 402. We have held that, even if an award was contrary to FPR § 1-2.407-8, the legality of the award would not be affected. Starline, Incorporated, 55 Comp. Gen. 1160, 1172 (1976), 76-1 CPD 365.

Protest denied.



For The Comptroller General
of the United States