

DECISION



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

26973

FILE: B-211525

DATE: December 7, 1983

MATTER OF: Dyneteria, Inc.

DIGEST:

1. Protest against a negative determination of responsibility is sustained where the determination is based on the cumulative effect of unsatisfactory ratings in a number of areas investigated by the pre-award survey team, and the team's conclusions in many of these areas are unreasonable or unsupported.
2. Agency cannot reasonably conclude that the protester's bid price was insufficient to absorb additional labor costs that the agency believes will be incurred when the agency failed to revise the cost analysis component of the pre-award survey to reflect a reduction in its own estimate of the minimum number of personnel needed.

Dyneteria, Inc. protests the proposed award of a contract to Maytag Aircraft Corp. under invitation for bids (IFB) No. F41800-82-B-0812 issued by the Department of the Air Force for fuels management operations at Kelly Air Force Base, Texas. Dyneteria, which submitted a lower bid than did Maytag, asserts that the Air Force improperly determined the firm to be nonresponsible for the procurement. Dyneteria contends in that regard that the Air Force misinterpreted a critical performance requirement of the solicitation while conducting its pre-award survey.

We sustain the protest.

After bid opening and the subsequent withdrawal of the apparent low bid on the basis of mistake, Dyneteria was the tentative awardee. However, as the result of a pre-award survey, the contracting officer determined Dyneteria (a large business concern) to be nonresponsible based on the following findings:

- (1) lack of evidence of sufficient labor resources;
- (2) lack of understanding in certain critical areas of the solicitation's Performance Work Statement;

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- (3) insufficiency of bid price; and
- (4) marginal performance record on prior fuels management contracts.

The determination of an offeror's responsibility is the duty of the contracting officer, who, in making that determination, is vested with a wide degree of discretion and business judgment. Generally, we will not question a negative determination of responsibility unless the protester can demonstrate bad faith by the agency or a lack of any reasonable basis for the determination. AMCO Tool & Die Company, 62 Comp. Gen. 213 (1983), 83-1 CPD 246. The Air Force's decision in this case is based on the cumulative effect of a number of findings regarding particular aspects of Dyneteria's responsibility. We believe most of those findings are not adequately supported, so that we cannot say that the Air Force's ultimate decision was reasonable.

(1) Lack of Sufficient Labor Resources

The contracting officer's determination that Dyneteria lacked sufficient labor resources relied upon the pre-award survey which rated the firm unsatisfactory in the following areas: organization and manning; recruitment and hiring; key personnel; and start-up and phase-in schedule. Essentially, the survey team concluded that Dyneteria had not demonstrated that it could adequately recruit, train and process its personnel in sufficient time to begin contract operations, and that it had not allowed for enough personnel to staff the project according to the Air Force's estimate of the agency's minimum needs.

The survey team found that the most critical area of deficiency was in the number of personnel proposed for the project. The Air Force had estimated that the minimum staffing necessary for satisfactory contract performance was 38 Personnel Equivalents (PEs). Dyneteria's manning plan was to utilize 24 full and 13 part-time employees, equivalent to 30 PEs. According to the Air Force, the 8-PE difference resulted in a 328 man-hour per week shortfall which would occasion an unsatisfactory level of performance. The Air Force relates that Dyneteria was unable to support its contention that the shortfall could be obviated through increased efficiency and cross-utilization of personnel.

In addition to the deficient manning plan, the survey team felt that Dyneteria's hiring method to recruit incumbent government civilian employees displaced by contracting the fuels operations, supplemented by hires of referred applicants from the local job service, was unsatisfactory. The Civilian Personnel Office at Kelly related that when the operations were finally contracted, all current fuels management employees would be placed in other positions, with only one down-grade. In addition, the local job service had only nine active applications for fuels driver operators and no applications for fuels distribution workers. The survey team thus concluded that Dyneteria would need a much more extensive recruiting effort to satisfy personnel needs than the one it proposed, and therefore rated the firm's recruitment and hiring plan as unsatisfactory.

In conjunction with the findings regarding staffing and hiring, the survey team felt that the acquisition plan for key personnel proposed by Dyneteria was questionable. Although Dyneteria had submitted the resumes of five persons apparently qualified for key fuels management positions, the survey team noted that several of the resumes were nearly 1 year old, and that no letters of intent had been provided. Further, the survey team felt that Dyneteria's start-up and phase-in schedule was unsatisfactory because the firm had not allowed for sufficient time to process security clearances as required for all affected personnel.

We do not question the Air Force's view that Dyneteria's proposed manning--30 PEs--was unsatisfactory. The determination of an agency's minimum needs and how they must be met necessarily are the prime responsibility of the procuring agency. Interstate Court Reporters, B-2088881.2, February 9, 1983, 83-1 CPD 145. Here, although the Air Force states that it has since reduced its minimum personnel needs estimate from 38 to 34.7 PEs, it is apparent from the record that no manning level short of the latter will be considered satisfactory.

It is clear, however, that Dyneteria's unsatisfactory rating in this area would not alone have led to a finding of nonresponsibility. The reason is that Maytag offered almost the exact same number of PEs in its manning plan (30.1), was rated unsatisfactory on this point, but was found responsible; certainly, it would be inconsistent in result to find Dyneteria nonresponsible and Maytag responsible when both firms submitted manning plans deemed unsatisfactory. In a similar respect, we question the survey team's rating of Dyneteria's recruitment and hiring plan as unsatisfactory, since Maytag's was found

marginal even though Maytag anticipated the hiring of incumbent employees and local job service referrals in virtually the same manner as Dyneteria did.

Further, we find the survey team's unsatisfactory rating for Dyneteria's proposed key personnel to have been unreasonable. As to the five resumes submitted, although our Office normally does not review the sufficiency and relative quality of such information, Owl Resources Company, B-210094, April 29, 1983, 83-1 CPD 461, we see no reason for the Air Force to discount or disqualify a particular resume simply because it is almost a year old. Regarding the lack of accompanying letters of intent, the cover letters to several of the resumes in issue clearly expressed the desire of the applicants to work for Dyneteria on the Kelly contract, and certainly served the same function.

On the issue of security clearances, the IFB required that the application process begin no later than 90 days prior to contract start. Dyneteria's start-up and phase-in schedule indicated that applications for security clearances as necessary for its employees would be initiated no later than 120 days prior to contract start. However, the schedule, in seeming contradiction, also stated that the recruitment and interviewing of replacement personnel, if needed, would take place only 14 days prior to contract start. According to the Air Force, the 14-day period indicated that Dyneteria would lack a sufficient number of employees with required clearances before the Fuels Management Operations commenced. Dyneteria disputes the Air Force's position, and states that any replacement personnel would be put into positions not requiring security clearances until their clearances were approved. In view of the apparent acceptability of Dyneteria's schedule and the fact that the 14-day period applied only if replacement employees would be hired, we do not see how Dyneteria's schedule reasonably can be viewed as an indication of nonresponsibility in the area; certainly, the survey team's concerns could have been allayed through a simple clarification by Dyneteria.

In summary, we question the Air Force's conclusions in three of the four labor resource areas and, as to the fourth area--manning--we note that Maytag was found to be responsible despite its unsatisfactory manning plan. See PhilCon Corp., B-206905; B-208233; B-208034, March 29, 1983, 83-1 CPD 319.

(2) Lack of Understanding of the Performance Work Statement

The survey team rated Dyneteria unsatisfactory regarding the firm's understanding of several critical areas in the solicitation's Performance Work Statement. For the most part, the issues result from conflicting views of the requirements and procedures for fuels management operations set forth in Air Force Regulation (AFR) 144-1 (January 4, 1982). We do not believe, however, that these disputes necessarily demonstrate Dyneteria's nonresponsibility. For example, section 3-4 of the regulation states that a two-person policy for certain fueling and defueling operations is required. The Air Force found Dyneteria unsatisfactory in this area because the firm did not offer to furnish two fuels operators to implement the allegedly mandated policy. Instead, Dyneteria had interpreted the two-person policy to mean that the second person could be (quoting section 3-4 directly) "a commercial contractor employee, maintenance crew chief, or any other individual knowledgeable of the hazards involved and corrective actions to take in an emergency," not necessarily a fuels operator. We cannot conclude that this interpretation is incorrect in view of the express language in the regulation.

Another example of a dispute about AFR 144-1 requirements involves the Air Force's rating of Dyneteria as unsatisfactory on the issue of the number of personnel required for vehicle maintenance inspection teams. The Air Force survey team held that Dyneteria's plan for two and three-person teams was insufficient, and maintained that the regulation required four-person teams. We cannot find that Dyneteria's use of a lesser number was incorrect. Section 10-20(2) of the regulation states that a typical team consists of four people. However, a notation to that section also clearly states that inspection teams "of two and three persons are authorized, dependent on work-load." Therefore, we feel it was improper to hold Dyneteria unsatisfactory merely because of its application of the express language of the regulation.

Further, Dyneteria is correct when it asserts that the survey team misinterpreted an important aspect of the Performance Work Statement when conducting its evaluation. Technical Exhibit No. 4 of the solicitation indicated that the normal mission requirement for aircraft fuel servicing under the contract would be 14,982 per year. The survey team interpreted

"servicing" to mean the refueling or defueling of a particular aircraft regardless of the number of fuel loads involved. Dyneteria interpreted "servicing" to mean the "run" of a tank truck to the aircraft. Thus, according to Dyneteria, if a large aircraft required seven truck loads in order to be refueled or defueled, that would constitute seven servicings, as opposed to the survey team's interpretation that it would constitute only one servicing.

The Air Force now admits that Dyneteria's interpretation was correct, and states that it has revised the pre-award survey accordingly. Although we cannot determine the exact manner and degree of prejudice to Dyneteria, if any, occasioned by the pre-award survey team's error, the firm cannot be found nonresponsible on the basis of lack of understanding of the Performance Work Statement when it correctly interpreted what the Air Force itself has stated to be the crucial requirement in that area.

(3) Insufficiency of Bid Price

Dyneteria's bid price would allow the firm to realize a gross profit of approximately 9 percent per contract year. The survey team rated this as unsatisfactory because that profit was based upon the number of personnel originally planned for, and not upon the number which the Air Force had concluded were required to meet its minimum needs. Accordingly, the survey team concluded that Dyneteria's profit margin was inadequate to absorb any additional labor costs. Although this conclusion was not necessarily unreasonable at the time it was made, the cost analysis should be revised to reflect the reduction of the Air Force's minimum personnel needs estimate from 38 to 34.7 PEs. Without such revision, we cannot conclude that the unsatisfactory rating of Dyneteria in this area is reasonable.

(4) Marginal Past Performance Record

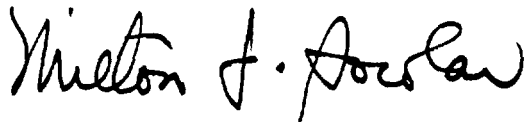
The survey team examined Dyneteria's record of past contract performance and rated it as marginal. The Air Force states that Dyneteria has been involved in numerous fuel spills at another contracting activity. Dyneteria, to a large extent, disputes both the frequency and severity of those spills, as well as its responsibility for them. What we have, therefore, are conflicting statements by the protester and the contracting agency, in which case Dyneteria has not met its burden of affirmatively proving that the Air Force's information regarding its prior contract performance record is fundamentally inaccurate. See Holley Electric Construction Co., B-209384, January 31, 1983, 83-1 CPD 103.

Conclusion and Recommendation

As stated above, the Air Force's finding that Dyneteria is nonresponsible is based on unsatisfactory ratings given the firm in three areas--labor resources, understanding of the Performance Work Statement, and bid price--and a marginal rating for prior performance. We question the Air Force's conclusion on three of four factors involved in the labor resources rating, and on the unsatisfactory ratings for understanding of the Performance Work Statement and bid price. The only ratings we believe are supported are the unsatisfactory manning rating (the fourth labor resource factor) which would not in itself appear to preclude an affirmative responsibility determination, and the marginal rating for prior performance.

We therefore recommend that the Air Force review its non-responsibility determination in accordance with the considerations articulated in this decision. If Dyneteria is found responsible, the Air Force, of course, should award the contract to the firm as the low acceptable bidder. By separate letter, we are so advising the Secretary of the Air Force.

The protest is sustained.

for 
Comptroller General
of the United States