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

FILE: B-212077.3; B-212077.4 **DATE:** October 24, 1984

MATTER OF: CFE Services, Inc.; Department of the Navy--Request for Reconsideration

DIGEST:

Where time permits, an agency should undertake further consideration of its determination of an offeror's nonresponsibility where it is notified of a material change in a principal factor on which the determination was based. Administrative inconvenience is not sufficient reason to ignore a firm's financial resources at time of contract award even in negotiated procurement conducted in conjunction with a cost comparison review.

CFE Services, Inc. and the Department of the Navy request reconsideration of our decision in Mercury Consolidated, Inc., B-212077.2, Aug. 17, 1984, 84-2 CPD ¶ 186. In that decision, we sustained Mercury's protest which contested the Navy's nonresponsibility determination of that firm under request for proposals (RFP) No. N00189-83-R-0088. The solicitation was issued in connection with a cost comparison under Office of Management and Budget (OMB) Circular A-76 to determine whether the operation of a Navy air terminal should be contracted out. For various reasons, CFE and the Navy contend that our prior decision was erroneous as a matter of law. We affirm our decision.

Two proposals--those submitted by Mercury and CFE--were found to be technically acceptable by the Navy. A preaward survey of Mercury, the low offeror, was conducted after the first round of best and final offers on November 29, 1983. Between early December and mid-January 1984, agency personnel requested Mercury on several occasions to provide more current financial information, including a new bank commitment letter. On January 20, the Navy contacted Mercury's bank directly and was told that a new credit line for Mercury would not

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be forthcoming until March 1984, when Mercury's annual report would be available. Based primarily on these financial circumstances, the contracting officer determined Mercury to be nonresponsible on January 25 and the subsequent cost comparison was based on the proposed prices of the second low offeror, CFE. On January 30, the contracting officer so informed Mercury. Four days later, by letter of February 3, Mercury's bank advised the government that it would commit $400,000 to finance Mercury's contract subject to assignment of the contract proceeds. Subsequent additional information was thereafter submitted by Mercury to the agency, including a revised bank commitment letter forwarded by letter of June 1, 1984. No award has been made.

In its protest, Mercury essentially argued that the agency was required to consider the bank commitment letter which was obtained after the completion of the cost comparison because responsibility must be determined as near to the time of award as possible. It was not disputed that the Navy had ample time due to CFE's successful appeal of the Navy's initial cost comparison, to consider the additional information prior to making award. We agreed with Mercury.

While acknowledging that information bearing upon a prospective contractor's responsibility may generally be considered by an agency at any time before award, CFE argues that application of such a rule here would be inconsistent with regulatory provisions and would unnecessarily disrupt OMB Circular A-76 procurements. Specifically, CFE and the Navy direct our attention to the following provision of the Defense Acquisition Regulation (DAR), reprinted in 32 C.F.R. pts. 1-39 (1983):

> "4-1203.4 Evaluation. After receipt of the sealed and dated in-house cost estimate and the offers, the procedures for CITA [Commercial or Industrial-Type Activities] contracting differ as follows from conventional contracting procedures.
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> . . . . .
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> "b) Negotiation.
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> (1) The contracting officer shall receive proposals, evaluate, negotiate and select

> the most advantageous proposal in accordance with Section III. The contracting officer, together with the preparer of the in-house cost estimate then open the Government in-house cost estimate, complete the cost comparison form and make a cost comparison. This cost comparison is made prior to public announcement."

CFE argues that selection of the most favorable proposal in negotiated A-76 procurements must include a consideration of responsibility prior to any cost comparison and that the intent of this provision is to preclude any consideration of proposals from nonresponsible offerors. Similarly, the Navy argues that these regulations prohibit an agency from considering the responsibility of an offeror such as Mercury after the initial cost comparison is completed.

We fail to see why selection of a proposal for cost comparison necessarily and conclusively precludes an agency from further considering the financial responsibility of an offeror when ample time remains prior to award. Certainly, a financially responsible offeror, such as CFE, whose proposal is selected for cost comparison, may suddenly and unexpectedly become financially nonresponsible after the initial cost comparison is completed but prior to award. In this respect, DAR, § 1-905.2 provides that "[i]nformation regarding financial resources . . . shall be obtained on as current a basis as feasible with relation to the date of contract award." Under such circumstances, therefore, an agency, despite the completion of the initial cost comparison, would be obligated to withhold award to the nonresponsible offeror even though the offeror was found to be responsible prior to the cost comparison. Our prior decision merely followed this specific rule.

Further, we do not regard the possible administrative inconvenience which may occur in the relatively few cases where a firm's responsibility status significantly changes after the completion of the initial cost comparison to be sufficient reason to ignore a firm's financial situation as close as possible to the time of contract award.

The Navy also argues that we erred in "requiring" the contracting officer to re-examine Mercury's responsibility rather than simply leaving it to his discretion, citing permissive language ("may") in one of our prior decisions, Guardian Security Agency, Inc., B-207309, May 17, 1982, 82-1 CPD ¶ 471. However, regardless of the literal language in our prior decisions, the fact remains that our Office has consistently stated that where ample time permits, further consideration of a prior determination of an offeror's responsibility should be made where a material change occurs in a principal factor on which the determination was based. Compare 53 Comp. Gen. 344 (1973) and 49 Comp. Gen. 619 (1970). We continue to adhere to this rule.

Finally, CFE argues that Mercury improperly used our bid protest mechanism to delay the award so that Mercury could gain time to improve its financial condition. We merely note that the Navy received notification from Mercury's bank of the approved line of credit on February 3, only a few days after the completion of the initial cost comparison, and that Mercury filed its initial protest shortly thereafter. Since the Navy should have acted upon the notification at that time, any subsequent delay is attributable to the Navy's refusal to reconsider the protester's financial responsibility.

Our prior decision is affirmed.

Milton J. Socolar

Acting Comptroller General
of the United States