

DECISION



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

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FILE: R-218301.2 **DATE:** June 11, 1985
MATTER OF: Hayes International Corporation

DIGEST:

1. Where agency inadvertently names offeror's subsidiary as awardee instead of offeror in the award document, agency may modify award document to designate proper offeror as the awardee.
2. GAO will not consider protest issue where issue already has been adjudicated by court of competent jurisdiction.
3. Whether contractor will comply with contract terms during contract performance is a matter of contract administration which GAO will not consider.

Hayes International Corporation (Hayes) protests award of contract No. N68520-85-D-9082, for aircraft maintenance, issued by the Department of the Navy (Navy).

Hayes complains that the award was made to a firm, Aero Corporation, which did not submit an offer under the solicitation for this contract. Hayes states that "Whitehall Corporation, P.O. Box 29709, Dallas, Texas 75229," submitted the proposal in response to the solicitation; however, the contract award document (Standard Form 26) which Hayes obtained shows under block 7 the name and address of the contractor as "Aero Corporation, A subsidiary of Whitehall Corporation, P.O. Box 1909, Lake City, Florida 32055."

The Navy responds that the listing of Aero Corporation in block 7 of the award document was a clerical error which it has corrected, and that the extent of Aero's participation in this procurement was decided by a United States Claims Court decision concerning this procurement in an action filed by Hayes.

We deny the protest in part and dismiss it in part.

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Seven proposals were submitted in response to the RFP. The Navy determined that only those offers from Hayes and Whitehall were in the competitive range. Under the RFP, offerors were required to provide information concerning the facility proposed for the work. Whitehall proposed that its principal place of performance would be a Greenville, Mississippi facility. Whitehall also proposed that it would use personnel, equipment and facilities of Aero, its subsidiary, at Aero's Lake City, Florida site in support of the contract. The Navy source selection board recommended award of the contract to Whitehall subject to a successful pre-award survey of the Greenville facility. The Navy's pre-award survey concluded that Whitehall was nonresponsible because Whitehall lacked the capability to satisfactorily perform the contract at the Greenville site. Because Whitehall is a small business, the Navy referred the question of Whitehall's nonresponsibility to the Small Business Administration (SBA) and Whitehall applied to the SBA for a certificate of competency (COC). In evaluating Whitehall's COC application, the SBA informed the Navy that it intended to issue Whitehall a COC based on the SBA's view that Whitehall reasonably could perform the contract at the proposed support facility in Lake City, Florida.

The Navy decided that award of a contract to Whitehall based on a different site raised uncertainties concerning contract price and technical qualifications. The Navy elected to withdraw the nonresponsibility determination and to request by amendment new best and final offers from Hayes and Whitehall. The amendment also reduced the number of aircraft to be serviced in the first year. Whitehall revised its offer proposing to perform the contract using the Lake City, Florida facility as its principal place of performance.

On March 18, 1985, Hayes filed a civil action in the United States Claims Court (Hayes International Corp. v. United States and Whitehall Corp., No. 151-85C), seeking an injunction against the Navy's decision to withdraw its nonresponsibility determination and to request another round of best and final offers. Hayes asserted that these actions prejudiced Hayes because Whitehall would not have been granted a COC on the basis of its offer of the Greenville site and would have been ineligible for award.

On April 4, 1985, the court denied Hayes' request for injunctive relief and granted summary judgment for the defendants. The court found that:

"Hayes has failed to establish that the Navy breached its duty to fairly and honestly consider Hayes' proposal. In a negotiated procurement, the contracting official is accorded broad discretion to obtain the most advantageous contract for the government. Thus, the contracting officer may withdraw a nonresponsibility determination and request new best and final offers when the information previously submitted is inadequate to justify award of the contract. Faced with the unavailability of Whitehall's proposed place of performance, the change in quantity of service/materials required under the contract, and the impending COC determination by SBA, the Navy acted responsibly and fairly in withdrawing Whitehall's notice of nonresponsibility and requesting best and final offers."

The Navy reports that based on the evaluation of the new best and final offers, Whitehall's proposal was the highest ranked offer and Whitehall was selected for award. The Navy subsequently awarded the contract to:

"Aero Corporation
A subsidiary of Whitehall Corporation
P.O. Box 1909
Lake City, Florida 32055"

Hayes protested to this Office that award to a source not submitting a proposal was improper. On May 10, 1985, in response to the Hayes protest, the Navy issued a modification to change the award document to show the correct awardee as:

"Whitehall Corporation
Aerospace Division
P.O. Box 1909
Lake City, Florida 32055"

Hayes asks that we closely examine the agency's "clerical error" in the award of this contract. Specifically, Hayes asks that we obtain copies of work orders issued under the contract to determine which company actually is performing the contract. Hayes also suggests

Aero may have submitted an offer after the closing date which the Navy, in fact, has accepted as the basis of this contract. Further, Hayes also points out that under the contract modification, reference is made to an aerospace division. However, Hayes states that Whitehall's annual report does not indicate that Whitehall has an aerospace division. The report lists Aero Corporation as Whitehall's aerospace group. Also, Hayes argues that the Florida address for Whitehall is actually Aero's address. From this record, Hayes concludes that Aero is the actual party performing the contract.

Our review here is limited to the propriety of the award, specifically whether the award of this contract was made to the offeror who submitted the proposal. While clearly the initial award document did not accurately show that award was being made to Whitehall, the subsequent contract modification names Whitehall as the awardee and corrects the impropriety raised by Hayes. In our view, reference to Whitehall's aerospace division in the revised award document does not detract from the propriety of the award to Whitehall. Hayes concedes that Whitehall's annual report states that Whitehall lists Aero as its aerospace group. We view the reference to Aero as a division instead of as a group in the contract document as merely a matter of form, not of substance. Similarly, we find no impropriety in the use of the Florida address for Whitehall since that address is the location for the principal work as provided for in Whitehall's final offer.


To the extent Hayes is arguing that Aero ultimately is performing the work and has, in effect, improperly been allowed to compete for this contract after the RFP closing date, we think the issue of Aero's participation in this procurement was resolved by the court and is not for our consideration. The court decision supported the Navy's decision to permit another round of best and final offers and, specifically, to allow Whitehall to substitute the Aero facility as the principal place of performance. Thus, in our view, Hayes' contentions regarding Aero's participation effectively were before the court. We note in this connection that Hayes specifically argued before the court that:

"The Navy should not be permitted . . . to give Whitehall a second bite at the apple which would enable Whitehall to submit a new proposal to include a site for performance selected for

Whitehall by the SBA or, in the alternative, would give Aero, a company that initially chose not to submit a proposal, the opportunity after the closing date for receipt of proposals to submit a proposal."

Thus, the issue of Aero's potential role in contract performance was before the court. Accordingly, we dismiss Hayes' allegations concerning the extent of Aero's participation in the procurement because the matter was effectively adjudicated on the merits by the Claims Court's granting of summary judgment for the defendants. 4 C.F.R. § 21.9 (1995); Decision Planning Corp., B-210423.2, Mar. 9, 1984, 84-1 C.P.D. ¶ 280. Furthermore, Hayes' contentions that Whitehall's performance of the contract may violate contract terms such as the provision limiting subcontracting is a matter of contract administration which is not for our consideration. Central Texas College System, B-217491, Jan. 25, 1985, 85-1 C.P.D. ¶ 102.

The protest is denied in part and dismissed in part.


for Harry R. Van Cleve
General Counsel