DECISION

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

FILE: B-218473.4 **DATE:** September 24, 1985

MATTER OF: Camel Manufacturing Company--
Request for Reconsideration

DIGEST:

1. Applicable regulations permit--but do not require--a contracting officer to discuss preaward survey results with a prospective contractor and prohibit discussions with other firms surveyed until after award. Thus, the regulations do not contemplate that preaward survey results will be available before award to permit contesting a nonresponsibility determination.

2. Contracting officer, not preaward survey team, ultimately must make responsibility determination. A protester seeking further review of a finding that it lacks financial capability therefore should promptly advise the contracting officer of specific changes in its financial position occurring after preaward survey.

3. Contracting officer should reconsider a nonresponsibility determination when two conditions are present: ample time and a material change in a principal factor on which the determination is based. A second preaward survey is not mandated, however, whenever a nonresponsibility determination is challenged.

4. Responsibility determination is administrative in nature and does not require the procedural due process otherwise necessary in a judicial proceeding.

5. While responsibility determination should be as current as feasible, a procurement must proceed in an orderly and efficient manner, with award on the basis of facts at hand, rather than be delayed indefinitely so that a bidder found nonresponsible may cure deficiencies.

6. Protester's argument that it did not have to raise a particular basis of protest because it would have been apparent from documents submitted with the agency report is without merit, since Bid Protest Regulations require a detailed statement of factual and legal grounds for a protest and warn that failure to present such a statement may result in dismissal.

Camel Manufacturing Company requests reconsideration of our decision in Camel Mfg. Co., B-218473.3, July 11, 1985, 85-2 CPD ¶ 40, dismissing Camel's protest against its rejection as a nonresponsible bidder under invitation for bids (IFB) No. DLA100-85-B-0494, issued by the Defense Logistics Agency's (DLA) Defense Personnel Support Center, Philadelphia, Pennsylvania. We affirm our prior decision.

Camel protested that the contracting officer's determination of nonresponsibility because of unsatisfactory financial capability while based on a preaward survey was improper because it was not based on current information and because Camel's proposed 100 percent subcontractor was a planned producer of the general purpose small tents being procured, so that Camel itself automatically should have been deemed responsible. We found that the contracting officer acted reasonably under the circumstances in not seeking a second preaward survey on Camel because the protester had provided no specific information in support of its purportedly improved financial status, but, in a letter dated June 14, 1985, had merely advised him that it had furnished "more complete and updated" information to the Defense Contract Administration Services Management Area (DCASMA), Atlanta. We did not consider whether the status of Camel's proposed subcontractor as a planned producer affected Camel's responsibility because we found that basis of protest untimely.

In its reconsideration request, the protester contends that it was not able to point out errors in the preaward survey report pertaining to its financial capability in its June 14, 1985 letter to the contracting officer because it did not obtain a copy of that report until July 2, 1985, the date on which it protested to our Office. Camel attempts to refute the preaward survey findings, stating that it has obtained an increase in its line of credit to $2.5 million and that DCASMA admitted that it had erroneously calculated Camel's negative cash positions and high liability-to-net-assets ratios. In addition, Camel argues

that, contrary to our decision, it was not required to provide specific information to the contracting officer, but only to the surveying activity, from which, under applicable regulations, the contracting officer must obtain information on as current a basis as possible. Camel cites the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.105-1 (1984), and our decision in 51 Comp. Gen. 588 (1972) in support of its argument that the contracting officer acted arbitrarily and irresponsibly in not obtaining a second preaward survey.

Camel also argues that it did not have to point out in its protest that it intended to subcontract to a planned producer, since that information was included in its bid and would have been apparent from the agency report on the protest if we had requested one.

Finally, Camel objects to a footnote in our July decision in which we stated that, according to DLA, in a later preaward survey in connection with a different procurement, Camel had again been found nonresponsible due to lack of financial capability. Camel argues that it was prejudiced by our use of this information.

We find no merit to Camel's contentions.

Camel correctly states that the FAR requires information on financial resources to be obtained or updated on as current a basis as is feasible up to the date of award. 48 C.F.R. § 9.105-1(b)(3). However, information accumulated for the purpose of determining responsibility may not be disclosed outside the government except as provided in the Freedom of Information Act. Id. § 9.105-3. Moreover, under this regulation provision, before award the contracting officer is permitted--but not required--to discuss preaward survey results with the prospective contractor; he may not discuss them with other firms surveyed until after award. Thus, the regulations do not contemplate that preaward survey reports will be available before award to permit contesting a nonresponsibility determination. Therefore, if Camel, upon learning of the survey team's conclusion, wished further review of the team's finding, it should have promptly advised the contracting officer that it had obtained an increased line of credit, rather than wait to obtain a copy of the preaward survey report and then point out alleged errors in it. The contracting officer, not the preaward survey team, ultimately must make the responsibility determination, based upon the preaward survey recommendation and other information available to him. Id. §§ 9.103(c) and 9.105-1(c). In this

regard, we note that Camel admittedly was aware of the general basis for the nonresponsibility determination, i.e., that it lacked financial capability, when it was contacted by the Small Business Administration (SBA) shortly after the contracting officer, on May 14, 1985, referred the matter to the SBA under the certificate of competency procedures.

Our decision in 51 Comp. Gen. 588, supra, does not, as Camel argues, mandate a second preaward survey in every case where a nonresponsibility determination is challenged. Rather, this and more recent decisions indicate that the contracting officer should reconsider when two conditions are present: ample time and a material change in a principal factor on which the determination is based. See C.F.R. Services, Inc., et al., 64 Comp. Gen. 19 (1984), 84-2 CPD ¶ 459, and cases cited therein.

Here, the agency's action in making award as soon as it was advised of our intent to dismiss Camel's protest suggests that time was of the essence. As for a material change in the information on which the nonresponsibility determination was based, as we stated in our July decision, in Camel's case the contracting officer could not have determined whether there had been a material change in the firm's financial resources from Camel's bare assertion that "more complete and updated" information had been furnished to DCASMA.

In its request for reconsideration, Camel also cites Related Industries, Inc. v. United States, 2 Cl. Ct. 517 (1983), in protesting the contracting officer's decision not to obtain a second preaward survey. The firm has not alleged or shown that its exclusion from this particular procurement is similar to the summary exclusion from a number of procurements, amounting to a de facto debarment, found in Related Industries, where the court held that the bidder was entitled to notice and an opportunity to present additional information as to its responsibility. As we have previously stated in distinguishing Related Industries, a responsibility determination is administrative in nature and does not require the procedural due process otherwise necessary in a judicial proceeding. System Development Corp., B-212624, Dec. 5, 1983, 83-1 CPD ¶ 644.

We therefore find that the rule applied in our July decision--that a procurement must proceed in an orderly and efficient manner, with award on the basis of the facts at

hand, rather than be delayed indefinitely in order to allow a nonresponsible bidder to cure deficiencies--was correct, and that the award did not violate the regulatory requirement that responsibility determinations be as current as practicable. See Roarda, Inc., B-204524.5, May 7, 1982, 82-1 CPD ¶ 438; Inflated Products Co., Inc., B-188319, May 25, 1977, 77-1 CPD ¶ 365.

As noted above, in our July decision we dismissed Camel's argument that it was by definition responsible due to the status of its proposed subcontractor, stating that the firm should have raised this basis of protest within 10 days after it learned of the contracting officer's nonresponsibility determination. We are still of this opinion. We find no merit in Camel's argument that it did not have to raise this basis of protest because its plan to subcontract would have been apparent from documents submitted with an agency report. Our Bid Protest Regulations require a detailed statement of the factual and legal grounds for protest and specifically warn protesters that we may dismiss protests that fail to present such a statement. See 4 C.F.R. §§ 21.1(c)(4) and (f). Camel did not do so in a timely fashion, and its reliance on our obtaining an agency report to make known its basis of protest is misplaced.

Finally, the footnote to which Camel objects was based on information relayed to our Office by DLA, was factual in nature, and was inserted so that the decision would reflect DLA's then-current position on Camel's responsibility; the decision, however, did not depend upon the allegedly erroneous facts set forth in the footnote. Accordingly, we fail to see how the protester was prejudiced by our inclusion of the footnote.

Our prior decision is affirmed.

James F. Hinchman
for Harry R. Van Cleve
General Counsel