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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Alan Scott Industries

File: B-225210.2

Date: February 12, 1987

DIGEST

1. Protest against contracting officer's negative responsibility determination is denied where the determination was based on a negative evaluation of preaward samples and the record contains documentation that provides a reasonable basis for the evaluation findings and the contracting officer's determination.
2. Fact that protester may have been found responsible by other contracting officers does not show that contracting officer acted in bad faith in making nonresponsibility determination because such determinations are judgmental and based upon the circumstances of each procurement.
3. Contracting officer may base nonresponsibility determination on evaluation of preaward samples which shows protester does not have capability to produce item in compliance with applicable specifications, without affording the contractor an opportunity to explain or discuss the evidence.
4. Protest against restrictive specifications is dismissed as untimely where protester failed to file written protest to either agency or General Accounting Office before bid opening.
5. Protest that contracting agency has not given protester opportunity to examine samples to determine the validity of sample defects is denied where record shows samples are available at agency for bidder examination.

DECISION

Alan Scott Industries (ASI) protests the rejection of its bid under invitation for bids (IFB) No. DLA120-85-B-2394, issued

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by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania, for retractors. ASI contends that DPSC improperly determined ASI to be nonresponsible because of defects in its preaward samples.

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

Section "M," clause 22 of the IFB stated that the purpose for the preaward samples was to establish the bidder's capability, if awarded the contract, to produce conforming items. ASI submitted its preaward samples as requested. Based on tests which revealed defects, DPSC determined that ASI was not capable of producing an item in compliance with the specifications, and therefore was ineligible for award. DPSC found that ASI's samples did not mesh properly, had grind marks, failed a copper sulfate test and boil test, and contained crevices.

The preaward sample requirement clearly related, by its terms, to a bidder's responsibility, that is, the firm's ability to meet the contractual obligation. See F.A.R., Division of Cabot Corp., B-215032, July 5, 1984, 84-2 C.P.D. ¶ 19. The determination of a prospective contractor's responsibility is the duty of the contracting officer, who is vested with a wide degree of discretion and business judgment in making that determination. Pauline James & Associates, B-220152, B-220152.2, Nov. 20, 1985, 85-2 C.P.D. ¶ 573. Although the contracting officer's determination of responsibility should be based on facts and conclusions reached in good faith, it is appropriate that the final decision be left to the administrative discretion of the contracting agency involved since it must bear the effect of any difficulties experienced in obtaining required performance. Mico Photo Type, B-223756, Oct. 9, 1986, 86-2 C.P.D. ¶ 413.

For these reasons, our Office generally will not question a contracting officer's negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or the lack of any reasonable basis for the determination. ICR, Inc., B-223033, Aug. 13, 1986, 86-2 C.P.D. ¶ 184. ASI has not made the necessary showing here. Instead, we find the record provides a reasonable basis for the contracting officer's determination.

For example, ASI alleges that DPSC cites as serious defects minute grind marks that can only be specified by micron finish, and that these marks do not affect the end use of the

retractor. ASI contends that DPSC illegally used magnification in the examination of the finish. DPSC replies that military specification MIL-R-36675, shown on page 5 of the IFB, classifies grind marks as major defects. According to DPSC, surgeons are very concerned about instruments with grind marks, and ASI's nonconformance was observed with normal unaided visual examination without any magnification.

Similarly, ASI contends that MIL-STD-753A specifically eliminates use of the copper sulfate test on type 400 stainless steel specified for surgical instruments. However, as DPSC points out, MIL-STD-753A does not apply to the IFB. MIL-R-36675, contained in the IFB, prescribes the copper sulfate test.

Furthermore, although ASI also contends that crevices in an instrument do not affect the end use of the retractor, DPSC notes that a crevice is a major defect since the instrument must be finished so as not to trap foreign matter which could cause contamination in a surgical procedure.

ASI also complains that DPSC disregarded its completion of previous contracts for the same instruments. DPSC replies that although the determination of capability to perform was made on the preaward samples inspected under the IFB, items submitted by ASI under its last contract were found defective.

In view of the failure of the preaward samples to comply with the IFB specifications, it was reasonable for the contracting officer to conclude ASI was nonresponsible. The fact that ASI may have been found responsible by other contracting officers does not indicate that the contracting officer here acted in bad faith. Responsibility determinations are made based upon the circumstances of each procurement which exist at the time the contract is to be awarded. These determinations are inherently judgmental, and two people can reach opposite conclusions as to a firm's responsibility without either acting in bad faith. See AMCO Tool & Die, 62 Comp. Gen. 213 (1983), 83-1 C.P.D. ¶ 246.

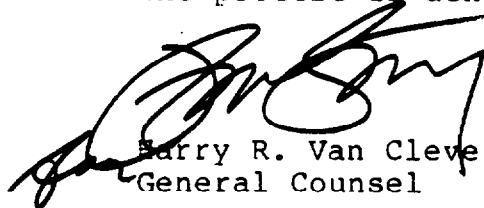
ASI also protests that it was not given an opportunity to correct defects DPSC found in its preaward samples. However, section "M," clause 22 of the IFB specifically states that an additional preaward sample will not be requested or accepted on this solicitation if the original samples and data are not approved. Moreover, there is no requirement that a protester

be afforded the opportunity sought by ASI. The contracting officer properly may base a nonresponsibility determination on the evidence of record without affording the contractor an opportunity to explain or otherwise defend against the evidence. See Omneco, Inc.; Aerojet Production Co., B-218343, B-218343.2, June 10, 1985, 85-1 C.P.D. ¶ 660. ASI also alleges that the boil test is subjective and a means for DPSC to exclude unwanted contractors. This allegation is untimely raised. The IFB provides that items shall be in compliance with military specification MIL-R-36675, which prescribes the boil test. Our Bid Protest Regulations require that protests based on alleged solicitation improprieties apparent on the face of the solicitation be filed with either the contracting agency or our Office prior to bid opening. 4 C.F.R. § 21.2(a)(1) and (3) (1986); Delta Elevator Service Corp., B-224903, Oct. 30, 1986, 86-2 C.P.D. ¶ 501. Since ASI did not raise its objection to the boil test until after bid opening, its protest on this issue is untimely and will not be considered.

ASI also contends that it has not been given the opportunity to examine the samples to determine the validity of the defects found by DPSC. However, the record shows that the preaward samples are available at DPSC for bidder examination.

ASI also complains that DPSC has refused to give it certain instruments which ASI apparently believes DPSC used to test its samples. However, DPSC has stated that the defects for ASI's samples were found without the aid of such instruments.

The protest is denied in part and dismissed in part.



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General Counsel