



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Tek-Wave, Inc.

File: B-228453.3

Date: April 26, 1988

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### DIGEST

Protest against negative responsibility determination is denied where the determination reasonably was based on a current negative preaward survey report that found protester had an unsatisfactory record of prior performance.

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### DECISION

Tek-Wave, Inc. protests the rejection of its low bid by the U.S. Army Communications-Electronics Command under invitation for bids (IFB) No. DAAB07-87-B-G079, for amplifiers for the Satellite Communications System. The contracting officer found Tek-Wave nonresponsive and rejected Tek-Wave's apparent low bid. The contracting officer based her nonresponsibility determination on a preaward survey report recommending a determination of nonresponsibility and "No Award" and citing Tek-Wave's unsatisfactory prior performance record, lack of satisfactory accounting system, questions concerning Tek-Wave's production capability, and its ability to timely meet delivery schedules.

We deny the protest.

Tek-Wave specifically objects to the contracting officer's reliance on the preaward survey report received by the contracting officer on January 4, 1988, that 11 of 19 contracts performed by Tek-Wave during the past 12 months were delinquent.<sup>1/</sup> The report further showed that more than 50 percent of the delinquencies were in excess of 60 days.

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<sup>1/</sup> We note that the preaward survey report referred to in this protest concerns Tek-Wave and its parent company, Frequency Electronics, Inc. (FEI). A prior determination of nonresponsibility by the contracting officer specific to Tek-Wave alone was submitted to the Small and Disadvantaged Business Utilization office which concurred with the contracting officer's determination. A referral then to the Small Business Administration was closed without decision, however, because Tek-Wave decided to combine its efforts with FEI and change its status to a "large" business.

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The report noted that, under a similar procurement for the identical item required under the present solicitation, Tek-Wave delivered the item 1 year late. The report also indicated that Tek-Wave did not have a satisfactory cost accounting system, and concluded from the high percentage of delinquent contracts that Tek-Wave's production capability would not permit it to meet the IFB delivery schedule. The contracting officer found Tek-Wave nonresponsive on January 6, immediately upon receipt of the preaward survey. Since there was no other eligible bidder on the solicitation, the Army issued an amendment canceling the solicitation on January 15. This protest followed.

A contracting agency has broad discretion in making responsibility determinations, which must of necessity be a matter of business judgment. Costec Associates, B-215827, Dec. 5, 1984, 84-2 CPD ¶ 626. Such judgments must, of course, be based on fact and reached in good faith; however, such decisions generally are within the discretion of the agency since that agency must bear the brunt of difficulties experienced in obtaining the required performance. Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48. Therefore, we will not question a nonresponsibility determination unless the protester demonstrates bad faith by the agency or lack of any reasonable basis for the determination. System Development Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644. Tek-Wave has not made the necessary showing here.

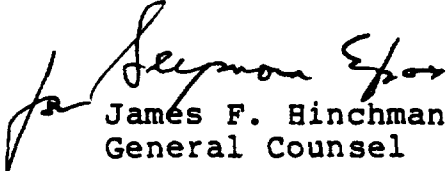
Tek-Wave contends that the contracting officer improperly relied upon the preaward survey and that the contracting officer failed to make an independent determination concerning Tek-Wave's nonresponsibility. Tek-Wave concedes that it has been delinquent in some of its deliveries, but contends that it has now significantly reduced its delinquency rate so that presently only one contract is delinquent, and that this indicates improvement in its ability to meet timely the delivery schedules under future contracts. Tek-Wave argues that its present facilities and equipment were determined in the report to be adequate to timely manufacture the required item, and that the report failed to recognize that Frequency Electronics, Inc., of which Tek-Wave is a subsidiary, had an adequate cost accounting system.

We specifically have held that a contracting officer may rely on a negative preaward survey which indicates that the firm's prior performance was unsatisfactory to support a finding of nonresponsibility. Firm Reis GmbH, B-224544, B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72. While Tek-Wave may consider the delinquency percentages on prior contracts misleading as to its capabilities, we find the contracting officer's reliance on these figures unobjectionable. The

record shows, and Tek-Wave does not dispute, that Tek-Wave was delinquent on a significant percentage of current and prior contracts (11 out of 19 in the year prior to the report). In our view, the contracting officer could reasonably consider these percentages as indicative of Tek-Wave's capabilities to timely perform even though there was a recent improved delivery record.

While Tek-Wave did offer to "cure" its delinquent performance<sup>2/</sup>, this offer came approximately 1 month after the solicitation was canceled. Tek-Wave's offer to cure its nonresponsibility after the decision of nonresponsibility was made does not establish that the decision was unreasonable. In this regard, the contracting officer need not delay indefinitely a decision on a firm's responsibility while a firm attempts to cure the causes for its being found nonresponsible. Roarda, Inc., B-204524.5, May 7, 1982, 82-1 CPD ¶ 438.

The protest is denied.

  
James F. Hinchman  
General Counsel

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<sup>2/</sup> Tek-Wave, on February 12, offered to produce certain items in-house rather than rely on its subcontractor since subcontractor delays apparently contributed to the delinquencies on other contracts.