Shanks

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: LD Research Corporation

File: B-230912.3

Date: September 9, 1988

DIGEST

1. Protest that agency acted in bad faith in finding protester nonresponsible is denied since the allegations upon which protest is based are without merit, and since protester has failed to meet its burden of proof.

2. Protest that contract award was improper because awardee did not meet definitive responsibility criteria for experience is denied since solicitation experience requirement was a proposal evaluation criterion, and the agency's consideration of the awardee's preincorporation experience was not improper.

DECISION

LD Research Corporation (LDR) protests the award of a contract under request for proposals (RFP) No. DAJB03-87-R-3928, issued by the Department of the Army for food service operation of the United States Army dining facilities in Korea. The protester contends that the agency acted in bad faith in finding LDR nonresponsible, as well as in several other aspects of its conduct of the procurement. LDR also contends that the Army's award of the contract to KCA Corporation was improper because the awardee did not meet the solicitation's definitive responsibility criteria for experience.

We deny the protest.

This procurement was the subject of a previous protest by LDR in which it contended that the Army improperly awarded the contract at a price higher than that offered by LDR. (See LD Research Corporation, B-230912, June 20, 1988, 88-1 CPD ¶ 587, in which we dismissed the protest on the basis that LDR was not an interested party to protest the award because the Army had determined it to be nonresponsible). LDR timely filed this protest after learning through the

043245/136

administrative report on its earlier protest that the Army had found it nonresponsible.

LDR contends that the Army's nonresponsibility determination was made in bad faith because, during oral discussions, the contracting officer did not, as the agency states, advise LDR of a preaward survey report recommendation that no award be made to the protester because of the finding that the protester had "insufficient corporate financial capability to meet the working capital requirements of this proposed contract together with [its] current business backlog." The agency states that it fully discussed this matter with the protester's representative and informed him that the preaward survey negative award recommendation would be removed if the firm obtained the additional $400,000 line of credit for which it had already applied but had not received approval at the time the survey was conducted. The agency states that the nonresponsibility determination was issued following LDR's submission of its best and final offer (BAFO) on March 17, 1988, because the firm had failed to "remedy" the finding of financial insufficiency.

To meet the Federal Acquisition Regulation (FAR) responsibility standards, a prospective contractor must have adequate financial resources to perform the contract or the ability to obtain those resources. FAR § 9.104-1(a). 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 to make such determinations. Gulton Industries, Inc., B-227132, Aug. 19, 1987, 87-2 CPD ¶ 179.

The contracting officer's determination of responsibility must be based on facts and reached in good faith. Since the contracting agency involved must bear the effect of any difficulties experienced in obtaining the required performance, however, it is appropriate that the final decision be left to its administrative discretion. Mico Phototype, Inc., B-223756, Oct. 9, 1986, 86-2 CPD ¶ 413. Our Office, therefore, will not question a contracting officer's nonresponsibility determination absent a showing by the protester that the determination was made in bad faith or lacks any reasonable basis. Gulton Industries, Inc., B-227132, supra.

In this case, the protester seeks to show that the contracting officer's determination that it was nonresponsible due to inadequate financial resources was made in bad faith because the contracting officer allegedly failed to inform the protester during discussions of the preaward survey results regarding its financial capability.

A contracting officer may base a determination of nonresponsibility upon evidence of record, including preaward survey information. A contracting officer may also discuss such information with a prospective contractor in advance of award, but he or she is not required to do so. Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158; Alan Scott Industries, B-225210.2, Feb. 12, 1987, 87-1 CPD ¶ 155 at 4. Thus, even if the contracting officer did not inform LDR of the preaward survey findings concerning the firm's financial capability, which the agency disputes, that would not establish that the agency's nonresponsibility determination was made in bad faith.

LDR also challenges the Army's nonresponsibility determination on the grounds that the agency overestimated the working capital requirements of the contract and that its revised cost proposal was not considered in the cost and pricing analysis by which its financial capability was determined. In this regard, the protester maintains that using the base year price that it proposed in its BAFO, the monthly working capital requirement is approximately $61,000, as opposed to $143,667 shown in the preaward survey report.

The contracting officer acknowledges that the calculation of the required working capital used "during the preaward survey" was based on LDR's original price proposal. The contracting officer also states, however, that the required working capital calculation referenced during oral discussions was based on the protester's BAFO. The agency calculates the amount of working capital required at $362,093. The agency observes that even if LDR's estimate of $61,000 (which does not allow for its current business backlog or the 2-month expenses rule for carrying payroll, etc.) were correct, the firm's financial capability would still be insufficient in light of its negative net worth and minimal existing working capital, as indicated in the preaward survey report.

Thus, the record does not support LDR's allegations that the agency failed to consider its revised cost proposal and improperly based its determination of financial nonresponsibility on the protester's initial proposal. Further, we do not find unreasonable the agency's position that even if LDR's own calculation of the working capital required is used as a point of reference, the firm's financial capability is still insufficient to justify awarding the contract to it.

A protester's disagreement with a contracting officer's determination of nonresponsibility does not suffice to show that the contracting officer acted in bad faith. Nations, Inc., B-220935.2, Feb. 26, 1986, 86-1 CPD ¶ 203. Contracting officers are presumed to act in good faith, and to make a showing otherwise, a protester must demonstrate by irrefutable proof that the contracting officer had a specific and malicious intent to injure the protester. Id. LDR has made no such showing. Accordingly, we find that LDR has failed to show that the agency lacked a reasonable basis or that it acted in bad faith in finding the firm financially nonresponsible.

In addition to its protest of the Army's nonresponsibility determination, LDR alleges that the agency report on its initial protest indicates the agency failed to establish a common cut-off date for submission of BAFOs, as required by FAR § 15.611(b)(3). The protester draws this inference from the table of contents (file index) entries of that agency report, since certain information and documents (such as the awardee's proposal) were excluded from its copy of the report.

Item (exhibit) No. 10 is listed there as: "Request for protestor Best and Final Offer dated 10 March 88" and item No. 18 is listed as: "BAFO and Revised Proposal of awardee KCA Corporation dated 8 Mar 88."

Noting that the agency's letters requesting BAFOs were not included in its copy of the agency report, the protester questions whether the Army, in fact, requested all BAFOs on March 10, and whether KCA acknowledged solicitation amendment 005, dated March 9, if in fact KCA's BAFO was dated March 8.

In denying this allegation, the agency explains that during discussions offerors were advised to prepare BAFOs, for which a formal request and deadline submission date would be issued upon the completion of all discussions. The agency further states that by letter dated March 10, its formal request for BAFOs was issued to the three offerors in the competitive range. That letter established the final cut-off date for the submission of BAFOs as March 17.1/

1/ The agency provided to our Office, as a part of its reports on LDR's first and second protests, respectively, copies of this letter showing the protester's acknowledgment of receipt on March 11 and the awardee's acknowledgment of receipt on March 14.

The agency further explains that in accordance with the advice received during discussions, the awardee proceeded to prepare the referenced BAFO, dated March 8. The awardee delivered that BAFO to the contracting officer in Korea and signed an acknowledgment of receipt of the request for BAFOs on March 14. The record shows that on the day following, the awardee submitted a letter to the contracting officer confirming that both solicitation amendments 004 and 005 were included in the BAFO submitted on March 14.

On the basis of the contracting officer's clarification of this series of events, which our in camera review substantiates, we conclude that LDR's speculative allegations concerning the lack of a common cut-off date for the submission of BAFOs and the awardee's acknowledgment of the final solicitation amendment are unfounded.

Finally,2/ LDR alleges that in making award to KCA, the Army disregarded a definitive responsibility criterion that offerors "show a minimum of five years experience in dining facility management." The protester states that none of the offerors, including itself, met this requirement.

The agency responds that the experience requirement was not a definitive responsibility criterion. The agency states further that even though KCA as presently organized was, as LDR states, incorporated in 1983, the firm did meet the experience requirement since it considered the preincorporation experience of its two directors, one of whom has 8 years, and the other 17 years, of food service experience.

We agree that the experience requirement was not a definitive responsibility criterion, but a proposal evaluation criterion. When responsibility-type factors such as experience are included among the technical evaluation criteria of a negotiated procurement, we do not regard them as definitive responsibility criteria. Consulting and Program Management, 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229. In a protest of the agency's award decision with respect to such a factor, we will examine the record to determine whether the evaluation was fair, reasonable, and consistent with the evaluation criteria. Nations, Inc., B-220935.2, supra.

2/ We consider all other matters discussed by the protester in its May 23 submission (which constituted both its comments in connection with the initial protest and its second protest of the subject procurement) to have been a part of its initial protest. Those matters are, therefore, not addressed in this decision.

We have held that in evaluating the experience of a new business under an evaluation criterion, an agency may consider the experience of supervisory personnel, as well as the firm's experience prior to its incorporation. Data Flow Corp., et al., 62 Comp. Gen. 506 (1983), 83-2 CPD ¶ 57; Nations, Inc., B-220935.2, supra.

Here, where the solicitation did not require that the relevant experience be limited to the institutional experience of the contracting entity, it was not improper for the agency to consider the food service management experience of the KCA directors who according to the record, are a part of the corporation's management team. See Data Flow Corp., et al., supra, 62 Comp. Gen. 506 at 510, 83-2 CPD ¶ 57 at 5. We conclude, therefore, that LDR's allegation that the contract award was improper because the awardee did not meet the solicitation's experience requirement is without merit.

The protest is denied.

James F. Hinchman
General Counsel