



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: IMC Magnetics Corporation--Reconsideration
File: B-232392.2
Date: December 12, 1988

DIGEST

1. Protest of rejection of protester's low offer is denied where it has not been shown that contracting officer's determination that the protester was not a responsible prospective contractor, based on a negative preaward survey report, was without any reasonable basis.
2. Protest of award to second-low offeror, on the basis that the awardee was not listed as an approved source in the solicitation, is denied where record shows awardee received approval after solicitation was issued and no basis has been presented upon which the propriety of that action may be questioned.
3. Protest that "desk" preaward survey of awardee may have been an inadequate basis upon which to determine that the awardee could satisfactorily perform the contract is dismissed because the General Accounting Office does not review a contracting officer's affirmative determination of an offeror's responsibility absent circumstances not present here.

DECISION

IMC Magnetics Corporation has requested reconsideration of our September 1, 1988, dismissal of its protest of an award made under request for proposals (RFP) No. DAAJ09-88-R-0560, issued by the Aviation Systems Command, Department of the Army for vaneaxial fans, a spare part for the AH-64 Apache attack helicopter. We dismissed IMC's protest on the basis that it was not an interested party to protest an award to another firm since it had not contested the agency's determination that it was nonresponsible. IMC now contends that because the Army had not responded to IMC's requests for copies of the preaward survey it was at the time of its original protest unable to contest the particulars of that

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determination, although it notes that it did assert in that protest that it "has been satisfactorily providing the item solicited on many previous occasions to [the Army]."

On reconsideration, we conclude that our interpretation of IMC's initial protest was too narrow and that it had in fact also protested the nonresponsibility determination. We therefore have reopened the file and developed the case. For the reasons stated below, however, we deny the protest in part and dismiss it in part.

In its initial protest, IMC asserted that it was the low priced, and a responsible offeror, and it objected to the award to another offeror, Noah Howden, Inc., because that firm was not listed in the RFP as an approved source of supply, and because the award was made at a price higher than that offered by the protester. The record shows that originally there were only two approved sources to compete for this procurement, IMC and McDonnell Douglas Helicopter Company (MDHC). After the solicitation was issued, however, Noah Howden also received approval as a source for this item. Offers from each of the three approved sources was received. Following preaward surveys of IMC, the low offeror, and Noah Howden, the second low offeror, IMC was found to be nonresponsible and Noah Howden responsible. On August 5, 1988, award was made to Noah Howden and IMC was notified of the award and the determination that IMC had been found nonresponsible on August 12. IMC's initial protest to our Office was filed within 10 working days thereafter and therefore was timely. 4 C.F.R. § 21.2(a)(2) (1988).

The Army argues that IMC properly was determined to be nonresponsible based on a negative preaward survey. In summary, the preaward survey recommended that no award be made to IMC because of its delinquent performance under some prior contracts, as a result of which its production capability was rated as unsatisfactory. IMC contends that the preaward survey did not take into account the firm's satisfactory performance under other contracts and that the preaward survey overstated IMC's delinquency rate.

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. We therefore will not question a nonresponsibility determination unless the protester shows bad faith on the part of the agency or that the determination lacks any reasonable basis. Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158. IMC has not asserted that

contracting officials acted in bad faith nor, for the reasons stated below, do we think it has proven the determination to have no reasonable basis.

We first note that after it had filed its request for reconsideration with us, IMC was provided with a copy of the preaward survey report in response to a Freedom of Information Act request it had made of the Army. IMC then took exception to some aspects of the preaward survey report in a letter written to the Army's contracting officer. The agency addressed those criticisms in its report to our Office upon which, of course, IMC had the opportunity to comment. IMC therefore has had two opportunities to comment upon the information adverse to it contained in the preaward survey report.

The preaward survey team determined that IMC's production capability was unsatisfactory, and therefore recommended that no award be made to it, because of five current contracts administered by the local Defense Contract Administration Services Management Area office, two--or 40 percent--were delinquent and because during the past 12 months, of the six contracts IMC had completed, three--or 50 percent--were delinquent. In their supporting narrative, the surveyors identified, of the five current contracts (which we identify by their last four digits), contracts -3778 and -3074 as delinquent and noted that contract -C277 was not delinquent only because the contracting agency had agreed to an extension of the delivery schedule for causes attributable to the contractor.

In its letter written to the contracting officer before the Army's report was submitted to our Office, IMC took issue with the preaward survey team's "no award" recommendation on two grounds: (1) the team unreasonably restricted its review to only five contracts and did not consider other contracts on which IMC had performed satisfactorily; and (2) that contract -0426 (one of the five considered) was not delinquent since its delivery date was September 1988 not June 1988. Therefore, IMC argued, its delinquency rate among the five contracts reviewed was 20 percent, not 40 percent.

In its report to our Office, the Army first explains that the preaward survey team only looked at the five bilateral--over \$25,000--contracts on which IMC was the prime contractor because those were the ones considered significant enough on which to base a responsibility determination. With regard to IMC's contention that its delinquency rate among the five contracts reviewed was 20 percent and not

40 percent, the Army disputes the protester's assertion that delivery under contract -0426 was to be in September rather than June 1988. More importantly, however, the Army points out that contract -0426 was not even among those identified in the preaward survey report as delinquent. The report says that contracts -3778 and -3074 were delinquent as of the time of the survey and that contract -C277 would have been delinquent had not the delivery schedule been extended.

In its comments on the agency report, IMC reiterates its objection to the surveyors' failure to consider a larger number of its contracts in assessing its performance. It also asserts that its earlier letter to the contracting officer "established" that its delinquency rate among the five contracts reviewed was 20 percent and not 40 percent. We are not persuaded by either of these arguments that the determination of nonresponsibility was without any reasonable basis.

Had IMC been found to be responsible, it would have been the prime contractor for a contract valued at more than \$100,000. Under these circumstances, we do not think it was unreasonable of the preaward survey team to consider as indicative of the contractor's performance its other contracts valued at \$25,000 or more for which it was the prime contractor.

Contrary to the protester's assertion, we also do not think its earlier correspondence "established" that the 40 percent delinquency figure was in error. In its report to our Office, the Army points out that the 40 percent figure refers to the protester's performance under contracts -3778 and -3074, discussed in the preaward survey report, and was not based on contract -0426, to which the protester had referred in its argument that the correct delinquency rate was 20 percent. In its comments on the agency report, the protester does not discuss contracts -3778 and -3074. We therefore have no basis on which to conclude that the 40 percent delinquency rate reported by the preaward survey team to the contracting officer was in error.

In addition, IMC has not rebutted the Army's observation that it was appropriate for the contracting officer to consider the fact that contract -C277 was not delinquent only because the delivery schedule had been extended. As the Army points out, we have held that a contracting officer may reasonably consider prior performance unsatisfactory where the contractor did not make timely delivery under the original delivery schedule and avoided delinquency only

because the agency revised the delivery schedule and allowed it to continue performance. Short Electronics, Inc., B-231610, Sept. 13, 1988, 88-2 CPD ¶ 233.

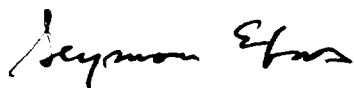
IMC's protest of the Army's nonresponsibility determination is therefore denied.

Next, IMC argues that Noah Howden, the awardee, was not listed in the RFP as an approved source and thus was ineligible for award. The record shows that Noah Howden was approved as a source after the solicitation was issued. This action was taken since the applicable MDHC drawing showed Noah Howden as an approved source for a part which is "two-way interchangeable" with that being procured here. We have no basis to question the propriety of the approval of Noah Howden as an additional source.

IMC's final argument is that the desk survey performed on Noah Howden was inadequate to determine whether that firm could satisfactorily perform the contract. In effect, IMC is challenging the contracting officer's affirmative determination that Noah Howden was a responsible prospective contractor.

We recognize that a contracting officer's determination of whether an offeror is a responsible prospective contractor essentially involves a business judgment as to which the contracting officer is afforded a great deal of discretion. We continue to review negative determinations, which result in the rejection as nonresponsible of offerors such as IMC, against a standard of reasonableness to assure that offers are not being arbitrarily rejected. Where a contracting officer affirmatively determines that another offeror, such as Noah Howden, is responsible, we apply a different standard of review in recognition of the fact that we have before us not the rejection of an offer but the acceptance of one pursuant to a decision which is inherently a matter of judgment. As to affirmative determinations of offerors' responsibility, therefore, we have as a matter of policy long restricted our review to those instances in which there has been a showing that the determination was made fraudulently or in bad faith or that definitive, or objective, responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(f)(5). To make a showing of fraud or bad faith, the protester has a heavy burden of proof; it must demonstrate that procuring officials had a specific and malicious intent to injure the protester. Bryant Organization, Inc., B-28204.2, Jan. 7, 1988, 88-1 CPD ¶ 10.

IMC has neither alleged nor demonstrated any fraudulent intent here, and in the absence of any indication that the agency failed to apply any definitive responsibility criteria in the solicitation, this aspect of the protest is dismissed.

for 
James F. Hinchman
General Counsel