Jordan

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Creative Systems Electronics, Inc.

File: B-235388.2

Date: August 24, 1989

DIGEST

Agency's nonresponsibility determination was reasonable where it was based on protester's failure to provide complete financial information and on a negative pre-award survey of protester's proposed inspection facility which revealed that protester did not have an adequate quality control system, testing facilities or segregation control procedures for defective material.

DECISION

Creative Systems Electronics, Inc. (CSE), protests award of requirements contracts to Rayovac Corporation and Eveready Battery Company under solicitation No. 7FXI-J5-88-6101-S, issued by the General Services Administration (GSA) for quantities of dry cell batteries. CSE contends that GSA improperly determined that it was not responsible and that it should have received the contracts as low bidder.

We deny the protest.

Bid opening was on November 30, 1988, and CSE was the low bidder on some 21 line items. According to its bid, CSE would supply batteries manufactured in Hong Kong and it identified its inspection point as the Buffalo, New York, Free Trade Zone. By letter of December 5, CSE advised that it was changing its inspection point to the Oakland, California, Foreign Trade Zone and that it would have a new shipment "arriving probably next week." A plant facilities report of the Oakland site was then ordered by the contracting officer and completed on December 19. Due to various problems discovered in the inspection of the facility, the inspector recommended a finding that CSE was incapable of performing. A pre-award survey of CSE's financial status was also ordered and completed on December 23. Due to CSE's failure to furnish information, the survey officer recommended no award. On the basis of these recommendations, the contracting officer determined

that CSE was not responsible. However, before rejecting its bid for nonresponsibility, the contracting officer later considered CSE for award of additional line items.1/ When CSE received the rejection notice, it protested to the agency and our Office.

As a preliminary matter, GSA argues that CSE's protest is untimely since CSE was aware on January 24, 1989, that GSA questioned the adequacy of its Oakland facility and its financial status, yet did not file its protest until April 13. While CSE was aware of these matters on January 24, we note that GSA advised it on January 31 that it had not yet made a final decision concerning CSE's bid. GSA subsequently considered CSE's low bid for award of additional line items and did not finally reject CSE's bid until a March 29, 1989, letter. Since CSE did not receive this letter until early April, we find that CSE's protest of April 13 was timely filed within 10 working days of that notice. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1988).

The essence of CSE's protest is that the contracting officer's finding of nonresponsibility was erroneous because CSE is financially capable of performing this contract and the Oakland facility report did not accurately portray CSE's planned operations under the contract.

The determination of a prospective contractor's responsibility involves a matter of business judgment, which is vested in the discretion of the contracting officer. We generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or a lack of any reasonable basis for the determination. Elliott Co., B-224887.3, May 4, 1987, 87-1 CPD ¶ 465. To be reasonable, a discretionary decision must reflect a reasoned judgment based on the investigation and evaluation of the evidence available at the time the decision is made. Apex International Management Servs., Inc., 60 Comp. Gen. 172 (1981), 81-1 CPD ¶ 24. Based on the information available, we find the

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1/ After each determination of nonresponsibility, the contracting officer referred the determination to the Small Business Administration for a certificate of competency (COC). These referrals were not necessary since small businesses offering foreign end products are ineligible for a COC. 13 C.F.R. § 125.5(b)-(c) (1988). See Betakut USA Inc., B-234282, May 8, 1989, 89-1 CPD ¶ 432.

contracting officer reasonably determined that CSE was not responsible.2/

GSA wrote to CSE on December 9 and 19 requesting that it complete a four page GSA form which required the provision of supplier and banking information, a balance sheet, and other financial information. When CSE failed to submit any information within the original deadline, the survey official recommended no award, noting that according to a private reporting service, CSE is a debtor in possession, having filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Act (11 U.S.C. § 101 et seq. (Supp. IV 1986)). Based upon this information, the contracting officer reasonably determined that CSE was not financially responsible.

However, CSE claims that it was given insufficient time to submit its financial information and that its subsequent submission of the form on January 5 established its responsibility. We disagree. According to CSE, it received the GSA form at least a week before the December 23 due date, and we find that this was a reasonable and sufficient period of time to furnish the information requested. Thus, its late submission on January 5, of only the first page of the form, reporting supplier and banking information, was reasonably viewed as insufficient to change the contracting officer's original determination. Although CSE has submitted an accountant-prepared balance sheet and other financial information in conjunction with its protest, the record does not establish when or if this information was submitted to GSA.3/

CSE also furnished a letter from its supplier which stated that it would be importing the batteries specified in the solicitation; was "prepared to offer [CSE] sufficient credit necessary to execute the ongoing processing of orders" under

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2/ CSE also argues that since backup contracting was authorized and planned under this contract, the government could have awarded it a contract with no risk. Since award of a backup contract is predicated on a responsible offeror receiving the primary contract, CSE's lack of responsibility makes the subject of backup contracts irrelevant to its protest.

3/ In this regard, we note that CSE submitted ample proof that it telefaxed the first page of the form on January 5, but has never provided a promised affidavit that would ostensibly establish that its accountant had prepared the balance sheet.

the contract; and was willing to accept an assignment of at least the entire amount due to it as consideration. Although CSE relies on this as a "letter of credit," we agree with GSA that it is insufficient to serve as such. Similarly, CSE's explanations, that its supplier's terms were long enough to provide "even the government" time to pay and that its Chapter 11 liabilities were considerably less than the profit on the contract, were insufficient indicia of a responsible financial status.

With regard to the contracting officer's reliance on the plant facilities report, the quality assurance specialist who made the report found the Oakland Foreign Trade Zone site served only as a storage warehouse for the batteries as they entered the United States. The specialist found the space, personnel, and equipment adequate, but found no quality control system or testing facilities at the site. The specialist also found that no segregation control procedures had been established for defective material and no drawings and specifications of the batteries were maintained. Further, there were no batteries stored at the site, thus preventing the specialist from verifying whether they met specification requirements. While a representative of CSE's subcontractor advised that the product would be packed in accordance with instructions from the prime contractor (CSE), the specialist found no packaging, packing, and marking procedures established.

CSE, however, takes issue with the report and claims that the Oakland facility is adequate for the purposes of this contract. In support of its position CSE alleges that the report was designed based on standards for a manufacturing plant and not a storage facility; notes that if it had been contacted at its New York office, it could have furnished all necessary information; and offers rebuttals to the quality assurance specialist's findings.

With regard to the adequacy of the plant facilities report standards, we disagree with CSE's conclusions. Our review of the form and the information entered on it indicate that it is appropriate for use both for manufacturing concerns and storage facilities. Notwithstanding CSE's intention to furnish supplies manufactured elsewhere, the government is reasonably entitled to require evidence of quality control, testing facilities, defective material segregation, and other matters before determining that a supplier is responsible. Further, the quality assurance specialist clearly noted where manufacturing-type standards were not applicable.

With regard to CSE's complaint that it was not contacted in New York, we first note that it notified GSA of its changed inspection point for its batteries, furnished its California address and a point of contact there, and that it expected a shipment the following week. Thus, we believe the agency acted reasonably in conducting a plant facilities inspection of the site after the time of the expected shipment. While a contracting officer may discuss information available to him with a prospective contractor, he is not required to do so before making his decision on responsibility. LD Research Corp., B-230912.3, Sept. 9, 1988, 88-2 CPD 223. Thus, we do not agree that the agency erred in failing to contact CSE's New York office for information which was unavailable at the inspection point.

Concerning quality control, CSE explains that its system is simple: its supplier will not accept batteries that do not pass inspection and CSE will not accept or ship any products that do not pass the tests of Underwriters Laboratories or other government approved testing house. Concerning testing, CSE further explains that the batteries would be tested in Hong Kong and Oakland by a certified testing house, such as Underwriters Laboratories, but never identified a specific third party tester.4/ In view of the solicitation's provision of performance specifications and test schedules, as well as its requirement that contractors provide and maintain a written quality control system, we do not believe it was unreasonable for the agency to require evidence of these matters before finding CSE responsible. CSE's conclusory quality control statement and unspecified plans for testing are insufficient to support a finding of responsibility.

CSE also explained that maintenance of drawings and specifications at the Oakland site was unnecessary since the batteries were easily identifiable, and promised that appropriate samples would be present if it received the award. It also explained that with regard to defective material segregation, it would reject unacceptable items. In view of the thousands of batteries which would pass through CSE's Oakland site under this contract and the government's performance specifications for each line item, CSE's explanations fall short of the agency's reasonable requirements and are insufficient to support a finding of responsibility.

4/ CSE requested names of "approved" testers, but the agency reasonably refused to endorse or promote a particular laboratory, since it was CSE's responsibility to choose and propose any third party tester.

Based upon the situation found at the Oakland site, we agree that the contracting officer reasonably determined CSE to be nonresponsible.

CSE also raises various allegations concerning the communications with GSA and GSA's handling of the responsibility determination. To the extent CSE is suggesting bad faith on the part of the agency, contracting officers are presumed to act in good faith, and to make a showing otherwise, a protester must demonstrate by convincing evidence that the contracting officer had a specific and malicious intent to injure the protester. LD Research Corp., B-230912.3, supra. CSE has failed in its burden of proof; we find no evidence of bad faith in the record.

CSE also claims that Rayovac intends to furnish foreign made batteries in violation of Rayovac's certificate, submitted as part of its bid, that it would furnish domestic manufactured batteries. However, CSE has submitted no evidence in support of its allegations. Accordingly, its mere speculation is insufficient alone to provide a basis for sustaining its protest. Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275. In any event, whether Rayovac supplies batteries in accordance with its certificate is a matter of contract administration which we will not review. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1).

The protest is denied.

James F. Hinchman
General Counsel