



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Chesapeake Laser Systems, Inc.

**File:** B-242350

**Date:** April 8, 1991

Jeanne A. Anderson, Esq., Cohen & White, for the protester.  
C.S. Przybylek, Esq., Department of Energy, for the agency.  
Kathleen A. Gilhooly, Esq., and James A. Spangenberg, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

Protester was properly found nonresponsible by a Department of Energy management contractor, where it reasonably was determined that the protester probably could not produce a system meeting the specifications within the short performance period required to meet the production schedule, notwithstanding its offer to do so.

### DECISION

Chesapeake Laser Systems, Inc. (a large business concern) protests the award of a contract to Leica, Inc. under solicitation and offer No. CB062-76, issued by Martin Marietta Energy Systems, Inc. for a laser beam measuring system required for the development and construction of a propulsor for the SEAWOLF class submarine.

We deny the protest.

Martin Marietta is the Department of Energy's (DOE) management/operating contractor for the Oak Ridge Operations Office, Tennessee. At the outset, we note that federal procurement statutes and regulations do not apply per se to such management contractors, who must conduct procurements according to the terms of their contracts with the agency and their own agency-approved procedures. Our review is limited to determining whether the procurement conforms to the "federal norm," i.e., the policy objectives in the federal statutes and regulations. Merrick Eng'g Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130.

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The solicitation, issued on September 7, 1990, required delivery of the laser beam measuring system by October 23, 1990. The solicitation advised that award would be made "to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to [Martin Marietta], the total cost of the acquisition and other factors considered."

Martin Marietta received three proposals, including Chesapeake's and Leica's, by the September 24, 1990, closing date. All were included in the competitive range, written discussions conducted, and best and final offers (BAFO) submitted by October 30. One BAFO was substantially higher priced than those of Chesapeake and Leica, and was eliminated from further consideration. Leica's BAFO stated that delivery could be made by January 7, 1991. Chesapeake's BAFO did not modify its initial offer to deliver within 90 to 120 days after receipt of the order.

Since Martin Marietta determined that the last possible acceptable delivery date was January 30, 1991, it contacted Chesapeake on November 6 to clarify the offer regarding the delivery schedule and to express its concern whether Chesapeake could timely meet both the government's specification and delivery requirements. In a letter dated November 7, Chesapeake offered to meet the January 30 delivery date. On November 11 and 12, Martin Marietta visited both vendors for a demonstration of their existing measuring systems. After observing and performing tests with a Chesapeake measuring system, Martin Marietta concluded that it was unlikely that Chesapeake could finish the design, fabrication, and testing of a system by January 30 to support the schedule for the development and construction of the SEAWOLF submarine. Martin Marietta was satisfied with the demonstration of the Leica system and awarded it a contract.

Chesapeake protests that Martin Marietta found its proposal technically unacceptable based on a demonstration test that was not included in the solicitation's evaluation criteria; improperly evaluated a product not offered by Chesapeake; and made its award without considering the impact of the Buy American Act on offerors' prices. According to Chesapeake, Martin Marietta basically demanded that Chesapeake pass acceptance testing prior to award, rather than after award as contemplated by the solicitation. Chesapeake argues that the testing of its existing measuring system could not reveal anything about the capabilities of the equipment it actually proposed because its existing equipment was not calibrated or designed to meet the solicitation requirements. Chesapeake also argues that Martin Marietta failed to consider that, with

the application of the Buy American Act evaluation preference, Chesapeake's offer was lower than Leica's.<sup>1/</sup>

DOE responds that, contrary to Chesapeake's allegation, Martin Marietta did not test Chesapeake's product to determine its technical acceptability, but rather to assess its ability to deliver the required system by January 30 as promised in its proposal. DOE stipulates that Chesapeake's proposal, which had the lowest evaluated price, offered to meet the technical specifications and deliver by January 30. Martin Marietta determined Chesapeake was nonresponsible after the site visit and demonstration of Chesapeake's equipment because Martin Marietta did not believe Chesapeake could overcome design and production difficulties, given the short performance period, to timely deliver a system meeting specifications.

Our review of the record shows that this case involves Chesapeake's responsibility, not the technical acceptability of its proposal. Technical acceptability concerns an assessment of whether the offeror's approach and resources set forth in its proposal are adequate to meet the needs of the agency as expressed in the solicitation. Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300. In contrast, responsibility involves an assessment of an offeror's ability to perform in accordance with the terms of its proposal, and is generally determined by an investigation, which is conducted after, or aside from, the actual competition and which may include the use of pre-award surveys. Id.

Chesapeake's BAFO, as clarified in its November 7 letter, agreed to comply with the delivery schedule; nothing on the face of its BAFO took exception to the schedule or other solicitation requirements.<sup>2/</sup> In its November 7 letter offering to meet the January 30, 1991, delivery date, Chesapeake acknowledged Martin Marietta's concerns about timely delivery, and invited Martin Marietta to visit its facility "to increase your confidence in our ability to deliver a product that meets your requirements." The record indicates that Martin Marietta's site visit was not to

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<sup>1/</sup> Since DOE concedes that Chesapeake's offer was low with the application of the Buy American Act preference, it is clear that this preference was taken into account. Inasmuch as we find Martin Marietta reasonably found Chesapeake not responsible, the fact that Chesapeake submitted the low evaluated offer does not entitle it to the award.

<sup>2/</sup> All concerns about the technical acceptability of Chesapeake's proposal were resolved during discussions. However, Martin Marietta remained concerned that Chesapeake would not be able to deliver as its proposal promised.

determine whether Chesapeake's equipment met specifications, since the equipment inspected was not that being offered. Indeed, as stated in Martin Marietta's contemporaneous trip report, the trip's purpose was to determine whether Chesapeake "had a realistic chance of meeting the technical requirements in time to support our needs." Since Chesapeake's proposal offered to meet the required schedule, the determination of whether Chesapeake was capable of satisfying this agreement was a matter of responsibility, not technical acceptability.<sup>3/</sup> See Standard Mfg. Co., Inc., B-236814, Jan. 4, 1990, 90-1 CPD ¶ 14.

The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer, and we will not disturb a nonresponsibility determination absent a showing that the determination lacked a reasonable basis. Pathlab, P.A., B-235380, Aug. 4, 1989, 89-2 CPD ¶ 108. We find Martin Marietta's determination of nonresponsibility reasonable.

The laser beam measuring system is used in fabricating classified components for a propulsor, which is an integral part of the SEAWOLF class submarine. In this case, Martin Marietta required a "single beam tracker" in the system, a tracker which Chesapeake apparently had not previously produced. DOE states, and Chesapeake does not dispute, that in order to meet production schedules critical to the national defense, the laser measuring system had to be available no later than January 30, 1991.

Chesapeake's proposal indicates that it had doubts that the single beam tracker specifications could be met. Its BAFO withdrew its exceptions to this approach only because of Martin Marietta's stated "persistence" in believing the specification could be met with a single beam tracker. Thus, Martin Marietta had a reasonable basis to be concerned whether Chesapeake could deliver a single beam tracker as promised.

As a result of the November site visit, we believe Martin Marietta reasonably concluded that there was a strong probability that Chesapeake could not overcome design problems

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<sup>3/</sup> Certain Martin Marietta documentation indicates that it found Chesapeake technically unacceptable rather than nonresponsible. However, since Chesapeake's proposal was found acceptable on its face (although doubts remained whether it could do what it promised), we think DOE is correct in explaining that this matter actually concerned Chesapeake's capability to perform what it promised, that is, its responsibility.

and produce a system meeting specifications within the short performance period of 2 1/2 months. Although Chesapeake had stated in its November 7 letter, inviting the demonstration, that it could show Martin Marietta "the repeatability that you require with our present tracker"<sup>4/</sup> at the site visit, Chesapeake's system exhibited repeatability errors of between one and one half and three times the minimum requirement.<sup>5/</sup> Furthermore, the accuracy of the tracker demonstrated that day was measured at 0.518 inches compared to a specification requirement that "volumetric accuracy test results are acceptable when measuring instrument deviation from slide position at each point is within 0.0022 inches."

Even considering the system demonstrated was part of Chesapeake's trilateration system, not the single beam tracker required, Martin Marietta was nevertheless concerned about the likelihood that Chesapeake would overcome the obstacles in producing a system with the requisite accuracy within the short time remaining before the required January 30, 1991, delivery date. Based on our review of the record, we believe Martin Marietta's concern was reasonable, given that it observed errors of over half an inch (.518), which was over 235 times what the specification required, and since Chesapeake was not able, as it promised, to show Martin Marietta that its tracker could meet the repeatability requirements.

In addition, Martin Marietta reports that during the demonstration various problems were identified, and solutions to these problems were discussed, but most of the "troubleshooting" was done by Martin Marietta, not by Chesapeake. This reasonably could have resulted in further undermining Martin Marietta's confidence in Chesapeake's


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<sup>4/</sup> Repeatability refers to repeat measurements of the same target from the same slide position, after having moved on the slide and returning. Repeatability was required to be within 0.001 inches band width.

<sup>5/</sup> Chesapeake comments that the design differences in the product actually offered would eliminate the "backlash," which resulted in the errors. Martin Marietta, however, reports that although "backlash" was probably a major contributor to the errors, its engineers concluded there must be other problems because the errors were not consistent.

ability to overcome the perceived obstacles in developing an acceptable item by the required delivery date. Thus, Martin Marietta reasonably found Chesapeake not responsible.

The protest is denied.

  
for James F. Hinchman  
General Counsel