



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Cinpac, Inc.

**File:** B-243366

**Date:** July 15, 1991

Edward E. Santen, Esq., and Charles M. Meyer, Esq., Santen & Hughes, for the protester.  
David K. Holwadel for Zesto Therm Inc., and Jacob H. Fischman, Esq., for Truetech, Inc., interested parties.  
Marty Lieb, Defense Logistics Agency, for the agency.  
C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency's decision to eliminate protester from the competitive range before requesting a best and final offer was reasonable where solicitation gave primary consideration to delivery schedule and price, and other offerors proposed shorter delivery schedules and lower prices than did the protester.
2. Firm's ability to meet delivery schedule is a matter of responsibility which generally is not for review by the General Accounting Office.

### DECISION

Cinpac, Inc. protests the rejection of its proposal under request for proposals (RFP) No. DLA13H-90-R-7305, issued by the Defense Personnel Support Center for flameless heaters. The protester contends that it was unreasonable for the agency to accept the delivery schedules of other offerors and eliminate Cinpac from the competitive range without verifying the ability of those offerors to perform in accordance with their offers.

We deny the protest in part and dismiss it in part.

On November 14, 1990, the agency issued the RFP for a firm, fixed-price contract for 12.9 million flameless ration heater pads,<sup>1/</sup> for delivery in the period of June through November 1991, in support of Operation Desert Shield/Storm. The agency announced the intention to award a contract to the offerors whose proposals it found most advantageous to the government, reserving for itself the right to make more than one award.

On January 15, 1991, the agency received three offers, from the protester and from the two eventual awardees, Truetech, Inc. and Zesto Therm Inc. The protester submitted the highest cost and offered the least advantageous delivery schedule, promising initial delivery in August, while the other offerors promised delivery beginning in April. With the outbreak of hostilities on January 16, delivery became of prime importance to the agency, and on January 28, 1991, the agency amended the solicitation to request new offers based on a fixed-price, indefinite-quantity contract. Also, due to Operation Desert Shield/Storm, proposed preaward surveys on the three firms were canceled.

The revised solicitation requested a delivery schedule more favorable than that previously solicited and requested offerors to provide information on their minimum and maximum production capability and the leadtime necessary for production. The agency asked offerors to propose quantity ranges for award and to provide prices for each proposed range; the agency advised offerors that the delivery schedule would be the most significant award factor, although it would still consider price in its decision.

On February 1, the agency received three revised offers. Review of these offers showed that the protester's offer contained no advantages in terms of delivery schedule or price, since Cinpac still proposed August delivery, 4 months after the April delivery proposed by the other offerors and offered a per box price 15 percent higher than the price per box proposed by the two remaining offerors.

The agency determined that Cinpac had no reasonable chance for award and excluded Cinpac's offer from further consideration. On February 14, 1991, the agency requested each of the two remaining offerors to submit a best and final offer (BAFO). On the next day, the agency sent a letter advising the protester of the rejection of its offer as outside the competitive range and the decision to award contracts to the other two offerors. This protest followed.

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<sup>1/</sup> The heaters are water-activated and contain a chemical that produces enough heat to warm a meal, ready-to-eat to a temperature of 100 degrees Fahrenheit in less than 12 minutes.

The protester contends that the two awardees do not have the production capability to deliver beginning in April 1991, as offered in their proposals and that a preaward survey would have demonstrated this fact. The protester argues that the agency should have required the other offerors to provide evidence to support their offered production capacity and that if the agency had done so, it would have realized that their proposed delivery schedules were not realistic. Cinpac argues that it was unreasonable to eliminate its proposal from the competitive range based on a comparison of its delivery schedule, which it claims to be realistic, with delivery schedules that it argues were not realistic.

In reviewing a competitive range determination, we examine the agency's evaluation to ensure that it was reasonable and in accord with the evaluation criteria. Rainbow Technology, Inc., B-232589, Jan. 24, 1989, 89-1 CPD ¶ 66. The competitive range consists of all proposals that have a reasonable chance of being selected for award, including deficient proposals that are reasonably susceptible of being made acceptable through discussions. Engineers Int'l, Inc., B-224177, Dec. 22, 1986, 86-2 CPD ¶ 699.

The RFP basically stated that proposals with an early delivery schedule would be given more consideration than low-priced offers with later delivery schedules. The protester's delivery schedule was significantly less advantageous than the two awardees' schedules and its price was 15 percent higher than both awardees' prices. Under these circumstances, since the protester's offer was not competitive in terms of either of the two specified evaluation criteria--delivery and price--we find that the agency decision to exclude the protester from the competitive range was reasonable and in accordance with those criteria.<sup>2/</sup>

Since both awardees offered firm delivery schedules, acceptance of their offers obligated them to deliver as proposed. The solicitation did not require firms to establish their ability to meet the schedules they offered in their proposals. No technical evaluation of their capabilities was required or contemplated. Thus, the protester's challenge of those awardees' ability to meet the delivery schedules concerns their responsibility. Our Office will not review an agency's affirmative determination of responsibility absent fraud, bad faith or the failure to meet definitive responsibility criteria. 4 C.F.R. § 21.3(m) (5) (1991).

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<sup>2/</sup> Although the protester separately proposed to enter into a letter contract with the agency, at a price based on its actual cost, the RFP called for a firm, fixed-price contract.

The protester argues that we should review the responsibility determinations here. The protester contends that the RFP incorporates the language of Federal Acquisition Regulation (FAR) § 9.104, which constitutes "definitive responsibility criteria," the application of which our Office may review. FAR § 9.104 sets forth the general standards of responsibility (such as prior performance and financial capability and ability to meet delivery or performance schedules) that apply to all procurements; they are not definitive responsibility criteria, which are specific and objective standards established by an agency for a particular procurement (such as a minimum period of prescribed experience). Information Sys., Inc.--Recon., B-240971.3, Jan. 9, 1991, 91-1 CPD ¶ 23; Management Eng'rs, Inc. et al., B-233085 et al., Feb. 15, 1989, 89-1 CPD ¶ 156.

The protester also alleges that the contracting officer's affirmative determinations of responsibility were unreasonable; however, bad faith has not been asserted. An affirmative determination of responsibility involves the exercise of business judgment which we will not disturb absent a showing of bad faith.<sup>3/</sup> CVD Equip. Corp., B-237637, Mar. 8, 1990, 90-1 CPD ¶ 259.

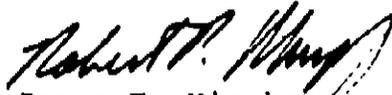
The protester also objects to the failure of the agency to conduct preaward surveys here because the protester argues the surveys would have established that the awardees' schedules were unrealistic. The preaward surveys were canceled due to reallocation of resources to Operation Desert Shield/Storm. A preaward survey is not a legal prerequisite to an affirmative determination of responsibility; contracting officials have broad discretion concerning whether to conduct such surveys and may use, as was done here, other information available to them concerning a firm's responsibility. The decision not to conduct a preaward survey does not establish any impropriety on the agency's part. CVD Equip. Corp., B-237637, supra, 90-1 CPD ¶ 259 at 3.

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<sup>3/</sup> The protester has submitted information to show that the awardees were delinquent under prior contracts. That information shows that while Truetech was 10 days late with its December delivery and 6 days late in January, its February deliveries were ahead of schedule. Zesto Therm was late with more than 275,000 units due in January but had delivered nearly 250,000 of these units, due under the earlier contract, prior to award of this contract. Thus, at the time of award, the point at which responsibility is determined, Truetech was not delinquent and Zesto Therm's delinquency, even if not excusable, appears de minimis.

Cinpac also protests the agency's failure to provide timely notice of its elimination from the competitive range. FAR § 15.609(c) provides that a contracting officer shall notify an unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award. In this instance, the agency made its determination on February 14 and advised the protester in writing on the next day; the protester received this notice on February 25, 6 days after receiving oral notice on February 19. We find nothing in the record that shows the agency unduly delayed notifying the protester of its elimination from the competitive range. In addition, the failure to provide timely notice is purely procedural in nature and does not affect the validity of an otherwise properly awarded contract. Hamilton Enters., Inc., B-230736.6, Dec. 20, 1988, 88-2 CPD ¶ 604.

The protest is denied in part, and dismissed in part.

  
James F. Hinchman  
General Counsel