



Comptroller General
of the United States

Washington, D.C. 20548

Evans

145292

Decision

Matter of: Aydin Vector Division

File: B-244838

Date: November 13, 1991

Lee Curtis, Esq., Howrey & Simon, for the protester.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest of contracting officer's determination that
protester is nonresponsible to perform contract is denied
where determination was reasonably based on protester's
delinquent performance under two contracts for similar
items.

DECISION

Aydin Vector Division protests the Department of the Navy's
determination that it is nonresponsible to perform a
contract under request for proposals (RFP) No. N60530-90-R-
0394, for first article test units and production quantities
of flight termination receivers (FTR) for HARM missiles.

We deny the protest.

The RFP, which represented a reprourement of a similar
contract that had been terminated for default, contained a
basic requirement for four first article test FTR units,
with an option for production quantities based upon accept-
ance of the first articles. Because of the performance
problems experienced under the defaulted contract, the Navy
planned to make multiple awards for the first article units
in order to qualify as many sources as possible for the
production quantities. Three offerors--Aydin, Loral Conic,
and Cincinnati Electronics--responded to the RFP by the
closing date. Aydin offered the lowest price for both the
first article units and the first article and production
units combined--\$49,521 and \$730,875, respectively--prices
which Aydin concedes are below cost; Loral's prices for the
same items were \$164,641 and \$1,532,155.

In the course of evaluating Aydin's offer, the Navy
requested a preaward survey of the firm from the Defense
Contract Management Area Office (DCMAO), Philadelphia,

Pennsylvania. With regard to Aydin's production capability, the survey noted that Aydin had experienced performance problems on several recent and current Naval Weapons Center contracts. Notwithstanding these problems, the survey concluded that Aydin's production capability was satisfactory to perform the contract, citing steps Aydin had taken to correct the problems. However, with regard to Aydin's financial capability to perform at less than cost, the survey stated that Aydin had failed to respond to DCMAO's request for financial information, and concluded that Aydin had not shown that it had the financial capacity to perform the contract. As a result, the survey recommended against award to Aydin.

In finding Aydin nonresponsible, the contracting officer noted that Aydin's rejection rate for items delivered under two current contracts for similar items was extremely high, that Aydin was delinquent in its performance of those contracts, and that it was therefore unlikely that Aydin would be able to deliver acceptable FTRs in accordance with the delivery terms it had proposed. The contracting officer also noted Aydin's alleged failure to respond to DCMAO's request for financial information. Based on these findings, the contracting officer determined Aydin nonresponsible. As Cincinnati's proposal had been rejected for other reasons, Loral was the only remaining technically acceptable, responsible offeror; the Navy therefore made award to Loral for the first article units and the optional production quantities.

Aydin argues that the Navy's responsibility determination was improper. With regard to the Navy's conclusion regarding Aydin's production capability, Aydin takes issue with the Navy's view of Aydin's past and current contract performance, specifically alleging that the contracting officer improperly focused her analysis on only two of Aydin's many recent contracts, both of which had been delinquent. In this connection, Aydin maintains that the contracting officer apparently was unaware that Aydin had reduced its delinquency rate to 7 percent. Aydin also contends that the Navy improperly failed to consider that DCMAO recommended in favor of award to Aydin in the area of production capability, and that Aydin's production record should not have been a matter of concern in any case since award of the optional production quantities would be contingent upon Aydin's successful performance of the basic requirement for the four first article test units.

Before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. Federal Acquisition Regulation (FAR) § 9.103(b). Among the general standards for responsibility are the requirements that a prospective contractor have

adequate financial resources to perform the contract and a satisfactory performance record, FAR § 9.104-1(a) and (c). The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer, including the issue of whether a preaward survey should be conducted and the degree of reliance that should be placed on the results of the survey. Firm Reis GmbH, B-224544; B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72. We therefore will not disturb a nonresponsibility determination absent a showing of either bad faith on the agency's part or that the determination lacked a reasonable basis. Id.

Aydin does not allege bad faith and we find the agency's determination of nonresponsibility reasonable. In support of its determination, the Navy has provided detailed information of Aydin's unsatisfactory performance under the two current contracts referenced above. The first, contract No. N60530-88-C-0249, required delivery of 104 transmitters at a rate of 16 units per month between February and September 1989. In October 1990, 20 units were yet to be delivered, and 33 units had been rejected and returned to Aydin for repairs. On October 17, 1990, the contracting officer approved a requested deviation; the contract was then modified on October 27 to extend the delivery date for the 20 outstanding units to November 26, and to require delivery of the 33 repaired units by October 30 and November 26. The Navy did not receive the 33 repaired units until January 10, 1991; 6 of these failed acceptance testing a second time.

The second contract, No. N60530-90-C-0088, required delivery of 20 transmitters by June 20, 1990. On October 1, Aydin promised delivery of all 20 units within 75 days of approval of a deviation. On October 27, after the deviation was approved, the contract was modified to require delivery by December 26; the units were not received until February 14, 1991, and 19 of 20 failed acceptance testing.

On April 8, 1991, the contracting officer (the same contracting officer who determined Aydin nonresponsible here) wrote to Aydin to express the Navy's dissatisfaction with Aydin's performance under both contracts, and requested a corrective action plan; the letter stated that Aydin's continuing unsatisfactory performance could adversely affect its eligibility for future awards. More than 1 month later, on May 14, Aydin informed the contracting officer that it was evaluating the failed units under both contracts, and would submit corrective action plans when it completed the respective failure analyses. Aydin also promised delivery of all repaired units by July 31. As of June 6, the date of the contracting officer's nonresponsibility determination,

the Navy had not received the failure analyses or corrective action plans.

Based on Aydin's performance history with this contracting activity, we find that the contracting officer had a reasonable basis to doubt Aydin's ability to deliver satisfactory items in accordance with the delivery schedule. See Flameco Div. of Barnes Group, Inc., B-243872, Aug. 2, 1991, 91-2 CPD ¶ 123. Although Aydin attributes its performance problems in part to defects in the agency's specifications and testing procedures, it is the contracting officer's reasonable judgment of events that must govern the agency's determination, even where the agency's interpretation is in dispute. Id.; Ingenieria Y Construcciones Omega S.A., B-241043, Dec. 28, 1990, 90-2 CPD ¶ 524.

As to Aydin's complaint that the contracting officer failed to consider DCMAO's positive preaward survey report of Aydin's production capability, the record indicates that the contracting officer did consider the report, but disagreed with its conclusion.¹ In any case, the contracting officer was not required to rely on the preaward survey results. Ingenieria Y Construcciones Omega S.A., supra. The survey official based his award recommendation on Aydin's recent correction of performance problems, while the contracting officer looked more closely at the firm's overall delinquency record under those contracts and the likelihood that Aydin would suffer similar problems under the instant contract for similar items. Under these circumstances, it was reasonable for the contracting officer to disregard the survey recommendation. See id.

Aydin maintains that its prior unsatisfactory performance should not have been a matter of concern in any case, since Aydin would be required to demonstrate its ability to produce the FTRs through delivery of acceptable first article test units before it would be eligible for award of

¹Aydin argues that the contracting officer could not have considered the preaward survey results in her determination because the nonresponsibility determination itself does not contain any reference to DCMAO's positive findings in the production area. However, the record contains the contracting officer's signed declaration that she was aware of the positive preaward survey results when she made her determination. While Aydin contends that the declaration, prepared after the protest was filed but before Aydin raised this issue, is inconsistent with the nonresponsibility determination, the fact that the positive preaward survey findings were not specifically referenced in the nonresponsibility determination does not render the two documents inconsistent.

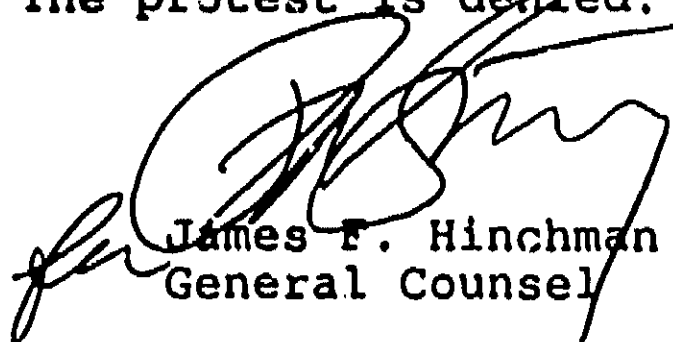
the optional production quantities. Stated differently, Aydin contends that an award to it would not have subjected the Navy to any risk associated with production problems since Aydin would have to prove its ability to produce FTRs through first article testing before it could be awarded the production option.

Aydin's position is without merit. First, successful delivery of four acceptable first articles demonstrates only a firm's ability to manufacture acceptable items; it does not establish a firm's ability to deliver large quantities of production units on schedule. In any case, Aydin's performance history under the two transmitter contracts demonstrates that Aydin had difficulty delivering even a few acceptable items on time, casting doubt on Aydin's ability to successfully deliver even the four first article items. We conclude that the contracting officer properly considered Aydin's prior performance in finding the firm nonresponsible.

As noted above, the Navy's nonresponsibility determination also included a finding that Aydin had failed to provide requested financial information; Aydin asserts that it was never asked to provide such information. We need not discuss this aspect of the nonresponsibility determination, since Aydin's prior performance by itself provided a reasonable basis for the determination.

In addition to its arguments concerning the nonresponsibility determination, Aydin alleges that the Navy improperly conducted discussions with Loral after the submission of best and final offers (BAFO). Since Aydin was found nonresponsible and thus is ineligible for award, it is not an interested party to protest the Navy's failure to hold post-BAFO discussions with all offerors. Mar-Mac Precision Corp., B-221561, Jan. 22, 1986, 86-1 CPD ¶ 72. While Aydin argues that it is an interested party with respect to this issue because the Navy could have addressed Aydin's responsibility if it had included Aydin in post-BAFO discussions, we note that an agency is not required to discuss with an offeror evidence in the record supporting the agency's nonresponsibility determination. Firm Reis GmbH, supra.

The protest is denied.


James F. Hinchman
General Counsel