



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-172061

June 27, 1973

The Honorable John L. Malinas
The Acting Secretary of the Air Force

Dear Mr. Secretary:

By decision B-172061, August 24, 1971, we considered and denied a protest against a nonresponsibility determination which precluded an award to Lear Siegler, Inc., under a 1970 solicitation for the Inspection and Repair as Necessary (IRAN) of C-130 aircraft. This decision was sustained in a decision dated February 22, 1972. Both of these decisions, which took into account documented reports from the Directorate of Procurement Policy, were furnished to your Department. We have been requested by counsel for Lear Siegler to reconsider these decisions on the basis that the determination was "arbitrary, capricious, not supported by substantial evidence and was erroneous as a matter of law." If we conclude that such was the case, claim is made for proposal preparation expenses.

Specifically, it is contended that Lear Siegler was a responsible prospective contractor which had comparable aircraft maintenance experience to that contemplated by the solicitation. In order to be responsive to this contention we requested and received comments thereon from the Assistant Secretary of Defense (Installations and Logistics) and the Commander, Naval Air Systems Command. We understand that Department of Defense representatives discussed the Lear Siegler matter with the Assistant Secretary of the Air Force (Installations and Logistics) and his staff.

Though the Federal courts have recognized that offerors are entitled to have their proposals considered fairly and honestly for award and that the recovery of proposal preparation expenses is possible if it can be shown that proposals were not so considered, arbitrariness or capriciousness must be established as a prerequisite to recovery. Continental Business Interprises, Inc. v. United States, 452 F. 2d 1016 (Ct. Cl. 1971). The record available to us does not establish that the standard of administrative misconduct is present here.

We have reviewed the determination by the contracting officer that Lear Siegler was nonresponsible for purposes of the 1970 procurement and we believe that such determination was not fully supported by the record before the contracting officer. Briefly, the nonresponsibility determination related to (1) Lear Siegler's lack of IRAN fixed facility experience on C-130 aircraft comparable to that required of a prospective contractor;

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(2) Lear Siegler's fixed facility experience on a noncomparable Navy contract for Progressive Aircraft Rework (PAR) on S-2 aircraft which was unsatisfactorily performed, and (3) the inadequacy of Lear Siegler's proposed key management team. At the time of the determination, the contracting officer had before him a comprehensive preaward survey in which he participated and concurred, which recommended "Complete Award" to Lear Siegler. At the same time, he had the following data for consideration: (1) a second preaward survey which recommended no award, and (2) a management evaluation of Lear Siegler. While dated subsequent to his nonresponsibility determination, the February 20, 1971, letter from the Deputy Chief, Weapons Systems and Major Equipment Division, Warner Robins Air Materiel Area, served to further support his action. That letter stated:

In summary the approximately 1,577,000 manhours of Field Team Effort shown as C-130 experience by LSI and the PAS in no way qualifies as comparable experience under IRAN. Satisfactory performance under Field Team Effort is not even remotely similar to the effort required of a contractor to accomplish IRAN in a Fixed Facility. The degree of experience, management of production expertise required for IRAN is not or cannot be attained under Contractor Field Team Effort. Again, the Field Team Effort is not the same skill level and the workers may be 2500 miles from the contractor's proposed IRAN facility. Even if these skills were possibly available to LSI it is unlikely that he could afford to "PCS" a total work force of about 500 people.

In making his determination of nonresponsibility, the contracting officer virtually ignored the initial preaward survey favorable to Lear Siegler. He relied exclusively on unfavorable data, including the second preaward survey, without rationalizing the basis for rejection of the initial preaward survey in which he participated and concurred in the "award" recommendation.

We are advised by a letter dated January 31, 1973, from the Assistant Secretary of Defense that Lear Siegler not only had comparable C-130 IRAN experience at other than a fixed facility, but that the firm's S-2 PAR fixed facility experience was at least comparable to the experience required in the solicitation. Also, the fact, as indicated in a Navy letter of November 13, 1972, that the Navy attempted to exercise an option for additional PAR work contained in the contract shows it was satisfied with Lear Siegler's eventual performance even though Lear Siegler encountered difficulties in performing the S-2 contract. We note that the option could not be exercised since a satisfactory price for "option" work could not be obtained from Lear Siegler, not because of any dissatisfaction with the firm's contract performance.

Practically every basis for determining Lear Siegler to be nonresponsible was contrary to data in the initial favorable pre-award survey. In our decision of August 24, 1971, we noted that the record before the contracting officer contained further documentation raising a serious question as to the correctness of the conclusions of the second preaward survey relative to commitments made by Lear Siegler to obtain adequate facilities. As far as Lear Siegler's performance on the Navy S-2 contract--considered to be relevant and pertinent by the preaward survey as to comparability--is concerned, the initial survey team's findings on performance record states:

1. Lear Siegler has performed on more than six (6) contracts at their Mobile Facility. All of these except the large S-2 contract for the Navy were delivered on time and in a very satisfactory manner. One particular contract, Aircraft Engine Test Stand overhaul, was of considerable significance and performance has been unusually good.
2. In the initial stages of the S-2 Modification and Repair contract for the Navy Lear Siegler became delinquent and the schedule had to be revised twice. The contractor isolated Lear Siegler's inadequacies relative to these delinquencies and took positive remedial action. As a result, deliveries were on time for the balance of the contract and the contractor managed to get the last few aircraft out under extremely difficult conditions because these airplanes had been used for cannibalization.
3. The contractor's performance on the S-2 aircraft was inadequate in the work request portion. There was a definite failure to timely submit work requests and work requests were not estimated in a manner that the Government's production personnel could readily verify the contractor's man-hours and material. The contractor has been carefully investigated concerning this inadequacy and he has provided again positive evidence of remedial action. The Administrative and Management write-up herein covers some of the contractor's plans as well as other write-ups in this Pre-Award Survey where definite plans have been made to submit work requests and detailed estimates for material and manhours timely and in accordance with the contract. As a result we are convinced that Lear Siegler, Inc. will not have the same difficulties regarding work requests on this aircraft.
4. Since Lear Siegler has performed satisfactorily on many contracts at the Mobile Facility and has taken positive action

on certain weak areas on their S-2 contract, performance record at this facility is satisfactory. [emphasis supplied.]

The management and administration findings of the initial preaward survey--which were signed by the contracting officer as a member of the preaward survey team--concluded as follows:

The corporation (LSI) has committed itself to support of the program by other divisions as necessary. The corporation possesses extensive experience in various phases of C130 aircraft work (reference Attachment 4). They intend to supply some of this talent (mainly from field team operations) as necessary to insure timely production of aircraft under this contract, attachment 1.

It is the opinion of this team that Lear Siegler, Inc. has the necessary management personnel in sufficient depth and experience to perform the MOD IRAN of the C130 aircraft.

It is the combined opinion of this team that Lear Siegler, Inc. has the proper management structure and procedures within its administrative area of operations to effectively administer this contract should it be awarded.

The technical capability findings of the initial preaward survey team were as follows:

1. LSI/MSD, one of the many divisions of Lear Siegler, Inc., has a wide range of experience in maintenance and modification type work on a number of different aircraft including various models of the P4, P6, P9, F100, F102, B26, B57, B59, T23, T27, T33, C119, C123, C130, K246, K21, Q-2, V-6, H3104 and C121. In addition LSI/MSD has just completed a contract for the Navy to perform PAR requirements on 141 various models of S-2 series aircraft. The proposed contractor's technical ability proved satisfactory.

2. Management personnel, both from LSI/MSD and LSI/MSIC were present for the survey and displayed a comprehensive understanding of the EQ requirements. The organizational structure, production planning, work flow sequence charting and availability of equipment and tooling were found to be in detail and complete.

3. The LSI/MAC is headed up by Mr. John Henson, Facility Manager. Mr. Henson has placed in key positions, personnel with vast experience in aircraft overhaul programs. Resumes of experience of these key personnel are enclosed * * *.

4. LSI/MAC has in excess of 1.5 million manhours of experience in the maintenance of C130 aircraft. This maintenance was performed primarily by field teams. Mr. Art Lenz, Vice President of LSI/MAC has committed field team members to this proposed program as necessary to accomplish the mission (see Attachment 2). Applications on file in the personnel department revealed that experienced personnel are available for all phases of operations. In addition, LSI/MAC has a planned training program to insure the further availability of skilled personnel. An outline of this proposed program is enclosed as Attachment 3. Also, the contractor's VOL 1 "Technical Proposal" submitted to WRANA substantiates and verifies his technical capability.

5. Based on a detailed review of the RFQ, a study of contractor's technical proposal, and conversations with the management group, it is the conclusion of the undersigned that LSI/MAC has a thorough understanding of the technical requirements for the C-130 ITAN Program and can perform the requirements of this RFQ. Technical capability is satisfactory.

From all this data now of record we believe that the determination of nonresponsibility is of doubtful validity. This belief further reinforces our recommendation of August 24, 1971, to your Department that steps should be taken to insure that such a determination is carefully made in light of all significant facts. Of course, it is particularly important to consider the information and opinion from informed sources available to and before the contracting officer at the time a determination of responsibility is made. Counsel for Lear Siegler concedes that "the Contracting Officer may obtain information from experts in areas where he may have little or no specialized knowledge, and that if he in good faith relies upon such information, in all probability he cannot be held at fault in case he makes an erroneous decision." In this regard, a determination of responsibility is subject to review for legal sufficiency notwithstanding the fact that the judgment may have been based on information furnished by technical personnel. See B-171407(1), July 14, 1971, at page 5.

The provisions of paragraph 1-900, et seq., of the Armed Services Procurement Regulation (ASPR) dealing with responsibility determinations impose affirmative duties on contracting officers when resolving the responsibility of a prospective contractor. Where, as here, conflicting information on the responsibility of a prospective contractor is a matter of record, a contracting officer has an information-gathering duty that cannot be avoided.

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and this duty has a direct relationship to the existence of reasonable doubts as to capacity. See 50 Comp. Gen. 231, 239 (1970). Incident to this duty is a correlative responsibility to resolve for the record inconsistencies and uncertainties before reaching a reasoned judgment of responsibility.

There are enclosed copies of our decisions of August 24, 1971, and February 22, 1972, together with a copy of our transmittal letter to your Department of August 24. Also, enclosed are copies of the reports from the Departments of Defense and Navy.

We recommend that the circumstances of this nonresponsibility determination be brought to the attention of procurement personnel to minimize future similar occurrences.

Sincerely yours,

Paul G. Darbling

For the Comptroller General
of the United States