

DOCUMENT RESUME

03614 - [A2593718]

[Protest against Determination of Nonresponsibility]. B-188454.
September 14, 1977. 12 pp.

Decision re: Decision Sciences Corp.; by Robert F. Keller,
Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: Small Business Administration.
Authority: F.P.R. 1-1.1203-3. F.P.R. 1-1.1204-1. 56 Comp. Gen.
411. 52 Comp. Gen. 977. B-184865 (1976). B-156449 (1955).
B-182038 (1974). E-184692 (1976). B-186335 (1976). Morgan v.
United States, 304 U.S. 1 (1938).

The protester objected to the award of contracts providing management and technical assistance services to eligible businesses in three geographical areas. Conflicting information relative to the responsibility of the prospective contractor was a matter of record, so the contracting officer had the duty to resolve inconsistencies and uncertainties before making a reasoned judgment of responsibility. Although some of the bases for the determination of nonresponsibility were unreasonable, the contracting officer's determination of nonresponsibility was not disturbed since the protester did not meet the definitive criterion of responsibility required by the request for proposals. (Author/SC)

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DECISION



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

FILE: P-188454

DATE: September 14, 1977

MATTER OF: Decision Sciences Corporation

DIGEST:

1. Protester contends that procuring agency's failure, prior to award, to disclose which elements of definitive responsibility criteria were not satisfied and to advise of type of documentation required, violated protester's right to hearing. Contention is without merit since procurement statutes and regulations do not require hearings in responsibility determinations and since contracting officer makes responsibility determination in administrative rather than judicial capacity.
2. When conflicting information relative to responsibility of prospective contractor is matter of record, contracting officer has duty to resolve inconsistencies and uncertainties before making reasoned judgment of responsibility.
3. Contracting officer's determination of nonresponsibility for inability to meet definitive responsibility criterion--publicly listed telephone number in firm's name--is based on interpretation that requirement could only be satisfied by listing in published telephone directory. Such interpretation is too narrow, since protester could satisfy literal requirement by having telephone number in firm's name available through directory assistance service.
4. Contracting officer's determination of nonresponsibility for inability to meet definitive responsibility criterion--written evidence that local office had been operating since November 15, 1975--will not be disturbed when protester presents evidence showing that from January 8 to May 1, 1976, office space was available through informal arrangement only upon request of another firm.
5. Contracting officer's determination of nonresponsibility for inability to meet definitive responsibility criterion--offeror's local location was focal point of consulting activity--is unreasonable when record shows that offeror performed 139 task orders under two separate contracts through that location for procuring agency

and under other contracts offeror performed 5,500 manhours of similar activity through that location.

6. Contracting officer's determination of nonresponsibility for inability to meet definitive responsibility criterion--one staff member who devotes 35 hours per week to offeror's work, 50 percent performed through local office--will not be disturbed when protester's data and procuring activity's field office report fail to show that project director or company comptroller satisfies requirement.
7. Determination of nonresponsibility based on offeror's inability to meet definitive responsibility criterion--one staff member who devotes 35 hours per week to offeror's work, 50 percent performed through local office--was not based on reasoned judgment of contracting officer when offeror named two staff members who allegedly could satisfy requirement and when preaward agency report was silent concerning named persons. However, since evidence presented here by protester fails to show compliance with requirement, protester was not prejudiced by agency action and the determination will not be disturbed.
8. As definitive criterion of responsibility, RFP required each offeror to have office in area since November 15, 1975. Offeror who did not have office in area proposed to use consultant's office. In circumstances, contracting officer's determination of nonresponsibility will not be disturbed since offeror did not have office in area as required by RFP.

Decision Sciences Corporation (DSC) protests the award of contracts for providing management and technical assistance services to eligible businesses in the Pittsburgh, Pennsylvania, Baltimore, Maryland, and Washington, D.C., areas under request for proposals (RFP) No. SBA-7(1)-MA-77-1 issued by the Small Business Administration (SBA) on November 15, 1976.

The RFP provided that proposals received for each of the geographic areas would be evaluated on a point system with respect to the experience and capability of each offeror's staff, the previous experience and effectiveness of each offeror's firm, and each offeror's man-day pricing. In each area award was to be made to the responsible offeror who submitted the highest evaluated proposal. DSC, the incumbent in each of the

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three areas, received the highest evaluated proposal in each area and was generally found to be responsible by SBA except for DSC's ability to meet the RFP's "office" requirement, which follows:

"Offerors must have an office (as defined below) in each geographic area for which he desires to submit a proposal. For the purpose of this solicitation, an OFFICE shall be defined as:

"1. Offeror must be able to demonstrate that this location has been the focal point of consulting activity similar in nature to that required by this solicitation since at least November 15, 1975.

"2. Offeror must be able to demonstrate that this location has operated under the same ownership or management since at least November 15, 1975.

"3. Offeror must be able to provide evidence showing that at least one full-time (minimum 35 hour work week) staff member has been performing services similar in nature to those required by this solicitation since at least November 15, 1975. This staff member must have devoted at least 50% of his professional time to the performance of such consulting services through this location.

"4. Offeror must have had a publicly listed telephone number in the name of the Offeror's firm since at least November 15, 1975.

"5. Offeror must possess written evidence of ownership, rental lease or other arrangement indicating that this location has been operating since at least November 15, 1975.

"Offeror must be prepared to substantiate and document all of the above provisions in writing upon request by the Contracting Officer."

The SBA made the office requirement specific and definitive because DSC's ability to meet the less definitive office requirement of SBA's

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solicitation issued last year for similar services was protested here. Our decision in that matter, Communication Products Company, B-186335, December 21, 1976, 76-2 CPD 508, in effect concluded that DSC had a Baltimore office as "office" was defined in last year's solicitation.

After determining that DSC submitted the highest evaluated proposals in the three areas, SBA requested field reports from its area offices to determine whether DSC could comply with the RFP's definition of office. Each SBA field office reported that DSC failed to meet one or more of the requirements. At this point, DSC somehow, and the record is unclear as to precisely how, discovered that it was in line for award but for SBA's belief that DSC could not meet the office requirement. DSC contacted the SBA program manager in an effort to discover which element of the definition was a problem in each area and what substantiating documents would be required to show compliance. DSC received no information but was permitted to submit additional documentation the next day. DSC submitted documentation for each area and further advised that, if necessary, still more data could be submitted to show compliance. SBA reviewed all DSC's data and, without requesting more, concluded that DSC could not meet the office requirement in any of the three areas. Again, DSC somehow discovered SBA's determination before award and protested that determination and SBA's refusal to seek the offered additional data to SBA and to our Office. Subsequently, award in each area was made to the offeror submitting the next highest evaluated proposal and meeting the RFP's office requirement.

DSC essentially contends that in each of the three areas it meets the RFP's literal requirements of each of the five criteria and, alternatively, that: more time should have been permitted to allow DSC to provide compliance documentation; and the contracting officer should have advised DSC where its information was deficient and permitted DSC to submit additional information before making the negative determination of responsibility.

Negative Responsibility Determinations

The Federal Procurement Regulations (FPR) permit the contracting officer to develop special standards of responsibility when the situation warrants and such standards are applicable to all offerors. FPR § 1-1.1203-3 (1964 ed. amend. 95). Award of a contract cannot be made when the contracting officer determines that an offeror is nonresponsible. FPR § 1-1.1204-1 (1964 ed. amend. 95). Recognizing

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that the determination of a prospective contractor's responsibility is primarily the function of the contracting officer and is necessarily a matter of judgment involving a considerable degree of discretion, this Office will not disturb a determination of nonresponsibility when the record provides a reasonable basis for such determination. United Office Machines, 56 Comp. Gen. 411 (1977), 77-1 CPD 195.

The nonresponsibility determination was based on three SBA field office reports indicating that in each area DSC did not meet all of the office requirements. We have held that a contracting officer's negative determination of responsibility relying on information contained in official agency reports was not unreasonable. United Office Machines, supra (agency audit report showing consistent failure to meet time of delivery contractual requirements); Western Ordnance, Inc., B-182038, December 23, 1974, 74-2 CPD 370 (negative preaward survey); Howard Ferriell & Sons, Inc., B-184692, March 31, 1976, 76-1 CPD 211 (prior default termination was proper even though the termination was under appeal).

Counsel for DSC contends that DSC had a right to be informed of the type of substantiating documentation that would be considered acceptable to meet the contentions advanced in the SBA district office reports. Citing Morgan v. United States, 304 U.S. 1 (1938), counsel for DSC concludes that the contracting officer failed to afford DSC procedural due process by granting DSC a hearing.

In Morgan v. United States, the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stock Yards was challenged because the order was made without the "full hearing" required by statute. The court held that the order was invalid even though the Secretary considered briefs submitted by the parties and the transcript of oral arguments because:

"[A] 'full hearing' - a fair and open hearing - requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the

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Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."
304 U.S. at 18-19.

In response, SBA argues that while the FPR lists various sources from which a contracting officer may obtain information to determine the responsibility of an offeror, there is no FPR requirement to independently gather such information as may be necessary to resolve any doubt relative to an offeror's responsibility which may be raised by information submitted by the offeror. SBA further argues that an offeror has no right to procedural due process relative to a responsibility determination. In support SBA refers to our decision B-156449, June 29, 1965, in which we held as follows:

"There is no question but that the agents of the Government engaged in the procurement of necessary goods and services are bound by the statutory requirements and limitations applicable thereto, including the advertising and competitive bidding procedures. However, we believe it to be equally true that, in the performance of their duties in the course of such procurement, such as making necessary determinations as to the responsiveness of bids, the responsibility of bidders, the evaluation of bids, and the bidder to whom award should be made, these agents are acting in a strictly administrative rather than a judicial capacity, and their actions are not subject to any procedural due process requirement that the bidders must be permitted to participate in the decision-making process, any more than the similar actions of a purchasing agent of a private corporation."

We believe that the situation in Morgan v. United States is distinguishable from the one here because there applicable statutes required a full hearing as a part of the rate-making procedure whereas here applicable procurement statutes and regulations do not require such a hearing since the determination of an offeror's responsibility is an administrative matter.

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Although the SBA concludes that a contracting officer has no duty to resolve inconsistencies and uncertainties in the information before making a reasoned judgment concerning responsibility, in 52 Comp. Gen. 977 (1973), referred to by counsel for DSC, involving a similar responsibility determination, this Office held that the contracting officer had a duty to resolve such inconsistencies before making the determination.

If the SBA field office reports were the only information available to the contracting officer, unquestionably the contracting officer's nonresponsibility determination would not be disturbed by this Office. However, DSC provided certain information and made specific statements indicating that additional information could have been provided to establish compliance with the office requirement. Thus, two questions arise: (1) were there material inconsistencies in the information before the contracting officer?; and (2) if so, could additional information have resolved the doubt in favor of DSC?

DSC's Compliance with the Office Requirement

Baltimore Area

SBA determined that DSC failed to meet the office requirement here because (1) DSC did not have "a publicly listed telephone number" in the name of the firm since at least November 15, 1975, and (2) DSC did not have "written evidence of ownership, rental or lease or other arrangement" indicating that its office had been operating since at least November 15, 1975.

With regard to the first basis the contracting officer had before him DSC's statement that its telephone numbers were registered in the names of employees but DSC's name was associated with those numbers by the telephone company's public information directory answering service. In addition, DSC stated that it had a telephone number published in a directory for the Philadelphia area and that SBA personnel in Baltimore used the Philadelphia telephone number when calling DSC personnel assigned to the Baltimore contract for the prior year. The issue here is whether the RFP's "publicly listed telephone number" in the name of the offeror requirement could be satisfied by either (a) the telephone company's directory assistance service being able to provide DSC's local number or (b) DSC's published number in the Philadelphia directory. Although it is clear that SBA interpreted the

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"publicly listed telephone number" RFP provision as requiring publication of DSC's local telephone number in the Baltimore area telephone directory, we believe that that provision may not properly be interpreted that narrowly. Since DSC's local telephone number could have been obtained from directory assistance in Baltimore, we believe that DSC satisfied the RFP's "publicly listed telephone number" requirement.

With regard to the second basis, DSC contends that its Baltimore office during the period January 1, 1976, to present was in a law firm's suite. In partial support of DSC's contention is a letter dated October 23, 1976, from the SBA to our Office concluding that DSC had a Baltimore office for 1 year preceding January 8, 1976. The contracting officer also had before him a letter from a partner in the law firm stating as follows:

"[DSC] entered into a formal lease agreement effective May 1, 1976, leasing office space including use of our library and conference area as well as secretarial services.

"Prior to May 1, 1976, our office facilities were made available to [DSC] upon request although no formal lease agreement had been made."

Based on this information the contracting officer concluded that DSC did not have a Baltimore office at all times but only upon request during the period between January 8 and May 1, 1976, and, therefore, did not comply with the RFP's office requirement.

Counsel for DSC concurs with the SBA's interpretation of our decisions in Haughton Elevator Division, Reliance Electric, Co., B-184865, May 3, 1976, 76-1 CPD 294 and other recent decisions, which held that meeting definitive responsibility criteria is an actual prerequisite of an affirmative determination of responsibility and such criteria may not be selectively waived by the contracting officer. However, counsel for DSC contends that DSC does not request nor require waiver of the RFP definitive responsibility criteria because DSC literally complies.

Since DSC did not have a Baltimore office at all times but only upon request during the period between January 8 and May 1, 1976, we cannot conclude that the contracting officer's determination was unreasonable. While we have not disagreed with the contracting officer's conclusion, we note that during that period, DSC was SBA's contractor for management assistance services in the Baltimore area and, according to SBA's

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field office report, DSC's performance was satisfactory. Since DSC has demonstrated to SBA's satisfaction that acceptable performance may be achieved without an "office" in the geographic area, by letter of today we are requesting that the Administrator of SBA review the necessity for the "office" requirement prior to issuing solicitations for future management assistance services.

Accordingly, SBA properly determined that DSC did not have an office in the Baltimore area since November 15, 1975, and under the terms of the RFP, SBA properly excluded DSC from consideration in the Baltimore area.

Washington Area

Based on the SBA Washington field office report and information provided by DSC, SBA determined that DSC failed to meet the office requirement here because: (1) its current facility was "seldom used;" (2) the only person in the area who could be considered a DSC staff member did not devote a minimum of 35 hours per week to DSC's work through its current facility; and (3) DSC did not have a publicly listed telephone number in the firm's name in the Washington area prior to May 14, 1976.

With regard to (1) the contracting officer had before him the following information: (a) during the period March 1975 to September 1976, DSC had performed 111 major task orders under a prior SBA management assistance services contract in the Washington area; (b) from March 1976 to February 1977, DSC performed 28 task orders under a similar SBA contract in the Washington area; and (c) during the period November 1974 to March 1976, under two contracts with the Federal Aviation Administration (FAA), DSC had performed over 5,500 manhours of similar consulting activity in the Washington area. Further, the SBA field office reported that DSC had an established office during the required period. In view of the information then before the contracting officer, the determination that DSC's Washington office was not the focal point of similar consulting activity merely because the office was seldom used was unreasonable.

With regard to (2), the SBA field office reported that the local project director for DSC under the then current SBA management assistance contract was not a salaried employee of DSC and did not devote a minimum of 35 hours per week to DSC's work. DSC advised the contracting officer

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that its local project director devoted an average of 35 hours a week to DSC work and DSC provided three more names of DSC staff members who satisfied the work-hours-per-week requirement in the Washington area. In addition, DSC provided some records of earnings for each person and records of participation for two of the four in prior SBA management assistance contracts. DSC also offered to provide additional records to establish work hours per week of each employee. The SBA field office report did not address whether the three other DSC staff members devoted 35 hours per week to DSC through its Washington office.

DSC interpreted the RFP's 35-hour week/50-percent performance through Washington office requirement, as follows:

"Information supplied by DSC in its letter of February 24th fully documented that at least four DSC staff people met the requirement of 1) working a minimum 35 hour work week, 2) performing services similar [in] nature to those required by the solicitation, 3) providing at least 50% of their professional time in the performance of such consulting services in the Washington area. It is extremely clear from examination of this requirement that a staff member need not be a resident of the geographic area since the requirement states categorically, that the staff member must devote only 'at least 50%' (not 100%) of his professional time at that location. * * *"

Although DSC correctly interpreted the RFP's requirement, we must concur with the contracting officer's conclusion that information provided by DSC before award failed to establish that either the local project director or the company comptroller satisfied the requirement. With respect to the other two DSC staff members, since the SBA field office report was silent and since DSC showed that significant work was performed through the Washington office on the two FAA contracts, we believe that sufficient doubt existed to require the contracting officer to seek additional information from the SBA field office or directly from DSC before making the responsibility determination. However, in the course of developing this matter DSC has had the opportunity to submit evidence in possession to establish compliance with the requirement. DSC presented records concerning the four staff members' work through the Washington office for our consideration.

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Those records show the following:

<u>Employee</u>	<u>No. of weeks during period in which 50% of work was performed through Washington office</u>
A (project director)	10
B (company controller)	10
C	6
D	2

We have thoroughly examined these records and must conclude that DSC again failed to show that any of the four staff members worked at least 50 percent through the Washington office since November 15, 1975. Accordingly, with respect to (2), DSC was not prejudiced by SBA's negative responsibility determination in the Washington area and because of this conclusion there is no need to consider SBA's third basis.

Pittsburgh Area

The SBA field office reported that (1) DSC's proposed project director is a consultant and not a staff member, (2) the evidence of a lease showed the office was in the consultant's name not DSC's, and (3) DSC did not have a publicly listed telephone number in its name prior to July 1976. The contracting officer determined that DSC would not be allowed to circumvent the RFP's office requirement by merely hiring a consultant and using facilities in that geographic area.


In response DSC argues as follows:

"The information supplied by the SBA concerning the Pittsburgh office again is a direct variance with the actual contractual requirements as well as the information supplied by DSC to the SBA on February 25, 1977. For example, the SBA states that [proposed project director] is a consultant to the firm and not a staff member. However, the SBA defines a staff member as one who works at

minimum of 35 hours per week and this is certainly true of [proposed project director]. The term 'consultant' is not defined by the SBA's requirements and therefore whether or not [proposed project director] was a consultant is not an issue - the only question is whether or not he was devoting 35 hours per week minimum and this was so stated. With respect to the question of written evidence of a lease it should be noted that the contractual requirement is simply that DSC must possess evidence that a lease exists, and not the lease be in the name of the firm. In point of fact, the SBA has admitted that a lease does exist (in the name of [proposed project director]) and that the office area that was leased was to be used for purposes of supporting DSC's focus of consulting activity in the Pittsburgh area. With respect to the question of a publicly listed telephone it should be noted that DSC's letter of February 23rd identified seven (7) telephone numbers (three in the Pittsburgh area and five in the Pennsylvania area) which were all publicly listed through 1975 and 1976 in DSC's name.
* * *

DSC presented the contracting officer with information showing that its Pittsburgh area location had been the focal point of similar consulting activity since November 1975. DSC's work included consulting services on two prior SBA management assistance contracts and similar work on three contracts for private companies. However, the record is clear that DSC's proposed project manager had an office in Pittsburgh but DSC did not. Therefore, under the terms of the RFP, DSC was not eligible to submit an offer in the Pittsburgh area. Accordingly, there is no need to address whether DSC had a publicly listed telephone number in that area.

Protest denied.


Deputy Comptroller General
of the United States

Related to 3718-3720

P.L.I - Boyle
P.L.II - Seeling



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

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SEP 14 1977

The Honorable A. Vernon Weaver
Administrator, Small Business
Administration

Dear Mr. Weaver:

Enclosed are copies of our decisions of today in response to protests of Burton K. Myers and Company and Decision Sciences Corporation regarding request for proposals RFP-SBA-7(1)-MA-77-1.

As indicated in the decisions, we have several concerns regarding this solicitation. They are set forth briefly below:

1. The RFP imposes a geographic restriction on the basis of SBA regional and district boundaries. It appears that SBA's needs could be satisfied by a less restrictive geographic requirement, one based on a number of miles from a central point. See, in this regard, the discussion in the Burton K. Myers decision. It is therefore recommended that you review this geographic restriction prior to utilizing it in future procurements.

2. While in the Burton K. Myers decision we have upheld, in general, the reasonableness of the "office" requirement, the record in the Decision Sciences Corporation case suggests that the requirement may be drawn more strictly than is necessary. In that latter case, the protester was the highest rated offeror in 3 of the 43 geographic areas. As the incumbent contractor in all these areas, the protester was reported to have performed satisfactorily, but was found nonresponsible for failure to meet the RFP's "office" requirement. While we do not disagree with the responsibility determination, since the protester had demonstrated that acceptable performance may be achieved without an "office" as defined, in the geographic area, we suggest that a review be made of the necessity for the "office" requirement prior to issuing solicitations for future management assistance services.

3. The solicitation limits subcontracting to 50 percent of the tasks assigned. It appears to us that the solicitation provisions are intended to apply where a wide variety of tasks have been

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assigned to the contractor, and not to a situation where the contractor has been assigned primarily tasks for which it planned to subcontract because of a lack of in-house capability. We suggest clarification of these solicitation provisions to make their meaning clear in subsequent procurements.

4. The solicitation requires pricing of a final report, but excludes consideration of that pricing in proposal evaluation. As explained more fully in the Burton K. Myers decision, this could result in an inaccurate indication of which proposal would result in probable lowest cost to the Government. We suggest that in the future solicitations should provide for inclusion of the cost of the report in the evaluation or for furnishing of the report at no charge.

We would appreciate your advice with respect to the action taken in response to the recommendations and suggestions set forth above.

Sincerely yours,

R. P. KELLER

Deputy, Comptroller General
of the United States

enclosures