



Comptroller General
of the United States
Washington, D.C. 20548

3452.12

Decision

Matter of: International Shipbuilding, Inc.

File: B-257071.2

Date: December 16, 1994

Gary L. Thorman for the protester.
Elizabeth Rivera Bagwell, Esq., for the Department of the Navy, the agency.
David R. Kohler, Esq., and Susan L. Sundberg, Esq., for the Small Business Administration.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging nonresponsibility determination on ground that agency's alleged failure to consider protester's financial information resulted in Small Business Administration's failure to receive vital information bearing on protester's financial capability is denied where: (1) small business protester failed to respond to three separate requests by contracting agency for financial information; and (2) Small Business Administration conducted its own investigation before affirming agency's determination that protester was nonresponsible.

DECISION

International Shipbuilding, Inc. (ISI), protests the award of a contract to The Ogilvie Company under request for proposals (RFP) No. N0064-93-R-0110, issued by the Navy for 10 3-tier paint floats. ISI contends that it was improperly determined nonresponsible as a result of the Navy's failure to consider vital information regarding its financial capability; because of this alleged failure, ISI protests that the Small Business Administration (SBA) similarly overlooked the same vital information and therefore improperly affirmed the Navy's determination that ISI was nonresponsible.

We deny the protest.

BACKGROUND

On October 5, 1993, the Navy issued the RFP as a total small business set-aside; by the November 30 closing date, 15 offers--including that of ISI--were received. From February 8 to March 7, 1994, the Navy conducted technical discussions with each offeror; because ISI's written response to these discussions was initially determined by the agency to be untimely, the protester was eliminated from further discussions. However, on April 13--in response to a protest filed by ISI at this Office--the Navy reinstated ISI's proposal in the competitive range, and issued a request for best and final offers (BAFO).

Based on the BAFOs received, ISI was the lowest-priced offeror; however, because ISI's price was more than \$150,000 lower than the next technically acceptable offeror--and because another offeror for a similar procurement was terminated for default by the agency based on its inability to perform at the price proposed by ISI--the contracting officer asked the Defense Contract Management Area Operations, Birmingham (DCMAO) to perform a pre-award survey of ISI, including an audit of ISI's accounting system, and a field pricing report to ascertain whether ISI's offered price was realistic.

To evaluate ISI's responsibility, DCMAO performed the following investigation. First, on May 17, DCMAO surveyed ISI's facilities and proposed site of performance; based on this inspection, DCMAO determined that although ISI--as part of a newly claimed joint venture with another company, Worldwide Marine--could technically perform this requirement, ISI's financial resources and independent technical qualifications were unproven. For example, the surveyors discovered that although ISI was incorporated in 1979 as a business engaged in the construction and repair of watercraft, it did not have any current commercial or government work, and consequently, the firm did not have a work force on site and would have to rely solely on subcontractors for contract performance. In addition, the pre-award surveyors discovered that under a recent contract that involved similar repair work to this requirement, the agency had terminated ISI's performance through a no-cost settlement due to ISI's inadequate cashflow; specifically, ISI's lack of financial resources had resulted in nonpayment of subcontractors and the firm's inability to complete the contract. Finally, although ISI represented to DCMAO that it had recently formed a joint venture with Worldwide Marine to perform this requirement, this joint venture relationship was not referenced anywhere in ISI's proposal--and in fact, the proposal under the RFP was submitted in ISI's name only.

this contract; according to the protester, because this request was not made in writing, ISI refused to respond and so advised DCMAO. DCMAO next submitted a facsimile request for a full financial and accounting audit. ISI agreed to a May 24 audit meeting with DCMAO; however, on that date, ISI advised DCMAO that it could not agree to the audit because its bookkeeper had to go to Florida to deal with a family illness. DCMAO and ISI rescheduled the audit for June 2; however, ISI again contacted DCMAO and advised the auditors that its bookkeeper was still unavailable, and that it had not yet had a chance to obtain any bookkeeping assistance for the audit. In response, DCMAO advised ISI to proceed with submitting its financial information and data in its raw form; however, ISI never complied with this request.

As a result of its concerns regarding ISI's performance, and ISI's failure to respond to the audit request, DCMAO issued a negative pre-award survey and responsibility evaluation of ISI. DCMAO's recommendation to the Navy that the agency not award this contract to ISI was primarily based on DCMAO's determination that ISI lacked the financial resources to successfully perform this contract.

On June 2, the agency notified ISI that it had been found nonresponsible. Where, as here, a small business is found nonresponsible, the matter must be referred to the SBA for review under the SBA's certificate of competency (COC) procedures since, under 15 U.S.C. § 637(b)(7) (1988), SBA has conclusive authority to determine a small business bidder's responsibility by issuing or refusing to issue a COC. Consequently, on June 13, the Navy referred the matter of ISI's nonresponsibility to the SBA Atlanta Regional Office for review, explaining that ISI was found nonresponsible due to inadequate financial and production capability.¹

By letter dated June 16, SBA notified ISI of the basis for its nonresponsibility determination, and further advised the contractor that SBA would review the determination but that "[i]t must be emphasized and duly noted that the burden of demonstrating competency to perform is solely your responsibility." The letter also informed ISI that in order to appeal the Navy's nonresponsibility determination, the firm would have to complete and submit an attached "Application Instruction Sheet" which required the following information to be provided to SBA: supplier and subcontractor information; completed contracts; present plant load; facilities and equipment; personnel resumes;

¹The Navy also concluded that ISI is not a regular dealer under the Walsh-Healey Act. SBA later found that ISI in fact is a regular dealer.

itemization of all costs; production milestone chart; labor requirements and workload; engineering drawings and specifications; a copy of the firm's quality control manual; a copy of ISI's small business size determination; cash flow information; profit and loss statements; and balance sheets for the past 3 fiscal years.

In response to the December 16 letter, ISI provided SBA with a copy of its small business size determination, a completed COC application, information on a 1985 loan, income statements from 1991, 1992, and 1993, and balance sheets for these years. To allay concerns about its financial capability, ISI provided a proposed monthly cash flow chart listing \$591,500 in projected loans from Worldwide Marine for the period of August 1994 through May 1995 as well as a June 3 letter from Worldwide Marine notifying DCMAO that it would control all financial administration of this contract.

On June 30, an SBA industrial specialist conducted a plant survey of ISI's production capability; on July 6, an SBA financial officer completed a report analyzing the status of ISI. That same day, SBA received a letter from Worldwide Marine advising the government that Worldwide Marine had withdrawn from the joint venture with ISI, and would not provide any performance or support for this contract.

Based on their investigations, the SBA industrial specialist and financial analyst each separately determined that they could not recommend ISI for contract award. First, the SBA industrial specialist determined that ISI was not capable to perform based on: ISI's apparent lack of cash to purchase needed materials and pay staff; ISI's failure to provide letters of commitment for required personnel; and ISI's lack of a production plan and facilities in which to assemble the tier crafts. Similarly, the SBA financial analyst determined that based on his review of ISI's submitted balance sheets and profit/loss financial statements, ISI's firm had a "deficit of retained earnings and a deficit net worth." The analyst also noted that the profit shown on the interim financial statements was not consistent with ISI's fiscal year end statements, and that there was "no evidence of cash availability to perform the contract." Additionally, the SBA financial analyst reported that Dun & Bradstreet² rated ISI "very slow and high risk,"

²Dun and Bradstreet is an independent reporting service that makes its reports available to the public for evaluating the financial positions of companies. Such reports are routinely used by contracting agencies in evaluating contractor responsibility. See Federal Acquisition Regulation (FAR) § 9.105-1(c)(5); Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158.

and concluded that as a high credit risk, ISI was unable to obtain credit accounts with suppliers. Finally, while ISI had stated that Worldwide Marine would pledge \$591,000 in loan money, ISI did not provide any documentation from Worldwide Marine to confirm the availability of these funds, i.e., a letter of credit. Based on these two SBA reports, the COC Review Committee unanimously recommended that SBA deny the COC on the grounds that ISI was not financially capable of performing this requirement.

By letter dated July 12, SBA notified ISI and the Navy that ISI's application for a COC was denied, thereby affirming the Navy's initial determination that ISI was nonresponsible. ISI subsequently filed this protest with our Office, reiterating its nonresponsibility challenge.

DISCUSSION

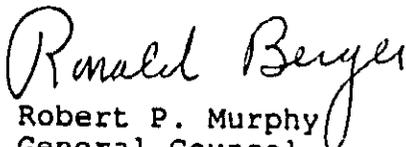
In order to be found responsible, a firm must, among other things, affirmatively demonstrate that it has sufficient financial resources to perform a contract, or the ability to obtain them. FAR §§ 9.104-1 and 9.104-3(b). Absent such a showing, the FAR requires the contracting officer to determine a firm nonresponsible. FAR § 9.103(b). Where a small business is found nonresponsible, the matter must be referred to the SBA. We do not review protests of such matters unless the protester indicates that SBA's action on a referral may have been taken fraudulently or in bad faith or that SBA failed to consider vital information bearing on the protester's responsibility. Fittman Mech. Contractors, Inc., B-241046.2, Feb. 1, 1991, 91-1 CPD ¶ 103.

In this case, although ISI maintains that the Navy's alleged failure to consider vital information bearing on ISI's financial capability misled the SBA into denying ISI's COC, we find no basis to question either the Navy's or SBA's determination that ISI is nonresponsible. First, the record contains absolutely no evidence showing bad faith on the part of either the Navy or SBA. Further, as noted above, the record unequivocally shows that despite three specific requests from the agency, ISI refused to provide the Navy with any information demonstrating its financial capability to perform this requirement. In fact, the only attempt made by ISI to ease the Navy's and SBA's concerns--ISI's attempted joint venture with Worldwide Marine--failed when Worldwide Marine withdrew all its support from this requirement. Finally, as noted above, two SBA officials conducted independent investigations of ISI's financial capability which were not influenced, in any way, by the Navy's alleged failure to obtain vital financial information bearing on ISI's responsibility--particularly since ISI was given the opportunity--in the SBA's COC application--to

furnish convincing evidence of its financial capability to the SBA for consideration.

An agency is not required to delay award indefinitely until an offeror cures the causes of its nonresponsibility. See Aceves Constr. and Maintenance, Inc., B-233027, Jan. 4, 1989, 89-1 CPD ¶ 7. Under these circumstances, where the record shows that both the agency and SBA have fully considered and investigated all available information--and where the protester has failed to respond to or otherwise allay the agencies' concerns regarding its capability to perform--the subsequent determination that the contractor is nonresponsible is unobjectionable. See UAV Sys., Inc., B-255281; B-255281.2, Feb. 17, 1994, 94-1 CPD ¶ 121; Harvard Interiors Mfg. Co., B-247400, May 1, 1992, 92-1 CPD ¶ 413.

The protest is denied.


In Robert P. Murphy
General Counsel