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DECISION

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

FILE: B-212077.2 **DATE:** August 17, 1984

MATTER OF: Mercury Consolidated, Inc.

DIGEST:

Where agency conducting negotiated procurement as part of cost comparison under OMB Circular A-76 had ample time, due to second low offeror's successful appeal of cost estimate, to review additional information bearing on the low offeror's financial responsibility received after the original cost comparison was completed and the results announced, that information should be considered because information relating to responsibility may be received any time prior to award.

Mercury Consolidated, Inc. protests the Naval Supply Systems Command's determination of nonresponsibility under request for proposals No. N00189-83-R-0088 issued in connection with a cost comparison review to determine whether the operation of the air terminal at the Naval Supply Center, Norfolk, should be contracted out. The Navy's primary basis for finding Mercury nonresponsible was its inability to obtain an adequate bank commitment during contract negotiations, before the cost comparison estimate was prepared. Mercury contends that the Navy was required to consider a bank commitment Mercury obtained after the cost comparison estimate was completed and the results announced, arguing that responsibility must be determined as near to the time of award as possible. We agree with Mercury and sustain the protest.

The solicitation was issued in conjunction with a cost comparison under Office of Management and Budget Circular A-76 to determine whether the Navy should operate the air terminal in-house with federal employees or contract out for those services. Of the proposals received by the closing date, two--those submitted by Mercury and CFE Services, Inc.--were technically acceptable. Mercury's proposed price of $4,228,500 was low

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after two rounds of best and final offers and would have been used for preparing the cost comparison if its offer was otherwise acceptable. However, because the Navy found that Mercury was not a responsible offeror, it used CFE's higher price for the cost comparison. Since this comparison showed that contracting out was more expensive, the Navy initially concluded that the work should be retained in-house. CFE successfully appealed the Navy's initial cost comparison, so that the final cost comparison showed that contracting with CFE was more advantageous. Award has been withheld pending resolution of this protest.

The Navy reports that it asked the Defense Contract Administrative Services Management Area (DCASMA), Santa Ana to conduct a preaward survey of Mercury after receipt of the first round of best and final offers on November 29, 1983. The record shows that between early December 1983 and mid-January 1984, DCASMA made several requests of Mercury for more current financial information, particularly a new bank commitment letter since Mercury's then-current commitment was due to expire. When these requests were not productive, on January 20, the head of the Navy contracting activity contacted Mercury's bank directly and was told that the bank would not issue a new credit line for Mercury until March 1984, when Mercury's annual report would be available. Shortly thereafter, DCASMA recommended against award to Mercury on the ground that it did not have the financial capability needed to perform the contract. On January 25, the contracting officer found Mercury to be nonresponsible for financial reasons. Consequently, Mercury's proposal was dropped from consideration and the Navy's initial cost comparison, which showed that in-house performance was less costly than contracting, was based on CFE's proposed price.

On January 30, the Navy advised Mercury of the result of the cost comparison and that its proposed price had not been used for the cost comparison because the firm was considered nonresponsible due to inadequate financial resources. Four days later, by letter of February 3, Mercury's bank advised DCASMA that it would commit $400,000 to finance Mercury's contract subject to assignment of the

contract proceeds. Thereafter, Mercury furnished additional information bearing on its financial status, the most recent being a corrected[1] bank commitment letter forwarded by letter of June 1, 1984.

Mercury contends that its responsibility should have been ascertained as near to the time of award as possible, after announcement of the results of the cost comparison and completion of the period of public review. Had this been done, Mercury argues, its lower priced proposal would have been used for the cost comparison and its financial condition reviewed afterwards, when more complete information was available. Alternatively, Mercury argues that even if the Navy could properly determine financial responsibility prior to completion of the cost estimate and period of public review, the Navy was nevertheless required to consider Mercury's bank commitment letter of February 3, 1984. In this regard, Mercury contends that its commitment letter was submitted shortly after the Navy's nonresponsibility determination and that ample time remained for the Navy to reconsider that determination without delaying award. Mercury points out that because CFE's appeal of the cost comparison was not decided until May 14, 1984, the Navy was not prejudiced by Mercury's delay in submitting its bank commitment letter. The Navy maintains that the pertinent regulation, Defense Acquisition Regulation (DAR) 4-1203.4, reprinted in 32 C.F.R. pts. 1-39 (1983), requires that responsibility be determined prior to performing the cost comparison in those cases where the cost of contracting out is based upon a negotiated procurement.

We do not believe it is necessary for us to determine whether DAR § 4-1203.4 requires in a negotiated procurement that responsibility be determined prior to performing the cost comparison. Whether responsibility was determined before or after the cost comparison, it is clear that the Navy was not in a position to make an immediate award as the result of CFE's appeal of the Navy's conclusion that it was more advantageous to retain the work in-house. Whatever the cause, the award was delayed and during that time additional information bearing on Mercury's financial capability became available. We agree with the protester that information bearing on responsibility may be received

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[1] The bank's February 3 commitment letter had been based on Mercury's first best and final offer, of $5,357,016, not its second, of $4,228,500.

24108

and considered at any time prior to award. Guardian Security Agency, Inc., B-207309, May 17, 1982, 82-1 CPD ¶ 471. No award has yet been made here and we believe it is incumbent upon the Navy to re-examine the question of Mercury's responsibility.

We sustain the protest. In view thereof, we need not discuss the other bases upon which Mercury objected to the nonresponsibility determination.

Milton J. Socolar
Acting Comptroller General
of the United States