



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

## REDACTED DECISION

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release..

**Matter of:** Saft America Inc.

**File:** B-270111

**Date:** February 7, 1996

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Richard J. Bednar, Esq., Crowell & Moring, for the protester.

Alan Grayson, Esq., and Victor Kubli, Esq., for BlueStar Battery Systems; Norman Steiger, Esq., for Power Conversion, Inc., intervenors.

Richard A. Couch, Esq., Vera Meza, Esq., and John J. Reynolds, Esq., Department of the Army, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Contracting officer reasonably determined that the protester was nonresponsible to supply large quantities of urgently needed batteries for communications-electronics equipment used by soldiers where the determination was based on the protester's delinquent deliveries under two recent contracts for similar items, the agency has received a number of reports from soldiers in the field that batteries previously supplied by the protester may vent toxic materials, and the Army has frozen its supply of the protester's batteries until the problem is corrected so as to prevent injuries to soldiers.

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## DECISION

Saft America Inc. (Saft) protests the Department of the Army's determination that it was nonresponsible to perform a contract under invitation for bids (IFB) No. DAAB07-95-B-G346, for supplying batteries for military applications.

We deny the protest.

On September 20, 1996, the Army's Communications-Electronics Command (CECOM) issued the IFB for 408,000 urgently needed BA-5590/U nonrechargeable lithium sulfur dioxide batteries. The BA-5590/U battery is a small, lightweight battery that is the primary power source for approximately 50 different types of portable communications-electronics equipment used by soldiers. As the procurement was conducted using accelerated procedures, CECOM orally solicited bids from the only two firms that had produced the battery for the Army previously,

Saft and Power Conversion Inc. (PCI).<sup>1</sup> Both firms submitted bids by the September 25 closing date. Saft's total bid price was \$16,870,800 and PCI's was \$21,750,480.

CECOM requested that the Defense Contract Management Area Office (DCMAO) conduct pre-award surveys of both firms. In PCI's case, the pre-award survey team's findings were positive and the firm was recommended for award. In Saft's case, the pre-award survey team made negative findings regarding Saft's financial, technical, and production capabilities. The pre-award survey report stated that Saft had not demonstrated adequate financial strength to perform the proposed contract and complete its current backlog of sales. The report noted that Saft had been asked to provide current financial information and had responded with financial data for 1993 and 1994, but had provided no data for 1995. Even though Saft had supplied the same batteries to the Army in the past, the pre-award survey team rated Saft as unsatisfactory on technical and production capability. The team noted Saft's technical/design problems and its unsatisfactory (*i.e.*, delinquent) delivery of similar batteries under two existing contracts with the Army. Overall, the pre-award survey team recommended that Saft not be considered for award of the present contract.

The contracting officer also was aware of and discussed with other cognizant CECOM officials the fact that there had been a number of incidents involving "venting" of BA-5590/U batteries manufactured by Saft. A venting is defined as the operating of the cell's vent mechanism; it occurs when the cell's internal pressure increases above normal operating parameters. As a safety feature, each battery cell has a venting mechanism (*i.e.*, a weak spot built into the cell container) that allows the controlled release of toxic materials when the cell's internal pressure gets too high.<sup>2</sup> Ventings are undesirable events and are considered a serious problem due to

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<sup>1</sup>An agency may use noncompetitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2) (1994).

<sup>2</sup>Since 1992, there have been 46 reported ventings involving BA-5590/U batteries manufactured by Saft; 36 of those were reported as violent ventings. A violent venting occurs under extreme conditions in which the cell's internal pressure increases so fast that the vent mechanism is overwhelmed and the cell itself explodes. Twenty-five of the reported ventings occurred in 1995.

the release of toxic materials that endanger any person in the immediate area.<sup>3</sup> On September 21, 1995, five additional ventings of Saft batteries were reported at Fort Irwin. The Army was not able to immediately determine what caused the Saft ventings and no manufacturing defect that would cause the problem was identified. The agency suspects that [DELETED] causes the problem, which is more likely to occur at the end of a battery's life. Because the Army knows of no method to screen its inventory for [DELETED] batteries, it has frozen its Saft inventory and will not release the batteries to the field.<sup>4</sup> Saft and the Army are currently working to determine the cause and to resolve the venting problem.

Based upon the recommendations of the pre-award survey team, as well as discussion of the venting problem with other knowledgeable CECOM personnel, the contracting officer determined that PCI was responsible but Saft was not. Therefore, on September 30, the contract was awarded to PCI. Saft was provided a copy of the negative pre-award survey report and was debriefed on October 4. Saft filed its protest in our Office shortly thereafter.

The protester contends that the contracting officer's negative determination of Saft's responsibility was unreasonable because it was based solely upon inaccurate factual information and conclusions in the pre-award survey report. According to the protester, the pre-award survey team incorrectly determined that it did not have the financial capability to do the job because the survey team did not give Saft enough time to submit 1995 financial data. Saft states that it was impossible for it to gather and submit audited/certified financial statements in the 2 days allowed by the survey team. Saft also contends that the survey team incorrectly concluded that it did not have the technical and production capability to produce sufficient quantities of batteries within the accelerated delivery schedule based upon technical problems and delayed delivery under two existing contracts for batteries that are materially different from the BA559/U batteries. Saft states that the batteries with which it had technical difficulties have different electrical requirements from the BA-5590/U battery or were developmental in nature, or were produced under tight specifications. In any event, Saft points out that it did eventually solve the

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<sup>3</sup>The materials vented include sulfur dioxide gas and liquid acetonitrile. Inhalation of sulfur dioxide gas causes severe respiratory irritation, and exposure to acetonitrile electrolyte can cause severe irritation to eyes and skin.

<sup>4</sup>In contrast, the Army reports that only five incidents involving PCI's batteries were reported during the same time period; most of those incidents involved dead or leaking cells. The Army deduced that PCI's problem was a manufacturing defect and that the existing inventory could be screened to locate defective batteries. Thus, after examination reveals no defects, PCI's BA-5590/U batteries are being released to the field.

technical difficulties encountered in those contracts. Saft asserts that the survey team and the contracting officer should have given greater weight to Saft's successful production of more than 2 million BA-5590/U batteries from 1989 through 1993, and to its production of approximately 5,500 batteries a day during the first 6 months of operation Desert Shield.

The protester also contends that the contracting officer's negative determination of responsibility was based upon inaccurate information regarding the venting problem. Saft acknowledges that a real problem exists in that its batteries are venting in the field at the end of their lives. However, Saft contends that the venting problem is not caused by defects in its batteries or in its manufacturing processes; Saft states that its batteries exceed CECOM's performance specifications in many cases. The protester asserts that the soldiers in the field, who are the end users of the batteries, may have reported ventings that did not occur or exaggerated the severity of ventings that really did occur (e.g., report mild ventings as violent ventings). The protester also asserts that soldiers may be abusing the batteries or otherwise using them improperly. In this connection, Saft contends that the performance specifications in the contracts do not accurately reflect the way in which the batteries are used in the field, and, therefore, CECOM should change the performance specifications. For example, Saft states that BA-5590/U batteries are often discharged at lower rates than those set out in the performance specifications and that discharge at lower rates may make the battery less stable and prone to vent.

The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer, including the issue of whether a pre-award survey should be conducted and the degree of reliance that should be placed on the results of the survey. Aydin Vector Div., B-244838, Nov. 13, 1991, 91-2 CPD ¶ 455. As a general matter, our Office will not question a nonresponsibility determination absent a showing of bad faith by the contracting agency or the lack of any reasonable basis for the determination, since the determination is essentially a matter of business judgment and encompasses a wide degree of discretion. MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431. In reviewing a nonresponsibility determination based on prior performance, we will consider only whether the determination was reasonably based on the available information. Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235.

The Federal Acquisition Regulation (FAR) provides that in order to be found responsible, a prospective contractor must have adequate financial resources to perform the contract, or the ability to obtain them, FAR § 9.104-1(a), and a satisfactory performance record, FAR Sec. 9.104-1(c), and that a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the

contractor has taken appropriate corrective action, FAR Sec. 9.104-3(c). A nonresponsibility determination may be based upon the contracting agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default and the contractor disputes the agency's interpretation of the facts or has appealed a contracting officer's adverse determination. MCI Constructors, Inc., supra.

We find that the contracting officer's negative determination of Saft's responsibility was reasonable.

The record shows that the contracting officer was aware of Saft's successfully having produced large quantities of BA-5590/U batteries in the past. However, the pre-award survey report and the contracting officer's statement in response to Saft's protest show that Saft had experienced technical problems and was delinquent in delivering the batteries under two recent contracts for similar batteries. The contracting officer states that he considered the pre-award survey team's negative findings concerning Saft's poor performance on these two contracts, because Saft's performance is "absolutely relevant to a consideration of their technical and production capability and ability to meet the terms of an urgency-based delivery schedule." The contracting officer specifically refutes Saft's assertion that any technical problems it encountered under those two contracts should be excused because the contracts are developmental in nature, stating that the contracts are production contracts. The contracting officer also points out that the original delivery schedule was extended more than once for both contracts and this allowed Saft to avoid the embarrassment of a termination for default on one of the contracts. While the contracting officer recognizes that the batteries manufactured under those contracts have different configurations from the BA-5590/U battery, the contracting officer reports that the basic design and manufacture of the batteries are similar. The contracting officer concluded that technical and production problems Saft encountered in the two recent battery contracts were clear evidence of Saft's overall competence in producing lithium batteries and were of much greater significance than Saft's performance record in manufacturing BA-5590/U batteries in contracts that were awarded 5 or more years ago.

Regarding Saft's venting problems, the record shows that a large number of incidents were reported and that incidents were reported with greater frequency in recent months. The record also shows that CECOM and Saft have not yet determined what causes Saft's batteries to vent, and to vent violently on occasion, and that, as a result, in the interest of safety the Army will not use Saft's BA-5590/U batteries until the cause is discovered and the problem corrected. On the other hand, CECOM points out that very few incidents have been reported with PCI

batteries, that the agency believes it has discovered the cause of the PCI failures, and that the Army will use current supplies of PCI BA-5590/U batteries after they have been inspected and found to be acceptable.

On this record of Saft's recent performance history, delinquencies in delivery and the technical problem related to venting, we think the contracting officer reasonably concluded that Saft might have difficulty producing sufficient quantities of usable batteries in accord with the urgent delivery schedule and, therefore, reasonably found the firm nonresponsible. See Aydin Vector Div., *supra*; Equa Indus., Inc., B-257197, Sept. 6, 1994, 94-2 CPD ¶ 96. Although Saft attributes its performance problems in part to defective specifications and in part to misuse and misreporting by soldiers, it is the contracting officer's reasonable judgment of events that must govern the agency's determination, even where the agency's interpretation is disputed by the protester. *Id.* We see nothing unreasonable in the Army's decision not to award Saft this contract because the cause of the venting has not yet been determined nor has a remedy been devised. See Hercules Aerospace Co., B-254677, Jan. 10, 1994, 94-1 CPD ¶ 7. This result is consistent with our general view that, where a solicitation requirement relates to human safety or national defense, an agency has broad discretion to set its minimum needs so as to achieve the highest possible reliability and effectiveness. See Dash Eng'g., Inc; Engineered Fabrics Corp., B-246304.8; 246304.9, May 4, 1993, 93-1 CPD ¶ 363.<sup>5</sup>

The protest is denied.

Comptroller General  
of the United States

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<sup>5</sup>As noted above, Saft also complains that the nonresponsibility determination considered DCMAO's finding that Saft failed to provide current financial data. As Saft's performance record was a sufficient basis for the contracting officer's nonresponsibility determination, we need not discuss this aspect of the pre-award survey. We note that the contracting officer reports that Saft had been asked for this same information in connection with another pre-award survey more than 1 month earlier.