



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Mexican Intermodal Equipment, S.A. de C.V.

File: B-270144

Date: January 31, 1996

Daniel J. Katz, Esq., Edward H. Kim, Esq., and Kathy S. Ghiladi, Esq., Daniel J. Katz & Associates, for the protester.

Alan W. Mendelsohn, Esq., and Owen C. Wilson, Esq., Department of the Navy, for the agency.

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DIGEST

Contracting officer reasonably determined that protester was not a responsible prospective contractor based upon reasonably based negative pre-award survey findings with regard to protester's production, technical, and transportation capabilities.

DECISION

Mexican Intermodal Equipment, S.A. de C.V. (MIE) protests the rejection of its offer under request for proposals (RFP) No. N62387-95-R-3094, issued by the Department of the Navy, Military Sealift Command for freight containers. The protester argues that the contracting officer unreasonably determined it to be nonresponsible.

We deny the protest.

BACKGROUND

The RFP, which was issued on September 14, 1995, sought offers for the manufacture and delivery of 500 "end opening" 20-foot dry cargo freight containers, with award to be made to the lowest-priced, technically acceptable, responsible offeror. Seven proposals were received by the September 22 closing date. The agency conducted discussions with all offerors whose proposals were in the competitive range and solicited best and final offers (BAFO). MIE's BAFO was the lowest-priced, technically acceptable offer. The contracting officer determined that MIE was not a responsible prospective contractor, however, and on September 29, the agency awarded a contract to another offeror, MTI, Inc.

On October 3, the contracting officer notified MIE that it had been determined nonresponsible based on its poor performance under two prior Marine Corps

contracts and the adverse findings of a Defense Contract Management Area Operations (DCMAO) office pre-award survey, which had just been conducted in conjunction with an ongoing Marine Corps procurement for containers. The agency explains that in seeking to determine MIE's responsibility, the contracting officer asked the Marine Corps, Blount Island Command, for performance data regarding two contracts that MIE had recently performed as a subcontractor for its parent company, Olympic Container Corporation (OCC).¹ The Marine Corps replied that MIE's first article had failed testing under the earlier of the two contracts and that MIE had delivered a year late on both contracts. In addition, the DCMAO pre-award survey of MIE in connection with the ongoing Marine Corps procurement recommended no award based on negative findings in the areas of production capability, technical capability, and transportation capability.

By letter dated October 4, MIE complained to the contracting officer that since it was an affiliate of OCC, a United States (U.S.) small business concern, the contracting officer should have referred her determination of nonresponsibility to the cognizant Small Business Administration (SBA) Regional Office, pursuant to Federal Acquisition Regulation (FAR) § 19.602. The contracting officer responded that MIE could not be considered a small business because MIE had certified in its offer that it was a Mexican corporation, and because MIE did not have income effectively connected with the conduct of a trade or business in the U.S., or an office or place of business or a fiscal paying agent in the U.S. By letter dated October 9, the protester asked the contracting officer to reconsider both her refusal to refer the matter of its responsibility to the SBA and her underlying determination of nonresponsibility. On October 10, MIE filed a protest with our Office.

Subsequent to the filing of MIE's protest with our Office, the contracting officer contacted the SBA and asked it to determine whether MIE was indeed a small business under the relevant standard industrial classification code, and, if so, whether it was eligible for a certificate of competency (COC). Our Office also contacted the SBA and asked for its opinion as to whether MIE was eligible to apply for a COC. On November 29, the SBA ruled that MIE does not meet the definition of a business concern eligible for assistance as a small business and thus is ineligible for COC consideration. In support of its adverse determination, the SBA concluded that MIE does not maintain a place of business in the United States within the contemplation of the governing regulations.²

¹The two contracts, No. M67004-91-C-0006 (for 40 "side-open" containers) and No. M68335-94-C-0016 (for 64 "open-top" containers) were the only previously performed government contracts identified by the protester in its proposal.

²MIE has appealed this determination to SBA's Office of Hearings and Appeals.

While our Office generally will not review a negative responsibility determination concerning a small business, since such matters are ordinarily for referral to the SBA under COC procedures, where—as here—the SBA determines that a firm is ineligible to apply for a COC, we will review the responsibility determination. Wallace & Wallace, Inc.; Wallace & Wallace Fuel Oil, Inc.—Recon., B-209859.2, B- 209860.2, July 29, 1983, 83-2 CPD ¶ 142.

ANALYSIS

The protester contends that the contracting officer's determination of nonresponsibility lacks a reasonable basis. MIE maintains that the findings of the pre-award survey team regarding its production, technical, and transportation capabilities are unsupported and unreasonable. It further maintains that its performance under the two previously cited Marine Corps contracts was not deficient.

In general, the determination of a prospective contractor's responsibility is the duty of the contracting officer, who is vested with a wide degree of discretion and business judgment. We therefore will not question a nonresponsibility determination unless the record shows bad faith on the part of contracting officials or that the determination lacks a reasonable basis. Standard Tank Cleaning Corp., B-245364, Jan. 2, 1992, 92-1 CPD ¶ 3. A contracting officer generally may rely on the results of a pre-award survey in determining a prospective awardee's responsibility, System Dev. Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644, but where he or she does so, we will consider the accuracy of the pre-award survey information relied upon in judging whether a negative determination of responsibility is reasonable. Fairchild Comms. & Elecs. Co., 66 Comp. Gen. 109 (1986), 86-2 CPD ¶ 633.

MIE first takes issue with the findings of the DCMAO surveyor who reviewed its production capability, arguing that he lacked a reasonable basis for his recommendation of no award in this area. The protester complains that the surveyor faulted it for failing to submit a milestone chart or a production plan; this was unfair, the protester maintains, since it did provide a production plan written in Spanish (which it was not given ample time to translate) and since it did furnish a milestone chart within 1 day after he requested it. The protester also complains that the surveyor refused to consider information relating to its parent corporation, OCC, in considering its production history. Finally, MIE complains that the surveyor made much of the fact that its facilities were exposed to the open air and that certain supplies, equipment, and completed items were stored uncovered and outdoors. The protester asserts that these criticisms are unreasonable: that the only equipment stored outside is related to uninstalled steel forging which has no relation to the actual production of containers; that the only supplies stored outside are steel coils, and that although these coils experience some oxidation on the outer

band, they are cut into sheets and edge-trimmed prior to installation; and that it is ludicrous to object to storage of the completed containers outside since they are manufactured for outdoor use.

Based on our review of the full text of the surveyor's report and the protester's arguments, we conclude that the surveyor had a reasonable basis for his findings in the area of production. First, the surveyor did not fault the protester for failing to furnish a milestone chart or a production plan; he faulted it for failing "to submit a milestone chart or production plan that would adequately identify the various manufacturing processes required and control of the production processes required during production." In other words, the surveyor's criticism was evidently directed at the content of the production plan, and not that no plan was furnished. Second, the record does not reflect that the surveyor refused to consider information relating to OCC; rather, it shows that he attempted to contact the buying activity responsible for the two OCC contracts that MIE identified in its proposal, but was unable to get in touch with anyone in time to consider this information.³ Finally, although the protester has offered rebuttals to the surveyor's criticisms of its outdoor storage of equipment, supplies, and finished products, it has offered no rebuttal to the surveyor's most significant criticism regarding its production capability, *i.e.*, that MIE's production facility is not satisfactory since most of the main production area floors are partially dirt and both ends (and one side) of the building are open, which means that there is nothing to prevent rain and sand from entering the work area during high winds and heavy rain storms.

The protester also takes issue with its pre-award survey rating of unsatisfactory in the area of technical capability. MIE contends that its rating in this area was based, in large part, on the allegedly inadequate qualifications of its general manager, whose resume (furnished to the pre-award team) shows that he has been president of OCC since 1975 and general manager of MIE since 1990. The protester argues that its organizational chart demonstrates that its general manager plays an active role in both management functions and technical aspects of the company's manufacturing activities.

Again, based on our review of the surveyor's report and the protester's arguments, we do not find unreasonable the surveyor's findings in the area of technical

³In this regard, we note that the pre-award survey was conducted under legitimate time constraints--it was performed in mid-September for use in connection with an award to be made by the end of that month. We also note that the contracts at issue are the two Marine Corps contracts, referenced above, which MIE recently performed as a subcontractor for OCC, and with respect to which the Marine Corps advised the contracting officer that it regarded MIE's performance as poor.

capability. The surveyor's criticism did not focus only on the qualifications of MIE's general manager; it also focused on the qualifications of MIE's other key personnel. In this regard, the surveyor noted that "after the translation of resumes for the remaining key personnel, the surveyor feels that the prospective contractor lacks the experienced technical personnel to manage the technical and production functions to ensure completion of a contract on schedule, if awarded." The protester has offered no rebuttal to this conclusion. We think that the surveyor's concerns about the qualifications of the individuals who would actually manage the day-to-day production operation provide a reasonable basis for his negative findings in this area, regardless of the qualifications of MIE's general manager.

Finally, MIE disputes the pre-award survey finding of unsatisfactory with regard to its transportation capability. The protester maintains that the surveyor incorrectly concluded that its proposed methods of conveyance were unavailable.

Based on our review of the portion of the pre-award survey addressing MIE's transportation capabilities, we find that the surveyor's principal objection to the protester's proposed methods of conveyance was not that they were unavailable, but rather that MIE had not presented a transportation plan that adequately addressed the difficulties (such as obtaining the permits necessary for a U.S. carrier to operate in Mexico or for a Mexican carrier to operate in the U.S.) that it would encounter in employing any of them. We think that this was a legitimate area of concern. Further, although the protester has furnished our Office with letters from two carriers which confirm that MIE has used them in the past for shipping from its plant in Mexico to destinations in the U.S., the date on the letters (October 4 in both cases) indicate that these items were not made available to the pre-award team at the time it was conducting its survey; thus we do not see how the pre-award team can be faulted for not having taken them into consideration.⁴

Finally, the protester argues that the agency's failure to award it this contract, as well as a contemporaneous Marine Corps contract for containers (*i.e.*, the contract for which the DCMAO survey was prepared), based on concurrent findings of

⁴Since, in our view, the contracting officer could reasonably have concluded, based on the findings of the pre-award survey team, that MIE was not a responsible prospective contractor, we need not consider whether MIE's allegedly poor performance under the two Marine Corps contracts provides a separate basis for finding it nonresponsible. We note that the protester has furnished evidence (not rebutted by the agency) indicating that its late delivery under the 1991 contract was attributable to a technical problem, which it eventually overcame, and that its late delivery under the 1994 contract was attributable to the agency's failure to furnish it with required serial numbers for the containers in a timely manner.

nonresponsibility, constitutes a de facto debarment or suspension of the firm. A de facto debarment occurs where a firm is excluded from contracting because of a contracting agency's making repeated determinations of nonresponsibility or even a single determination of nonresponsibility as part of a long-term disqualification attempt, without following the procedures for suspension or debarment set forth in FAR Subpart 9.4. Government Contract Advisory Servs., Inc., B-255918; B-255919, Mar. 8, 1994, 94-1 CPD ¶ 181. Here, the concurrence of the Marine Corps and Military Sealift Command determinations of nonresponsibility does not demonstrate that they were part of a long-term disqualification attempt; that different contracting officers reached the same conclusion at the same time regarding the protester's responsibility is merely a reflection of the fact that the determinations were based on the same current information and is not a de facto debarment. Id.

The protest is denied.

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