



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

B-179028

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October 12, 1973

Electro Impulse, Inc.
P.O. Box 870
Red Bank, New Jersey 07701

Attention: Mr. Mark Rubin
President

Gentlemen:

Reference is made to your letter of July 6, 1973, and subsequent correspondence, protesting against award of a contract to anyone other than your firm under request for proposals (RFP) No. M00027-73-R-0042, issued by the U. S. Marine Corps.

The solicitation in question was issued on January 26, 1973, requesting quotations for 540 wattmeters, plus an option for an additional 264. On June 11, 1973, the deadline for best and final proposals, three proposals were submitted, Electro Impulse (EI) being low. A pre-award survey was then conducted on EI. The preaward team found EI to be unsatisfactory in several areas; namely: purchasing and subcontracting; quality assurance; past performance record; and ability to meet the required delivery schedule. Based upon this preaward survey, the contracting officer determined that EI was not responsible.

On June 14, 1973, the contracting officer requested a Certificate of Competency (COC) review from the Small Business Administration (SBA). SBA, however, replied that it would take until July 11, 1973, to process the COC. The Marine Corps determined this delay to be too long, due to the urgent nature of the procurement, and requested SBA to return all paperwork to them if SBA could not reply by June 29, 1973.

On June 20, 1973, the Marine Corps requirements office confirmed in writing the urgent need for the wattmeters. A Certificate of Urgency was issued by the Acting Director of the Procurement Division, pursuant to the provisions of Armed Services Procurement Regulation (ASPR) 1-705.4(c)(iv). As a result, SBA returned all documents on the COC request.

The Marine Corps Procurement Division Contract Review Board reviewed and approved the contracting officer's recommendation to award to other

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than the low offeror (EI) and on June 21, 1973, award was made to Coaxial Dynamics, Inc. (Coaxial), the second low offeror.

Given this set of circumstances, EI protested to our Office on June 27, 1973, basing their protest on the following contentions:

- (a) The preaward survey was unjust and unfair.
- (b) That they were completely responsive and responsible and could have proven such if given their right to a COC action by the SBA.
- (c) The Marine Corps did not have a right to award the contract to Coaxial based on urgency simply because of the close of the fiscal year.

As concerns your first contention, the preaward survey team found your firm to be unsatisfactory in numerous areas. Our Office has consistently taken the position that the question as to the qualifications of a prospective contractor primarily is for determination by the procurement officers concerned, and in the absence of any showing of bad faith or lack of a reasonable basis for the determination, we are not required to object to the determination made by the administrative agency. See 37 Comp. Gen. 430, 435 (1957). On the basis of our review of the record and consideration of the information relied upon by the contracting officer in making his determination of your lack of responsibility, we find no basis upon which to legally object to the action taken.

You next contend that you could have proven your responsibility if given an opportunity to have such reviewed by SBA. Our position has been that a contracting officer's determination of nonresponsibility is not final insofar as the capacity or credit of a small business is concerned. See 50 Comp. Gen. 67 (1970). As a result, the contracting officer's initial unfavorable determination should not warrant ignoring a more favorable proposal of a small business concern without further investigation. ASPR 1-705.4(c) requires the contracting officer to refer a small business concern to the SBA for the possible issuance of a COC where the proposal of that concern is to be rejected because the concern has been determined to be nonresponsible as to capacity or credit. The negative preaward survey upon which the contracting officer relied in making his determination in your case was based on factors which directly related to EI's capacity to perform the contract. Therefore, the contracting officer was correct and in compliance with ASPR upon referring the matter to SBA on June 14.

However, the withdrawal of the request from SBA was also proper, given the circumstances of this case. ASPR 1-705.4(c)(iv) states that:

"A referral need not be made to the SBA if the contracting officer certifies in writing, and his certification is approved by the chief of the purchasing office, that the award must be made without delay, includes such certification and supporting documentation in the contract file, and promptly furnishes a copy to the SBA. Contracting officers shall, immediately upon receipt of sufficient information, make a determination concerning the responsibility of the low responsive prospective small business contractor. If a contracting officer makes a determination of nonresponsibility, and if only capacity or credit considerations are involved, he shall promptly refer to SBA for COC consideration unless he executes a documented certificate of urgency indicating the specific reasons why an award must be made without the delay incident to referral to SBA. * * *

In this particular instance, the contracting officer made his certification on June 20, 1973, and such was approved by the chief of the purchasing office, that the award had to be made without delay due to the urgent need for the items involved. A copy of this finding was sent to SBA. As a Certificate of Urgency had been properly executed, the contracting officer was justified in not allowing SBA to review your application for a COC. Therefore, your contention that you were improperly denied a hearing before the SBA is without merit as ASPR 2-705.4(c)(iv) was fully complied with.

Your final contention is that the Marine Corps did not have the right to make an award of the contract simply because the fiscal year was quickly coming to an end. The actual basis for the award, however, was that a critical need existed for the wattmeters and the lack of such items severely affected FFP combat readiness. It is reported that any further delay would have resulted in an insufficient amount of lead time remaining to acquire the goods when needed. No evidence has been presented to refute this determination.

ASPR 2-407.8(b)(3)(1) gives the contracting officer the authority to make an award in such instances. That section states:

"Where a written protest against the making of an award is received, award shall not be made until the matter is resolved, unless the contracting officer determines that:

(1) the items to be procured are urgently required; or " * * *"

Such a determination was made on June 20, 1973.

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In view of the foregoing, your protest is denied.

Sincerely yours,

Paul G. Dembling

Acting Comptroller General
of the United States