

Protest of) Date: June 12, 1991
AUTOMATED BUSINESS PRODUCTS, INC.)
Solicitation No. 104230-90-A-0167) P.S. Protest No. 91-16

DECISION

Automated Business Products, Inc., ("Automated") timely protests its rejection as a nonresponsible offeror under Solicitation No. 104230-90-A-0167 for 550 Type II and 3,000 Type III coin-counting and sorting machines.^{1/} Automated also challenges the award of the contract for the Type III machines to Brandt Company ("Brandt"), contending that it, not Brandt, offered the lowest priced offer which conformed to the solicitation requirements.

Solicitation No. -0167 was issued on July 26, 1990, by the Office of Procurement, Headquarters, soliciting offers for quantities of Type II and Type III coin-counting machines to be submitted no later than August 27. It stated in Section A.1 that the Postal Service would "either award two separate contracts to different offerors for Type II and Type III Coin Counting Machines, or one contract to an offeror for [both] Type II and Type III. Award will be based on the offer or offers which provide the lowest total overall cost to the Postal Service and passes [sic] the product evaluation sample test."

Seven firms submitted offers, of which Automated's was the apparent low offeror on the Type III machines. To assist the contracting officer in making a determination of Automated's responsibility, a preaward survey was arranged to take place on December 13. Prior to the preaward survey, the quality assurance (QA) specialist assigned to the survey sent Automated a preaward survey form. In addition to requesting answers to a series of standard questions set forth on the form,^{1/} the QA specialist requested information concerning the following factors: the background of employees and reliability of subcontractors; required equipment and facilities; firm commitments from the vendor supplying the machines; Automated's QA manual; the names and reliability of

^{1/} Specification USPS-M-1178 described three types of coin counting machines, of which Type III is at issue here. Type III is described as a "light-duty" machine with fewer capabilities and lesser capacities than the other described machines.

^{2/} The preprinted form requested information concerning whether Automated had an inspection system which met the requirements of Mil. Spec. MIL-I-45208, which was substantially more demanding than the inspection system which was required by the solicitation.

the transportation companies Automated used; Automated's labor market, including hiring and training plans; past and present postal and military contracts; and documentation concerning Automated's ability to meet the schedule set forth in the solicitation.

Following the preaward survey, the QA specialist prepared a report which included the following points: Automated has been selling and servicing money handling equipment since 1976, was a dealer rather than a manufacturer, and has been the exclusive distributor for the machine it offered since 1987.^{3/} No problems concerning production capacity or meeting the delivery schedule were noted. The QA specialist noted that Automated's facility was "extremely crowded," and concluded that "[i]t is unclear how [Automated] plans to stage, test, inspect, and ship five hundred (500) units at the peak of delivery from this facility."^{4/} The QA specialist found Automated's quality assurance capability lacking, noting:

[Automated] provided a letter of commitment to meet the requirements of MIL-I-42508. [Automated] was informed that the solicitation did not require the inspection system to meet the requirements of MIL-I-45208. It was brought to [Automated]'s attention that as the prime contractor, they were required to implement a standard inspection system according to pages 18 and 19 of the solicitation. It was also brought to [Automated]'s attention that they were responsible for ensuring that JCM's quality system meets the same requirements. [Automated] could not produce any type of quality system currently in place nor could they provide details of how they planned to ensure the quality of the units manufactured by JCM. [Automated] discussed very sketchy and informal plans as to how they were planning to test and inspect the units. Nothing was documented.

Automated did provide a general flowchart describing how the machines would be inspected. As to labor resources, the report stated that JCM stated that they had adequate staff to manufacture the machines, and that Automated "will use its current staff of personnel." Automated estimated that five people would be required to perform this contract, working one shift per day and five days per week. Automated also stated that it could bring in temporary help at peak periods, if necessary, to ensure that the delivery schedule was met. It further provided an extensive flow chart showing the operations undertaken at JCM to manufacture the units, but not including inspection and shipping. The report further noted that, although Automated has stated that it had provided this machine to numerous postal and defense facilities, it was unable to provide any particular references, and had failed to substantiate any commercial references or dealers. The QA specialist's recommendation was as follows:

[Automated] and JCM appear to have some type of business relationship, but it is unclear as to how close their ties actually are. [Automated] discussed modifications to the commercial product with JCM during the preaward survey

^{3/} This machine was the CS-20, manufactured by Japan Cash Machine Co., Ltd. (JCM).

^{4/} The delivery schedule set forth in this solicitation called for this peak monthly volume four months after contract award.

but no agreements were in writing at the time of the preaward survey.⁴⁴ . . .

[Automated] does not appear to understand what is expected of it with regard to meeting the quality requirements of the solicitation. This was evident when [Automated] provided a letter of commitment to meet the requirements of MIL-I-45208 which is not part of the solicitation. The only reference to MIL-I-45208 is on the preaward survey form which was faxed to [Automated]. It seems that [Automated] provided the letter of commitment without fully realizing what they were committing themselves to.

. . .

Based on the findings of this preaward survey, Automated Business Products is found to be a non-responsible offeror for the procurement of the Type III coin counting machines.

The General Manager, Quality Assurance division, concurred with the QA specialist's findings and informed the contract specialist on December 17, 1990, that he had determined Automated to be nonresponsible.

After conferring with the requiring activity, the contract specialist requested additional information from Automated on December 19. In response, on December 28, Automated provided additional material to the contract specialist. One item was a four-page sales agreement between JCM and Automated, dated January 18, 1989, which established Automated as the sole authorized distributor of JCM's products in the United States in consideration of Automated's undertaking to use its best efforts to market, sell, distribute and service JCM's machines.⁴⁷ Automated also supplied two December, 1990, letters from the General Manager, JCM American Corp., which confirmed JCM's commitment to deliver machines to Automated in time to meet the delivery schedule required by the solicitation and that the machines delivered include all options necessary to meet the specifications set forth in the solicitation.

Automated also sent a copy of a letter from Donadio Distributing Corp., dated December 27, 1990, which undertook to provide storage and handling for up to 3,000 machines, as well as an area which could be used for inspection and testing of the machines. The letter was signed by the president of Donadio and accepted by Automated, but a space for the agreement to be countersigned by the president of Donadio following Automated's acceptance had been left blank.

⁴⁵ The QA specialist's report had noted, however, that "[s]ome modifications need to be made to the machine in order to meet the specifications of the USPS. JCM and [Automated] have agreed to make the modifications and have documented them..."

⁴⁶ In its December 28 letter, Automated referred to the agreement as a "written contract agreement[] ... which [is] not reduced to writing, [is] negotiated and impl[i]ed in a continu[ing] business relationship." While the contracting officer later cited this language as support of his position that the agreement between JCM and Automated was unenforceable, we do not agree that this language, by itself, would serve to make an agreement which otherwise appears to be enforceable unenforceable.

Further information was received from Automated throughout the next month. On January 8, 1991, it sent JCM's further commitment to meet the delivery schedule. On January 12 it sent a list of twenty-nine commercial customers for the JCM machine on which it had proposed will . On January 14 and January 23 it responded to specific questions concerning how it would meet the delivery schedule in the event of a subcontractor's default, how many machines it repaired monthly, and what percentage of sales these repairs represented.

In early January, Automated also forwarded its quality assurance manual, dated January 8, 1991, to the contract specialist. Automated's cover letter requested the specialist to "please advise if you require any changes and we will take immediate action to satisfy your requirements." The manual was reviewed by the QA specialist, who noted various discrepancies.^{7/} One of the five functional areas which the solicitation required to be addressed,^{7/} the control or disposition of nonconforming material, was said to have been omitted from the manual. The manual was faulted for failing to identify how obsolete manuals will be removed from use, to address specific procedures for process control, and to indicate how nonconforming material will be identified to preclude use. The was said to be silent on whether all test and measuring equipment will be calibrated, and several sections marked "Intent" or "Purpose" were faulted as insufficiently specific. Further, the manual was faulted for leaving out several necessary statistical sampling methods and failing to provide for the creation, implementation, or documentation of rework procedures. The analysis included the following summary:

Overall, the quality assurance manual is vague and lacks substantive

^{7/} Many of the comments reflect trivial problems with the manual, such as references to the National Bureau of Standards, which has been renamed the National Institute of Standards and Technology, and the duplication of titles in the text of sections 5 and 6, a duplication not reflected in the table of contents. Similarly, other comments discuss discrepancies which could be easily remedied, such as references to Mil-Std-105D and Mil-C-45662 where Mil-Std-105E and Mil-Std-45662A were intended. The text discusses only those comments which deal with the substance of the manual.

^{8/} Section g. of the clause, Inspection -- Fixed-Price, set out as clause E.5 in section E (Inspection and Acceptance) of the solicitation provides as follows:

g. The contractor must use a written inspection/quality control system acceptable to the Postal Service. . . . As a minimum, the contractor's inspection/quality control system must reflect controls and record keeping in the following functional areas:

1. Receiving Inspection
2. In-Process Inspection
3. Final Inspection and Test (including packaging)
 4. Calibration of Inspection/Test Equipment
 5. Control or Disposition of Nonconforming Material

procedures. Generalizations abound and it is difficult to understand how [Automated]'s system will be implemented and function. The manual is an outline of a quality system which fails to address the most critical area facing [Automated], control of its suppliers. As it is written, this quality control manual fails to adequately address the five functional areas outlined in Clause 2-1, Inspection--Fixed-Price, included in the subject solicitation.

The contracting officer made a determination that Automated was nonresponsible on February 5. A memorandum to the file and an accompanying addendum describe the reasons underpinning this determination as follows: a) Automated's failure to pass the preaward survey for the reasons stated by the QA specialist; b) Automated's lack of an enforceable agreement with JCM; c) the New York Transit Authority's unsatisfactory reference concerning Automated's repair of its machines under contract;^{9/} d) the fact that Automated was not a manufacturer or regular dealer as required by the Walsh-Healey Act; and e) the QA specialist's analysis of the inadequacies of Automated's QA Manual. The protester was notified of this decision by letter dated February 15. On the same date, award was made to Brandt, the next lowest offeror whose machine complied with the specifications. Automated timely protested to this office.^{11/}

Automated's Protest

Automated asserts, through counsel, that the contracting officer's determination of its nonresponsibility is at odds with the governing standards set forth in the Procurement Manual ("PM"). It contends that the contracting officer's determination was not one of responsibility, but rather that its quality assurance manual did not meet specific solicitation requirements. According to Automated, since its perceived quality control problems involved its compliance with the solicitation requirements, it should have been given an opportunity to correct the deficiencies through discussions pursuant to PM 4.1.5 g.^{11/} Automated notes that the Postal Service conducted discussions with it on other matters and that it had stated a willingness to discuss its manual when it was submitted and to make whatever manual changes the Postal Service desired.

Automated notes that it is distributor of coin machines and a service provider, not a manufacturer. It notes that the JCM machines it would supply come from the same

^{9/} The New York Transit Authority was, apparently, the only other governmental entity which Automated had identified as a customer. There is no indication that any of the twenty-nine commercial references supplied by Automated were contacted.

^{10/} The record indicates that, in response to Automated's request for a debriefing on February 21, 1991, the contracting officer transmitted written information to Automated, apparently in lieu of an oral debriefing discussion. This procedure is unsatisfactory. We understand Postal Service regulations concerning debriefings (Procurement Manual 4.1.5 j., Procurement Handbook 5.1.5 X., and Administrative Instruction OP-4-001) as contemplating an oral debriefing, for which a written summary is not a satisfactory substitute. Cummins-Allison Corporation, P. S. Protest No. 91-18, June 4, 1991.

^{11/} PM 4.1.5 g. states, in part, that "[w]hen appropriate, written or oral discussions may be held with offerors to resolve uncertainties in their proposals, to give them an opportunity to correct deficiencies, and to give them an opportunity to revise their proposals."

manufacturer who will be providing machines to Brandt. As Automated has proposed, JCM would manufacture and ship the machines to Automated, who would inspect the machines in accordance with the solicitation and deliver them to the Postal Service. Automated states that, during the preaward survey, it reassured the Postal that, although there were only five employees present at its facility, it actually had eleven employees and it was prepared to add more personnel, as needed. Automated contends that the Postal Service simply ignored the information it submitted subsequent to the preaward survey, information that substantiated its ability to obtain the necessary controls and facilities. It stresses that the responsibility standard of PM 3.3.1 b. provides that it is sufficient if the offeror has the ability to obtain various elements^{12/} even if it does not have them at the time the responsibility determination is made. Automated requests that the Postal Service terminate the award to Brandt and award the contract to it, or, alternatively, reopen discussions with it to allow it to resubmit its quality assurance manual.

The Contracting Officer's Position

The contracting officer responds that Automated failed its pre- award survey and was subsequently determined to be nonresponsible for seven reasons. First, according to the QA specialist's preaward survey report, Automated's relationship with JCM was "unclear," and the contracting officer concluded that the written agreement between them was unenforceable. Second, Automated had no existing system of testing, inspection or quality control at its facility. Based on the QA specialist's preaward survey, which he adopted, the contracting officer did not think that Automated could provide adequate quality control. Third, Automated's quality control manual was insufficient, based on the QA specialist's analysis. While noting that the review found the manual deficient in "several important areas," the only specific omission cited by the contracting officer is the failure to address the control or disposition of nonconforming material. Fourth, Associated's facility appeared to be a "large house" incapable of accommodating more than 100 units at a time. The contracting officer dismisses the letter from Donadio as being neither dated nor countersigned by its president. The contracting officer concluded that Automated did not have access to adequate storage facilities. Fifth, Automated had only five people in its facility during the preaward survey. The contracting officer finds this number inadequate, dismisses without explanation the other technicians Automated listed as available to work on this contract, and discounts as unsupported Automated's contention that it could bring in temporary help at peak periods. Sixth, Automated failed to provide a complete commercial customer list in a timely manner (submitting its list only on January 12) and was unable to substantiate its claim that it had contracts with postal and defense facilities. Seventh, Automated did not appear to be a "regular dealer" as required by the Walsh-Healey Act, a requirement under the contract, but rather was a distributor/importer.^{13/}

^{12/} Specifically, "organization, experience, accounting and operational controls, technical skills, production and property controls, and quality controls" (PM 3.3.1 b. 5) and "production, construction, and technical equipment and facilities" (PM 3.3.1 b. 6).

^{13/} The Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45, requires that government agencies, including the Postal Service, contract only with "manufacturers or regular dealers" in procurements over \$10,000 for the manufacturing or furnishing of supplies. The Postal Service's regulations implementing the Walsh-Healey Act are at PM 10.2.5. PM 10.2.5 f.2. defines "regular dealer" as

The contracting officer views this last failure, by itself, to be sufficient to disqualify Automated from award of the contract.

The contracting officer states that the additional information submitted by Automated did not alleviate these concerns. He emphasizes the Postal Service's effort to gather information in order to make a fair assessment of Automated capabilities. Further, he asserts he did hold discussions with the protester about these concerns, but that, according to PM 4.1.5, he was obligated to advise Automated only of its deficiencies in terms of meeting Postal Service requirements, and not of deficiencies resulting from Automated's lack of diligence or competence. He states that the protest should be denied as without merit.

The Protester's Response

In response to the contracting officer's statement, the protester alleges that the contracting officer selectively ignored information it provided. Automated says it is a Walsh-Healey regular dealer as it certified in Section L.7 of the solicitation. (Automated acknowledges that while it is a regular dealer for these machines, it is also an importer/distributor as to other products, and that the two categories are not mutually exclusive.) Automated points out that the preaward survey report referred to Automated as a dealer twice.

Automated disputes the contracting officer's characterization of its sales agreement with JCM as lacking legal enforceability. The protester states that the several letters it supplied established JCM's commitment to supply it with the machines in furtherance of the sales agreement, and that the agreement and subsequent letters were enforceable under theories of contract and promissory estoppel. Automated asserts that its relationship with JCM is typical of that in the industry and questions whether Brandt had that degree of written agreement with JCM when it was awarded the contract. Automated reminds us that JCM's commitment was evident because its representative was present during its preaward survey.

The protester contends that the contracting officer inaccurately stated that it was unable to identify its customers. Automated maintains that it provided information on its

[a] person who owns, operates, or maintains a store, warehouse, or other establishment in which supplies such as described by the contract specifications are bought, kept in stock, and sold to the public in the normal course of business.

PM 10.2.5 h. sets out the procedure to be used when a contracting officer determines that an offeror is not eligible as a manufacturer or regular dealer. Under that procedure, the offeror is notified of the determination, it may protest by submitting additional evidence of its eligibility to the contracting officer, and if the contracting officer finds, after reviewing the additional evidence, that the offeror is not eligible, the protest will be forwarded to the Administrator, Wage and Hour Division, Department of Labor, for final determination.

The contracting officer did not follow the procedure at PM 10.2.5h. with respect to his determination of Automated's Walsh-Healey eligibility.

federal and state government customers and commercial contracts at the preaward survey,^{14/} promised to supplement the information as needed, and did so. The protester heard from some of its customers that the Postal Service contacted them, and that they gave positive comments, but the protester notes that none of the favorable comments appear in the reports filed by the contracting officer. It explains that the New York Transit contract was for the maintenance of sixty older Brandt machines, and is, therefore, not comparable to this requirement for the supply of the newer JCM CS-20.

Automated also argues that, contrary to the preaward report, it conducts its business in an office building which is quite sizeable and that it had arranged to rent a warehouse, which show its "ability to obtain" the necessary facilities. It explains that the agreement from Donadio was not countersigned because of the time constraints imposed by the contract specialist, and that a countersigned version could have been provided if requested. The protester reiterates that it was willing to hire additional employees, as needed, and that if the Postal Service was dissatisfied with the number or qualifications of the personnel it proposed, it should have given Automated an opportunity to address these concerns. Automated also indicates that additional personnel were only needed at the peak periods in order to meet the delivery schedule, and its resources could be planned and allocated accordingly.

Finally, Automated contends that its quality assurance manual met the minimum requirements set forth in the solicitation, including, specifically, the disposition of nonconforming materials.^{15/} It further states that any deficiencies in the manual should have occasioned discussions.

Interested Parties' Comments

Several offerors commented on this protest. I.C., Inc., notes that Automated has sold coin and currency processing equipment for many years, that Automated is the national distributor for JCM machines, and that Automated's machine is the same as that being provided by Brandt. I.C. characterizes Automated as a dealer, and confirms its opinion that Automated is a knowledgeable and competent supplier with the capability and technical knowledge necessary to meet the contract requirements. Scan Coin remarks that it has known Automated for many years as a responsible and credible supplier of money processing equipment. It emphasizes that the money machine that Automated distributes is the same machine as that offered by Brandt. Glory comments that Automated is a dealer who represents several money processing equipment manufacturers.^{16/}

^{14/} Automated states that it then explained during the survey that some of these sales were through dealers and that it had not listed the names and addresses of the points of contacts. It adds that it informed the contracting officer that it could provide information concerning contact persons if necessary, but was not asked to do so.

^{15/} The protester points to section 6 of its QA manual, entitled "Procedure for the disposition of discrepant components, assemblies, and finished products," which describes the processes to be followed in identifying and disposing of nonconforming items.

^{16/} Glory questions why it was never given a site visit or a debriefing, as well as the propriety of using a negotiated procurement. It also asks for clarification concerning where the specifications were derived,

Brandt, through counsel, submitted comments that, in large part, expand upon and support the contracting officer's statement. It contends that the protester has not submitted evidence sufficient to show that the contracting officer's determination is arbitrary, capricious or not supported by substantial evidence. It reads the record as establishing that Automated failed to demonstrate its responsibility despite repeated efforts by the Postal Service to solicit information from it.

Brandt points out that the solicitation emphasized that quality assurance was important and that the prime contractor would be required to implement a standard inspection system. Brandt notes that as amended, the solicitation required that the Type III machines be able to support full bags of coins without tipping. Brandt notes that the preaward survey questions whether Automated could meet this necessary modification. It suspects that Automated must rely on JCM for these modifications, and notes, in contrast, that it promised to modify its Type III machines itself. Brandt sees this as a crucial difference between the machines it offered to supply and the ones proposed by Automated.

Brandt asserts that the record is devoid of any evidence that Automated now possesses or has the ability to establish an inspection/quality control system. Brandt stresses that Automated did not even have its own quality assurance manual until January, after the preaward survey. It points out that Automated failed to submit a complete list of its customer base and that the one customer contacted by the Postal Service had unfavorable remarks about Automated.

Brandt argues that Automated merely disagrees with the contracting officer's determination that it is nonresponsible, rather than producing substantive evidence that it is responsible. Brandt notes that the Comptroller General has stated that a contracting officer may rely upon a preaward survey in determining an offeror's responsibility, without making an independent evaluation. Brandt concludes that the preaward survey was accurate and the preaward team had a reasonable basis for its report.

Finally, Brandt rejects the protester's argument that the evaluation of its quality assurance manual was a question of compliance with the solicitation requirements rather than a responsibility issue. Brandt explains that Automated's failure to have an acceptable inspection/quality control system relates to its capability to perform the contract, a matter of responsibility, not its obligation to deliver Type III machines - a solicitation requirement. According to Brandt, the contracting officer was not required to hold discussions with Automated on this point because the PM relates only to discussions concerning proposal deficiencies, not responsibility determinations.

Brandt also submitted comments on Automated's rebuttal of the contracting officer's statement. While seconding the assertions of the contracting officer, Brandt notes that

adding that it was not given an opportunity, as a manufacturer of these machines, to offer its advice. These last issues are not raised by the protester. Treated as a separate, independent protest, the issues are untimely raised pursuant to PM 4.5.4, since the comments were received more than fifteen working days after award was made to Brandt on February 15. See International Jet Aviation Services, P.S. Protest No. 87-36, September 1, 1987. Accordingly, we do not address these concerns.

the commitment letters Automated submitted were from JCM American Corp., a different entity from JCM, which may well not be a manufacturer able to honor the commitment it has made. It argues that the submission of a partial customer list a month after the preaward survey was inadequate, and Automated's dismissal of its unsatisfactory performance on the New York Transit Authority contract fails as a challenge to the contracting officer's exercise of his discretion. Brandt reiterates that Automated cannot prove that the contracting officer's determination of Automated's nonresponsibility was unreasonable. It also argues that Automated's QA manual was a reasonable basis for its being found nonresponsible, and that no discussions with Automated concerning the elements of its responsibility were required.

Contracting Officer's Rebuttal

In a further reply to the protester, the contracting officer disputes that Automated is a Walsh-Healey regular dealer, stating Automated has failed to present substantive evidence that it fulfilled the requirements of PM 10.2.5. The contracting officer encloses additional comments from the QA specialist, which note that the term "dealer" used in the preaward survey was not an indication that Automated was Walsh-Healey "regular dealer."¹⁷ The contracting officer also states that Automated has failed to carry its burden of proof that its agreement with JCM was, in fact, enforceable.

The Protester's Conference and Comments

At its protest conference, the protester stated that it had received many oral requests for further information from procurement personnel. Automated believes the contracting officer ignored the information submitted in his responsibility determination and that, therefore, the determination was not based upon fact. Automated questions the contracting officer's reliance upon the faulty preaward survey, particularly the negative remarks concerning its quality control procedures. Automated notes that the contracting officer never gave it a written determination that it was not a regular dealer, a fact of which it was first informed in the contracting officer's statement on its protest.

In comments following its conference, Automated argues that none of the contracting officer's reported bases for finding it nonresponsible are supported by the evidence, making his decision arbitrary and capricious. The protester points out that one of the bases -- that it did not meet the quality control clause in the solicitation -- is not valid since, as it reads the clause, that the quality control system was required of the successful contractor, not prospective offerors. Automated states that Section E.5 could well be interpreted as a matter of contract administration, rather than a solicitation requirement, which would lead to the conclusion that the clause could not serve as a justification for the contracting officer's rejection of its offer.

Since Automated views this clause as a question of compliance with the solicitation requirements rather than an issue of responsibility, it views the Postal Service's nonresponsibility determination as being instead an erroneous decision that it did not

¹⁷ The QA specialist also notes that at the time of the preaward survey, she had not been provided with much of the information that should have been provided. In the absence of that information, she defends the determination in the preaward survey report that Automated was nonresponsible.

meet all of the solicitation requirements, which, on the facts in this record, must be overturned. Automated asserts that it did meet the responsibility criteria concerning quality control: it showed that it had the ability to obtain the necessary quality control system. Finally, Automated reiterates its request for relief -- termination of Brandt's contract, arguing that this case meets all the elements necessary to show that such relief is appropriate.

Discussion

PM 3.3.1 b. states that to be determined responsible, a prospective contractor must:

1. Have financial resources adequate to perform the contract;
2. Be able to comply with the required or proposed delivery or performance schedule . . . ;
3. Have a good performance record;
4. Have a sound record or integrity and business ethics;
5. Have the necessary organization, experience, accounting and operational controls, technical skills, production and property controls, and quality controls, or the ability to obtain them;
6. Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
7. Be otherwise qualified and eligible to receive award under applicable laws and regulations.

The standard by which we review a contracting officer's determination that an offeror is nonresponsible is as follows:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based upon substantial information.

Cardinal Glove Company, Inc., P.S. Protest No. 89-84, November 14, 1989, citing Craft Products Co., P.S. Protest No. 80-41, February 9, 1981. However, the contracting officer cannot place the entire burden of justifying its responsibility on the offeror, but must look at the information available to him. National Fleetway, Inc., P.S. Protest No. 80-26, July 3, 1980. The contracting officer must consider all information bearing on an offeror's responsibility brought to his attention prior to award of a contract, in order that the determination of responsibility is based on information that is as current as possible. AHJ Transportation, Inc., P.S. Protest No. 88-76, January 12, 1989.

While we agree that a determination of responsibility should not be made on the basis of "stale" information, we also believe that a procuring agency is not required to delay award indefinitely while a bidder attempts to cure the causes for its being found nonresponsible. A contracting officer should reconsider his nonresponsibility determination when two conditions are present: ample time and a material change in a principal factor on which the determination is based.

Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985 (citations omitted). The record indicates that while the contracting officer had information available (the preaward survey report) which may have supported a finding of Automated's nonresponsibility, he gave Automated the opportunity to provide further information concerning its responsibility.¹⁷ Having done so, the question becomes whether the eventual determination was reasonable based on all the information available.

As the Comptroller General has stated:

A contracting officer may rely on the results of preaward surveys in making responsibility determinations, but such a determination must be based on accurate information and conclusions from the [preaward survey] team. Our Office will consider the accuracy of the [preaward survey] information relied upon in judging whether a negative determination of responsibility was reasonable. [Citations omitted.]

Campbell Industries, Comp. Gen. Dec. B-238871, 90-2 CPD & 5, July 3, 1990; accord Fairfield Stamping Corporation, P.S. Protest No. 88-04 Service, June 3, 1988.

As stated above, the contracting officer based his finding of nonresponsibility on seven grounds. We discuss them individually. The contracting officer determined that Automated's relationship to JCM was insufficiently defined because of concerns about the enforceability of its sales agreement. This finding was unreasonable. PM 3.3.1 does not require that a contractor have a signed, enforceable contract in order to fulfill the requirement that the offeror demonstrate its ability to obtain the necessary production and property controls. Here, Automated produced three unambiguous letters from the General Manager of JCM American¹⁸ indicating that JCM would provide

^{18/} The protester's contention that the preaward survey results (or the similar matter of the deficiencies in its QA manual) must be the subject of discussion, is incorrect. The deficiencies disclosed by a preaward survey are a matter of responsibility, as to which PM 3.3.1 e.5.(c) provides that "[t]he contracting officer may discuss preaward survey information with the prospective contractor being surveyed." (Emphasis added.) Use of the word "may" renders such discussions permissible but not required. Accord Pathlab, P.A., Comp. Gen. Dec. B-235380, 89-2 CPD & 108, August 4, 1989 ("the contracting officer may base a nonresponsibility determination on the evidence in the record without affording the offeror an opportunity to explain or otherwise defend against the evidence"). The preaward survey results are not deficiencies in a proposal requiring discussions in the course of offer evaluation under PM 4.1.5. g.3., since, logically, they address the capability of the offeror to perform the contract rather than to the adequacy of the written proposal submitted by the offeror.

^{19/} Brandt's suggestion that JCM American cannot bind JCM is not persuasive.

Automated machines which conformed to the solicitation requirements in sufficient quantities to meet the delivery schedule, and the presence of JCM's representative during the preaward survey was a further indication of JCM's commitment. The contracting officer unreasonably afforded insufficient weight to the material provided by Automated in this regard.

The next area of concern was the perceived lack of adequate quality controls based on the QA specialist's determination at the preaward survey that no system for testing and inspecting the machines at JCM was apparent. However, subsequent to the preaward survey, Automated submitted a detailed flowchart describing how the machines would be tested and inspected in Japan prior to their being shipped to Automated, a simplified flowchart indicating how the units would be tested and inspected at Automated's facility, and a QA manual indicating Automated's proposed course of testing and inspection. All these documents were in the possession of the contracting officer prior to award and warranted consideration in the responsibility determination. The prospective contractor must have "quality controls, or the ability to obtain them." PM 3.3.1 b.5. (Emphasis added.) The record details how the preaward survey team and the contracting manual officer decided that since Automated did not have a written testing and inspection system, it could not perform the contract. However, the evidence presented by Automated, including its draft QA manual, showed, at the very least, that if it did not have quality controls in place, it possessed the ability to obtain them. Reliance on this ground by the contracting officer was unreasonable.

The third area of concern was the inadequacies which the QA specialist identified in Automated's QA manual. The QA specialist's determination that the manual was not in conformity with the Inspection -- Fixed Price clause was in error, as Automated's manual had, in fact, addressed the control or disposition of nonconforming material. The other inadequacies cited by the QA specialist were of minor importance and could have been easily and quickly rectified by Automated. The contracting officer's reliance on the flawed review of Automated's QA manual was unreasonable and cannot serve as a basis for a determination that it was nonresponsible.^{1/}

The fourth and fifth reasons asserted to justify the determination of Automated's nonresponsibility were the preaward survey's determinations that Automated lacked sufficient personnel and facilities to perform this contract. PM 3.3.1 b. 5 and 6 require the prospective contractor to have the necessary experience and facilities or the ability to obtain them. However, Automated submitted substantial supplemental evidence to

^{20/} Additionally, reliance on the offeror's purported nonconformity with the inspection clause was erroneous. It is not a provision applicable to offerors. It is instead a clause applicable to the eventual contractor. See C.R. Daniels, Inc., P.S. Protest No. 90-62, December 21, 1990. Absent a provision making current possession of an acceptable quality control process a special criterion of responsibility, not present here, Automated did not have to demonstrate current compliance with the clause to be determined responsible. It instead had to demonstrate the ability to obtain adequate quality controls.

While Section E.5 could have been used to gauge Automated's progress toward its objectives, there is nothing to suggest that such an analysis was made in this case. If Automated lacked something the clause required, the contracting officer should have evaluated whether the missing portion could be supplied.

address these areas. Automated provided persuasive evidence of its ability to obtain necessary storage space. Donadio's letter established, at the very least, that Automated had the ability to obtain additional space. Also unrebutted is Automated's insistence that it had five more technicians than those viewed during the preaward survey, and its willingness to add additional personnel should this be necessary for timely contact performance. The contracting officer either ignored this information or failed to discuss why the information was not sufficient to show an ability to obtain these items. There is no substantial evidence supporting the contracting officer's position, and his determination was unreasonable as to these issues.

The sixth area of concern was Automated's failure to provide a customer list to the preaward survey team. A customer list was provided more than a month before the date of award. Since the list was provided to the contracting officer prior to award, and no harm has been identified from the delay, the delay does not justify the determination of nonresponsibility.

In addition, the contracting officer unreasonably relied upon the negative reference he received concerning Automated's performance on its contract to maintain the New York Transit Authority's coin counting and sorting machines. The postal solicitation was for the supply of coin counting machines with an added warranty, while the Transit Authority contract involved service and maintenance of existing coin counting machines. Information concerning a prospective contractor's prior performance is only relevant if the prior performance is for the same or a similar item. See Cardinal Glove Company, Inc., supra. In this case, there is sufficient dissimilarity between the contracts for service and supply to make the comparison unreasonable.

Finally, the contracting officer determined that Automated was not a Walsh-Healey regular dealer. As discussed above, PM 10.2.5 h. details the process the contracting officer must follow to determine if an offeror is a regular dealer. In this case, the contracting officer did not afford Automated the opportunity to contest his adverse determination; this omission was incorrect. Thus, the contracting officer cannot rely on this basis for finding Automated to be nonresponsible. While this office lacks authority to resolve Walsh-Healey Act protests (PM 4.5.1), it is appropriate for us to reverse a finding of nonresponsibility grounded upon the improper application of the Walsh-Healey Act requirements.

Since none of the reasons advanced by the contracting officer to support his determination of Automated's nonresponsibility are reasonable, we must overturn that determination. Levi Carver, P.S. Protest No. 76-25, March 29, 1977. However, we cannot find Automated to be responsible, as the determination of an offeror's responsibility is a matter for the contracting officer, not for our office. See Top Mop Commercial Cleaners, P.S. Protest No. 84-88, April 1, 1985; L.P. Fleming, Jr. Hauling, Inc., P.S. Protest No. 83-64, December 19, 1983.^{21/}

^{21/} In past cases where we have found determinations of nonresponsibility to be without reasonable basis, we have remanded the matter to the contracting officer for a new determination of responsibility to be made. See AHJ Transportation, Inc., P.S. Protest No. 88-81, February 27, 1989; James E. Toney, P.S. Protest No. 88-45, October 6, 1988; Top Mop Commercial Cleaners, supra; Mesa Constructors, et al., P.S. Protest Nos. 80-20, 80-22, July 29, 1980; Mutual Maintenance Company, P. S. Protest No. 76-82, May 31, 1977; Levi Carver, On Reconsideration, P.S. Protest No. 76-25, October 28, 1976.

As to the relief to be granted in this case, our prior decisions indicate that several factors are to be weighed in determining what relief is appropriate. These factors include "consideration of ... the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission." Cummins-Allison Corporation, supra, quoting Inforex Corporation, et al., P.S. Protest No. 78-12, June 26, 1978. It is clear that the procurement deficiency complained of here is quite serious, and that Automated was substantially prejudiced thereby. However, these factors are counterbalanced by the substantial performance which has occurred on the Brandt contract and the possibly substantial cost of ordering termination of that contract. Therefore, we decline to order termination of the Brandt contract. However, we do order that the contracting officer not exercise the option quantities set forth in the Brandt contract pending a proper evaluation of Automated's responsibility. Should Automated be found responsible, it should be awarded a contract for the option quantities at its offered prices.

The protest is sustained to the extent indicated.

[Signed]

William J. Jones
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Office of Contracts and Property Law

[Compared to original 5/16/95 WJJ]