



# Decision

**Matter of:** Scientific-Atlanta, Inc.; Magnavox Electronic Systems Company

**File:** B-258711; B-258711.2

**Date:** December 8, 1994

Jack W. Bright for Scientific-Atlanta, Inc.; and Alfred J. Verdi, Esq., for Magnavox Electronic Systems Co., the protesters.

William H. Gammon, Esq., Moore & Van Allen, PLLC, for MacKay Communications, Inc., an interested party.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Henry J. Gorczycki, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Protest challenging agency's determination that low bidder will be able to supply equipment conforming to the solicitation requirements involves an affirmative determination of responsibility, which will not be reviewed by the General Accounting Office absent a showing of possible fraud or bad faith on the part of the procurement officials or that definitive responsibility criteria in the solicitation were misapplied.
2. Protester is not an interested party to protest alleged agency action preventing the protester from submitting its bid prior to bid opening where the protester's purported bid would not have been in line for award.

## DECISION

Scientific-Atlanta, Inc. and Magnavox Electronic Systems Company protest an award to MacKay Communications, Inc. (Mackay) under invitation for bids (IFB) No. S-DTS-PO-94-B-2031, issued by the Department of State, Diplomatic Telecommunications Service Program Office, for portable satellite communication terminals.

We dismiss the protests.

The agency issued the IFB on August 20, 1994, contemplating a fixed-price, indefinite delivery/indefinite quantity contract for Standard "M" INMARSAT Terminals. The IFB statement of work listed several technical requirements,

including that the terminals "must have [S]ecure Telephone Unit, Version 3 (STU-III) software/hardware capability." No descriptive literature was required to be submitted with the bid.

The agency issued three amendments. The second amendment, reproduced questions from prospective bidders and the agency's responses. In response to a question regarding whether the terminals offered had to be STU-III capable prior to award or whether they could be made capable after award but prior to delivery, the agency stated the terminals must be STU-III capable at the time of delivery. The IFB required delivery within 30 days of the date of an order.

The agency opened bids on September 20. Six bids were received. Mackay was the low bidder at a unit price of \$15,650. Mackay's bid stated that "[it would] supply the [Mackay terminal] with STU III capability [and other required features]." Mackay's bid included an executive summary which stated the following:

"[Mackay] is due to field a STU III compatible terminal in the October/November time frame. We have contracted out the development of the Secure Interface Unit (SIU) protocol with Comsat. The SIU protocol will very shortly allow the [Mackay terminal] to operate a STU III . . . over the Inmarsat-M Satellite network through any one of the Comsat Land Earth Stations worldwide. Comsat is contractually obligated to deliver the SIU to [Mackay] on October 9, 1994."

Scientific-Atlanta was the second low bidder at a unit price of \$17,915. Magnavox's bid was not presented by bid opening.

Minutes after bid opening was concluded, a Magnavox representative and another firm's representative were escorted to the contracting officer's office. The Magnavox representative acknowledged to the contracting officer that it was past the bid deadline, stated that he "was carrying a bid to submit," and indicated that he had been detained in the lobby by security until the contracting office provided an escort. The contracting officer responded that "all bids had already been properly received and opened." The Magnavox representative then asked the contracting officer to reveal the bidders and bid prices. The contracting officer stated that he did not have the documents readily available, but recollected that the approximate low bid price was "over \$15,000." After being told this, the Magnavox representative reportedly stated that there was no reason to leave Magnavox's bid because Magnavox could not

beat the low bid price. The Magnavox representative did not leave Magnavox's bid with the agency.

The agency awarded the contract to Mackay on September 23. These protests followed. Scientific-Atlanta alleges that Mackay did not offer to provide a terminal that was STU-III-capable at the time of award and that Mackay could not make its terminal STU-III-capable prior to delivery. Magnavox alleges that its late bid should have been accepted because the government was the cause of the late submission.

A bid is responsive as submitted when it offers to perform without exception the exact thing called for in the IFB, and acceptance of the bid will bind the contractor to perform in accordance with all the IFB's material terms and conditions. Stay, Inc., B-237073, Dec. 22, 1989, 89-2 CPD ¶ 586. In contrast, responsibility involves an assessment of an offeror's ability to perform in accordance with the terms of its offer. See King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Because a determination that a bidder is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, our Office will not review an agency's affirmative determination of responsibility, absent a showing of fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation were misapplied. 4 C.F.R. § 21.3(m)(5) (1994); King-Fisher Co., supra.

Here, the IFB did not require bidders to demonstrate that their products had STU-III capability at the time of award. Rather, the amended IFB specifically stated that this capability was only required at the time of delivery. The record shows that Mackay's bid to supply STU-III-capable terminals did not take exception to either the requirement for STU-III capability or any other terms of the IFB. Thus, Mackay's bid was responsive.

The preponderance of Scientific-Atlanta's protest actually challenges Mackay's ability to perform the contract based on the discussion in Mackay's bid on the firm's ability to supply STU-III-capable terminals, although not as of the date of award, and the reasonableness of the agency's determination that Mackay could provide a compliant product for delivery. The agency made an affirmative determination of Mackay's responsibility in determining that Mackay could deliver compliant terminals by the time of delivery. The protester does not allege, much less show, fraud or bad faith on the part of the agency procurement officials in this regard. Furthermore, since the IFB only required STU-III capability upon delivery, *i.e.*, 30 days after placement of an order, this requirement did not establish a definitive responsibility criterion as a precondition

to award. See King-Fisher Co., supra. Accordingly, we will not review the agency's affirmative determination that Mackay was a responsible bidder and thus dismiss Scientific-Atlanta's protest.

Magnavox alleges that the agency prevented Magnavox's representative from timely submitting its bid and that the agency refused to accept its bid when tendered after bid opening. The agency refutes both of these allegations and further alleges that Magnavox is not an interested party to protest these issues because Magnavox would not have been the low bidder, even if Magnavox had submitted its bid. Magnavox provided during this protest a portion of its bid showing its bid price of \$16,475, and otherwise does not refute the agency's assertion that its bid would not have been low.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Here, the protester provided evidence to show that it would not have been the low responsive and responsible bidder, even if its bid had been considered. Thus, Magnavox is not an interested party for the purposes of this protest.

The protests are dismissed.

James A. Spangenberg  
Assistant General Counsel

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<sup>1</sup>To the extent that Magnavox participated in the protest of the agency's decision to award to Mackay, Magnavox adopted the position presented by Scientific-Atlanta, which we dismissed above.