



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Physical Research, Inc.--Reconsideration

**File:** B-241808.4

**Date:** June 10, 1991

John C. Garvin, Jr., Esq., Rigney, Garvin & Webster, P.C., for the protester. Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Definitive responsibility criterion which overstates agency's needs may be waived where agency's actual needs will be satisfied and no other offerors will be prejudiced by award to an offeror which has not met the criterion.
2. The General Accounting Office will examine the record to determine whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that responsibility criteria have been met only where noncompliance with a definitive responsibility criterion is alleged.

## DECISION

Physical Research, Inc. (PRI) requests reconsideration of our decision, Ktech Corp.; Physical Research, Inc., B-241808; B-241808.2, Mar. 1, 1991, 91-1 CPD ¶ \_\_\_\_\_, in which we denied its protest of the Department of the Air Force's award of a contract for high power microwave research and experiments to Fiore Industries, Inc. under request for proposals (RFP) No. F29601-90-R-0005. PRI contends that we should not have permitted the agency to waive the solicitation requirement that each offeror obtain a top secret facility security clearance prior to award. The protester also objects to our failure to review the contracting officer's affirmative determination of Fiore's responsibility.

We affirm our prior decision.

In its protest, PRI argued that Fiore failed to comply with the requirement in the solicitation that each offeror obtain a top secret facility security clearance prior to award. Although this issue involved a challenge to the contracting

officer's affirmative responsibility determination regarding Fiore, an issue we generally do not consider, we concluded that our review was appropriate since the requirement for a security clearance before award constitutes a definitive responsibility criterion. We found that while Fiore did not meet the clearance requirement before award, the agency properly could waive the requirement since it overstated its minimum needs, there was no evidence that other offerors were prejudiced by the waiver, and award to Fiore would meet the agency's needs. PRI now objects to our conclusion that the waiver was appropriate, arguing that it is inconsistent with the rule that proposals are to be evaluated solely on the basis of the factors specified in the solicitation for us to consider whether or not an award would meet the agency's actual (as opposed to stated) needs and whether or not other offerors or potential offerors would be prejudiced by the award.

As we noted in our prior decision, the requirement for a facility security clearance prior to award is a definitive responsibility criterion. Definitive responsibility criteria are specific and objective standards established by the agency to measure an offeror's ability to perform the contract. Stocker & Yale, Inc., B-238251, May 16, 1990, 90-1 CPD ¶ 475. Where a standard which overstates the agency's requirements is included in a solicitation, the appropriate remedy would ordinarily be cancellation of the solicitation followed by resolicitation based on the agency's actual needs. Haughton Elevator Div., Reliance Elec. Co., 55 Comp. Gen. 1051 (1976), 76-1 CPD ¶ 294. Contrary to the protester's suggestion, however, prejudice is an essential element of a viable protest. Lucas Place, Ltd.--Recon., B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180. Thus, where, as here, the agency's actual needs will be satisfied and no other offerors or potential offerors will be prejudiced by an award under the original solicitation, there is no reason to require the agency to go to the time and expense of conducting another procurement, and the agency may in effect waive the overly restrictive requirement. Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275.

PRI further argues that it was in fact prejudiced by the agency's decision to waive the requirement for a top secret facility security clearance prior to award since it assumed that competition would be limited to companies with such clearances and this assumption was instrumental in its decision to incur the expense of preparing a proposal. The protester stops short of arguing that it would not have competed had it known that a pre-award clearance would not be required, however, and absent such a showing, we think that

the protester has failed to establish prejudice. Cf. Tandem Computers, Inc., 65 Comp. Gen. 490 (1986), 86-1 CPD ¶ 362, aff'd, 86-2 CPD ¶ 315 (protester was prejudiced by agency's waiver of salient characteristics where it would not have competed had it known of relaxed requirements). PRI also states that it "was, and still is, of the opinion that the requirement eliminated a substantial number of potential small business competitors." PRI did not make this argument in the initial protest and does not elaborate on it now, and there is no support in the record for its contention.

The protester argues that our decision to permit waiver of the definitive responsibility criterion is inconsistent with prior decisions of our Office. In particular, the protester cites Stocker & Yale, Inc., B-238251, supra, in which we sustained a protest against award of a contract to an offeror which did not have certain licenses required by the solicitation at the time of award. The Stocker case is clearly distinguishable from the one currently before us since it did not involve an overly restrictive requirement; rather, it involved an offeror's compliance with a licensing requirement necessary to meet the agency's minimum needs.

The protester also cites Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401, as conflicting with our decision. In Logitek, we held that the agency improperly waived an overly restrictive delivery requirement in the solicitation. Contrary to PRI's contention that our holding in this case is inconsistent with Logitek, we in fact made clear in that decision that a protest challenging an agency's relaxation of an overly restrictive requirement will be sustained only where the agency's action resulted in prejudice, by affecting the relative standing of the parties or significantly compromising full and open competition. In Logitek, we resolved any doubt regarding the prejudicial effect of the agency's action in favor of the protester since it appeared that the protester would have lowered its price had it been given the opportunity to respond to the relaxed requirement. Here, in contrast, the record did not show a prejudicial effect on actual or potential offerors.

The protester argues next that since we insist upon the presence of objective evidence from which the contracting officer could find compliance with definitive responsibility criteria and have sustained protests against affirmative determinations of responsibility where such evidence is lacking, we should apply the same standard in examining other issues of responsibility. PRI contends that in order to find Fiore responsible, the contracting officer was required to determine that it had both a satisfactory performance record and a satisfactory record of integrity and business ethics and that the record could not possibly contain evidence

supporting such determinations since Fiore is a new company and thus has no record of either performance or integrity and business ethics.

As we noted in our previous decision, we will review a contracting officer's affirmative determination of responsibility only where it is alleged that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. We will not review other aspects of a contracting officer's determination that an offeror is capable of performing a contract because such determinations are based in large measure on subjective judgments which generally are not susceptible of reasoned review. Bid Protest Regulations, 4 C.F.R. § 21.3(m) (5) (1991). Thus, we will examine the record to determine whether evidence of compliance has been submitted from which the contracting officer could reasonably conclude that responsibility criteria have been met only where noncompliance with a definitive responsibility criterion is alleged. Here, the protester does not argue, and we see no basis to conclude, that the factors it cites constitute definitive responsibility criteria;<sup>1/</sup> accordingly, we will not undertake the review that the protester requests.

Finally, the protester contends that our decision failed to address its argument that the agency could not reasonably have rated Fiore's technical/management proposal higher than its own since the RFP required the agency to consider an offeror's past and present performance in evaluating proposals and Fiore, as a new company, had no performance record.

Attachment 9 to the RFP, entitled "Evaluation Criteria," provided as follows:

"1. EVALUATION CRITERIA. Evaluation of the proposals submitted for the High Power Research and Experiment effort will be accomplished using the criteria set forth below.

1.1 GENERAL CONSIDERATIONS: In addition to evaluating each offeror's proposal as specified herein, the Government will evaluate other considerations. The Government will consider each offeror's adherence to the terms and conditions of the [RFP], as well as responsibility issues and

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<sup>1/</sup> The protester refers to the factors it cites as "specific" responsibility criteria; however, the factors cited are general factors of responsibility specified in Federal Acquisition Regulation § 9.104-1.

results of pre-award surveys. Additionally, the Government will conduct an evaluation of the contractor's proposal as follows:

a. Past and Present Performance. The Government will also conduct a performance risk assessment based on the offeror's present and past performance as it relates to the probability of successfully accomplishing the proposed effort. When assessing performance risk, the Government will use performance data to evaluate the area listed below. Performance data risk is a structured treatment of past and present performance used as a general consideration. Performance risk is co-equal in relative importance to the color rating and proposal risk assessment. Offerors are to note that in conducting the performance risk assessment the Government will use both data provided by the offeror and data obtained from other sources.

b. An evaluation of the offeror's performance in subcontracting to Small Disadvantaged Businesses, Historically Black Colleges and Universities and Minority Institutions will be made. Offerors shall identify contracts and points of reference in the Government to substantiate their ability to subcontract with these concerns."

In the portions of Fiore's proposal describing its past performance, which we have reviewed in camera, Fiore concedes that due to its relative youth as a company, it has not previously contracted with the government. Instead, it summarized relevant contracts held by its key subcontractors<sup>2/</sup>


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<sup>2/</sup> Section L of the RFP (Instructions, Conditions, and Notices to Offerors) required each offeror to submit information on past and current contracts with both government and non-government institutions that it considered relevant in demonstrating recent experience in technologies related to this effort. The section further indicated that this information and data obtained from other sources would be used to develop a performance risk assessment of the offeror. The section went on to define relevant past experience as work which is essentially comparable to the work proposed, with the same or similar scope, performed by the same company/division profit center or by other divisions, corporate management critical subcontractors, or teaming subcontractors, if such

(continued...)

and contracts under which its proposed personnel, while employed by Rockwell, the incumbent contractor, had gained experience. The contracting officer indicates that the Performance Risk Assessment Group used this information, along with the pre-award survey, in developing a performance risk assessment of Fiore. Thus, the record does not support the protester's assertion that because Fiore is a new company the agency had no basis upon which to determine the performance risk of its proposal.

Our prior decision is affirmed. In addition, the protester's request for proposal preparation costs and the cost of pursuing its protest are denied.

  
for James F. Hinchman  
General Counsel

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2/(...continued)  
resources would be brought to bear or significantly influence the performance of the proposed effort. Thus, this section of the RFP explicitly permitted the agency to consider the experience of Fiore's proposed subcontractors in developing the performance risk assessment of its offer.