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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Kilgore Flares Company

File: B-292944; B-292944.2; B-292944.3

Date: December 24, 2003

Michael B. Hubbard, Esq., Joseph J. Dyer, Esq., and Robert F. Pezzimenti, Esq., Seyfarth Shaw, for the protester.

Ronald K. Henry, Esq., Kaye Scholer, for FR Countermeasures, Inc.; and Richard W. Oehler, Esq., and Eric A. Aaserud, Esq., Perkins Coie, for Armtec Defense Products Company, intervenors.

Rick Martinelli, Esq., Department of the Navy, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contention that agency wrongly rejected protester's offer after determining that the protester was nonresponsible is denied where the record shows that the agency reasonably concluded that protester had not clearly established that it could meet the solicitation's delivery schedule.

DECISION

Kilgore Flares Company protests the determination that it is not a responsible offeror, and the resulting rejection of its lowest-priced offer, by the Department of the Navy under request for proposals (RFP) No. N00104-03-R-K054, issued to procure two types of flare decoys--known as MJU-38B and MJU-32B flares (hereinafter, the "38B" and "32B" flares)--for use as countermeasures for aircraft under attack by heat-seeking missiles. In finding that Kilgore is not a responsible offeror, the Navy concluded, primarily, that Kilgore could not meet the delivery schedules here; Kilgore argues that the agency's determination lacks a reasonable basis.

We deny the protest.

BACKGROUND

The manufacture of flare decoys involves assembling highly explosive and unstable materials. Many of the firms that build these flares have experienced catastrophic explosions resulting in plant shutdowns, missed deliveries and sometimes, loss of

life. After years of successfully producing these flares, and surviving in a market where other manufacturers dropped out of the business, Kilgore's plant suffered a fatal explosion in April 2001. As a result, its plant was closed while the incident was investigated, and Kilgore was unable to make deliveries of flares on two previously-awarded Navy contracts for the 38B and 32B flares.

As Kilgore was the only remaining firm producing flares for the Navy at the time of the accident, the Navy was forced to issue Military Interdepartmental Purchase Requests to the Army's Crane Ammunition Activity for its 38B and 32B flares. The Navy explains that the cost of purchasing its flares from the Army is "significantly higher" than purchasing flares from the commercial explosives sector. Navy Clearance Memorandum at 3. This is the environment in which the RFP here was issued.

On February 5, 2003, the Navy issued the instant RFP for 38B and 32B flares, seeking offers for the award of a fixed-price contract. The RFP's base quantity sought 32,340 of each flare; the RFP also contained two options—one for each flare—seeking up to 48,150 each. RFP at 2-5. The RFP advised that award would be made "to the responsible offeror submitting the lowest priced, technically acceptable offer." *Id.* at 70.

The RFP provided explicit guidance on the need for first article testing, and on the importance of timely deliveries. On first article testing, the RFP advised potential offerors that they would be required to produce and deliver a quantity of the flares for government testing unless the contractor requested, and received from the government, a waiver of the requirement because the contractor had produced "supplies identical or similar to" those solicited. *Id.* at 38. Under the circumstances here, Kilgore was the only potential offeror likely to be in a position to obtain a waiver of the first article test requirement.

On timely deliveries, the RFP advised potential offerors that there was a critical need for the timely delivery of these flares, and warned that offerors who take exception to the delivery schedule in the solicitation would not be considered for award. *Id.* at 6. The RFP also included detailed schedules indicating when specific quantities of each flare should be delivered depending on whether first article testing was required, or waived; offerors for whom such testing was waived were required to deliver flares sooner than those for whom testing was not waived. *Id.* at 23.

By the solicitation closing date of April 30, the Navy received three offers—one each from Kilgore, FR Countermeasures, Inc. (FRC), and Armtec Defense Products Company. The evaluated costs of these offers, including the option quantity, are as follows: Kilgore, \$4.2 million; FRC, \$4.3 million; and Armtec, \$6.8 million.

As part of the process of determining each offeror's responsibility, a preaward survey was conducted by the Defense Contract Management Agency (DCMA). In

conducting its review of Kilgore, DCMA requested submission of information via e-mail, and visited the Kilgore facility on May 20. At the conclusion of its review, DCMA recommended against award to Kilgore because of its assessment that Kilgore lacked responsibility in the areas of production capability and financial capability, and because of perceived inadequacies in Kilgore's accounting systems. The results of DCMA's preaward survey were communicated to the contracting officer (CO) for this procurement by report dated June 27.

Upon receipt of the DCMA preaward survey for Kilgore, the CO endorsed DCMA's findings. The CO decided that since Kilgore would not be required to undergo first article testing (so that Kilgore's deliveries would begin 120 days after contract award), and since Kilgore would be busy manufacturing the 32B and 38B flares it had failed to deliver under its prior Navy contracts, the company would not have the capacity to also make deliveries of the flares required by this contract. Specifically, the CO found:

Since Kilgore Flares Co. cannot make concurrent deliveries on the contracts already in place and cannot comply with the required delivery schedule contained in the solicitation, they are considered non-responsible to the solicitation requirements and disqualified for award.

Navy Clearance Memorandum at 8. In addition, the CO's concerns were broader than just an assessment of Kilgore's projected production rates. He also concluded as follows:

While revised schedules have been modified into both current contracts, previous schedule revisions have not been met due to production problems arising within the new automation systems. No confidence exists at this time that further problems will not arise and cause further delays in deliveries.

Id. at 6.

Preaward surveys were also undertaken for FRC and Armtec. At the conclusion of this process, on September 9, the Navy disqualified Kilgore, and decided that FRC and Armtec were responsible offerors. In order to develop both firms as sources for Navy flares, the Navy elected to split the award. Thus, FRC was awarded a contract for the 38B flares at its unit price of \$26.59 per flare, for a total contract price, including options, of \$2,005,080. Armtec was awarded a contract for the 32B flares at its unit price of \$43.50 per flare, for a total contract price of \$3,345,249.60. Id. at 8; Agency Rep. at 7. Under either of the award configurations described above, the Navy acknowledges that Kilgore was the lower-priced offeror. Id.

By letter dated September 18, the Navy advised Kilgore that it had not been selected for award, and that awards had been made instead to FRC and Armtec. The next

day, Kilgore requested a debriefing. By letter dated September 22, the Navy provided a written debriefing, where Kilgore was advised that it was found nonresponsible. The debriefing letter first advised Kilgore of the results of DCMA's preaward survey, and then advised the company of the CO's view that Kilgore was "unable to make concurrent deliveries on the contracts already in place and cannot comply with the required delivery schedule contained in the solicitation." Debriefing Letter, Sept. 22, 2003, at 1. The CO concluded by advising that "[i]n the event your production and delivery situation improves, I feel sure a positive recommendation would be forthcoming on future solicitations."¹ This protest followed.

DISCUSSION

Kilgore argues that the Navy's determination of nonresponsibility lacked a reasonable basis because the company is not at risk for failing to deliver the flares in a timely manner. In this regard, Kilgore argues that the Navy wrongly concluded that the company could not make good on deliveries required under its two previous Navy flare contracts--on which Kilgore was delinquent at the time of the preaward survey--and also produce the flares sought here. In addition, Kilgore argues that the Navy wrongly failed to give the company an opportunity to respond to the CO's concerns about its responsibility.

Before turning to the specifics of Kilgore's arguments, there are two preliminary matters that must be addressed--the disagreement between the parties about the extent of the Navy's nonresponsibility determination, and the outstanding delivery requirements on Kilgore's previous Navy contracts for these flares. With respect to the extent of the determination here, we note that the DCMA survey questioned Kilgore's ability to perform, and recommended against award, based on the results of its review in three areas--production capability, financial capability, and perceived inadequacies in Kilgore's accounting systems. Although the Navy Clearance Memorandum and the CO's Debriefing Letter to Kilgore identify these issues as DCMA concerns, neither document is clear about the extent to which the CO is adopting each of these concerns as his own--and more importantly, the extent to which the CO relies upon each finding as a stand-alone basis for a nonresponsibility determination. While Kilgore seeks to limit the bases on which it was found

¹ The Navy's debriefing letter--as well as a follow-on letter sent 2 days later--also advised Kilgore that production lot test samples of 38B flares (provided as part of Kilgore's effort to begin providing flares under its earlier, previously delinquent, Navy contract), had failed flight tests on September 16, putting in jeopardy Kilgore's ability to meet the modified delivery schedules for those contracts. Kilgore argued to our Office that the failure of its flares to pass flight testing on September 16 could not have played a role in the Navy's decision to find the firm nonresponsible on September 9. The Navy agreed, and offered to defend its nonresponsibility determination without relying in any way upon the September 16 flight test failure.

nonresponsible to those which the CO expressly adopted as his own, the Navy would expand the list--adding concerns first identified in a declaration from the CO provided with the agency report in this protest.

In our view, this debate is largely academic. In reviewing the record as a whole, there is little doubt that the CO's primary basis for disqualifying Kilgore is that it "is unable to make concurrent deliveries on the contracts already in place and cannot comply with the required delivery schedule contained in the solicitation." CO's Debriefing Letter, Sept. 22, 2003, at 1. Given the primary nature of this concern, and given our view that the CO's concerns in this regard were reasonable, we need not consider the other bases for disqualifying Kilgore identified by DCMA, or by the CO in the agency report.

With respect to the issue of Kilgore's existing obligations to deliver Navy flares, we note that under its prior contract for 38B flares (contract No. N00101-00-C-K114), it was required to make monthly deliveries of flares from February 2001 through December 2002. Other than completion of flares that were in process at the time of the fatal explosion at Kilgore's facility, on April 18, 2001, no further deliveries of 38B flares were made until August 2003. As of the date of the agency report on this protest, Kilgore owes the Navy 231,285 flares on the 38B contract. On June 17, 2003, the Navy and Kilgore agreed to modify the delivery schedule on the 38B contract to permit monthly deliveries from August 31, 2003 through May 31, 2004. Agency Rep. at 6-7; Declaration of CO at 1-2.

Similarly, under Kilgore's prior contract for 32B flares (contract No. N00104-02-C-K001), it was required to make monthly deliveries of flares from August 2002 through February 2003. It appears that, to date, none of the 32B flares have been delivered. Thus, Kilgore owes the Navy 96,600 flares on the 32B contract, and (as above), the Navy and Kilgore agreed on June 17, 2003, to modify the contract's delivery schedule to permit deliveries to begin 1 month after completion of deliveries on the 38B contract. This delay in producing 32B flares until after production of the 38B flares was adopted at Kilgore's request. As a result, Kilgore is now required to make monthly deliveries of 32B flares from June through September, 2004. Agency Rep. at 6-7; Declaration of CO at 1-2.

As indicated above, Kilgore primarily argues that the Navy improperly concluded that the firm lacked capacity to produce the flares here and still meet its obligation to produce flares arising from its previously awarded, yet largely unperformed, Navy contracts. Kilgore argues that the Navy ignored evidence of the firm's projected production capabilities once its plant begins producing Navy flares. Specifically, Kilgore contends that its redesigned production lines can produce up to **[deleted]** flares per shift, which--especially when considering the addition of extra shifts--will allow the company to produce enough flares to make timely deliveries on all three Navy contracts.

We begin by noting that CO's are required by Federal Acquisition Regulation (FAR) § 9.103(b) to make an affirmative determination of responsibility before every award. This determination includes a finding that a prospective contractor will "be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and government business commitments." FAR § 9.104-1(b). In this case, the CO looked at Kilgore's previous delinquencies for the same items, at the company's proposed schedule for addressing its previously delinquent contracts, and at the delivery schedule here, and concluded it did not appear that Kilgore would be able to make the deliveries required under the solicitation. The FAR requires that "[i]n the absence of information clearly indicating that the prospective contractor is responsible, the [CO] shall make a determination of nonresponsibility." FAR § 9.103(b).

When an agency's nonresponsibility determination is reviewed by our Office, we will not disturb the determination unless a protester can show that the agency had no reasonable basis for its determination; put simply, this is a matter where the CO is vested with broad discretion in exercising his or her business judgment. Document Printing Serv., Inc., B-256654, B-257051, July 8, 1994, 94-2 CPD ¶ 13 at 3. Our review of such a determination is limited to whether the determination was reasonable when it was made, given the information the agency had before it at the time. See Mail Boxes Etc., B-281487, Feb. 16, 1999, 99-1 CPD ¶ 37 at 3.

This solicitation required monthly deliveries of the 38B flares beginning 120 days after contract award, and ending 2 months later—providing the contractor would not be required to submit flares for first article testing. RFP at 38. Thus, given an award date of September 10, 2003, Kilgore would have been required to begin deliveries on or about December 10, ending on or about February 10, 2004. The solicitation required monthly deliveries of the 32B flares to start 30 days later (210 days after contract award), and end 2 months after that. Id. Thus, deliveries of the 32B flares here would have been required beginning on or about March 10, 2004, ending on or about May 10.

When the DCMA preaward survey team—supplemented by Navy personnel familiar with the situation—arrived at Kilgore's facility on May 20, 2003, Kilgore's ability to both address its backlog, and produce the flares required by the solicitation here, was a topic of discussion. In this regard, Kilgore presented the preaward survey team with a handwritten 2-page document showing how the company would accomplish the deliveries. This document, appended to a declaration submitted by the Navy's Acquisition Engineering Agent, and submitted with the agency report, showed Kilgore producing flares at rates of up to 44,100 flares per month beginning in September 2003. Agency Rep., Tab F. The document also showed Kilgore producing 32B and 38B flares concurrently in early 2004.

In support of its ultimate conclusion that Kilgore's projections were overly optimistic, the Navy made the following observations: (1) prior to the April 2001

accident, the most Navy decoy flares Kilgore had ever delivered in a single month was approximately 30,000; (2) at the time of the preaward survey site visit, Kilgore had yet to deliver a single Navy decoy flare in more than 2 years; (3) Kilgore had not yet begun operating its new automated production line, and was, at this point, basing its estimates entirely on projected capabilities, not proven experience; and (4) Kilgore was estimating monthly production of 14,700 38B flares only 2 months after award, but showing a lead-time of 12 weeks to obtain at least one of the parts required for production. Agency Rep., Tab F, Declaration of Acquisition Engineering Agent, at 1-2.

During the course of this protest, our Office asked Kilgore to provide more information about the events after the fatal explosion, and to provide the specific dates that Kilgore began reopening its production lines. In answering our questions, Kilgore explained that it initially closed its entire facility while it investigated the cause of the explosion and decided what renovations it should make to avoid similar incidents in the future. The company explained that it began reopening its production lines based, in part, on the amount of energetic material involved in a product, the extent to which the company could ensure safe production, and the status of its renovations. Given these considerations, Kilgore began producing certain flares purchased by the Army and Air Force in February 2002 (the MJU-7A/B) and in April 2003 (the MJU206), and began producing the Navy's 38B flares in June 2003. The facility has not yet produced the 32B flare. Kilgore Letter to GAO, Dec. 11, 2003, at 3-4.

Our Office also asked Kilgore to advise on the status of its production of the Navy 38B flares during the period between the time of the DCMA visit in May, and the date of the contract award, in early September. In response, we learned that Kilgore produced 2,793 38B flares in June, 8,904 in July, and 15,309 in August. Under the projected rates that Kilgore provided to the DCMA review team, Kilgore advised that it would produce 14,600 flares in June, and 14,700 flares per month in July and August to meet the delivery requirements of these three contracts.

Upon reviewing the additional information provided by Kilgore, and for the reasons set forth below, we conclude there was nothing unreasonable about the Navy's decision to find Kilgore not responsible under the instant solicitation. We reach this conclusion based on our review of the totality of the circumstances surrounding this situation, and not just on a parsing of Kilgore's expected production capabilities upon the reopening of the manufacturing lines required to produce these flares. See, e.g., Downtown Legal Copies, B-289432, Jan. 7, 2002, 2002 CPD ¶ 16 at 8 (GAO upheld an agency's determination that the protester lacked the capacity to perform, in part, because events had created a reasonable concern that the protester was overstating the readiness of its new facility).

Kilgore first argues that the Navy wrongly assumed that it would have to produce up to 44,100 flares per month to meet the delivery requirements of its two prior Navy

contracts, and the requirements of the solicitation here. Thus, Kilgore contends that the Navy erred when it concluded that the company would have to produce flares at a level higher than it had ever done before. On this issue, we note that Kilgore was the source of those estimates, not the Navy. The Navy's statement that Kilgore would have to manufacture flares at the rate of up to 44,100 per month was derived from the projections Kilgore provided to the DCMA preaward survey team during the course of the site visit on May 20, 2003. Thus, we do not think the Navy's concerns were based on unreasonable conclusions about the estimated production levels that would be required to address both Kilgore's backlog, and the delivery requirements here.

Alternatively, Kilgore argues that even if the Navy were right about the level of production that would be required to address the backlog and make the required deliveries here, its newly-renovated facility will have the requisite capacity to produce even at this level. While we have no basis to disagree with Kilgore's claims about the ultimate production capacity of its newly-renovated facility, we do not think the Navy was required to accept the company's projections at face value. During the DCMA site visit, on May 20, 2003, Kilgore had not yet produced either of the flares here, and was projecting that once its renovations were complete and its production lines opened, it would produce flares at a rate it had never produced before. Thus, Kilgore was asking to be found responsible based on projections, not on experience with the new equipment or processes.

The record also shows that the CO here had experience with Kilgore's projections that caused him to be skeptical. At the time the Navy began reviewing the offers in response to this solicitation, Kilgore remained in default on prior Navy contracts for the very same flares; the delivery schedules in those contracts were not modified until almost a month after the DCMA site visit. While there is little doubt on the part of the DCMA reviewers, or the Navy, that Kilgore will eventually return to making successful deliveries of flares to the Navy, the fact remains that at the time of this assessment, Kilgore had not done so.² Further, the CO expressed concerns that Kilgore's projections might not prove accurate. In this regard, he stated as follows:

² Many of Kilgore's specific attacks on the reasonableness of the nonresponsibility determination here are buttressed by quotes from the preaward survey and other materials where the Navy, as well as the DCAA review team, indicate their favorable views of the ways in which Kilgore has renovated its facilities, and automated its process. Based on this record, it appears that agency officials have little doubt that Kilgore eventually will be able to resume its role as a trusted source for these flares. This lack of doubt about the soundness of Kilgore's approach, however, is not inconsistent with the doubts expressed here that Kilgore may not be able to make the deliveries required in this solicitation, while at the same time making good on its previous deficiencies.

While revised schedules have been modified into both current contracts, previous schedule revisions have not been met due to production problems arising within the new automation systems. No confidence exists at this time that further problems will not arise and cause further delays in deliveries.

Navy Clearance Memorandum at 6. For our part, we note that the CO's lack of confidence in Kilgore's projections is buttressed by evidence in the record of previous occasions where overly optimistic delivery schedules were abandoned.³

Kilgore also complains that the Navy wrongly concluded that the company could not concurrently produce the 38B and 32B flares, as the company's May 20 estimates of production showed during the months of February and March of 2004. Agency Report, Tab F, attach. In response, the Navy produced several Kilgore documents--some prepared before the current renovations, one prepared after--which either expressly indicated a desire not to produce the flares concurrently, or showed a projected production of flares consistent with the prior express reluctance to produce both flares concurrently.

We have reviewed the materials relied upon by the Navy, and we see nothing unreasonable about the Navy's determination that Kilgore could not produce both types of flares concurrently. Although Kilgore is right when it says that its express statements about not wanting to produce the two flares concurrently were made before its current renovations, it has acted in a manner consistent with its earlier practice since the renovations. For example, in Kilgore's May 29, 2003 letter transmitting to the Navy CO the company's proposed revised delivery schedule for its two delinquent contracts, Kilgore submits a schedule (based on production estimates in its newly-renovated facility) wherein it will deliver all the remaining 38B flares, and then 30 days later, begin delivering the 32B flares. Given its consistent approach of scheduling production of these two flares at different times, we think the Navy reasonably concluded that this would continue to be Kilgore's practice.⁴

³ We note further that while we recognize that any delays experienced after the award date here cannot have properly contributed to the Navy's responsibility decision, it appears that the modified delivery schedules incorporated into Kilgore's previous Navy contracts for these flares may yet not be met.

⁴ In addition, since we think it reasonable to assume that Kilgore must have wanted to address the Navy delinquencies as quickly as possible, we do not understand why, if it viewed simultaneous production as feasible, the company did not offer to produce both flares simultaneously as part of its proposed resolution of its ongoing delinquencies--especially since the proposed resolution was transmitted to the CO only 9 days after the preaward visit.

We also disagree with Kilgore's contention that the Navy's determination might have been understandable at the time of the DCMA site visit, in May, but was unreasonable in early September. As explained above, we requested and reviewed Kilgore's production rates during the summer of 2003. Although Kilgore met its projected production rate in August of 2003, its production rates for June and July fell far below its projections. Given these numbers, even if the Navy had been closely monitoring Kilgore's production over the summer--and we have no evidence that it was not--Kilgore had still not produced at the rates it would need to meet the delivery schedules here. In addition, we see nothing unreasonable about the Navy's skepticism that matters here might not go as well as projected, and we see no reason the Navy should have risked further delinquencies on the matter.⁵

Kilgore also argues that the Navy should have held discussions with the company over the summer to allow Kilgore to address the agency's concerns about its ability to meet the delivery schedule. In support of its contention, Kilgore points to our prior decision in Schwendener/Riteway Joint Venture, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ 203, where our Office sustained a protester's challenge against an agency finding that it lacked financial responsibility on the basis that the CO misunderstood information concerning the protester's bonding, and thus reached an unreasonable conclusion. In particular, our Office noted that the CO there did not request any clarifying information from the protester during a face-to-face meeting conducted as part of the preaward survey. Id. at 2, 6.

In our view, the situation here is distinguishable from the situation in Schwendener. The Navy has been discussing delivery matters with Kilgore for well over 2 years. Letters in this record from June and August of 2001 include proposed revised delivery schedules that have long since been abandoned. The preaward site visit on May 20, 2003, included a discussion about how Kilgore proposed to meet the delivery

⁵ On this issue, Kilgore also argues that the Navy should have taken notice of the rates at which the company had resumed producing the MJU-7A/B flares for the Army and Air Force. According to Kilgore, these flares are very similar to the Navy flares here and its production of these flares should have given the Navy assurance that Kilgore would be able to produce at the same rates. The Navy asserts that Kilgore's progress on the Army and Air Force flares is not dispositive of the issue here because of differences in the flares the Navy contends are significant. We have reviewed the arguments raised by Kilgore and the Navy, and find no basis here for concluding that the Navy's determination was unreasonable. In addition, we note that Kilgore resumed its production of the MJU-7A/B flares in February 2002--less than a year after the accident and 16 months before it produced its first Navy 38B flare, despite its ongoing delinquency in delivering 38B flares. We think the additional time required to open the 38B production lines--in light of Kilgore's explanation for why different production lines were reopened at different times--adds credence to the Navy's view that the flares are significantly different.

schedule in this solicitation while also making good on its delinquencies. This discussion was apparently anticipated by Kilgore, given that it greeted the reviewers with a handwritten table showing how the production challenge would be addressed. Nine days later, Kilgore submitted a proposed revised delivery schedule to the Navy; and on June 17, the delinquent contracts were amended to include the revised schedules. In short, unlike Schwendener, this is not a matter where the agency was misunderstanding the facts before it, and failing to take opportunities to learn the complete story. Under the circumstances here, we see no reason the Navy was required to discuss this matter further.

A final matter, though not specifically alleged here, is an undercurrent of arguments throughout these pleadings that the Navy made the responsibility determination in bad faith. Kilgore has suggested, among other things, that the CO does not truly doubt that Kilgore could perform; that issuance of the solicitation here was but a ruse to permit the Navy to develop other sources for these flares; and that the Navy could not appropriately find Kilgore to be nonresponsible, while at the same time reaching affirmative determinations of responsibility for two companies that have not previously manufactured these flares. We have examined the record here, and find no basis to conclude that the Navy, or its representatives, acted for improper reasons; as a result, we deny these contentions. See Telestar Int'l Corp., B-247557.2, June 18, 1992, 92-1 CPD ¶ 530 at 3.

The protest is denied.

Anthony H. Gamboa
General Counsel