

E. Fitzmaurice
Proc I



DECISION

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

8814

FILE: B-192602

DATE: January 10, 1979

MATTER OF: B. F. Goodrich Company DLG 00542

[Employees of Protester Formed Corporation and Submitted
Digest: Competitive Bid]

1. IFB's Certificate of Independent Price Determination was not violated where unknown to protester some of its employees formed corporation and submitted bid in competition with protester. Purpose of certification is to assure that bidders do not collude among themselves to set prices or restrict competition while here there was no collusion but rather alleged unauthorized disclosure of confidential business information.
2. Where matter is referred to SBA under certificate of competency (COC) procedures and SBA determines small business bidder to be responsible as to capacity, credit, and integrity, such determination is binding on contracting officer and will not be reviewed by GAO since SBA disposition with regard to responsibility is final. Wirt ~~DLG~~
DLG 00557
3. New information bearing on bidder's responsibility may be furnished after bid opening so that SBA can reconsider whether COC should be issued.

B.F. Goodrich Company (BFG) has protested against the award of a contract to Wirt Inflatable Specialists, Inc. (Wirt), under invitation for bids (IFB) No. DLA100-78-B-0585 issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania.

The IFB was issued on April 20, 1978, and requested offers to supply DPSC with 99,100 nylon, pneumatic mattresses. Six bids were received. When these were opened on May 10, 1978, Wirt was found to be the low bidder with BFG the third low bidder. However, on May 17, 1978, BFG sent a telegram to the contracting officer protesting any award that Wirt might receive under the solicitation.

~~Protester~~
~~Bidders~~ and Collusion Among ~~Employees~~
Submit to Submit Bid
Competitive

BFG contended that Wirt had violated the IFB's "Certificate of Independent Price Determination" because four of Wirt's officials possessed knowledge of BFG price factors at the time the Wirt bid was prepared and submitted. The individuals in question are all former BFG employees who collectively have considerable skill and experience in the production of the item requested. They had formed Wirt while still employed by BFG and had never informed their superiors of their involvement with another business concern. After Wirt proved to be the low bidder, BFG began to investigate the background of this then unknown competitor. It was at this time that BFG discovered the close connection between Wirt and its own employees. Although there is some dispute over whether these employees resigned their positions at BFG or were discharged, for our purposes, it suffices to say that they ceased working for BFG as of May 15, 1978, and thus prompted the BFG protest of May 17, 1978.

By telegram dated May 19, 1978, the contracting officer requested that BFG provide additional evidence in support of its allegation. BFG replied by letter of May 25, 1978, setting out the titles and duties of its former employees, the information they had access to, and why it believed that the Certificate of Independent Price Determination had been violated.

However, before making his decision on this protest, the contracting officer determined Wirt to be nonresponsible as the result of a negative preaward survey and on June 8, 1978, referred the matter to the Small Business Administration (SBA) for consideration under certificate of competency (COC) procedures. By letter dated July 5, 1978, SBA declined to issue a COC because of the number of obstacles that Wirt would have to overcome before it had the capacity and credit to perform. In this same letter, however, SBA also concluded that there was not sufficient information to support the determination that there was a lack of integrity on the part of Wirt's officials.

The record indicates that after being denied the COC, Wirt provided SBA with new information that presented revised production plans. SBA reviewed these plans and concluded that Wirt had now established its ability to obtain the necessary capacity and credit to insure satisfactory performance on the proposed contract. Therefore, by telegram dated July 20, 1978, SBA informed DPSC of this development and indicated that if DPSC wished to once again refer this matter to SBA a COC could be recommended. On the next day, the contracting officer sent a telegram requesting that Wirt's case be reconsidered. After completing this reconsideration, SBA informed DPSC by letter dated August 1, 1978, that it now certified Wirt as competent as to capacity and credit to perform the proposed procurement.

During the time that SBA was considering whether or not to issue a COC, the contracting officer was also reviewing the BFG protest alleging a violation of the Certificate of Independent Price Determination. He concluded that the protest was without merit, and by letter dated August 4, 1978--the same day that award was made to Wirt--he informed BFG that its protest was denied.

Thus, on August 11, 1978, BFG filed a protest with our Office once again alleging a violation of the IFB's Certificate of Independent Price Determination. Specifically, BFG argues that its former employees, either individually or collectively, had knowledge of certain BFG cost and pricing information which they used in preparing Wirt's bid to insure that it was lower than the one BFG would submit. This conduct, BFG contends, was in violation of the above-mentioned certificate because with the information that Wirt's officers possessed, Wirt could not have arrived at the prices contained in its bid "independently" as required by the certificate.

BFG also maintains that the contracting officer should have rejected Wirt for lack of integrity despite the COC issued by SBA. In BFG's opinion, the SBA determination as to Wirt's integrity is not binding on the

contracting officer. BFG contends, therefore, that the contracting officer should have followed his initial position--mentioned in the June 8, 1978, letter which referred Wirt's case to SBA--to reject Wirt for lack of integrity regardless of the SBA determination on Wirt's capacity and credit. BFG also argues that SBA never sufficiently examined the question of Wirt's lack of integrity or appreciated its true impact in this case.

Lastly, BFG also questions whether it was proper for DPSC to reopen the inquiry into Wirt's eligibility for a COC. BFG maintains that by allowing Wirt to offer changes in how it will perform the contract, DPSC has in fact allowed Wirt to negotiate a response to a formally advertised procurement.

The "Certificate of Independent Price Determination" contained in the solicitation provides in pertinent part:

"(a) By submission of this offer, the offeror certifies, and in the case of a joint offer, each party thereto certifies as to its own organization, in connection with this procurement:

"(1) The prices in this offer have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition as to any matter relating to such prices with any other offeror or with any competitor: * * *."

We have held in the past that the purpose of this certification is to assure that the bidders did not collude among themselves to set prices or to restrict competition by inducing others not to submit bids. Kepner Plastics Fabricators, Inc.; Harding Pollution Controls Corporation, B-184451, B-184394, June 1, 1976,

76-1 CPD 351. In addition, we have also stated that in the absence of Government employee involvement in an alleged price disclosure to a competitor, there is no requirement that such an allegation be investigated by the procuring agency since to hold otherwise would impose an intolerable burden as well as inordinately delay the procurement process. Surveillance Systems, B-185562, April 8, 1976, 76-1 CPD 235.

In the present case, there has in fact been no collusion among bidders, but rather an alleged disclosure of certain confidential information which BFG does not want revealed to its competitors. Thus, BFG's actual concern is with the loss of skilled employees who use the training and knowledge obtained during their employment to aid some competitor or to become competitors themselves. Whether an employer has any legal recourse against such competition depends on the facts of the specific case. See, e.g., Salomon v. Crown Life Insurance Co., 536 F.2d 1233 (8th Cir.), cert. denied, 429 U.S. 961 (1976); but cf. Arnold's Ice Cream Co. v. Carlson, 330 F. Supp. 1185 (E.D.N.Y. 1971).

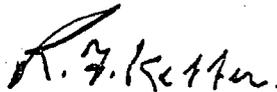
Consequently, since this case involves a question of business practice rather than one of bidders attempting to set prices or restrict competition under a Government procurement, there has been no violation of the Certificate of Independent Price Determination. Kepler Plastics Fabricators, Inc., supra; Surveillance Systems, supra.

Under 15 U.S.C. § 637(b)(7) (1976), as amended by Pub. L. No. 95-89, § 501, 91 Stat. 561, August 4, 1977, the SBA has authority to certify to Government procurement officers with respect to all elements of responsibility, "including, but not limited to, capability, competency, credit, integrity, perseverance, and tenacity of any small business concern * * * to receive and perform a specific Government contract." Our Office, therefore, does not review SBA determinations made under the above authority since by law an SBA disposition on the matter is final. Ikard Manufacturing Co., B-190450, October 28, 1977, 77-2 CPD 332.

BFG has argued that the contracting officer was not bound by the SBA determination on Wirt's integrity. Yet, as indicated above, it is clear that such a determination was in fact binding on the contracting officer. Moreover, since an SBA determination on matters of responsibility is final, our Office will not review the adequacy of SBA's investigation into the question of Wirt's integrity.

Finally, it is well established that information bearing on a bidder's responsibility may be furnished after bid opening. Reliable Building Maintenance Co., B-190167, February 17, 1978, 78-1 CPD 139; Southern Crane & Monorail Co., B-187837, January 25, 1977, 77-1 CPD 54. Therefore, there was nothing improper with DPSC's requesting SBA to reconsider Wirt's eligibility for a COC after Wirt had provided new information on the question of its responsibility.

Accordingly, the protest is denied.



Deputy Comptroller General
of the United States