

DECISION



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

FILE: B-202735

DATE: September 4, 1981

MATTER OF: Domar Industries Co., Inc.

DIGEST:

1. Protest against contracting agency's consideration of the lower of two bids submitted by the same bidder is denied. Where after submitting a bid the bidder received lower supplier quotations which enabled the firm to furnish the items at a lower price, the later, lower-priced bid was in the nature of a modification to initial bid and may properly be considered for award.
2. Protest alleging that apparent low bidder is not responsible bidder because the firm is in voluntary bankruptcy, has outstanding tax debt to the Government and will not deliver an acceptable domestic product in performing the contract is dismissed. The contracting officer has determined on the basis of a preaward survey which considered the matters raised by the protester that the firm is a responsible bidder, and GAO does not review affirmative determinations of responsibility except under circumstances which do not apply to this case.

Domar Industries Co., Inc., protests the proposed award of a contract to Aurora Cord & Cable Company under invitation for bids (IFB) No. DAAE07-81-B-A248 issued by the Department of the Army for the reprocurement of headlight assemblies. Aurora submitted two bids in response to the IFB, and Domar contends that Aurora's second, lower-priced bid should not be considered for award. The protester also asserts that despite the Army's favorable preaward survey, Aurora is not a responsible bidder.

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We find the protest against consideration of the second bid to be without merit and will not consider the allegations about Aurora's responsibility.

Of the seven bids received at the March 31, 1981, bid opening, Aurora's March 30 bid of \$107 per assembly is the apparent low bid. Domar's unit bid price of \$109 is second low, and Aurora's March 25 bid is fourth low. Award has been withheld pending resolution of the protest.

Domar contends that Aurora's submission of two differently priced bids gives the firm an unfair competitive advantage over other bidders. The protester suggests that allowing multiple bids would permit a bidder whose bids are low to allege a mistake and withdraw the lower bid, thereby choosing after bid opening which bid the Government should accept. Aurora's lower-priced bid, Domar argues, also indicates that the firm had information about other contractors' bid prices.

In commenting on the protest to the Army, Aurora explained that after submitting its March 25 bid, the firm received quotations from other suppliers which decreased material costs and enabled Aurora to submit a lower-priced bid. Aurora was not sure whether a supplemental letter to the original bid would suffice, and, therefore, decided to submit a totally new bid on March 30, 1981. Aurora also advised the Army that the March 30 bid of \$107 per assembly was the bid it wanted the Army to consider for the award.

In our opinion, Aurora's explanation constitutes a legitimate business reason for the submission of a lower bid price. Aurora's March 30 unit price, albeit in the form of a second bid, is in the nature of a bid modification timely submitted before bid opening. Moreover, Aurora intended the lower price to apply to its bid for the assemblies. We find no basis in the record to conclude that the Army's consideration of the bid is prejudicial to the other bidders. Regarding Domar's concern about a possible mistake claim, Aurora has made no such claim and, therefore, no actual prejudice to any party occurred. See Sis-Q Flying Service, Inc., B-188194, April 7, 1977, 77-1 CPD 245.

Although Domar insists that bid prices were disclosed, the protester has not presented any evidence to support its contention. Domar itself states that Aurora's March 30 bid was delivered to the bid room before the time set for bid opening. The Army reports that there is no indication of Government mishandling of the bids during the bid opening process. Absent any probative evidence of price disclosure, we must assume that Domar's allegation is speculative and conclude that the protester has not met its burden of proof. Questar Data Corporation, B-199769, November 28, 1980, 80-2 CPD 403; Dynal Associates, Inc., B-197348, July 14, 1980, 80-2 CPD 29. Therefore, we find no basis to object to the Army's consideration of Aurora's March 30 bid, and Domar's protest on this ground is denied.

Domar contends that Aurora is not a responsible bidder because the firm is currently in voluntary bankruptcy and that the Army will incur undue risk of a second default by awarding the contract to Aurora. Domar further asserts that the Army did not consider the effect of Internal Revenue Service (IRS) Federal Excise Tax litigation in determining Aurora's financial capacity to perform the contract. Because Aurora is in voluntary bankruptcy, Domar also insists that the firm cannot manufacture the assemblies at the price bid without using foreign components, contrary to the Buy American Act certificate included in its bids. Finally, Domar argues that the military specification for the assemblies requires that bidders' products be qualified for inclusion on a qualified products list at the time of bid opening and that the Army's favorable preaward survey indicates that this definitive responsibility criterion of the IFB was not applied to Aurora.

The Army states that the preaward survey did consider Aurora's financial position, including information obtained from the Defense Contract Audit Agency, Dun & Bradstreet, and the IRS. In conducting the survey, the Army also confirmed that Aurora's supply sources for assembly components were domestic rather than foreign. Based on the preaward survey the Army contracting officer has determined that Aurora is a responsible bidder.

Contrary to Domar's contention, both Aurora and the Army state that the assembly specification does not require product qualification. An amendment to the specification dated August 23, 1974, deleted the original product qualification provisions and substituted a requirement for first article testing.

Domar's allegations that Aurora is not financially capable of performing the contract and that the firm will not supply an acceptable domestic product essentially challenge the contracting officer's affirmative determination of Aurora's responsibility. Our Office will not, however, review protests of affirmative determinations of responsibility unless fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Federal Data Corporation, B-196643, November 14, 1979, 79-2 CPD 353. Neither exception applies here, and we will not consider these grounds of Domar's protest.

We have consistently held that the mere fact that a contractor files a petition in bankruptcy under chapter XI of the Bankruptcy Act does not require a finding of nonresponsibility. Mid America Movers, Inc., B-201740, February 9, 1981, 81-1 CPD 84; Hunter Outdoor Products, Inc., 54 Comp. Gen. 276 (1974), 74-2 CPD 207. Our review of the record shows that both the firm's bankruptcy status and its Federal tax obligations were considered in determining Aurora's financial ability to perform the contract. Aurora's bid obligates the firm to supply domestic source assemblies for purposes of the Buy American Act, and we will not review assertions that the firm will not comply with that obligation. Gulf and Western Manufacturing Co., B-195804, September 6, 1979, 79-2 CPD 181; Gillette Industries, Inc., B-192175, July 7, 1978, 78-2 CPD 24. Finally, because product qualification is no longer required by the assembly specification, it is not a definitive responsibility criterion of the IFB. Domar's objection on this ground would be inappropriate for our review.

The protest is denied in part and dismissed in part.


Acting Comptroller General
of the United States