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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ICR, Inc.
File: B-223033
Date: August 13, 1986

DIGEST

1. Record does not support protester's contention that contracting agency deliberately delayed in providing it with a copy of the solicitation, which protester asserts adversely affected its ability to arrange contract financing acceptable to the agency.
2. Protest against contracting officer's negative responsibility determination is denied where the determination was based on a negative preaward survey report which found that the prospective contractor lacked adequate financial resources to perform the contract and the record contains documentation that provides a reasonable basis for the preaward survey findings and the contracting officer's determination.
3. Where an agency rebuts an issue raised in the initial protest and the protester fails to respond to the agency's rebuttal in its comments on the agency report, the issue is deemed abandoned.
4. Claim for bid preparation and protest filing costs is denied where General Accounting Office finds a protest to be without merit.

DECISION

ICR, Inc., protests the rejection of its low bid on 14 line items under invitation for bids (IFB) No. 2FC-HDW-A-A4053Q issued by the General Services Administration (GSA), Federal Supply Service, New York, for the procurement of file folders. ICR contends that GSA improperly determined ICR to be nonresponsible. ICR requests that either it be awarded the contract for 14 (of 19) line items on which it was the low bidder or that it be paid its bid preparation and protest filing costs.

We deny the protest and claim for costs.

The IFB contained a total of 159 line items and contemplated awards of multiple requirements contracts to furnish 40 types of file folders to several listed locations. ICR submitted the lowest bid on 19 line

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items with a total estimated price of more than \$1 million. The contracting officer requested that plant capacity and financial capability reports be prepared on ICR so that ICR's responsibility could be assessed.

The plant capacity report concluded that ICR was incapable of performing the work bid upon. The report stated that although ICR had written commitments for equipment, none of the necessary equipment was currently in the plant and there was likely to be a considerable time delay before ICR could perform at a satisfactory level.

The financial capability report, dated March 14, 1986, recommended that no award be made to ICR because, among other things, ICR had a small net worth (under \$6,000), ICR had a net loss in 1985 and because the items on which ICR submitted the low bid totaled in price over 9 times more than ICR's 1985 yearly sales. The financial capability report indicated that ICR's financial statements were inaccurate and did not conform to generally accepted accounting procedures.

By letter dated March 27, 1986, ICR sent GSA new information concerning actual and potential grants and loans which ICR either received or expected to receive. The contracting officer forwarded this additional information to the chief of the credit and finance office (chief) for consideration in redetermining ICR's financial responsibility. The credit and finance office was specifically requested to consider the possibility of a recommendation of a partial award to ICR because ICR was the low bidder on a number of individual line items with an estimated dollar value of less than \$2,000.

After reviewing the additional information submitted to GSA by ICR, the chief again recommended "no award" to ICR. The chief found that ICR's loans and grants were contingent and not in place and the chief again questioned ICR's accounting system. The chief found ICR's finances did not warrant any award and the credit and finance office notified the contracting officer on April 14, 1986, that the recommendation of "no award" was unchanged. Based upon the recommendations from the credit and finance office that "no award" should be made to ICR due to questionable finances, and the director of the contract management division, region 4 that ICR was "incapable" of timely performance, the contracting officer determined that ICR was a nonresponsible bidder. Award of the items on which ICR was the low bidder was made to the next low bidder on April 29, 1986.

ICR first asserts that if its arrangements for financing contract performance were insufficient (which it does not concede), it is GSA which should bear the responsibility for that situation because that agency, in what the protester characterizes as a deliberate act of discrimination against sheltered workshops for the disabled, allegedly delayed in providing to ICR a copy of the solicitation when it was issued. This delay, ICR states, "placed [us] in an impossible position

as far as presenting any viable and coherent financial package." ICR states that it never received the original solicitation (issued December 17, 1985), but received only an amended solicitation on January 15, 1986, which established bid opening on January 30, 1986. ICR complains that it therefore had 4 or 5 weeks less than other bidders to arrange for the necessary contract financing, which adversely affected its ability to assemble a "financial package" acceptable to GSA.

We do not think the record supports the conclusion that GSA acted in a manner calculated to prejudice ICR's ability to arrange its contract financing. This solicitation twice was synopsisized in the Commerce Business Daily (CBD), first on December 3, 1985, when it was originally issued, and again on December 18 when the bid opening date was extended. GSA further states that it sent a copy of the solicitation to all potential bidders on its bidder's mailing list, including ICR. ICR has not provided any evidence of a deliberate attempt to exclude it from competition and the fact that it did receive a copy of the solicitation, as amended, indicates that ICR was not excluded. In addition, as we indicated above, GSA considered additional financial information from ICR which was submitted after the initial financial evaluation had been made. In fact, GSA did not finally determine ICR to be nonresponsible until the latter part of April, more than 2 months after bid opening.

ICR also contends that GSA acted without any reasonable basis in determining that ICR was nonresponsible and that GSA ignored important information from financial supporters and product and equipment suppliers that indicated that ICR had the ability to obtain the necessary financing and production capacity to perform the contract work on which ICR was the low bidder.

The determination of a prospective contractor's responsibility rests with the contracting officer, and, in making that determination, he is vested with a wide degree of discretion and business judgment. Venusa, Ltd., B-217431, B-217432, Apr. 22, 1985, 85-1 C.P.D. ¶ 458. However, in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer is required to make a determination of nonresponsibility. Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103(b) (1985); Lamari Electric Co., B-216397, Dec. 24, 1984, 84-2 C.P.D. ¶ 689.

A contracting officer may rely upon the results of a preaward survey in determining the bidder's responsibility and is not obligated to make an independent evaluation. Martin Electronics, Inc., B-221298, Mar. 13, 1986, 86-1 C.P.D. ¶ 252. In any event, the contracting officer's determination must be based on fact and reached in good faith; however, it is only proper that the determination be left to the administrative discretion of the agency involved as the agency must bear the brunt of difficulties experienced in obtaining the required performance. Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 C.P.D. ¶ 48. Therefore, we will not question a nonresponsibility determination unless the protester

demonstrates bad faith by the agency or a lack of any reasonable basis for the determination. System Development Corp., B-212624, Dec. 5, 1983, 83-2 C.P.D. ¶ 644. ICR has not made the necessary showing here. Instead, we find that the record provides a reasonable basis for the preaward survey findings and the contracting officer's determination.

For example, ICR admits that just its start up costs and minimum necessary financing would be approximately \$200,000-\$245,000. When the preaward survey was conducted, first, in late March 1986, then in April 1986, the record shows that ICR did not have adequate firm financing necessary for contract performance. Although ICR states that by mid-April it had received a private loan of \$70,000, and two grants totaling \$62,000, the record shows that only a grant for \$32,000 was firmly committed to ICR and ICR planned to rely on other loans and a loan guarantee which were at that time merely applied for, contingent, and unfinalized.

Because there were no binding written commitments for the additional financial resources, we do not think it was unreasonable for the GSA credit and finance preaward survey team to factor into its "no award" recommendation the merely contingent nature of these resources. See Engineering and Professional Services, B-219657, B-219657.2, Dec. 3, 1985, 85-2 C.P.D. ¶ 621.

ICR contends that it had developed "a solid financial package" of "essentially irrevocable loans" consisting of the following:

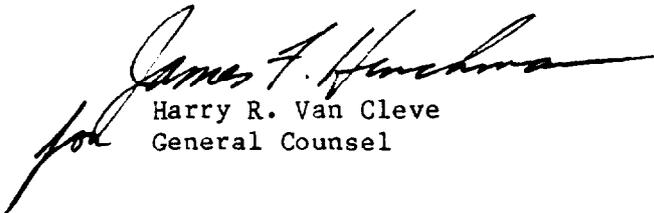
\$32,000	Pittsburgh Foundation grant
\$75,000	Forbes Fund Guarantee to Mellon Bank
\$70,000	Private loan--Harland Press, Inc.
\$52,000	U.R.A., City of Pittsburgh
\$30,000	Allegheny County MH/MR/DA [Mental Health/Mental Retardation/Drug & Alcohol Program]"

The record indicates, however, that by mid-April, when the preaward survey team made its second "no award" recommendation, most of the above loans were at best contingent and were not approved. For example, the record shows that the Urban Redevelopment Authority (U.R.A.), City of Pittsburgh, never approved its proposed loan of approximately \$52,000, which was contingent upon, among other things, ICR's "securing all of the private financing proposed in the project application." By mid-April, the "Forbes Fund Guarantee to Mellon Bank" for \$75,000 was not an approved loan to ICR, but instead was an unapproved guarantee for a proposed Mellon Bank loan to ICR which itself was never approved. We conclude that the "no award" recommendation of the credit and finance preaward survey team had a reasonable basis and the contracting officer could properly rely upon that recommendation in determining that ICR was nonresponsible. Martin Electronics, Inc., B-221298, supra.

Since the finding that ICR had inadequate finances to perform the contract work by itself justified the determination of nonresponsibility, we need not consider ICR's contentions concerning its ability to timely perform the work and the preaward survey finding that ICR was "incapable" of timely performance. FAR, 48 C.F.R. § 9.104-1(a); Engineering and Professional Services, B-219657, B-219657.2, supra.

In its protest, ICR raised the argument that even if it was properly determined to have inadequate financial resources to perform all of the contract work on which it submitted the low bid, since the estimated prices of some line items were very small (under \$2,000) it should have been considered for a partial award. GSA responded in its report to our Office that both the credit and finance office and the contracting officer considered ICR for partial award, but because of the contingent nature of ICR's financial arrangements, a partial award was considered to be inappropriate. In its comments on the agency report, ICR did not rebut that part of the agency report or again raise the issue of a partial award. Therefore, we consider ICR to have abandoned this protest ground. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 C.P.D. ¶ 218.

The protest is denied. Because we find the protest to be without merit, we also deny the claim for costs. R.S. Data Systems, 65 Comp. Gen. 74 (1985), 85-2 C.P.D. ¶ 588.


for
Harry R. Van Cleve
General Counsel