



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hotel Donuts & Pastries

File: B-227306

Date: September 18, 1987

DIGEST

1. Agency is not precluded from awarding a contract to a bidder whose price is higher than prices it previously offered other contracting activities, where the agency finds the price is reasonable.
2. Contention that estimated requirement for an item is understated and does not reflect the government's actual needs, based on actual requirements under protester's prior contract, is untimely where it is not filed in our Office until after contract award.
3. General Accounting Office will not review affirmative determinations of responsibility unless protester shows possible fraud or bad faith on the part of the contracting officials, or alleges that the solicitation contains definitive responsibility criteria which have been misapplied; evidence regarding awardee's financial ability to perform contract does not satisfy this burden of proof.
4. Decision of contracting activity to base determination of responsibility on bidder's performance under prior contracts does not constitute bad faith conduct. A preaward survey is not a legal prerequisite to an affirmative determination of responsibility; contracting officer have broad discretion whether to conduct surveys and may use other information available to them concerning a bidder's capability.

DECISION

Hotel Donuts & Pastries protests the award of a contract to Da Donut Shop under invitation for bids (IFB) No. DLA137-87-B-13-2910, issued by the Defense Subsistence Office-Hawaii (DSO), a field activity of the Defense Logistics Agency. The IFB contemplated multiple awards of fixed-price requirements contracts for a variety of baking and chip products during the period of June 1 through November 30, 1987. Da Donut was the low bidder, and received the award,

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for one group of items, "Doughnuts, Fresh." Hotei primarily contends that for an individual item in this group--filled or topped doughnuts--Da Donut offered a higher price than its price under other current contracts. Additionally, Hotei alleges that the estimated requirement for this same item was grossly understated, which resulted in higher prices, and that Da Donut is not financially capable of performing the contract. We deny the protest in part and dismiss it in part.

In objecting to Da Donut's pricing, Hotei apparently relies on the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.813-1 (1986), which provides that the government generally should not purchase items at a price that exceeds the lowest price at which such items are sold to the public, unless the difference is clearly justified by the seller. Hotei's reliance on this regulation is misplaced since the regulation applies to negotiated procurements and not to sealed bidding, utilized here. In this regard, the standard clause implementing FAR, 48 C.F.R. § 15.813-1, although reprinted in the IFB, was not checked as being applicable. Under these circumstances, the DSO properly could accept a higher price if it determined the price was reasonable. See FAR, 48 C.F.R. § 14.407.2. As Da Donut's price here (\$2.44 per dozen) only marginally exceeded its price under other contracts (\$2.20), there is no basis for questioning the reasonableness of the price.

Hotei next contends that the estimated requirement provided in the IFB for this item was understated and did not reflect the contracting activity's actual needs for this product. Based on its experience under a prior contract, Hotei states that this estimated requirement was in fact less than one month's actual needs. Our Bid Protest Regulations require that allegations based upon alleged improprieties in an IFB that are apparent prior to bid opening, be filed prior to bid opening in order to be considered. 4 C.F.R. § 21.2(a)(1) (1987). Since Hotei did not raise this basis of protest until after award, despite the fact that it is based on information Hotei had before bid opening, it is dismissed as untimely. The W.H. Smith Hardware, Co., B-219405.2, Oct. 25, 1985, 85-2 CPD ¶ 460.

Finally, Hotei raises numerous concerns regarding Da Donut's financial ability to perform this contract. Referencing an IRS tax lien filed against Da Donut prior to award and a petition of bankruptcy filed by Da Donut's prime stockholder, Hotei questions the contracting activity's affirmative determination of Da Donut's responsibility, especially in view of the activity's failure to conduct a preaward survey. DSO reports it determined Da Donut

responsible based on its satisfactory performance of prior contracts.

Our Office will not review affirmative determinations of responsibility unless the protester shows possible fraud or bad faith on the part of the contracting officials, or alleges that the solicitation contains definitive responsibility criteria which have been misapplied. Arcwel Corp., B-224835, Oct. 1, 1986, 86-2, CPD ¶ 373. The latter exception clearly does not apply, and the evidence furnished by Hotei only involves factors that could be considered, along with others, in determining Da Donut's responsibility; it does not show possible fraud or bad faith. See Teledyne CME, B-223609, Sept. 23, 1986, 86-2 CPD ¶ 308 (protester must demonstrate by virtually irrefutable proof that agency had specific or malicious intent to harm protester in order to show that a responsibility determination was made in bad faith). Further, a preaward survey is not a legal prerequisite to an affirmative determination of responsibility; contracting officials have broad discretion concerning whether to conduct surveys and may use other information available to them concerning a bidder's capability. See Hercules Painting, B-223647, July 31, 1986, 86-2 CPD ¶ 131.

The protest is denied in part and dismissed in part.

for 
Harry R. Van Cleve
General Counsel