



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Keal Cases, Inc.
File: B-233370
Date: January 12, 1989

DIGEST

1. The General Accounting Office will not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of the procurement officials or that definitive responsibility criteria in the solicitation were misapplied.
2. Where protesting firm would not be in line for award were its protest sustained, protester does not have the required direct interest in the contract award to be considered an interested party under General Accounting Office Bid Protest Regulations. Allegation that lower priced bidders may be found nonresponsible is too tenuous to support a finding that protester is an interested party to protest an award to low bidder.

DECISION

Keal Cases, Inc., protests the award of a contract to ISM Incorporated under invitation for bids (IFB) No. DAKF24-88-B-1085, issued by the Department of the Army, for the acquisition of transit and storage cases for the Zenith Z-248 computer system. Keal alleges that no bidder, other than Keal, is capable of supplying cases which comply with the IFB's specifications. Keal also argues that ISM's bid should have been rejected as nonresponsive because the descriptive literature it submitted with its bid reveals that its case will not meet the Army's specifications.

We dismiss the protest.

The Army issued the IFB on August 16, 1988, and bid opening was held on September 19. The IFB required descriptive literature. Six bids were received at bid opening; ISM

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submitted the second low bid, and Keal submitted the fifth low bid. The low bidder was determined to be nonresponsive. Following a pre-award survey, ISM was awarded the contract on October 24. Keal then filed its protest on October 27.

In its protest, Keal alleged that other bidders had made a "misrepresentation of fact," presumably in their bids, that they could comply with the specifications. Keal subsequently explained that it was challenging not any particular statement in the other bids, but the ability of the other bidders to satisfactorily perform the contract since there exists only one supplier which manufactures a component of the item in conformity with the specifications and none of the other bidders has a business relationship with that manufacturer or has made arrangements to purchase the component from the particular supplier. Thus, by its assertion of misrepresentation, Keal is merely challenging the ability of the other bidders to comply with the specifications.

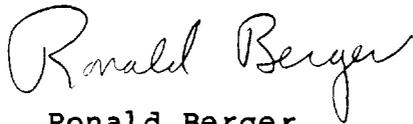
A protest questioning an awardee's ability to comply with the specifications is a challenge to the contracting officer's affirmative determination that the firm is a responsible contractor. TLC Systems, B-231969, Sept. 13, 1988, 88-2 CPD ¶ 238. Here, the contracting officer determined that ISM was responsible.^{1/} Because such a determination is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an agency's affirmative determination of responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation were misapplied. 4 C.F.R. § 21.3(m)(5) (1988); TLC Systems, B-231969, supra. No such showing has been made.

Keal also argues that ISM's bid was nonresponsive because the descriptive literature submitted with its bid does not demonstrate clearly that ISM's case will meet the Army's specifications. Keal is not an interested party under our Bid Protest Regulations to protest the responsiveness of ISM's bid. Our regulations provide that we will only consider a protest by an interested party, i.e., an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the

^{1/} We note that because ISM was determined to be responsible, the agency did not evaluate the responsibility of the other bidders.

failure to award a contract. 4 C.F.R. §§ 21.0(a), 21.1(a) (1988). A party is not an interested party to protest where it would not be in line for award were its protest sustained. Motorola, Inc., B-232843, Nov. 16, 1988, 88-2 CPD ¶ 484. Here, while Keal alleges broadly that no other bidder, including those which submitted lower-priced bids, could supply cases which conformed to the required specifications, this contention, as indicated above, concerns responsibility, and the protester does not allege that any of the other bidders who submitted bids lower than Keal submitted nonresponsive bids. In this connection, we have held that a protester's supposition that lower-priced bidders may be found nonresponsive is too tenuous to support a finding that the bidder is an interested party to protest an award to the low bidder. Eastman Kodak Co.-- Request for Reconsideration, B-220646.2, Mar. 24, 1986, 86-1 CPD ¶ 289. Consequently, even if we determined that ISM's bid was nonresponsive as alleged, Keal would not be in line for award and therefore it is not an interested party under our regulations to protest this issue.

The protest is dismissed.



Ronald Berger
Associate General Counsel