

DECISION

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

FILE: B-207808

DATE: August 30, 1982

MATTER OF: Sundance Helicopters

DIGEST:

1. Proposed award to a small business concern is not objectionable where subsequent to contracting officer's determination that bidder was nonresponsible, Small Business Administration certified firm was competent to perform the contract. Procedures followed by contracting agency were not improper and did not evidence favoritism towards proposed awardee, as alleged by protester.
2. Allegation that IFB was defective, filed five months after bid opening, is dismissed as untimely because GAO's Bid Protest Procedures require protest based upon an alleged impropriety apparent prior to bid opening to be filed prior to bid opening.

Sundance Helicopters protests the proposed award of a contract to David A. Johnson under invitation for bids (IFB) No. F05611-82-B-0047, issued by the Air Force Academy for the provision of sailplane towing services. Sundance alleges that the Air Force improperly permitted Johnson to correct deficiencies in the aircraft it intended to use in the performance of the contract and that the solicitation was defective. The protest is denied in part and dismissed in part.

The purpose of IFB-0047 was to provide for sailplane towing services when military aircraft were not available for that duty. Included in the solicitation were specifications which set forth the minimum requirements to be met by the contractor's aircraft and the minimum qualifications required of all its pilots.

Of the three bids opened on March 8, 1982, Johnson was low and Sundance was second low. In the course of determining Johnson's ability to perform the contract--that is, his responsibility--the Academy inspected the aircraft which Johnson intended to use and concluded that they did not meet the IFB's specifications in a number of respects. The contracting officer then requested the Defense Contract Administration Services Management Area - Denver (DCASMA) to perform a preaward survey of Johnson which included his technical capability, plant facilities and equipment, financial capability, labor resources and performance record. DCASMA - Denver found all factors to be satisfactory except for "plant facilities and equipment," which it found unsatisfactory essentially for the same reasons as the Academy. DCASMA - Denver therefore recommended that no award be made to Johnson. The contracting officer then determined that Johnson was not a responsible prospective contractor.

Because Johnson was a small business firm, the contracting officer was required to refer the question of Johnson's responsibility to the Small Business Administration (SBA) for possible issuance of a Certificate of Competency. 15 U.S.C. § 637(b)(7)(A) (Supp. III 1979); Defense Acquisition Regulation (DAR) § 1-705.4. This was done and SBA subsequently certified that Johnson was competent to perform the contract. As the contracting officer correctly points out in his report to our Office, this determination by the SBA is by statute conclusive upon the contracting agency. Upon receipt of the SBA's determination, therefore, the Academy could have made award to Johnson. Nevertheless, the Academy decided that a reinspection of Johnson's aircraft was in order since SBA had not actually conducted a technical inspection of the aircraft against the IFB's specifications and the Academy did not want to be in the position of awarding a contract which it immediately would have to terminate for default for safety considerations. After reinspecting the aircraft, the Academy found them satisfactory. Award of the contract to Johnson has been withheld pending resolution of Sundance's protest.

In its initial protest, Sundance alleged that Johnson had "failed to provide" aircraft which conformed to the solicitation specifications and that "the award procedure has been improperly conducted in that protracted consideration of, and negotiation with, the apparent low bidder, who is nonresponsive, has prejudiced the protester." When asked by the contracting officer if it could be more specific, in order that the agency could reply more precisely to the protester's concerns, Sundance replied that "the apparent low bidder submitted non-complying aircraft for initial inspection [and] that the procedure followed by the Department of the Air Force in qualifying the aircraft was improper and untimely." After receipt of the Air Force's report, Sundance reiterated its understanding that Johnson's aircraft were not found satisfactory upon the initial inspection and objected to Johnson being given additional time and a "second chance" to submit aircraft conforming to the specifications.

There is no question that Johnson was the low bidder and that his bid was responsive since he unqualifiedly offered to provide the sailplane towing services. The only issue was whether Johnson was capable of performing these services in accordance with the specifications--that is, whether he was a responsible bidder. We understand the protester's position to be that as an experienced contractor, Johnson should have shown, at the initial inspection by Academy personnel, that he was prepared to perform the contract with aircraft which met the specifications and, upon Johnson's failure to do so, the contracting officer should have determined Johnson to be nonresponsive and awarded the contract to Sundance instead of providing Johnson additional time and a "second chance" to establish its responsibility.

The procedures followed by the contracting officer in this case were proper and the record does not evidence "favoritism" toward Johnson, as alleged by the protester.

A contracting officer must affirmatively determine that a prospective contractor is responsible before making award to it. DAR § 1-904.1. Before making such a determination, the contracting officer must have information sufficient to satisfy himself that the prospective contractor meets the required standards. DAR § 1-905.1. Generally speaking,

a "responsible" prospective contractor is one who has financial resources adequate to assure performance of the contract; is able to comply with the required performance schedule; has a satisfactory record of performance and integrity; and be otherwise qualified and eligible to receive an award. DAR § 1-903.1.

In dispatching an aircraft inspection team from the Academy and in requesting a preaward survey by DCASMA - Denver, the contracting officer was assembling the information which he needed in order to determine whether Johnson was a responsible prospective contractor. The contracting officer could not make this determination in the affirmative because of deficiencies in Johnson's aircraft. Once the contracting officer determined that Johnson was nonresponsible, however, he was not free to proceed with award to Sundance. This is because Congress has provided for small business concerns the "second chance" to which Sundance objects, through a statute which states in part:

" * * * A Government procurement officer * * * may not, [for reasons relating to a bidder's responsibility] preclude any small business concern * * * from being awarded such contract without referring the matter for a final disposition to the [Small Business] Administration."

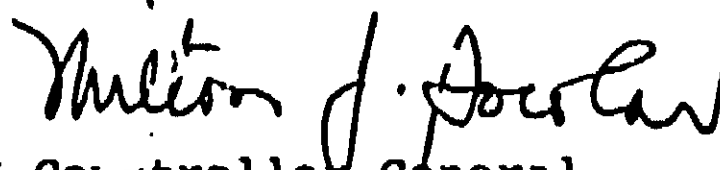
15 U.S.C. § 637(b)(7)(A)(Supp. III 1979). Such a referral was made in this case and the SBA certified that Johnson was competent to perform the contract. As a matter of law, SBA's determination settled the question of Johnson's responsibility and the Academy could have proceeded with an award at that point. Although there was no legal requirement that the Academy then conduct a second technical inspection of Johnson's aircraft, we cannot be critical of the Academy's desire to reassure itself that the deficiencies had been corrected. Had the deficiencies not been corrected, the Air Force, as it states in its report, could have appealed the issuance of the COC to avoid the possible default situation. The protester has pointed to no specific statutory or regulatory provision which was violated by these preaward procedures and we have found none.

We received the protester's comments upon the agency report on August 20, 1982. In addition to basically reiterating its position which we have discussed above, the protester argues for the first time before our Office that the IFB contained a "major deficiency" in that it did

not require that contractors be certified and operate under the rules of Part 135 of the Federal Aviation Regulations. Sundance maintains that the present IFB should be canceled and that these services should be resolicited under an IFB which incorporates the requirements of Part 135.

Our Bid Protest Procedures require that protests based upon an alleged impropriety in an invitation for bids be filed prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1982). Since Sundance did not raise this ground for protest until five months after bid opening, it is clearly untimely and is dismissed.

The protest is denied in part and dismissed in part.



Acting Comptroller General
of the United States