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DECISION



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

FILE: B-215689.3

DATE: January 7, 1985

MATTER OF: Carolina Waste Systems, Inc.

DIGEST:

1. Bid may not be rejected as nonresponsive because it is not accompanied by evidence indicating that the bidder has a state certificate required by the solicitation. A requirement that the bidder have a specific license or permit relates to responsibility, that is, capability to perform, and the bidder should be afforded a reasonable opportunity after bid opening to furnish evidence that it meets the requirement.
2. Contracting officer has discretion not to conduct a preaward survey, and unless the protester shows possible fraud or bad faith on the part of such an official or the failure to apply definitive responsibility criteria, GAO will not review a decision not to conduct a preaward survey.
3. GAO will deny a protest alleging that an agency awarded a contract before resolution of a protest. A deficiency of this sort is only procedural and does not affect an otherwise valid award.

Carolina Waste Systems protests the award of a contract to Mark Dunning Industries under solicitation No. N62467-84-B-0473. Issued by the Naval Facilities Engineering Command, it covered the collection and disposal of wastes at the Charleston, South Carolina, Naval Base. We deny the protest in part and dismiss the remainder.

Carolina contends that Mark Dunning's bid should have been rejected as nonresponsive because, contrary to the requirements of the solicitation, Mark Dunning

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failed to submit with its bid a certificate indicating that its disposal site was state certified. Carolina also alleges that the Navy improperly made the award without conducting a preaward survey and before resolution of its protest filed with the agency.

The record shows that the Navy initially rejected Mark Dunning's bid as nonresponsive because it failed to comply with section 00001, paragraph 15.1, of the solicitation, which provided:

"DISPOSAL SITE: The contractor shall submit with bid copy(s) of certificates verifying that disposal site(s) to be used are state certified for the type of wastes to be delivered."

Upon reconsideration, the Navy determined that this requirement actually concerned bidder responsibility, rather than bid responsiveness. Mark Dunning was therefore permitted to furnish a copy of the state certificate after bid opening.

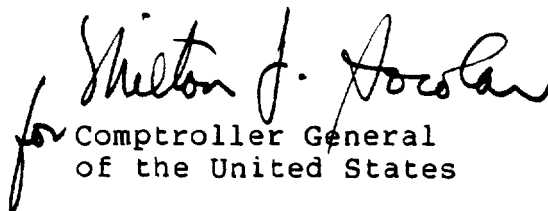
We have held that a requirement that a bidder obtain a specific license or permit concerns the bidder's responsibility, that is, its performance capability, rather than bid responsiveness, that is, its promise to perform. This is true even where the solicitation requires that a bidder possess such license or permit at time of bid opening. U.S. Jet Aviation, B-214093, May 25, 1984, 84-1 CPD ¶ 575; Day Detectives, Inc., B-208312.2, Oct. 28, 1982, 82-2 CPD ¶ 379. Being a matter of responsibility, the bidder should be afforded a reasonable opportunity after bid opening to furnish evidence of the required certification. Id. Accordingly, the Navy's actions regarding this matter were proper, and we deny the protest on this basis.

Carolina also contends that the Navy made the award without first conducting a preaward survey to determine whether Mark Dunning was financially or physically capable of performance. Preaward surveys are often used by contracting officers in determining the responsibility of a prospective contractor. See United Aircraft and Turbine Corp., B-210710, Aug. 29, 1983, 83-2 CPD ¶ 267.

They are not, however, a legal prerequisite to an affirmative determination of responsibility. Contracting officials have broad discretion regarding whether to conduct surveys and may use other information available to them concerning the bidder's capability. Therefore, we will not review such a decision or a subsequent affirmative determination of responsibility unless a protester shows possible fraud or bad faith or the part of contracting officials or that definitive responsibility criteria in the solicitation have not been applied. Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 CPD ¶ 264. Since neither has been alleged here, we will not question the contracting officer's decision not to conduct a preaward survey or his determination that Mark Dunning is a responsible contractor, and we dismiss the protest on these bases.

Carolina's final concern is the fact that the Navy awarded the contract before resolution of its protest to it. Assuming the validity of Carolina's contention, we have consistently held that an agency's failure to follow applicable regulations in making an award notwithstanding a protest is merely a procedural defect that does not affect an otherwise valid award. Creative Electric Inc., B-206684, July 15, 1983, 83-2 CPD ¶ 95.

The protest is denied in part and dismissed in part.


for Comptroller General
of the United States