



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SKM Manufacturing Company
File: B-222521, B-222522
Date: July 31, 1986

DIGEST

1. Protests against the rejection of offeror's unsolicited, revised low proposals as late, filed more than 10 days after the basis of the protest was known, are untimely under General Accounting Office Bid Protest Regulations.
2. Award may be made on the basis of initial proposals, without discussions, where the solicitation notified offerors that award might be made without discussions and acceptance of an initial proposal will result in the lowest overall cost to the government at a fair and reasonable price based on adequate competition and prior cost information.
3. Protest of the awardee's financial and technical capabilities to perform the contract concern the contracting agency's affirmative determination of the awardee's responsibility which will not be questioned absent a showing of fraud or bad faith by procuring officials or that definitive criteria in the solicitation were not met.
4. Since as the fourth low offeror, the protester's direct economic interest is not affected by the award of the contract, protester is not an interested party under General Accounting Office Bid Protest Regulations to protest the contracting agency's failure to conduct discussions and its determination of the awardee's responsibility.

DECISION

SRM Manufacturing Company (SRM) protests the awards of firm-fixed-price contracts to Chatel Engineering Company (Chatel) under requests for proposals (RFP) Nos. F41608-86-K-1234 (1234) and F41608-85-K-2722 (2722) issued, as small business set-asides, by the Department of the Air Force, Kelly Air Force Base, Texas for inner and outer tubes for a practice bomb. SRM contends that the contracts should have been awarded to SRM based on its unsolicited, low revised offers submitted after the closing date for receipt of proposals. SRM also alleges that discussions should have been held prior to award, that Chatel is not financially responsible because of a negative financial evaluation in a preaward

survey, and that Chatel is not technically capable of performing the contracts.

The protest filed under RFP 1234 is dismissed in part and denied in part. The protest filed under RFP 2722 is dismissed.

FACTS

Both RFPs advised offerors that the contract would be awarded to the responsible offeror whose offer, conforming to the solicitation, was the most advantageous to the government, cost and other factors considered. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.215-16 (1985). The contract award provision also advised that initial offers should contain the offeror's best terms from a cost and technical standpoint because award may be made on the basis of initial offers received. Id. The RFPs further stated that late offers, received after the closing date, would be subject to the FAR provision governing late submissions. See 48 C.F.R. § 52.215-10.

Seven offerors responded to RFP No. F41608-86-R-1234 by the January 17, 1986 closing date and nine proposals were received in response to RFP 2722 by the February 4, 1986 closing date. Chatel was the low offeror under both solicitations.^{1/} On February 5, 1986, the Air Force notified all firms responding to RFP 2722 that Chatel was the low offeror in order to allow for challenges of Chatel's small business size status. Subsequently, on February 12, 1986, the protester hand-delivered to the contracting agency unsolicited, revised proposals for both procurements that reduced its prices below Chatel's. The Air Force advised SRM that its revised proposals were late submissions under the terms of the RFPs and could not be considered. Chatel was awarded the contract under 1234 on April 9, 1986 and the contract under 2722 on April 11, 1986.

RFP 1234

SRM contends that it should have been awarded the contract under RFP 1234 because its revised proposal was lower than Chatel's proposal. Under our Bid Protest Regulations, a protester is required to

^{1/} Under RFP 1234, Chatel was initially the second low offeror but became the low offeror after the apparent low offeror received a negative evaluation on its preaward survey and did not file for a Certificate of Competency with the Small Business Administration.

file its protest with our Office not later than 10 days after the basis of the protest was known or should have been known. 4 C.F.R. § 21.2(a)(2) (1986). Since SRM was informed on February 12, 1986 that its revised proposal would not be considered, this protest contention, filed with our Office on April 21, 1986, is dismissed as untimely.

With respect to SRM's contention that discussions were required to be held prior to award of the contract, the Air Force states that it determined pursuant to FAR, 48 C.F.R. § 15.610(a), that discussions were not required. Under that FAR provision, discussions are not required where the solicitation notifies offerors of the possibility that award might be made without discussions, discussions are not held prior to contract award, and acceptance of an offeror's initial proposal will result in the lowest overall cost to the government at a fair and reasonable price based on the adequacy of competition and prior cost information. Since the record indicates that the requirements of FAR, 48 C.F.R. § 15.610(a), were met in this case, the contract was properly awarded without discussions. See Technical Servs. Corp., 64 Comp. Gen. 245 (1985), 85-1 CPD ¶ 152.

SRM also alleges that Chatel is not financially responsible because it received a negative financial evaluation as the result of a preaward survey, and that it lacks the technical capability to perform the contract. The negative financial evaluation only related to the inadequacy of Chatel's accounting system for the purpose of administering progress payments. The preaward survey also found that Chatel was satisfactory in all other areas, including technical capability. The Air Force subsequently determined that Chatel was responsible.

A preaward survey's findings are not determinative of a prospective contractor's responsibility; rather, the authority to determine a prospective contractor's responsibility rests with the contracting agency which is vested with a wide degree of discretion and business judgment. See Martin Elecs., Inc., B-221248, Mar. 13, 1986, 86-1 CPD ¶ 252. The agency has broad discretion in determining the degree of reliance that should be placed on a preaward survey and may make independent evaluations. Id. Our Office will not question the agency's affirmative responsibility determination unless there is a showing of fraud or bad faith by contracting officials, or that definitive responsibility criteria in the solicitation have not been met. Trail Blazer Servs., B-220724, Feb. 12, 1986, 86-1 CPD ¶ 275. In this case, the protester has not shown that either exception applies to the Air Force's independent evaluation of Chatel's financial responsibility or to the Air Force's acceptance of the preaward survey's finding that Chatel was responsible in all other areas.

SRM's protest under RFP 1234 is dismissed in part and denied in part.

RFP 2722

SRM's protest against the rejection of its late revised proposal submitted under RFP 2722 also is untimely because, as under RFP 1234, the Air Force advised the protester on Feb. 12 that the proposal would not be considered and SRM failed to file its protest within the 10-day period for protest. 4 C.F.R. § 21.2(a)(2), supra.

With regard to the allegations concerning discussions and the awardee's responsibility, SRM is not an interested party to protest these matters. An interested party is defined in the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(a) (Supp. II 1984), and our implementing regulations, 4 C.F.R. § 21.0(a), as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." Since SRM is the fourth low offeror, its economic interest is not directly affected by the award of the contract to Chatel and its protest under RFP 2722 is dismissed.

for *Samuel E. Fries*
Harry R. Van Cleave
General Counsel