Circs

The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

Matter of: Dayton Bag and Burlap Co.

File: B-225758

Date: April 30, 1987

## DIGEST

1. Refusal by Small Business Administration to issue low bidder a certificate of competency constitutes an affirmation of the contracting officer's finding of nonresponsibility.

2. Protest that certain equipment test should not have been required by solicitation is dismissed as untimely since it was filed after bid opening.

3. As a general matter, an agency cannot waive a material specification, simply because the low bidder cannot meet it, to take advantage of a low price.

## DECISION

Dayton Bag and Burlap Co. protests the rejection of its bid under General Services Administration (GSA) invitation for bids (IFB) No. 2FC-EB0-A4421-S for burlap sand bags. The IFB required that the sand bags be manufactured in accordance with a military specification which in turn required them to pass a test that entails dropping the bag, filled with 44 pounds of sand, from 2-1/2 feet. Dayton was found nonresponsible after GSA determined the firm's bags could not pass the test.

We dismiss the protest in part and we deny it in part.

On bid opening day, September 3, 1986, GSA received six bids, with Dayton, the incumbent, submitting the lowest one. Subsequently, the contracting officer determined that Dayton was nonresponsible because Dayton's bags failed the drop test and because a preaward survey report indicated that Dayton was not financially responsible to perform the contract. Since Dayton is a small business concern the contracting officer referred the nonresponsibility determination to the Small

Business Administration (SBA) under the certificate of competency (COC) procedures. Initially, the SBA decided to issue a COC to Dayton based on its finding that the firm was financially responsible and its belief that the drop test had been eliminated from the IFB. After GSA informed the SBA that the drop test was in fact a requirement of the solicitation, the SBA revised its decision, declining to issue a COC to Dayton. GSA then rejected Dayton's bid.

Dayton filed its protest with our Office on February 24, 1987. The firm admits that its bags cannot pass the drop test, but asserts that the test should be performed with the bag folded in half so that the sand is distributed evenly throughout the entire bag. Dayton further protests that the drop test should not have been included in the solicitation anyway because no company can supply bags that will pass this test as performed by GSA, and that since the test is going to be deleted from the next solicitation for these bags GSA should waive it here to take advantage of Dayton's low cost. After receiving GSA's report Dayton also asserted that the SBA in fact did not refuse to issue the firm a COC.

Initially, we note that the record contains a February 27 letter from the SBA to GSA informing that agency that a COC will not be issued to Dayton. By statute, the SBA's denial of a COC constitutes conclusive affirmation of a contracting officer's finding of nonresponsibility. See 15 U.S.C. § 637(b)(7) (1982); Consolidated Marketing Network, Inc., B-218104, Feb. 12, 1985, 85-1 C.P.D. ¶ 190.

We recognize that it appears Dayton might have been issued a COC but for the drop test requirement of the IFB and GSA testing method. Nevertheless, we will not consider the merits of Dayton's argument that the test should not have been included in the IFB at all, or the firm's view of how the drop test should be performed. In its administrative report, GSA states that the Army, the agency responsible for the drop test, verified that GSA properly performs the test, that is, that the bag is not to be folded in half as Dayton would like. The record is clear that Dayton, before submitting its bid, knew precisely how bags were tested under the military specification, and knew that its bags would not pass. Our Bid Protest Regulations, 4 C.F.R. part 21 (1986), do not permit a firm to compete against a specification it knows it cannot meet and later, when the agency confirms that knowledge, protest that the specification was included improperly. Instead, they require that an issue be raised when corrective action, if warranted, is most practicable and, thus, least burdensome on the conduct of the procurement. See Shaw Aero Development, Inc., B-221980, Apr. 11, 1986, 86-1 C.P.D. ¶ 357. In the case of a specification that

a prospective bidder thinks is unwarranted or otherwise improper, that time is before bids are due. 4 C.F.R. § 21.2a. Since Dayton did not file its protest until February 24, well after the September 3 bid opening date, these issues clearly are timely.

Dayton also asserts that since the drop test will be eliminated from the next solicitation, the test should be waived for this procurement and the contract should be awarded to Dayton. GSA responds that firms that bid to furnish bags that would pass the drop test would be prejudiced by such an award, since their bids were higher than Dayton's because their bags are of higher quality.

We deny this aspect of the protest. As a general matter, the integrity of the competitive bidding system precludes an agency from awarding a contract based on specifications different from those under which the competition was conducted, simply because the low bidder cannot meet the advertised requirements. U.S. Materials Co., B-216712, Apr. 26, 1985, 85-1 C.P.D. ¶ 471. Here, we find reasonable GSA's point that the inclusion of the drop test requirement in the IFB affected bid prices to the advantage of firms like Dayton whose bags could not pass the test. Further, we have no reason to believe that the other competitors also cannot pass the test, as Dayton suggests, or that there are no other firms that would have submitted bids but for the test requirement. In these circumstances, award to Dayton would not be appropriate.

The protest is dismissed in part and denied in part.

Seymour Efros

for Harry R. Van Cleve
General Counsel