The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Haz-Tad, Inc.

File: B-232025.2

Date: July 26, 1989

DIGEST

Where protester, who had submitted low bid, was on list of suspended contractors at time of the award, and where second low bidder refused to extend acceptance period, agency reasonably concluded that award to second low bidder was in the government's interest.

DECISION

Haz-Tad, Inc., protests the rejection of its low bid and the award of a contract to Honeywell, Inc. under invitation for bids (IFB) No. DAAB07-88-B-J101, issued by the Army Communications-Electronics Command (CECOM). The protester argues that the agency improperly made award to Honeywell, the second low bidder, before the Department of the Navy could lift the protester's suspension from doing business with the government.

The protest is denied.

On July 1, 1987, the agency issued request for technical proposals (RFP) No. DAAB07-87-R-J042, for production and delivery of digital group multiplexer (DGM) equipment,1/ as the first step of a two-step procurement in accordance with Federal Acquisition Regulation (FAR) subpart 14.5 (FAC 84-12). Six offerors submitted technical proposals, and on March 18, 1988, the agency asked the five offerors whose proposals had been determined technically acceptable to submit bids based on those proposals, for a firm, fixed-price contract no later than April 18.

1/ Such equipment is used as an element of the Army's TRI-TAC tactical communications system; the DGM equipment links field units with larger shelter-mounted units to create a secure communication network.

The protester submitted the low bid, $69,120,064; Honeywell has submitted the second low bid in the amount of $69,618,646. The third low bid of $103,191,302 was submitted by ISC Defense Systems. On May 11, Honeywell wrote to the contracting officer challenging the protester's status as a regular dealer or manufacturer under the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35-45 (1982). The protester's responses created doubt in the contracting officer's mind as to the legal entity submitting the bid, that is, whether he should consider Haz-Tad, Inc., the corporation, as the bidder or whether Haz-Tad had intended to bid as part of a joint venture with its chief stockholders, Hazeltine Corporation and Tadiran, Ltd., an Israeli corporation. On July 6, the contracting officer advised the protester that he was rejecting its bid as nonresponsive because of his inability to determine the identity of the real party in interest in Haz-Tad's bid.

Haz-Tad, Hazeltine and Tadiran protested to our Office. In our initial decision dated November 17, 1988, we found that apart from the post-bid opening submissions by the protester, there was no evidence that the bid had been signed by Haz-Tad as part of a joint venture and no evidence of ambiguity in the bid as originally submitted. We therefore sustained Haz-Tad's protest, holding that its bid was responsive in that the identity of the bidder was established as Haz-Tad, Inc., a corporation owned and controlled by a joint venture consisting of Hazeltine and Tadiran. We recommended further that if the protester did in fact qualify as a regular dealer or manufacturer, and if otherwise appropriate, the contract should be awarded to Haz-Tad, Inc. Haz-Tad, Inc. et al., 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486.

After we issued our decision, Honeywell, on December 19, 1988, applied to the U.S. Claims Court for an injunction against an award to Haz-Tad. On January 13, 1989, that court issued an order permanently enjoining the agency from awarding a contract to Haz-Tad, Inc. Honeywell, Inc. v. United States, No. 698-88C (Cl. Ct. Jan. 13, 1989). Haz-Tad immediately appealed this decision to the U.S. Court of Appeals for the Federal Circuit.

Meanwhile, on January 6, 1-week before the Claims Court decision, Hazeltine and two of its corporate officers had pled guilty to Federal criminal violations, as a result of the Ill Wind investigation into improper acquisitions of sensitive procurement information by defense contractors. As a consequence, on January 11, the Navy had suspended Hazeltine from contracting with the government; on February 13, the Navy suspended several affiliates of

Hazeltine, including Haz-Tad, from contracting with the executive branch of the federal government.

On April 5, 1989, the Court of Appeals issued a decision reversing the order of the Claims Court and ruled that Haz-Tad's bid was responsive, as our Office had previously determined. Honeywell, Inc. v. United States, Nos. 89-1155,-1204 (Fed. Cir., April 5, 1989). On April 6, Honeywell advised the agency that it would not extend its bid acceptance period, which was due to expire on the next day. With regard to Haz-Tad's suspension, the record shows that the contracting officer was advised on Friday, April 7, that the suspension was under review and that the Navy's "best guess" was that lifting the suspension would occur in approximately 1 to 2 weeks. Consulting with the requiring activity, the contracting officer learned that further delay in awarding the DGM contract would prevent fielding millions of dollars of critical communications systems. The contracting officer was concerned that if Haz-Tad remained ineligible for award, and if Honeywell's bid expired, the agency would have no option but to resolicit or to pay $34 million more to the next low bidder. He therefore determined that it was in the government's interest to accept Honeywell's bid before it expired rather than risk the uncertainty regarding the lifting of Haz-Tad's suspension. On April 7, the agency awarded a contract to Honeywell. On Tuesday, April 11, the Navy lifted the suspension of Hazeltine and its affiliates, and Haz-Tad filed this protest.

The protester argues that by awarding a contract to Honeywell as it did, the agency failed to follow the recommendation of our Office and failed to implement the Court of Appeal's decision in good faith. The protester asserts that upon issuance of the Court of Appeals decision, the agency advised the protester that it was processing an award to Haz-Tad, which would take about a week, by which time the suspension of the protester would have been lifted. The protester argues that the agency: (1) was unreasonable in making an award to Honeywell on April 7 when it knew that the Navy would be lifting Haz-Tad's suspension within a few days and (2) showed bad faith and violated applicable regulations by executing an award to Honeywell within 48 hours after advising the protester that it would need a week to process an award to Haz-Tad.

Based on the record before us, we do not find that the Army knew on April 7, that the suspension would be lifted on April 11. Rather, the record shows that on April 7, the Army only knew that Haz-Tad's suspension could be lifted in 1 or 2 weeks.

Haz-Tad alleges that Honeywell caused the dilemma that the contracting officer faced on April 7 by originally appealing our decision of November 17, and then by refusing to extend its bid for any period beyond April 7. Therefore, Haz-Tad argues that Honeywell should not benefit from these actions.

We do not agree that the award was improper. The fact was that on April 7, Haz-Tad remained suspended and thus ineligible for an award, and the contracting officer could not be certain that Haz-Tad's suspension would be lifted anytime soon. While Haz-Tad argues that the contracting officer should have known that the lifting of the suspension was imminent, the record does not support such an assertion. As indicated above, the Navy simply gave the Army its "best guess" that the suspension would be lifted in 1 to 2 weeks.

Thus, there's no evidence that the Army made this award on April 7 to deny award to Haz-Tad or to frustrate our recommendation or the Court's opinion. Rather, we find that the contracting officer's action in making the award on April 7 was motivated by his determination that the public interest would be served thereby. Moreover, the Army was not precluded by its internal Army notice procedures from making a prompt award when deemed necessary to do so. Accordingly, we find no basis to question the award.

The protest is denied.

for James F. Hinchman
General Counsel