

Timmerman



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Johnny F. Smith Truck & Dragline Service, Inc.

File: B-236984

Date: January 2, 1990

DIGEST

1. Protester's contention that the contracting officer's determination of responsibility in the face of awardee's bankruptcy proceedings amounted to bad faith is denied where actions by bankruptcy court secured payment to subcontractors and suppliers for this contract and awardee recently satisfactorily performed other similar contracts for the agency.
2. Protest that alleged defect in certificate of sufficiency submitted with bid bond made low bid nonresponsive is denied since certificate serves only to assist the contracting officer in determining the surety's responsibility.
3. A protester has no standing to claim an error in a competitor's bid since it is the responsibility of the contracting parties--the government and the low bidder--to assert rights and present the necessary evidence to resolve mistake questions.
4. Protest that agency should not have accepted protester's bid because it is too low, is dismissed since there is no legal basis on which to object to the submission or acceptance of a below cost bid. Protester's suggestion that awardee will not be able to perform at the price it bid concerns the contracting officers affirmative determination of responsibility, a matter which our Office does not generally review.

DECISION

Johnny F. Smith Truck & Dragline Service, Inc., protests the proposed award of a contract to V. Keeler & Co., Inc., under invitation for bids (IFB) No. DACW29-88-B-0107 issued by the U.S. Army Corps of Engineers for levee construction at Lake Pontchartrain, Louisiana. Smith contends that Keeler is not

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a responsible bidder because it lacks the financial capability required to perform the contract. Smith also asserts that Keeler's bid is nonresponsive because the certificate of sufficiency that it submitted with its bid bond was defective.

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

At the bid opening on February 14, 1989, the agency received nine bids in response to the IFB. Keeler was the apparent low bidder with a price of \$3,945,197.18. The protester was the next low bidder with a price of \$4,900,792. By letter of February 15, the Corps asked Keeler to verify its bid since it was considerably lower than the government estimate of \$5,742,019. Keeler verified its bid and explained that its low price was due to its plan to use an alternate "borrow pit." ^{1/} On March 31, Smith filed an agency-level protest asserting that Keeler was not responsible and that its bid was nonresponsive. The agency made an affirmative determination of Keeler's responsibility on August 16 and by decision dated August 25 denied Smith's protest. Smith then filed its protest with our Office.

The protester asserts that award to Keeler would be improper since documents filed in the firm's current bankruptcy proceedings demonstrate that it lacks the financial capability to perform the contract. The protester points to the numerous liens against Keeler as evidence that it neither has nor will have access to financial resources adequate to perform the contract.

Generally, our Office will not review protests against affirmative determinations of responsibility absent a showing of possible fraud or bad faith on the part of contracting officials. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1989); Nationwide Glove Co., Inc., 67 Comp. Gen. 151 (1987), 87-2 CPD ¶ 624. The protester argues that the contracting officer's determination of responsibility in the face of Keeler's financial difficulties and its low bid price is so unreasonable as to constitute bad faith.

First, the fact that a contractor is undergoing bankruptcy does not require a finding of nonresponsibility. Hugo's Cleaning Serv., Inc., B-228396.4, July 27, 1988, 88-2 CPD ¶ 89. Second, contracting officials are presumed to act in good faith and the mere fact that in their judgment Keeler was a responsible firm in spite of its financial trouble and

^{1/} A borrow pit is a source for the soil used in the construction of a levee.

low bid price will not support a finding that their action was tantamount to bad faith. See Air Tractor, Inc., B-228475, Feb. 5, 1988, 88-1 CPD ¶ 115.

In any event, we have no reason to question the Corp's determination that Keeler is responsible. The record indicates that the contracting officer considered the contractor's recent and successful performance of other similar contracts was also aware of and considered the ongoing bankruptcy proceedings in reaching his decision to award to Keeler. In particular, the record shows he took into consideration the fact that the bankruptcy court ordered payments under the contract to be segregated and that suppliers and subcontractors for this work would have priority over other claimants to the proceeds from this contract.

Smith also contends that Keeler's bid should have been rejected because the certificate of sufficiency the firm submitted with its bid were defective. The IFB required bidders to provide a bid bond (SF 24) in the amount of 20 percent of the bid price or \$3,000,000 whichever was less. Keeler submitted a bond for the appropriate amount backed by two individual sureties. Because Keeler was bonded by individual sureties, it was required to submit an affidavit of individual surety and a certificate of sufficiency (SF 28) for each of the two sureties. See Federal Acquisition Regulation § 28.202-2. Smith contends that defects in the certificate of sufficiency for each of the sureties made Keeler's bid nonresponsive. The protester argues that instead of using the language set forth in SF 28, Keeler's sureties submitted separate letters which attested to the facts set forth in "previous" affidavits rather than those set forth in the sureties' current affidavits submitted with the bid on this procurement.

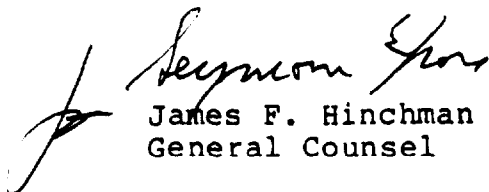
The purpose of a bid guarantee is to secure the liability of a surety to the government in the event that the bidder fails to fulfill its obligation to execute a written contract. The sufficiency, and thus the responsiveness, of a bid guarantee depends on whether a surety is clearly bound by its terms. Noslot Pest Control, Inc., 68 Comp. Gen. 396 (1989), 89-1 CPD ¶ 396. The documents accompanying the bid bond, specifically the affidavit of individual surety and certificate of sufficiency, are separate from the bid bond itself and serve only to assist the contracting officer in determining the responsibility of an individual surety. North American Construction Corp.--Request for Reconsideration, B-236672.2, Sept. 21, 1989, 89-2 CPD ¶ 264. Therefore, the presence of defects in these documents does not affect the responsiveness of the bid itself.

See Hispanic Maintenance Servs., B-218199, Apr. 22, 1985, 85-1 CPD ¶ 461.2/

The protester also contends that the award to Keeler is unconscionable because Keeler's bid is too low, approximately 31 percent below the government estimate.

To the extent Smith is claiming Keeler made an error in its bid, a protester does not have standing to claim an error in a competitor's bid since it is the responsibility of the contracting parties--the government and the low bidder--to assert rights and present the necessary evidence to resolve mistake questions. Esilux Corp., B-234689, June 8, 1989, 89-1 CPD ¶ 538. Additionally, the record shows that Keeler has twice verified its bid in writing in response to the Corps' requests. To the extent Smith is claiming that Keeler's bid is simply too low, there is no legal basis to object to the submission or acceptance of a below-cost bid. MEI Environmental Services-Reconsideration, B-231401.2, et al., June 16, 1988, 88-1 CPD ¶ 579. If Smith is claiming that Keeler will not be able to perform at the price it bid, this constitutes a challenge to the contracting officer's affirmative determination of responsibility, a matter which we have already resolved. See Keyes Fibre Co., B-225509, Apr. 7, 1987, 87-1 CPD ¶ 383.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel

2/ In a footnote to its protest, Smith suggested that the assets of Keeler's sureties, comprised in large part of interests in apartment complexes, were not sufficiently liquid to permit them to be readily available to the government. The agency's conclusion that the assets listed were acceptable to support the bonds was an affirmative responsibility determination which we will not review absent a showing of possible fraud or bad faith on the part of contracting officials. See Noslot Pest Control, Inc., 68 Comp. Gen. 396, supra; Nationwide Glove Co., Inc., 67 Comp. Gen. 151, supra. Neither has been shown here.