

P. Williams



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: All Rite Rubbish Removal, Inc.

File: B-241288

Date: January 31, 1991

Lloyd A. Schmid, Jr., Esq., Brown, Shiels & Chasanov, for the protester.

Scott E. Friedlander, Esq., for Eastern Waste Industries, Inc., an interested party.

Millard F. Pippin, Department of the Air Force, for the agency.

Paula A. Williams, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's affirmative determination of responsibility on the basis that the awardee made false representations in the "representations and certifications" section of its bid is denied where there is no evidence in the record of bad faith on the part of procurement officials. The awardee's errors and omissions in completing the certifications properly were corrected prior to award and the contracting officer considered the accurate information in making his affirmative responsibility determination.

DECISION

All Rite Rubbish Removal, Inc. protests the award of a contract to Eastern Waste Industries, Inc. under invitation for bids (IFB) No. FO7603-90-B-6004, issued by the Air Force for refuse collection and disposal services at Dover Air Force Base, Delaware. All Rite has raised a number of objections to the award, pertaining generally to the agency's determination that EWI is responsible.

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

The solicitation was issued on June 19, 1990, and contemplated the award of a fixed-price contract for a 1-year base period with two 1-year options. Section K of the solicitation contained various standard representations and certifications which bidders were required to complete in order to assist the

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contracting officer in determining bidder responsibility. These certifications include: Federal Acquisition Regulation (FAR) § 52.209-5, "Certification regarding debarment, suspension, proposed debarment, and other responsibility matters," which relates to indictments, convictions or previous debarments or suspensions; FAR § 52.214-8, "Parent company and identifying data," which requires bidders to self-certify whether they are owned or controlled by a parent company; and, FAR § 52.204-3, "Taxpayer identification," pursuant to which bidders are to furnish the tax identification number (TIN) for its common parent.

The Air Force received bids from four firms, including All Rite and EWI. EWI submitted the low bid of \$751,495.20, and All Rite submitted the second low bid of \$771,000. The contracting officer requested a preaward survey of EWI to determine EWI's capability to meet the requirements of the contract. Prior to completion of the survey, All Rite filed an agency-level protest challenging any award to EWI, asserting that the firm made false certifications under the debarment certification clause, the parent company clause and the TIN for common parent clause.

Specifically, the protester alleged that: EWI failed to disclose the relationship between itself, Attwoods Merger Corporation, Industrial Waste Services, Inc. and Attwoods PLC Ltd.; EWI failed to list Attwoods PLC Ltd. as its common parent; EWI failed to provide the TIN for its common parent, Attwoods PLC Ltd.; EWI failed to reveal that directors of EWI are under indictment by the State of Florida for violations of criminal statutes; and, that current directors of EWI, who were also directors of Industrial Waste Services, Inc. have been convicted of criminal offenses in connection with waste hauling contracts in the State of Florida. All Rite also alleged that EWI may not be licensed to do business in the State of Delaware because the firm failed to register as a foreign corporation with the state.

By letter dated September 10, the contracting officer denied the protest finding that the omission of information or incorrect representations in EWI's bid were minor informalities which EWI was allowed to correct. The contracting officer further found that neither EWI, its parent corporation nor the corporate officers identified by All Rite as engaging in criminal activities had been suspended or debarred from doing business with the government. The contracting officer concluded that there was no convincing evidence that EWI lacked integrity or business ethics. On that same day, the agency made award to EWI as the low, responsible, responsive bidder.

The protester alleges that EWI amended the certifications contained in its bid only because of All Rite's agency-level protest, and contends that EWI's bid should have been rejected because EWI's original certifications constituted criminal misrepresentations. All Rite further asserts that EWI still has not made a full and accurate disclosure of the relationship between itself, its parent company Attwoods PLC and its alleged affiliates, Attwoods, Inc. and Industrial Waste, evidencing that the firm lacks integrity and business ethics and should have been determined nonresponsible. The protester maintains the contracting officer acted in bad faith by continuing to find EWI responsible despite knowledge of this information.

To the extent that All Rite is protesting that EWI made material misrepresentations which contravene 18 U.S.C. § 1001 (1988), this constitutes an allegation of criminal conduct which is within the cognizance of the Justice Department, and is outside the scope of our bid protest function. Transcontinental Enters., Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3. Similarly, All Rite's assertion that EWI and its officers are engaged in predatory pricing practices and other violations of the anti-trust laws is a matter for consideration by the Justice Department, and not by our Office under our bid protest function. Industrial Enter. of America, Inc., B-239898, Sept. 18, 1990, 90-2 CPD ¶ 228.

Our Office will not question an agency's affirmative determination of responsibility absent, as pertains here, evidence of possible fraud or bad faith on the part of contracting officials. 4 C.F.R. § 21.3(m)(5) (1990); see also, Krug Int'l, B-232291.2, Feb. 6, 1989, 89-1 CPD ¶ 116. Since procurement authorities are presumed to act in good faith, in order for our Office to conclude otherwise, the record must show that procuring officials had a specific intent to harm the protester. See NFI Management Co., B-238522; B-238522.2, June 12, 1990, 90-1 CPD ¶ 548. Here, the record contains no evidence of bad faith on the part of agency contracting officials.

The record indicates that the contracting officer considered all the allegations concerning EWI's alleged intentional misrepresentations, and the information contained in the preaward survey, and concluded from the information presented that EWI was responsible. In so doing, the contracting officer found that while there were omissions and errors in EWI's certifications they were inadvertent and constituted minor informalities which EWI was allowed to, and did, correct. The representations and certifications clause specifically permits a bidder to make corrections any time prior to contract award if "the [bidder] learns that its certification was erroneous when submitted or has become

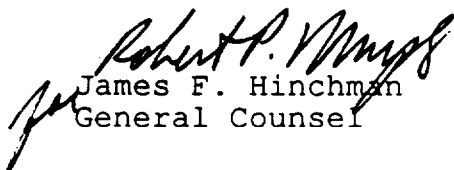
erroneous by reason of changed circumstances." The errors and omissions in EWI's certifications were properly corrected prior to the contract award. Intermountain Elec., Inc., B-236953.2, Jan. 31, 1990, 90-1 CPD ¶ 143.

Although the protester argues that EWI's certifications were deliberate misrepresentations, the record suggests that the awardee's failure to fully complete the certification provisions was inadvertent. For example, EWI's bid indicates that the company is an affiliate of EWI of Maryland and that it is owned or controlled by EWI of Maryland. The bid documents also disclose that the awardee is an affiliate of Attwoods Company, although the original certification did not identify Attwoods PLC as the common parent. EWI subsequently furnished this information prior to award. Thus, the record supports the contracting officer's finding that EWI's failure to certify correctly was not intentional. Id. Further, the contracting officer made a second affirmative determination of EWI's responsibility on September 4, 1990, taking into consideration the corrected representations and certifications and All Rite's allegations. Thus, it is clear that the contracting officer did not rely on the alleged misrepresentations in making his affirmative determination. See Moorman's Travel Serv., Inc.--Recon., B-219728.2, Dec. 10, 1985, 85-2 CPD ¶ 643.

All Rite's allegation that the agency disregarded the documentary evidence it furnished of EWI's failure to comply with the corporation statutes of the State of Delaware has been refuted by the agency. The Air Force reports that prior to award of the contract, the contracting officer contacted the requisite authorities in Delaware and ascertained that EWI has registered in Delaware as a foreign corporation and does possess a valid license to haul waste in that state.

In sum, while the protester has questioned various aspects of the contracting officer's affirmative determination, there is no evidence that the agency acted in bad faith in finding the awardee responsible. See Krug Int'l, B-232291.2, supra.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel