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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Mid-America Engineering and Manufacturing

File: B-247146

Date: April 30, 1992

Orley Swoveland for the protester.
Major William R. Medsger, Esq., and Joseph M. Picchiotti, Esq., Department of the Army, for the agency.
John M. Melody, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly failed to reconsider nonresponsibility determination based on new information after Small Business Administration's denial of a certificate of competency is denied where, although protester asserts that agency must have been aware of the information before award to another firm, the agency denies such knowledge and the record contains no persuasive evidence to the contrary.

DECISION

Mid-America Engineering and Manufacturing (MEM) protests its rejection as nonresponsible under Department of the Army invitation for bids (IFB) No. DAAA09-91-B-0369, for annunciators for the Bradley Fighting Vehicle System.

We deny the protest.

Bids were opened on August 23, 1991. MEM was the low bidder with a price of $48,607.55 with first article testing, and $46,106.13 without. The Army ordered a preaward survey to determine MEM's responsibility. The survey team responded with a "no award" recommendation based on its determination that MEM lacked adequate financial capability to perform. The contracting officer accepted that recommendation and determined MEM nonresponsible but, since MEM is a small business, referred the negative determination to the Small Business Administration (SBA) for a final responsibility determination under the certificate of competency (COC) program.

SBA found no basis for disagreeing with the Army's determination and notified the agency on December 11 that it declined to issue a COC. On December 23, the agency made award to the next low bidder, D-F Incorporated, at a price of $58,825. Also, on December 23, MEM received notice that two pending claims--under a Department of the Navy, Aviation Supply Office contract (No. N00383-87-C-8989) and an Army Tank-Automotive Command (TACOM) contract (No. DAAE07-89-C-0244)--had been settled in the amounts of $282,794 and $161,413.73, respectively.

By letter dated December 31, MEM protested to our Office that the two settlements would have a significant effect on its financial capability and therefore should be deemed new information warranting referral of the matter back to SBA for another COC review. Although award has been made, MEM maintains that the agency and the preaward survey team were well aware that tentative agreement had been reached on the claims at least as of the time of the survey, and that since the activity had been monitoring the progress on MEM's claims, it is "reasonable to assume" the activity knew sometime prior to issuance of the contract modifications on December 23 that the settlements had been finalized.

The Army responds that the contracting officer did not become aware of the settlements until he received copies of the contract modifications with MEM's December 31 protest, that is, after the award had been made. The agency concedes it was aware of the pending claims and tentative settlement agreements early in the procurement process, but states that, due to their contingent nature, the claims could not be deemed income or accounts receivable under generally accepted accounting procedures, and were accorded less weight in the responsibility determination. The Army concludes that there thus is no basis for now reconsidering MEM's responsibility.

SBA has conclusive authority to determine a small business firm's responsibility by issuing or refusing to issue a COC. Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5. However, where new information bearing on a small business concern's responsibility comes to light for the first time after denial of a COC, but before award, the contracting officer may reconsider his original nonresponsibility determination. Marlow Servs., Inc., 68 Comp. Gen. 390 (1989), 89-1 CPD ¶ 388. On the other hand, where, after SBA's denial of a COC, no new information is presented to lead the contracting officer to determine that the concern is responsible, the Federal Acquisition Regulation (FAR) requires the contracting officer to proceed with award to the next low bidder. FAR § 19.602-4(a) and (c).

We find that the record does not support MEM's assertion that the Army was aware of the final claim settlements before it proceeded with the award to D-F on December 23. The only evidence bearing on the timing of the Army's knowledge of the settlements shows that the Army, as it concedes, was aware of the tentative agreements on the TACOM and Navy contract claims. A September 11 telephone memorandum states, for example, that Navy personnel advised an individual at the activity of the tentative Navy contract settlement, but it also states that the Navy "would not give [the activity] any dollar amount as everything is tentative." Similarly, the preaward survey team was aware of MEM's outstanding contract claims, generally, as indicated by the following statement in the survey report:

> "Mid-America has adopted the accounting policy of recognizing a portion of outstanding claims against the government as other income and receivables when the claim is filed rather than when the claim is settled. The recognition of contingent income and the resulting accounts receivable is not consistent with prior years and is not in accordance with generally accepted accounting principles."

MEM also states that it met with Army officials on October 3 and October 9 to discuss the firm's financial capability, at which time MEM states it advised the Army of the dollar amounts of the tentative settlements.

This evidence does not establish that the Army learned of the final approval of the tentative settlements (in the form of contract modifications) prior to December 23. MEM's evidence of the timing of the Army's knowledge consists solely of its assertion that the agency had been monitoring the settlements and thus "had reason to know about the [claim settlement] developments prior to award of the contracts." However, while it does appear that the Army had been generally aware that the claims were moving toward settlement throughout the fall of 1991, there is no indication that the Army was so closely monitoring this progress that it knew of the final approval prior to December 23 or, indeed, prior to December 31, the date the contractor states in an affidavit the Army first knew of the settlements, when it received copies of the modifications as part of MEM's protest.

Nor was there any legal obligation that the Army monitor the process in the settlement process. While an agency may reconsider a nonresponsibility determination based on new information, there is no requirement that an agency continue

to monitor a bidder's financial condition up until award after a COC has been denied to obtain such information, or that it automatically reconsider the bidder's responsibility based on that information whether or not the bidder has requested that it do so. The obligation to timely and clearly establish the capability to perform a contract generally lies with the bidder. See generally Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23. Thus, the burden ordinarily is on the bidder to present all relevant information to the agency along with a request that the agency reconsider its responsibility determination. Here, it is not clear at precisely what time the award was made on December 23, but it is clear that MEM did not promptly notify the Army of the modifications, and apparently never requested reconsideration of its responsibility. Based on this record, then, the agency properly proceeded with the award to D-F after it was advised that SBA had declined to issue a COC to MEM. See McGhee Constr., Inc., B-233763.2, Apr. 4, 1989, 89-1 CPD ¶ 352.

MEM also argues that SBA's denial of the COC is called into question by the fact that the preaward survey--the document on which MEM claims the COC denial was based--did not reference the TACOM and Navy contracts and the existence of tentative settlements for both. While MEM is correct that the tentative settlements were not specifically referenced in the survey, the COC review is based on information furnished by both the agency and the bidder. MEM was obliged to apply for the COC, and to timely present all of the information the firm believed was relevant to SBA's review. Technical Ordnance, Inc., B-236873, Jan. 19, 1990, 90-1 CPD ¶ 73. In fact, the record shows that MEM did specifically bring these two tentative settlements to SBA's attention. Further, we find nothing in the record that shows that SBA disregarded this information.

The protest is denied.

for James F. Hinchman
General Counsel