



Comptroller General
of the United States

Washington, D.C. 20548

Morrow
148571

Decision

Matter of: Sweepster Jenkins Equipment Co., Inc.

File: B-250480

Date: February 8, 1993

Sterling C. Scott, Esq., Jenner & Block, for the protester.
Scott Allen for Schmidt Engineering & Equipment, Inc., an
interested party.

Matthew Geary, Esq., Defense Logistics Agency, for the
agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Where there is no evidence that the individual that signed the Certificate of Procurement Integrity was authorized to bind the company at the time the bid was submitted and another individual, who was authorized to bind the company, signed the bid, the bid cannot be accepted for award, since it cannot reasonably be found that the company would be bound to the certificate's terms.

2. Invitation for bids (IFB) should be canceled and the requirement resolicited, where the low bidder's Certificate of Procurement Integrity is executed by the individual responsible for preparing the bid, but this person did not have the authority to bind the bidder at the time of bid opening; bidder was reasonably misled by the Federal Acquisition Regulation § 52.203-8 certificate included in the IFB, which requests the certifier to be the "officer or employee responsible for the preparation of this offer," but does not state that the individual executing the certificate must have the authority to bind the bidding entity.

DECISION

Sweepster Jenkins Equipment Co., Inc. protests the proposed award of a contract to Schmidt Engineering & Equipment, Inc. under invitation for bids (IFB) No. DLA730-91-B-4017, issued by the Defense Logistics Agency, Defense Construction Supply Center (DCSC), for front-mounted rotary snow sweepers. Sweepster contends that Schmidt's bid must be rejected as nonresponsive for failing to contain a properly executed Certificate of Procurement Integrity.

We sustain the protest.

DCSC issued the IFB on February 22, 1991, to procure 84 front-mounted rotary snow sweepers, with an option to purchase an additional 131. The IFB contained the Certificate of Procurement Integrity clause set forth at Federal Acquisition Regulation (FAR) § 52.203-8, as required by FAR § 3.104-10(a), since the contract was expected to exceed \$100,000. The clause implements the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423(e) (1988 and Supp. II 1990), which precludes federal agencies from making award to a competing contractor¹ unless the officer or employee of the contractor responsible for the offer or bid certifies in writing that neither he nor those employees who participated in preparation of the bid has any information concerning violations or possible violations of the OFPP Act. See Holly's Inc., B-246444, Mar. 4, 1992, 92-1 CPD ¶ 261. The activities prohibited by the OFPP Act involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information. Id.

The certification requirement obligates the officer or employee responsible for the bid or offer to become familiar with the prohibitions of the OFPP Act, and imposes a requirement to make full disclosure of any possible violations of the OFPP Act, and to certify to the veracity of the disclosure. Mid-East Contractors, Inc., 70 Comp. Gen. 383 (1991), 91-1 CPD ¶ 342. Additionally, the signer of the certificate is required to collect similar certifications from all other individuals involved in the preparation of the bid or offer. 41 U.S.C. § 423(e) (1) (B).

The certification clause incorporated in the IFB stated the following:

"(a) Definitions. The definitions at FAR § 3.104-4 are hereby incorporated in this provision.

"(b) Certifications. As required in paragraph (c) of this provision, the officer or employee responsible for this offer shall execute the following certification:

¹Under 41 U.S.C. § 423(n), a competing contractor is defined as any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity. See FAR § 3.104-4.

"CERTIFICATE OF PROCUREMENT INTEGRITY

"(1) I, _____ (name of certifier), am the officer or employee responsible for the preparation of this offer and hereby certify that . . . I have no information concerning a violation or possible violation of . . . the [OFPP] Act . . . occurring during the conduct of this procurement [DLA700-91-B-4017].

"(2) . . . I further certify that, to the best of my knowledge and belief, each officer, employee, (. . . .) agent, representative, and consultant of _____ (Name of Offeror) . . . is familiar with, and will comply with, the requirements of the Act . . .

"(3) Violations or possible violations:
(. . . ENTER NONE IF NONE EXIST) _____

[Signature of the officer or employee responsible for the offer and date]
[Typed name of the officer or employee responsible for the offer]."

On June 3, 1992, DCSC received four bids in response to the IFB. Schmidt submitted the lowest bid of \$11,774,953.08, while Sweepster's bid was next low at \$12,077,007.51. On its Standard Form (SF) 33, under the space provided for the name and title of the person authorized to sign the bid, Schmidt's bid was signed by the company president John W. Schlump. However, in the pertinent spaces of the Certificate of Procurement Integrity clause, Schmidt's bid was executed and signed by Scott Allen, manager of "Sales Support." In addition, Schmidt failed to complete the space for identifying violations or possible violations of the OFPP Act.

Sweepster initially protested the propriety of Schmidt's Certificate of Procurement Integrity certification with DCSC, but filed this protest with our Office on September 24 prior to the resolution of the agency-level protest. The award has been withheld pending our decision.

The certification requirement, which imposes substantial legal obligations, is a material solicitation term and, thus, a matter of responsiveness. See Mid-East Contractors, Inc., supra. Where, as here, a bid's responsiveness is challenged, we review the bid to determine whether the bid represents an unequivocal commitment to perform without

exception the requirements stated in the IFB. Contech Constr. Co., B-241185, Oct. 1, 1990, 90-2 CPD ¶ 264. As a result of the substantial legal obligations imposed by the certificate, and given the express requirement for the certificate to be separately signed, a bid with an improperly executed Certificate of Procurement Integrity renders the bid nonresponsive. See Consolidated Metal Prods., Inc., B-244543, July 15, 1991, 91-2 CPD ¶ 58.

Sweepster argues that Schmidt failed to properly execute the Certificate of Procurement Integrity, which requires the rejection of its bid as nonresponsive. Sweepster contends that the signer of the certificate, Mr. Allen, is not the same individual who signed Schmidt's bid, and thus he cannot be considered the official or employee responsible for Schmidt's bid.

DCSC and Schmidt argue that the OFPP Act does not prohibit separate individuals, both of whom have authority to bind the bidder, from signing the bid and the certificate. DCSC reports that in response to the protest DCSC requested Schmidt to furnish an SF-129, which lists the names of individuals authorized to sign contracts on Schmidt's behalf. Schmidt furnished DCSC an SF-129, dated October 7, 1992, which listed Messrs. Schlump and Allen, as well as another individual, as persons authorized to sign contracts for Schmidt. Schmidt explains that the reason the same individual did not execute the certificate and sign the bid was that the certificate was required to be executed by the person "responsible for the preparation of" the bid and Mr. Allen was responsible for and prepared the bid, while Mr. Schlump was not "responsible for the bid," but had the requisite authority to sign the bid.

The OFPP Act and FAR § 3.104-9 require "the" officer or employee "responsible for the bid or offer" to execute the certificate and to obtain additional certifications from those participating in the preparation or submission of the bid. The regulations implementing the Act do not define who would be considered "responsible for the bid." The legislative history of the Act suggests that the same individual was intended to sign both the certificate and the bid. The report of the House Committee on Government Operations accompanying the bill that became 41 U.S.C. § 423 stated that:

"With regard to contractor certification, it is intended that this clause be made a standard clause in all Government contracts. Thus, when an official or employee of the winning contractor signs a contract, he or she will also be certifying to that company's compliance with the Act. This will reduce drastically the paperwork

requirements on the contractor and at the same time ensure proper compliance with the Act. The Act requires that the certification be made "to the best of that official's or employee's knowledge and belief." This criteria is fashioned after the Truth in Negotiations Act and is intended to operate in a similar manner. The purpose of the requirement is to ensure that the official or employee is in fact responsible for the procurement and not just a figurehead or token official who is assigned the job of certifying for the company." H.R. Rep. No. 911, 100th Cong., 2d Sess. 23 (1988).

While the language of the statute is not so specific, it does distinguish between "the" individual "responsible for the bid," who executes the Certificate of Procurement Integrity, and others who participate in "preparation or submission of the bid," who provide certifications to the individual executing the Certificate of Procurement Integrity. This distinction points to an understanding of the person "responsible for the bid" in a legal sense, *i.e.*, the person with authority at a minimum to submit a bid on behalf of the prospective contractor, whether or not another person actually signs the bid. In our view, the individual executing the certificate must have the authority to bind the bidder because of the significant legal obligations contained in the certificate, and the penalties imposed upon the certifying individual for violating the certificate, as well as the administrative penalties that might be imposed on the contractor for its employee's violation. Indeed, the reason the proper execution of the certificate is regarded as a matter of bid responsiveness is because the legal obligations imposed by the certificate on the employee who executes the certificate and, in effect, on his or her employer, are materially different from those to which they otherwise are bound by signing the bid itself. McMaster Constr., Inc. v. United States, 23 Cl. Ct. 679 (1991); Mid-East Contractors, Inc., *supra*.² The question, then, is whether Mr. Allen was "responsible for the bid," 41 U.S.C. § 423(e)(1), with the authority to bind his employer.

²We agree with DCSC and Schmidt that, based on the language of the statute itself and the implementing regulation, different individuals are not prohibited from signing the bid and the certificate as "responsible for the bid." In other words, more than one individual could have the legal power to authorize a bid on behalf of the contractor. *See, e.g., W.G. Yates & Sons Constr. Co.*, B-248719, Aug. 11, 1992, 92-2 CPD ¶ 97 (three individuals signed the bid on behalf of the joint venture bidder and one of those individuals executed the certificate).

See Mid-East Contractors, Inc., supra; W.G. Yates & Sons Constr. Co., supra.

We find that the record contains no evidence that Mr. Allen, who executed Schmidt's certificate, actually had authority to bind the company to the legal obligations contained in the certificate at the time Schmidt submitted its bid. While bidders may submit evidence after bid opening to establish the authority to sign a certificate or bid, W.G. Yates & Sons Constr. Co., supra; see Cambridge Marine Indus., Inc., 61 Comp. Gen. 187 (1981), 81-2 CPD ¶ 517; 49 Comp. Gen. 527 (1970), the evidence submitted must reasonably establish that the person who signed the certificate or bid had that authority as of the time of bid opening. See Forest Scientific, Inc., B-192827 et al., Feb. 9, 1979, 79-1 CPD ¶ 188; New Jersey Mfg. Co., Inc., B-179589, Jan. 23, 1974, 74-1 CPD ¶ 25. If Mr. Allen did not have the requisite authority, Schmidt's bid cannot be accepted for award, since Schmidt's post-opening assertions that it will be bound to the terms of the certificate cannot be considered in determining that firm's responsiveness. See Holly's Inc., supra.

There are a number of factors suggesting that Mr. Allen did not have the authority to bind Schmidt in executing the certificate. In responding to the protest, Schmidt explained the two signatures in the bid by stating that Mr. Schlump is one of several individuals authorized to sign offers on Schmidt's behalf, while Mr. Allen was the individual responsible for the preparation of the bid. Schmidt has never asserted or submitted any evidence that Mr. Allen had the requisite authority to bind Schmidt as of bid opening, even though that individual's authority was brought into issue during the course of the protest and Schmidt had been requested by the agency to provide evidence of such authority. The SF-129 submitted to the agency to establish Mr. Allen's authority to sign bids and contracts on behalf of Schmidt was dated October 7, 1992, more than 4 months after bid opening. In addition, Schmidt has offered no explanation for why Mr. Allen did not sign the bid, even though he prepared the bid and executed the certificate; a more senior company official, Mr. Schlump, signed the bid. Mr. Allen's failure to execute the bid in these circumstances suggests that he did not have the authority to do so.

Therefore, Schmidt did not submit a properly executed Certificate of Procurement Integrity.³ We sustain the protest for this reason.

Schmidt points out that the certificate itself uses the term "responsible for the preparation of this offer," and states that Mr. Allen executed the certificate because he was responsible for preparing the bid. The IFB states that "the officer or employee responsible for this offer" must sign the certificate, and the certificate signature line requires the "signature of the officer or employee responsible for the offer." But, Schmidt is correct--in the text of the certificate itself, the certifier is represented as being "responsible for the preparation of this offer." Schmidt's understanding of the language of the certificate is not unreasonable, and Schmidt was evidently misled into having an individual execute the certificate who could not properly do so under the governing statute. Thus, we think the IFB certificate is misleading.⁴ The proper remedy in such a situation is to modify the applicable IFB language, and allow interested firms to submit bids after canceling the solicitation and resoliciting. See Shifa Servs., Inc., 70 Comp. Gen. 502 (1991), 91-1 CPD ¶ 483; Nomura Enter. Inc., B-244993; B-245521, Sept. 6, 1991, 91-2 CPD ¶ 216 (low bidders reasonably misled into not executing the certificate where there was no line for the signature included in the IFB).

For the forgoing reasons, we recommend that the requirement be resolicited, and that bidders be clearly apprised that the individual who executes the certificate must have the actual authority to bind the bidding entity to the obligations contained therein. Under the circumstances, Sweepster is entitled to recover the costs of filing and pursuing the

³Sweepster also contends that Schmidt's bid was nonresponsive for failing to complete paragraph (3) of the certificate; for example, in not inserting the word "NONE." The failure to complete this blank is immaterial and does not render a bid nonresponsive, since it does not affect the bidder's legal obligations under the OFPP Act. See Neighborhood Dev. Corp., B-246166, Feb. 7, 1992, 92-1 CPD ¶ 162; Boardsen Assocs., Inc., B-245876, Jan. 27, 1992, 92-1 CPD ¶ 115.

⁴By letter of today, we are apprising the Federal Acquisition Regulatory Council that the certificate language is misleading, and recommending that the Council revise the language as discussed in this decision, defining the term "responsible for the offer" for the guidance of prospective bidders and offerors.

protest, including reasonable attorneys' fees. 4 C.F.R.
§ 21.6(d) (1992).

Milton F. Anstler
for Comptroller General
of the United States