

Matter of: Schmidt Engineering & Equipment, Inc.

File: B-250480.5

Date: December 17, 1993

Thomas C. Wheeler, Esq., and Vincent Antonacci, Esq., Pettit and Martin, for the protester.

Sterling C. Scott, Esq., Jenner & Block, for Sweepster Jenkins Equipment Co., Inc., an interested party.

Ronald M. Pettit, 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

Agency reasonably decided not to evaluate an option in determining the low bidder under a previously protested invitation for bids where the using activity advised the contracting officer--more than a year after bid opening and less than a month after the issuance of a General Accounting Office decision allowing for an award to the protester--who is the low bidder if the option is evaluated--that the option could no longer be reasonably exercised because of lack of funding; there is no evidence that the agency purposely delayed the award to avoid making award to the protester.

DECISION

Schmidt Engineering & Equipment, Inc. protests the award of a contract for the base quantity to Sweepster Jenkins Equipment Co., 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.

We deny the protest.

DCSC issued the RFP on February 22, 1991, to procure 84 front-mounted rotary snow sweepers, with an option to purchase an additional 131 sweepers, for the Department of the Air Force, Warner Robbins Air Logistics Center. The IFB provided that bids would be evaluated by adding the total price for all options to the total price for the basic

requirement, except when it was determined in accordance with Federal Acquisition Regulation (FAR) § 17.206(b) not to be in the government's best interest. See FAR § 52.217-5. FAR § 17.206(b) provides that the government will only evaluate bids based upon the basic requirement when it is determined that it is not in the best interest of the government to evaluate options, for example, when there is a reasonable certainty that funds will be unavailable to permit the exercise of an option.

By bid opening on June 3, 1992, DCSC received four bids. Schmidt submitted the lowest total bid of \$11,774,953.08 based on both the base and option quantity. Sweepster had the next lowest total bid at \$12,077,007.51. Sweepster's bid price at \$4,401,184 for the base quantity was lower than Schmidt's base quantity bid price of \$4,491,269. At that time, since the Air Force advised DCSC that it was likely that the option would be exercised, Schmidt was determined to be the low bidder.

On June 17, DCSC determined Schmidt to be nonresponsible.¹ Since Schmidt is a small business concern, the question of its responsibility was referred to the Small Business Administration (SBA) for review under the Certificate of Competency (COC) program. On July 24, the SBA notified DCSC of its intent to issue Schmidt a COC, but DCSC furnished the SBA with additional information bearing upon Schmidt's responsibility. After considering the new information, the SBA again advised DCSC of its intent to issue Schmidt a COC on September 4.

Before the COC was issued, however, Sweepster filed, on September 24, a protest at our Office, challenging DCSC's potential award of the contract to Schmidt on the grounds that Schmidt's bid was nonresponsive for failing to include a properly executed Certificate of Procurement Integrity. Because of the protest, the award of the contract was withheld pending our decision. 31 U.S.C. § 3553(c). On November 30, while Sweepster's protest was still pending at our Office, the SBA issued a COC to Schmidt. On February 8,

¹This determination was based upon Schmidt's apparent lack of adequate financial resources due to its recent bankruptcy and above-average debt ratio. DCSC also found that Schmidt's past performance record was deficient because of its affiliation with a company that had defaulted under a prior DCSC contract for the same item.

²Under 15 U.S.C. § 637(b)(7) (1988), the SBA has the authority to conclusively determine the responsibility of small business concerns by issuing or refusing to issue a COC.

1993, our Office sustained Sweepster's protest and found that Schmidt's bid was nonresponsive for failing to include a proper certificate, but recommended resolicitation because the certificate requirement as set forth in the IFB was misleading. See Sweepster Jenkins Equip., Co., Inc., B-250480, Feb. 8, 1993, 93-1 CPD ¶ 111. Both DCSC and Schmidt timely requested reconsideration of that decision. On June 18, we reversed our prior decision, concluding that Schmidt's bid was responsive based on additional evidence furnished to the agency after our prior decision. See Schmidt Eng'g & Equip., Inc.; Defense Logistics Agency--Recon., B-250480.2; B-250480.3, June 18, 1993, 72 Comp. Gen. ____, 93-1 CPD ¶ 470. DCSC reports that it received this decision on June 23.

After receipt of our decision, more than a year after bid opening, DCSC contacted the Air Force on June 29 to determine the likelihood of the option exercise, given the reported base closings and budgetary cutbacks. On June 30, the Air Force initially responded that the option would be exercised, but in a letter on July 16, the Air Force informed DCSC that it did not have funds available that would allow for the exercise of the option. The Air Force advised that this decision was based upon major command realignments, mission changes, base closures, and budget decreases. Since there was a reasonable likelihood that the option would not be exercised, DCSC determined that the option should not be evaluated. Under a reevaluation that only considers the base quantity, Sweepster is the low bidder. DCSC awarded Sweepster the contract on August 6. This protest followed.

Schmidt argues that DCSC deliberately and intentionally sought to prevent award to Schmidt by not making a prompt award to Schmidt after receipt of our June 18 decision and the Air Force's initial advice that the option quantity was still needed. DCSC reports that it did not then make an immediate award to Schmidt because it was updating Schmidt's financial information because more than 6 months had elapsed since the SBA's issuance of the COC. DCSC reports that during this review the Air Force informed DCSC on July 16 that the option would not be exercised.

Schmidt does not argue that there is a current need for the option quantity or deny that it is only entitled to award if the option is evaluated. Indeed, DCSC reasonably decided to reevaluate bids not considering the option when it was apprised that the option could no longer be exercised due to a lack of funds. See Foley Co., 71 Comp. Gen. 148 (1992), 92-1 CPD ¶ 47; Mobile-Modular Express, Inc., B-250790, Feb. 22, 1993, 93-1 CPD ¶ 159.

Instead, Schmidt argues that the failure to make award promptly evidenced a conscious intent on DCSC's part to prevent an award to Schmidt under the IFB. There is no support for Schmidt's position. DCSC's relatively short delay--less than 1 month from receipt of our decision--was not unreasonable, nor is it evidence of an intent by DCSC to avoid an award to Schmidt; DCSC's desire to obtain updated financial information on Schmidt, given its financial history, was understandable, and it is apparent that the initial determination by the Air Force that the option was not necessary was questionable, given the anticipated budgetary cutbacks. Moreover, the agency defended the proposed award to Schmidt against Sweepster's protest and successfully sought reversal of that decision to allow for award to Schmidt--this would hardly be the actions of an agency seeking to avoid an award to Schmidt. Under the circumstances, we find no basis to object to the award to Sweepster.

The protest is denied.

James F. Hinchman
General Counsel