

Protest of)
DWS, INC.) Date: November 6, 1987
Solicitation No. 059990-87-A-P026) P.S. Protest No. 87-100

DECISION

DWS, Inc., protests the contracting officer's determination that it was a nonresponsible bidder on Solicitation No. 059990-87-A-P026 for building maintenance services at the Western Regional Headquarters.

Invitation for Bids (IFB) No. 059990-87-A-P026 was issued by the Western Region Procurement & Materiel Management Service Center on June 9, 1987, with an offer due date of July 15. Four bids were received. The pricing page for one of the bidders, Ogden Allied Building & Airport Services, Inc. (Ogden Allied), could not be located at the time its bid was opened. DWS was the low bidder. After requesting and receiving verification of DWS' bid, the contracting officer ordered a pre-award survey of DWS, which occurred on August 19. On August 20-24, the contract specialist made several calls to agencies which currently have contracts with DWS. This information gathering led to a finding of nonresponsibility dated September 18. The reasons given supporting this determination are as follows:

1. Significant financial weakness as indicated by DWS' application for relief under Chapter 11 of the Bankruptcy Code;
2. Apparently unsuccessful performance on an Army contract in Fort Rucker, Alabama, which is presently in litigation;
3. Doubts as to whether DWS could perform at the low price it had bid and verified;
4. Unduly low number of manhours allotted to contract performance;
5. Use of custodial personnel for landscaping, window washing, and preventive maintenance;
6. Mixed reports from procurement officials in other agencies which had contracts with DWS, some of whom very strongly recommended

7. against award of a contract to DWS;
Failure to satisfy the solicitation's requirement of five years of experience in building maintenance in all categories;
8. Failure of the proposed Stationary Engineer to meet the standards required by the solicitation.

Based on these facts, the contracting officer determined that "DWS does not have the technical capability to perform, does not understand the complexities of the solicitation, has been found to be nonresponsive on other contracts awarded and has some financial problems as determined by their bankruptcy filing". The contracting officer notified DWS by letter dated September 23 that it was nonresponsive and that award had been made to Ogden Allied.^{1/} DWS' timely protest followed.

DWS alleges that the contracting officer's findings are factually inaccurate and constitute a facade for the real reason for DWS' rejection: its Chapter 11 reorganization in bankruptcy. DWS asserts that it has met the five-year experience criteria, having over ten years experience in maintaining facilities and having maintained much more complex facilities than the one at issue here. DWS states that, during the pre-award survey, it made clear to the postal representatives that it would use subcontracted professionals for difficult window washing and landscaping. The proposed Stationary Engineer is said to have the necessary qualifications to perform the contract. DWS also attacks, in general terms, the information from other agencies which impugns DWS' performance capability and notes that it is confident that the Fort Rucker default termination will be overturned. DWS alleges that it is unaware of any other contract on which it has received even a cure notice. Finally, DWS states that the contracting officer's concern about its financial condition shows her lack of understanding of the Chapter 11 reorganization process and that the finding of DWS' nonresponsibility violates 11 U.S.C. '362.^{1/}

DWS also questions the bid opening procedure, noting that the bid opening officer could not find Ogden Allied's price page at the bid opening. DWS states that the bid opening officer declared Ogden Allied's bid to be "unacceptable" and implies that any award to Ogden Allied is improper because its bid was nonresponsive and cannot be made responsive after bid opening.

The contracting officer disputes the facts asserted by DWS. She reiterates DWS only met the experience requirement in one of the many required areas. She supports her findings concerning the inadequate staffing and inexperience of the Stationary Engineer with documentation from other postal technical personnel, and has stated with specificity the mixed evaluations received from other government procurement personnel. While she retracts her allegation that another DWS contract had been terminated for default, she states her concern that DWS' financial resources will be inadequate, especially given the Army litigation in which DWS is currently involved.

^{1/}Award to Ogden Allied (the record low bidder) was possible because the contracting officer has located its pricing page in its bid package after bid opening but before award.

^{2/}This section provides for an automatic stay of the commencement or continuation of all "judicial, administrative or other proceedings" against a Chapter 11 debtor.

She concludes that DWS did not have any "right" to an award, that her determination that DWS was a nonresponsible bidder did not violate 11 U.S.C. '362, and that a determination of responsibility is a business judgment within her discretion based on the facts before her.^{1/}

DWS has responded to the contracting officer's report. Aside from generally denying the contracting officer's assertions, DWS proffers conversations which it has had with procurement officials at the agencies with which the contracting officer received negative comments in which other officials state their satisfaction with DWS' performance. DWS urges this office to conduct its own investigation of these matters and reemphasizes its contention that the only reason it did not receive award was that it is currently involved in a Chapter 11 bankruptcy reorganization.

An interested party (CommAir) has submitted comments which indicate agreement with DWS' questioning of the bid opening procedures. CommAir states that Ogden Allied's bid was rejected because their pricing page could not be found in its bid at the time of bid opening. It feels that the contracting officer's explanation for the subsequent location of Ogden Allied's pricing page is dubious and that the award of a contract to Ogden Allied is in contravention to usual bid opening procedures and is very questionable.

The contracting officer has submitted supplemental comments which notes that the bid opening officer did not declare that Ogden Allied's bid was rejected or was otherwise unacceptable, but that the initial abstract of bids has the hand-written notation "no pricing page located."

Our review of a contracting officer's determination of a bidder's nonresponsibility is limited:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

David W. Baker, P.S. Protest No. 87-53, July 1, 1987, quoting, Craft Products Company, P.S. Protest No. 80-41, February 9, 1981.

The primary issue raised by this protest is the contracting officer's partial reliance on DWS' financial weakness, as indicated by its status as a bankrupt, as a justification for his determination.^{1/} While a petition in bankruptcy does not require a determination of

^{3/}The contracting officer further explains that the pricing page to OgdenAllied's bid was located after bid opening, upon a page-by-page review of its bid. Therefore, since the bid was responsive based on just the documents located in the bid package, the bid was properly considered for award.

^{4/}While our decision does not require us to reach the issue of whether a responsibility determination violates the Bankruptcy Code's automatic stay provisions, we note that similar administrative actions have been held not to violate such provisions. Cf., e.g., In re Fresh Approach, Inc., 49 B.R. 494 (Bankr. Ct. Tx. 1985) (Department of Agriculture denial of license to debtor does not violate automatic stay).

nonresponsibility, and a bidder may not be found to be nonresponsible solely because it is in bankruptcy, a contracting officer may consider the bidder's bankruptcy in her determination of responsibility. See Marine and Industrial Insulators, Inc., P.S. Protest No. 87-31, July 1, 1987; Government Products Corporation, P.S. Protest No. 84-58, December 10, 1984; Dohrman Manufacturing Co., Inc., P.S. Protest No. 84-8, March 13, 1984. That is all the contracting officer has done here. We do not think that his reliance upon the financial weakness of DWS and its status as a Chapter 11 bankruptcy debtor is improper. There is no evidence that the only reason why DWS was found to be nonresponsible was that it was in bankruptcy; indeed, the contracting officer reviewed DWS' overall financial condition, including its status as a bankrupt, before making her conclusion.

Her conclusion is buttressed by the non-financial reasons which she cited as justifications for her finding of nonresponsibility. A recent termination for default, even if currently the subject of litigation, may be considered as part of a responsibility determination. See C&H Enterprises, P.S. Protest No. 84-70, December 6, 1984; James A. Carroll & Sons, P.S. Protest No. 79-42, October 3, 1979. Similarly, the doubts which the contractor had that DWS would successfully perform the contract, based on its low price, low number of manhours, multiple use of custodial personnel, inadequate experience in many of the required maintenance areas, and mixed reports received from other government agencies all support the reasonableness of her finding. PCM 1-902, 1-903.1 (ii). Unsupported allegations, standing alone, do not carry this burden of proof. Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984 and cases cited therein. DWS has failed to carry its burden of proving that the contracting officer's determination was arbitrary or capricious, therefore, we must uphold the determination.

As to the bid opening issue, we note that responsiveness is determined on the basis of the bid submitted at bid opening. Master Molding, Inc., P.S. Protest No. 83-67, January 10, 1984. While there is a conflict over the facts alleged by the contracting officer and the protester, DWS loses even under its version of the facts, as there is sufficient support to uphold the determination that Ogden Allied's bid was responsive. That the contracting officer mistakenly declared a bid to be nonresponsive does not make it nonresponsive if it is, in fact responsive. See Colt Industries, Comp. Gen. Dec. B-225483, March 16, 1987, 87-1 CPD & 288. There is no evidence of any fraud or bad faith on the part of the contracting officer or her representatives in the failure to locate the missing pricing page or its subsequently being found in the bid package, and certainly not the "irrefragable proof" necessary to succeed as to those claims. See Garden State Copy Company, *supra*.

The protest is denied.

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[checked against original JLS 3/9/93]