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Roger Ayer
Proc. II

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-188035 DATE: April 7, 1977

MATTER OF: Pacific Architects & Engineers, Incorporated

DIGEST:

Where agency issues request for proposals which contains broad, general requirement that contractor obtain appropriate licenses and later during course of negotiations modifies its requirement so as to require a specific license, agency did not act improperly in rejecting offer of firm which refuses to apply for required specific license.

Pacific Architects and Engineers, Inc. (PAE) protests the United States Air Force's (Air Force) award of a contract to any offeror other than PAE for the interior painting and repair of 120 family housing units at the Sagamihara Dependent Housing Area, Sagamihara-shi, Kanagawa-ken, Japan, under Request for Proposals (RFP) F62562-76-R-0695. PAE is both the low offeror and the only non-Japanese firm among the 14 offerors proposing under the solicitation. The RFP incorporated by reference the generally worded license requirements of Armed Services Procurement Regulation (ASPR) 7-602.13, entitled "Permits and Responsibilities (1964 JUN)." During the course of negotiations the Air Force was advised by the U.S. Navy Officer-in-Charge of Construction, Far East, that PAE did not have a Japanese license to perform maintenance and construction in Japan. The record indicates that the same issue had previously arisen with regard to several Navy contracts and that award was made by the Navy to PAE notwithstanding the lack of the required license because PAE had made its offer as a joint-venturer in conjunction with a Japanese firm which was in possession of the required license.

Upon learning of PAE's lack of licensing, the Air Force requested all offerors within the competitive range to furnish evidence of such licensing. PAE did not furnish the required evidence. Air Force inquiries at the Japanese Ministry of Construction indicated that the reason PAE could not furnish the evidence was that PAE had never applied for a license. It

is the Air Force's position that the requirements for licensing under Japanese laws are not restrictive or prejudicial to PAE and are required of American contractors pursuant to the Status of Forces Agreement (SOFA) between the United States and Japan. PAE admits that a non-Japanese firm may be licensed, but points out that a condition precedent to such licensing is that a principal of the firm be a Japanese citizen. PAE also notes that the time involved in obtaining a license is approximately one year. PAE questions the Air Force's authority to request that all offerors in the competitive range furnish evidence of licensing. PAE contends that ASPR 3-805.3 only authorizes discussions with offerors in order to advise them of deficiencies in their proposals. PAE takes the position that "/I/ack of information in the proposal as to licenses, when none was required by the solicitation, is not a 'deficiency.'". However, this is merely a corollary to the main issue presented which is whether the Air Force, in a negotiated procurement, can declare a low offeror to be nonresponsible for failure to hold a specific Japanese license where the requirement for such specific license is not found in the solicitation, but rather emerges during the course of negotiations.

Since the solicitation contained only a generally worded license requirement the request for evidence of specific licenses constituted a change in the Government's requirements as defined by ASPR 3-805.4 (1976). This section, which authorizes the agency to change its requirements after the issuance of a solicitation, states that when such changes are made a written modification to the solicitation should normally be issued. In certain instances the regulation provides that offerors may be orally informed of the change if this oral notification is promptly confirmed by a written amendment. Although it is clear that the regulations authorized the Air Force to change its requirements the agency failed to properly follow-up its oral change with a written amendment. However, since all offerors were informed of the change and no offeror complains that it was prejudiced by the lack of a written amendment this omission does not effect the validity of the agency's requirement change.

Turning to the main issue, PAE argues that the Air Force contracting officer does not have the legal authority to deny an award to PAE on the ground that PAE is nonresponsible because of its lack of a license from the Japanese Government. In support of its position PAE cites several of our decisions. Mid American

Movers, Inc., B-187612, February 4, 1977, 77-1 CPD 92, is cited for the proposition that where an Invitation for Bids (IFB) contains a license requirement which is couched in broad, general language, which does not specifically require the obtaining of specific licenses the matter of whether or not such licenses are obtained is a matter soluly between the contractor and the licensing authority and that the presence or absence of a license has no bearing on the award of a contract or the responsibility of a bidder.

Reference is also made to B-125577, October 11, 1955 which was excerpted in later published decisions 51 Comp. Gen. 377 (1971) and 53 Comp. Gen. 51 (1973) which stated in part that,

> "* * * No Government Contracting Officer is competent to pass upon the question whether a particular local license or permit is legally required for the prosecution of Federal work, and for this very reason the matter is made the responsibility of the contractor."

Finally, PAE quotes, with emphasis, the following passage from our decision in Martin Wiberker, Eng., 55 Comp. Gen. 1296 (1976), 76-2 CPD 61:

> "As we have stated in 51 Comp. Gen. 377 (1971), the validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts. We believe the same situation exists in the case of offshore procurement. (Emphasis supplied.)"

It is PAE's view that the foregoing citations should be dispositive of the issue presented.

We do not believe that this case is governed by the decisions cited by PAE. Those decisions all concern situations in which the contracting officer, by use of general language in the solicitation, attempted to insure compliance with licensing requirements that may or may not have been applicable to or enforced against the prospective contractor. In the instant case the contracting officer by his oral request clearly amended the solicitation to include a specific license requirement.

We have held in this connection that the procuring agency may, in exercising its broad discretion in determining a prospective contractor's qualifications to perform a contract, properly include in a solicitation a requirement that offerors have a designated local license regardless of the applicability of that license requirement to the specific procurement involved. See 53 Comp. Gen. 51 (1973).

Accordingly, we believe that it was not improper for the Air Force to amend the solicitation to include a specific license requirement nor do we believe that the agency erred in rejecting PAE's proposal because that firm failed to comply with the specific license requirement.

Accordingly, the protest is denied.

Acting Comptroller General
of the United States