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PL-11
Mr. Pogany

DECISION



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

FILE: B-195913

DATE: March 25, 1980

MATTER OF: Career Consultants, Inc. 4219

DIGEST:

Where IFB provision merely requires in general terms that bidder "comply with all Federal, State, County, and City Codes", failure of bidder to possess specific state license is not a proper basis for a nonresponsibility determination and is not a factor controlling bidder eligibility to obtain Government contract except where contracting officer has reasonable basis for believing that particular state license is required and that bidder's lack of license would likely interrupt or delay performance.

Career Consultants, Inc. (CCI), the second low bidder, protests its rejection under invitation for bids (IFB) No. 28-79-073, a total small business set-aside, issued by the Department of Housing and Urban Development (HUD) for security guard services at an apartment complex in Gary, Indiana. CCI and the low bidder, National Security Services, Inc. (NSS), were rejected by the contracting officer for failure to furnish evidence of compliance with the so-called Anti-Pinkerton Act, 5 U.S.C. § 3108 (1976), and for failure to possess an Indiana state license as a private detective agency. A contract under the solicitation was awarded to the third low bidder, Peay's 4221 - ~~Detective Agency, Inc. (PDA)~~, for a twelve month period commencing September 16, 1979.

HUD concedes that the contracting officer erred in requiring evidence of compliance with the Anti-Pinkerton Act (see James B. Nolan Company, Inc., B-192482, September 26, 1978, 78-2 CPD 232), and also states that the contracting officer should have referred the nonresponsibility determination of the low bidder, based on failure to possess a state

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[Protest Against Bid Rejection]

license, to the Small Business Administration (SBA) for consideration under its certificate of competency (COC) program. In this regard, HUD concurrently sent SBA a copy of its agency report to our Office and now believes that "these responsibility issues should be resolved by the Small Business Administration prior to any action to terminate this contract."

The IFB merely required in general terms that contractors "comply with all Federal, State, County, and City Codes". Where a solicitation contains only a general requirement that the contractor have all necessary licenses and permits to perform the contract but does not indicate a specific State or local license which is required, we have consistently held that a contracting officer should not have to determine what the State or local requirements may be, and the responsibility for making such a determination is correctly placed with the prospective contractor. 53 Comp. Gen. 51 (1973) and cases cited therein. We have also held that the failure of a low bidder to obtain a license required under State or local law is not a proper basis upon which to reject the low bidder where the solicitation merely states in general terms that all State or local licenses must be obtained by the successful bidder, and that such failure could not affect the eligibility of a bidder to be awarded a Government contract but was rather a matter to be resolved between the contractor and State and local authorities. See B-165274, May 8, 1969; B-125577, October 11, 1955.

The only exception to the rule precluding the contracting officer from determining a bidder nonresponsible for failure to possess a state or local license (in circumstances where the solicitation does not specify which State/local licenses are mandatory) are situations where the contracting officer reasonably determines (based on indications from State authorities) that enforcement attempts by the State are likely and that there is a reasonable possibility that such enforcement attempts could interrupt and delay performance under the contract if awarded to the unlicensed contractor. See What-Mac Contractors, Inc., B-192188, September 6, 1979, 79-2 CPD 179. No such circumstances are apparent here.

Accordingly, we must conclude that the contracting officer could not properly consider any state licensing requirement in making a responsibility determination under this solicitation. Consequently, the negative determinations with respect to NSS and CCI were invalid and no referral to SBA is necessary. However, we cannot recommend award to either CCI or NSS.

NSS did not protest rejection of its bid and in fact, we did not receive any communication from NSS evidencing expression of interest in CCI's pending protest until February 5, 1980, several months after rejection of NSS's low bid and the filing of CCI's protest. NSS's letter to our Office was apparently filed in response to HUD's January 4, 1980 report which acknowledged agency error. In this letter, NSS states that it could have complied with the solicitation's licensing requirements shortly after award and prior to contract performance. We do not believe that NSS, under these circumstances, should be permitted to revive its bid after months of inaction, especially where its initial silence upon being informed of the rejection of its bid (subsequent to bid opening and exposure of competitors' prices) could reasonably be construed as the result of a conscious and deliberate business decision to acquiesce in the rejection of its bid for sound economic reasons, e.g., profitability and availability of alternative markets based on information available only after bid opening.

Similarly, we do not believe award to CCI, the second low bidder, would be consistent with the statutory and regulatory provisions requiring award to the low bidder. See 41 U.S.C. § 253 (1976) and 41 C.F.R. § 1-2.407-1 (1979). Stated somewhat differently, CCI did not suffer any prejudice as a result of the contracting officer's erroneous nonresponsibility determination simply because, as the second low bidder, it would never have been entitled to the award if the proper regulatory procedures had been followed. Under the circumstances, CCI has not suffered any deprivation of legitimate and recognized economic interests as a result of the agency's error. We do not believe, therefore, that our Office should, in effect, "award damages" to a "nonaggrieved plaintiff" by recommending award to CCI.

Generally, when an agency has made an improper award, our Office would recommend that the contract be terminated for the convenience of the Government, if feasible, and that the agency resolicit its requirements for the balance of the contract term. However, in determining whether it is in the best interest of the Government to undertake action to terminate an improperly awarded contract, we have taken into consideration factors such as the seriousness of the procurement deficiency; the degree of prejudice to other offerors or the integrity of the competitive procurement system; the good faith of the parties; the extent of performance; the cost to the Government; the urgency of the procurement; and the impact on the user agency's mission. Honeywell Information System, 56 Comp. Gen. 505 (1977), 77-2 CPD 256.

We note that PDA has already satisfactorily performed for more than 6 months of the current 12 month contract term and that the contract does not contain any option periods. We must therefore weigh the factors militating against disturbing the award with the benefits to be gained by recommending termination and resolicitation. In view of the extent to which the contract has been performed and the lack of compelling economic or equitable considerations with respect to either CCI or NSS, we do not believe that this case warrants our recommending termination. We are, nevertheless, bringing this matter to the attention of the Secretary of HUD by letter of today and recommending that appropriate action be taken to preclude a recurrence of this error.



For The Comptroller General
of the United States



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

B-195913

March 25, 1980

The Honorable Moon Landrieu
The Secretary of Housing and Urban Development

Dear Mr. Secretary:

Enclosed is a copy of our decision of today on the protest of Career Consultants, Inc. (CCI), wherein we conclude that the contracting officer could not properly consider any state licensing requirement in making a responsibility determination under invitation for bids (IFB) No. 28-79-073.

While we are not recommending that the current contract be terminated for the convenience of the Government, we do recommend that appropriate steps be taken to preclude a recurrence of the situation which gave rise to the protest. Please advise us of the action taken on this recommendation.

Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Fowler".

For The Comptroller General
of the United States

Enclosure