

DeGeorge



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Southern Nevada Communications

File: B-241534

Date: February 11, 1991

Sam Zalman Gdanski, Esq., for the protester.
Michael D. Lindsey, for SpectraComm, an interested party.
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
Steven W. DeGeorge, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A low bid is not unbalanced where there is no evidence that the bid contained enhanced prices for any items.
2. Whether a bidder will comply with requirement that employees hold certificates of training and competence to perform certain maintenance services prior to their starting work is a matter of contract administration which is the responsibility of the agency and not within the purview of the General Accounting Office's bid protest function.
3. The necessity of a business license in a particular state or locality is generally a matter between the contractor and the issuing authority and will not be a bar to a contract award, absent a specific licensing requirement in the solicitation.

DECISION

Southern Nevada Communications protests the award of a contract to SpectraComm under invitation for bids (IFB) No. F29651-90-B-0028, issued by the Department of the Air Force for the maintenance of base land mobile radio (LMR) equipment. Southern contends that the bid submitted by SpectraComm was unbalanced and that SpectraComm failed to

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comply with certain technical certificate and business licensing requirements.^{1/}

We deny the protest in part and dismiss it in part.

The IFB, issued July 11, 1990, sought bids to provide maintenance service for a base year and 4-option years on LMR equipment located at Holloman Air Force Base and its surrounding area in New Mexico. Detailed requirements governing performance under the contract were set forth in a performance work statement attached to the IFB. Included among these was a requirement that, before starting work, employees hold certificates of competency issued by the Land Mobile Radio Industry, and in data encryption standards for Motorola LMR equipment. Bid opening was on August 10.

The Air Force received five bids by the opening date, with SpectraComm the apparent low bidder, and the protester next in line. On August 14, Southern submitted a protest to the contracting officer alleging that SpectraComm did not exist as a legal entity at the time of bid submission. The contracting officer requested a preaward survey of SpectraComm, the result of which was a recommendation for award. On September 12, certificates of technical training and competence in the area of LMR equipment maintenance were submitted to the Air Force by SpectraComm for certain of its employees. On September 28, the contracting officer denied Southern's agency protest and made award to SpectraComm as the low responsible, responsive bidder.

The protester first contends that the award was improper because SpectraComm's bid was unbalanced. As basis for this contention, Southern relies solely upon a comparison between SpectraComm's prices and its own in one area of non-recurring costs, and concludes that SpectraComm's relatively lower costs in that area are the result of "low-balling."

Before a bid can be rejected as unbalanced, it must be found both mathematically and materially unbalanced. A bid is mathematically unbalanced only where it is based on nominal

^{1/} Initially, the protester also argued that SpectraComm had engaged in improper collusive bidding by virtue of its attempt to subcontract certain work under the contract to another bidder. The agency responded to this argument in its report. In its comments to the agency report, however, Southern did not attempt to rebut the agency's position or substantiate its contention. Thus, we consider the protester to have abandoned this issue and we will not consider it further. Tenavision, Inc., B-236985.2, Jan. 23, 1990, 90-1 CPD ¶ 94.

prices for some of the items and overstated prices for other items. Thus, in order to show that a bid is mathematically unbalanced, the protester must demonstrate that the bid contains both understated and overstated prices. OMSERV Corp., B-237691, Mar. 13, 1990, 90-1 CPD ¶ 271. Southern does not allege that any of the prices in SpectraComm's bid were overstated--in fact SpectraComm's bid is low in all areas of work as well as for the base year and each of the option years. We thus have no basis to find the bid unbalanced. Moreover, reliance by a protester, as here, on a comparison to its own prices alone to support its conclusion is insufficient to show that another bidder's prices are unbalanced. Unidynamics/St. Louis, Inc., B-232295, Dec. 21, 1988, 88-2 CPD ¶ 609.

The protester next contends that SpectraComm's bid was nonresponsive because the firm failed to comply with the IFB requirement mandating that employees hold certain certificates of technical training and competence in the area of LMR equipment maintenance. The Air Force responds that it was not necessary for this requirement to be met at the time of bid submission, but that under the terms of the IFB, the certificates could be obtained by the employees at any time before their starting work under the contract.

We agree. The solicitation plainly states that the contractor's employees must hold these certificates "before starting work" under the contract. There simply is no requirement that the certificates be obtained prior to bid submission or, for that matter, even prior to award. As such, the requirement at issue is a performance obligation. Whether SpectraComm is capable of meeting that requirement is a matter of responsibility. Here, the agency has determined that SpectraComm is responsible and we will not review such an affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of the contracting officials or that definitive responsibility criteria in the solicitation have not been met. Bid Protest Regulations, 4 C.F.R. § 21.3(m) (5) (1990); Standard Mfg. Co., Inc., B-236814, Jan. 4, 1990, 90-1 CPD ¶ 14. Southern does not allege bad faith and as we stated above, the wording of the certificate requirement shows that it is a performance obligation rather than a definitive responsibility criteria. Computer Support Sys., Inc., B-239034, Aug. 2, 1990, 69 Comp. Gen. ____, 90-2 CPD ¶ 94.2/

2/ In its comments to the agency's report, the protester argued that to interpret the certificate requirement as a performance obligation rather than a definitive responsibility criteria results in an ambiguous solicitation. We disagree.

(continued...)

As a final matter, Southern argues that SpectraComm should have been found either nonresponsive or nonresponsible because it allegedly was not a legal entity at the time of bid submission or award. In this regard, the protester asserts that SpectraComm, although a legal partnership, was not properly licensed to do business in New Mexico until October 17 and therefore was not a legal entity with capacity to enter into enforceable contracts until that time. The Air Force responds that the preaward survey conducted on SpectraComm was positive and revealed no reason to question the capacity of SpectraComm as a legal entity. The agency also reports that SpectraComm received a capitalization loan from the Small Business Administration prior to submission of bids, which in the agency's view also evidenced the existence of the firm.

We do not believe that the Air Force made an improper award in these circumstances. We have no basis upon which to disagree with the agency's conclusion that the SpectraComm partnership is a viable legal entity. To the extent there is a particular requirement for a state or local business license for the bidder to engage in the business of radio repair, that is generally a matter between the contractor and the issuing authority, and will not be a bar to a contract award absent a specific requirement in the solicitation. It may however be considered in determining the bidder's responsibility. See Technology Advancement Group; B-238273; B-238358, May 1, 1990, 90-1 CPD ¶ 439. In this case, the IFB does not express a business license requirement of any sort and we have already indicated that we will not review the agency's affirmative responsibility determination under the circumstances here. We therefore do not find the award improper.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel

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As indicated, in our view, the requirement is clearly stated and subject to only one reasonable interpretation, i.e., that it is a performance obligation. To be timely, a protest against this clear requirement had to have been filed prior to bid submission. 4 C.F.R. § 21.2(a)(1).