



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Service Associates, Inc.

File: B-253050

Date: August 4, 1993

Richard D. Lieberman, Esq., Sullivan & Worcester, for the protester.

Frank T. Dvorak, Jr., for Flagship Investigation & Security, Inc., an the interested party.

Sharon Swain, Esq., Department of Housing and Urban Development, for the agency.

Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's rejection of bid from small business firm on the basis that firm did not possess, at the time of award, license required under state law for firm to engage in the business of providing security guard services is sustained since the rejection was, in fact, a determination that a small business bidder was nonresponsible--a matter which was required to be referred to the Small Business Administration for certificate of competency review but was not.

DECISION

International Service Associates, Inc. (ISA), a small business concern, protests the rejection of its low bid under invitation for bids (IFB) No. DU203B930000156, issued by the Department of Housing and Urban Development (HUD) for security guard services. The protester contends that its bid was improperly rejected on the basis that the firm did not possess a valid Maryland private detective agency license at the time of award.

We sustain the protest.

The IFB, issued on March 12, 1993, contemplated the award of a firm, fixed-price contract for security guard services to protect tenants of the Hanlon House apartment complex in Maryland for a period of 6 months; HUD determined that there was a critical need for the guard services because of the development's location in a "drug-infested" community. Due

to the immediate need for the services, HUD declared the existence of an unusual and compelling urgency and solicited bids from a limited number of sources, pursuant to Federal Acquisition Regulation (FAR) § 6.302-2, under the authority of 41 U.S.C. § 253(c)(2) (1988).

Section C of the IFB, the statement of work, included the following provision entitled "Compliance with Law":

"The Contractor shall comply with all [f]ederal, [s]tate, and [c]ity [c]odes and laws applicable to such service at time of award and shall obtain at his own expense all permits, licenses, bonds, etc. required by such codes and laws in the performance of the services specified herein. All guards performing security guard patrol services on the property shall carry a gun while on duty assignment at this project."

Maryland state law, at Annotated Code of Maryland, Business, Occupations and Professions § 13-701(c), provides that:

"A person may not engage in, attempt to engage in, or offer to engage in the business of providing security guards for hire in the State unless licensed as a private detective agency by the Superintendent."

The IFB did not require that evidence of the bidders' possession of a Maryland private detective agency license be provided with the bid or before award. The IFB, which did not preclude subcontracting to meet the solicitation's requirements, contained the clause at FAR § 52.219-14(b)(1) which provides that at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the awardee.

Two bids were received by bid opening on April 2. ISA submitted the apparent low bid at a unit price per hour per guard of \$13.33 (a total dollar amount of \$172,756.80); Flagship Investigation & Security, Inc. bid a unit price per hour per guard of \$14.72 (a total dollar amount of \$190,771.20). At bid opening, ISA informed HUD that it did not have a Maryland private detective agency license but that it intended to apply for one in the immediate future. Several days after bid opening, ISA informed HUD that it intended to enter a subcontract agreement with a firm (The Travers Organization, Inc.) that possessed a current Maryland private detective agency license to perform the services until ISA's license application was approved. (The protester estimated the application process to take several weeks, after which time ISA proposed to perform all of the services to ensure compliance with the IFB's 50-percent rule

limiting the costs associated with subcontracting.)
Flagship provided evidence that it was licensed in Maryland to provide the services.

On April 6, HUD's contracting personnel contacted the Maryland State Police and were told that a private detective agency license application for ISA could not be readily located; HUD was also told that it would take approximately 3 months to process an application and issue the license. After determining that ISA was "ineligible for award" because the bidder "did not possess a [d]etective [l]icense as required by Maryland [s]tate law by the time of contract award," the contracting officer rejected the protester's bid and awarded the contract to Flagship on April 8.¹ The contracting officer further determined that since ISA was found to be "ineligible" for "award under applicable laws and regulations," citing FAR § 9.104-1(g), the matter did not have to be referred to the Small Business Administration (SBA), pursuant to FAR § 19.602-1(a)(2)(i), for certificate of competency review. This protest followed.² The agency made a decision to continue performance for urgent and compelling reasons. The contract expires on October 15, 1993.

If a licensing requirement does not obligate a bidder to possess or show the ability to obtain a particular license before award, it is a contract performance requirement that does not affect a decision to award a contract. IBI Sec. Serv., Inc., B-240495.2, Feb. 28, 1991, 91-1 CPD ¶ 241. Since the IFB here does not require bidders to provide

¹The contracting officer interprets Maryland's licensing provision, quoted above, to prohibit a contractor's compliance through subcontracting. HUD, however, provides no legal authority for that interpretation. We note that in other procurements involving various other states' licensing requirements where a solicitation, as here, did not preclude subcontract agreements, subcontracting was considered an acceptable method of compliance with state licensing requirements. See, e.g., Honolulu Marine, Inc., B-248380, Aug. 6, 1992, 92-2 CPD ¶ 87; Kim Van Co., Inc., 69 Comp. Gen. 584 (1990), 90-2 CPD ¶ 17. Whether or not a bidder can comply with a solicitation's requirements through subcontracting (where subcontracting is permitted), such as a bidder's compliance with the IFB's 50-percent rule, is a matter for final determination by the SBA. See PHE/Maser, Inc., 70 Comp. Gen. 689 (1991), 91-2 CPD ¶ 210.

²The protester states that its application for a Maryland private detective license was granted on May 19, and that a license was issued that day to the firm under the protester's trade name of Federal Protective Specialists.

evidence of the license with the bids or before award, the solicitation can only be read as imposing a general requirement that the contractor have all necessary licenses and permits to perform the contract. (Although the Maryland code refers to licensing as a precondition to submitting an offer and to actual performance, the IFB does not require possession of the license in order to submit an offer.) See Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154. Whether ISA is capable of meeting such a performance requirement is a matter of the firm's general responsibility. Id.

Where, as here, an agency determines that a small business will not be able to meet a licensing requirement, the matter must be referred to the SBA under its exclusive certificate of competency (COC) jurisdiction so that the SBA can review the contracting officer's conclusion. 15 U.S.C. § 637(b)(7) (1988); Janel Tohm, 71 Comp. Gen. 314 (1992), 92-1 CPD ¶ 295. We believe HUD's interpretation of the FAR as exempting it from the statutory requirement of referral to the SBA in this case is incorrect. First, a small business bidder's compliance with licensing and similar requirements involves a traditional element of responsibility that must be referred to the SBA. No exceptions from the referral procedure for traditional matters of responsibility are contemplated or contained in the SBA Act or the SBA's implementing regulations. See 13 C.F.R. § 125.5 (1992). The language contained in the FAR excusing an agency's failure to refer the matter on the basis of its determination that the bidder was not qualified for award simply does not apply to a rejection on the basis of traditional elements of responsibility. International Business Investments, B-206724, May 27, 1982, 82-1 CPD ¶ 500; International Business Investments, Inc.; Career Consultants, Inc., B-198894, Feb. 23, 1981, 81-1 CPD ¶ 125.

Second, the agency's determination of ineligibility here was based upon HUD's misinterpretation of the IFB's general licensing provision (and its application to Maryland's licensing requirements) as requiring possession of the state license as a condition for award. As stated above, a bidder's failure to comply with a particular state's licensing requirement which is not specifically set forth in the solicitation's requirements, does not render the bidder ineligible for award under a federal procurement since the only reasonable reading of the solicitation is that actual compliance need only be accomplished by the start of contract performance; the matter involves an issue of the bidder's responsibility that must be referred to the SBA for resolution. Janel Tohm, supra.

Accordingly, we sustain the protest.

HUD has not referred its decision concerning the protester's responsibility to the SBA for review as required. Since the contract is to expire in 3 months, we see no useful purpose in recommending that the issue of ISA's responsibility be referred to SBA. However, we find ISA entitled to the costs incurred in pursuing this protest, including reasonable attorneys' fees and its bid preparation costs. 4 C.F.R. § 21.6(d)(1) (1993). The protester should file its claim for costs, detailing and certifying the time expended and costs incurred, within 60 days after receipt of this decision.

for Milton J. Bowler
Comptroller General
of the United States