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Henry Hufford

Proc. II

DECISION



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

FILE: B-186756

DATE: November 30, 1976

MATTER OF: Newton Private Security Guard
and Patrol Service, Inc.

DIGEST:

1. GAO does not review agency determination to withdraw solicitation set-aside under section 8(a) of Small Business Act.
2. Protester generally has burden of affirmatively proving its case and where written record provides no probative evidence other than conclusory conflicting statements regarding alleged racial discrimination, protest is denied.
3. Determination of specification meeting minimum needs of Government is primarily for procuring activity. Absent clear and convincing evidence of error and that contract would be unduly restrictive of competition, such determination will not be questioned.

This is a protest by Newton Private Security Guard and Patrol Service, Inc. (Newton) concerning solicitation GS-05B-41876, issued May 18, 1976, by the General Services Administration (GSA) for guard services at federal installations in the Detroit, Michigan metropolitan area. In view of the urgency of the requirement, the contract has been awarded prior to resolution of Newton's protest. For the reasons stated below, we agree with GSA's recommendation that Newton's protest be denied.

Newton protests GSA's withdrawal of a predecessor solicitation, GS-05BB-41839, which was set-aside for award to the Small Business Administration (SBA) under its so called 8(a) program, which is designed to assist small business concerns owned or controlled by socially or economically disadvantaged persons. Ultimately, GSA cancelled the 8(a) set-aside and resolicited for guard services under the instant IFB, which was totally set-aside for small business concerns.

B-186756

Newton, a minority business enterprise, alleges that racial discrimination on GSA's part caused the removal of the 8(a) set aside and has hampered its efforts to win this contract. The protester, however, has presented no probative evidence to support its position and GSA has denied the allegation. A protester, generally, has the burden of affirmatively proving its case. If, as here, the written record upon which this Office must rely provides no probative evidence other than conflicting conclusory statements from each side, a sufficient basis does not exist for sustaining the protest. James R. Parks Co., B-186031, June 18, 1976, 76-1 CPD 384; Phelps Protection Systems, Inc., B-181148, November 7, 1974, 74-2 CPD 244. Accordingly, the protester's allegations of racial discrimination are denied.

Moreover, section 8(a) of the Small Business Act, 15 U. S. C. 637(a) (1970), authorizes the SBA to enter into contracts with any Governmental agency having procurement powers, and the contracting officer of such agency is authorized "in his discretion" to let the contract to SBA upon such terms and conditions as may be agreed upon between SBA and the procuring agency. It is clear that a determination to withdraw a procurement from the 8(a) program is not subject to legal review by this Office and is a matter to be decided by SBA and the procuring agency. Arcon Construction & Engineering Co., B-185859, March 31, 1976, 76-1 CPD 213; Baltimore Electronics Associates, Inc., B-185042, February 17, 1976, 76-1 CPD 105. Accordingly, we must dismiss this portion of Newton's protest.

Newton states its general belief that the quality and cost controls and personnel qualifications specified in the invitation for bids exceed the services actually needed by the Government. The protester further argues that such specifications permit consideration of overly subjective factors in the award and administration of the contract.

Specifically, Newton objects to the specification requirement that guards be 21 years of age and possess a high school diploma or its equivalent. With regard to education, experience and age, the solicitation provides in part as follows:

"Education/Experience. Possess a high school education or equivalency, and have two years of experience demonstrating:

(1) The ability to meet and deal with the general public

B-186756

- (2) The ability to understand and apply various rules and regulations
- (3) The ability to maintain poise and self-control under stress
- (4) Establish proficiency in the use and safe handling of .38 caliber service type revolver
- (5) Any type of military service may be credited toward meeting requirements in (1) (2) (3), but excluding (4)
- (6) In lieu of the above, each employee shall have had two years of education at a residence school above the high school level, or any combination of education and experience totaling two years

(a) Special Requirements.

1. Supervisors must be individuals of unquestionable integrity with a minimum of two (2) years successful protection experience in administration and supervision.

2. All contractor employees shall be a minimum of 21 years of age (age requirements waived for veterans). "

In this connection, Newton points out that for age and education requirements, the State of Michigan requires for licensure as a private security guard only that the applicant be 18 years old and possess an 8th grade education or its equivalent. Mich. Stat. Ann. § 18,185(17)(2) (Supp. 1976).

The IFB requires the contractor to provide protection services at several Government installations in the Detroit area through the use of uniformed armed guards. These guards perform various functions such as maintenance of law and order, control of ingress and egress to buildings, control of traffic and parking, monitoring and operating fire alarms and intrusion alarm systems, control and issuance of keys, dealing with emergencies and disturbances, and dealing with the public in a variety of situations. In order to successfully perform these services, GSA believes that the contract guards must meet minimum requirements with respect to age, education, maturity and emotional stability.

B-186756

The agency argues that the qualification requirements of which Newton complains are reasonably related to the Government's requirements and are not improperly restrictive. As to the provisions of Michigan law, we see no reason why GSA cannot require a higher standard for the protection of federal installations, provided any such requirement is not arbitrary.

This Office has consistently taken the position that the preparation or establishment of a specification which reflects the minimum needs of the Government is a matter primarily within the jurisdiction of the procurement activity and that such will not be questioned by our Office unless there is clear and convincing evidence that the determination of the activity is in error and that a contract award on the basis of such a specification would be unduly restrictive of competition. Schreck Industries, Inc., B-184127, October 15, 1975, 75-2 CPD 235, and cases cited therein. We think Newton has not clearly and convincingly shown any error in GSA's determination of the Government's minimum needs, or that the above quoted specifications unduly restricted competition. In the circumstances, we do not find the age and education requirements to be unreasonable.

Newton also disputes as unnecessarily subjective, various provisions of the specification which define the Government's responsibilities concerning contract administration. In this connection, Newton objects to specification paragraphs 10(a)(3) through 10(a)(6) which provide as follows:

"(3) Technical Manager. A person designated by the contracting officer who is responsible for overall directions of the technical performance of the contract.

"(4) Technical Manager's Representative. A person designated by the contracting officer who is responsible for the technical management of and satellite areas of the contract.

"(5) Technical Monitor. A person(s) responsible for providing guidance and liaison with the contracting personnel on the performance of specific tasks on each work relief. Technical Monitors evaluate the contractor's performance in accordance with contract specifications.

"(6) Inspections. The quality of work performed will be determined by inspections made by the Technical Manager, Representatives of the Technical Manager and Technical Monitors. Inspections determine the contractor's level of performance and work practices."

L-186756

GSA contends that these provisions serve to define the responsibilities involved in administration of the contract in furtherance of a contracting officer's obligation to assure that the contractor performs in accordance with specifications. The agency states that it is a common and accepted practice to designate personnel responsible for the day-to-day administration of a contract. We agree with GSA that the use of such personnel is necessary and proper.

The protester also objects to specification paragraph 16(e)(a) which provides that the Technical Manager may direct the Contract Manager, an employee of the contractor, to remove employees from the work site who are unsuitable to perform the required services. GSA contends that the right of the Government to determine the suitability of contract employees is a reasonable and responsible provision because of the important responsibilities placed on the guards relative to the protection of persons and property and the maintenance of law and order.

In our opinion the degree of control to be retained by the Government is reasonable in view of the nature of the work. Moreover, we find that these administrative provisions, while broad, are not so indefinite as to prevent competition, particularly because the underlying suitability required of contractor personnel is relatively well defined elsewhere in the specifications.

Finally, Newton cites specification paragraph 19(b), concerning deductions from payments, as being objectionable. This section provides as follows:

"19. Deductions. (Item a to be completed by contracting officer). The following deductions are applicable for nonperformance or unsatisfactory performance:

(a) Hourly Rate. A rate of \$10.88 per hour will be deducted for each hour where a post is not manned (the required number of hours by post and by work relief shall be those as recorded on GSA Forms 2580 Guard Post Assignment Record).

(b) Other Deductions. Deductions shall also be made when the Technical Manager determines that contractor personnel fail to perform required services in a professional manner (paragraph 1 - performance) such as untimely response to open doors,

B-186756

gates, answer telephones, radios, raise and lower the flag, appearance and performance unbecoming a uniformed guard, etc."

GSA concedes that paragraph 19b is not free from ambiguity and has indicated this will be clarified and made more specific in future solicitations. However, the agency contends that the procedural safeguards of the standard "Disputes" clause protects the contractor from possible arbitrary or capricious deductions and it believes that the ambiguity is not so great as to require a resolicitation after bid opening or contract award.

We agree that paragraph 19b affords the technical officer considerable discretion. However, we question whether these paragraphs are ambiguous in the sense that they could reasonably lead offerors skilled in the field of security protection to varying interpretations of what was required by the IFB so as to prevent bidding on a common basis. Even though it may be desirable to modify the specifications in future solicitations, we believe such broad language does not provide justification to cancel the IFB. Federal Procurement Regulation 1-2.404.1 provides that an invitation, once opened and bids exposed, should not be cancelled except for a compelling reason. As a whole, the IFB was reasonably clear as to the minimum needs of the Government. Newton's protest was not shown to be unduly restricted competition inasmuch as eight bids were received on this solicitation. Even though Newton's decision not to bid on this procurement may have been partly influenced by these paragraphs, the fact that a particular bidder may be unable or unwilling to meet the minimum requirements of a solicitation will not of itself warrant the conclusion that the specifications unduly restrict competition. 33 Comp. Gen. 586 (1954); B-171582, May 27, 1971.

Newton's protest, therefore, is denied.


Deputy Comptroller General
of the United States