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

FILE: B-190187 DATE: March 31, 1978

MATTER OF:

Aetna Ambulance Service, Inc.
G & L Ambulance Service

DIGEST:

1. Determination by contracting agency not "to extend" contract negotiated under provisions of section 8(a) of Small Business Act is within discretion of agency and generally not subject to legal review by GAO.

2. Record does not support contention that contractor's actions taken to prevent termination of existing section 8(a) contract also resulted from Government obligation to extend contract for following fiscal year.

3. Amendment to IFB which only extends bid opening date need not be acknowledged by bid opening; telephone notification of extended bid opening date, which is confirmed by written amendment presented to bidders at bid opening, is generally consistent with applicable regulations.

4. Allegation that protester was unfairly deprived of reasonable time to prepare bid is not supported by record which indicates 1) IFB was issued more than 20 days prior to scheduled bid opening date, 2) protester knew six days prior to bid opening that IFB might not be canceled as it had anticipated, and 3) protester submitted timely bid, and where protester fails to indicate how its bid might have been adversely affected.

5. General IFB provision that successful bidder meet all requirements of Federal, state or city codes does not require rejection of low bidder for

failure at time of bid opening (or award) to have state agency approval of rate bid that was below minimum rate established by state agency since need for such approval is matter between state agency and bidder and is not for consideration of contracting officer.

6. Protest that bidder cannot perform its offered price relates to responsibility of bidder. Affirmative determinations of responsibility are not reviewed by GAO unless fraud is alleged on part of procuring agency or solicitation contains definitive responsibility criteria which allegedly have not been applied.

7. Agency determination to hold up award to low responsive, responsible bidder is proper where protest is filed prior to award and United States District Court judge concurs in stipulation, entered into by Government, providing that incumbent contractor is to continue providing services on interim basis.

Aetna Ambulance Service, Inc. (Aetna) protests the decision of the Veterans Administration Hospital of Newington, Connecticut (VA), not to "extend" beyond September 30, 1977, contract V627P-831, for furnishing ambulance service to VA beneficiaries, entered into pursuant to section 8(a) of the Small Business Act, 15 U.S.C. 637(a) (1976), and to instead obtain the services through a competitive procurement under invitation for bids (IFB) number 627-6-78. Aetna also protests any award to G&L Ambulance Service (G&L), the low responsive bidder under the IFB. G&L protests the failure of VA to award the contract to that firm.

BACKGROUND: In 1975, after an IFB issued by the VA for fiscal year 1976 ambulance services was canceled because no responsive bids were received, VA entered into negotiations with the Small Business Administration (SBA) under the provisions of the

Small Business Act, 15 U.S.C. 637 et. seq. Subsequently, a contract was awarded to the SBA with Aetna as subcontractor to perform the required services for the period April 1 through September 30, 1976, later extended through September 30, 1977.

In August 1976, the VA received a complaint from an Aetna competitor alleging that Aetna was not meeting contract requirements, because its vehicles did not meet Federal Specification KKK-A-1822, Type I. The complaint was referred by the VA to the SBA, which responded that Aetna alleged compliance with the contract requirements. Another complaint was received by the VA in October 1976 from the same source, to the effect that the contract for ambulance services for fiscal year 1977 was not competed and that Aetna did not have vehicles which met the contract requirements. The complainant also forwarded a letter from the Office of Emergency Medical Services, State of Connecticut, which stated that the agency's records indicated Aetna owned three ambulances that could not meet the Federal specification required by the contract. This complaint was again referred to the SBA, which replied on February 2, 1977, stating in effect that if Aetna's performance was satisfactory, the contract requirements as to type of vehicles should be amended.

On April 21, 1977, VA wrote the SBA that it was the SBA's responsibility to assure that the subcontractor, Aetna, had equipment which conformed to the contract requirements. A meeting among the parties, VA, SBA and Aetna, took place on May 2, 1977, at which it was determined that the contractor had no vehicles which met contract requirements. At the meeting, the VA advised the SBA and Aetna that bids would be solicited competitively for the next contract period starting October 1, 1977. A notice dated May 5, 1977, was sent by VA to the SBA canceling the contract effective June 15, 1977.

On May 16, 1977, the VA issued IFB No. 627-21-77 for ambulance services after June 15, 1977. The IFB

authorized the use of Type II and III vehicles as well as Type I. By letter to VA dated M 19, 1977, the SBA advised that it could not concur in the termination of the contract, stated that it knew that Aetna could "get well" prior to June 15, 1977, recommended that the IFB be canceled, and that the present 8(a) contract be amended to authorize the use of the same types of vehicles set forth in the May 16, 1977 IFB. On May 25, 1977, VA advised the SBA that it would be willing to cancel the IFB and amend the existing contract to allow use of Type I, II, or III vehicles, provided that the vehicles were licensed by the State of Connecticut, Office of Emergency Medical Services, (OEMS) and inspected and approved by the VA no later than June 15, 197, and that a rate reduction would be agreed to by Aetna and OEMS prior to that date. Subsequently, the IFB was canceled, a rate reduction was agreed to, and vehicle which met contract requirements was acquired by Aetna.

On August 26, 1977, IFB No. 527-6-78, was issued by the VA for ambulance service for the period October 1, 1977, through September 30, 1978. Bid opening was set for 1:30 p.m., September 19, 1977. Aetna and other potential bidders received copies of the IFB. Aetna alleges that the SBA repeatedly advised and told it not to worry about submitting a bid inasmuch as negotiations were going on with the VA relative to continuing the section 8(a) contract. However, on or about September 13, 1977, Aetna was advised by the SBA that negotiations with the VA weren't going well and that it might be wise to submit a bid. VA reports that during the afternoon of September 16, Aetna and all other potential bidders on the IFB known to the VA were telephonically advised of the possibility that the IFB would be canceled and told that they would receive further notice and a written "amendment" should that happen. Aetna alleges that the contracting officer informed its president that the IFB was being withdrawn and that a letter would follow, thereby negating any necessity to prepare and submit a bid.

On September 19, 1977, VA decided that cancellation of the IFB would be inappropriate. Attempts were made to contact all potential bidders to advise them of a new bid opening time of 10:00 a.m. on September 20, 1977. Aetna states it was not advised of the new bid opening time and date until about 4:00 p.m. on September 19, 1977. Aetna submitted a bid at 10:00 a.m. on September 20, 1977. At that time Aetna was given a copy of an amendment dated September 16, 1977, which extended the bid opening from the original date. Aetna signed the amendment.

By telegram dated September 21, 1977, Aetna protested to this Office. On September 30, 1977, Aetna filed suit, Civil Action No. 77-506, in the United States District Court, District of Connecticut seeking (1) a temporary restraining order, preliminary injunction and permanent injunction restraining and enjoining the SBA and VA from refusing to extend the existing contract between the SBA and VA; (2) a temporary restraining order and preliminary injunction precluding the VA "from executing and implementing the contract awarded on September 20, 1977 to G&L Ambulance Service, Inc. until the General Accounting Office of the United States Government issues its decision upon the protest filed by Plaintiff"; (3) "declaratory relief ordering the contract awarded on September 20, 1977 and bids thereto null and void as the result of an illegal solicitation"; (4) "Specific performance of contract No. V627P-831 in its extension through applicable regulations"; and (5) other ancillary relief. On October 11, 1977, a hearing was held and the parties stipulated that the subject of the litigation should be submitted to this Office in accordance with 4 C.F.R. 20.10 (1977) and that Aetna would provide ambulance service to the VA as described in contract V627P-831 on an interim basis at the rates offered by the low bidder on IFB No.

627-6-78. The court concurred with the stipulation, and we are advised by the United States Attorney that the court intended the concurrence to serve as a request that we issue a decision on the matter. Accordingly, under 4 C.F.R. 20.10, this case is appropriate for our consideration. See, e.g., Kleen-Rite Corporation, B-189458, September 28, 1977, 77-2 CPD 237; Control Data Corporation, 55 Comp. Gen. 1019 (1976), 76-1 CPD 276; Dynalectron Corporation, 54 Comp. Gen. 1009 (1975), 75-1 CPD 341.

AETNA PROTEST

Section 8(a) of the Small Business Act, authorizes the SBA to enter into contracts with any Governmental agency having procurement authority and to arrange for the performance of such contracts by letting subcontracts to small business or other concerns. SBA utilizes this authority to "assist small business concerns owned and controlled by socially or economically disadvantaged persons to achieve a competitive position in the marketplace." 13 C.F.R. 124.8-1(b) (1977). A Government contracting officer, however, is authorized "in his discretion" to let the contract to SBA upon such terms and conditions as may be agreed between the SBA and the procuring agency. It is clear that under the statute and implementing regulations, see 13 C.F.R. 124.8 and Federal Procurement Regulations (FPR) 1-1.713 (1964 ed. amend. 100), 41 C.F.R. 1-1.713 (1976), the contracting agencies and SBA have broad discretionary authority in this area, see Kings Point Manufacturing Company, Inc., 54 Comp. Gen. 913 (1975), 75-1 CPD 264, and that no firm has a right to a contract award under the section 8(a) program. This is so regardless of whether the action being challenged relates to a procuring agency decision not to set aside a procurement for a noncompetitive section 8(a) award, Baltimore Electronic Associates, Inc., B-185042, February 17, 1976, 76-1 CPD 105; Isiah Johnson & Titus Services,

Inc., B-187433, September 24, 1976, 76-2 CPD 283; Alpine Aircraft Charters, Inc., B-179669, March 13, 1974, 74-1 CPD 135, to an agency decision to withdraw a procurement from the section 8(a) program, Newton Private Security Guard and Patrol Service, Inc., B-186756, November 30, 1976, 76-2 CPD 457, or to an SBA determination that a firm should not be continued in the section 8(a) program, Wallace and Wallace Fuel Oil Company, Inc., B-182625, July 18, 1975, 75-2 CPD 48; Search Patrol Agency, Inc., et al., B-182403, April 3, 1975, 75-1 CPD 196. Thus, an agency decision not to enter into a section 8(a) arrangement for a particular procurement is generally not a matter for legal review by this Office.

Here, however, Aetna seems to allege in effect that the Government obligated itself to continue the 8(a) contract when it prevailed upon Aetna to accept the contract amendment in June 1977. Aetna states it agreed to the rate reduction and obtained a conforming vehicle for use in performing the remaining 3 1/2 months of the contract work in "consideration of the continuance of the 8(a) contract and in anticipation of an extension thereof." Aetna's claim is similar to one we considered in Alpine Aircraft Charters, Inc., supra. There, the procuring agency issued a competitive solicitation, but retained the option of using section 8(a) procedures if the circumstances permitted. The protester submitted a proposal (which was not accepted because of its high price), but also contended that it had been promised a section 8(a) contract through various contacts with the procuring agency and the SBA, and that as a result necessary equipment (a Lear Jet) was obtained by the firm and held for use on the particular procurement. The agency made a competitive award when it determined that an award under section 8(a) procedures was not feasible. We found that the agency acted properly, that "the determination to initiate a set-aside under section 8(a) is a matter within the sound discretion of the SBA and the contracting agency," and that the

record did not support a finding that "a contract or any other legal obligation resulted from" the contacts between the protester and the Government.

Similarly, we find no support in the record for Aetna's allegation. The VA reports that on May 2, 1977, in a conference with the SBA and Aetna, it advised that there would be a competitive procurement for the services for the contract period starting October 1, 1977. Aetna does not directly dispute this statement. Instead, it asks if it would "have purchased a vehicle and equipment for an estimated $30,000 and agreed to a lower price for the remaining [term] of the contract knowing that it would not be extended?" Whatever the reasons for Aetna's actions, it appears that its primary concern in May and June 1977, and that of SBA, was to avoid a termination of the existing contract. It took the actions necessary to avoid that result. While it may have assumed once it took those actions it would be the beneficiary of a section 8(a) contract for the next fiscal year also, we see nothing in the record which would elevate Aetna's "anticipation" that the contract would be extended to the level of a Government commitment that the ambulance services procurement would remain a section 8(a) set-aside or that Aetna would be continued as the firm providing the services.

Aetna also protests certain procedural aspects of the procurement, alleging that the VA did not amend the IFB in accordance with proper procedures and that it, Aetna, was unfairly deprived of a reasonable time in which to prepare its bid. We find no merit to these contentions.

Amendments to invitations are issued when, after issuance of the invitations but prior to bid opening,

it becomes necessary to make changes in delivery dates, specifications, bid opening dates or other aspects of the original IFB provisions. FPR 1-2.207 (1964 ed. amend. 139). When amendments are issued, bidders are generally required to acknowledge their receipt not later than bid opening or have their bids rejected as nonresponsive. See 53 Comp. Gen. 64 (1973); 49 id. 459 (1970); 47 id. 597 (1968). However, a bidder's failure to acknowledge an amendment may be waived or cured after bid opening if the amendment does not have a material effect on the price, quality, quantity or delivery terms of the resulting contract or if the bid as submitted indicates that the bidder received the amendment. FPR 1-2.405(d).

Here, the amendment only extended the bid opening date. Since such an amendment makes no changes having any effect on price, quality, quantity or delivery, it need not be acknowledged by bid opening. Inscom Electronics Corporation, 53 Comp. Gen. 569, 572 (1974), 74-1 CPD 56; 51 Comp. Gen. 408 (1972). Moreover, we have recognized that where an amendment extends the bid opening date, the submission of a bid on the new date which is dated subsequent to the original bid opening date may constitute constructive acknowledgment of the amendment. Inscom Electronics Corporation, supra; Algernon Blair, Inc., B-182626, February 4, 1975, 75-1 CPD 76; Artison, Inc., B-186601, August 6, 1976, 76-2 CPD 132. We also point out that FPR 1-2.207(c) expressly authorizes "notifying bidders of an extension of [the bid opening date] by telegraph or telephone" when "only a short time remains before the [original] time set for opening." Thus, we find VA's actions in advising bidders telephonically of the new bid opening date, and furnishing them a solicitation amendment at bid opening which confirms that advice to be generally consistent with the applicable regulations and prior decisions of this Office.

With regard to the time Aetna had to prepare its bid, Aetna claims that from the date the IFB was issued (August 26, 1977) it anticipated that the IFB would be canceled until it was advised by the SBA on September 13, 1977, six days prior to the originally scheduled bid opening date, to submit a bid. Aetna also claims that it was further advised by the VA on September 16, that the IFB would be canceled, and that it was not until September 19, 1977, that it was notified that the IFB was not canceled and that a new bid opening time had been set for 10:00 on September 20. This, according to Aetna, left it only about 18 hours to prepare or finish work on its bid.

The regulatory provisions governing solicitation of bids require that all IFBs allow sufficient time between the distribution of the IFB and the date set for bid opening to allow bidders an adequate opportunity to prepare and submit bids, with the general rule being that at least a 20 calendar day bidding period will be provided when standard commercial services are being procured. FPR 1-2.202-1(c) (1964 ed. amend. 139). The VA clearly complied with that requirement. Moreover, while Aetna may have hoped or anticipated that the IFB would be canceled and its own section 8(a) contract extended, Aetna's purported reliance on that anticipation cannot be deemed the fault of the Government. Aetna claims only that it was "told [by SBA] not to worry about submitting a bid" because SBA and VA were negotiating "relative to continuing the 8(a) contract." That statement, of course, cannot be construed as a guarantee that the VA would cancel the IFB, and Aetna admits that it knew at least six days prior to the scheduled bid opening that the negotiations between SBA and VA "were not going well." Thus, even if we accept Aetna's statement that it was told on September 16 that the IFB "was

being withdrawn" (VA states it advised only of the possibility of withdrawal), by that time it should have been well on its way to formulating its bid. Accordingly, when Aetna was subsequently advised of the extended bid opening date, it should have been able to complete its bid without any particular difficulty, especially since it in effect was the incumbent contractor and was well familiar with VA's needs. In fact, Aetna did submit a timely bid (albeit not the low bid and in VA's view not a responsive bid.)

In any event, while Aetna complains of the short time it allegedly had to prepare its bid, it offers no evidence whatsoever or even any indication of how its bid might have been adversely affected by these circumstances. Thus, on the record before us, we find no prejudice to Aetna (as a bidder) as a result of VA's actions in soliciting bids.

Aetna also protests any award to G&L on the grounds that G&L did not obtain "necessary prior approval" of its bid rate from the State of Connecticut Office of Emergency Medical Services and that the bid "was so low that the financial ability of the bidder to service the contract must be called into question." With respect to the first point, Aetna alleges that the failure of G&L to obtain prior state agency approval of the rate bid violated paragraph 2 of the Special Conditions to the IFB entitled "Qualifications", which provides in part as follows:

> "a. * * * Successful bidder shall meet all requirements of Federal, State or City Codes regarding operations of this type of service."

The State of Connecticut, by Connecticut General Statues 19-73bb, requires the licensing by the OEMS, State Department of Health, of firms engaged within the

State in the business of providing commercial ambulance services. Further, OEMS has the authority to establish rates charged by commercial ambulance services within the State. By Memorandum of Decision, dated February 19, 1976, upon application for rate increases by commercial ambulance services, and after due notice and hearing, OEMS issued the following order:

> "The office finds that in light of the information supplied the rate increase is warranted and the following schedule of rates is established for all commercial ambulance services licensed under the provisions of Chapter 334b. * * *
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> | | |
> |---|---|
> | Base Rate | $49.00 |
> | Mileage | $ 1.75 |
>
> "It is ordered that rates as set forth above include ambulance services rendered for the account of all State, City, Governmental or municipal agencies. Contract rates negotiated between governmental agencies and commercial ambulance operators will not be permitted unless prior approval is received from the Office of EMS.
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> "It is further ordered that the rates set forth above are herewith prescribed for application for all licensed commercial ambulance operators holding authority from the Office of EMS to operate an ambulance service in the State of Connecticut."

The G&L bid specified a rate below that set by OEMS.

We have recognized a distinction between a general requirement that a bidder or contractor be in compliance with any applicable licensing or permit

requirements and a solicitation requirement that a bidder have a particular license. In the latter case, the requirement is one specifically established for the procurement and compliance therewith is a matter of bidder responsibility. See, e.g., 53 Comp. Gen. 51 (1973); Silico, Inc., B-188026, April 29, 1977, 77-1 CPD 296. In the former case, however, a bidder's failure to possess a particular license or operating authority need not be a bar to award to that bidder because the question of whether a bidder needs a license to perform the contract may be treated as a matter between the bidder and the licensing authority. National Ambulance Company, Inc., 55 Comp. Gen. 597 (1975), 75-2 CPD 413; E.I.L. Instruments, Inc., 54 Comp. Gen. 480 (1974), 74-2 CPD 339; 53 Comp. Gen. 36 (1973).

In this case it is clear that the language in the VA solicitation is general only and does not require, as a condition of award, that a bidder satisfy any particular licensing or operating requirements imposed by a state or local government entity. See National Ambulance Company, Inc., supra; 53 Comp. Gen. 36, supra; and Veterans Administration - Request for Advance Decision, B-184384, July 29, 1975, 75-2 CPD 63, where we so construed the identical language appearing in other solicitations issued by the Veterans Administration for ambulance services. As we said in the latter cited case:

> "In B-125577, October 11, 1955, our Office stated the general rule regarding the effect of State or Local laws requiring a license or permit as a prerequisite to performing the type of services required by a Federal contract, as follows:
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> 'State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. 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, and it would be impossible for the contracting agencies of the Government to make such determinations with any assurance that they were correct. It is precisely because of this, in our opinion, that the standard Government contract forms impose upon the contractor the duty of ascertaining both the existence and the applicability of local laws with regard to permits and licenses. In our opinion, this is as it should be."

We regard G&L's asserted failure to obtain prior approval for its bid from OEMS as analagous to a state licensing requirement. See New Haven Ambulance Service, Inc., B-190223, March 22, 1978, 78-1 CPD ___. Thus, compliance with the requirement for approval of the bid rate, if indeed it was intended to be applicable to bidders involved in the Federal procurement process (we have some doubt in this regard, since to require prior approval of the bid submitted would destroy the competitive nature of advertised procurement as rates varying from those approved by OEMS and submitted for approval would be known to other than the bidder prior to bid opening, and to require approval after bid opening but prior to award would also stymie the competitive bid process as the bid would be contingent upon receipt of State agency approval and thus not constitute a firm offer. See Charles Paul v. United States, 371 U.S. 245 (1963)) is a matter which must be settled between the local authorities and G&L, either by agreement or by judicial determination.

With regard to G&L's low bid and its financial ability to perform at the rates bid, the matter goes to G&L's responsibility to perform the contract.

Skil Corporation, B-190574, December 6, 1977, 77-2 CPD 436; DOT Systems, Inc., B-187994, February 18, 1977, 77-1 CPD 123 and cases cited therein. Where, as here, a contracting agency has determined a bidder to be responsible, that affirmative determination of responsibility will not be questioned by this Office unless fraud is alleged on the part of procurement officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350; Central Metal Products, Inc., 54 Comp. Gen. 66, 74-2 CPD 64. Since this case involves neither of these allegations, there is no basis for us to consider the propriety of the affirmative responsibility determination regarding G&L.

Accordingly, for the foregoing reasons, Aetna's protest is denied.

G&L PROTEST: Although VA regards G&L as the low responsive, responsible bidder, award has not been made because of the Aetna protest and the stipulation concurred in by the court in the action filed by Aetna. FPR 1-2.407-8(b)(4) (1964 ed. amend. 68) provides that when a protest is filed before award, no award is to be made until the matter is resolved unless certain conditions are found to exist. Accordingly, since no such findings were made by VA, the initial decision to hold up award was consistent with the regulations. Since we have now resolved the protest, the question of award is a matter for the court and the parties to the stipulation.

R. F. Keller

Deputy Comptroller General
of the United States