

Pro. Law I  
M. Hordell

DECISION



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

8910

FILE: B-193447

DATE: January 22, 1979

MATTER OF: National Ambulance Service of Louisiana,  
Inc.

DIGEST:

1. As matter of policy, [GAO will consider untimely protests on merits when court has expressed interest in GAO decision] Therefore, threshold question concerning timeliness need not be addressed.
2. Under 15 U.S.C. § 637(b)(6) (1976), Small Business Administration is empowered to conclusively determine matters of small business size status for Federal procurement purposes.
3. IFB provision that successful bidder meet all requirements of Federal, State or City codes is not a matter of responsiveness. }
4. Under 15 U.S.C. § 637(b)(7) (1976), as amended by Pub. L. 95-89, 91 Stat. 561, SBA has authority to issue or deny certificate of competency and GAO declines to review SBA determination to require issuance of COC or to reopen case when COC has been denied, except in circumstances not applicable here. } *later*
5. Allegation that contractor's performance of contract has not been proper is matter of contract administration, not reviewable under GAO Bid Protest Procedures. }

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DLG00718

DLG00719 ✓  
National Ambulance Service of Louisiana, Inc.  
 (National), protested the award of a contract to  
Mid-South Ambulance Corp. (Mid-South) for ambulance  
and nonemergency vehicle service for the 1-year period  
commencing October 1, 1978, under invitation for bids  
(IFB) No. 629-12-79, a total small business set-aside,  
issued on September 8, 1978, by the Veterans Administra-  
tion (VA). Bid opening was scheduled for September 22, AGC  
 1978. 00016

AGC 00002  
 non-employment  
 On September 29, 1978, Mid-South filed a protest with the VA questioning National's representation as a small business. This protest was forwarded by the VA to the Small Business Administration (SBA) on October 4, 1978. On October 2, 1978, shortly after award, National was advised that award was made to Mid-South, notwithstanding Mid-South's protest, since National was not licensed to do business in the city of New Orleans. Consequently, National filed with the VA a protest concerning such action. In addition, on October 3, 1978, National commenced suit in the United States District Court for the Eastern District of Louisiana, Civil Action No. 78-3256. Subsequently, on October 5, 1978, National filed an additional protest with the Director of the New Orleans VA Hospital. Then, by letter dated October 6, 1978, which incorporated by reference National's October 2, 1978, protest letter to the VA, National requested "\* \* \* an administrative review or remedy as may be available to National to seek redress of [the VA's] wrongful and improper award of the contract to Mid-South \* \* \*." Further, on October 13, 1978, an additional letter of protest was filed with the VA essentially questioning Mid-South's performance pursuant to the contract.

The VA responded to National's protests by letters dated October 11 and 16, 1978. The thrust of those letters was that the award to Mid-South was proper, Mid-South was performing pursuant to the terms of the contract and, therefore, National's protest was denied. National filed its protest with our Office on November 8, 1978.

The complaint in the court action puts in issue the substance of National's instant protest. It is our policy not to render a decision on a protest where the material issues involved, as here, are before a court of competent jurisdiction. See Nartron Corporation and DC Electronics, Incorporated, 53 Comp. Gen. 730 (1974), 74-1 CPD 154; Premier Maintenance Company, B-190201, December 6, 1977, 77-2 CPD 435; Perth Amboy Drydock Company, B-184379, November 14, 1975, 75-2 CPD 307; 4 C.F.R. § 20.10 (1978). However, we have been advised that the court expressed an interest in our views when it granted a motion to stay action for 60 calendar days and, therefore, we will consider the protest on the merits at this time. 52 Comp. Gen. 706 (1973). Moreover, the threshold question concerning the timeliness of National's protest to our Office under our Bid Protest Procedures, 4 C.F.R. part 20 (1978), need not be addressed, since it is our policy to consider issues that are untimely raised when a court expresses interest in our decision. Dynalectron Corporation, 54 Comp. Gen. 1009 (1975), 75-1 CPD 341; Kleen-Rite Corporation, B-189458, September 28, 1977, 77-2 CPD 237.

Mid-South's protest with respect to National's size status was forwarded by the VA to the Small Business Administration (SBA) regional office in Dallas. On November 3, 1978, SBA made the determination that National "meets the appropriate size standard established for this solicitation and is therefore small business." This decision was appealed by Mid-South and is for consideration by the SBA Size Appeals Board in Washington, D.C. If SBA reverses its earlier determination, National's protest will be moot. Moreover, such decision by the SBA Size Appeals Board would not be subject to review by this Office. See 15 U.S.C. § 637(b)(6) (1976), which provides that the SBA is empowered to conclusively determine matters of small business size status for Federal procurement purposes, and Sachs/Freeman Associates, Inc., B-190990, January 24, 1978, 78-1 CPD 65.

The IFB contained the following clause in the special conditions:

"2. QUALIFICATIONS: BIDS WILL BE CONSIDERED ONLY FROM FIRMS LOCATED IN THE METROPOLITAN NEW ORLEANS AREA.

a. Proposal will be considered only from bidders who are regularly established in the business called for and who are financially responsible and have the necessary equipment and personnel to furnish service in the volume required for the items under this contract. Successful bidder shall meet all requirements of Federal, State or City codes regarding operations of this type of service."

The city of New Orleans, by Ordinance No. 828 M.C.S., known as the Code of the City of New Orleans, requires, among other things, that a company providing ambulance and nonemergency vehicle service obtain a New Orleans city license, which will be issued after the ambulance units pass inspection, and that individuals who are employed as emergency medical technicians be certified by the city of New Orleans.

National states that on Friday, September 29, 1978, "[it was] notified [by the city of New Orleans] that the license would be delivered and the ambulances inspected the next day as the inspector was busy that day." In addition, National advises that it was in contact with VA but only with respect to Mid-South's protest to the SBA and "[t]he license was not mentioned." It is National's "belief that the quality of patient care would not be affected by National's possession or nonpossession of a license issued pursuant to a revenue producing municipal ordinance."

With respect to the September 29 conversation between National and the VA, it is the VA's position that National was asked to produce the New Orleans city license. The VA has reported that on September 29, 1978, it was advised by the city of New Orleans Department of Health that a license to National had not been issued at that time since the department had not inspected National's equipment. Moreover, the VA advises that it was also told that such inspection was planned for October 2, 1978. We note that, when the VA inquired as to whether or not National could operate without a license

within Orleans parish, which we understand includes the city of New Orleans and some of the surrounding area, the reply was in the negative. Consequently, the VA rejected National's low bid as nonresponsive since National was not licensed to engage in the provision of ambulance and nonemergency vehicle service in the city of New Orleans. Then, the VA awarded the contract to Mid-South, the second low bidder.

The VA argues essentially that National had to possess the New Orleans city license prior to award and that otherwise its bid would be nonresponsive and must be rejected. License requirements are not matters of responsiveness. See New Haven Ambulance Service, Inc., 57 Comp. Gen. 361 (1978), 78-1 CPD 225; United Security Service, Inc., 53 Comp. Gen. 51 (1973); 51 Comp. Gen. 377 (1971); and Veterans Administration - Request for Advance Decision, B-184384, July 29, 1975, 75-2 CPD 63. Responsiveness concerns whether a bid is an offer to perform, without exception, the exact thing called for in the IFB and upon acceptance will bind the bidder to perform in accordance with all the terms and conditions thereof. Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268. Accordingly, National's bid should not have been rejected as nonresponsive and, therefore, National's protest on that aspect is sustained. The only remaining question, other than size status, is National's responsibility. Responsibility concerns whether a bidder is capable of performing in compliance with all the terms and conditions of the IFB. See Bates and Associates, Inc., B-192589, August 24, 1978, 78-2 CPD 143.

In this regard, the record indicates that the VA has requested the SBA to make a determination regarding National's responsibility under the certificate of competency procedure. Pursuant to 15 U.S.C. § 637(b)(7) (1976), as amended by Pub. L. 95-89, 91 Stat. 561, August 4, 1977, the SBA has the authority to issue or deny a certificate of competency (COC), and our Office declines to review an SBA determination, to require the issuance of a COC, or to reopen a case when a COC has been denied, except in circumstances not applicable here.

See Industrial Design Laboratories, Inc., B-190031, May 19, 1978, 78-1 CPD 385. If the SBA determines that National is not responsible, declining to issue a COC, National's protest would become moot.

With respect to National's allegation concerning Mid-South's performance pursuant to the contract, that is a matter of contract administration not reviewable under our Bid Protest Procedures. Health Care Services, Inc., B-193143, November 21, 1978, 78-2 CPD 357.

As this protest is in court, the matter of corrective action, if required after SBA disposition of the matters before it, is left to the court. }



Deputy Comptroller General  
of the United States