P.L. II
M. Eaton

DECISION

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

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FILE: B-192482 DATE: February 9, 1979

MATTER OF: James B. Nolan Company, Inc. - Reconsideration DLG 00861

DIGEST:
[Protest Alleging That Low Bidder Lacked Required License]

1. Federal court decision that bidder does not fall within prohibition of Anti-Pinkerton Act unless offering "quasi military armed forces" for hire changes eligibility requirements for guard services contract and permits firm with private investigator's license to compete. Prior decision on this point is affirmed.

2. Contracting officer could reasonably find that bidder for guard services contract satisfied responsibility criterion by submitting either of two state licenses which permitted it to perform services of Watch/Guard or Patrol agency.

3. When it is apparent from face of submission that there is no legal basis for sustaining protest, GAO will not request or obtain report from contracting agency.

The James B. Nolan Company, Inc. (Nolan) requests reconsideration of our decision, B-192482, September 26, 1978, 78-2 CPD 232, summarily denying its protest that a lower bidder for guard services at an Internal Revenue Service facility on Long Island lacked a New York license permitting it to conduct the business of a Watch/Guard or Patrol Agency, as required by the solicitation. Nolan, the incumbent contractor, argued that it was the lowest responsive, responsible bidder and objected to delay in award by the General Services Administration (GSA).

In our decision, we stated that possession of the state license was a matter of bidder responsibility, i.e. affecting ability to perform, rather than bid responsiveness. Thus, although each bidder was instructed to submit a copy of its license with its

bid, failure to do so would not have rendered a bid nonresponsive.

In this case, the solicitation stated that if the bidder had not obtained the necessary license(s) at the time of submission of offers, a copy should be submitted "prior to commencement of performance under the contract." Immediately following this statement, the solicitation provided space for bidders to list the name and type of license(s) to be obtained. Under these circumstances, we saw no reason for rejecting the low bid of Spartan Security Services (Spartan), the firm alleged by Nolan not to have a Watch/Guard or Patrol Agency license, assuming that Spartan was otherwise responsive and responsible and could obtain the license within a reasonable time.

In addition, the protested solicitation indicated that bidders who fell within the prohibition of the so-called Anti-Pinkerton Act, 5 U.S.C. 3108, would not be eligible for award. We found that submission of evidence of compliance with this Act was unnecessary in light of the recent decision in United States ex rel. Weinberger v. Equifax, Inc., 557 F. 2d 456 (5th Cir. 1977), cert. denied 434 U.S. 1035 (1978), rehearing denied 435 U.S. 918 (1978), holding that a firm is not similar to the Pinkerton detective agency unless it offers "quasi military armed forces" for hire. We recommended that this eligibility provision be eliminated from future solicitations, but did not recommend corrective action with regard to the protested solicitation because there had been no showing of prejudice to any bidder or prospective bidder.

In its request for reconsideration, Nolan states that it bid relying on the requirement that all bidders would be licensed. It indicates that our decision altered or eliminated this requirement and therefore defeated its bid. Nolan questions whether Spartan can be considered responsive and responsible without the New York license and/or the necessary insurance and bonding needed to obtain such a license, particularly when Spartan has never operated in the area where the contract is to be performed.

Although agreeing that the Anti-Pinkerton Act no longer applies to firms merely because they are licensed to perform detective work, Nolan argues that in this case bidders should have been required to comply with the eligibility rules set forth in the solicitation, since our Office announced its adoption of the 5th Circuit decision after bid opening. Nolan further asserts that our summary denial of the protest, without requesting a report from the contracting agency, was arbitrary, capricious, and without a rational basis.

We believe Nolan has misread our decision. We did not eliminate the license requirement, but rather pointed out that where, as here, the contracting officer is familiar with such a state or local requirement, he may reasonably include it in a solicitation in order to assure that the awardee is legally able to perform. However, we indicated, such a license may not be required at time of bid opening.

Following receipt of Nolan's request for reconsideration, we contacted GSA and learned that, as Nolan alleged, Spartan did not have a Watch/Guard or Patrol Agency license. Rather, it had a New York private investigator's license, a copy of which had been submitted to GSA on August 30, 1978. GSA informed us that the contracting officer found that, in view of our decision, Spartan was eligible to compete. He also determined that the private investigator's license would be sufficient to perform the contract, since the applicable New York statute provides:

> "* * * The department of state shall have power to issue separate licenses to private investigators and to watch, guard or patrol agencies. Nothing in this article shall prevent a private investigator licensed hereunder from performing the services of a watch, guard or patrol agency * * *." N.Y. General Business Law § 70 (McKinney, 1968).

Award was made to Spartan on September 29, 1978, with performance to begin on November 1, 1978.

With regard to eligibility of bidders under the Anti-Pinkerton Act, Nolan correctly states that our Office did not announce its adoption of the 5th Circuit decision until after bid opening. The decision itself, however, was issued on August 12, 1977, well before opening. We therefore agree that Spartan, which held a private investigator's license, was eligible to compete. Our prior decision on this point is affirmed.

As for the New York license requirement, we believe that, in view of the quoted portion of the statute, the contracting officer reasonably assumed that a bidder could satisfy the responsibility criterion by furnishing a copy of or stating that it intended to obtain either an investigator's license or a Watch/Guard or Patrol Agency license. Moreover, we are advised by the Division of Licensing Services, Department of State, Albany, New York, that a firm with an investigator's license may perform guard services. Since Spartan furnished GSA with a copy of its current investigator's license, the award was proper.

Nolan has stated that it relied on the fact that all bidders would be licensed. However, Nolan has not shown that the 54 cent difference between its bid of $8.94 an hour and Spartan's bid of $8.40 an hour was related to the cost of obtaining a Watch/Guard or Patrol Agency License, and we are advised by the Division of Licensing Services that the cost of such a license is actually $100 less than that of an investigator's license. Accordingly, Nolan's protest on this basis is denied. (We note that on October 24, 1978, Nolan submitted an amended bid of $8.35 an hour; since award has properly been made, the contracting officer cannot consider this bid.)

Finally, although it is our general practice to request and obtain a fully documented report from the contracting agency when a protest is filed, we did not do so in this case because it was apparent from the face of Nolan's submission that there was no legal basis for sustaining the protest. Thus,

no useful purpose would have been served by our requesting such a report. See What-Mac Contractors Inc. - Reconsideration, B-187782, January 14 1977, 77-1 CPD 34.

R. F. Keller

Deputy Comptroller General
of the United States