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DECISION

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

[Protests of Proposal Rejections]

FILE: B-198894 DATE: February 23, 1981

MATTER OF: International Business Investments, Inc.; Career Consultants, Inc.

DIGEST:

1. Solicitation requirement that offeror demonstrate that it had or could obtain necessary security clearances by contract performance date relates to offeror's responsibility.

2. Army decided that small business otherwise eligible for award was nonresponsible because business lacked required security clearances to perform contract; however, Army did not refer nonresponsibility decision to Small Business Administration (SBA) under certificate of competency procedure. Army's decision was consistent with provisions of Defense Acquisition Regulation (DAR) but contrary to Small Business Act Amendments of 1977 and SBA's implementing regulations. Nevertheless, GAO will not recommend action leading to possible termination of contract and disruption of services thereunder since contracting officer reasonably relied on DAR provisions.

3. GAO recommends that DAR provision, covering certificate of competency procedures, be promptly revised to eliminate exception to procedures for nonresponsibility determinations involving small business' alleged ineligibility to receive award under "applicable laws and regulations," since legislative history of Small Business Act Amendments of 1977 and implementing regulations do not provide for exception.

4. Allegations after award that procurement should have been formally advertised rather than negotiated and that RFP security clearance

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requirements were excessive are untimely. Allegations relate to alleged solicitation deficiencies which were apparent on face of solicitation. Under § 20.2(b) of GAO's Bid Protest Procedures (4 C.F.R. part 20 (1980)), protest should have been filed prior to closing date for proposals.

5. Protests against award on initial proposal basis and small business size status of awardee are denied since: (1) awardee was not allowed to change its initial proposal before award; and (2) size status protests are for review by SBA.

6. Claim for proposal preparation expenses is denied since claimant did not have substantial chance that it would have received award but for alleged improper actions; moreover, procuring agency actions were not arbitrary.

On May 7, 1980, the Defense Supply Service-Washington of the Department of the Army issued request for proposals (RFP) No. MDA 903-80-R-0122 to procure security guard services commencing July 1, 1980, for a Defense facility. Closing date for receipt of proposals was June 10, 1980. Eight proposals were received; two proposals (those submitted by Allied Security, Inc., and Halifax Engineering) were found acceptable, two were eliminated because they did not contain technical approaches, and four proposals--including those submitted by the protesters--were eliminated from consideration for award because the offerors did not possess the necessary security clearances. Thereafter, award was made on an initial proposal basis to Allied, the low acceptable offeror, on June 12, 1980, under an RFP award standard which mandated award to the "lowest offeror who submits an offer conforming to the solicitation, and who is responsive, responsible, and technically acceptable."

International Business Investments, Inc. (IBI), which submitted the low offer under the RFP, and Career Consultants, Inc. (CCI), the second lowest offeror, have protested the rejection of their offers without referral to the Small Business Administration (SBA) under the certificate of competency (COC) procedure. Additionally, CCI requests bid preparation costs. Based on our review of the record, we sustain IBI's protest; however, we deny CCI's protest and claim.

Background

In regard to the security requirements for the contractor and his personnel, the RFP stated:

> "Section K-24 Personnel Security Clearance
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> "All contractor's employees engaged in the performance of work pursuant to this contract must have a current security clearance (Military) authorizing them access to classified information up to and including TOP SECRET NONFORN. * * * Employees of the contractor shall not be assigned for classified work pursuant to this contract unless and until the contractor has been granted necessary security clearance. * * *
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> "Section L-33 Security Requirements
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> "This solicitation contains a Department of Defense Contract Security Classification Specification (DD Form 254) which requires the contractor to have or be able to obtain a facilities clearance in accordance with DOD Regulation 5220.22. This clearance is required for performance under the contract. Offerors shall be required to demonstrate that they either have a current facilities clearance, a current 'interim' facilities clearance, or can obtain one of these [prior to performance.]"

Both IBI and CCI, as small businesses, contend that the issue of whether they could obtain the necessary security clearances as required under the RFP relates to their responsibility, and that the Army should have referred the matter to the SBA for determination under SBA's COC procedures.

The Army justified its actions on alternative grounds. The Army contends that IBI's and CCI's failures to possess top secret security clearances relate to the "responsiveness" of the offers and not the concerns' responsibility. (Although the Army has used the term "responsiveness"--a term associated with advertised procurements, it is clear that the protesters' offers were actually considered unacceptable and rejected solely because of the security requirements of the RFP.)

Alternatively, the Army alleges that it was not required to refer the matter to the SBA under Defense Acquisition Regulation (DAR) § 1-705.4(c)(v) (DAC #76-15, June 1, 1978), and 1-903.1(v) (DAC #76-15 June 1, 1978), which state:

> "1-705.4(c)(v)- A [COC] referral need not be made to the SBA if a contracting officer determines a small business concern nonresponsible pursuant to 1-903.1(v) * * *"

> "1-903.1(v)- [a prospective contractor must] be otherwise qualified and eligible to receive an award under applicable laws and regulations * * *"

(On August 24, 1980, the authority set forth in DAR § 1-705.4(c)(v) was amended; the substance of that regulation is now found in DAR § 1-705.4(c)(5) (DAC #76-24, August 28, 1980) which reads:

> "A [COC] referral need not be made to the SBA if a contracting officer determines a small business concern to be unqualified and ineligible pursuant to 1-903.1(v) * * *"

DAR § 1-903.1(v) remains in effect as of the date of this decision.) The Army notes that under "applicable laws and regulations" the SBA is not authorized to grant security clearances; that neither CCI nor IBI could be awarded the contract without these clearances; and that, therefore, the Army properly did not refer the matter to SBA.

In cases involving advertised procurements, we have held that similar security requirements relate to responsibility. See Ensec Service Corporation, 55 Comp. Gen. 494 (1975), 75-2 CPD 341; 51 Comp. Gen. 168, 172 (1971). As we said in Ensec Service Corporation:

> "We note that * * * the IFB established a requirement for a 'Secret' security clearance in the performance of the contract. * * * a requirement of this type relates not to bid responsiveness but to bidder responsibility. * * * "

The basis in the cited cases for this position is that a security clearance relates essentially to a concern's performance capability rather than the concern's promise to perform the contract requirements, which involves bid responsiveness.

The negotiated character of the procurement does not change our conclusion that the requirement here that a contractor demonstrate that it could obtain the necessary security clearances before performance relates solely to responsibility. It is clear that the Army considered the security clearance requirement to be a requirement relating to an offeror's capability of performing the contract and not a proposal evaluation factor admitting of comparative degrees of merit. Further, the lowest priced proposal of IBI apparently would have been accepted for award on an initial proposal basis but for this standard of responsibility; therefore, we consider the rejection of IBI's proposal to have been tantamount to a non-responsibility decision and for referral to the SBA under the COC procedure unless the Army was otherwise authorized not to refer the decision. See Electrospace Systems, Inc., 58 Comp. Gen. 415, 425-426 (1979), 79-1 CPD 264.

Since CCI proposed a price higher than IBI's price and was, therefore, ineligible for an immediate award, the Army was not required to refer the question of CCI's competency to the SBA even if the Army should have referred the question of IBI's competency. Thus, we deny this part of CCI's protest.

Under section 501 of the Small Business Act Amendments of 1977, Pub. L. No. 95-89, 91 Stat. 557, effective August 4, 1977, no small business may be precluded from award because of nonresponsibility without referral of the matter to the SBA for a final disposition under the COC procedure. No exceptions from the referral procedure are provided for in section 501. Thus, in What-Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD 179, we concluded that:

> "* * * there is an apparent conflict between [section 501] which requires referral to the SBA with respect to 'all elements of responsibility' with no exceptions and [DAR] 1-705.4(c)(v) and 1-903.1(v) which create an exception for nonresponsiblity determinations where the bidder is not otherwise qualified and eligible for award under applicable laws and regulations. * * *"

Nevertheless, in that decision, we concluded that we would "not consider whether the contracting officer properly relied on [these regulations]" as an exception to the COC referral procedure "since SBA has not yet issued appropriate implementing regulations."

On October 19, 1979, SBA issued final implementing rules. These rules permit no exception to the referral requirements. 13 C.F.R. § 125.5 (1980). Subsequently, in Z.A.N. Co., 59 Comp. Gen. ____, B-198324, August 6, 1980, 80-2 CPD 94, which did not involve a small purchase, we reviewed the legislative history of the act and concluded that there was "no indication that the Congress intended to limit the authority of the SBA [in COC procedures] to proposed awards of more than $10,000." We therefore sustained a protest against a contracting officer's decision to rely on the authority in DAR § 1-705.4(c) (DAC #76-19, July 27, 1979), which provided that the COC procedures applied

only to proposed awards exceeding $10,000. (This exception to the COC procedure was eliminated by DAC #76-24, August 28, 1980; however, DAR § 1-705.4(c) (DAC #76-24, August 28, 1980) provides that the COC procedures do not apply to small purchases.) Nevertheless, we concluded that the decision should apply only prospectively since the contracting officer acted in reliance on the existing DAR provision which provided for the exception to the referral procedure.

We have again reviewed the legislative history of the act. There is no indication in the history that the Congress intended to permit an exception to the COC procedure in those instances when a concern is found to be nonresponsible because it is not "qualified and eligible to receive an award under applicable laws and regulations." See H.R. Rep. No. 95-1, 95th Cong., 1st sess. 18 (1977); H. Conf. Rep. No. 95-535, 95th Cong., 1st sess. 21 (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 838, 851.

As noted above, the current DAR provision (§ 1-705.4 (c)(5)) does not use the word "nonresponsible" in referring to a contracting officer's decision that a concern is not "qualified * * * under applicable laws and regulations"; instead, the phrase "unqualified and ineligible" is used in referring to the decision. Nevertheless, the different wording cannot defeat a small concern's right to a COC referral under the act when compliance with a traditional element of responsibility is involved as in the subject case. It is also our informal understanding that the SBA objects to this DAR exception as currently worded and that the SBA's failure to specifically note its objection to the exception in a recent letter addressed to the Secretary of Defense was an "oversight."

Thus, we sustain IBI's protest under this specific ground of protest. Nevertheless, the procuring agency reasonably relied on DAR § 1-705.4(c)(v) and DAR § 1-903.1(v), above. Consequently, we will not recommend any action leading to a possible termination of Allied's contract and disruption of the security guard services provided for thereunder. See Z.A.N. Co., supra.

We are, however, by letter of today to the Secretary of Defense, recommending that the current DAR § 1-705.4(c)(5) and 1-903.1(v) be promptly revised to eliminate the current exception to the COC procedure found in these provisions and that, in the interim, contracting activities be advised to follow the holding of this decision.

Further, although we have concluded that referral to the SBA for COC consideration is required in these circumstances, it is obvious that the issuance of the security clearances remains the responsibility of the appropriate DOD agency. The SBA's issuance of a COC would not be equivalent to the granting of the required security clearances. The SBA would determine the small business concern's ability to obtain the clearances in the time remaining before performance. If the contractor attempts performance without the security clearances, even though the contractor has been issued a COC, the contract could be terminated for default and the contractor held liable for any resulting reprocurement costs. Additionally, in such circumstances, the Government could be without the required security guards. Such circumstances need not result, however, if there is close coordination between SBA and the appropriate agency issuing the security clearances.

Other Grounds of Protest

The protesters argue other grounds of protest as a basis for resoliciting the requirement involved here.

Improper Use of Negotiation and Excessive Security Requirements

This ground of protest relates to apparent RFP deficiencies; under § 20.2(b)(1) of our Bid Protest Procedures (4 C.F.R. part 20 (1980)), this protest should have been filed prior to the closing date set for receipt of proposals. Teleprompter of San Bernadino, Inc., B-191336, July 30, 1979, 79-2 CPD 61. Consequently, this ground of protest is dismissed.

Initial Proposal Award

The argument here is that the Army improperly allowed Allied to clarify its initial proposal regarding the provision of "radio support equipment." In response to the request for clarification, Allied assured the Army that it had "plenty of equipment"; however, the company was not allowed to change any term of its proposal.

Since the Army did not allow Allied to change its proposal, we reject this ground of protest. See Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD 404.

Allied is not a Small Business

SBA, rather than GAO, is authorized to hear small business size protests. Consequently, we dismiss this ground of protest.

CCI Claim for Proposal Preparation Costs

In view of our above analysis, we cannot conclude that there was a substantial chance the company would have received award but for the Army action in issue since IBI rather than CCI was the lowest offeror; moreover, we find no evidence supporting a finding of arbitrary action on the Army's part. Thus, we deny CCI's claim. See Decision Sciences Corporation - Claim for Proposal Preparation Costs, 60 Comp. Gen. __, B-196100.2, October 20, 1980, 80-2 CPD 298.

Milton J. Socolar

For the Comptroller General
of the United States