

DECISION



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

Eaton
119089

FILE: B-208081

DATE: July 27, 1982

MATTER OF: Dragon Services, Inc.

DIGEST:

1. Small Business Administration has exclusive authority to determine the size status of small businesses for Federal procurement purposes, and GAO will dismiss any protest on this ground.
2. Below-cost bid provides no basis for challenging the award of a Government contract to a responsible prospective contractor. In a pre-award situation, if the procuring agency finds a below-cost bidder responsible, GAO generally will not review this affirmative determination. Any nonresponsibility determination involving a small business must be referred to the Small Business Administration, and GAO will not review issuance or refusal to issue a certificate of competency except in cases involving fraud or bad faith.
3. GAO will not consider any protest alleging that a contractor will have insufficient time to prepare for performance unless the protest has been filed before bid opening date, since scheduled starting time was apparent on the face of the solicitation.
4. Evidence of authority to sign a bid may be submitted any time before award, so long as it is provided promptly when requested; the bidder must establish the authority of its signer, but the contracting officer determines the amount and weight of evidence required.

5. Bid generally will be considered nonresponsive when a required guarantee is not submitted with it or the guarantee, as submitted, contains a defect which detracts from the liability of the surety. However, when the word "construction" appears on the face of a bond for a services contract, but solicitation number and amount of bond are correct, and company furnishing it is an approved surety, the defect does not affect the enforceability of the bond or the responsiveness of the bid.
6. When solicitation does not limit award to firms incorporated in a particular state, fact that bidder is not properly organized in that state provides no legal basis for challenging an award.

Dragon Services, Inc. protests the proposed award of a custodial services contract for Elmendorf Air Force Base, Alaska, to either of two prospective contractors, Ameriko Maintenance Service or WIL-SYK Co. Both are competing under invitation for bids No. F65501-82-B0040, a total small business set-aside for which opening date was June 21, 1982. The protest is dismissed in part and denied in part, as indicated below.

The protest on the following grounds is dismissed:

Dragon Services alleges that neither Ameriko nor WIL-SYK qualify as small businesses, the former because its average gross annual receipts are more than \$4.5 million and the latter because it is affiliated with a large business concern. Neither of these allegations is for our review. Under 15 U.S.C. § 637(b)(6) (1976), the Small Business Administration (SBA) has exclusive authority to determine the size status of small businesses for Federal procurement purposes. Edmonds Mechanical Contractor, Inc., B-206194, February 4, 1982, 82-1 CPD 96. The Air Force advises us it already had contacted the SBA regarding these bidders.

Dragon Services also alleges that both Ameriko and WIL-SYK have submitted bids which are so low that they indicate the bidders either do not understand contract requirements or have made errors in their bid prices. According to the protester, Ameriko's bid of \$328,509 is 29 percent lower than the contract price of the incumbent, \$462,000, although the new contract will require services which are greater in amount and frequency than the current year's. WIL-SYK's bid also is "grossly" low, the protester alleges. As we frequently have stated,

a below-cost bid provides no basis for challenging the award of a Government contract to a responsible prospective contractor. Flight Refueling, Inc., B-207980, July 13, 1982, 82-2 CPD _____. If the Air Force finds either of these bidders responsible, which it must do before awarding the contract, this would constitute an affirmative determination of responsibility, which our Office generally does not review. On the other hand, if either is found nonresponsible, if they are small businesses the agency must refer the matter to the SBA, which will conclusively resolve it by issuing or refusing to issue a certificate of competency; our review here is limited to cases involving fraud or bad faith. Technical Food Services, Inc., B-203742.2, September 15, 1981, 81-2 CPD 219.

Dragon Services further alleges that there is insufficient time between the June 21 opening date and the July 1 expected starting date for any contractor to prepare for performance. Since no award can legally be made for five working days after opening, the protester asserts, only two working days will remain for the successful contractor to purchase equipment and supplies, ship them to Alaska, and hire and train employees and supervisors. Dragon Services argues that at least 45 days should be allowed for these activities. This basis of protest is untimely. The scheduled starting date was apparent on the face of the solicitation and, under our Bid Protest Procedures, 4 C.F.R. § 21.2 (1982), should have been protested before opening. Since the first of Dragon Service's two letters of protest was not received in our Office until June 28, we will not consider the question of start-up time.

The protest on the following bases is summarily denied:

Dragon Services questions the authority of the signers of both Ameriko's and WIL-SYK's bids. The protester alleges that Ameriko's bid is not binding because the firm is a partnership, but only one partner has signed the bid documents and this individual has not presented evidence that he was authorized to represent the others. Also, according to the protester, WIL-SYK's corporate minutes do not properly authorize the signer of its bid. The protester urges that both bids therefore should be rejected as nonresponsive. Our cases, however, state that evidence of authority to sign a bid may be submitted any time before award, so long as it is provided promptly when requested. The bidder bears the burden of establishing the authority of the signer, but the contracting officer determines the amount and weight of evidence required to establish such authority. Self-Powered Lighting, Ltd., 59 Comp. Gen. 300 at 310 (1980), 80-1 CPD 195. The Air Force advises us that in this case, it is requesting the signature of Ameriko's other general partner, and we assume it also will request evidence of the authority of WIL-SYK's signer, if necessary.

Dragon Services also contests the adequacy of Ameriko's bid bond, alleging that it is for a construction contract. Dragon Services believes the bond may not have been intended to apply to this contract, and alleges that it also is faulty due to its December 31, 1982, expiration date. As a general rule, a bid is considered nonresponsive when a required guarantee is not submitted with it or when, as submitted, the guarantee contains a defect which detracts from the liability of the surety. Clear Thru Maintenance, Inc., B-203608, June 15, 1982, 61 Comp. Gen. ____, 82-1 CPD ____.

We previously have considered the effect of erroneous solicitation numbers and dates in bid guarantees and have held that despite such technical defects, they were enforceable by the Government against the surety. See, for example, Custodial Guidance Systems, Inc., B-192750, November 21, 1978, 78-2 CPD 355 and cases cited therein. We find the defect in this case similar. The Air Force advises us that although the word "construction" appears on the face of the bid bond, both the solicitation number and the amount of the bond are correct, and the insurance company furnishing it is an approved surety. We therefore do not believe either the enforceability of the guarantee or the responsiveness of the bid are affected. As for the December 31 expiration date, an individual bid bond need only be effective until the end of the stated acceptance period, generally 60 days, since its purpose is to insure that the bidder, if selected for award, will go forward with his commitment under the contract. Since award is to be made several months prior to the bond's expiration, the bond is not faulty.

Finally, Dragon Services alleges that WIL-SYK should be declared nonresponsive because it is not a properly organized Alaska corporation. The Air Force, however, advises us that the solicitation did not limit award to Alaska corporations, so this provides no legal basis for challenging the proposed award.

Since it was clear from the protester's initial submission that the latter bases of protest had no legal merit, we have reached our decision without requesting or receiving a written report from the Air Force. See Lowy's Express, Inc., B-206433, March 10, 1982, 82-1 CPD 228.

for *Milton J. Rowland*
Comptroller General
of the United States