



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: GEBE Gebaeude und Betriebstechnik, GmbH

File: B-231048

Date: July 7, 1988

DIGEST

1. Where doubt exists concerning the date a protester became aware of the basis of its protest, doubt is resolved in favor of the protester.
2. Contract clause, incorporated in request for proposals, requiring the contractor to warrant that it is authorized to do business and has obtained necessary licenses, does not constitute definitive responsibility criteria since the requirement does not indicate that any necessary licenses must be obtained prior to award and does not otherwise state specific, objective standards for measuring an offeror's capability to perform.

DECISION

GEBE Gebaeude und Betriebstechnik, GmbH (GEBE) protests the award of a contract to Horst Fischer Wassertechnik, GmbH under request for proposals (RFP) DAJA76-88-R-0065 issued by the Army for inspection, preventive maintenance, and emergency repair of water treatment plants throughout the United States military community in Frankfurt, West Germany.

We dismiss the protest.

Five firms responded to the RFP with Fischer the low offeror and GEBE, second low. When Fischer was awarded the contract on January 12, 1988, GEBE protested to the agency that Fischer was not registered with the appropriate German Trade Registry and consequently lacked the requisite licenses to perform the work covered in the RFP.

GEBE based its protest on the "requirements" of the following contract clause whose full text was incorporated in the RFP:

"The contractor warrants that he has been duly authorized to operate and do business in the country or countries in which this contract is to be performed; that he has obtained, at no cost to the United States Government, all necessary licenses and permits required

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in connection with this contract; and that he will fully comply with all the laws, decrees, labor standards and regulations of such country or countries during the performance of this contract."

In response to the protest, Fischer explained that it was not currently registered because of a change in its organization from a retail trade firm to a GmbH. Since its registration was pending, it had arranged, prior to submitting its offer, to have a properly licensed subcontractor available to perform the contract until the registration was complete. As verified by the contracting officer, the subcontractor was properly registered, and on February 18, 1988, Fischer's registration was completed. In denying the agency protest, the contracting officer stated that he had determined Fischer to be "fully capable of performing the work under [the] contract." GEBE then protested to our Office.

As a preliminary matter, the Army questions whether GEBE's protest was in fact timely filed. Relying upon the efficiency of the German mail system, it infers that GEBE received the agency protest denial letter more than 10 working days prior to filing its protest with this Office. GEBE responds that it did not receive the March 28, 1988, denial letter until April 5, and thus, maintains that its April 15 protest to this Office is timely. Where, as here, the contracting agency and the protester provide conflicting statements about the timeliness of a protest, and the agency produces no evidence to establish the protest is untimely, our Office will resolve doubt in favor of the protester. See Menasco, Inc., B-223970, Dec. 22, 1986, 86-2 CPD ¶ 696. We therefore decline to dismiss the protest as untimely.

As at the agency level, GEBE's protest essentially alleges that the Army was incorrect in its determination that Fischer was a responsible contractor, capable of meeting the contract's requirements. Since such determinations rest within the broad discretion of the agency, we will not review those determinations absent a showing of fraud or bad faith on the agency's part or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m)(5) (1988); W. H. Smith Hardware Co., B-228576, Feb. 4, 1988, 88-1 CPD ¶ 110.

In this case, GEBE has neither alleged nor shown that the responsibility determination was fraudulent or made in bad faith. Instead, it has concentrated on an allegation that the contract clause contains definitive responsibility criteria, which Fischer failed to meet prior to award and that, by not incurring the costs of compliance, Fischer

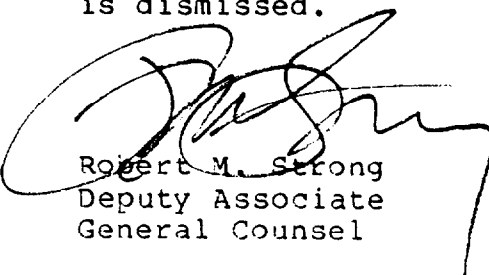
obtained an unfair competitive advantage. We reject GEBE's claims and agree with the Army that award to Fischer was proper since the clause does not set forth definitive responsibility criteria.

Definitive responsibility criteria are objective standards established by a contracting agency to measure an offeror's ability to perform the contract, as stated in certain specific qualitative and quantitative qualification requirements contained in a solicitation. W. H. Smith Hardware Co., B-228576, supra. Such criteria do not involve the offeror's performance obligations under the contract. Id. Where, as here, a contract clause incorporated in a solicitation indicates that the contractor (as distinguished from an offeror) must warrant that it is authorized to do business and has obtained necessary licenses, but neither specifies those licenses nor requires that any be obtained prior to award, the contractor may obtain them after award. Cumberland Sound Pilots Association--Request for Reconsideration, B-229642.2, June 14, 1988, 88-1 CPD ¶ ____. Thus, the warranty and related licensing requirements of the contract clause do not constitute definitive responsibility criteria.

Further, we find no basis for inferring, as GEBE urges, that such criteria exist based on the nature of the contract, i.e., the Army's need for qualified contractors due to the health concerns related to work on water treatment plants. While the Army would necessarily consider such matters in its responsibility determination, that consideration does not transform the requirements of the contract clause into definitive responsibility criteria.

Finally, we disagree that Fischer enjoyed any unfair competitive advantage. First, since the requirements did not have to be met prior to award, any effect on offered costs is immaterial. Second, as noted by the Army, Fischer ultimately did incur the costs of compliance during the registration process.

Since the protest does not fall within the circumstances under which we have stated we will review contracting officers' affirmative determinations of responsibility, it is dismissed.



Robert M. Strong
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General Counsel