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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: American International Contractors, Inc.

File: B-260727

Date: May 31, 1995

Scott M. Heimberg, Esq., Sheila C. Stark, Esq., and Andrew R. Miller, Esq., Akin, Gump, Strauss, Hauer & Feld, for the protester.
Barry F. Puschauver, Esq., Department of State, for the agency.
Daniel I. Gordon. Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Department of State's interpretation of statutory language in the Percy Amendment, 22 U.S.C. § 302 (1988), is not legally objectionable as the Department, responsible for implementing the Percy Amendment, is afforded substantial deference in its interpretation of the statute and its interpretation is not inconsistent with the statutory language or otherwise unreasonable.

2. Discussions were not misleading, notwithstanding errors that occurred, because the errors had no prejudicial effect.

DECISION

American International Contractors, Inc. (AICI) protests the determination by the Department of State that Cosmopolitan, Inc./Contrack International, Inc. Joint Venture is the successful offeror under request for proposals (RFP) No. S-FBOAD-95-R-0019. AICI contends that: (1) the awardee's proposal should have been rejected because the joint venture was not properly prequalified, as required by the RFP; (2) the awardee's evaluated price was low only as a result of the agency's improperly giving the awardee the benefit of a 10-percent evaluated price reduction reserved for American-owned offerors; and (3) the agency misled the protester during discussions into raising its proposed price in its best and final offer (BAFO).

We deny the protest.

On November 16, 1994, the agency issued an invitation for bids for the construction of a warehouse complex in Cairo, Egypt, to be used by the U.S. Embassy in Cairo. On December 2, the agency converted the acquisition to a negotiated procurement by issuing the RFP at issue as a replacement for the invitation for bids. Award was to be made to the offeror whose conforming proposal had the low evaluated price.

The RFP indicated that the procurement was subject to section 11 of the Foreign Service Buildings Act of 1926, 22 U.S.C. § 302 (1988), commonly referred to as the Percy Amendment. That provision limits eligibility for award of certain overseas construction contracts to "American-owned bidders" and foreign offerors satisfying certain specified criteria (which are not at issue in this protest). 22 U.S.C. § 302(a). In addition, the Percy Amendment mandates that the price proposed by "American-owned bidders" be reduced by 10 percent for evaluation purposes. 22 U.S.C. § 302(b)(2).

The statute states, at 22 U.S.C. § 302(b)(4), that qualification as an "American-owned bidder" requires:

> "evidence of (A) performance of similar construction work in the United States, and (B) either (i) ownership in excess of fifty percent by United States citizens or permanent [residents], or (ii) incorporation in the United States for more than three years and employment of United States citizens or permanent residents in more than half of the corporation's permanent full-time professional and managerial positions in the United States."

The Percy Amendment also provides that "[q]ualification under this section shall be established on the basis of determinations at the time bids are requested," 22 U.S.C. § 302(b)(5), and that "[d]eterminations under this section shall be committed to the discretion of the Secretary of State." 22 U.S.C. § 302(d).

The agency advised a number of offerors in November 1994 that they had prequalified under the Percy Amendment, without distinguishing between the two bases for prequalification. That is, the November 1994 notices did not indicate whether the offerors were viewed as American-owned, and therefore eligible for the 10-percent reduction in the evaluated price for the purpose of source selection, or simply as qualifying foreign firms, which would permit the firm to compete without receiving the 10-percent evaluated price reduction. Among the offerors receiving the November 1994 notice of prequalification were

AICI, Cosmopolitan, Inc., and Contrack International, Inc. At that time, the latter two firms had applied for prequalification as separate offerors, not as a joint venture.

On January 10, 1995, the agency advised offerors whether they had qualified as American-owned and therefore eligible for the 10-percent evaluated price reduction. At that time, the agency informed the protester and Cosmopolitan that they had qualified as American-owned. Contrack International was advised that it had not qualified as American-owned, because it had not furnished evidence of having performed similar construction work in the United States, as required by the Percy Amendment. At some point in January, AICI asked the agency which firms had prequalified; the agency responded by providing two lists, one consisting of the firms prequalified as American-owned and the other of the prequalified, non-American-owned firms.

Shortly after January 10, Cosmopolitan and Contrack International informed the agency that they wished to submit a proposal as a joint venture, with Cosmopolitan (the firm which had been qualified as American-owned) exercising majority control. On January 26, the agency informed the joint venture that it would be required to submit an application for prequalification as a separate entity and to request "American-owned bidder" status for the joint venture for purposes of the 10-percent advantage in price evaluation.

The joint venture submitted the required applications, together with documents showing that Cosmopolitan would control 51 percent of the joint venture, on January 27. On January 30, the agency advised the joint venture that it was prequalified to submit a proposal as an American-owned offeror, thus entitling it to benefit from the 10-percent price evaluation advantage. Closing date for the receipt of proposals was January 31; the joint venture and AICI were among the firms submitting proposals.

Upon review of the proposals, the agency determined that the joint venture's price of $5,624,065 was low, while the protester's price of $5,783,000 was next low. Since both were considered American-owned, the 10-percent price preference had no impact on their evaluation. Both proposals were determined to be in the competitive range.

In preparing for discussions with the offerors, the contracting officer compared each proposal's prices for various components of the contract work (consisting of 16 "divisions," each subdivided into labor and materials) with the independent government estimate for that work. Where a proposed price was viewed as substantially above or

below the government estimate (and therefore identified as "excessive" or "conservative," respectively), the contracting officer decided to so advise the offerors. Accordingly, during discussions with the protester, the agency identified 10 proposed prices that the agency viewed as low, while 5 were identified as high; the agency also stated that the protester's proposed overhead rate appeared high. The joint venture was told that six of its prices appeared low, while three were viewed as high.

In its BAFO, the protester raised the prices it had initially proposed for seven of the items where the agency had identified the initial prices as low. For three of the items whose initial prices had been criticized as low, however, the protester lowered its prices at BAFO. The protester reduced its prices at BAFO for all five of the items whose prices the agency had identified as high. It lowered its overhead only slightly in its BAFO. In its BAFO, the joint venture lowered all prices that the agency had identified as high, and raised all those identified as low.

These price adjustments did not affect the relative standing of the two proposals. The joint venture's BAFO price was $5,509,129, while the protester's was $5,896,000. Because both proposals were found to conform to the RFP requirements and price was therefore the discriminator, the joint venture's proposal was selected for award. This protest followed.

AICI's first contention is that, since the Percy Amendment provides that "[q]ualification under this section shall be established on the basis of determinations at the time bids are requested," the agency acted improperly in permitting the joint venture to prequalify after December 2, the date on which the agency issued the RFP. The agency's position is that the statutory language is broad enough to allow the agency to permit prequalification up to the date on which proposals are to be submitted. Because the joint venture was prequalified on the day before proposals were due, the prequalification was, in the agency's view, timely.

An agency's interpretation of a statute that it is responsible for implementing is entitled to substantial deference. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). So long as the agency's interpretation is reasonable, it should be upheld. Id. Here, the Department of State is responsible for implementing the Percy Amendment, and we therefore accord it substantial deference in our review of its interpretation of the statutory language. While the Percy Amendment language ("the time bids are requested") could be interpreted to require that prequalification determinations be completed by

(or be based on the situation as of) the date on which the offers were requested (that is, the date the solicitation was issued), the language is not unambiguous and it does not preclude the agency's reading, which is that offerors may apply for and be granted prequalification up to the date on which the offers were requested to be submitted (the closing date). The agency correctly points out that its interpretation serves the broader goal of fostering competition by permitting additional firms to prequalify between the date the solicitation is issued and the closing date. Because the statutory language does not preclude the Department of State's approach, we have no basis to conclude that the agency's interpretation of the statute is unreasonable.[1]

In its comments on the agency report, the protester asserted that it "relied to its detriment on incorrect information reflected in the outdated prequalified bidders list in preparing and submitting its initial proposal and BAFO."[2] This allegation refers to reliance on the absence of the joint venture from the list of prequalified firms provided to AICI during January. The agency explains that, whenever it received an inquiry about which offerors had been prequalified, it provided the list that was current at the time of the inquiry. The list provided to AICI did not indicate that it was final, nor was that list a part of the solicitation documents or otherwise information that the agency was required to furnish to offerors. Because the information furnished was accurate at the time provided and no representation was made that the list was final, there is no reasonable basis for AICI's "detrimental reliance" argument.

The argument is also implausible on its face, since both components of the joint venture appeared on the list provided to AICI--one component as a prequalified American-owned offeror and the second as a prequalified non-American-owned offeror. Accordingly, to the extent that

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[1]We note that AICI initially appeared to agree that firms could be prequalified up to the closing date. Thus, the protest alleged that: "As of [the January 31 closing date], [the Department of State] had prequalified six companies, including AICI, as 'American-owned' for this procurement." This statement, although factually incorrect, appears to reflect AICI's understanding that the agency could prequalify offerors up to the closing date.

[2]It was in those comments that the protester for the first time raised the argument, which we have rejected, that prequalification was required to be determined prior to December 2.

AICI is asserting that it relied on the list as the basis for assuming that it would not be competing with one or both of those firms, or that neither firm would be benefiting from the 10-percent evaluated price adjustment for U.S.-owned firms, there is no factual basis for such an assumption.

AICI's second ground of protest is that the agency had no basis to find the joint venture qualified as an "American-owned bidder." The protester points out that the Percy Amendment does not explicitly state that a joint venture may be prequalified as American-owned, and argues that the agency improperly adopted the definition of a "qualified United States joint venture person" from another statute governing certain overseas diplomatic construction programs, the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (the Omnibus Act), 22 U.S.C. § 4852(c)(3) (1988). The Omnibus Act defines a qualifying joint venture as one in which "a United States person or persons owns at least 51 percent of the assets of the joint venture." Id. The agency prequalified the joint venture because Cosmopolitan, the firm which had previously qualified as American-owned, controlled at least 51 percent of the assets of the joint venture.

In arguing in its protest that the joint venture could not satisfy the relevant definition, the protester initially cited the Omnibus Act definition and alleged that the joint venture could not qualify "because the Joint Venture is comprised in large part of a firm that is not 'American-owned'." In its comments on the agency report, AICI changed its position and argued that the Omnibus Act definition did not apply and that no joint venture that included a non-American-owned firm could compete for the contract at all. This argument is based on the fact that, with certain exceptions not relevant here, the Omnibus Act applies only to projects which have a total project value exceeding $10,000,000. 22 U.S.C. § 4852(a)(1) (Supp. V 1993). The procurement here has an estimated value below that amount.

As with the question of the statutory deadline for prequalification, we accord substantial deference to the Department of State's interpretation of a statute that it is responsible for implementing. The agency's interpretation, which permits prequalification of a joint venture controlled by an American-owned firm, appears reasonable on its face. Nothing in the language of the statute would bar the agency from prequalifying a joint venture, like any other offeror, as American-owned, so long as it satisfied the Percy Amendment definition of an "American-owned bidder." Moreover, AICI's interpretation, which would impose a per se rule precluding joint ventures of American and non-American

firms from being considered American-owned (or, indeed, for being considered for award at all), appears unreasonable on its face, since it would prohibit such consideration even where, for example, an American firm held an 80-percent interest in the joint venture. Accordingly, we conclude that the agency's interpretation of the statutory language is reasonable.

In this case, on the basis of the majority share in the joint venture held by Cosmopolitan (whose "American-owned" status is not contested), the agency reasonably determined that the joint venture met the Percy Amendment definition. Since we find that the agency was not required to adopt a per se approach precluding joint ventures from qualification as American-owned, and the protester has not pointed to any prong of the Percy Amendment definition that the joint venture does not satisfy, we find that the agency reasonably determined that the joint venture qualified as American-owned and was therefore eligible for a 10-percent reduction in its evaluated price.

AICI's final allegation is that the agency misled it in discussions into raising its price at BAFO. In support, AICI points to apparent errors in the agency's discussion of proposed prices as high and low. For example, AICI cites one division for which its price was identified as low, even though it was $688 above the agency estimate. In another case, the agency advised the joint venture that its initial price for one division was low even though that price was actually $90,000 above the agency estimate. Our review confirms these and several other instances in which the discussions did not accurately reflect a comparison of the offerors' prices with the agency's estimates.

Here, however, the errors in the discussion questions did not prejudice AICI. Notwithstanding the mistakes, most of the discussion comments reflected an accurate comparison of the proposed and estimated prices. In addition, AICI was accurately advised that its overhead was high, which was apparently the single greatest contributor to its price ranking, and yet it chose to leave overhead at essentially the same level at BAFO. Moreover, because errors occurred in the discussions with both offerors and in both directions (low and high), their net effect did not affect the outcome of the competition.[3] In the context of a price difference

[3]For example, while AICI was told that its initial price was low on one item, even though it was actually above the agency estimate, it was advised that its price was high for another item, despite its price being $29,000 below the estimate. Similarly, there was one instance in which the (continued...)

of more than $150,000 in initial proposals (a difference which widened to almost $400,000 at BAFO), the errors had no impact on the ranking of the proposals and therefore did not prejudice AICI. Because prejudice is an essential element of a viable protest, Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379, we deny the protest allegation that the agency conducted misleading discussions.

The protest is denied.

Ronald Berger
for Robert P. Murphy
General Counsel

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[3](...continued)
joint venture was told that its price was low, when the estimate indicated the contrary.

In addition, review of the errors shows that they had little impact at BAFO on the spread between AICI's and the joint venture's prices. Thus, while the agency advised AICI inaccurately, as noted above, that a particular price was low (when it was actually already $688 above the agency estimate), AICI did not raise the price (which might suggest that it was misled by the discussions), but rather lowered it at BAFO by $11,000. On the other hand, where the joint venture was improperly advised that a particular price was low (when in fact it was already more than $90,000 above the agency estimate), the joint venture raised the price by $15,000 at BAFO. If these errors had any impact, therefore, it appears to have been to prejudice the joint venture, not AICI.