



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Tucson Mobilephone, Inc.
File: B-258408.3
Date: June 5, 1995

Theodore M. Bailey, Esq., and Garreth E. Shaw, Esq., Bailey, Shaw & Deadman, P.C., for the protester.
Gregory H. Petkoff, Esq., and Capt. Charles W. Crews, Jr., Department of the Air Force, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Awardee, which had not been in business for 5 years, satisfied a definitive responsibility criterion requiring 5 years of two-way radio maintenance experience by its key employees' experience with another company.
2. Protest that awardee intentionally misrepresented that it had the permission of the protester's lead technician to propose the technician's services in order to comply with a definitive responsibility criterion is denied where the record does not support the claim of intentional misrepresentation.

DECISION

Tucson Mobilephone, Inc. protests the award of a contract to ENC Federal, Inc. under invitation for bids (IFB) No. F65501-94-B-0034, a total small business set-aside, issued by the Department of the Air Force, for land mobile radio maintenance services. Tucson alleges that ENC failed to satisfy, and/or met by misrepresentation, certain IFB definitive responsibility criteria.

We deny the protest.

The IFB was issued on July 22, 1994, to obtain a maintenance services contractor for land mobile radios (LMR) at Elmendorf Air Force Base, Alaska. The LMRs include approximately 1,325 portable radios, 206 mobile radios, 25 base stations, 4 repeaters with 42 nets, 55 frequencies, and a trunking system. The IFB contemplated the award of a firm, fixed-price contract for a base year with 4 option years. Under section C, paragraph 5.19.2, the IFB stated in pertinent part:

"MAINTENANCE QUALIFICATION: The contractor shall provide, prior to award, supporting documents as follows:

"(a) Proven Reliability: The contractor will have proven reliability of five years of generalized two-way radio maintenance and at least three years experience of specialized maintenance of types and models of equipment or equivalent listed in technical exhibit 1.

"(d) All contractor's personnel performing internal adjustments or maintenance on radio equipment must (have) the technical capability to service the equipment listed in technical exhibit 1. They must possess as a minimum a second class commercial radio operator's license. A copy of the technicians(') certificates must be submitted prior to award." [Emphasis in original.]

At bid opening on September 16, the Air Force received five bids. ENC submitted the low bid and Tucson, the incumbent contractor, the next low bid. After requesting and obtaining various documentation from ENC, the Air Force determined that ENC satisfied the requirements of paragraph 5.19.2 and was otherwise responsible, and thus made award to that firm on October 26. On October 27, Tucson protested that ENC did not satisfy the requirements of paragraph 5.19.2 and therefore was not entitled to the award. On November 4, the Air Force determined that it was in the government's best interest to proceed with performance under the contract, notwithstanding the protest.

The Air Force reports that the determination that ENC met the requirements of subsections (a) and (d) of paragraph 5.19.2 was based upon the 5 years of two-way radio maintenance experience of ENC's President and other key employees while employed by Ellen and Company, whose government business has been acquired by ENC, as well as the credentials of the lead technician then employed by Tucson on the incumbent contract. Tucson argues that these employees' experience with Ellen cannot satisfy the criterion that assertedly contemplates that the company itself have this experience. Tucson also submitted an affidavit from the lead technician stating that he had not authorized and had indeed forbade ENC from utilizing his qualifications to obtain the contract, and that he had apprised the Air Force of his position prior to award. The Air Force responded that employee experience can satisfy the 5-year two-way radio maintenance experience requirement. The Air Force also submitted an affidavit from the

contracting officer asserting that the agency reasonably considered the lead technician's qualifications in finding ENC qualified, noting that the lead technician had personally delivered his qualifications to the contracting office prior to award. Our Office held a hearing to obtain testimony as to whether ENC had the authority to propose this individual to qualify for contract award, and as to the extent and timing of the Air Force's knowledge of the matter.¹

According to the lead technician, he attended the September 16 bid opening on behalf of Tucson, where he learned that ENC was the low bidder and Tucson was second. Hearing Transcript (Tr.) at 13, 110. On September 19, he contacted ENC and spoke with its authorized representative about the possibility of future employment with ENC if that firm obtained the award. ENC's representative stated that he was interested in employing the lead technician, but that he needed to see a resume before making a decision. See Tr. at 14-15. The lead technician testified that at that time he instructed the ENC representative that while the lead technician was interested in future employment ENC could not use his qualifications to qualify for the contract, to which the ENC representative responded that the lead technician need not worry about this possibility because ENC already possessed all the technical personnel necessary to qualify for the contract. See Tr. at 14-15.² The record contains a letter from the lead technician dated September 22 to ENC reflecting the conversation and accompanied by a resume, which does not mention the lead technician's restriction.

On September 22, ENC submitted its first response to the agency's request that it show compliance with the requirements of paragraph 5.19.2 prior to award. This response contained the qualifications of an ENC employee, which no party now contends would satisfy the requirements of this paragraph, and a statement that it would hire an unnamed technician working for Tucson. The Air Force's technical representative--the Quality Assurance Evaluator (QAE)--who was responsible for reviewing ENC's qualifications, indicated that he thought this was a reference to Tucson's lead technician. Tr. at 269.

¹Although ENC was invited to participate in the protest and attend the hearing, it chose not to do so.

²Tucson's president's testimony and contemporaneous telephone notes concerning what the lead technician advised him about the matter at that time are consistent with the lead technician's testimony in this regard. Tr. at 114-116.

The lead technician testified that around September 29, he learned, while picking up radios from the QAE's office, that ENC had named him as the lead technician they intended to use for this contract. Tr. at 17. The lead technician testified that he then informed the QAE that he had contacted and provided a resume to ENC, but that he had instructed ENC not to use his credentials to qualify for the contract. Tr. at 17-18, 32. In their testimony, the QAE and the QAE's supervisor essentially confirmed the lead technician's reaction in this regard, and testified that the lead technician advised them "several times" since that initial conversation that he objected to ENC's use of his qualifications to obtain the contract and that they had never been informed by the lead technician that "he had changed his mind." Tr. at 250, 271-272, 286, 327.³

On October 6, ENC furnished the resume of the Tucson lead technician to the contracting office for review in response to the Air Force's request that ENC demonstrate compliance with paragraph 5.19.2. This response also included the statement that the lead technician "will continue his knowledge . . . to perform the forthcoming contract to ENC."

The lead technician testified that when he learned that ENC had in fact submitted his resume to the contracting office, he expressed his concern to the contract administrator and advised her that he had not given ENC permission to use his credentials to qualify for the contract. Tr. at 21. The contract administrator testified that at this meeting the lead technician queried whether it was ethical for ENC to use his credentials to obtain award or for him to provide his credentials to ENC; that the lead technician did not state that he had not authorized the use of his credentials by ENC to obtain the contract; and that the contract administrator advised the lead technician that this was "just normal procedure" and that a contractor could ask for credentials from incumbent employees who may be employed by the new contractor. Tr. at 146-147, 151, 153-154, 191-193.

Because of the lead technician's continuing concerns, a second meeting between the lead technician, the contract administrator, and the contracting officer occurred on approximately October 18. The lead technician testified that he advised these officials that ENC had been forbidden to use his credentials to qualify for the contract and was concerned that this had been done, to which the contracting

³The QAE's supervisor also testified that she had informed the contracting officer of the lead technician's opposition to ENC's use of his credentials to obtain the contract, to which the contracting officer reportedly responded that this was the way it was done all the time. Tr. at 328, 331.

officer, essentially responded that it was not unusual for a bidder to submit the resumes of the incumbent contractor's employees. Tr. at 21-24. The lead technician testified that he entered the meeting opposing the use of his resume by ENC, and departed the meeting "confused" because he believed that the contracting officer did not understand or respond to his concerns but had changed the topic and advised him that ENC's use of his resume was not "abnormal" and essentially "was okay." Tr. at 21-24.

With regard to this second meeting, the contracting officer and contract administrator testified that the lead technician did not advise that he had restricted the use of his resume by ENC, and that they were under the impression that the lead technician was requesting their advice concerning his moral dilemma and the ethics of whether he could submit his credentials to ENC while still working for Tucson. The contract administrator also acknowledged that during this meeting the lead technician expressed his desire for possible employment with ENC if it obtained the contract, as well as his concern about the use of his credentials by ENC to obtain award; the contract administrator further affirmed that the lead technician indicated that he did not want his credentials to be used by ENC to obtain the contract. According to these officials, the contracting officer advised the lead technician that it was not unusual for the credentials of incumbent employees to be solicited and obtained by other bidders, and that it was the lead technician's personal decision as to whether he should provide his credentials to ENC.⁴ See Tr. at 42-44, 147-151, 153-154, 191-193, 201-205, 220-221.

The lead technician testified that ENC's representative contacted him around October 24 or 25 to inform him that if he were interested in employment by November 1 he had to take his credentials into the agency for their approval before ENC could employ him or ENC would have to employ somebody else.⁵ Tr. at 25, 36-37. The lead technician further testified that he understood the purpose of submitting his credentials at that time was solely to obtain employment with ENC and that he had not changed his mind regarding ENC's use of his credentials to qualify for the contract. Tr. at 26-28, 30, 338-339. However, the lead

⁴There is no contemporaneous documentation prepared by the agency reflecting its meetings or conversations with the lead technician. See Tr. at 56-57.

⁵The required credentials consisted of the lead technician's Federal Communications Commission operators license as well as his certificate of training on certain particular equipment to be maintained under the contract.

technician did not testify that ENC apprised him that it had obtained the award. Nor did he testify that he reiterated to ENC's representative his previously stated restriction on the use of his credentials.

The lead technician hand carried his credentials to the contracting office, which the contract administrator accepted. Tr. at 26-27, 154. Neither the lead technician nor the contract administrator remembers any conversation at that time. Tr. at 29, 222-223. The Air Force officials testified that they believed that by his delivery of his credentials the lead technician had decided to allow his credentials to be used by ENC to obtain award. See Tr. at 48, 222. No Air Force official testified that the lead technician specifically informed them that ENC was authorized to use his credentials to qualify for the contract. See Tr. at 228, 278, 327.

The Air Force officials testified that prior to the lead technician's delivery of his credentials to the contracting office the Air Force made several contacts with ENC regarding the need for ENC to furnish the credentials of its proposed technicians in order for ENC to receive award; that the lead technician's credentials were relied upon by the Air Force in making award to ENC; and that only by submitting the lead technician's credentials did ENC satisfy the requirements of paragraph 5.19.2. Tr. at 97, 209, 223, 255-262, 272.

The lead technician testified that when he learned that ENC had used his credentials to obtain award, despite his restriction on such use, he decided that he could not work for ENC under these circumstances. Tr. at 28. He immediately attempted to retrieve his credentials and notified the agency that ENC may not use his qualifications on any future contracts. Tr. at 28-29, 44-45, 125-126.

Tucson argues that the Air Force could not properly determine that ENC met the definitive responsibility criteria in paragraph 5.19.2. The Air Force disputes that paragraph 5.19.2 constitutes definitive responsibility criteria and argues that the Air Force reasonably determined, on the basis of the documentation submitted, that ENC met the requirements.

Definitive responsibility criteria are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor's ability to perform the contract. See Federal Acquisition Regulation (FAR) § 9.104-2; T. Warehouse Corp., B-248951, Oct. 9, 1992, 92-2 CPD ¶ 235. The criteria limit the class of contractors to those meeting specified qualitative and quantitative qualifications

necessary for adequate contract performance, e.g., unusual expertise or specialized facilities. Id. Here, the requirements of paragraph 5.19.2 (a) and (d) that the contractor possess a specific number of years of particular experience and that its technicians possess certain licenses are clearly definitive responsibility criteria because they are objective standards to which the contractor was required demonstrate compliance with in order to obtain the award. Coastal Elecs., Inc., B-250718, Feb. 16, 1993, 93-1 CPD ¶ 144; Townscoc Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313, aff'd, B-240289.2, Mar. 15, 1991, 91-1 CPD ¶ 290.⁶

Where a protester alleges that definitive responsibility criteria have not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted, from which the contracting officer reasonably could conclude that the criteria have been met; although we recognize that the relative quality of the evidence is a matter within the contracting officer's judgment, the official may only find compliance with the definitive responsibility criteria based upon adequate, objective evidence. T. Warehouse Corp., supra.

Tucson first argues that the Air Force lacked objective evidence to determine that ENC met the 5-year two-way radio maintenance experience requirement because ENC was not incorporated until December 7, 1989. Tucson contends that ENC may not substitute the experience of its employees for corporate experience in order to meet the requirement.

We disagree. In determining whether a contractor satisfies a definitive responsibility criterion for a specified number of years of experience, an agency may consider the experience of the bidder's employees, even if the experience was gained while these employees worked for other employers. D.H. Kim Enters., Inc., B-255124, Feb. 8, 1994, 94-1 CPD 86; J.D. Miles & Sons, Inc., B-251533, Apr. 7, 1993, 93-1 CPD ¶ 300. Here, the record indicates that the President of ENC was formerly the General Manager of Ellen's federal contracting business, which included contracts involving two-way radio maintenance, and that the entire government

⁶Tucson argues that ENC should be rejected because it allegedly did not meet any of the other 5.19.2. criteria. However, only subparagraphs (a) and (d) quoted above are definitive responsibility criteria, since only these subparagraphs state objective standards. See Motorola, Inc., B-234773, July 12, 1989, 89-2 CPD ¶ 39. Rather, compliance with solicitation requirements concern an affirmative determination of responsibility which we do not generally review. 4 C.F.R. § 21.3(m) (5) (1995).

business, including assets and employees was now ENC's. Since Tucson does not otherwise dispute the quality of the experience of these employees, we think that the Air Force had a sufficient basis to conclude that ENC met the 5-year two-way radio maintenance experience requirement.

Tucson also argues that the objective evidence that the Air Force relied upon to determine that ENC met the paragraph 5.19.2 criteria was based upon a material misrepresentation because ENC did not have lead technician's permission to use his credentials to qualify for the contract.

Generally, where a bidder has made an intentional misrepresentation concerning personnel that materially influences an agency's consideration of its offer or bid, we will find that the misrepresentation provides a basis to reject the offer or bid or terminate the contract award based upon the misrepresentation. See Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53; ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326. We have applied this rule where the alleged misrepresentation concerns information submitted to assist the contracting officer in determining a bidder's or offeror's responsibility, including satisfaction of definitive responsibility criteria. See J&J Maintenance, Inc., B-251355.2; B-251355.4, May 7, 1993, 93-1 CPD ¶ 373; Universal Technologies, Inc.; Spacecraft, Inc., B-248808.2; et al., Sept. 28, 1992, 92-2 CPD ¶ 212. In such cases, we review the matter to determine whether the alleged misrepresentation was made in bad faith or materially influenced the agency's determination of the awardee's responsibility. Id.; Moorman's Travel Serv., Inc.--Recon., B-219728.2, Dec. 10, 1985, 85-2 CPD ¶ 643. A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact upon the determination. Informatics, Inc., supra; ManTech Advanced Sys. Int'l, supra.

Although the lead technician may not have granted ENC permission to use his credentials to meet the criteria under 5.19.2,⁷ we cannot conclude on the basis of the

⁷We find that the lead technician's testimony was entirely truthful and credible. The Air Force witnesses testified that the lead technician was an honest and trustworthy individual with integrity. See Tr. at 97, 237, 334. The lead technician is not employed by Tucson, and states that he testified not because of any pressure from Tucson, but because he felt that an injustice had been done. Tr. at 30, 33.

record before us that ENC intentionally misrepresented to the agency its authority to propose the lead technician. ENC's submissions to satisfy paragraph 5.19.2 do not state that ENC had the lead technician's agreement to use his credentials nor that he was committed to this contract, but only stated the reasonable expectation that the lead technician, who had voluntarily provided ENC with his resume seeking employment under this contract (albeit with his understanding that the resume would not be used to qualify ENC for award), would be employed by ENC to perform the contract.

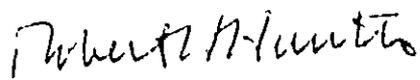
These submissions were insufficient to satisfy the agency, which demanded that ENC submit the technician's credentials before award could be made. ENC then requested on October 24 or 25 that the lead technician provide his credentials to the Air Force contracting office if he wanted to work for ENC on November 1; there is no evidence that ENC represented to the lead technician that it had obtained the award. The lead technician then submitted his credentials to the Air Force with intention of working for ENC and with no comment to the Air Force.

While the lead technician may have been confused about the purpose for and import of submitting his credentials, ENC could have reasonably believed that it had the authority to use the credentials to obtain the award because the lead technician agreed to deliver his credentials to the contracting office and to work for ENC on November 1. Tr. at 37; see American Contract Health, Inc., B-255165, Feb. 10, 1994, 94-1 CPD ¶ 98. Also, given that the lead technician personally delivered his credentials without stating that they were for a limited purpose and could not be used to qualify ENC for award, the Air Force reasonably accepted them to qualify ENC.⁹ Under the circumstances, we cannot conclude that the Air Force unreasonably considered

⁹To the extent that Air Force officials were aware of the lead technician's limitations on the use of his credentials, they could reasonably conclude, by the lead technician's delivery of his credentials in response to the request that ENC provide the credentials, that the lead technician had changed his mind.

that the credentials of the lead technician satisfied the paragraph 5.19.2. criteria, or that the evidence otherwise establishes an intentional misrepresentation on ENC's part.

The protest is denied.


10 Robert Murphy
General Counsel