DECISION

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

60197

FILE: B-184429 DATE: November 21, 1975

MATTER OF: ENSEC Service Corporation 97701

DIGEST:

1. Where it is alleged that definitive responsibility criterion--IFB security clearance requirement--was waived, contracting officer's affirmative determination of responsibility is for review on merits. Determination was supported by objective evidence before contracting officer, who had received information from bidder that adequate personnel working at nearby facilities could be used to perform contract, and that predecessor contractor's qualified personnel might also be hired. GAO has no objection to determination in view of facts of record and absence of evidence from protester demonstrating that determination lacked reasonable basis.

2. Whether guard services contractor is, as protester claims, in default of contract is matter of contract administration, which is function of contracting agency, not GAO. In any event, contracting officer states that contractor beginning performance using personnel with Confidential security clearances adequately meets initial needs under contract; that necessary administrative processing to transfer Secret clearances from old to new contractor is being accomplished; and that in event Secret tests or equipment are utilized at site, contractor has capability to furnish Secret-cleared personnel.

3. Advertised procurement is open and public to protect interests of both Government and bidders. Agency's position that no regulation obliged it to notify apparently successful bidder of fact that undisclosed late bid was being considered for award is not persuasive justification for declining to provide information where apparently successful bidder makes several preaward inquiries attempting to ascertain procurement status. Record does not show whether there was actual failure to furnish advice, or merely poor communication. But procurement officials should be sensitive to position of bidder and make reasonable efforts to respond to inquiries.

PUBLISHED DECISION
55 Comp. Gen. .....

The protest of ENSEC Service Corporation (ENSEC) presents two issues: (1) Did the Department of the Army by making an award to Advance Services, Inc. (Advance), improperly waive a requirement in invitation for bids (IFB) No. DAAG53-75-B-1920 for a "Secret" security clearance in connection with the performance of guard services?; (2) Should the Army have advised ENSEC that the Advance bid, which was submitted late, was under consideration when ENSEC made inquiries before award concerning the status of the procurement?

The IFB was issued at Fort Belvoir, Virginia, and sought bids for 1-year's guard services. Three bids were opened at the bid opening on June 18, 1975. Uffinger & Associates, Inc., submitted the low bid but was later found to be ineligible for award. ENSEC's bid price was second low.

A fourth bid--submitted by Advance--was received about 1 hour late. The contracting officer subsequently determined, however, that the bid would have been delivered on time but for mishandling by the Government. Since the Advance bid price was lower than ENSEC's, a contract was awarded to Advance on July 1, 1975, prior to ENSEC's protest.

ENSEC does not object to the Army's determination that the late Advance bid was eligible for acceptance due to Government mishandling. ENSEC contends, however, that according to documents included with the Army's report, the Army Security Officer has waived the IFB requirement for personnel with Secret clearances by allowing Advance to begin performance of the contract using personnel with Confidential clearances. Also, ENSEC states that its former employees who were hired by Advance for the performance of the contract have not completed DD Form 48-2, "Application and Authorization For and Access to Confidential Information." ENSEC believes that the Army Security Officer had no right to waive a contract specification, and that Advance was and remains in default of its contract.

We note that DD Form 254 in the IFB established a requirement for a "Secret" security clearance in the performance of the contract. As the Army report points out, a requirement of this type relates not to bid responsiveness but to bidder responsibility. 51 Comp. Gen. 168 (1971). The Army further notes that our Office no longer reviews affirmative determinations of responsibility, absent a showing of fraud. While this is an accurate statement of the general rule (see Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64),

our Office does review affirmative determinations of responsibility where the solicitation contained definitive responsibility criteria which allegedly were not applied. See Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. Since the security clearance requirement in the present case is a definitive responsibility criterion and since ENSEC's allegations call into question whether the contracting officer adequately considered Advance's ability to perform in accordance with this requirement, the question of Advance's responsibility is properly for review by our Office.

The contracting officer states that the determination of Advance's responsibility was based upon information provided by Advance and the cognizant Army Security Office. In a letter dated June 24, 1975, responding to a request from the contracting officer, Advance stated that it had adequate personnel employed at facilities in nearby communities to meet the requirements of the contract, and also that it intended to offer employment to the predecessor contractor's qualified personnel. Also, prior to the issuance of the IFB the Army Security Office had verified that Advance was listed as having the required security clearance in the records of the Defense Contract Administration Services Region. The contracting officer states that he considered the foregoing information adequate to support an affirmative determination of responsibility.

Our Office will not object to a contracting officer's determination of responsibility unless it is shown to be without a reasonable basis. See Leasco Information Products, Inc., et al., 53 Comp. Gen. 932 (1974), 74-1 CPD 314. In the present case, there was objective evidence before the contracting officer relevant to the definitive responsibility criterion. This in itself is sufficient to satisfy our Office's review standard. The relative quality of the evidence is a matter for judgment by the contracting officer, not our Office. See Yardney Electric Corporation, supra. Also, we have considered the several questions raised by ENSEC concerning whether the Army could properly permit Advance representatives to visit the work site and make offers of employment to ENSEC's personnel. ENSEC has stated that this visit interfered with its business operations. We see nothing in these or ENSEC's other allegations which would demonstrate the unreasonableness of the responsibility determination and, therefore, our Office has no objection to it.

As for ENSEC's allegation that Advance is in default of its contract, in many decisions we have noted that questions as to a

contractor's performance are matters pertaining to contract administration, which is a function of the contracting agency, not this Office. See, for example, Kelly Services, B-182071, October 8, 1974, 74-2 CPD 197. We note for the record that the contracting officer has stated that the requirement for Secret clearances was established to cover the possibility of occasional Secret equipment being used or tests being performed at the sites; that Confidential clearances would be adequate as of the time of beginning contract performance; that the necessary administrative processing of clearances from the predecessor contractor to the successor was being accomplished; and that if Secret equipment or tests are required at the site, Advance has the capability to furnish Secret-cleared personnel.

Based upon all of the foregoing circumstances, we see no basis for objection to the Army's acceptance of the Advance bid as the lowest-priced responsive bid submitted by a responsible bidder.

As for the second issue involved in the protest, ENSEC has stated that after bid opening and prior to award it had "continual" telephone conversations with the contracting officer's representative concerning the apparent low bidder (Uffinger). ENSEC states it was never advised that a late bid was being considered for award, and that this conduct by the Army prejudiced its ability to seek administrative relief prior to award of the contract.

The Army's report disputes several of ENSEC's factual allegations, stating, for instance, that on June 27, 1975--the date it was decided that the late Advance bid could be accepted--the contracting officer's representative did not discuss the procurement with ENSEC on the telephone because he was not available when ENSEC placed either of its calls on that date. It is stated that the person to whom ENSEC spoke had no knowledge of the present procurement.

We do not view the factual conflicts in the record as being particularly important. What is significant is the contracting officer's conclusion that there was no obligation under the circumstances to notify other bidders that a late bid was being considered for acceptance. In this regard, the contracting officer states that, under ASPR § 2-303.2 (1974 ed.), the only obligation is to notify a late bidder in the event that its bid cannot be accepted.

The procedures for formal advertising established by 10 U.S.C. § 2305 (1970) are by their nature open and public. Among the purposes to be served by these procedures is the protection both of the public

interest and the rights of bidders competing for the Government's business. See, in this regard, 48 Comp. Gen. 413, 414-415 (1968), where we stated as follows in regard to bid openings:

> "* * * The purpose of public opening of bids for public contracts is to protect both the public interest and the bidders against any form of fraud or favoritism or partiality or complicity, and such openings should as far as possible be conducted so as to leave no ground even for suspicion of any irregularity."

Similarly, in a recent decision (Edward B. Friel, Inc., B-183381, September 22, 1975, 55 Comp. Gen. ____, 75-2 CPD 164), we objected to a bid evaluation method which had the effect of introducing into the procurement new evaluation factors as to which unsuccessful bidders had not had an opportunity to compete. One reason for our objection was that in the absence of any protests, bidders conceivably could be unaware of the changes introduced into the evaluation.

We believe that such concerns logically apply to the treatment of late bids and the right of bidders to obtain information concerning changes in the procurement situation. The fact that ASPR does not specifically provide for notice to bidders of a late bid being considered for award is not, in our view, a persuasive justification for failing to provide such information to a bidder apparently in line for award who has attempted several times to ascertain the status of the procurement. The facts in this case are not sufficiently clear to determine whether there was any actual failure by the contracting officials to properly respond to ENSEC's inquiries. There may simply have been poor communication between the parties. Moreover, since ENSEC's protest has been found to be without merit, we can see no prejudice to the protester in this regard. Nonetheless, this would appear to be a situation in which responsible procurement officials should be sensitive to the position of the inquiring bidder and should reasonably respond to inquiries of this type " * * * in order that [bidders'] confidence in the integrity of the procurement process may be furthered." Federal Leasing, Inc., et al., 54 Comp. Gen. 872, 888 (1975), 75-1 CPD 236.

In view of the foregoing, ENSEC's protest is denied.

R. F. Keller

Acting Comptroller General
of the United States