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Pergamo Proc II

DECISION

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

FILE: B-190223 DATE: March 22, 1978

MATTER OF: New Haven Ambulance Service, Inc.

DIGEST:

1. IFB provision that successful bidder shall meet all requirements of Federal, State, or City codes pertains to bidder responsibility, not bid responsiveness, since it concerns bidder's legal authorization to perform resulting contract.

2. Allegation concerning bidder's capacity to perform involves question of responsibility. While GAO will review protests involving agency determinations of nonresponsibility in order to provide assurance against arbitrary rejection of bids or proposals, affirmative determinations generally are not for review by GAO since such determinations are based in large measure on subjective judgments of agency officials.

3. Where contracting officer, through the regular course of mail, receives before award copy of protest transmitted to GAO, agency is on notice of protest and should comply with FPR provision for award after notice of protest, notwithstanding absence of formal notification of protest from GAO. No consideration by GAO is required where agency failed to comply with procedural requirement of FPR in making award after notice of protest, since validity of award was not thereby affected.

New Haven Ambulance Service, Inc. (NHAS), protests the award of a contract to Flanagan Ambulance Service, Inc. (Flanagan), the low bidder under invitation for bids (IFB) No. 78-14 issued by the Veterans Administration Hospital (VA), West Haven, Connecticut, on October 27, 1977.

The IFB, as amended, was for furnishing ambulance service to beneficiaries of the VA during the period November 28, 1977 through September 30, 1978. Items 1 and 2 of the schedule solicited bids for day and night rates, respectively, for emergency medical care vehicle trips during the proposed contract period based on estimated quantities set forth therein. Flanagan bid the same unit price for Items 1 and 2, a bid of $29.75 each for trips entirely within city limits and $1.60 per mile for trips beyond city limits. The IFB limited payment for mileage traveled beyond city limits to "one way only," the distance over which the patient was to be transported. Such mileage costs were to be paid in addition to the applicable rate per trip for any trip entirely within city limits. NHAS' bid was $40 per trip and $1.75 per mile.

The solicitation contained the following clause on page 4 under Special Conditions:

> "2. QUALIFICATIONS: a. Proposal will be considered only from bidders who are regularly established in the business called for and who are financially responsible and have the necessary equipment and personnel to furnish service in the volume required for all the items under this contract. Successful bidder shall meet all requirements of Federal, State or City codes regarding operations of this type of service."

The State of Connecticut, by Connecticut General Statutes § 19-73bb, requires the licensing by the Office of Emergency Medical Services (OEMS), State Department of Health, of firms engaged within the State in the business of providing commercial ambulance services. Further, OEMS has the authority to establish rates charged by commercial ambulance services within the State. By Memorandum of Decision, dated February 19, 1976, upon application for rate increases by commercial ambulance services, including Flanagan and NHAS, and after due notice and hearing, OEMS issued the following order:

"The office finds that in light of the information supplied the rate increase is warranted and the following schedule of rates is established for all commercial ambulance services licensed under the provisions of Chapter 334b. The rates are effective starting March 1, 1976 except that for state governmental agencies, it is effective July 1, 1976.

Base Rate	$49.00
Mileage	$ 1.75

* * * * *

"It is ordered that rates as set forth above include ambulance services rendered for the account of all State, City, Governmental or municipal agencies. Contract rates negotiated between governmental agencies and commercial ambulance operators will not be permitted unless prior approval is received from the Office of EMS."

It is NHAS' position that Flanagan failed to comply with special condition 2(a) of the IFB, thereby rendering its bid "nonresponsive" to the solicitation. Specifically, NHAS' protest is based on the following contentions: (1) Flanagan does not have a valid state license to provide ambulance services since Flanagan made application for and obtained its license at a time when the corporation was dissolved by forfeiture because of its failure to file annual reports (Flanagan's application for the license at such time, it is argued, was in violation of Connecticut regulations); (2) Flanagan is not licensed to provide all of the services required by the IFB, specifically, paramedic advanced life support emergency services (R5 service); (3) Flanagan failed to obtain prior approval from OEMS for its bid of $29.75 per trip and $1.60 per mile, a rate below that specified by OEMS' February 19, 1976 order and thus requiring prior approval by the terms of that order; and (4)

Flanagan does not have sufficient emergency care vehicles and equipment to satisfy the performance requirements of the contract.

Notwithstanding the receipt by the contracting officer of a copy of the protest transmitted to GAO, the contract was awarded to Flanagan on November 25, 1977. NHAS then filed suit in the United States District Court, District of Connecticut (New Haven Ambulance Service, Inc. v. Max Cleland, Administrator, et al., Civil Action No. N-77-390), seeking to enjoin contract performance. The court issued an order, dated December 27, 1977, deferring the matter pending our decision on the protest.

The protester first questions the validity and adequacy of the state license held by Flanagan. NHAS believes the bid of Flanagan to be nonresponsive to the solicitation because the bidder does not have a valid license to provide all services called for in the solicitation.

For the reasons stated below, we find that the issues raised by the protester pertain to the matter of Flanagan's responsibility and, as such, are not for resolution by our Office.

There is a definite distinction between requirements related to bid responsiveness and those concerned with bidder responsibility. As we stated in 49 Comp. Gen. 553 (1970), at page 556:

> "* * * [T]he test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically made a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive. * * *"

Responsibility, on the other hand, concerns a bidders's ability to perform its obligations under the terms of its submitted bid. In the instant solicitation, nothing on the face of Flanagan's bid, or specifically made a part thereof, limited, reduced, or modified its obligation to perform the required services in accordance with the terms of the IFB. NHAS, by disputing the validity of state licenses held by Flanagan, essentially questions the latter's ability to comply with special condition 2(a)'s license requirement, not Flanagan's apparently express obligation under its bid to do so. In short, NHAS questions Flanagan's legal authorization to perform the contractually specified services without possessing the necessary licenses. In this regard, our Office has consistently held that a license requirement in an invitation is a requirement concerning the responsibility of prospective contractors--that is, to determine a bidder's legal authorization to perform the contract, which is a matter of responsibility and is not related to an evaluation of the bid. 53 Comp. Gen. 36 (1973); 47 id. 539 (1968); 46 id. 326 (1966); see, generally, Federal Procurement Regulations (FPR), 41 C.F.R. subpart 1-1.12 (1977) (Responsible Prospective Contractors).

Furthermore, we have had occasion in previous cases to consider the question of the impact of a requirement in a solicitation for compliance with state and local licensing laws. In 53 Comp. Gen. 36 (1973), wherein we denied a similar protest involving a solicitation containing identical language to that in special condition 2(a) here, we stated at 37:

> "With respect to the effect of a State law requiring a license or permit as a prerequisite to performing the type of services required by a Federal contract, in our decision B-125577, October 11, 1955, we considered an IFB for a Federal construction contract to be performed in Tennessee, under which the contractor was to obtain all licenses and permits required for the prosecution of the work. We held therein that:

> 'State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. The validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts, and it would be impossible for the contracting agencies of the Government to make such determinations with any assurance that they were correct. It is precisely because of this, in our opinion, that the standard Government contract forms impose upon the contractor the duty of ascertaining both the existence and the applicability of local laws with regard to permits and licenses. In our opinion, this is as it should be'."

The present solicitation merely required in general terms that contractors "meet all requirements of Federal, State, or City codes" and is therefore distinguishable from circumstances where the solicitation expressly requires that the successful bidder actually hold a specified State or local license. See 53 Comp. Gen. 51 (1973). We also point out that the solicitation did not require bidders to provide an R5 paramedic advanced life support emergency service as alleged by NHAS.

Moreover, Flanagan's asserted failure to obtain prior approval for its bid from OEMS is analogous to the licensing requirement. Indeed, counsel for NHAS characterizes Flanagan's failure to obtain prior approval as a violation of a specific "licensure requirement." Compliance with such a requirement, if it was indeed intended to be applicable to bidders involved in the Federal procurement process, is a matter which must be settled between the local authorities and Flanagan, either by agreement or by judicial determination. For the reasons stated above concerning state licensing requirements, we conclude that the failure of Flanagan to obtain prior approval for its bid did not render its bid nonresponsive to the solicitation.

NHAS' next contention, whether Flanagan has sufficient vehicles and equipment to perform the contract, in essence also questions Flanagan's responsibility and the VA's affirmative finding thereof. While this Office does review protests involving negative determinations of responsibility to assure that bids or offers are fairly considered, we do not review affirmative determinations of responsibility except where the protester alleges actions by procuring officials which are tantamount to fraud or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform. We note in passing that the record indicates that the VA conducted a preaward inspection of Flanagan. The inspection report, dated November 25, 1977, showed that Flanagan satisfactorily complied with all necessary requirements concerning emergency medical care vehicles and equipment. The Inspection Team recommended award of the contract to Flanagan.

NHAS also argues that the VA awarded the contract after notice of its protest to the GAO in violation of FPR § 1-2.407.8(b)(3). Generally, under FPR § 1-2.407.8(b)(4), where a protest is received before award, a contracting officer may nevertheless proceed to make award based upon a written determination of urgency, that delivery or performance will be unduly delayed by failure to make award, or that a prompt award will otherwise be advantageous to the Government. Further, FPR § 1-2.407.8(b)(3) provides that "[w]here it is known that a protest against the making of an award has been lodged directly with GAO, a determination to make award under § 1-2.407.8(b)(4) must be approved at an appropriate level above that of the contracting officer, in accordance with agency procedures." Our Office's Bid Protest Procedures provide that award during the pendency of a protest will be made as provided for in the applicable procurement regulations. 4 C.F.R. § 20.4 (1977).

NHAS protested to our Office against any award being made in a mailgram sent at 4:11 p.m., November 23, 1977, the bid opening date, and received in our Office at 3:36 p.m., Friday, November 25, 1977. NHAS, at 4:13 p.m., November 23, 1977, concurrently sent an exact copy of its GAO protest to the contracting officer which was received by him at approximately 9:08 a.m., November 25, 1977. The contracting officer states that during a meeting with representatives of the protester in the early afternoon of November 25, at approximately 1:40 p.m., he was told that "a protest was also registered with the Comptroller General." The VA further reports that during that day, November 25, and prior to award, the contracting officer made a telephone call to the VA's Washington office to ascertain whether it had been notified by GAO of a protest. He was informed that the VA had not as yet been so notified. (In fact VA was not notified by our Office of this protest until the following week.) The contract was awarded at approximately 4:20 p.m. on November 25, without a written determination having been made or approval having been obtained at a level above that of the contracting officer.

Initially, VA conceded that the contracting officer had notice of the protest prior to award and should have obtained the requisite approval of his determination to proceed with the award. The agency stated that it would take remedial action to prevent a recurrence. In a subsequent report to our Office, however, the agency argued that its contracting officer did not have notice of the GAO protest until after the award was made.

We agree with VA's initial position. We believe that where the contracting officer receives, through the regular course of mail, a copy of the protest transmitted to the GAO, he is thereby placed on notice of the protest and is deemed to "know" that a protest has been "lodged" with the GAO. The very purpose of our requirement for the protester to concurrently file its protest with the contracting officer is to place him on such notice of the protest. It would be a rare instance indeed for a protester to transmit a copy of its GAO protest to the contracting officer and not to

have sent the original to our Office. Receipt by the contracting officer of a copy of the GAO protest is sufficient evidence that the protester has at least concurrently transmitted the original protest to our Office. The fact that we may not receive it for a short time thereafter is not relevant or dispositive. The act of mailing a letter or sending a mailgram or telegram, with reference to the addressee's receipt of the communication, gives rise to a presumption of due delivery. 1 Wigmore on Evidence § 95 (3rd ed. 1940 & Supp. 1977). Receipt by the contracting officer constitutes effective notice for a reasonable time, such time dependent on the circumstances, during which the communication can arrive at our Office. We note that often protests are lodged by bidders local to the area where the procuring activity is located and that therefore it is natural and probable for a copy of the GAO protest to reach the contracting officer before it is received by us. In such circumstances, telephonic notification by our Office of receipt of the protest is not necessary to place the agency on notice of the protest. If award is urgent or otherwise advantageous and necessary prior to resolution of the protest, the appropriate regulatory procedures for award should be followed.

However, these regulations concerning award pending protest are purely procedural and we have consistently held that even though the award action was contrary to these FPR provisions, the legality and the validity of the award is not thereby affected. Starline, Inc., 55 Comp. Gen. 1160 (1976), 76-1 CPD 365; B-178303, June 26, 1973. Therefore, the matter requires no further consideration by our Office.

Finally, NHAS argues that a preliminary injunction granted by the United States District Court on October 25, 1977, involving a prior solicitation for ambulance services by the VA and involving these same two bidders, constitutes res judicata for the purposes of this protest. At the time of the prior solicitation, Flanagan was not a corporation in good standing in Connecticut, its corporate charter having been forfeited. Flanagan had also not obtained prior approval from OEMS for the bid that it submitted on the prior

solicitation. We do not decide this issue of res judicata since we perceive the court's December 27, 1977, order deferring the case to our Office as a request to decide the matter on the merits. We leave it to the court to decide what effect, if any, it will give to its prior preliminary injunction.

Accordingly, the protest is denied.

R.F. Keller

Deputy Comptroller General
of the United States