



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Vereinigte Gebäudereinigungsgesellschaft

**File:** B-280805

**Date:** November 23, 1998

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Reed L. von Maur, Esq., Parker, Poe, Adams & Bernstein, for the protester.  
Maj. Susan D. Tigner, Department of the Army, for the agency.  
Jennifer Westfall-McGrail, Esq., and Christine Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest that agency treated bidders unequally in reprocurring contract for custodial services is denied where record does not support protester's allegation that agency demanded that it produce bilingual management personnel immediately, but gave awardee 2 weeks to produce such personnel.
2. Repurchase need not be conducted in accordance with the terms of the original solicitation; thus, agency was not precluded from requiring a preaward demonstration of the linguistic abilities of a bidder's management personnel by the fact that such a demonstration had not been required under the original solicitation.

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## DECISION

Vereinigte Gebäudereinigungsgesellschaft (VGR) protests the Department of the Army's award of contract No. DAJA89-98-D-0016, for custodial services at the Department of Defense (DOD) elementary and high schools in Würzburg, Germany, to Perfekt Service GmbH (PSG). The contract was awarded to PSG as a result of a procurement action after the Army terminated the original contractor, Z & H Sauberkeit, Hygiene, Gesundheit GmbH, for default. VGR contends that it should have received the award because it was qualified to perform and had offered a price lower than PSG's in response to the original invitation for bids (IFB).

We deny the protest.

## BACKGROUND

IFB No. DAJA89-98-B-0017, issued on April 17, 1998, sought bids to furnish custodial services for the DOD schools in Würzburg for a base and 2 option years, beginning on July 1, 1998. The solicitation required the assignment of a Project Supervisor to manage the contract and a Project Leader (or Leaders) to supervise the work at

each of the two schools.<sup>1</sup> To qualify as a Project Supervisor, an employee had to possess a certification known as a "Meisterbrief" and to qualify as a Project Leader, possession of a "Gesellenbrief" was required.<sup>2</sup> IFB § C-1.03.1. Each Project Supervisor and Project Leader also had to be able to write and speak both English and German fluently and to communicate with all of their foreign country employees. Id. The IFB required bidders to furnish proof of their Project Supervisor's Meisterbrief and Project Leaders' Gesellenbriefs to the contracting officer within 5 days of his request and warned that a failure to comply could result in a determination of nonresponsibility. IFB § B.2(2).

The agency explains that it included the requirements for Meister- and Gesellenbriefs in the IFB because it has been experiencing significant performance problems under its custodial services contracts in Germany. According to the Army, the contractors generally employ unskilled foreign workers at low wages, which results in a large turnover in contractor personnel and poor contract performance. To alleviate this problem, the Army has sought to contract with firms employing skilled project supervisors and leaders to train and supervise workers.

Eight bids were opened on the May 18 opening date; VGR's price was fourth, and PSG's fifth, low. The low bidder, Hasenwinkel, was permitted to withdraw its bid after it informed the contracting officer that it could not furnish an employee with a Gesellenbrief to serve as a Project Leader and had failed to include the cost of such an employee in its bid price. The second low bidder, Schwaben Gebäudereinigungs GmbH, was rejected as nonresponsible after failing to furnish proof that it could provide an employee with a Gesellenbrief.

The third low bidder, Z & H Sauberkeit, Hygiene, Gesundheit GmbH, furnished Meisterbrief and Gesellenbrief documents in response to the contracting officer's request and was determined to be responsible. On June 22, the Army awarded Z & H a contract with a start date of July 1. At a pre-performance conference held on June 29, the contracting officer discovered that Z & H's proposed project

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<sup>1</sup>In addition to performing oversight responsibilities, the Project Supervisor could serve as Project Leader at one of the sites, in which event only one additional Project Leader would be required.

<sup>2</sup>The skill levels required of the supervisors and leaders are established by reference to certificates issued by the German government. An individual with 3 years of educational training who passes qualifying tests may be designated as a "Geselle" in that trade, and is issued a document known as a Gesellenbrief. After a designated period of work in the trade (generally 2 or more years), additional educational training, and successful completion of further testing, a Geselle may be certified at the higher skill level of Meister and issued a "Meisterbrief."

supervisor did not speak English. At a second meeting, held on July 7, Z & H conceded that neither the supervisor nor its proposed project leaders could communicate in English and proposed to hire interpreters for them. The contracting officer advised Z & H that this was not acceptable and issued a cure notice. At a third meeting, held on July 27, the contracting officer reiterated that use of interpreters for the project supervisor and leaders was not acceptable. The Army terminated Z & H's contract for default on August 3.

Because the services were urgently required and little time had elapsed since the original competition, the contracting officer decided to reprocure without resolicitation, pursuant to the discretion afforded him by the contract's default clause, Federal Acquisition Regulation (FAR) § 52.249-8(b), and FAR § 49.402-6(b).<sup>3</sup> The contracting officer, through his representative, the contract specialist, first contacted VGR since it had been next in line for award under the IFB. The parties offer differing accounts of that conversation, which took place on July 24. VGR insists that the contract specialist informed its branch manager, Herr Müller, that if the firm were still interested in award, he would need to appear in Würzburg immediately with the Meister and Gesellen that his company intended to employ so that the government could confirm their fluency in English. According to VGR, Herr Müller explained that VGR did not have any English-speaking Gesellen available to begin work immediately and would need a few days to hire qualified personnel. As an alternative, VGR proposed to employ two German-speaking Gesellen together with a bilingual employee capable of translating for them, an arrangement that the contract specialist declared unacceptable because the Army was in the midst of terminating Z & H, which had proposed the same arrangement,

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<sup>3</sup>FAR § 52.249-8(b) provides, in relevant part, that "[i]f the Government terminates [a] contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services." FAR § 49.402-6(b) adds the requirement that the contracting officer obtain competition to the maximum extent practicable for the repurchase.

The protester has not challenged the agency decision to reprocure without resolicitation, and we have previously found it reasonable to award a reprocurement contract to the next-low, qualified offeror on the original solicitation at its original price, provided that there is a relatively short time span between the original competition and the default, and there is a continuing need for the services. International Tech. Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 at 3. Under such circumstances, we have noted, an agency can reasonably view the offers received under the original solicitation as an acceptable measure of what the competition would bring, sufficient to satisfy the FAR § 49.402-6(b) competition requirement for the reprocurement. Id.

for default. According to VGR, the contract specialist concluded the telephone call by asking it to confirm the conversation in writing and to indicate the extent to which it would be capable of meeting the solicitation's requirements as of that date.

The contract specialist disputes several aspects of VGR's account. He denies both that he demanded that VGR produce its English-speaking Meister and Gesellen immediately, and that VGR told him that it would need a few more days to hire qualified personnel. The contract specialist also maintains that at the conclusion of the call, he simply asked VGR to confirm in writing whether or not it could comply with the solicitation's requirements.

VGR responded to the contract specialist's request for written confirmation of the conversation later that day. In its letter, VGR proposed to appoint "Frau Bara" (the bilingual employee mentioned above) as a project leader and Mr. Harald Karl, who possesses a Meisterbrief and speaks English, as the supervisor. Upon receipt of VGR's letter, the contracting officer, who was familiar with Frau Bara due to her work on a predecessor contract and knew that she spoke German and English, but possessed neither a Meisterbrief nor a Gesellenbrief, determined that VGR was non-responsible because its proposed project leader did not possess the required credentials.

After determining that VGR's bid was unacceptable, the contracting officer directed the contract specialist to contact PSG, which had submitted the next low bid under the original IFB. By letter dated August 3, PSG confirmed that its bid price was still good and that it would furnish two "certificated housekeepers." On August 7, Army representatives met with PSG's proposed Meister and Gesellen and confirmed that each possessed the requisite certification and was fluent in English. On August 8, the Army awarded contract No. DAJA89-98-D-0016 to PSG. VGR protested to our Office on August 14.<sup>4</sup>

## ANALYSIS

The protester contends that the Army did not treat the parties equally in conducting the reprourement in that it required VGR to present its English-speaking supervisory personnel immediately, but gave PSG 2 weeks to produce qualified personnel. VGR also objects to the imposition during the reprourement of a requirement not imposed during the original procurement, *i.e.*, that bidders demonstrate the English-speaking capabilities of their project supervisor and leader(s) prior to award.

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<sup>4</sup>The contracting officer issued a stop work order to PSG on August 20. On September 28, the head of the procuring activity authorized continued performance of the contract, finding that urgent and compelling circumstances would not permit waiting for the decision of our Office.

It is, as the protester argues, a fundamental principle of federal procurement that a contracting agency must treat offerors equally. DynaLantic Corp., B-234035, May 3, 1989, 89-1 CPD ¶ 421 at 2. Here, we find no evidence of unequal treatment, however. The record simply does not support the protester's allegation that the contract specialist required it to produce English-speaking personnel immediately and denied its request for an extension to comply. Herr Müller recalls that such a demand was made, but the Army's contract specialist denies that it was<sup>5</sup>--and the only document memorializing the conversation prepared at the time, *i.e.*, VGR's own letter of July 24, supports the contract specialist's version of events. In this regard, there is no mention in the letter that the protester had been asked to produce qualified personnel immediately, that it had requested an extension to comply, or that it was offering Frau Bara's services due to its inability to furnish personnel with the required qualifications on such short notice.

Regarding the protester's second complaint, we see no reason that the agency could not have required bidders under the procurement to demonstrate the language proficiency of their supervisory personnel prior to award, even if such a demonstration was not required during the original procurement. There is no

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<sup>5</sup>We find the evidence proffered by the protester to demonstrate the contracting specialist's lack of trustworthiness to be unconvincing. The protester has not supported its allegation that one of PSG's project leaders, Mr. Volker Grzeszek, does not speak English and thus that the contract specialist must have been lying when he represented in his affidavit that the government had confirmed Mr. Grzeszek's fluency prior to award. As discussed below, we have confirmed that Mr. Grzeszek speaks English quite well.

Nor has the protester demonstrated that the contract specialist lied in stating that he did not discover until the pre-performance conference on June 29 that Z & H's proposed project supervisor did not speak English. The protester offers evidence that another Army official, who had performed a preaward survey of Z & H in connection with another solicitation, was aware that Z & H's proposed project supervisor did not speak English--but the fact that another Army official may have known that this individual did not speak English does not mean that the contract specialist here knew.

Finally, PSG has not demonstrated that the contract specialist misrepresented the content of discussions between Z & H and Army personnel regarding the use of interpreters. In response to the protester's allegation that the contracting officer told Z & H on June 29 that it would be acceptable for it to hire interpreters to aid its non-English speaking project supervisor and leaders, the contracting officer has explained that he told Z & H not that it could hire interpreters for its project supervisor and leaders, but rather that it would need to hire its own interpreter for future meetings with government contracting personnel.

requirement that a repurchase be conducted using precisely the same terms as in the original procurement, see, e.g., Bud Mahas Constr., Inc., B-235261, Aug. 21, 1989, 89-2 CPD ¶ 160 at 4 (reprocurement of small business set-aside contract need not be restricted to small businesses); FAR § 49.402-6(b) authorizes the contracting officer to use "any terms and acquisition method deemed appropriate for the repurchase," provided that a reasonable price and competition to the maximum extent practicable are obtained. Marvin Land Sys., Inc., B-276434, B-276434.2, June 12, 1997, 97-2 CPD ¶ 4 at 3. We review the contracting officer's decisions in this regard for reasonableness only. Barrett and Blandford Assocs., Inc., B-250926, Feb. 2, 1993, 93-1 CPD ¶ 95 at 3. Here, it seems to us quite reasonable that the Army would seek to confirm compliance with the language requirements prior to award given that it had just terminated a contractor for failing to comply with them.

The protester argues next that the agency violated the FAR by permitting the contract specialist to conduct the reprocurement and to make a determination regarding its responsibility. VGR argues that the contracting officer is the only one authorized to perform these functions.

The contract specialist did not "conduct" the reprocurement; he merely contacted VGR and PSG, at the direction of the contracting officer, to inquire whether they continued to be interested in, and capable of, performing. We are aware of no regulations that would preclude a contracting officer from delegating this sort of a task to a subordinate. Moreover, the contract specialist did not make a determination regarding VGR's responsibility; the contracting officer made that determination after reviewing VGR's affidavit of July 24.<sup>6</sup> Contracting officer's affidavit, Sept. 30, 1998, ¶ 4; contracting specialist's affidavit, Oct. 26, 1998, ¶ 5.

Finally, VGR argues that the Army waived the requirement for a preaward demonstration of English proficiency for PSG. According to VGR, one of PSG's Gesellen, Mr. Volker Grzeszek, does not speak English at all and has, since performance began, relied on an interpreter to communicate in English. The protester also argues that PSG's other project leader does not possess a Gesellenbrief.

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<sup>6</sup>VGR argues that it is clear from the contract specialist's statement that "[a]fter receipt of the letter [of July 24] from VGR and determining they did not meet the definite responsibility criteria, I contacted Perfekt Service GmbH . . .", Contracting Specialist's affidavit, Aug. 28, 1998, ¶ 10, that the contract specialist was the one who made the responsibility determination. We disagree. The construction of the sentence is awkward, but we do not think that it necessarily implies that it was the contract specialist who received the letter and made the responsibility determination.

We held a telephone hearing to investigate the protester's allegation that Mr. Grzeszek was unable to communicate in English. It is our conclusion, based on that hearing, that Mr. Grzeszek's English is excellent. Our conclusion is supported by a sworn affidavit from Mr. Kenneth Payne, Assistant Principal at Würzburg American High School, who states that he speaks with Mr. Grzeszek approximately three to four times a day regarding cleaning and custodial issues; that he has no difficulty communicating with Mr. Grzeszek in English; and that, in his opinion, Mr. Grzeszek has an excellent working knowledge of English. Affidavit of Kenneth L Payne, Oct. 22, 1998.

Regarding the protester's second allegation, the Army has furnished us with a copy of a Gesellenbrief for Mr. Timothy Davis, PSG's other project leader.

The protest is denied.

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of the United States