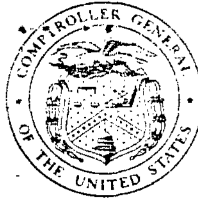
11326 PL-1

DECISION



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

FILE: B-192188

DATE: September 6, 1979

MATTER OF: What-Mac Contractors, Inc. CNG00325

DIGEST:

1. Prior decision under same solicitation held that, since solicitation contained only general statements requiring contractor to obtain all necessary licenses and permits, failure of proposed awardee (protester in present decision) to obtain State license did not require contracting officer to find proposed awardee nonresponsible and would not affect validity of award if made. However, prior decision did not hold that State license statute and threatened enforcement thereof were irrelevant nor that contracting officer was required to find proposed awardee responsible as protester alleges. Decision in Inter-Con Security Systems, Inc.; Washington Patrol Service, Inc., B-192188, February 9, 1979, 79-1 CPD 86, clarified.

2. Contracting officer was notified after bid opening that State would try to enforce State license requirement on unlicensed bidder. Even though particular State license was not specifically incorporated into solicitation, contracting officer considered bidder's failure to obtain State license in 8 months since bid opening and likelihood that State would try to enforce licensing statute and thereby interrupt or delay performance by unlicensed contractor as factors affecting bidder's ability to perform. Determination that unlicensed bidder was nonresponsible in such circumstances was reasonable.

3. Since SBA has not issued regulations to resolve discrepancies between 1977 amendments to Small Business Act, which require referral to SBA before small business may be rejected as nonresponsible, and Defense Acquisition Regulation (DAR), GAO will not consider whether contracting officer properly relied on DAR exceptions to SBA referral procedure.

~~006714~~/110283

[Protest Involving Security Services Contract]

4. Contracting officer did not refer nonresponsibility determination of small business to SBA as required under Small Business Act Amendments of 1977 because contracting officer interpreted DAR § 1-903.1(v) and DAR § 1-705.4(c)(v) as creating exception to SBA referral procedure where small business concern was determined nonresponsible because it was not otherwise qualified and eligible under applicable State law. While we cannot find contracting officer's interpretation and failure to refer matter to SBA to be unreasonable in present case, it is our opinion that these DAR provisions create exception to SBA referral only where bidder is not otherwise qualified and eligible under Federal laws/regulations. Accordingly, in future decisions we will strictly limit use of DAR § 1-903.1(v) to situations involving Federal laws/regulations in absence of clarifying regulations issued by SBA.

What-Mac Contractors, Inc. (What-Mac), protests award of a contract to Washington Patrol Service, Inc. (Washington), for the management and operation of base security services at the Los Angeles Air Force Station, AGC00021 Los Angeles, California. What-Mac contends that it was entitled to award of the contract as the lowest responsive, responsible bidder, and that the contracting officer improperly determined What-Mac to be nonresponsible in contravention of prior decisions of our Office including a decision under this same solicitation (Inter-Con Security Systems Inc.; Washington Patrol Service, Inc., B-192188, February 9, 1979, 79-1 CPD 86). What-Mac further contends that, once the contracting officer determined What-Mac to be nonresponsible, the contracting officer was required to refer the matter of What-Mac's responsibility to the Small Business Administration (SBA) for a final determination as required under 15 U.S.C. § 637(b)(7)(A), (1976 & Supp. I 1977).

BACKGROUND

Invitation for bids (IFB) No. F04693-78-B0002, a small business set-aside, was issued by the Department of the Air Force on November 18, 1977. When bids were opened on June 12, 1978, it was determined that National Investigation Bureau, Inc. (National), DLG00239

was the low bidder. However, a preaward survey conducted by the Air Force on National resulted in a negative determination, and on September 8, 1978, SBA refused to issue a certificate of competency (COC) to National. Therefore, the contracting officer rejected National's bid after determining National to be nonresponsible.

The Air Force prepared to make award to What-Mac, the second low bidder, but the award was held in abeyance because several protests were filed with our Office contending, among other things, that What-Mac was not a responsible bidder since it did not possess a Private Patrol Operator license to perform security guard services in California as required in section 7520 of the California Business and Professions Code and by the IFB in paragraph 35, section "C," and paragraphs 15 and 21, section "J," entitled "Special Provisions."

Paragraph 35, section "C," stated:

> "Offerors without necessary operating authority may submit offers, but the offerors shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits prior to award of a resultant contract and for complying with all laws, ordinances, statutes and regulations in connection with the furnishing of the services herein."

Paragraph 15 of the Special Provisions stated:

> "In performance of work hereunder, the Contractor shall procure and keep effective all necessary permits and licenses required by the Federal, State or local Government, or subdivision thereof, or of any other duly constituted public authority, and shall obey and abide by all applicable laws, regulations and ordinances."

Paragraph 21 of the Special Provisions provided in part that:

"[T]he Contractor shall abide by and comply with all relevant statutes, ordinances, laws and regulations of the United States (including Executive Orders of the President) and any state * * *"

In the earlier protests leading to our February 9, 1979, decision, the protesters contended that, since the contracting officer was familiar with California licensing requirements for security guard services and was aware that What-Mac did not have a mandatory Private Patrol Operator license, the contracting officer had no choice but to declare What-Mac to be nonresponsible in view of the above-quoted provisions of the IFB. Also protested was the fact that the contracting activity had extended the contract with the incumbent contractor several times pending resolution of the protests, thereby allowing What-Mac more time in which to obtain the California Private Patrol Operator license, since What-Mac had applied for, but had not yet received, a license from the California Bureau of Collection and Investigative Services.

In our February 9, 1979, decision, we held, among other things, that the contracting officer's actions in extending the contract with the incumbent were proper since the record showed that such extensions were related solely to delays involving resolution of the protests in our Office. Since the solicitation contained only general statements regarding compliance with State and local licensing requirements, we held also that the failure of What-Mac or any other bidder to meet State or local licensing requirements prior to award was a matter to be resolved between the contractor and State and local authorities. Accordingly, we held that the contracting officer was not required to reject What-Mac as nonresponsible and that the failure to meet State licensing requirements prior to award would not affect the validity of an award made to What-Mac.

Pending resolution of the prior protests, the contracting officer inquired of the California Bureau of Collection and Investigative Services (by telephone conversation of January 8, 1979, and by letter of

January 9, 1979) whether the State licensing requirement would be enforced if award were made to What-Mac without a license. The Bureau of Collection and Investigative Services responded by letter of January 19, 1979, that What-Mac had applied for a Private Patrol Operator license but had not yet been issued one. The Bureau indicated that, if any firm attempted to operate in California without a license, it would initiate an investigation and recommend that appropriate action be taken by the local District Attorney. The Bureau also stated that unlicensed performance would be grounds for denying a license to a contractor. The contracting officer reports that a What-Mac representative informed him on February 14, 1979, that What-Mac's representative had failed the licensing examination taken on January 26, 1979, and that the next examination could not be rescheduled until March 30, 1979.

The contracting officer determined that award should be made by February 28, 1979, since the latest contract extension would expire at the end of March 1979, and the contract required a phase-in period of 1 month. Therefore, on February 15, 1979, just 6 days after our decision on the procurement was issued, the contracting officer determined What-Mac to be nonresponsible since What-Mac would not be able to obtain the Private Patrol Operator license before award. On February 21, 1979, the contract was awarded to Washington, the next low bidder. What-Mac was notified of the award to Washington on February 22, 1979, and filed a protest with our Office on February 23, 1979. On May 15, 1979, the California Bureau of Collection and Investigative Services issued a Private Patrol Operator license to What-Mac.

LICENSING - GENERAL DISCUSSION

Our decisions on licensing requirements have taken different approaches depending on the license required in the performance of the Government contract.

We have drawn a distinction between Federal licenses or permits and State or local licenses or permits. It is well established by the decisions of this Office that failure to submit permits or licenses by the time of award or at the very latest by the time of contract performance, plus any leadtime which may be necessary in the particular case, shall affect the responsibility of

a contractor in cases where the permit or license is a requirement of the Federal Government. See 34 Comp. Gen. 175 (1954), wherein a permit from the Interstate Commerce Commission was required; 39 id. 655 (1960), wherein operating authority from the Federal Aviation Administration was required; and 46 id. 326 (1966), wherein a license from the Atomic Energy Commission was required. See, generally, 51 Comp. Gen. 377 (1971). Since a contracting officer must make a determination that a bidder is responsible before he may make award to that bidder, we have held that a bidder may be held responsible if in the view of the contracting officer the bidder will be capable of performing and will have all necessary Federal authority and permits to perform at the time required for performance. 39 Comp. Gen. 655, supra. Award of the contract prior to the awardee obtaining the required Federal license is conditioned upon the awardee obtaining the Federal license prior to performance, and, if the condition is not met by the time of peformance, the contract is void ab initio. 46 Comp. Gen. 326, supra.

We have treated State or local licensing requirements differently with respect to the effect they have on a bidder's responsibility. The crucial distinction in such cases has been whether the solicitation merely stated in general terms that the successful bidder must meet all requirements of Federal, State or city laws and regulations or whether the solicitation required that the successful bidder must have a particular State or local license. See New Haven Ambulance Service, Inc., 57 Comp. Gen. 361 (1978), 78-1 CPD 225; 53 Comp. Gen. 51 (1973).

Where a solicitation contains only a general requirement that the contractor have all necessary licenses and permits to perform the contract but does not indicate a specific State or local license which is required, we have held that a contracting officer should not have to determine what the State or local requirements may be, and the responsibility for making such a determination is correctly placed with the prospective contractor. 53 Comp. Gen. 51, supra. We have held also that the failure of a low bidder to obtain a license required under State or local law was not a proper basis upon which to reject the low bidder where the solicitation

merely stated in general terms that all State or local licenses must be obtained by the successful bidder, and that such a failure could not affect the eligibility of a bidder to be awarded a Government contract. See B-165274, May 8, 1969; B-125577, October 11, 1955. Further, we have recognized that, if a State determines that under its laws a Federal contractor must have a license or permit in order to be legally capable of performing the required services in that State, the State might be able to enforce its reqirements against the contractor, provided the application of the State's laws does not interfere with the execution of Federal powers. See 51 Comp. Gen. 377, supra, and cases cited therein. In 51 Comp. Gen. 377, supra, we also held that, if as a result of State enforcement of the licensing requirement, the contractor chooses not to perform the contract or is prevented from doing so by an injunction won by the State, the contractor may be terminated for default by the contracting activity. We further held that the failure of a bidder to meet State or local licensing requirements prior to award, where the IFB contained only general statements regarding State or local licenses, was a matter between the State and local authorities and the awardee and would not affect the legality of the contract awarded.

In situations in which a contracting officer is aware of and familiar with the local licensing requirements before issuance of the solicitation, we have held that he may incorporate those specific requirements into the solicitations, thereby making possession by the bidders of the particular licenses a prerequisite to affirmative determinations of responsibility. 53 Comp. Gen. 51, supra.

CONTRACTING OFFICER'S DETERMINATION OF WHAT-MAC'S NONRESPONSIBILITY

PROTESTER'S CONTENTIONS

What-Mac protests that the contracting officer's determination that What-Mac was nonresponsible was "arbitrary, capricious, recalcitrant" and was made in total disregard of our decision in Inter-Con Security Systems, Inc.; Washington Patrol Service, Inc., supra. What-Mac contends that our February 9, 1979, decision held that What-Mac was responsible under the protested

IFB regardless of whether it was in possession of the California Private Patrol Operator license at the time of award. Referring to the February 9, 1979, decision, What-Mac states in pertinent part:

> "Without question, this decision held that What-Mac could not be held nonresponsible due to a lack of the subject State license. The protest alleged that the lack of the license made What-Mac nonresponsible. The protest was denied. Lack of a State license did not then, and does not now, make What-Mac nonresponsible.
>
> "The February 9, 1979, decision conclusively determined that possession of the subject license was not a matter of bidder responsibility under this IFB. * * * According to this decision, it is only in the former case [where the solicitation requires a specific State license] that possession of the license can be a responsibility factor. In the latter case, where the compliance statement is general, possession of a specific license is not a matter of bidder responsibility." (Emphasis supplied by protester.)

In support of its interpretation of our February 9, 1979, decision and of its position that possession of a State license is irrelevant to the issue of bidder responsibility where the solicitation contains only general statements that all licenses or permits are necessary, What-Mac cites a long line of our decisions, including: New Haven Ambulance Service, Inc., 57 Comp. Gen. 361 (1978), 78-1 CPD 225; McNamara-Lunz Warehouses, Inc.; Central Moving and Storage, Inc., B-188100, June 23, 1977, 77-1 CPD 448; McNamara-Lunz Vans & Warehouses, Inc., B-185803, July 8, 1976, 76-2 CPD 20; Mid South Fire Protection, Inc., B-180390, February 25, 1974, 74-1 CPD 102; Paul's Line, Incorporated, et al., B-179605, February 7, 1974, 74-1 CPD 57; 53 Comp. Gen. 51, supra; 53 Comp. Gen. 36 (1973); 51 Comp. Gen. 377, supra; B-165274, supra; and B-125577, supra.

What-Mac also argues that the Air Force has acted improperly in determining What-Mac to be non-responsible because the Air Force report on the earlier protests, dated November 27, 1978, indicated that the Air Force did not believe that What-Mac could be held to be nonresponsible because it did not have a California Private Patrol Operator license. Then, just 6 days after our decision was issued, the Air Force reversed it position, according to the protester, and held What-Mac to be nonresponsible.

What-Mac also contends that the Air Force acted improperly in rejecting What-Mac on February 15, 1979, for failure to possess a required State license because What-Mac was in the process of applying for a license and, therefore, should have been granted more time to obtain the Private Patrol Operator license. What-Mac contends that the Air Force did not need to award the contract by February 28, 1979, since the Air Force contract with the incumbent had already been extended for 8 months and the last contract extension was not due to expire until March 31, 1979.

What-Mac argues that the State of California could not successfully prohibit What-Mac or any other unlicensed firm from performing under a guard services contract within the confines of the Los Angeles Air Force Station. What-Mac points out that the California Bureau of Collection and Investigative Services merely stated in its letter of January 19, 1979, that it would investigate any unlicensed activity and would report such activity to the local District Attorney's office for appropriate action. The Bureau did not specifically state that any legal action would be taken to prevent unlicensed performance by What-Mac if it attempted to perform guard services in California without the proper State license.

What-Mac also contends that the contracting officer's nonresponsibility determination was improper since it amounted to the addition of a definitive responsibility criterion by the contracting officer without expressly stating in the IFB that the State Private Patrol Operator license would be considered in determining a bidder's

responsibility. What-Mac cites several decisions of this Office in support of the proposition that definitive responsibility criteria must be clearly stated in the solicitation.

AGENCY'S RESPONSE

The Air Force states that there was a significant change in circumstances between the issuance of its November 27, 1978, report on the previous protests and February 15, 1979 (the date on which the contracting officer held What-Mac to be nonresponsible). Essentially, the Air Force indicates that on November 27, 1978, What-Mac was in the process of applying for the California license and the contracting officer believed that What-Mac would be successful in obtaining the license prior to award of the contract. In such circumstances and in the face of our previously summarized licensing decisions, the Air Force did not believe that it could properly hold What-Mac to be nonresponsible. When our February 9, 1979, decision on this procurement was issued, the Air Force did not interpret that decision to hold that the California licensing statute was irrelevant to the issue of What-Mac's responsibility nor did the Air Force interpret that decision to mandate that What-Mac must be held responsible even without a State license. The Air Force states that, when the contracting officer learned that What-Mac had failed the licensing examination and would not be able to obtain the license by the time of award and that the State authorities were intent on enforcing the licensing statute if possible, the contracting officer was justified in finding What-Mac nonresponsible due to the changed circumstances.

Moreover, the Air Force points out that What-Mac was not issued the Private Patrol Operator license until May 15, 1979, well after the expiration of the contract extension on March 31, 1979. After our February 9, 1979, decision was issued, the Air Force did not feel that any further contract extensions could be justified. The Air Force also believed that the nature of the services being procured, security guards at an Air Force base, prevented the Air Force from making award to an unlicensed firm and then terminating the contract for default if the contractor could not secure the license and the State enforced its licensing laws. Lastly, the Air Force reports that the contracting officer consulted on many

occasions with both the California Bureau of Collection and Investigative Services and with the Air Force Judge Advocate General's office in order to determine if the State would attempt to prevent performance of unlicensed security guard services and whether such enforcement could be imposed upon a Federal contractor. The contracting officer determined that enforcement attempts by the State were very likely and that there was a possibility that such enforcement attempts would either be successful or, at least, could interrupt and delay performance under the contract if awarded to an unlicensed contractor. Since the contract was for security services, the contracting officer did not feel that the Air Force could tolerate any interruptions in performance. Therefore, on February 15, 1979, the contracting officer held What-Mac to be nonresponsible and rejected its bid.

LEGAL DISCUSSION

Our cases hold, among other things, that the failure to hold a State/local license (in circumstances where the solicitation does not specify which State/local licenses are mandatory) is a matter to be settled between the contractor and the State or local authorities. Many of these cases also indicate that the proper procedure in such circumstances is for the contracting officer to make award to the unlicensed bidder and to terminate the contract for default if the contractor is unable to perform due to State interference. This rule developed in large part because State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. The validity of a particular State license as applied to the activities of a Federal contractor often cannot be determined except by the courts. 53 Comp. Gen. 51, supra. Where the contracting officer is aware of and familiar with local requirements prior to issuance of the solicitation, or bid opening at the latest, he should incorporate the local requirements into the solicitation if desired in order to make the holding of the particular licenses a prerequisite to an affirmative determination of responsibilty. 53 Comp. Gen. 51, supra.

However, we believe that the circumstances in the present case are distinguishable from the circumstances of the above cases and that the actions of the contracting officer in determining What-Mac to be nonresponsible were, therefore, reasonable. There is no evidence in the record to show that the contracting officer was aware of or familiar with the California licensing statute at any time prior to bid opening.

Even though the Air Force argued in its November 27, 1978, report that it did not believe that it could find What-Mac to be nonresponsible at that time, the circumstances changed significantly by February 15, 1979, the date upon which What-Mac was actually determined to be nonresponsible. What-Mac had failed the examination and could not get a license before performance was to begin. The State indicated that it would enforce its licensing law on an unlicensed contractor, if necessary, and the Judge Advocate General's office indicated that there was a good possibility that the State of California could enforce its licensing statutes upon What-Mac. We are aware that in some instances State licensing requirements may not be enforceable against Federal Government contractors. Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956). However, we think it is reasonable for a contracting officer to be more concerned with whether the contract will be carried out properly and without interference than whether the contractor will ultimately prevail in litigation. 53 Comp. Gen. 51, supra. Therefore, we are not persuaded by the protester's argument that the State would ultimately fail in any attempt to enforce State licensing laws. The crucial question is whether contract performance may be prevented or delayed by State intervention. Moreover, since the contract was for security guard services at an Air Force base, the contracting officer's fear that State interference might interrupt or delay performance was reasonable.

We think that the failure of What-Mac to hold such license in these circumstances was relevant to What-Mac's ability to perform the contract in an efficient and uninterrupted fashion. Since the burden is on the prospective contractor to affirmatively demonstrate its ability to perform before being awarded a contract under section 1-902 of the Defense Acquisition Regulation (DAR) (1976 ed.), we believe that the possibility that the State authorities would attempt to prevent performance by What-Mac,

or that What-Mac's performance might very well be delayed or interrupted by State attempts to prevent unlicensed activity, was clearly relevant to the issue of What-Mac's responsibility.

We also do not believe that What-Mac was entitled to have the incumbent's contract extended in order to allow What-Mac an opportunity to obtain the State license. The contract had been extended for 8 months pending resolution of several protests and What-Mac had not been able during this extended time to comply with the California license provision. There was no need for the contracting officer to extend the contract further. Under DAR section 1-902, the burden is on a prospective contractor to affirmatively demonstrate its "responsibility," i.e., the apparent ability to successfully meet the contract requirements, before being awarded the contract. In this case, What-Mac was unable to affirmatively demonstrate its ability to perform prior to award and was not, in fact, able to obtain the State license until several months after award, and 1-1/2 months after performance was to begin. Accordingly, we find that the contracting officer properly exercised the administrative discretion entrusted to him in finding What-Mac to be nonresponsible. See Edw. Kocharian & Company, Inc.--request for modification, B-193045, May 10, 1979, 79-1 CPD 326.

REFERRAL TO SBA

PROTESTER'S CONTENTION AND AGENCY RESPONSE

What-Mac also protests that, since it is a small business concern, the contracting officer was required to refer the matter to the SBA for final disposition once What-Mac was found to be nonresponsible.

The Air Force responds that it was not necessary to refer the matter of What-Mac's responsibility to the SBA because the contracting officer's determination of nonresponsibility was made in accordance with DAR § 1-903.1 (1976 ed.) which states in pertinent part:

> "1-903.1 General Standards. Except as otherwise provided in this paragraph 1-903, a prospective contractor must:
>
> * * * * *
>
> (v) be otherwise qualified and eligible to receive an award under applicable laws and regulations, e.g., Section XII, Parts 6 and 8."

The applicable law under which What-Mac was not qualified was, according to the Air Force, section 7520 of the California Business and Professions Code--the State licensing statute. Under DAR § 1-705.4(c)(v) (DAC #76-15, June 1, 1978), a referral need not be made to the SBA if a contracting officer determines a small business concern nonresponsible pursuant to DAR § 1-903.1(v) and such determination is approved by the head of the procuring activity or his designee. The Air Force argues that since the determination was made and approved under these DAR sections, referral to the SBA for final disposition on responsibility was not appropriate.

LEGAL DISCUSSION

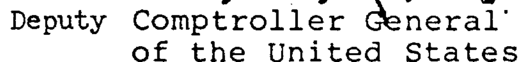
Section 501 of the Small Business Act Amendments of 1977, 15 U.S.C. § 637(b)(7) (1976 & Supp. I 1977), provides that no small business concern may be precluded from award because of nonresponsibility without referral of the matter to the SBA for a final disposition under the COC procedures. No exceptions from this referral procedure are provided under the act. Thus, there is an apparent conflict between the terms of the Small Business Act which requires referral to the SBA with respect to "all elements of responsibility" with no exceptions and sections 1-705.4(c)(v) and 1-903.1(v) which create an exception for nonresponsibility determinations where the bidder is not otherwise qualified and eligible for award under applicable laws and regulations. We have previously questioned similar conflicts between the Small Business Act, as amended by P.L. 95-89, and section 1-705.4 of DAR which creates exceptions to the mandatory referral to SBA on responsibility determinations. See Applied Control Technology, B-190719,

September 11, 1978, 78-2 CPD 183; X-Tyal International Corp., B-190101, March 30, 1978, 78-1 CPD 248. However, since the SBA has not yet issued appropriate implementing regulations to clarify these discrepancies, this Office will not consider whether the contracting officer properly relied on DAR § 1-705.4(c)(v) and DAR § 1-903.1(v) as an exception in the present case. Applied Control Technology, supra.

Nevertheless, in our opinion, DAR § 1-903.1(v) applies, if at all, only to Federal laws and regulations and not to State or local laws and regulations. In the absence of SBA regulations clarifying this matter, we will apply our view that DAR § 1-903.1(v) refers only to Federal statutes/regulations in any future protests arising under this DAR section. However, in the present case, we cannot find unreasonable the contracting officer's interpretation that DAR § 1-903.1(v) applies to State law and his failure to refer the matter to the SBA because of his interpretation, since it is not clear whether State law is included within the purview of the provision and because our Office had not provided any interpretation of the provision in any prior decision.

CONCLUSION

In view of the above discussion, the protest is denied.



Deputy Comptroller General
of the United States