



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Pond Security Group Italia, JV

File: B-400149.3

Date: December 22, 2008

Paul Reinsdorf, Esq., Reinsdorf & Associates, for the protester.
William J. Nelson, Department of the Army, for the agency.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's nonresponsibility determination is denied where protester failed to meet a definitive responsibility criterion requiring submission of licenses to provide security guard services in the relevant geographical regions.

DECISION

Pond Security Group Italia, JV, a joint venture, of Vicenza, Italy, protests the nonresponsibility determination of the Department of the Army under request for proposals (RFP) No. W912PF-08-R-0015, for security guard services at United States Army Garrison (USAG) locations in Italy.

We deny the protest.

The agency issued the RFP on April 8, 2008, seeking a contractor to provide security guard services at USAG locations in Vicenza and Livorno, Italy. According to the agency, for purposes of contracting and business practices in Italy, the U.S. government is treated as a commercial enterprise and must ensure that its actions conform to Italian requirements. Contracting Officer's Determination, at 1. Therefore, many of the contracts awarded by the agency in Italy contain unique requirements dictated by the Italian government. In the case of this RFP, offerors were required to submit copies of specific necessary permits, licenses, and certifications. As relevant here, offerors were required to submit prefecture licenses to provide security services. In the case of a joint venture, this requirement was intended to apply to each member of the joint venture.

On May 8, 2008, Pond filed a protest of the solicitation with our Office, alleging that the terms of the RFP were unclear because some of the licensing requirements were stated in Italian, that the licensing requirements unduly restricted competition, and that, to the extent licensing requirements applied to all companies in a joint venture, that requirement was unnecessary under Italian law and contrary to commercial practices. The agency asserted that the licensing requirements were mandated by Italian law, which specifically included the requirement that all companies in a joint venture be licensed by the relevant prefectures in order to provide security guard services. In its comments, Pond responded that the very requirement that offerors submit prefecture licenses to provide security guard services was unclear from the face of the solicitation.

Our review of the record revealed that the statement of certain licensing requirements in Italian was not unclear, that the licensing requirements were not unduly restrictive of competition, and that the requirement that all members of a joint venture submit certain permits, licenses, and certifications was not improper. However, we agreed with the protester that the requirement for all offerors to specifically submit prefecture licenses to provide security guard services was not unambiguously stated in the RFP.

On July 22, our Office conducted an outcome prediction conference call, in which we explained to the parties the conclusions that our Office was mostly likely to reach in a written decision. As a result of that conference call, the agency took corrective action. The corrective action consisted of reopening the RFP, issuing amendment 4 to the RFP to clarify the requirement for prefecture licenses, indicating that offerors would be allowed to restructure if necessary to comply with the licensing requirement, and setting a new proposal due date of August 8. On the basis of the corrective action, our Office dismissed the protest as academic.

On August 8, Pond submitted a revised proposal which removed one of the companies from its joint venture, but failed to include copies of licenses to perform security services from the local prefectures for any of the companies remaining in the joint venture. Accordingly, the agency found Pond ineligible for award due to failure to submit required licenses and, on August 28, awarded the contract to another firm. This protest followed.

The RFP included a modified version of Federal Acquisition Regulation (FAR) clause 52.212-1, Instructions to Offerors—Commercial Items, which stated in relevant part:

The offeror shall submit with its proposal all the documentation listed here below in order to be eligible for an award. Failure to submit with the proposal any of below listed required documents/certificates will be cause for rejection of the initial proposal as not in compliance with the requirement of the

solicitation, if a determination is made to award the contract based on initial proposals without discussion.¹ The offeror is discouraged from including with its proposal any additional data or information not requested by this solicitation.

RFP at 14. Among the list of documentation requirements, the RFP, as modified by amendment 4, included the following requirement:

The offeror shall submit a copy of their Prefecturer [sic] License to provide guard services (licenza prefettizia) from the providence [sic] of which services are provided and in accordance with Italian T.U.L.P.S. 134. In the case of a joint venture, a copy of the license of each company in the joint venture shall be submitted.

Amendment 4 at 1.

The agency and the protester agree that the requirement for all companies in a joint venture to submit valid prefecture licenses to provide security guard services constituted a definitive responsibility criterion. Responsibility is a term used to describe the offeror's ability to meet its contract obligations. See FAR subpart 9.1. A contracting officer may not make an award to a contractor unless the contracting officer makes an affirmative determination of responsibility. FAR § 9.103(b). In most cases, responsibility is determined on the basis of general standards set forth in FAR § 9.104-1, and involves subjective business judgments that are within the broad discretion of the contracting activities. Bryan L. and F.B. Standley, B-186573, July 20, 1976, 76-2 CPD ¶ 60 at 5.

However, in some solicitations, as is the case here, an agency will include a special standard of responsibility, referred to by our Office as a definitive responsibility criterion. See FAR § 9.104-2. In effect, definitive responsibility criteria represent an agency's judgment that an offeror's ability to perform in accordance with the contract must be measured against specific requirements, compliance with which at least in part can be determined objectively. The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164 at 3. An offeror must show compliance with definitive responsibility criteria as a precondition to award. Coastal Elecs., Inc., B-250718, Feb. 16, 1993, 93-1 CPD ¶ 144 at 6-7.

Pond asserts that the determination that it was not responsible was unreasonable since the agency knew or should have known, had it made any effort to gather more information, that each of the companies in Pond's joint venture possessed the required prefecture licenses. Specifically, Pond acknowledges that the required

¹ The award in this procurement was made based on initial proposals, without discussions.

licenses were not included in its proposal, but asserts that regardless of the terms of the RFP, evidence pertaining to a definitive responsibility criterion may be obtained at any time prior to the award, and that the contracting officer was required to solicit further information on Pond's licensing before making a determination of responsibility. According to Pond, it was improper for the agency to base its nonresponsibility determination solely on a "mechanical review" of the documents in Pond's proposal.

We agree with the protester that matters of responsibility are to be determined at the time of award, and that regardless of the terms of the RFP, information pertaining to the protester's responsibility could have been submitted at any time prior to award. LORS Med. Corp., B-259829, B-259829.2, Apr. 25, 1995, 95-1 CPD ¶ 222 at 4. It is well-established that the terms of a solicitation cannot convert a matter of responsibility into one of proposal acceptability. See Mobility Sys. and Equip. Co., B-243332, Apr. 25, 1991, 91-1 CPD ¶ 412 at 3. However, we do not agree that the contracting officer was required to seek out additional information pertaining to Pond's responsibility, and we conclude that the contracting officer properly determined that Pond failed to meet a definitive responsibility criterion based on a review of the submitted documents.

To the extent Pond argues that the agency was obligated to contact it upon discovering that the prefecture licenses were not included in its proposal, we disagree. An agency is not required to contact an offeror prior to making its determination; a contracting officer may base a negative determination of responsibility on evidence in the record, without affording offerors the opportunity to explain or otherwise defend against the evidence. Victor Graphics, Inc., B-249297, Oct. 19, 1992, 92-2 CPD ¶ 252 at 3-4. It is the duty of the bidder to supply all necessary documentation to establish its responsibility. Yellowhorse Indus., B-250282, Jan. 12, 1993, 93-1 CPD ¶ 35 at 4. More specifically, whether an offeror has complied with a definitive responsibility criterion relating to the submission of a specific license or certification is an objective determination that is made on the basis of the documents submitted to the contracting officer prior to the time of the award. See The Mary Kathleen Collins Trust, *supra*.

Here, in light of the RFP's clear admonition that an offeror was to submit all required documents with its initial proposal, and the fact that Pond did not submit the required prefecture licenses with its proposal or at any other time prior to award, we see no basis to object to the agency's determination that Pond failed to meet a definitive responsibility criterion contained in the RFP.

The protest is denied.

Gary L. Kepplinger
General Counsel