



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: 50 State Security Service, Inc.

File: B-272114

Date: September 24, 1996

Richard J. Webber, Esq., and Alison J. Micheli, Esq., Arent Fox, for the protester.
Maj. Michael J. O'Farrell, Jr., Department of the Army, for the agency.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer reasonably found protester nonresponsible where the protester failed to promptly provide the necessary proof that it would be able to comply with the required performance schedule.

DECISION

50 State Security Service, Inc. protests its rejection as nonresponsible under request for proposals (RFP) No. DAHC92-96-R-0039, issued by the United States Army Garrison-Panama, for security guard services.

We deny the protest.

The RFP, issued April 15, 1996, contemplated the award of a firm, fixed-price contract to the lowest priced, technically acceptable offeror for a base period of 4 months (June 1 through September 30, 1996) with 4 option year periods extending to December 31, 1999 (when the installations covered by the contract are to be turned over to the government of Panama under the terms of the Panama Canal Treaty). The RFP cautioned offerors to submit sufficient information to enable the contracting officer to fully ascertain each offeror's capability to perform all of the requirements contemplated in the RFP.

The agency received 10 proposals by the April 30, 1996, closing date. 50 State's proposal was one of the four proposals determined by agency evaluators to be technically acceptable. 50 State, which was not operating in Panama, proposed filling the majority of guard positions with incumbent guards. These guards had been recruited by 50 State's proposed general manager for the contract, who was then the general manager for an incumbent firm.

On May 7, the contracting officer requested that the four acceptable offerors furnish specific information about their capabilities, including the "qualification[s] of personnel assigned to the project," for a pre-award survey to determine the offerors' responsibility. Offerors were told that the requested information must be available for the survey and that failure to comply could result in exclusion from the competition.

The following day (May 8) 50 State's president and proposed general manager for the contract met with Army contracting officials in Panama to discuss the information requested by the agency. Before the meeting began, one of the contracting officials stated that the presence of 50 State's proposed general manager presented a conflict of interest because that individual was currently employed by an incumbent contractor, who also was competing for this contract. Accordingly, 50 State's president asked his proposed general manager to leave the meeting, and that individual did not participate further.

The contracting officer's record of the May 8 meeting shows that he asked 50 State: "How are your people meeting minimum requirements (Bilingual, Experience, Police records)? Show me files." The contracting officer's record shows that 50 State responded: "119 People, list of names cannot be obtained. Can get in office." 50 State's president states in an affidavit that the Army ignored his offer at the meeting to put together such a list and provide it after the meeting.

On May 9, the contracting officer transmitted letters to the offerors being considered for award, including 50 State, requesting that they provide, by the following day, copies of their business certificates to operate as security guard companies in accordance with a specified Panamanian government decree, or proof that the certification is being obtained and will be in effect on June 1 (which was the commencement date for performance of the contract).

50 State responded on May 10 that it had retained a Panamanian lawyer and would obtain the necessary business certificate "in a timely manner," and that there was a possibility that 50 State would be purchasing a Panamanian company that is already certified. In a separate letter dated that same day, 50 State's Panamanian lawyer said that he expected the negotiations to purchase the Panamanian security firm to be completed by May 17, but that he could not yet divulge information about the firm.

The contracting officer rejected 50 State and two of the three other offerors as nonresponsible later that day (May 10) and awarded the contract to Universal Security, S.A., on May 13. In response to 50 State's debriefing request, the agency, by letter dated May 15, listed the reasons 50 State was determined nonresponsible:

"(a) The feasibility of approach was considered to be too high a risk. 50 State Security Service would be starting a new business in Panama, with no existing workforce in country and could not provide evidence that the required business certificates would be approved by the Government of Panama by the contract award date (contract awarded May 13, 1996).^[1]

"(b) The proposal indicated that recruitment had taken place for prospective employees and that in-depth interviews had been conducted. Moreover, 50 State Security Service had obtained letters of intent from personnel that had been selected. Nonetheless, when asked to provide a list of names of prospective employees, the company was not able to do so nor did it present the letters of intent.

"(c) The proposal indicated that it would require approximately 85 hours of training for entry level applicants before performance. It was determined that this was too high a risk to be achieved in 18 days (considering no organizational structure existed at time of award to accomplish this).

"(d) During the evaluation period, 50 State Security Service indicated that it was negotiating to purchase a licensed security company in Panama. However, it provided no evidence that any financial arrangements had been made or letter of intent from the licensed security company existed."^[2]

¹The contracting officer's request for proof of the required business certificate indicated that the certification procedure would take at least a month after the filing of the application with the Panamanian government. Neither 50 State nor its Panamanian lawyer indicated in their responses when 50 State had filed its application, nor has 50 State produced any such evidence during the course of this protest.

²Although it was not mentioned in the proposal, 50 State indicated on May 10, in responding to the contracting officer's request for proof of the required business certificate, that there was a possibility it would be purchasing a controlling interest in a licensed Panamanian security firm, whose identity 50 State did not reveal. As
(continued...)

"Even though 50 State Service's proposal was technically acceptable and the company has a good record of past performance, the risks involved in not having the proper number of trained security guards in place by midnight on 31 May 1996 was the deciding factor. Tremendous loss of government property and great risk to government personnel could occur if the delivery schedule was not met. In accordance with [Federal Acquisition Regulation] Part 9, a prospective contractor must present acceptable evidence of its ability to obtain required resources. At the time of contract award, the contracting officer determined that a mere statement indicating all required resources would be in place, was not sufficient to override the tremendous risk involved."

50 State protested the nonresponsibility determination to our Office on May 22. Notwithstanding 50 State's protest, the Army authorized the awardee to commence performance of the contract based on urgent and compelling circumstances.

50 State argues that it was not given a reasonable opportunity to demonstrate its responsibility and that each of the grounds upon which the Army based its nonresponsibility determination was unreasonable. 50 State asserts that it should have received award and, had it become apparent as the performance date approached that 50 State would be unable to perform as proposed, the contracting officer could have extended the incumbent contracts and taken whatever contractual actions regarding 50 State he deemed appropriate.

The Army explains that the current solicitation consolidates the guard duties covered by eight existing contracts that expired May 31, some of which could not be extended further, and that the contractor is also to assume critical new security responsibilities not covered by existing contracts. The contracting officer states that his nonresponsibility determination considered the critical nature of the guard services as well as the limited time--18 days--remaining prior to the commencement of contract performance. With time running out, the Army asserts that the contracting officer made a reasonable business decision to find 50 State nonresponsible, and to award the contract to Universal in order to permit Universal adequate time to prepare to begin performance on June 1, 1996.

Contracts may only be awarded to responsible prospective contractors. Federal Acquisition Regulation (FAR) § 9.103(a). To be determined responsible, a prospective contractor must, among other standards, be able to comply with the

²(...continued)

described above, 50 State's Panamanian lawyer mentioned that he expected the negotiations to be completed by May 17, a week later.

required performance schedule and have the necessary organization, experience, operational controls, and technical skills, or the ability to obtain them. FAR § 9.104-1(b) and (e); Schwendener/Riteway Joint Venture, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ 203. Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, the contracting officer should require acceptable evidence of the prospective contractor's ability to obtain required resources. Acceptable evidence normally consists of a commitment or explicit arrangement, that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel. FAR § 9.104-3(b).

The burden is on a prospective contractor to demonstrate affirmatively its responsibility. FAR § 9.103(c). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer must make a determination of nonresponsibility. FAR § 9.103(b); Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64. A nonresponsibility determination is a matter of business judgment within the discretion of the contracting officer; we generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or a lack of any reasonable basis for the determination. TAAS-Israel Indus., Inc., B-251789.3, Jan. 14, 1994, 94-1 CPD ¶ 197. While a contracting officer should give an offeror a reasonable opportunity to offer relevant information with respect to responsibility issues if time permits, we have also recognized that a procuring activity is not required to delay an award indefinitely while an offeror attempts to cure the causes for its nonresponsibility. See Tomko, Inc., 63 Comp. Gen. 218 (1984), 84-1 CPD ¶ 202; Schwendener/Riteway Joint Venture, *supra*.

As indicated, the contracting officer's fundamental concern with 50 State was that it may not have a sufficient number of qualified guards in place when performance under the contract began on June 1 to ensure the protection of personnel and property, given that the existing contracts were expiring or did not cover the work. The solicitation clearly established June 1 as the date on which contract performance commenced, and thus it should have been reasonably apparent to 50 State and the other offerors that within the month following the April 30 closing date the agency needed to evaluate proposals and make an award with sufficient lead time for the awardee to prepare for contract performance. Further, in light of the Army's May 7 expedited scheduling of the pre-award survey meeting; the discussion at the May 8 meeting, which 50 State personnel traveled to Panama to attend; and the Army's May 9 request for proof of the required certification, to be provided by the following day, it should have also been reasonably apparent to 50 State that any additional information showing its responsibility was needed immediately as award was imminent—only 3 weeks remained before the commencement of contract performance.

Specifically, the contracting officer at those times sought evidence that 50 State possessed, or could at least obtain, a work force meeting the minimum qualifications listed in the RFP and promised in 50 State's proposal. In the May 7 notification of the pre-award survey, the contracting officer requested that information on the qualifications of personnel be made available, and at the May 8 meeting, asked 50 State: "How are your people meeting minimum requirements (Bilingual, Experience, Police records)? Show me files." Despite the contracting officer's explicit request that information on the qualifications of personnel be available for the pre-award survey, 50 State did not bring any such documentation with it to the meeting, and despite the contracting officer's actual request for such information at the May 8 meeting, 50 State did not then provide such information or offer to supply the requested information on qualifications after the meeting. Indeed, while the RFP required that documentation showing the qualifications of all proposed personnel be submitted by the awardee prior to the commencement of contract performance, 50 State has never provided such evidence that any of its proposed guards met the minimum qualifications.³

Thus, it clearly was incumbent on 50 State, in order to receive the award, to respond promptly to the contracting officer's request for acceptable evidence of the firm's ability to obtain the necessary resources to meet the performance schedule. Under such circumstances, the agency acted reasonably in finding 50 State nonresponsible for failure to promptly demonstrate its responsibility. See Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23; Roarda, Inc., B-204524.5, May 7, 1982, 82-1 CPD ¶ 438.

50 State argues that it was not given a meaningful opportunity to demonstrate its responsibility because its proposed general manager, who had recruited the necessary personnel, was excluded from participating in the May 8 pre-award survey meeting, and because the Army did not ask 50 State to submit a list of names of prospective employees and letters of intent.

However, the record evidences that even had 50 State's proposed general manager been allowed to participate in the May 8 meeting, he could have only provided his recollection of the names of some of the guards he recruited and his assurances that the guards were committed to working for 50 State. Although the president of 50 State alleges that his offer to compile a list of guards and provide it to the Army

³Although 50 State is relying primarily on incumbent guards, the record indicates that the previous contractors were performing to a variety of different standards, and thus it is not certain that all the incumbent guards would have met the qualifications set out in this RFP. Even if the incumbent guards already met the qualifications, 50 State was also proposing other guards, but provided no acceptable evidence that these individuals were also qualified.

after the meeting was ignored by contracting officials, and that contracting officials did not ask for letters of intent, it was incumbent upon 50 State to provide such information on its own initiative regarding its capability to obtain the requisite personnel to meet the performance schedule, since it is the burden of the offeror to affirmatively demonstrate its responsibility. Theodor Arndt GmbH & Co., supra. 50 State never did provide a list of proposed guards or show that those guards were committed to working for 50 State and has not demonstrated in its protest that it ever had such evidence available. More significantly, merely supplying a list of proposed guards would have been insufficient to satisfy the agency's request that 50 State provide evidence that the proposed guards would be qualified by the June 1 commencement date.

50 State asserts that, had it been asked, it could have provided more information about its arrangements with the Panamanian security firm it was negotiating to purchase, which would have provided another source of guard personnel. However, 50 State did not inform the Army that such an arrangement was even contemplated until its May 10 response to the contracting officer's request for the required business certificate. As indicated above, it should have been apparent to 50 State that any additional information showing its responsibility, such as a letter of intent from the Panamanian security firm, needed to be provided immediately to the contracting officer.

Given the agency's need for information pertaining to the availability of qualified guards in light of the rapidly approaching contract commencement date, and in view of the failure of 50 State to promptly provide the necessary proof of responsibility as required by FAR § 9.103(c), the contracting officer's decision to find 50 State nonresponsible was reasonable. Theodor Arndt GmbH & Co., supra.

The protest is denied.

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