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

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FILE: B-192188 CNG00021 DATE: February 9, 1979

MATTER OF: Inter-Con Security Systems, Inc.; Washington Patrol Service, Inc.

DIGEST: CNG00363

[Protest of Contract Award for Security Service at Air Force Station]

1. Solicitation for base security services contract contained provision requiring contractor to obtain "any necessary licenses and permits." Failure of proposed awardee to obtain State license does not affect validity of award since the matter is one between contractor and State and local authorities.

CNG00325

2. GAO will not consider protests alleging that phase-in period of contract will be shorter than phase-in period specified in IFB since contract has not been awarded, contracting agency has not reduced phase-in period, and contracting agency indicates that no reduction in phase-in period is anticipated. Contracting agency has taken no action adverse to protesters, and, therefore, protests on this issue are premature.

3. Protest that bid for 1-year security services contract with 3 option years, which priced second option year approximately 19 percent higher than basic year, is unbalanced is denied. Review of bid does not show nominal or greatly inflated prices for any year and, therefore, bid is not mathematically unbalanced.

4. Under recent court and Comp. Gen. decisions, bidder does not fall within prohibition of Anti-Pinkerton Act unless offering "quasi-military armed forces for hire." Where solicitation for security services contains provisions regarding Anti-Pinkerton Act prohibition, such provisions are unnecessary. However, since no prejudice to any bidder or proposed bidder is shown by inclusion of provisions, no corrective action is required in present solicitation.

5. All parties are on constructive notice of material published in Federal Register.

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6. Protest that small business set-aside solicitation should have been amended when SBA issued new size standard is untimely filed and will not be considered on merits since new size standard was published in Federal Register more than 10 days prior to filing of protest and protester is held to be on constructive notice of all material published in Federal Register. In addition, new size standard was not for application since effective date for its use was after bid opening.

Inter-Con Security Systems, Inc. (Inter-Con), and Washington Patrol Service, Incorporated (Washington), have filed protests against award of a contract to What-Mac Contractors (What-Mac) for the management and operation of base security services at the Los Angeles Air Force Station, Los Angeles, California, pursuant to invitation for bids (IFB) No. F04693-78-B0002.

The solicitation, a small business set-aside, was issued on November 18, 1977. When bids were opened on June 12, 1978, it was determined that National Investigation Bureau, Inc. (National), was the apparent low bidder. However, a preaward survey conducted by the Air Force on National resulted in a negative determination, and on September 8, 1978, the Small Business Administration refused to issue a certificate of competency to National. Accordingly, the contracting officer rejected National's bid after determining National to be nonresponsible. The Air Force now proposes to make award to What-Mac, the second-low bidder, but award is being held in abeyance pending our decision on the instant protests.

Both protesters contend that What-Mac is not a responsible bidder because it does not possess a license to perform security services in California as required by the IFB. In this regard, Washington questions the propriety of contract extensions with the incumbent which allow What-Mac more time to comply with the licensing requirements. Both protesters also argue that the contract to be awarded to What-Mac differs materially from the IFB requirement because the phase-in period has been reduced from the 1-month period advertised to a phase-in period of just 2 weeks. Washington alleges that What-Mac submitted an unbalanced bid. Inter-Con raised two additional grounds of protest when it filed its comments on

the Air Force report on December 18, 1978. First, Inter-Con contends that the solicitation should have been canceled because it required bidders to certify that they do not perform private detective services--a statutory prohibition required by the Anti-Pinkerton Act, 5 U.S.C. § 3108 (1976), but which our Office has held applicable only to organizations offering "quasi-military armed forces for hire." Second, Inter-Con contends that the subject solicitation should have been canceled because it carried a small business size standard of only $2 million while the Small Business Administration (SBA) adopted a new size standard of $4.5 million on September 22, 1978.

LICENSING REQUIREMENT

The protesters allege that What-Mac is not a responsible bidder because, in order to provide security services in California, a firm must first obtain a license from the California Office of Consumer Affairs and What-Mac does not have such a license nor has it applied for one. We note that by letter dated December 28, 1978, What-Mac states that it has filed an application for a license in California. The protesters argue that such a license is required by the IFB in paragraph 35, section "C," and paragraphs 15 and 21, section "J," entitled "Special Provisions."

Paragraph 35, section "C," states:

> "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." (Emphasis supplied.)

Paragraph 15 of the Special Provisions states:

> "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." (Emphasis supplied.)

Paragraph 21 of the Special Provisions provides 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 * * *" (Emphasis provided by counsel for Inter-Con.)

Inter-Con argues that the contracting officer was aware of and familiar with California licensing requirements relevant to security services and What-Mac's failure to comply with them. Inter-Con cites our decision in James B. Nolan Company, Inc., B-192482, September 26, 1978, 78-2 CPD 232, in support of its argument that, where a contracting officer has included a licensing requirement in a solicitation, compliance with that requirement is a matter of bidder responsibility. Inter-Con concludes that What-Mac is nonresponsible and, therefore, under Defense Acquisition Regulation (DAR) § 1-904.1 (1976 ed.) no award may be made to What-Mac.

We do not agree with Inter-Con's conclusion since we believe that the facts of the Nolan decision are clearly distinguishable from the facts of the present protest. In the present procurement, the solicitation provisions quoted above are all written in general terms to insure compliance with Federal, State and local laws and regulations. In Nolan, the language of the solicitation specifically required bidders to be licensed to conduct the business of Watch/Guard or Patrol Agency as required by New York law. We have held that there is a significant distinction between solicitation provisions which merely contain general language in attempts to insure compliance with State licensing requirements that may or may not be applicable to or enforced against a prospective contractor and solicitation provisions which require bidders to hold a specific State license. 53 Comp. Gen. 51, 53 (1973). Where the contracting officer is aware of and familiar with local requirements, he may properly incorporate into the solicitation a requirement

that the particular license is a prerequisite to an affirmative determination of responsibility. 53 Comp. Gen. 51, 53, supra. However, we have held that, where, as here, only a general statement regarding compliance with State and local licensing requirements is contained in a solicitation, the failure of a bidder under a solicitation for security guard services to meet the State and local licensing requirements prior to award does not affect the validity of award and the matter is one which must be settled between the contractor and State and local authorities. 51 Comp. Gen. 377 (1971).

Regarding the propriety of extensions of the present guard services contract, there is no evidence of record that such action was taken to allow What-Mac more time to obtain a California license. The Air Force indicates that it extended the present contract solely because of delays related to resolution of the instant protest filed with our Office. Section 2-407.8(b)(3) of the DAR (1976 ed.) provides authority to withhold award pending resolution of a protest, and, therefore, the contracting officer's actions were proper in this regard. See Tennessee Valley Service Company, B-188771, December 8, 1977, 77-2 CPD 442.

For the above reasons, the protest on this issue is without merit.

PHASE-IN PERIOD

Both protesters contend that the present solicitation should be canceled because the phase-in period has been shortened from 1 month to 2 weeks. The protesters contend that, since the delivery/performance schedule in the IFB required a phase-in period of 1 month, award of a contract containing a 2-week phase-in period would be improper because it is a fundamental principle of Government contract law that the contract awarded must be the same as the contract which was advertised. Washington has further alleged that the phase-in reduction will work to the advantage of What-Mac since What-Mac will "pick up additional funds by understating the first option period."

We agree with the protesters that award of a contract pursuant to the advertising statutes must be made on the same terms offered to all bidders. See The Manbeck Bread

Company, B-190043, October 5, 1977, 77-2 CPD 273. However, we cannot agree that the present procurement has been mishandled so as to violate this rule. The Air Force indicates in its report on the protests dated November 27, 1978, that it has not shortened the phase-in period and that no such reduction is anticipated. We have examined the record and find no evidence that the phase-in period has been or will be shortened. We assume that the contract awarded will be made on the same terms as those contained in the IFB. Accordingly, since the contracting activity has not taken or proposed any action adverse to the interests of the protesters, we consider the protest on this point to be premature and will not consider this issue further. See, for example, Clifford Industries, Inc., B-191075, February 8, 1978, 78-1 CPD 107.

UNBALANCED BID

Washington contends that award to What-Mac would be improper since What-Mac submitted an unbalanced bid. Washington alleges that What-Mac overinflated its prices in the second of 3 option years so as to "get their foot in the door." It is not clear exactly how Washington arrived at this conclusion. However, it appears that Washington believes that What-Mac bid extremely low on the basic period of the contract (1 year) and then raised its prices very high in the second of the three 1-year option periods.

Our Office has recognized the twofold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Mobilease Corporation, 54 Comp. Gen. 242 (1974), 74-2 CPD 185.

In the present case, the IFB contained the following clause regarding evaluation of options and unbalanced bids:

"EVALUATION OF OPTIONS

"a. Bids or proposals will be evaluated for purposes of award by adding the total price for all option quantities to the total price for the basic quantity. Evaluation of option will not obligate the Government to exercise the option or options.

"b. Any bid or proposal which is materially unbalanced as to prices for basic and option quantities may be rejected as nonresponsive. An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work and prices which are significantly overstated for other work."

The Air Force indicates in its report that it has examined What-Mac's bid and determined that the bid is not unbalanced. The Air Force contends that What-Mac could not have gained any advantage over other bidders by bidding nominal prices for one option period while bidding enhanced prices for other periods since the IFB was for a firm-fixed-price contract and the evaluation was conducted by adding the price bid on the basic period to the prices bid on the three option periods. The Air Force also states that it has analyzed What-Mac's bid, and, even though the bid shows an increase of 18.78 percent between the basic period and the second option period, the Air Force found What-Mac's bid to be in line with the percentage increases found in other bids.

We have examined What-Mac's bid and compared its prices to those of other bidders. We agree with the Air Force's conclusion that What-Mac's bid does not appear to be mathematically unbalanced. What-Mac's price for the basic year is not nominal and the increase for the second option year does not appear to be far out of line with increases proposed by other bidders. The increase does not seem unreasonable in light of the fact that the contract is labor intensive and inflation must have been taken into account by What-Mac in deciding its prices. We can see no advantage to be gained by What-Mac in bidding at an underinflated price for the base period and at an overinflated price for the second option year in view of the fact that prices for the basic contract

and all 3 option years were totaled for evaluation purposes. Even assuming, arguendo, that What-Mac's bid is mathematically unbalanced, we cannot find it to be materially unbalanced since there is no reasonable doubt that What-Mac's price for the base period, as well as its price for the base and option periods together, will result in the lowest ultimate cost to the Government. See S.F.&G., Inc., dba Mercury, B-192903, November 24, 1978, 78-2 CPD 361.

ANTI-PINKERTON ACT PROVISION

Inter-Con protests that the IFB improperly contained a provision informing bidders that the so-called Anti-Pinkerton Act, 5 U.S.C. § 3108 (1976), would be applicable to any contract to be awarded. Inter-Con contends that such provision should not have been included because on June 7, 1978, our Office sent a memorandum to the heads of all Federal departments and agencies which indicated that the statutory prohibition of the Anti-Pinkerton Act would only be applied if an organization offers "quasi-military armed forces for hire" and that guard and protective services do not fall within the purview of the prohibition. 57 Comp. Gen. 524 (1978).

In paragraph 13, part I - section "B," of the IFB, the solicitation provided:

> "The detective employment prohibition contained in 5 U.S.C. 3108 shall be applicable to any contract awarded as the result of this RFP. The cited act provides, 'An individual employed by the Pinkerton Detective Agency or similar organization may not be employed by the Government of the United States or the Government of the District of Columbia. P.L. 89-554, Sept. 6, 1966; 80 Stat. 416.
>
> "The offeror certifies that he is ( ) is not ( ) a detective agency and is ( ) is not ( ) owned by, employed by, licensed as or controlled by a detective agency. Offeror acknowledges that failure to submit this required certification may result in the proposal's being non-responsive."

A similar statement is found in paragraph 31, part I - section "B," of the IFB.

In James B. Nolan Company, Inc., supra, we held that solicitation requirements for evidence of compliance with the Anti-Pinkerton Act were unnecessary, and that all that should be required is certification that a bidder is not offering "quasi-military armed forces." Therefore, in the present case, the above-quoted certification provisions were unnecessary. However, no evidence has been presented to show that any bidder or prospective bidder was prejudiced by the inclusion of the provision in the IFB. We note also that our memorandum on this issue was sent to the heads of departments and agencies on June 7, 1978, while bid opening in the present procurement took place on June 12, 1978. It is unlikely that the contracting activity was aware of our position on the Anti-Pinkerton Act by bid opening. We therefore do not believe that corrective action is necessary with regard to this procurement on this issue. However, in the future, we recommend that the Air Force omit all requirements for compliance with the Anti-Pinkerton Act from its solicitations for security services.

SMALL BUSINESS SIZE STANDARD

Inter-Con also protested for the first time on December 18, 1978, that the solicitation, a 100-percent small business set-aside, used a $2 million size standard which unduly restricted competition since the SBA adopted a size standard of $4.5 million effective September 22, 1978.

Paragraph 27, part I - section "B," of the IFB limited participation to businesses with average annual receipts in the 3 preceding fiscal years of $2 million or less. The SBA raised this limit to $4.5 million for protective services and published this change in the Federal Register on July 24, 1978. 43 Fed. Reg. 31883 (1978). All parties are held to be on constructive notice of material published in the Federal Register. Enterprise Roofing Service, B-184430, January 2, 1976, 55 Comp. Gen. 617 (1976), 76-1 CPD 5; DeWitt Transfer and Storage Company, B-180039, January 31, 1974, 53 Comp. Gen. 533 (1974), 74-1 CPD 47. Therefore, since Inter-Con did not file a protest on this issue until more than

10 days after the new limitation was published in the Federal Register, the protest on this issue is untimely filed under our Bid Protest Procedures and will not be considered on its merits. 4 C.F.R. § 20.2(b)(2) (1978). In any event, since the effective date of the change in the size standard was after bid opening, the new standard was not for use in the instant solicitation.

CONCLUSION

For the above reasons, the protests are denied in part and dismissed in part.

R.F. Keller

Deputy Comptroller General
of the United States