

*Heberman*

*17775 PL*

**DECISION**



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

*[Protest of Army Contract Award]*

FILE: B-200470

DATE: April 15, 1981

MATTER OF: Transco Security, Inc., of Ohio

**DIGEST:**

1. Protest relating to small business size status is not for consideration by GAO since exclusive authority for size determination is statutorily vested with Small Business Administration.
2. Where solicitation does not require any specific State license, alleged failure of bidder to possess detective or security company license is not proper basis for nonresponsibility determination.
3. Accidental misdesignation of bidder's State of incorporation and omission of company identification number from bid may properly be waived as minor informalities since bidder, in fact, was incorporated entity and errors have no material effect on bid.
4. Allegations concerning below-cost bidding and low bidder's alleged lack of financial resources involve questions of responsibility. GAO does not review affirmative determinations of responsibility absent conditions not present here.
5. Protest, alleging defect in solicitation's option provision, which was apparent prior to bid opening date, is untimely since filed after bid opening; similarly, allegation concerning alleged deletion of two work requirements of solicitation after bid opening will not be considered since protest was filed months after protester was apparently aware of deletions.

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Transco Security, Inc., of Ohio (Transco), protests the award of a contract to Pan American Services, Inc. (Pan American), under solicitation No. DAEAL8-80-B-0147 issued by the Army. Based on our review, the protest is denied in part and dismissed in part.

The solicitation, a small business set-aside, was issued on August 20, 1980, to obtain civilian security guard services for the Fort Huachuca Military Reservation in Arizona. Bid opening occurred on September 12, 1980; Pan American was the apparent low bidder and Transco the second low bidder. Transco initially protested the proposed award to our Office in September 19, 1980. The Army subsequently made a determination to award the contract to Pan American notwithstanding the pendency of the protest.

Transco contends that Pan American is possibly affiliated with a large business and thus ineligible for award; that Pan American is not licensed as a detective or security company in New Mexico; that Pan American incorrectly identified itself as a New Mexico corporation in its bid; that Pan American has "forfeited its right to do business" in Texas, the State in which it is incorporated; and that Pan American submitted a below-cost bid. Finally, Transco contends that after bid opening, the Army improperly deleted two solicitation work requirements--allegedly having a substantial effect on bid prices--and that the solicitation's option clause does not contain an expiration date for the option period involved.

Transco's assertion that Pan American may be affiliated with a large business is apparently based on the information that, according to Transco, Pan American's phone number is answered "Am-Rep," which Transco believes to be a large development corporation. By letter of October 24, 1980, to Pan American, the Small Business Administration (SBA) made a determination that Pan American is a small business concern for the purposes of the procurement in question. Under 15 U.S.C. § 637(b) (1976), the SBA is empowered to conclusively determine matters of small business status for Federal procurement and sales purposes, and its determination is not subject to review by GAO. Home Oxygen & Medical Equipment, Inc., B-201370 December 29, 1980, 80-2 CPD 445.

With respect to licenses, the solicitation contained no specific requirement that the bidder be licensed as a detective or security company in any State. Instead, the IFB provided in general terms that bidders/contractors shall have complied with applicable State and Federal laws, and that compliance will continue throughout the period of contract performance. Where a solicitation contains only a general requirement that the contractor be in compliance with applicable laws and 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. New Haven Ambulance Service, Inc., 57 Comp. Gen. 361 (1978), 78-1 CPD 225. We have also held that the failure of a low bidder to obtain a license required under State or local law is not a proper basis upon which to reject the low bidder where the solicitation merely states in general terms that all State or local licenses must be obtained by the successful bidder, and that such failure could not affect the eligibility of a bidder to be awarded a Government contract, but was rather a matter to be resolved between the contractor and State and local authorities. Career Consultants, Inc., B-195913, March 25, 1980, 80-1 CPD 215

The only exception to the rule precluding the contracting officer from determining a bidder nonresponsible for failure to possess a State or local license (in circumstances where the solicitation does not specify which State/local licenses are mandatory) concerns situations where the contracting officer reasonably determines (based on indications from State authorities) that enforcement attempts by the State are likely and that there is a reasonable possibility that such enforcement attempts could interrupt and delay performance under the contract if awarded to the unlicensed contractor. See What-Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD 179. No such circumstances are apparent here.

Regarding the allegation that Pan American incorrectly identified itself as a New Mexico corporation in its bid, the Army states that, shortly after bid opening, Pan American advised the agency that it had mistakenly

indicated New Mexico rather than Texas, the proper entry for State of incorporation. The contracting officer determined that this error, along with the omission by Pan American of its company identification number, was a minor irregularity which he determined should be waived under Defense Acquisition Regulation (DAR) § 2-405 (DAC #76-17, September 1, 1978). In reply to the Army's position, Transco insists that, as of the date of bid opening, Pan American "was, in fact, a corporation not in good standing [with the State of Texas] and had forfeited [its] right to do business." And Transco argues that the president of Pan American "falsified the solicitation."

A contract cannot be awarded to an entity other than the one which submitted the bid. Martin Company, B-178540, May 8, 1974, 74-1 CPD 234. The bidder named in the bid in question was "Pan American Services, Inc"; however, Transco does not deny that Pan American is an incorporated entity, but only argues that the company lost its right to do business in Texas for a certain period of time. As to the limits of this time period, the record contains a November 5, 1980, letter from the Business Tax Division of the State of Texas to the Army which reads:

"Pan American's Franchise Tax account became delinquent on June 15, 1980, for non-filing of the 1980 Franchise Tax report.

Because the report was not filed by September 15, 1980, the corporation forfeited its right to do business in Texas on that date, in accordance with Tex. Gen. Ann. Art. 12.14.

On September 27, 1980, a 1980 Franchise Tax report was filed by Pan American Services, Inc., and the final liability was paid on November 5, 1980, which brought the corporation back into good standing with the State of Texas \* \* \*."

Since this letter does not state that Pan American also forfeited its corporate status during the time in which it could not do business in Texas, it seems clear

that the company could have accurately represented itself to be a corporation even during this time period, which began after bid opening. Thus, there is no basis for Transco's position that Pan American falsified its corporate status.

As to whether Pan American deliberately falsified its State of incorporation, Pan American claims, as noted above, that it simply made a mistake in listing New Mexico rather than Texas. Moreover, Transco has not submitted any proof that would establish a deliberate misrepresentation on Pan American's part.

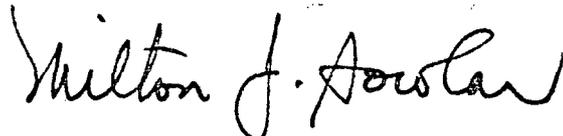
In any event, we agree that the company's failures to designate its correct State of incorporation and to list its identification number could be properly waived or corrected in the interest of the Government under DAR § 2-405, above, as having no effect on price, quality, quantity or delivery. See Airwest Helicopters, Inc., B-193277, June 7, 1979, 79-1 CPD 402.

Transco also asserts that Pan American submitted a below-cost bid which does not meet basic payroll costs, and that Pan American has insufficient revenue and working capital, thereby implying that the awardee will be unable to perform at the bid price. We have held that the Government may accept a below-cost bid. See, for example, Lite Industries, Inc., B-200646, January 30, 1981, 81-1 CPD 55. Moreover, to the extent this allegation actually questions whether Pan American has the capability to perform at a loss, Transco is asserting that the Army should have found the company to be nonresponsible. Our Office does not review affirmative determinations of responsibility except in certain circumstances not present here. See School Transportation Co., Inc., B-192799, January 10, 1979, 79-1 CPD 12. Therefore, we may not consider this part of the protest.

Finally, in its January 12, 1981, letter commenting on the agency report, Transco alleges, as noted above, that the Army improperly deleted two solicitation work requirements in October 1980 after bid opening and that the solicitation's option clause was defective since it did not contain an expiration date.

The Army has advised our Office that no such deletions have, in fact, been made, and that the solicitation requirements remain unchanged. In any event, Transco's allegations are apparently based on changes in services ordered from it by the Army during the month of October 1980, at which time its contract under a previous solicitation for the guard services had been extended on a month-to-month basis pending an SBA size status determination concerning Pan American. Transco's protest concerning these deletions was not received by our Office until January 16, 1980, months after the deletions are said to have occurred. Since the company was aware of the alleged changes long before we received the protest, we consider these grounds of protest to be untimely filed under § 20.2(b)(2) of our Bid Protest Procedures (4 C.F.R. part 20 (1980)). We also regard the protest against the allegedly defective option clause as untimely since it was not filed with our Office prior to bid opening. See 4 C.F.R § 20.2(b)(1) (1980). Thus, these allegations are untimely and not for consideration on the merits.

The protest is denied in part and dismissed in part.



Acting Comptroller General  
of the United States