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DECISION



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

FILE: B-201924

DATE: July 7, 1981

MATTER OF: A.R. & S. Enterprises, Inc.

DIGEST:

1. Decision by contracting officer pursuant to DAR § 10-104.2(a) (1976 ed.) that performance bond requirement is necessary in procurement for hospital housekeeping services cannot be questioned since default of contract might result in serious medical risks having financial consequences and bond affords, at minimum, penal sum to mitigate consequences as well as affording alternative possibility that surety would elect to complete performance. Since performance bond requirement cannot be questioned, payment bond requirement is not legally objectionable.
2. Army's decision that it needed to award contract for hospital housekeeping services to secure "bonded performance" notwithstanding pendency of protest cannot be questioned.
3. Experience requirements constituting definitive responsibility criteria can be satisfied by business enterprise through its employees or through its officials or owners. Army properly considered experience of proposed awardee's contract management staff--consisting of supervisors and labor force of incumbent contractor for prior year's services--in determining that proposed awardee met solicitation's experience criteria.

In January 1981 A.R. & S. Enterprises, Inc. (A.R. & S.) protested the requirement for performance and payment bonds in invitation for bids (IFB) DAAH03-81-B-0024. The IFB was issued by the U.S. Army Missile

[Protest Against IFB Requirements]

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Command for maintenance, repair and custodial service at Fox U.S. Army Hospital, Redstone Arsenal, Alabama. Bid opening was scheduled for 10 a.m. on February 2, 1981. We understand that only two concerns submitted bids and only one of those bidders was deemed to have submitted a responsive bid. The protester, which did not bid, requested delay of bid opening or, in the alternative, delay of contract award until the protest is resolved.

On March 18, 1981, the Army decided to award the contract to Miller and Miller, Inc., and Ferguson-Williams, Inc., a joint venture, as advantageous to the Government notwithstanding the fact that a protest had been filed against that award. On March 20, the protester filed a further protest after award contending, first, that award of the contract even though a protest against that award was pending was improper and, second, that award to the contractor was contrary to definitive responsibility criteria set forth in the IFB. Subsequently, the protester filed an action involving these issues in the United States District Court for the Northern District of Alabama, North-eastern Division. A.R. & S. Enterprises, Inc. v. John O. Marsh, Jr., Secretary, Department of the Army, Civil Action CV-81-PT-5096-NE. On April 3, 1981, the court, Robert B. Propst, Judge, issued an order filed April 6, 1981, formally requesting a decision by the Comptroller General on the issues raised.

As a general rule, GAO will not consider issues raised in a bid protest where the same issues are before a court of competent jurisdiction. However, where, as here, the court expresses interest in obtaining our views, we will provide the court with our decision. See 4 C.F.R. § 20.10 (1980).

Requirement for Performance and Payment Bonds

Section H-13 of the IFB, as amended by amendment 0001, required the submission of performance and payment bonds in the amount of 50 percent of the total contract price. A.R. & S. alleges that the performance bonding requirement is contrary to DAR § 10-104.2(a) (1976 ed.) which provides that performance bonds shall be required (i) when the terms of the contract provide for the contractor to have the use of Government material, property or funds to be handled in a specified manner, or (ii) if needed for financial reasons to protect the Government's interests. A.R. & S. argues that the contractor under the contract is not required to have the use of Government material, property or funds,

and that no financial reason exists requiring a performance bond to protect the interests of the Government.

In justifying the performance bond requirement, the Army has essentially adopted the position of the contracting officer who found that the requirement was appropriate, as follows:

"The maintenance, repairs, and custodial services required by subject solicitation are essential to provide hospital operations required for proper health care to patients. Default by the contractor in providing these services would abruptly place this health care facility in jeopardy. The Government could not respond in the time frame required to prevent transfer of many of the health care services to commercial hospital facilities. The surety, however, could respond quickly to default by the contractor and maintain the necessary key personnel required for continued operation of the hospital. Example: If a default situation occurred then the present employees in key positions would remain at the hospital as an employee of the bonding company and therefore be insured of a paycheck. But if a key person or persons chose at that time to leave due to the default of his/her employer then the bonding company would most expeditiously supply the key person or persons causing no disruptions of health care services."

The IFB in question required the contractor to furnish the required performance bond on standard form 25 (DAR § F-100.25 (1976 ed.)) which binds the surety to pay the Government only the stipulated penal sum in the event of the contractor's default, but does not require the surety to complete performance of the contract in case of default. Indeed, DAR § 18-618.6 (1976 ed.) dictates procurement procedures where a "surety does not complete performance of the [defaulted] contract." Thus, to the extent the Army's position is founded on the assumption that the surety for this contract would always complete performance in the case of the contractor's default, the position is erroneous.

Nevertheless, it is clear that the default of the contractor for these services might result in serious medical risks having financial consequences (for example, transfer of health care services) and that the performance bond affords, at a minimum, a penal sum to mitigate these financial consequences; further, the bond affords the alternative possibility that the surety would elect to complete performance--thereby affording the Government an additional remedy to ensure the continuation of services. Moreover, in similar circumstances, we recognized that a performance bond was appropriate under DAR § 10-104.2(a)(ii), supra, and that the bond requirement there had not been imposed as a substitute for a determination of bidder responsibility. See Steamco Janitorial Services, Inc., B-188330, August 2, 1977, 77-2 CPD 69.

A.R. & S. distinguishes our Steamco decision, supra, on the grounds that a service default had occurred in the hospital involved in that decision but no default has ever occurred in the Fox Army Hospital for these services. Whether or not a default has occurred, the threat and attendant risks exist. We cannot find that precautions against such risks are either unreasonable or taken in bad faith.

A.R. & S. also contends that bonding is shown to be unnecessary because the Army waived the bonding requirements for the last year of performance of the services by A.R. & S., which was the incumbent contractor.

The Army states that the bonding was waived because A.R. & S. was either unwilling or unable to secure bonding at the time of the exercise of the second renewal option under the prior contract, there was insufficient time to reprocur the services, and performance by A.R. & S. had been faultless for 2 years. Consequently, the fact that the incumbent contractor performed so reliably that bonding was waived in the final year of performance is, in our view, not relevant to the reasonableness or necessity of bonding on a new contract.

In view of the above analysis, we cannot question the performance bond requirement. Therefore, the payment bond requirement is not legally objectionable. See DAR § 10-104.3 (1976 ed.) which provides, in pertinent part, that payment bonds may be required when a performance bond is required.

Award of Contract Prior to Resolution of Protest

DAR § 2-407.8(b)(3), supra, provides that when a protest against the making of an award is received, award will not be made until the matter is resolved, unless the contracting officer determines that the services to be procured are urgently needed, or delivery or performance will be unduly delayed by failure to make prompt award, or that a prompt award is otherwise advantageous to the Government. DAR § 2-407.8(b)(2) (1976 ed.) further provides that such a determination to make an award must be approved at an appropriate level above that of the contracting officer.

In accordance with these provisions, the contracting officer prepared a determination and finding in justification of award stating that the prior contract had expired on February 6, 1981; that an extension to April 6, 1981, had been negotiated with the incumbent at an additional cost to the Government of about \$13,000 per month; and that a further extension would "put the Government in an untenable position of having to negotiate on a sole source basis with no assurance that an agreement can be reached, therefore leaving the health care situation in jeopardy." This determination was referred to the Army Headquarters, Pentagon, where award was approved by the Deputy for Contract Placement and Administration acting for the Deputy Assistant Secretary of the Army. We have regularly held that where the contracting officer acted in accordance with the regulations, the decision to proceed with the contract award is not subject to objection by our Office. New England Telephone and Telegraph Company, 59 Comp. Gen. ____ (B-197297, September 25, 1980), 80-2 CPD 225.

A.R. & S. argues, however, that the officials at Redstone Arsenal misled the approving official because at the time that the decision to award the contract was made, A.R. & S. was performing under a 2-month extension with a ceiling price of \$150,000, but the actual price had not been finalized. Therefore, the estimation of a cost to the Government of \$13,000 in excess of the cost by award to the apparent successful bidder was without basis, and the contract award decision is tainted by a misrepresentation.

In reply, the Army acknowledges that the additional cost figure of \$13,000 per month was an estimated pricing

differential derived--given the "Time and Materials" type contracting method involved--from comparing the price ceiling in A.R. & S.'s contract extension with the price ceiling contained in the joint venture's bid. Nevertheless, the Army insists it "stands with the dollar" differential since the differential is considered a good-faith estimate. Further, the Army insists that its primary justification to award was based on urgency apparently stemming from the Army's concern that it was in an "untenable position of having to request a further extension on an unbonded, sole source basis"--a statement found in a March 10, 1981, memo from the Command Counsel, Army Materiel Development and Readiness Command, to Army Headquarters in support of the request to award the contract.

Based on our review of the record, we cannot conclude that the pricing comparison was inappropriate as a reason for proceeding with an immediate award given the nature of the contract type involved. Although the pricing comparison was not expressly stated to be of an estimated nature, we find no evidence that this method of presenting the comparison resulted from an attempt to mislead officials. In any event, we cannot disagree with the Army's decision that it needed to award immediately to secure bonded performance in view of the advantages, discussed above, of bonded performance.

Affirmative Determination of Responsibility Under Definitive Criteria

As a general rule, affirmative determinations of responsibility are not reviewed by this Office unless fraud on the part of the procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. Proficiency Associates, Inc., B-198844.2, January 19, 1981, 81-1 CPD 29. There is no allegation of fraud, but the protester does allege that the Army has misapplied definitive responsibility criteria set forth in paragraph C-4 of the IFB. Definitive responsibility criteria are specific and objective standards established by an agency for a particular procurement for the measurement of an offeror's ability to perform the contract. These special standards of responsibility limit the class of offerors to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance, such as specific experience requirements. Proficiency Associates, Inc., supra; Contra Costa Electric, Inc., B-200660 March 16, 1981, 81-1 CPD 196.

Paragraph C-5(b) of the IFB specified that all factors noted in paragraph C-4 were minimum requirements and all were to be satisfied for an offeror to be declared technically acceptable. Further, that failure to satisfy even one of the minimum requirements would be cause for a determination of technical unacceptability. Paragraph C-4 (b)2a required a certified statement of experience of hospital service in conducting a Hospital Maintenance, Repair, and Custodial Services Program, which was to have been obtained:

"* * * as a company, corporation, or other entity, which may be as a management staff or retained consultant staff. Offerors are cautioned, [however,] that the mere furnishing of a labor force without corollary contractor training and supervisory responsibility, as described in paragraph 3 [involving the education and experience requirements for certain key employees] does not satisfy the experience requirement."

And paragraph C-4(b)2b states that the minimum level of experience is 24 months of hospital service within the immediate 48 months.

The record shows that an Army contract specialist at the Command made a finding on March 17, 1981, that the joint venture was in compliance with the requirement involving "24 months experience in hospital service." This determination was based on the fact that the joint venture would employ the same personnel as employed by the incumbent which had performed the services for more than 24 months in the prior 48 months. In explaining this position, the Army states:

"[The] joint venture * * * proposed to hire their key personnel (management staff) from A.R.&S. These key personnel have performed the hospital custodial services for the past 36 months under Contract DAAH03-78-C-0049 as employees of A.R.&S. Their bid included the resumes of the seven key personnel required by this solicitation and a certification that these seven had signed letters of intent to become

employees of the joint venture should it be awarded the contract. * * * This bid also stated that the management capabilities held by the joint venture plus the technical expertise of the seven key personnel would satisfy the requirements of this solicitation.

"* * * In this evaluation no requirement of the IFB was waived. The joint venture was determined to be satisfactory in every area and therefore responsible."

A.R. & S. contends, however, that the contractor does not satisfy the definitive responsibility criteria because neither the joint venture participants, nor any of the participants' officials or owners, have 24 months of hospital service, or, indeed, any hospital service. Miller and Miller, Inc., one of the participants of the joint venture, is a construction firm and Ferguson-Williams, Inc., the other participant, "is experienced in performing nothing more sophisticated than landscaping contracts at Redstone Arsenal * * *." The entity, the joint venture, was formed only for the purpose of bidding on this contract.

A.R. & S. admits that under our decision in Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051, 76-1 CPD 294, "the experience of a newly created entity can be achieved using the experience of corporate officials prior to the formation of the Corporation." But, in the present instance, the joint venture's officials do not "have any experience in performing hospital services contract(s) or their equivalent." And A.R. & S. rejects the Army's position that the experience of the "key personnel" to be employed by the joint venture was properly considered in making the responsibility decision, since, in A.R. & S.'s view, "key personnel" are not "corporate officials."

The Haughton decision, supra, involved a solicitation for bids issued for the furnishing of maintenance of the vertical transportation systems in a Veterans Administration hospital. Under Special Conditions the solicitation provided, inter alia, that the bidder shall have had approximately 5 years successful experience in repairing and servicing the "specified equipment." All of the employees of the successful bidder had at least 5

years in general elevator maintenance but there was no showing that the employees had 5 years in the "specified" equipment or with elevators of equal or greater complexity. Consequently, there was no basis for finding that the successful bidder met the definitive responsibility criteria.

While we did say in the Haughton decision that the employees of the successful bidder could not be found to qualify under the definitive responsibility criteria, it was not because a business concern could not qualify through the experience of its employees, but simply because there was no showing that the employees met the criteria. We did not hold, as suggested by A.R. & S., that a bidder could not qualify by the experience of its employees. Indeed, we cited decisions of our Office holding that a company could qualify by the experience of its officials. This was by way of an example of inclusion not of exclusion as suggested by A.R. & S. That is, the decisions were cited to show that we had recognized that a company could qualify through the experience of those employed by the company. Thus, in J. Baranello and Sons, supra, we stated, citing our decision in the Haughton Elevator case, that compliance does not necessarily mean literal compliance with the specific letter of such definitive criteria "as a bidder may be able to demonstrate experience equivalent to that specified in the solicitation through the experience of its officers and employees." (Emphasis added.) See also Courier-Citizen Company, B-192899, May 9, 1979, 79-1 CPD 323.

Paragraph C-4(b)2a of the solicitation specifically provided that a business could qualify through its management staff or retained consultants. In our view, those employees who manage the contract (namely, the key employees) must be considered to be part of the joint venture's management staff for the purpose of this contract and, therefore, the experience requirement; moreover, no contention has been made that these key employees do not individually satisfy the stated education and experience requirements. Thus, we cannot question the Army's determination that the joint venture complies with the requirement.

Protest denied.

Milton J. Aroslan
Acting Comptroller General
of the United States