



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

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B-178969

July 19, 1973

S. P. LaCerva, M.D.
Hospital Director
Veterans Administration Hospital
Northport, New York 11768

Dear Dr. LaCerva:

Reference is made to your letter of June 19, 1973, with enclosures, concerning the protest of Anthony J. Altieri, Inc., dba Double "A" Transport, Commack, New York (AJA), against award of a contract to the apparent low bidder, B&D Ambulance and Oxygen Service Corp., Huntington Station, New York (E&D), under invitation for bids (IFB) No. 632-9-74.

The IFB was issued for the procurement of taxi and emergency pick-up service to the Veterans Administration and its beneficiaries. The solicitation contained clauses concerning licensing and registration requirements and certain business information requirements as follows:

2. QUALIFICATIONS: a. Proposal will be considered only from bidders who are regularly established in the business called for and who are financially responsible and have the necessary equipment and personnel to furnish service in the volume required for all the items under this contract. Successful bidder shall meet all requirements of Federal, State or City codes regarding operations of this type of service.

b. Each bidder must submit with his bid a letter in duplicate fully describing the make of vehicles, model and year which he agrees to furnish under this proposal including the location and telephone numbers of his establishment where calls are received on a 24-hour a day basis and vehicles are immediately available for dispatch. The Contracting Officer will be notified in writing of any equipment added for (sic) deleted after award of contract.

It is AJA's position that B&D failed to comply with the above qualifications. AJA states that B&D does not hold a valid license to engage in the taxi business as required by paragraph 2a. AJA further states that B&D did not furnish the letter required by paragraph 2b.

PUBLISHED DECISION
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Upon these two contentions, AJA believes the bid of B&D to be nonresponsive to the solicitation.

It is well established by the decisions of our Office that failure to submit permits or licenses by the time of award or at the very latest by the time contract performance is to be commenced, plus any lead time which may be necessary in the particular case, shall affect the responsibility of a prospective contractor in cases where the permit or license is a requirement of the Federal Government. See 51 Comp. Gen. 377 (1971).

With respect to the effect of a state law requiring a license or permit as a prerequisite to performing the type of services required by a Federal contract, in our decision B-125577, October 11, 1955, we considered an IFB for a Federal construction contract to be performed in Tennessee, under which the contractor was to obtain all licenses and permits required for the prosecution of the work. We held therein that:

"State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. The validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts, and it would be impossible for the contracting agencies of the Government to make such determinations with any assurance that they were correct. It is precisely because of this, in our opinion, that the standard Government contract forms impose upon the contractor the duty of ascertaining both the existence and the applicability of local laws with regard to permits and licenses. In our opinion, this is as it should be.

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No Government contracting officer is competent to pass upon the question whether a particular local license or permit is legally required for the prosecution of Federal work, and for this very reason the matter is made the responsibility of the contractor. No statute has been brought to our attention which would authorize the inclusion of a condition in Federal contracts or bid invitations that local permits or licenses must be obtained, regardless of their necessity as applied to the work to be done. Accordingly, we are of the opinion that the obtaining of a general contractor's license for performing Government work in Tennessee is a matter which must be settled between the local authorities and the contractors, either by agreement or by judicial determination."

If a state determines that under its laws a bidder on a Federal contract must have a license or a permit as a prerequisite to its being legally capable of performing the required services for the Federal Government within the state's boundaries, the state may enforce its requirements against the bidder, provided the application of the state's law is not opposed to or in conflict with Federal policies or laws, or does not in any way interfere with the execution of Federal powers. See Leslie Miller, Inc. v. Arizona, 352 U.S. 137 (1956); United States v. Georgia Public Service Commission, 371 U.S. 235 (1963); Charles Paul v. United States, 371 U.S. 245 (1963). In those instances where the requirements of a state law do not violate this proviso, the state may proceed to enforce its requirements against a contractor who failed to comply. However, if as a result of enforcement by the state, the contractor chooses not to perform the contract or is prohibited from doing so by an injunction won by the state, the contractor may be found in default and the contract terminated to its prejudice.

Furthermore, our Office has consistently held that a license requirement in an invitation is a requirement concerning the responsibility of prospective contractors--that is, to determine a bidder's legal authorization to perform the contract, which is a matter of responsibility and is not related to an evaluation of the bid. 47 Comp. Gen. 539 (1968), 46 Comp. Gen. 326 (1966). In the latter cited case, we stated that the critical time for actual compliance with a requirement concerning responsibility could be as late as the time for performance plus any lead time which may be necessary in the particular case. Therefore, we find no reason to question the award to B&D for failure to hold licenses and permits at the time of bid opening.

With regard to AJA's contention that failure to furnish all of the requested data with the bid should render it nonresponsive, it is the contracting officer's position that omission of this data had no effect on the contractor's obligation to perform in compliance with the specification requirements. The omission of data can be waived as a minor informality where the data does not go to the substance of the bid, and waiver therefore would not work an injustice on the other bidders. A request for the submission of data with a bid may generally be considered of substance only if it affects price, quantity, quality, or delivery. Since such was not the case here, we must conclude that the failure of B&D to submit the data in question with its bid did not require rejection of its bid as nonresponsive. See D-174204, February 16, 1972.

Furthermore, we think there is no question but that the equipment listing requirements of paragraph 2b are for the purpose of determining

whether a prospective bidder will have the capacity and ability to perform the work described. The contract is one for the furnishing of services and not for the furnishing of equipment, except as an incident to performing the services. The equipment list submission requirement was clearly designed to enable the contracting officer to determine in advance of award whether the firm awarded the contract would be able to perform responsibly.

We have consistently held that where the requirement for submission of data is for the purpose of determining the capability (responsibility) of the bidder rather than the responsiveness of the bid, the failure of the bidder to submit such data is not fatal to consideration of the nonconforming bid and the data may be provided subsequent to bid opening, as was done by B&D in this instant procurement. 39 Comp. Gen. 247 (1959). The result is the same even in cases where bidders are warned that failure to conform to data submission requirements may result in rejection of their bids. 39 Comp. Gen. 655 (1960). In this connection, we note that the present invitation did not contain any notice as to the consequences of a bidder's failure to submit an equipment list, or of the submission of an incomplete list. As there was no requirement that bidders actually own the necessary equipment at the time of bid submission, this appears to indicate that the objective to be served by submission of the equipment list could just as appropriately be accomplished by submission of the list after bid opening as before such opening. 42 Comp. Gen. 728 (1963).

AJA has contended that paragraph 2a required bidders to be in the taxi business and not in the ambulance business as was the case of B&D at the time of bid opening. The experience requirement is a matter relating to responsibility rather than responsiveness. 45 Comp. Gen. 4 (1965). In this regard, our Office has held that an offer need not be rejected for failure to meet literal responsibility requirements of a solicitation where, as here, the contracting officials are satisfied that the offeror is in fact responsible. 49 Comp. Gen. 9 (1969).

In view of the foregoing, the AJA protest should be denied.

Sincerely yours,

Paul G. Deubling

For the Comptroller General
of the United States