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Decision

Matter of: Inter-Con Security Systems, Inc.

File: B-295352; B-295352.2

Date: February 8, 2005

David F. Innis, Esq., and Neil H. O'Donnell, Esq., Rogers Joseph O'Donnell & Phillips, for the protester.

David B. Dempsey, Esq., Caitlin K. Cloonan, Esq., and Kristen E. Ittig, Esq., Holland & Knight, for Wackenhut International, Inc., an intervenor.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation for local guard services provided for 10-percent price evaluation preference for offerors qualifying as "U.S. persons," fact that awardee has a foreign parent did not preclude awardee from receiving the preference, since nothing in the solicitation or underlying statute required offerors to establish ownership and control by U.S. citizens to qualify for the preference.

2. Awardee's proposal was not entitled to application of "U.S. person" evaluation preference, and protest is sustained, where solicitation provided that offerors would qualify for preference if required certification showed offeror had achieved a specified business volume, and awardee's certification, which consisted solely of consolidated (*i.e.*, corporate parent and subsidiary) financial information, failed to show that awardee had adequate business volume; agency's knowledge of awardee's other contracts was insufficient to establish that awardee met the requirement, since a majority of those contracts were performed by awardee as a joint venturer, and there was no breakdown information showing amount of business volume attributable to awardee.

DECISION

Inter-Con Security Systems, Inc. protests the award of a contract to Wackenhut International, Inc. (WII) under solicitation No. S-IV100-2002-Q-0567, issued by the Department of State for guard services in Abidjan, Ivory Coast. Inter-Con asserts that WII's offer was improperly given a 10-percent price preference, which put WII in line for the award.

We sustain the protest.

The solicitation sought proposals for providing local guard services at the U.S. Embassy in Abidjan, Ivory Coast. Award was to be made to the offeror with the lowest-priced, technically acceptable proposal, for a base year, with 4 option years. Proposals were evaluated on the basis of several technical factors and price, including application of a 10-percent price evaluation preference for offerors meeting the qualifications of a “U.S. person.” Application of the preference was primarily based on information provided by each offeror in a qualification statement/certification required by section K.11 of the solicitation, which provided that an offeror’s status as a U.S. person was to be based on the Foreign Relations Authorization Act for Fiscal Years 1990-1991, P.L. 101-246 (22 U.S.C. § 4864 (2000)).

Inter-Con, WII, and a third offeror submitted proposals, which were evaluated by the agency. Subsequently, WII’s corporate parent, Group 4 Falck, a Danish firm, merged with Securicor, a United Kingdom firm. Based on its evaluation of the offerors’ revised proposals, including revised qualification statements, the agency determined that the third firm’s proposal was technically unacceptable, but that Inter-Con’s and WII’s proposals were acceptable. The agency also found that both technically acceptable firms qualified as U.S. persons eligible for the price preference. With application of the price preference to both proposals, WII’s price of \$11,997,256 was lower than Inter-Con’s, and the agency thus made award to WII. After a debriefing, Inter-Con filed this protest.

Inter-Con asserts that WII does not meet the definition of a U.S. person because it is owned by a foreign corporation, Securicor, and because it failed to provide adequate information in its section K.11 qualification statement to establish its status as a U.S. person. If WII does not qualify as a U.S. person for purposes of the preference, then Inter-Con, which does qualify, will be in line for the award.

FOREIGN OWNERSHIP

Inter-Con asserts that WII’s acquisition by Securicor deprived WII of its status as a U.S. person under 22 U.S.C. § 4864 and the solicitation. In Inter-Con’s view, WII is simply a domestic “shell” corporation whose sole purpose is to obtain the price preference.

This argument is without merit. Under the statute (and solicitation section K.11), a firm qualifies as a U.S. person if it: “is incorporated or legally organized under the laws of the [U.S.]”; “has its principal place of business in the [U.S.]”; “has been incorporated or legally organized in the [U.S.] (i) for more than 2 (two) years before the issuance date of the [solicitation]”; “has performed within the [U.S.] or overseas security services similar in complexity to the contract being bid”; “has achieved a total business volume equal to or greater than the value of the project being bid in

3 years of the 5-year period before the [solicitation issuance date]”; “employs [U.S.] citizens in at least 80 percent of its principal management positions in the [U.S.]”; “employs [U.S.] citizens in more than half of its permanent full-time positions in the [U.S.]”; and “has the existing technical and financial resources in the [U.S.] to perform the contract.” 22 U.S.C. § 4864(d); Solicitation § K.11. Under this definition of a U.S. person, ownership of a firm by a foreign firm, such that it is not owned or controlled by U.S. citizens, does not preclude the firm from receiving the preference, so long as it meets the listed requirements. Inter-Con Sec. Sys., Inc., B-290493, B-290493.2, Aug. 14, 2002, 2002 CPD ¶147 at 3. Thus, the fact that WII is owned by a foreign firm, Securigard, was not a basis for denying WII the preference.

WII'S U.S. PERSON QUESTIONNAIRE

Inter-Con asserts that WII does not meet the U.S. person criteria based on its responses to two parts of the section K.11, Statement of Qualifications for Purposes of Obtaining Preference as a U.S. Person (Questionnaire). Specifically, Inter-Con asserts that WII's responses to questions 5 and 7 included consolidated financial information covering WII's subsidiaries and the Wackenhut Corporation as a whole, and thus were inadequate to establish WII's own U.S. person status.

Question 5, Total Business Volume

As noted above, the solicitation provided (consistent with the statute) that, in order to qualify as a U.S. person, a firm must have “achieved a total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the [solicitation issuance date].” Solicitation § K.11, Questionnaire, at 4. Total business volume is defined as the “U.S. dollar value of the gross income or receipts reported by the prospective offeror on its annual federal income tax returns.” Id. To establish status as a U.S. person, the offeror was required to submit “for at least three of the five twelve-month income tax periods (fiscal years) defined [in the questionnaire], the gross receipts of the organization seeking eligibility.” Id. The solicitation specifically provided that the information submitted in response to the questionnaire “shall not include information pertaining to corporate affiliates or subsidiaries,” and warned that only offerors “submitting a properly completed and certified [response]” would be considered in the determination of eligibility for the price preference. Solicitation § K.11, Questionnaire, at 1.

WII provided a financial statement for [deleted] period, which showed total income well over the \$11.9 million contract value. However, the statement covered both WII and its subsidiaries, without any indication of how much of the income was attributable to WII alone as “income or receipts reported . . . on its annual federal income tax returns.” Similarly, WII provided three annual consolidated financial statements for the Wackenhut Corporation that showed income well in excess of the contract amount, but did not segregate the income attributable to WII. There thus was no way to discern from the information submitted which portion of the reflected annual receipts was attributable to WII, and thus no way to conclude that the firm

possessed the required business volume. Since WII's qualification statement failed to include the information required to establish its business volume, it did not provide a basis for finding WII eligible for the price preference.¹

The agency asserts that the insufficient financial information did not preclude a finding that WII was eligible for the preference because it was not restricted solely to the information submitted by offerors in making its eligibility determination. In this regard, the agency points to its regulations, which provide that, although qualifications will be determined "primarily" on the basis of information submitted in the offeror's Statement of Qualifications, "the Government may, at its discretion, rely on information contained elsewhere in the offeror's proposal or obtained from other sources." Department of State Acquisition Regulation (DOSAR) § 652.237-73(c). Thus, in finding that WII possessed the requisite business volume, the agency turned to other information, specifically, other contracts that WII had performed for the agency. In this regard, the agency reasoned as follows: "While specific figures for gross business volume of WII as [an] entity separate from parent Wackenhut Corporation cannot be extracted from consolidated business statements, payments made to WII joint ventures under Embassy contracts are plainly more than sufficient to meet the business volume requirement." Agency Report (AR), Tab 3, at 2.

While we agree with the agency that it could rely on other available information, the record does not support the agency's conclusion. Although WII's questionnaire includes evidence of 18 security guard contracts with an annual, combined contract value in excess of the new contract's value, WII performed most of these contracts as a joint venturer with another entity. Since these contracts are performed overseas by the foreign joint venture partner using locally-hired personnel, it is reasonable to infer that some significant portion of the contract payments flow to the foreign joint venture partner. Inasmuch as WII is the entity seeking eligibility as a U.S. person, only that portion of the annual contract value flowing to WII is relevant to the determination. However, there is nothing in the record to indicate how much of that annual value qualifies as WII's under the question 5 definition of "total business volume." For example, the contracts with the largest annual values--\$1 million to \$6.9 million--were performed as joint ventures with various of WII's foreign joint venture partners such as Group 4 Falck (Canada) Ltd., Wackenhut SA (Ivory Coast), Wackenhut Jamaica Ltd., Wackenhut U.K. Ltd., and Group 4 Falck Korea. WII Questionnaire, attach. 1 & 2. Other contracts were performed without WII as a partner at all, including those performed by Wackenhut Security Hellas (Greece), Wackenhut El Salvador (El Salvador), and Serenos Victoria (Venezuela). Id. Only two contracts were performed by WII alone--Gambia and Mozambique--and their

¹ Provision of the consolidated information also casts doubt on WII's certification that "all of the representations and certifications provided in response to the questions contained in this 'Statement of Qualifications' are accurate, current, and complete" Solicitation § K.11, Questionnaire, at 8.

combined annual value, even over 3 years, is less than the new contract value. Id. While the requirements for establishing the requisite business volume are plainly stated in the questionnaire, nothing in the record indicates that the agency made any attempt to identify that information for WII; it did not calculate what portion of the payments to the joint venture represented WII income. Likewise, although WII intervened in this protest, it has provided no information to establish what portion of the identified contract value represented gross income or receipts reported by WII on its federal income tax returns. Absent some information indicating that the identified annual value of WII's joint venture contracts represents such taxable income for WII, there was no basis for the agency to conclude that the firm met the business volume requirement. Accordingly, we sustain the protest on this basis.

Question 7, Existing Technical and Financial Resources

The statute requires that a U.S. person have "the existing technical and financial resources in the [U.S.] to perform the contract." Solicitation § K.11, Questionnaire, at 6. "Existing technical and financial resources" is defined as the "technical and financial capability within the [U.S.] to mobilize adequate staffing, equipment and organizational arrangements to perform the contract." Id. Technical resources could be demonstrated by an organization chart, and resumes of current officers and employees in the U.S. possessing the skills and expertise necessary to provide management and oversight of the work. Id. Financial resources could be demonstrated by proof of a combination of net worth, bank lines of credit, or bank guarantees. Id.

Inter-Con asserts that neither the minimal technical information provided by WII, which did not include an organizational chart or resumes of its U.S. staff, nor the consolidated financial information WII submitted for question 5, provided an adequate basis for the agency to conclude that WII met this aspect of U.S. person status. It also questions whether WII's six personnel constitute sufficient technical resources.

These assertions are without merit. While WII's submission was lacking in the detail suggested by the questionnaire, as discussed above, we agree with the agency that it had the discretion to consider other information demonstrating WII's capabilities. DOSAR § 652.237-73(c). In this regard, the agency noted that WII had provided information on its organization, key personnel, and financial resources, and that "[w]hile it is clear that WII is a small subsidiary utilized by Wackenhut Corporation to manage its foreign operations, successful performance of [a] large number of Embassy guard contracts plainly evidences that WII in fact has adequate technical and financial resources. WII's Florida office is actively involved in proposal preparation and submission." AR, Tab 3 at 3. Although WII has a small staff, the agency explains that none of the security guard providers with which it contracts furnishes guards or on-site supervisors from its assets in the U.S., instead relying on locally-recruited guard forces and, often, locally incorporated subsidiaries. Supplemental AR at 4. WII explains that, given its use of local resources, its six

U.S.-based personnel are adequate to provide home office management, contract administration, and responsible oversight of the work performed by its local subsidiaries. WII Supplemental Comments at 5. We find that the agency's determination was reasonable. While Inter-Con believes otherwise, it has not demonstrated that this level of personnel is per se insufficient, and its mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Command Mgmt. Servs., Inc., B-292893.2, June 30, 2004, 2004 CPD ¶ 168 at 3.

With regard to financial assets, we note that, even though WII's consolidated financial information does not differentiate WII from its corporate parent, affiliates, and subsidiaries, the requirements to establish financial capability are not as specific as those for business volume. In this regard, while total business volume must equal or exceed the new contract value, there is no minimum value specified for question 7. In our view, based on its experience with WII's financial capability in successfully performing numerous other embassy guard contracts, the agency could reasonably conclude that WII met the question 7 requirements.

RECOMMENDATION

We sustain the protest on the ground that WII provided insufficient information--and the agency lacked any other sufficient information--to establish that it satisfied the business volume requirements for purposes of establishing its U.S. person status; there thus was no rational basis for the agency to find WII eligible for the 10-percent price preference. Moreover, given the agency's and WII's failure to present--during the course of the procurement or in responding to this protest--financial statements showing adequate revenues for WII itself, or other information showing that WII had the requisite revenue from its joint venture contracts, there simply is no reason to believe that WII is able to meet the business volume requirement. Accordingly, WII was not entitled to the preference, and we therefore recommend that the agency terminate WII's contract and make award to Inter-Con. We also recommend that the agency reimburse Inter-Con the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2004). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel