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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Department of State; Wackenhut International, Inc.--Reconsideration and Modification of Recommendation

File: B-295352.3; B-295352.4

Date: April 19, 2005

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DIGEST

1. Requests for reconsideration of decision finding that the contracting agency improperly applied an evaluation preference for U.S. persons to the awardee's proposal absent the information required by the agency's regulation and the solicitation are denied, where the requests do not show that the required information was provided to, or otherwise known by, the agency at the time of the evaluation.

2. Agency's request for modification of GAO recommendation that guard services contract at a foreign embassy be terminated immediately and a new contract awarded to the protester is granted, in view of security concerns at the embassy, as well as significant change in the agency's needs for guard services.

DECISION

The Department of State (DOS) and Wackenhut International, Inc. (WII) request that we reconsider our decision in Inter-Con Sec. Sys., Inc., B-295352, B-295352.2, Feb. 8, 2005, 2005 CPD ¶ __, sustaining Inter-Con's protest of an award to WII under solicitation No. S-IV100-2002-Q-0567, issued by DOS for guard services in Abidjan, Ivory Coast. DOS alternatively requests that we modify the recommendation in our decision.

We deny the requests for reconsideration; we grant the request for modification of the recommendation.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains errors of either fact or law, or must present information not previously considered, upon which reversal or modification of the decision is deemed warranted. 4 C.F.R. § 21.14(a) (2004).

The issue on which we sustained Inter-Con's protest concerned DOS's application of an evaluation preference to WII's proposal. The Foreign Relations Authorization Act for Fiscal Years 1990-1991, Pub. L. No. 101-246, 104 Stat. 15, 33 (codified as amended at 22 U.S.C. § 4864 (2000)), requires the agency to apply a 10-percent price evaluation preference to the proposals of offerors qualifying as either "United States persons" or "qualified United States joint venture persons." 22 U.S.C. § 4864(c)(3). The Act defines a U.S. person as a person that meets a number of specific requirements, and defines a qualified U.S. joint venture person as a joint venture in which a U.S. person(s) owns at least 51 percent of the assets of the joint venture. 22 U.S.C. § 4864(d)(1), (2). Pertinent to the protest is the requirement in the definition of a U.S. person that the person "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]." 22 U.S.C. § 4864(d)(1)(E). Total business volume, though not defined in the Act, is defined in a questionnaire that an offeror is required to complete if it represents that it is eligible for the evaluation preference. The questionnaire derives from Department of State Acquisition Regulation (DOSAR) § 652.237-73, "Statement of Qualifications for Preference as a U.S. Person," which defines total business volume as "the U.S. dollar value of the gross income or receipts reported by the prospective offeror on its annual federal tax returns." DOSAR § 652.237-73(d)(5). The questionnaire, with this definition, was included in the solicitation at § K.11.

In order to obtain the evaluation preference, an offeror had to submit a properly completed and certified Statement of Qualifications questionnaire. The questionnaire states that the "Statement of Qualifications shall provide information correctly applicable to the U.S. person whose qualifications are being certified, and shall not include information pertaining to corporate affiliates or subsidiaries." DOSAR § 652.237-73(d); Solicitation at § K.11, Questionnaire, at 1. WII sought qualification as the U.S. person participant in a joint venture that consisted of WII and an affiliate that is incorporated in Ivory Coast; WII certified that it would own at least 51 percent of the assets of that joint venture. WII's Statement of Qualifications at 7-8. In response to the total business volume requirement, WII's Statement of Qualifications provided only consolidated financial statements for WII and its subsidiaries or corporate affiliates. Id. at 4, attachs. 3, 4. Recognizing that WII had not provided the required information, the agency considered other information related to WII's revenues, and stated:

> While specific figures for gross business volume of WII as [an] entity separate from [its corporate parent] 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, Tab 3, at 2.

In sustaining Inter-Con's protest of the application of the preference to WII, we reviewed, among other things, WII's consolidated financial statements, the embassy contracts relied upon by DOS, and all submissions by WII during the protest, and found that the record did not contain information sufficient to identify the gross income or receipts reported by WII on its federal income tax returns for any of the years in question. We concluded that there was thus no basis for DOS to find that WII met the total business volume requirement, and thus no rational basis for the agency to find WII eligible for the 10-percent evaluation preference for U.S. persons. Decision at 3-5, 6.

The requesters argue that the record was adequate to show that WII met the total business volume requirement in a number of ways, including the following: (1) the consolidated statements for the periods submitted by WII, either overall or for the most recent period, show revenues in excess of the required level; and (2) the contract values of WII's prior embassy contracts, either in total or adjusted for WII's percentage of distribution under the joint venture agreements applicable under those contracts, show revenues in excess of the required level.

In our decision, we analyzed all the various financial data in the protest record, noting that some of the revenue figures did exceed the dollar amount that WII's total business volume would have to achieve in order for the firm to be eligible as a U.S. person. However, those revenue figures could not be attributed solely to WII, apart from its subsidiaries, corporate affiliates or joint venture partners. The record did not otherwise establish the gross income or receipts that WII reported on its federal income tax returns for any period, which, as stated above, was the applicable definition of total business volume announced by the agency in its regulation and in the solicitation. The requests for reconsideration do not show error in our conclusion in that regard, nor do they identify any document in the record where WII or the agency identified the gross income or receipts that WII reported on its federal income tax returns for any period.[1] The parties' repetition of arguments made during consideration of the original protest and statements of disagreement with our decision do not meet our reconsideration standard. Social Sec. Admin.--Recon., B-261226.2, Nov. 30, 1995, 95-2 CPD ¶ 245 at 1-2.

[1] We note that, even now, the record does not identify such data.

The requesters' allegations otherwise do not provide a basis to reverse our decision. For example, the agency argues that we should have limited our review of DOS's finding that the facts supported application of the preference for WII to whether that finding was arbitrary, capricious, or contrary to the weight of the evidence. As the agency acknowledges, however, the "reasonableness" standard of review that our Office applies is essentially the same as an "arbitrary and capricious" standard. See A-E Sys. Mgmt., Inc., B-211904.2, Apr. 23, 1984, 84-1 CPD ¶ 454 at 6.

Another example is the agency's advice that it had accepted WII's submission of consolidated financial statements for WII and its affiliates and subsidiaries as adequate evidence in prior procurements, so that the agency believes it was reasonable to accept this information as adequate evidence of total business volume here. However, since each procurement must stand on its own, DOS's action in prior procurements is not determinative of whether similar action is reasonable in this one. See Johnson Controls World Servs., Inc., B-285144, July 6, 2000, 2000 CPD ¶ 108 at 5.

Finally, WII alleges that the definition of total business volume was not equally applied to Inter-Con. The record does not support this allegation. Although DOS stated during the protest that Inter-Con had not submitted its tax returns, Agency Supplemental Report at 3, the questionnaire did not require actual submission, but only that the U.S. person state its gross income as reported on its federal tax returns for the specified period. Inter-Con stated during the protest that its Statement of Qualifications did include the gross income amounts reported on its federal tax Returns, Inter-Con's Supplemental Comments at 3, and there is no evidence that Inter-Con does not meet the requirement.

In sum, neither the agency nor WII has stated a basis for reversing our decision.[2] The requests for reconsideration are denied.

MODIFICATION OF RECOMMENDATION

The agency requests that we modify our recommendation to permit DOS to delay terminating WII's contract and making award to Inter-Con. The agency states that the delay is needed to accommodate security concerns arising from civil unrest in Ivory Coast, and which would be exacerbated by a transition in contractors during a move to new facilities, scheduled for June 24. DOS asks that we:

[2] WII proffers a number of other arguments to support its reconsideration request (regarding, for example, provisions in the Generally Accepted Accounting Principles). We have reviewed those arguments, and none show that the agency had before it the gross income amounts reported on WII's federal tax returns.

> offer . . . the alternatives of 1) deferring termination of the WII contract for up to one year in order to complete the move to the New Embassy Complex and effect the downsizing of the guard force prior to changing contractors; or 2) pay Inter-Con's proposal costs on the protested solicitation and resolicit the changed security guard contract requirements that will exist after the move to the New Embassy Compound.

The agency explains the "downsizing" and "changed . . . requirements" by advising that the new embassy complex is designed with physical security features that have become standard since the 1998 terrorist bombings at embassies in Africa, and that the new facilities will require a guard force half the size of the one at the current location.

We find the agency's request reasonable, and we therefore modify our recommendation for immediate termination and award.[3] See SMF Sys. Tech. Corp., B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203 at 6-7 (disruption to agency's mission to provide medical services was considered in fashioning recommendation); J & J/BMAR Joint Venture, LLP--Costs, B-290316.7, July 22, 2003, 2003 CPD ¶ 129 at 2 (wartime exigencies provide reasonable basis for delay in implementing corrective action). However, given the agency's advice that its need for guard services at the embassy has changed substantially--DOS characterizes it as "a major change in personnel requirements," Recon. Request at 16--the proper approach in these circumstances is reflected in DOS's second alternative, to issue a new solicitation that reflects actual needs at the new facilities, and then award a contract for guard services at the new facilities under that solicitation.[4]

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[3] During the protest, the agency had authorized performance of the protested contract that was awarded to WII due to urgent and compelling circumstances attributed to civil unrest in the country; however, the agency did not advise our Office during the protest that a transition in contractors could not occur due to security concerns.

[4] We do not believe that it would be appropriate in these circumstances to simply modify the otherwise improperly awarded contract by half (and leave it in place for up to a year), given the agency's explanation that its needs have significantly changed from those under which the competition was conducted. Cf. Department of Energy--Recon. et al., B-246977.2 et al., July 14, 1992, 92-2 CPD ¶ 20 at 4-7 (even where an indefinite quantity contract provided flexibility for ordering quantities different from the agency's estimated need stated in the solicitation, it was improper for agency to award a contract based on the stated need where its estimated needs had changed significantly).

In light of the above, we recommend that (1) DOS expeditiously conduct a competition for its needs at the new embassy compound, to include award and transition (depending on the results of the competition) as close to the scheduled June 24 move as is practicable[5]; (2) reimburse Inter-Con its proposal preparation costs; and (3) reimburse Inter-Con the reasonable costs of filing and pursuing its protest, including attorneys' fees (as we initially recommended), as well as the costs of responding to the agency's reconsideration request.

The requests for reconsideration are denied; the request that we modify our recommendation is granted to the extent set out above.

Anthony H. Gamboa
General Counsel

[5] We note that in opposing DOS's request for delay, Inter-Con has identified its experience in dealing with contract transition during civil unrest in this and other regions.