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Statzenberg P.L. #1

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

FILE: B-189563 DATE: February 1, 1978

MATTER OF: G. A. Braun, Inc.

DIGEST:

Solicitation is not restrictive of competition merely because agency uses design specifications to describe needs.

G. A. Braun, Inc. (Braun), protested against the specifications in invitations for bids (IFB) M2-33-77 and M2-36-77 issued by the Veterans Administration (VA). The IFB's were for the furnishing and installing of laundry systems in the VA hospitals in Brockton, Massachusetts, and Buffalo, New York, respectively.

Braun protested before the bid openings that the specifications in the IFB's were restrictive and it did not bid. The contracting officer subsequently determined that the procurements were urgent and made awards under Federal Procurement Regulations § 1-2.407-8(b)(4)(i) and (iii) (1964 ed. amend. 68) notwithstanding the protest.

Braun contends that the use of design specifications, rather than performance specifications, is restrictive of competition. It relies on our decision in Charles J. Disperiza & Associates, et al., B-181102, B-180720, August 15, 1974, 74-2 CPD 101, as authority for this view. Braun quotes the following passage from the cited decision and interprets it as precluding the use of design specifications:

> "* * *In that decision, we affirmed our commitment to the proposition that specifications should permit the broadest field of competition to fulfill the legitimate needs of the Government. Within this concept, it is our opinion that a specification that dictates the manner in which the Government's requirement be fulfilled, beyond stating the Government's minimum need, is restrictive of competition.* * *"

In that decision, we had determined that, under the facts and circumstances presented, the procuring agency had not presented sufficient justification to impose a design requirement beyond its stated performance requirement. We did not state that the use of design specifications was improper *per se*. Moreover, the use of design specifications is not an automatic basis for determining a solicitation to be unduly restrictive of competition. To be unduly restrictive of competition, the design requirements must be beyond the Government's minimum needs.

In the instant case, the record indicates that the VA relied upon a consulting engineer for the preparation of the specifications. In proposing the Brockton equipment, the engineer represented that "The systems employ the latest in labor and energy saving techniques * * *." With respect to the Buffalo specifications, the engineer stated that "It is our considered opinion that the proposed equipment is the most economical to purchase, install, and operate within the confines of the designated space." During a conference in our Office regarding these procurements and another procurement for similar equipment for the VA Hospital, Salisbury, North Carolina, which is presently under reconsideration (Gardner Machinery Corporation; G. A. Braun, Incorporated, B-185418, September 15, 1976, 76-2 CPD 245), Braun contended that its laundry system would be substantially cheaper and more efficient and require one less operating employee than the type of equipment solicited by the VA. Following the conference, Braun filed a detailed written statement in support of its position on the Salisbury procurement.

There is no indication in the VA report that the consulting engineer evaluated the Braun equipment for the Brockton and Buffalo procurements. However, since the acceptability of Braun's system for VA laundry needs will ultimately be resolved in the Salisbury case and Braun has requested that we consider this protest apart from the Salisbury protest and has indicated that the essential contention here is that design specifications are automatically restrictive, no further

action will be taken in view of the conclusion in the latter regard above. In that connection, we note that the Brockton and Buffalo contracts are scheduled for completion on February 28, 1978.

For the foregoing reasons, the protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States

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F. Phillips

PL 1

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

FILE: B-190865 DATE: February 1, 1978

MATTER OF: Security Systems, Inc.

DIGEST:

GAO has no jurisdiction to review denial by agency of claim for extraordinary contractual relief under Public Law 85-804 requested by contractor who contends that he was misled by agency personnel into believing that Service Contract Act wage rates did not apply to its guard service contracts. There were no other grounds for relief since solicitation contained valid Service Contract Act wage determination and clearly indicated that act was applicable. Moreover, Government is not responsible, in absence of statutory provision, for malfeasance, misfeasance, negligence or omission of duty of its agents or employees.

By letter dated December 5, 1977, counsel for Security Systems, Inc. (SSI), requested our Office to review a denial by the Corps of Engineers of a claim by SSI under Public Law 85-804.

According to SSI's counsel, the claim arose as a result of the following chain of events. SSI entered into a contract with the Corps of Engineers, Buffalo District Office, to provide guard services at the Corps of Engineers Civil Works facilities in Cleveland, Ohio, for the period July 1, 1975, to June 30, 1976. This contract was extended for a period of 3 months through September 30, 1976. A second contract was entered into for the period October 1, 1976, to September 30, 1977. Due to a misunderstanding concerning the applicability of the

Service Contract Act, 41 U.S.C. § 351, et seq. (1970), SSI paid its employees the rate prescribed by the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1970), rather than the higher rate prescribed by the Service Contract Act. SSI contends that the reason it did not pay the Service Contract Act wage rate was that it had asked Corps of Engineers personnel whether the Service Contract Act applied to the above contracts and had been led to believe that it did not.

On February 8, 1977, the United States Department of Labor informed SSI that it was in violation of the Service Contract Act and owed its employees $15,563.58, the difference between the wages actually paid and the rates called for under the Service Contract Act. This amount covered the period from the beginning of the first contract, July 1, 1975, to December 31, 1976. By letter of February 28, 1977, SSI requested extraordinary contractual relief under Public Law 85-804, alleging that the Government's erroneous advice caused its loss. The request was subsequently denied by the Corps.

While SSI contends that it was misled by the Corps of Engineers personnel into believing that the Service Contract Act did not apply to its (SSI's) contracts, the record does not clearly establish how this was accomplished. SSI states that the bid forms referred to certain minimum wages under the Service Contract Act, but when inquiry was made of the Corps of Engineers, SSI was advised that this reference was for information only, applying only to wages of employees hired directly by the Government. SSI refers to page 13 of the solicitation to the section which requires that every contract covered by the Service Contract Act contain a statement of rates that would be paid by the Federal agency to the various classes of service employees if 5 U.S.C. § 5341 (1970) were applicable to them. Section 5341 applies to Federal Wage Board employees and guards are not Wage Board employees. This section of the solicitation is for information only. Page 22 of the solicitation

incorporated Wage Determination No. 67-111. SSI contends that inquiries were made of the Corps of Engineers regarding the significance of the page 22 Department of Labor Register of Wage Determinations and that the response by the Corps of Engineers personnel was consistent with SSI's interpretation that the reference was for information only and that the wages and benefits listed applied only to Government employees working in comparable positions.

The Corps of Engineers gave as one basis for the denial of SSI's request for extraordinary contractual relief the fact that SSI had not shown that its activities were in any way connected with National Defense requirements, thereby not activating the relief provisions of Public Law 85-804. Additionally, the Corps pointed out in its Memorandum of Decision that the solicitations for the subject contracts contained identical clauses referencing the contractor's obligations under the Service Contract Act and that each clause advised that inquiries regarding that section be addressed to the Department of Labor. While SSI misunderstood the requirements of these instructions, believing compliance with the Act was not necessary, there is no indication that inquiries were made to the Department of Labor. Therefore, the Corps of Engineers concluded that SSI had not shown that specific Government action caused any loss to SSI but that SSI had failed to contact the proper authorities as instructed in the solicitation, in order to verify its interpretation, and that this failure was the basis for SSI's misunderstanding of the solicitation requirements.

Concerning SSI's request that our Office review the Corps of Engineers denial of SSI's claim under Public Law 85-804, we have held that denials of claims by Government agencies under that statute are not subject to review by our Office so far as entitlement to the relief authorized by the statute is concerned. See Edfield Research, Inc., B-185709, June 28, 1976, 76-1 CPD 413, and cases cited therein. Therefore, we have no jurisdiction to review the denial of the claim under the above statute.

Concerning any other grounds for relief, it appears from the record that the solicitation contained a valid Service Contract Act wage determination and clearly indicated that the Service Contract Act was applicable to the contracts in question. Regarding SSI's contention that certain Corps of Engineers personnel led it to believe that the Service Contract Act was not applicable to these particular contracts, aside from the fact that SSI should have requested clarification from the Department of Labor and failed to do so, it is well settled that in the absence of specific statutory provision, the Government is not responsible for the malfeasance, misfeasance, negligence or omission of duty of its agents or employees. National Ambulance Co., Inc., 55 Comp. Gen. 597 (1975), 75-2 CPD 413.

For the foregoing reasons, we find the denial of SSI's claim by the Corps of Engineers to have been proper.

R.F.Keller

Deputy Comptroller General
of the United States

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

T. Phillips
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IN REPLY REFER TO: B-190865

February 1, 1978

The Honorable Howard M. Metzenbaum
United States Senate

Dear Senator Metzenbaum:

Enclosed is a copy of our decision of today in the matter of Security Systems, Inc.

Pursuant to your request, the enclosures accompanying your letter of December 13, 1977, are returned.

Sincerely yours,

R.F. Keller

Deputy Comptroller General
of the United States

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