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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Consortium Argenbright Security-Katrantzos Security

File: B-288126; B-288126.2

Date: September 26, 2001

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

Request for proposals providing for the submission of offers priced in local currency cannot reasonably be interpreted as prohibiting the submission of offers priced in euros where the euro has been adopted as a country's national currency.

DECISION

The consortium of Argenbright Security and Katrantzos Security (AS-KS) protests the award of a contract to the joint venture of Wackenhut International Inc. and Wackenhut Security Hellas S.A. under request for proposals (RFP) No. SGR100-00-R-0002, issued by the Department of State for guard services for the U.S. Embassy in Athens, Greece. The protester contends that its proposal was improperly rejected as non-compliant because it was priced in euros.

We sustain the protest.

The RFP, which was issued on December 11, 2000, contemplated the award of a time-and-materials contract for a base and 4 option years. The solicitation advised offerors that, as required by 22 U.S.C. § 4864 (1994 and Supp. IV 1998), the government would award the contract to the technically acceptable, responsible offeror with the lowest evaluated price. The solicitation further advised that award might be made on the basis of initial proposals, without discussions. Evaluation factors to be considered in the determination of technical acceptability were management plan, experience and past performance, and preliminary transition plan. The RFP provided for the submission of offers in U.S. dollars or local currency.

Consistent with the terms of 22 U.S.C. § 4864(c), the RFP also provided that for evaluation purposes, the government would reduce the price of each offer determined to be eligible for U.S. preference by 10 percent.

Six offerors submitted proposals by the April 19, 2001 closing date. AS-KS and another offeror priced their offers in euros; the other four offerors priced their offers in Greek drachmas or U.S. dollars. The contracting officer determined that the euro-priced offers were non-compliant with the solicitation provision requiring the submission of prices in U.S. dollars or local currency. Of the remaining four proposals, Wackenhut's was the lowest in price. It was also technically acceptable. On June 7, the contracting officer awarded a contract to Wackenhut, without conducting discussions.

AS-KS argues that it was not inconsistent with the requirements of the RFP for it to have priced its offer in euros. As discussed below, we agree.

Section B.1.1 of the RFP provided as follows with regard to the currency to be used in the pricing of offers:

> Offers and Payment in U.S. Dollars. U.S. firms are eligible to be paid in U.S. dollars. U.S. firms desiring to be paid in U.S. dollars should submit their offers in U.S. dollars. A U.S. firm is defined as a company which operates as a corporation incorporated under the laws of a state within the United States. NOTE: The definition of U.S. Firm for payment purposes should not be confused with the definition of U.S. Person for purpose of applying U.S. preference in the proposal evaluation.
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> Foreign Firms. Any firm which is not a U.S. firm is a foreign firm. Any firm that does not meet the above definition of U.S. firm shall submit its prices and receive payment in local currency.

At the time offers were received, the euro was the official currency of Greece, the Greek parliament having on September 27, 2000 enacted legislation providing that:

> As from 1 January 2001 the euro shall substitute for the drachma as the currency of Greece in accordance with the provisions of [governing regulations of the Council of the European Union].[1] Banknotes and

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[1] Articles 2 and 3 of European Council Regulation No. 974/98 provided that beginning on January 1, 1999, the currency of the participating member states would be the euro, and that the euro would be substituted for the currency of each participating member state at a fixed conversion rate. Articles 10, 11, and 15 of the regulation further provided that as of December 31, 2001, only banknotes and coins

(continued...)

> coins in drachmas shall continue to have the status of legal tender within the Greek territory until 28 February 2002.

Law 2842/27/9/2000.

The agency maintains that despite the foregoing legislation establishing the euro as the currency of Greece as of January 1, 2001, it intended "local currency" for purposes of this solicitation to mean Greek drachmas only. According to the agency, it conveyed that intent to offerors in § G.2.4 of the RFP, which stated:

> The Government will pay foreign firms (as defined in B.1.1) in Greek Drachmae. The Government will pay U.S. firms in U.S. dollars if requested.

The agency maintains that by pricing its offer in euros, the protester took exception to the foregoing clause; the agency further argues that the requirement for payment in drachmas was material because the Embassy's financial office currently has no mechanism in place to handle euro transactions. The agency also argues that the protester recognized that the terms of the solicitation ran contrary to its desire to submit a euro-priced offer, as demonstrated by its posing of the following question to the contracting officer prior to submission of its offer:

> Question. Ref. Section B1.1 and Section G2.4: Since the base year of the contract will end sometime in 2002, and in view of the introduction on January 1, 2001 of the euro as the optional monetary unit in Greece and its mandatory use beginning January 1, 2002, please confirm:
>
> a. That price quotations from and payments to foreign firms for the base and option years shall be in euros.
>
> b. That price quotations from and payments to U.S. firms for the base and option years shall be either in US dollars or euros.

The agency further maintains that its answer to the protester's question, noted below, plainly indicated that the Embassy would not amend the solicitation as the protester wished to provide for pricing and payment in euros.

> Answer. If the European Union (EU) requires that the Euro be used in all commercial transactions by a mandated date, a one-time currency

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denominated in euros would have the status of legal tender in all member states, although banknotes and coins denominated in a national currency unit could remain legal tender within their territorial limits for up to 6 months thereafter.

> conversion to the Euro will be made for a contract priced out in local currency only (not US Dollars). The rate used to make the conversion will be established by the European Central Bank on the date conversion is to occur. No exchange rate adjustments shall be made after the initial conversion.[2]

First, we do not agree with the agency that it was clear from § G.2.4 that it intended "local currency," as that term is used in § B.1.1, to mean Greek drachmas only. Section G.2.4 refers solely to payment and says nothing about pricing. Since there is a fixed conversion rate between euros and drachmas, services could be priced in drachmas but paid in euros, or vice versa (indeed, once the drachma is withdrawn from circulation in a few months, payments will have to be made in euros, even if the contractor used drachmas in its pricing). Second, we do not agree that the protester's request for confirmation that offers from foreign firms should be priced in euros revealed that it recognized that the terms of the RFP ran contrary to its desire to submit a euro-priced offer; instead, the protester's request revealed that it recognized that § G.2.4, providing for contract payments in Greek drachmas, was inconsistent with the Greek legislation discontinuing use of the drachma and replacing it with the euro. Third, regarding the agency's argument that its response to the protester's question indicated that it did not intend to amend the solicitation to provide for pricing and payment in euros, while the agency's response made clear that the pricing of offers from foreign firms in euros was not required (since drachma-priced contracts would be converted to euros once the use of drachmas was discontinued), it did not prohibit pricing in euros.

Regarding the agency's argument that by pricing in euros, AS-KS took exception to § G.2.4, as modified by § B.11, providing for payment to foreign firms in Greek drachmas until acceptance of the drachma as legal tender is discontinued, we see no reason that the Embassy would be precluded from paying in drachmas (until use of the drachma is discontinued in early 2002) a contractor whose offer was priced in

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[2] The protester's question and the agency's response to it were furnished to all potential offerors, but were not incorporated into the RFP. The agency did, however, add the following clause to the RFP to reflect its response:

> B.11 Conversion to EURO – For a contract award priced out in local currency a one time currency conversion will be made upon the mandated date for conversion to the EURO. The rate for the conversion will be established by the European Central Bank on the date conversion is to occur. No exchange rate adjustments shall be made after the initial conversion.

Amendment No. 001.

euros. Again, the fact that there is a fixed exchange rate makes the conversion from drachma pricing to euro payments (or vice versa) a simple matter of arithmetic. In sum, AS-KS's euro-priced offer was not inconsistent with the requirements of the solicitation, and the agency acted improperly in rejecting it on that basis. We reach that conclusion because (1) the RFP provided for the pricing of offers from foreign firms in local currency; (2) the Greek parliament had passed legislation providing that the euro would substitute for the drachma as the national currency of Greece as of January 1, 2001, i.e., prior to the date proposals were due; (3) the fixed conversion rate between drachmas and euros meant that the difference between pricing in drachmas and euros was immaterial; and (4) the protester did not take exception to the solicitation clause providing for payment in drachmas by pricing its offer in euros.

The agency argues that even had the protester's proposal not been rejected for its euro pricing, it would not have been in line for award because it did not establish the protester's entitlement to the U.S.-firm price evaluation preference of 10 percent, without which it would not have been lower in price than Wackenhut's offer.[3] In the alternative, the agency argues that even had AS-KS's proposal not been rejected for its euro pricing, it would not have been in line for award because it was not technically acceptable as submitted, and the agency was under no obligation to conduct discussions. Accordingly, the agency argues that the protester was not prejudiced by the rejection of its proposal based on its euro pricing.

To conclude, as the agency argues, that the protester was not prejudiced, we must conclude that there is no reasonable possibility that the contracting officer would have decided to hold discussions had he recognized that the RFP did not prohibit the pricing of offers in euros and that with the 10 percent preference, AS-KS's offer would be low. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see also Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). The agency's post-protest assertion that it was not obligated to conduct discussions, while accurate, simply does not support this conclusion.

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[3] As noted above, the solicitation provided that the price of each offer determined to be eligible for U.S. preference would be reduced by 10 percent for evaluation purposes. RFP §§ M.3, M.4. Wackenhut's offer of 10,805,946,065 drachma, which was equivalent to $28,264,879, was determined to be eligible for the preference; thus, it was reduced by 10 percent, to $25,438,388, for evaluation purposes. AS-KS submitted a total price of [deleted] euros, which, when converted at the applicable rate, equals [deleted]. If that amount were further reduced by 10 percent, AS-KS's evaluated price would become [deleted].

With regard to the price evaluation preference, the record shows that, although AS-KS certified that it was a joint venture in the "Statement of Qualifications for Purposes of Obtaining Preference as a U.S. Person" that it submitted as part of its proposal, the agency determined that its legal status was uncertain because elsewhere in its proposal, the protester stated that it had created the consortium as "a separate entity from [its] established joint venture." The agency interpreted this reference as raising the possibility that the consortium was a new corporation chartered under Greek law, in which case it would not qualify as a U.S. person joint venture entitled to the evaluation preference. See Wackenhut Int'l, Inc./Instituto di Viglanza Citta di Roma S.r.l. (Mettronotte)--a joint venture, B-251398.2, Jan. 26, 1996, 96-1 CPD ¶ 25 at 2-3, recon. den., United Mondial Int'l S.r.l.; Dep't of State--Recon., B-251398.3, B-251398.4, May 21, 1996, 96-1 CPD ¶ 245. All that would have been required to clarify the uncertainty as to the protester's legal status would have been the submission of a copy of its joint venture agreement.

With regard to the technical acceptability of the protester's proposal, the record shows that the evaluators identified concerns in such areas as the protester's proposed Guard Force Commander and the prior experience of the Greek partner. The evaluators clearly regarded the weaknesses in the proposal as curable, however, given that they found the proposal, while technically unacceptable, capable of being made acceptable.

Under these circumstances, it is possible that the contracting officer would have elected to conduct discussions to clarify AS-KS's eligibility for the 10 percent U.S. preference and to resolve the technical weaknesses in its proposal. Accordingly, we conclude that there is a reasonable possibility that the protester suffered prejudice as a result of the agency's improper rejection of its proposal based on its pricing in euros.

We recommend that the contracting officer make a determination as to whether it would be in the agency's best interest to proceed with discussions with AS-KS, given that such discussions might result in the protester's offer becoming the lowest-priced, technically acceptable one. If the contracting officer does decide to proceed with such discussions, and as a result, AS-KS's offer is determined to be the lowest-priced, technically acceptable offer, and AS-KS is otherwise determined to be responsible, we recommend that the agency terminate the award to Wackenhut and make award to AS-KS. We also recommend that the agency reimburse the protester

for its costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2001). In accordance with section 21.8(f) of our Regulations, AS-KS's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel