

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gentile-Meinert & Associates, Inc., :
Petitioner :
 :
v. : No. 1506 C.D. 2009
 : Submitted: December 11, 2009
Department of General Services, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: January 6, 2010

Gentile-Meinert & Associates, Inc. (Protestor) appeals from a decision of the Deputy Secretary of the Department of General Services (DGS) denying its bid protest regarding the award of the surveillance services contract for IFB 6100008859 to Pittsburgh Information and Research Company (PIRC). Finding no error in DGS' decision, we affirm.

Protestor is a private investigation firm that performs corporate investigations, surveillance activities and investigations in support of criminal and civil legal matters. Since March 2004, Protestor has provided surveillance services and activity checks to the State Workers' Insurance Fund (SWIF) under a state contract. On October 28, 2008, DGS issued an invitation for bids (IFB) to provide

comprehensive activity checks and surveillance services to SWIF “to determine if a claimant’s activities are consistent with his/her purported disability, and whether the claimant is engaging in unreported employment.” This was to be a multiple award contract, and DGS intended to award three contracts to the lowest responsible and responsive bidders in each geographical area set forth in the IFB.

Initially, the three lowest bidders for the western Pennsylvania area were Litigation Solutions (\$113,025), Marlow Freeman, Jr. (\$126,040) and PIRC (\$152,222); however, Marlow Freeman, Jr. was subsequently disqualified. Protestor and NEPA Insight Investigations, Inc. (NEPA) tied for the next lowest bidder at \$160,025, and both were given the opportunity to revise their bids. NEPA’s revised bid was \$139,020 and Protestor’s revised bid was \$142,425. On March 25, 2009, DGS awarded contracts for the western Pennsylvania area to Litigation Solutions, PIRC and NEPA.

On March 31, 2009, Protestor timely filed a bid protest arguing that PIRC did not qualify as a “responsible bidder” under Section 103 of the Procurement Code¹ because it misrepresented its status as a Women Business Enterprise (WBE).² Protestor claimed that PIRC was not a valid WBE because its president, Cynthia

¹ 62 Pa. C.S. §103. Section 103 defines “responsible bidder” as “[a] bidder that has submitted a responsive bid and that possesses the capability to fully perform the contract requirements in all respects and the integrity and reliability to assure good faith performance.”

² “Women’s Business Enterprise” is defined as “[a] small business concern which is at least 51% owned and controlled by women, or, in the case of any publicly owned business, at least 51% of the stock of which is owned by one or more women and whose management and daily business operations are controlled by one or more of the women who own it.” 18 Pa. C.S. §4107.2(b).

Onyshko (Ms. Onyshko), was not in control of the corporation, but her estranged husband and vice president of PIRC, William Onyshko (Mr. Onyshko), was in control.³ Protestor also argued that given Ms. Onyshko's statements regarding her personal financial situation in her civil divorce complaint, PIRC was not financially able to meet the contract requirements. Finally, Protestor claimed that PIRC was not a responsible bidder because it failed to submit fingerprint cards for its detective employees as required under the Private Detective's Act (Act).⁴

On June 1, 2009, DGS Deputy Secretary Anne Rung (Deputy Secretary) issued an order staying the award of the contract to PIRC. This order also stated that if the Bureau of Procurement (BOP) wished to proceed with an award to PIRC, it must do the following:

1. Undertake an investigation through the DGS Bureau of Minority and Women Business Opportunities to determine if PIRC should be de-certified as a woman-owned business enterprise.
2. Undertake a full and complete investigation to determine if PIRC is financially capable of performing the contract in accordance with its terms.
3. Obtain a legal opinion that PIRC is not required to abide by the Private Detective Act of 1953 in performing the contract.

³ The record indicates that Ms. Onyshko held a 51% ownership interest in PIRC and Mr. Onyshko held the remaining 49%.

⁴ Act of August 21, 1953, P.L. 1273, 22 P.S. §11 – 30.

(DGS Decision of June 1, 2009 at 5).

BOP, by letters dated July 7 and 8, 2009, informed the Deputy Secretary that the Bureau of Minority and Women Business Opportunities (BMWBO) conducted an investigation and on-site visit of PIRC, and found that Ms. Onyshko had the power to set the policies of the company as well as oversee its day-to-day management; therefore, there was no evidence to warrant de-certification of PIRC as a WBE.⁵ BOP also indicated that it conducted an investigation of the financial responsibility of PIRC, including a review of its corporate tax returns for the past five years, and determined that PIRC had sufficient revenues and was financially capable of performing the contract.⁶ Finally, BOP found that PIRC possessed a valid license under the Act and that PIRC had now complied with filing the fingerprint forms for all of its detectives. Protestor contested these assertions and requested that the Deputy Secretary uphold its bid protest and award the contract to Protestor.

On July 17, 2009, the Deputy Secretary denied Protestor's bid protest finding that:

- BMWBO's investigation into PIRC and Ms. Onyshko's position with the company as well as PIRC's re-certification as a women/disadvantaged business enterprise

⁵ PIRC was re-certified as a women/disadvantaged business enterprise under the Pennsylvania Unified Certification Program by the Allegheny County Department of Minority, Women and Disadvantaged Business Enterprise on May 21, 2009.

⁶ The review of PIRC's tax returns showed an average yearly income from 2004 through 2008 of \$412,000.

by Allegheny County all demonstrated that PIRC was indeed a WBE and that it should not be de-certified.

- BOP's investigation into PIRC's finances and its average yearly income of \$412,000 demonstrated that PIRC had sufficient revenues and was financially capable of performing the contract.
- PIRC was issued a valid Private Detective License on April 3, 2008, and it filed fingerprint forms for each of its detectives as required under the Act on July 1 and July 2, 2009. While the fingerprint forms for each detective occurred after bid opening, the IFB did not require bidders to submit evidence of compliance with the fingerprint form filing with their bids. Therefore, such compliance was not a matter of bid responsiveness but contractor responsibility, and an agency only has to determine contractor responsibility prior to awarding a contract.

The Deputy Secretary determined that PIRC was a responsible bidder and fully capable of performing the contract and rejected Protestor's protest. This appeal then followed.⁷

On appeal, Protestor first contends that the Deputy Secretary erred in finding that PIRC is a valid WBE because it is not under the control of a woman. It cited to Ms. Onyshko's divorce complaint filed on August 19, 2008, asserting that her estranged husband provides health care for her; that he is self-employed at PIRC and employed full-time as a City of Pittsburgh firefighter; that she is employed only part-time, lacks sufficient income and property to provide for her reasonable needs, and is

⁷ On appeal from denial of a bid protest, this Court shall affirm the determination of the purchasing agency unless it finds from the record that the determination is arbitrary and capricious, contrary to law or an abuse of discretion. *Cummins v. Department of Transportation*, 845 A.2d 983, 985 (Pa. Cmwlth. 2004); 62 Pa. C.S. §1711.1(i).

unable to support herself through appropriate employment; and that her estranged husband's earnings and earning capacity and his sources of income and property are substantially in excess of her own. Protestor alleges that these statements indicate that Mr. Onyshko was the one truly in control of PIRC and that it was not entitled to WBE status. Alternatively, Protestor argues that if the statements that Ms. Onyshko made in her divorce complaint were false, then she lacked the integrity necessary to meet the definition of a "responsible bidder" under the Procurement Code.

However, there are several errors in Protestor's argument. First, Ms. Onyshko's statements that her estranged husband provided her with health care benefits, that he was self-employed through PIRC, and that she lacked the income and property necessary to provide for her reasonable needs do not prove that Mr. Onyshko was the person truly in control of PIRC. To the contrary, BMWBO conducted a full investigation into this matter and found that Ms. Onyshko was not employed elsewhere and did not have any income outside of PIRC, that she had the power to determine company policy and that she controlled PIRC's day-to-day operations.

Second, the rule in Pennsylvania is that "a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person." *Longenecker v. Commonwealth of Pennsylvania*, 596 A.2d 1261, 1262 (Pa. Cmwlth. 1991) (citing *College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 468 Pa. 103, 360 A.2d 200 (1976)). PIRC was the bidder in this case, not Ms. Onyshko, and Protestor errs in attributing the actions and statements of Ms. Onyshko to the corporation itself since it is a separate legal entity. The statements that Ms. Onyshko

made in her civil divorce complaint are standard boilerplate language, have no bearing upon PIRC's ability to perform the contract, and cannot be attributed to the corporation itself as it is a separate entity.

Similarly, Protestor's argument that PIRC is not financially able to meet the contract requirements and, therefore, is not a responsible bidder must also fail. Again, Protestor points to Ms. Onyshko's statements in her divorce complaint, including the statement that she is without sufficient funds, income or assets to pay her counsel fees, costs and expenses. Protestor argues that such statements indicate that she, as the owner of PIRC, is financially destitute, and that DGS failed to provide any evidence that PIRC was financially capable of performing under the contract. As stated earlier, PIRC is a separate legal entity from Ms. Onyshko or any of its employees, and Protestor errs in attributing these statements made by an individual employee in a civil divorce proceeding to the corporation itself. Ms. Onyshko's statements regarding her own personal income and assets have no bearing upon the financial stability of PIRC. In addition, the Deputy Secretary found that BOP's investigation into PIRC's financial responsibility and its average yearly income of \$412,000 indicated that it had sufficient revenues and was financially capable of performing the contract.

Finally, Protestor argues that at the time of initial bidding, PIRC had not properly registered its detective employees as required under the Act because it had not filed their fingerprint forms with the Court of Common Pleas of Allegheny County. Because PIRC allegedly failed to comply with the Act, Protestor argues that

it is not a responsible bidder and should be disqualified from receiving the contract award. We disagree.

Section 13(a) of the Act requires that a corporation obtain a private detective license before engaging in detective services. PIRC held a valid license issued pursuant to the Act at the time of bidding and submitted a copy of this license along with its initial bid. Therefore, PIRC did not violate the Act in the submission of its bid. Even if specific employees had not yet filed their fingerprints with the county court at the time of the bid submission, this would not invalidate the responsiveness of PIRC's bid nor would it mean that PIRC was no longer a responsible bidder. A corporation may hire and fire employees at any given moment, and at the time BOP awarded the contract to PIRC, all of its relevant employees had complied with the fingerprint requirements of the Act.

For all of the above reasons, the decision of the Deputy Secretary of DGS denying Protestor's bid protest is affirmed.

DAN PELLEGRINI, JUDGE

