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

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United Security Services, Inc.
4080 Woodcock Drive, Suite 214
Jacksonville, Florida 32207

Attention: Mr. William G. Johns
President

Gentlemen:

We have considered your protests against the guard service license requirement included in advertised solicitations issued by the General Services Administration (GS-03B-17607, -17696, -17700, 2PBO-RC-784, -785, and -MB-797).

The solicitations required that the bidder have a license to conduct a guard service business in the State of New York or that the contractor be licensed as a qualified guard service company in Virginia, County of Fairfax and Maryland, Montgomery County. It is your position that these licensing requirements restricted competition and that the requirements should have been deleted or ignored in making awards. On the other hand, you are aware of the position maintained by GSA that the requirements are a proper exercise of procurement responsibility.

We regret the delay in disposing of your protests. But since the protests raised issues significant to advertised procurement procedures, we found it was necessary to reevaluate prior similar matters in the light of the policy and legal

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considerations implicit in your protests. On the bases discussed below, we have denied your protests.

In 51 Comp. Gen. 377 (1971), we discussed our earlier decisions respecting various licensing requirements; also, we distinguished Federal requirements from State and local requirements. At pages 378-379, we noted that a failure to comply with a Federal license requirement would affect the responsibility of the bidder. With respect to State and local requirements, we quoted from a prior decision (B-125577, October 11, 1955) at page 379:

> State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. The validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts, and it would be impossible for the contracting agencies of the Government to make such determinations with any assurance that they were correct. It is precisely because of this, in our opinion, that the standard Government contract forms impose upon the contractor the duty of ascertaining both the existence and the applicability of local laws with regard to permits and licenses. In our opinion, this is as it should be.
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> * * * No Government contracting officer is competent to pass upon the question whether a particular local license or permit is legally required for the prosecution of Federal work, and for this very reason the matter is made the responsibility of the contractor. No statute has been brought to our attention which would authorize the inclusion of a condition in Federal contracts or bid invitations that local permits or licenses

must be obtained, regardless of their necessity as applied to the work to be done. Accordingly, we are of the opinion that the obtaining of a general contractor's license for performing Government work in Tennessee is a matter which must be settled between the local authorities and the contractors, either by agreement or by judicial determination.

We further said that "if as a result of enforcement by the State the contractor chooses not to perform the contract or is prohibited from doing so by an injunction won by the State, the contractor may be found in default and the contract terminated to its prejudice."

Both B-125577, supra, and 51 Comp. Gen. 377 supra, as well as B-165274, May 8, 1969, also cited in the latter case, involve solicitations with only a general requirement that contractors have necessary State licenses. For example, in 51 Comp. Gen. supra, involving a solicitation for security guard services, the IFB stated that "the contractor and each of his employees provided under this contract shall meet state and local requirements for the type services required by this contract." We think it is clear, in that type of situation, that a contracting officer should not have to determine what those state and local requirements may be, and the responsibility for making that determination is correctly placed with the prospective contractor.

All of the cases cited involved situations in which the contracting officers, by use of general language in the solicitation, attempted to insure compliance with state licensing requirements that may or may not have been applicable to or enforced against the prospective contractors. However, we think there is a significant distinction between those situations and cases in which the contracting officer validly requires bidders to hold a specified state license. Where the contracting officer is aware of and familiar with the local requirements and incorporates those requirements into a solicitation, it may well be decided that possession by the bidder of the particular license is a prerequisite for an affirmative determination of responsibility. In such situations the requirement may properly be included in the solicitation without concern--expressed in some of the

earlier cases--that the IFB may require a local license even though not necessary to accomplishment of the work.

To view the matter otherwise would be tantamount to requiring a contracting officer to award a contract that he knows may well be significantly delayed or even unperformed because of noncompliance with a known state licensing requirement. We are aware that state licensing requirements may not be enforceable against Federal Government contractors, Leslie Miller Inc. v. Arkansas, 352 U.S. 187 (1956). However, we think it is reasonable for a contracting officer to be more concerned with whether the contract will be carried out properly and without interference than whether he will ultimately prevail in litigation.

In this connection, FPR 1-1.1202, setting forth the Government's policy on contractor responsibility, states that award of a contract to a bidder who is not responsible "* * * is a disservice to the Government if subsequently the contractor defaults * * * with the result that the Government incurs additional procurement or administrative costs, and acceptable supplies or services may not be furnished within the time required. * * *"

In view of the above and the large degree of discretion vested in contracting agencies in determining bidder qualifications to perform a contract, 36 Comp. Gen. 649 (1957), we think a contracting officer may properly take reasonable steps to assure that a bidder is legally able to perform a contract by requiring the bidder to comply with a specific known state or local license requirement in order to establish responsibility.

With respect to the instant solicitations, the inclusion in the solicitations of requirements for compliance with state or local licensing laws indicates that the contracting officer had reason to believe that the licensing requirements were applicable to the procurements. This is evidenced by the reports of the GSA General Counsel to our Office wherein it is stated, in effect, that State or local law (other than Virginia and the County of Fairfax) required compliance with its licensing laws. In this context, these solicitations are similar to the one we considered in B-174348 of December 29, 1971. There the solicitation required a Pennsylvania license to conduct the business of watch-guard or patrol agency.

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We regarded this license requirement as proper, approved the agency's decision that the license requirement affected responsibility notwithstanding language of "responsiveness" in the solicitation, and upheld the award made to a bidder who obtained the state license subsequent to bid opening.

In appropriate circumstances, we believe that the procuring agency may properly require bidders to have a designated state or local license or permit, regardless of the applicability of that state or local licensing requirement to the specific procurement involved. Such circumstances would exist when it could be shown that the minimum needs of the Government could not be met by a contractor without a local license or that the nature of the procurement is such that it is reasonable to believe that only a licensed contractor could safely or effectively perform the contract.

While in some circumstances it may be possible for an unlicensed company to provide adequate guard services, we think it would not be unreasonable, in light of the guard services to be rendered, for the contracting officer to believe that appropriate performance could be obtained only from licensed agencies. In this respect, the solicitations contemplated the exercise of police authority as an incident to contract performance. We, therefore, cannot conclude that the contracting officer's determinations to require state and local licenses were unreasonable or improperly were restrictive of competition.

Accordingly, your protests are denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States