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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Chant Engineering Company, Inc.

File: B-402054

Date: December 29, 2009

Marc Lamer, Esq., Kostos and Lamer, P.C., for the protester.
Thomas Janczewski, Esq., Michael Best & Friedrich LLP, for Clover Industries, an intervenor.
Paul Sax, Esq., Department of the Army, for the agency.
Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that quotation, on its face, should have led agency to conclude that winning vendor could not and would not comply with limitation on subcontracting clause is denied where protester points to no clear indications in the quotation that the successful vendor will not comply with the clause.

DECISION

Chant Engineering Company, Inc., of New Britain, Pennsylvania, protests the issuance of a purchase order to Clover Industries, Inc., of Wausau, Wisconsin, under U.S. Army Corps of Engineers request for quotations (RFQ) No. W911XK-09-T-0082, issued as a small business set-aside for the rehabilitation of the Poe Lock hydraulic system at Sault Saint Marie, Michigan. Chant argues that Clover's quotation is unacceptable because it exceeded the limitation on subcontracting and is noncompliant with the small business set-aside requirements in the RFQ.

We deny the protest.

The RFQ, issued July 13, 2009, provided for the issuance of a fixed-price purchase order for the construction, fabrication, assembly, testing and delivery of the necessary hydraulic system components. Specifically, the RFQ required vendors to supply four hydraulic power units, six miter gate assemblies, six complete limit switch drive assemblies, four Tainter valve cylinders, two fender boom socket cylinders, two fender boom cylinders, six miter gate manifolds, four Tainter valve manifolds, two fender boom brake and boom manifolds, two fender boom brake and socket manifolds, spare parts and tools. RFQ at C4-C5. The purchase order was to

be issued to the vendor whose quotation offered the “best value” to the agency considering technical capability/experience, past performance, and price. Id. at 8.

The RFQ incorporated by reference the “Notice of Total Small Business Set-Aside” clause, Federal Acquisition Regulation (FAR) § 52.219-6, and the “Limitation on Subcontracting” (LOS) clause, FAR § 52.219-14. Id. at 7. The LOS clause states, in pertinent part:

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for - -

(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(2) Supplies (other than procurement from a nonmanufacturer of such supplies). The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

The agency received quotations from 12 vendors, including Chant and Clover. Agency Report (AR), Tab 1, Memorandum of Law, at 2. Clover stated in its quotation that it would be the prime contractor and that Oilgear Company would be its subcontractor, and specified the components each would supply. The quotation also stated that the hydraulic power units would be designed, assembled, tested, and painted, and the system assembled and tested, in Oilgear’s Milwaukee facility. Clover Quotation at 2. Clover’s price was \$2,131,075 and its quotation received a very good overall rating under the non-price factors; Chant’s price was \$2,460,960 and its quotation received a marginal rating. Agency Request for Dismissal, exh. A, at 2. The agency determined that Clover’s quotation represented the best value, and issued a purchase order to Clover on September 24.

Chant argues that Clover’s quotation should have been found unacceptable because, on its face, it did not comply with the RFQ’s LOS clause, FAR § 52.219-14(b)(2) (the so-called “50% rule”). Specifically, Chant contends that the breakdown of work to be performed by Clover and Oilgear shows that Clover will perform less than 50% of the contract value.

As a general rule, an agency’s judgment as to whether a small business concern will comply with the LOS clause is a matter of responsibility, and the contractor’s actual compliance with the provisions is a matter of contract administration. However, where a quotation, on its face, should have led the agency to conclude that the concern could not and would not comply with the subcontracting limitation, this is a matter of technical acceptability. A submission that fails to conform to a material term or condition of the solicitation, such as the LOS clause, is unacceptable and

may not form the basis for an order. KIRA, Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3.

We find nothing on the face of Clover's quotation indicating an intent not to comply with the LOS clause. Chant points to nothing, and we find nothing, in Clover's quotation or in the solicitation that establishes that Clover's method of performance does not comply with the LOS clause. In contrast, the agency states that its analysis of the quotation shows that Clover will supply and fabricate a number of unique, one-of-a-kind components and assume total project responsibility, while Oilgear is to supply other components that are readily available in its supply chain and require only modest fabrication to meet the solicitation specifications. AR, Tab E, Engineers' Statement, at 3-4. Additionally, the agency states that, after analyzing Clover's proposal, it determined that Clover will incur far more than 50% of the cost to manufacture the entire hydraulic power system (not including the cost of materials). Id. at 3. Under these circumstances, there is no basis for us to conclude that Clover's quotation, on its face, should have led the agency to conclude that Clover could not and would not comply with the LOS clause.

Chant argues that Clover's quotation should have been found unacceptable because it showed that Clover would not incur at least 50% of the personnel costs, as required under the LOS clause. Protest at 5. However, either subparagraph (1) or subparagraph (2) of the LOS clause applies, but not both, depending upon whether the contract is one for services or supplies. The contract here is for the construction, fabrication, assembly, and testing of a hydraulic system, components and new operating machinery, and thus falls under the supplies requirement at subparagraph (2) (as reflected in the agency's analysis above which we have no basis to question). Accordingly, subparagraph (1), establishing the 50% of personnel costs requirement, does not apply. See TFab Mfg., LLC, B-401190, June 18, 2009, 2009 CPD ¶ 127 at 3-4.

The protest is denied.

Lynn H. Gibson
Acting General Counsel