

33015 Westfall
PL-II

DECISION



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

FILE: B-219968.2

DATE: December 17, 1985

MATTER OF: Hare Road & Bridge Construction Company

DIGEST:

Agency acted improperly in failing to refer its rejection of a small business low bidder to the Small Business Administration because it erroneously concluded that a solicitation provision requiring the contractor to perform 33-1/3 percent of the project with its own work force concerned the responsiveness of the bid rather than the bidder's responsibility.

Hare Road & Bridge Construction Company, an Indian-owned small business, protests the rejection of its bid as nonresponsive under Bureau of Indian Affairs (BIA) solicitation No. H65-R-5-8. The solicitation was a total Buy Indian set-aside for construction work on the Turquoise Trail, a roadway located on the Hopi and Navajo Indian Reservations in Arizona. Although award was made to the second low bidder, the notice to proceed is being withheld pending our decision.

We sustain the protest in part and dismiss it in part.

The contracting officer rejected Hare's bid as "nonresponsive" because he determined, based on information submitted by Hare after bid opening, that Hare had not established that it would perform 33-1/3 percent of the work itself or that it had adequate financial capacity or a satisfactory past performance record.

Hare protested the contracting officer's determination to the agency. The agency responded, this time stating that Hare had not affirmatively demonstrated its "responsibility" and affirmed the rejection of Hare's bid. On August 22, 1985, Hare filed a protest with our Office complaining that it had been improperly determined to be nonresponsible. We dismissed the protest because it concerned a nonresponsibility determination of a small

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business, a matter for the Small Business Administration's (SBA) review under its certificate of competency (COC) procedures. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(3) (1985).

Hare subsequently applied to SBA to have that agency consider what Hare thought was a negative responsibility determination under its COC procedures. Although the record shows that BIA also referred the matter to SBA, that agency, by letter dated September 9, returned the matter to BIA "pending a contracting officer's decision as to the responsiveness" of the bid. BIA then awarded the contract to the second low bidder, Little Soldier Enterprises. This protest followed.

Hare argues that all three of the grounds cited by the contracting officer in rejecting its bid are matters of responsibility, not responsiveness. The protester further disputes the contracting officer's conclusions regarding its financial capacity, past performance record and its capability to perform at least 33-1/3 percent of the work itself. In addition, the protester complains that the solicitation clause requiring the contractor to perform 33-1/3 percent of the work was improper as it was established long before the project was planned and was established without permitting the public to comment. As to the latter contention, we dismiss it as untimely since it concerns an alleged solicitation impropriety which was not raised until after bid opening. Bid Protest Regulations § 21.2(a)(1).

The agency concedes in its protest report, and we agree, that two of the three reasons cited for the rejection of Hare's bid--that firm's alleged lack of a satisfactory record of performance and financial capacity--are matters of responsibility. The agency further admits that the percentage of the work to be performed by the contractor may also concern Hare's responsibility. We conclude for the reasons cited below that the percentage of performance also involved a question of responsibility, which like the other two, should have been referred to SBA for review under its COC procedures.

The solicitation stated that the successful contractor would be required to perform "on the site, and with its own organization," work equivalent to at least 33-1/3 percent of the total. Hare did not take exception to the requirement in its bid, and all the information upon which the agency based its rejection of the bid was submitted after bid opening.

We have held that provisions like this one, which require a contractor to perform a certain percentage of the work with its own work force, constitute contract performance requirements. Therefore, we agree with the protester that compliance with such provisions relate to bidder responsibility, that is, its performance capability, rather than bid responsiveness, that is its promise to perform. Delta Elevator Service Corp., B-208252, Mar. 23, 1983, 83-1 CPD ¶ 299.

Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1982), a small business may not be precluded from an award on the basis of a nonresponsibility determination without referral of the matter to SBA for final disposition under COC procedures. Oceanside Moving and Storage, B-218075.2, May 23, 1985, 85-1 CPD ¶ 591. Since SBA has the final authority to issue a COC in these cases, our Office will not, absent an allegation of fraud or bad faith, review the agency's or the SBA's conclusions concerning the small business' responsibility. 4 C.F.R. § 21.3(f)(3).

We therefore conclude that all three grounds cited by the contracting officer for rejecting Hare's bid were matters of responsibility which should have been referred to SBA under the COC procedures. Further, since the protester has not alleged fraud or bad faith, Hare's contention that BIA's evaluation of its responsibility was erroneous is not for consideration by our Office. 4 C.F.R. § 21.3(f)(3). We recommend that BIA refer this matter to SBA. We further recommend that, if SBA issues a COC, BIA terminate for the convenience of the government the contract awarded to Little Soldier and make award to Hare.

The protest is sustained in part and dismissed in part.



Acting Comptroller General
of the United States