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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J.A. Jones Construction Company

File: B-227296

Date: September 1, 1987

DIGEST

1. An agency's defense of its evaluation of a proposal at a debriefing held in response to a protest to the agency alleging that the evaluation had been improper constitutes initial adverse agency action on the protest such that any subsequent protest to the General Accounting Office must be filed within 10 working days of the debriefing.

2. Where an offeror represents in its proposal that resources of its parent company will be available to it during contract performance, an agency properly may consider the experience of the parent company in evaluating the offeror's proposal.

3. Protest alleging that the awardee does not have the capacity to perform the contract because of its lack of experience as a separate entity and because the resources of its parent company may not be available to it is dismissed because the protest involves the contracting officer's affirmative determination of the awardee's responsibility, a matter the General Accounting Office generally does not review.

DECISION

J.A. Jones Construction Company protests the award of a contract to National Projects, Inc., (NPI), for construction work at the Jackson Lake Dam, Wyoming, under request for proposals (RFP) No. 6-SP-10-03550/DC-7695, issued by the Bureau of Reclamation, Department of the Interior. We dismiss the protest in part and deny it in part.

The RFP sought offers for the removal of embankment material, densification of an embankment wall, construction of roads, and other work, under a fixed-price contract. The solicitation provided that source selection would be based

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on a formula under which technical merit would be weighted at 70 percent and price at 30 percent. Jones submitted the lowest proposed price, $38,865,811, while NPI's proposed price of $40,115,337 was second lowest. Following application of the evaluation formula, Jones' proposal received a rating of 75.99 (including both technical and price points), and that of NPI received a rating of 79.12. The agency awarded a contract to NPI on April 13, 1987.

On April 16, Jones filed a protest with the contracting officer contending that the agency had not properly evaluated its proposal in accordance with the evaluation criteria listed in the RFP and that it was entitled to award of the contract because it had submitted the lowest price. The firm also requested a meeting to discuss the technical evaluation. On April 20, the agency debriefed Jones concerning the evaluation of the firm's proposal, highlighting the proposal's strengths and weaknesses. The agency reports that it informed Jones at the debriefing that it anticipated issuing a notice to proceed to NPI. The record contains an affidavit from the contracting officer stating that the agency made no representation to the protester at the debriefing that it would take any further action in response to Jone's protest or that it would reconsider the award to NPI. Jones, on the other hand, contends that it left the debriefing with the understanding that the agency would reexamine its evaluation of the firm's proposal in the context of addressing the firm's protest.

By letter dated May 18 and received here on May 22, Jones filed a protest with this Office on two grounds. First, Jones said that NPI has been in existence for only 3 years and has no experience in performing contracts such as that involved here, in contrast to Jones' allegedly considerable experience. The protester cited a solicitation provision stating that in evaluating technical proposals for purposes of determining the most appropriate methods for completing the required work the agency would assign higher ratings to those proposals that were based on work that the respective offerors had successfully performed. Jones complained that it had not received sufficient evaluation credit for its experience. Second, Jones listed a number of technical deficiencies noted by the evaluators concerning the firm's proposal and offered a rebuttal on each point.

By letter of May 29 the protester asserted an additional basis for protest as a result of its review of portions of NPI's proposal released to Jones under the Freedom of Information Act, 5 U.S.C. § 552 (1982). Jones noted that in several instances NPI's proposal acknowledged that

firm's lack of experience and relied instead on the experience and resources of its parent company, Morrison-Knudsen Company, Inc. On this basis, Jones alleged that NPI did not have the capacity to perform the contract and should have been downgraded under the evaluation criteria relating to experience. Further, Jones alleged that NPI was merely a "shell" company created by Morrison-Knudsen and that the latter firm may or may not decide to provide NPI with the personnel and other resources needed to perform the contract.

The agency argues that the protest is untimely. With respect to Jones' contention that the agency improperly evaluated the firm's proposal, we agree.

Our Bid Protest Regulations, 4 C.F.R. Part 21 (1987), provide that protests, other than those based on alleged solicitation improprieties, must be filed with either the contracting agency or this Office within 10 working days of when the basis for the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). If a protest has been filed initially with the contracting agency, any subsequent protest to this Office must be filed within 10 working days of the protester's actual or constructive knowledge of initial adverse agency action on the agency-level protest. Id. § 21.2(a)(3). Initial adverse agency action may consist of the agency's reaffirmation of its position at a debriefing conference followed by the award of a contract. Priest & Fine, Inc., B-210737, July 5, 1983, 83-2 CPD ¶ 54. Once informed of initial adverse agency action, a protester may not delay filing a subsequent protest with this Office while it awaits written notice of the agency's action on its protest, see Sheraton South Hills, B-225092, Nov. 10, 1986, 86-2 CPD ¶ 548, or while it continues to pursue the protest with the agency. Linn Timber, Inc.--Reconsideration, B-225430.2, Nov. 18, 1986, 86-2 CPD ¶ 584.

In this case, Jones filed its protest with the agency immediately after learning that it had not been selected for award. The firm claimed that the agency had evaluated its proposal improperly. In response to the protest, the agency debriefed Jones to explain and defend its evaluation of the proposal. Jones filed a protest with this Office, 24 working days later, again alleging an improper evaluation and this time citing in support of its position specific proposal weaknesses discussed during the debriefing.

In our view, Jones was on notice as a result of the debriefing that, contrary to what Jones asserted in its agency-level protest, the agency believed that its

evaluation of Jones' proposal had been proper. The agency's defense of its evaluation at the debriefing constituted initial adverse agency action on the protest to the agency such that any subsequent protest to this Office should have been filed within 10 working days of April 20, but was not filed until 24 working days later.

We find no merit to Jones' contention that the agency should have downgraded NPI's proposal because of its lack of experience as a separate entity. We have recognized that where, as here, an offeror represents in its proposal that resources of its parent company will be committed to the contract, the agency properly may consider the experience of the offeror's parent company in evaluating its proposal. Vector Engineering, Inc., B-200536, July 7, 1981, 81-2 CPD ¶ 9.

We dismiss the protester's remaining contentions concerning the relationship between NPI and its parent company. In this regard, the protester contends that NPI does not have the capacity to perform the contract because of its lack of experience and because the resources of the parent company upon which NPI must rely may not be available. These contentions all relate to the issue of whether the awardee is responsible.

The Federal Acquisition Regulation (FAR) requires that prior to the award of any contract the contracting officer must make an affirmative determination that the proposed awardee is responsible. FAR, 48 C.F.R. § 9.103(b) (1986). To be responsible a prospective contractor must have, among other things, the resources, experience, and technical skills needed to perform the contract, or the ability to obtain them. FAR, 48 C.F.R. § 9.104-1. Because a determination of responsibility is in large part a subjective judgment, our regulations provide that we will not review an affirmative responsibility determination absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility critera contained in the solicitation were not met. 4 C.F.R. § 21.3(f)(5). There has been no such showing here.

The protest is dismissed in part and denied in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel