



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Certified Underwater Systems, Inc.
File: B-242943
Date: June 21, 1991

Larry M. Murphy for the protester.
William Mohny, Department of the Navy, for the agency.
Steven W. DeGeorge, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protester, a prospective subcontractor, was properly found nonresponsible where prime contractor acting on behalf of the government reasonably determined that protester did not have a functional quality control program or adequate facilities to produce the required items.

DECISION

Certified Underwater Systems, Inc. (CUSI) protests its exclusion from further consideration for award of a contract under request for proposals (RFP) No. 0177-90, issued by Global Associates/Phillips Cartner & Co. for lightweight dive systems. On the basis of a preaward survey, CUSI was found nonresponsible. The protester disputes that finding and contends that its proposal was improperly evaluated by Global with a predisposition on the part of that firm to award to another offeror.

We deny the protest.

Global is responsible for operating and maintaining several Emergency Ship Salvage Management (ESSM) bases under a cost-plus-fixed-fee contract with the Department of the Navy. Pursuant to this contract, Global is required, when necessary, to periodically replace equipment regularly stored at the ESSM bases. On November 1, 1990, the Navy project manager for the contract issued a Technical Instruction to Global requiring it to "procure and receive lightweight diving sets" to replace certain obsolete World War II-era equipment stored at the bases. The subject RFP was issued by Global on that same date.

The RFP is for the initial acquisition of five diving sets with an option to acquire up to 20 additional sets. The RFP contained no technical evaluation criteria and simply provided that award would be made to the responsible offeror submitting the lowest price.

The RFP provided in part:

"3.1 QUALITY PROGRAM: The contractor shall have an existing quality control program in accordance with MIL-Q-9858A (QUALITY PROGRAM) and section 3.3 of NAVSEA T9592-AB-SPN-010 (ENCL. 4)."

This provision referred to the manner in which the diving sets were to be manufactured. The RFP also provided for preaward surveys of offerors' facilities "in order to assure compliance to the Quality Control and other requirements"

Six proposals were received by Global by the December 14, closing date. By letter dated January 18, 1991, best and final offers (BAFO) were requested from each of the six offerors. The BAFO request included the following provisions:

"The successful low bidder will be required to provide proof of an existing MIL-Q Quality Control Program at a Pre-Award visit."

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"The successful low bidder will be required to have a facility suitable for all production requirements to include a Class 100,000 level clean room on site. The facility will be inspected at the Pre-Award visit."

CUSI's BAFO was low. Accordingly, on February 5, representatives of Global and the Navy conducted a site visit at CUSI's facility. Based upon that site visit, Global determined that CUSI did not have a functional quality control program in compliance with the requirements of MIL-Q-9858A. Additionally, Global found that CUSI's proposed facility was not suitable for the production requirements of the RFP. Thus, Global concluded that CUSI was not qualified to perform the contract and was therefore not a responsible contractor. This protest followed.

CUSI contends that Global's determination that it was not qualified to perform was based upon a faulty technical evaluation. The protester maintains that it could not have reasonably been found unqualified to perform. In this regard, the protester refers to the experience and technical

competence of its personnel and argues that Global conducted its evaluation based upon indefinite technical factors and with a predisposition in favor of another offeror. The protester also contends that Global improperly interpreted the RFP specifications to require that its quality control program be fully "functional" prior to award.

As an initial matter, the Navy argues that the protest should be dismissed because it does not concern the award of a subcontract "by or for the government." According to the agency, while Global is a facilities management contractor, it does not have ongoing discretionary purchasing authority on behalf of the government. Thus, the agency maintains that our Office lacks jurisdiction over this protest.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(1) (1988), our Office has jurisdiction to decide protests involving contract solicitations and awards by federal agencies. We have interpreted CICA as authorizing us to decide protests of subcontract solicitations and awards when the subcontract is "by or for the government." Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1991). A subcontract is typically considered to be "by or for the government" where the prime contractor principally provides large-scale management services to the government and, as a result, generally has ongoing purchasing responsibility. SRI Int'l, B-237779, Mar. 22, 1990, 90-1 CPD ¶ 318. Such circumstances exist where the prime contractor operates and manages a government facility, otherwise provides large-scale management services in a government facility, serves as an agency's construction manager, or functions primarily to handle the administrative procedures of subcontracting with vendors effectively selected by the agency. Id.

The Navy admits that Global's essential responsibility is to manage a group of its ESSM facilities. Although the agency attempts to draw a distinction between Global and a typical facilities management contractor by suggesting that Global lacks discretionary authority to award subcontracts, this distinction is not controlling. According to the terms of the prime contract, Global is required to procure equipment for the ESSM facilities when necessary. In that regard, the instant procurement is being carried out under the express direction of the Navy. We find it therefore to be "by or for the government" and subject to our bid protest jurisdiction.^{1/}

^{1/} The Navy has also requested that we dismiss this protest on the basis that CUSI failed to furnish a copy of its protest to the agency within 1 working day after it was filed. See 4 C.F.R. § 21.1(d). According to the Navy, it never received

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At this juncture, we note that federal procurement statutes and regulations do not apply per se to management contractors, who must conduct procurements according to the terms of their contracts with the agency and their own agency-approved procedures. Our review in subcontractor protests is limited to determining whether the procurement conforms to the "federal norm," i.e., the policy objectives in the federal statutes and regulations. Merrick Eng'g Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130.

The protester first argues that Global used indefinite evaluation factors in evaluating its proposal. According to CUSI, because technical proposals were not required, the agency could not have reasonably found it technically unqualified without having imposed indefinite or unstated evaluation factors.

Global and the agency counter that the evaluation was conducted solely in the manner indicated in the RFP. The agency reports that while Global used a "checklist" during the site visit, which correlated to the technical requirements of the RFP, this "checklist" did not constitute the use of undisclosed evaluation factors. Rather, according to the agency, the "checklist" was used precisely for the purpose stated for the site visit, i.e., to verify the existence of a compliant quality control program and a suitable production facility. The agency maintains further that the items on the "checklist" related to matters of responsibility as opposed to technical evaluation factors.

We find no support for the protester's allegations. Our review of the record confirms that Global's use of the "checklist" and its determination regarding CUSI concerned CUSI's responsibility, not the technical acceptability of its proposal. In performing the preaward survey, Global was concerned with assessing CUSI's quality control program and the adequacy of its production facilities. These matters were

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a copy of the protest from CUSI. However, a copy of the protest was provided to Global and the Navy learned of the protest from Global the day after it was filed. By providing a copy of the protest to the prime contractor, Global, CUSI reasonably complied with the purpose of the regulation cited by the Navy, and we accordingly will not dismiss the protest. See University of Michigan; Indus. Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643.

essential to CUSI's qualifications to perform the contract and thus pertained to the firm's responsibility. See Chesapeake Laser Sys., Inc., B-242350, Apr. 8, 1991, 91-1 CPD ¶ 358.

The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer, and we will not disturb a nonresponsibility determination absent a showing that the determination lacked a reasonable basis. Pathlab, P.A., B-235380, Aug. 4, 1989, 89-2 CPD ¶ 108. We find Global's determination that CUSI lacked responsibility to be reasonable.

A material requirement of the RFP was that the successful contractor have an existing quality control program in accordance with MIL-Q-9858A. This specification establishes certain standards and requirements for a contractor's in-house quality control program relative to the production of military items. A compliant quality control program must include certain written policy instructions as well as established procedural controls in such areas as program management, facilities and standards, manufacturing and purchasing. At the preaward survey, Global found that while CUSI had a written quality control program, it was not functional. For example, Global found that CUSI had not implemented or developed a large number of the procedures and controls required by MIL-Q-9858A. These inadequacies were noted by Global in connection with the checklist used at the site visit and are documented in the record.

The protester argues that Global evaluated its quality control program based upon an erroneous interpretation of the RFP requirements. According to the protester, the RFP did not require that the program be functional, but only that it be in existence. The protester relies upon language contained in paragraph 3.3.1 of enclosure 4 to the RFP, which states that "the bidder shall establish a quality control program." Additionally, the protester maintains in this regard that the quality control program need not be functional until after award.

We find the protester's argument unpersuasive. We agree with the agency that despite the language contained in paragraph 3.3.1, of enclosure 4, the RFP was reasonably clear in requiring the existence of a functional quality control program prior to award. Paragraph 3.1 of the RFP explicitly stated that "the contractor shall have an existing quality control program." Furthermore, the BAFO request submitted to CUSI by Global expressly advised that "the successful low bidder will be required to provide proof of an existing MIL-Q Quality Control Program at a preaward visit." Aside from finding CUSI's quality control program not functional, Global also found it noncompliant, as written, with several of the

requirements set forth in MIL-Q-9858A. For example, the program did not include written procedures for the control of raw material or written instructions for the inspection, handling, storage and delivery of work materials. These were considered by Global to be significant deficiencies. In view of the record, we believe that Global was clearly justified in evaluating the existence and functionality of the protester's quality control program and reasonably found it noncompliant.^{2/}

A second reason underlying Global's adverse responsibility determination was that CUSI's proposed production facility was inadequate. The RFP and the BAFO instructions to offerors provided that the proposed production facility was required to be suitable for all production requirements, including the existence of a "100,000 level" clean room. Offerors were advised that their proposed facilities would be inspected during the preaward site visit. At the CUSI site visit, Global representatives were shown a large empty building which was represented to be the protester's production facility. Global found this facility inadequate because it was not equipped for production of light-weight diving sets and had no areas dedicated for storage of engineering and controlled accesses for engineering documentation, nonconforming raw material or government furnished material as required by MIL-Q-9858A.

The protester does not dispute the fact that its proposed facility is not currently operational, but maintains that it could be fully-equipped and made operational in time to meet the first article and production requirements of the contract. The protester notes that it offered to meet the contract schedule in its proposal, and indicates that it should not be declared unqualified to perform simply because its facility was not operational at the time of the site survey.

On the record before us, we think that Global reasonably found CUSI's proposed production facility inadequate. In our view, the RFP, along with Global's BAFO request, required the existence of a facility in operating condition, not one proposed to become operational at some point in the future. To conclude otherwise would effectively make the preaward site visit superfluous. Given the complex nature of the required diving sets and the status of CUSI's proposed facility, we believe that Global's skepticism concerning the ability of CUSI to timely produce those items was reasonable. See Pathlab, P.A., B-235380, supra.

^{2/} To the extent that CUSI challenges provisions of the RFP as ambiguous or inconsistent, such challenges are untimely raised. 4 C.F.R. § 21.2(a)(1).

Finally, the protester contends that Global conducted this procurement with a predisposition in favor of awarding to another offeror. We find no support for this allegation in the record. In this case, CUSI has presented nothing more than a bald allegation of bias. This simply does not provide a sufficient basis to find bad faith or improper conduct on the part of Global. G.K.S., Inc., 68 Comp. Gen. 589 (1989), 89-2 CPD ¶ 117.

The protest is denied.


for James F. Hinchman
General Counsel