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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Clegg Industries, Inc.

File: B-242204.3

Date: August 14, 1991

Judy Clegg for the protester.
Paul M. Fisher, Esq., and Arthur F. Thibodeau, Esq.,
Department of the Navy, for the agency.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

Although an agency may use traditional responsibility factors, like management and staff capabilities and company experience, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business firm's proposal as technically unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of the proposal but instead effectively constituted a finding of nonresponsibility.

DECISION

Clegg Industries, Inc. protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. N47408-90-R-2036, issued by the Department of the Navy for diesel generator plants. Clegg argues that its proposal was improperly determined to be technically unacceptable.

We sustain the protest.

The RFP, issued as a total small business set-aside, is for the purchase and installation of a generator plant system, including outdoor diesel engine-generator units with switch-gear and other accessories and control equipment. The generator plant equipment is to be housed in a weatherproof enclosure and wired, piped, and connected to other control panels in a separate building.

Separate technical and cost proposals were required and award of the contract was to be made to the technically acceptable, low-priced offeror. Evaluation of proposals was performed in

two stages; Phase I comprising the technical evaluation of proposals; and Phase II, the price competition among acceptable offerors. The RFP provided that technical acceptability would be based on the following criteria: (1) company experience; (2) technical capabilities; (3) management and staffing capabilities; (4) facilities and equipment; and (5) quality and timeliness. To be determined technically acceptable, offerors had to demonstrate acceptability in each factor and subfactor, on a "go-no go" basis.

The agency received seven proposals by the November 30, 1990, closing date, two of which were submitted by Clegg. The technical evaluators determined that Clegg's primary proposal was based on hardware that conformed to the solicitation specifications, but that its alternate proposal did not conform. Clegg was notified that its alternate proposal was rejected as unacceptable by a letter of February 21, 1991. Clegg's primary proposal, along with four other offerors' proposals, was rated marginal.

The agency conducted written discussions with the offerors whose proposals were rated marginal by letters dated February 5 and requested responses by February 12. The agency's letter to Clegg listed eight deficiencies, including specific questions concerning Clegg's company and staff experience. Clegg was asked for a description of its involvement in the projects it identified in its proposal as fulfilling the company experience criteria and for additional information about the specific experience of its staff on projects involving comparable complexities and delivery schedules because it appeared that Clegg did not satisfy the minimum experience qualification under the RFP.

After reviewing Clegg's responses, the technical evaluation board determined that Clegg's proposal was technically unacceptable for lack of adequate company experience and personnel and staff experience. Clegg was notified that its primary proposal was eliminated from the competitive range by a letter of March 29 and was provided with additional information regarding its rejection in a letter dated April 3. Three offers were included in the competitive range, and best and final offers were due by April 18.

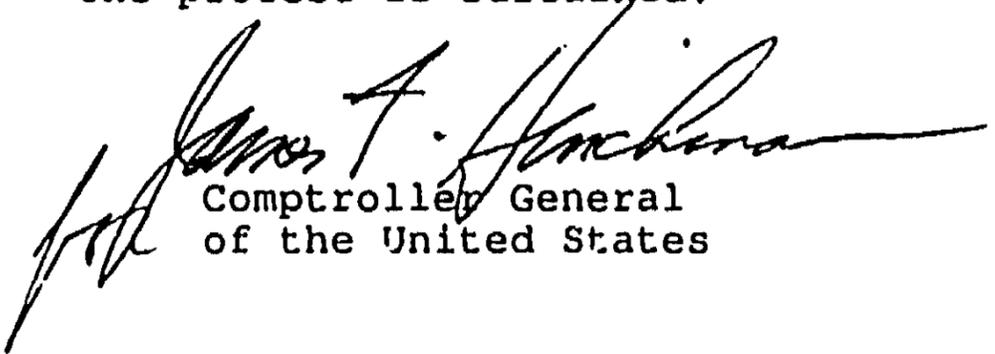
The technical factors on which Clegg's proposal was judged technically unacceptable--management and staffing capabilities and company experience--traditionally are considered responsibility factors, that is, matters relating to Clegg's ability to perform the contract. See Federal Acquisition Regulation §§ 9.104-(c), (e); Apex Envtl., Inc., B-241750, Feb. 25, 1991, 91-1 CPD ¶ 209. While traditional

responsibility factors may be used as technical evaluation criteria in a negotiated procurement, see, e.g., Pacific Computer Corp., B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292, the factors may be used only if special circumstances warrant a comparative evaluation of those areas. Flight Int'l Group, Inc., B-238953.4, Sept. 28, 1990, 69 Comp. Gen. _____, 90-2 CPD ¶ 257; Sanford and Sons Co., 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266. Under the Small Business Act, agencies may not find that a small business is nonresponsible under the guise of an assessment of the responsibility factors and thus avoid referring the matter to the Small Business Administration (SBA), which has the ultimate authority to determine the responsibility of a small business concern. See 52 Comp. Gen. 47 (1972); Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297.

Here, the record shows that the Navy did not use the responsibility-type technical evaluation criteria for the purpose of a comparative evaluation of the merits of the proposals received. Rather, proposals were found technically acceptable on a "go-no go" basis, and Clegg's proposal was rejected solely because of the firm's purported lack of experience and management and staffing capabilities. Clegg would have been denied the contract no matter how the rest of its proposal was judged. Under these circumstances, the determination that Clegg was technically unacceptable was, in effect, a determination by the contracting officer that Clegg was not a responsible contractor. Therefore, Clegg's elimination from the competition without a referral to SBA was improper.

We recommend that the agency include Clegg in the competitive range. If Clegg is found to be otherwise in line for award, and if Clegg's responsibility is still questioned, the issue should be referred to the SBA for a final determination under its certificate of competency procedures. 15 U.S.C. § 637(b)(7) (1988); ECS Metals Ltd., B-229804, Feb. 10, 1988, 88-1 CPD ¶ 136. We also find Clegg is entitled to the costs incurred in pursuing this protest. 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6).

The protest is sustained.


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