



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

Decision

Matter of: Braswell Services Group, Inc.
File: B-248336
Date: August 19, 1992

William A. Scott, Esq., for the protester,
Thomas A. Mason, Jr., Esq., United States Coast Guard,
Department of Transportation, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Protest challenging agency's rejection as nonresponsive of a bid submitted under a solicitation for drydocking repairs and alterations based on the agency's concern that the route the ship must travel to the facility listed as the protester's intended place of performance is not accessible is sustained. The protester's compliance with the accessibility requirement is related to the bidder's responsibility, not the responsiveness of the bid, and, as such, the bidder's capability to provide an accessible place of performance could have been determined at any time prior to award.

DECISION

Braswell Services Group, Inc. protests the rejection of its bid under invitation for bids (IFB) No. DTG80-92-B-3FA771, issued by the United States Coast Guard for drydocking repairs and alterations. Braswell, a small business concern, contends that the agency's rejection of its bid as nonresponsive based on information supplied about the firm's designated place of performance is a de facto nonresponsibility determination that the agency was required to refer to the Small Business Administration (SBA) in accordance with the Small Business Act, 15 U.S.C. § 637(b) (7) (A) (1988).

We sustain the protest.

The IFB called for the contractor to furnish all necessary labor, material, equipment, facilities, and services necessary to perform drydocking repairs and alterations to the USCG Red Beech, a 157-foot coastal buoy tender. The IFB required the contractor to "provide a facility accessible

from a navigable waterway at which [the] ship . . . can, using its own propulsion, safely arrive, lie afloat and depart."

Section K.26 of the IFB, entitled "Location of Offeror's Commercial Shipyard," called for offerors to specify the location of the shipyard they planned to use in performing under the contract.¹ In response, Braswell indicated that it would perform at the following location: 60 Braswell Street, Foot of Braswell Street, Ashley River Site, Charleston, South Carolina. In response to the IFB's standard "Place of Performance" clause, Federal Acquisition Regulation (FAR) § 52.214-14, Braswell indicated by checking the appropriate box that it did not intend to use a facility at an address different from that noted in its bid. The address in Braswell's bid is 60 Braswell Street, Charleston, South Carolina.

Upon receiving Braswell's low bid, the contracting officer noted that in order to reach Braswell's facility, the ship would have to travel under the Ashley River Bridge which, because of current construction, only has a 47-foot clearance; according to the contracting officer, the ship's height from the water line to the top of the mast exceeds 47 feet. Since the facility Braswell indicated that it planned to use is not now accessible via the Ashley River Bridge, the contracting officer found Braswell's bid nonresponsive and made award to the second low bidder. Braswell's protest to our Office followed the agency's denial of its agency-level protest.²

Braswell contends that the agency improperly found its bid nonresponsive because the firm's bid did not reduce, limit, or modify any requirement in the solicitation. Braswell argues that the agency's determination is in effect a de facto determination that the firm is not responsible which the agency should have forwarded to SBA; according to Braswell, the issue of whether the ship will have access to

¹The IFB required that offerors specify the location of the their shipyards in order for the contracting officer to evaluate certain costs to the Coast Guard that would vary with the location of the shipyard. These costs were defined in section M and included, for example, transportation costs for a Coast Guard representative to the shipyard, and fuel costs to navigate the vessel between its home port and the shipyard. Section M also provided that the total of these costs would be added to the bids for evaluation purposes.

²On April 16, the head of the contracting activity authorized continued performance under the contract based on urgent and compelling circumstances.

Braswell's facility solely concerns Braswell's capability, which is a matter of responsibility as opposed to responsiveness. Braswell points out that a small business may not be found nonresponsive without referring the matter for final disposition by the Small Business Administration. In other words, the SBA has the responsibility for determining if a small business is capable of meeting the agency's needs. According to the protester, it has more than one facility in the Charleston area and its other facilities are accessible.

To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Only where a bidder provides information with its bid that reduces, limits, or modifies a solicitation requirement may the bid be rejected as nonresponsive. Oscar Vision Sys., Inc., B-232289, Nov. 7, 1988, 88-2 CPD ¶ 450. Responsibility, on the other hand, refers to a bidder's apparent ability and capacity to perform all contract requirements and is determined not at bid opening but at any time prior to award based on any information received by the agency up to that time. Radionic Hi-Tech, Inc., B-219116, Aug. 26, 1985, 85-2 CPD ¶ 230.

A bidder's designated place of performance generally concerns a matter of responsibility. See Kings Point Indus., 66 Comp. Gen. 74 (1986), 86-2 CPD ¶ 488. However, we have in rare circumstances considered place of performance to be a matter of responsiveness where the government has a material need for performance at a certain location. See 53 Comp. Gen. 102 (1973) (agency properly rejected a bid taking exception to a Department of the Navy home port requirement and indicating a place of performance 100 miles from the San Diego area where the solicitation specifically required that ship repair work be performed in the San Diego area in order to comply with the Navy's home port policy). Unlike the circumstances in 53 Comp. Gen. 102, where the solicitation required performance at a specific location, the IFB in this case did not require that performance take place at a particular location; on the contrary, the solicitation allowed the contractor to substitute locations at any time with the approval of the contracting officer. Thus, we find that the place of performance clause here relates to the bidder's responsibility, not the responsiveness of its bid.

The language of the accessibility requirement in the IFB further supports the conclusion that the agency's finding did not relate to the responsiveness of Braswell's bid. The IFB specifically states that "[t]he contractor shall provide a facility accessible from a navigable waterway at which

[the] ship . . . can, using its own propulsion, safely arrive. . . ." (Emphasis added.)

The accessibility requirement thus is a contract performance requirement, which simply sets forth how the vessel is to be transported after award, rather than a prerequisite to award. See Evergreen Int'l Airlines, Inc., B-244284, Aug. 15, 1991, 91-2 CPD ¶ 154.

By signing and submitting the bid without taking any exceptions to the solicitation, Braswell offered to perform the drydocking work in conformance with all the terms and conditions of the solicitation, including the accessibility requirement. Thus, Braswell's bid was responsive. Luther Constr. Co. Inc., B-241719, Jan. 28, 1991, 91-1 CPD ¶ 76. With regard to the accessibility requirement, Braswell states that it intended to remove and reinstall the mast of the ship to reach its facility located upstream from the Ashley River Bridge, a procedure the firm followed in completing recent work on the USCG Red Cedar, a sister ship to the Red Beech. The contracting officer's finding that, based on Braswell's plan to remove the mast, Braswell will not comply with the accessibility requirement concerns an element of Braswell's responsibility, and the subsequent rejection of Braswell's bid is, in effect, a nonresponsibility determination. The contracting officer's finding that Braswell will not comply with the accessibility requirement because its plans to remove the mast present an unacceptable risk is an element of Braswell's responsibility. The subsequent rejection of Braswell's bid is, in effect, a nonresponsibility determination. Since Braswell certified itself to be a small business concern, the agency was required to refer its determination to the SBA for review under its certificate of competency (COC) procedures. Id. SBA's responsibility is to investigate the matter and determine whether, in fact, the protester is not capable of meeting the agency's needs.

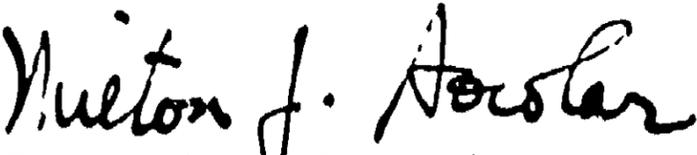
RECOMMENDATION

Although the agency maintains that its determination does not relate to Braswell's responsibility, the contracting officer nevertheless referred the matter to SBA for its consideration on May 15, after the agency made award and a month after it decided to proceed with performance of the contract.³ By letter dated June 1, SBA informed the agency that it would delay action on the referral until the

³Since the agency does not agree that its determination concerned Braswell's responsibility, it is clear that its referral to SBA was not intended as corrective action in response to the protest.

protest was resolved. Since work under the contract has been substantially completed, we cannot recommend corrective action even in the event that SBA were to issue a COC to Braswell.⁴ Accordingly, we find that Braswell is entitled to recover its bid preparation costs, and the costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d) (1992). Braswell's claim for such costs should be submitted directly to the Coast Guard.

The protest is sustained.


Acting Comptroller General
of the United States

⁴According to the agency, the awardee has performed nearly all of the contract requirements and contemplates completion of the contract in the near future.