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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Zeiders Enterprises, Inc.

File: B-251628

Date: April 2, 1993

Michael D. Zeiders for the protester.
Jonathan H. Kosarin, Esq., and Anita Dixon Polen, Esq., Department of the Navy, for the agency.
Paula A. Williams, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's proposal did not comply with solicitation requirement that offeror satisfy applicable tax requirements is denied where awardee's proposal evidenced tax-exempt status of nonprofit offeror and, consistent with this tax-exempt status, did not include inapplicable taxes in its proposal.

2. The General Accounting Office will not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation were misapplied.

3. An agency is not required to conduct a preaward survey if information available to the agency is sufficient to allow the contracting officer to make an affirmative determination of responsibility.

DECISION

Zeiders Enterprises, Inc. protests the award of a contract to The Planning Council (TPC), a nonprofit organization, under request for proposals (RFP) No. N00189-92-R-0228, issued by the Naval Supply Center, Department of the Navy, to provide support services for Navy Family Services Centers (NFSCs)[1] in the Hampton Roads area of Virginia. The

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[1]The NFSCs are human, social and educational agencies that provide services in support of fleet readiness and naval retention to single and married active duty personnel and their families.

protester alleges that TPC's proposal should have been disqualified because it did not meet solicitation requirements regarding payment of all applicable taxes, and that the Navy improperly determined TPC to be a responsible offeror.

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

The RFP, issued on September 14, 1992, contemplated the award of a firm, fixed-price contract with labor-hour options for a base year with three 1-year option periods. The RFP provided that award would be made to the responsible offeror whose proposal offered the greatest value to the government. On December 2, following a competition in which three initial offers were submitted and Zeiders's and TPC's proposals were determined to be technically acceptable, TPC was awarded a contract based on its proposal's higher technical rating and lower price.[2] This protest followed.

Zeiders challenges the agency's acceptance of TPC's proposal primarily on the grounds that the price proposal did not provide for payment of certain taxes in contravention of the standard tax clause, Federal Acquisition Regulation (FAR) § 52.229-3, which was included in the RFP. It is essentially the protester's position that the work required under the contract is not the type of tax-exempt activity which TPC can perform in its tax-exempt status, therefore, TPC should have included unrelated business income tax and other business license and state income tax in its indirect rates.

The standard tax clause, FAR § 52.229-3, advises offerors that they will be held responsible for all applicable federal, state, and local taxes, and that the contract price should include these taxes. The purpose of soliciting offers on a tax-included basis is to limit the government's payment obligation to the price offered, that is, the contractor will not be reimbursed by the government for any

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[2]The RFP notified offerors that award might be made on the basis of initial proposals received, without discussions, and cautioned offerors that the initial proposals should contain the offerors' most favorable terms.

It also provided that technical merit would be more important than price. TPC's proposal's technical score was 386.75 out of a possible score of 400 while Zeiders's was 369; the awardee's price was $18,798,873 while the protester's was $20,097,861.

taxes it might have to pay when they are not included in its contract price. See Coyote Corp., B-238582, Apr. 25, 1990, 90-1 CPD ¶ 425.

There is nothing in TPC's proposal to indicate that the firm took exception to the tax clause or to any other term in the RFP. TPC's proposal contained a statement that the firm is exempt from income taxes under Section 501(c)(3) of the Internal Revenue Code of 1986. TPC reiterated this position in a February 19, 1993, letter to the contracting officer as follows:

> "[TPC] was organized as a non-profit entity for the purpose of providing community planning services and social service programs for the benefit of the Hampton Roads community. Since the [NFSC] contract is directly related to the purposes for which we were formed, . . . this activity does not endanger our tax exempt status and . . . revenues from this contract would not constitute unrelated business taxable income."

Contracting agencies generally are not sufficiently familiar with the offerors' operations to arrive at definite conclusions concerning the applicability of taxes to the contract, and it would be inappropriate to impose on them the burden of examining the tax situation of each offeror who may elect to submit an offer on a tax-excluded basis. Ameriko Maintenance Co., B-242303, Mar. 21, 1991, 91-1 CPD ¶ 314; J & W Welding and Fabrication, B-209430, Jan. 25, 1983, 83-1 CPD ¶ 92. TPC's offer was submitted on a tax-excluded basis because of its tax-exempt status, which is not a bar to contract award; however, TPC bears the ultimate responsibility for any tax liability that may arise from this contract. See E.I.L. Instruments, Inc., 54 Comp. Gen. 480 (1974), 74-2 CPD ¶ 339.

Zeiders next protests the agency's affirmative determination of the awardee's responsibility. The protester contends that the awardee does not have adequate taxable financial resources or the personnel capability to perform the contract as offered in its proposal and that a preaward survey would have demonstrated this fact. In addition, Zeiders alleges that TPC's cost accounting system does not accurately allocate overhead and/or general and administrative costs between tax-exempt and taxable activities and the awardee is using its tax-exempt income to finance the contract at issue.

These allegations all relate to the adequacy of the agency's general determination that TPC is a responsible contractor. A determination that an offeror is capable of performing a contract is based in large part on subjective judgments which generally are not susceptible of reasoned review. Thus, we will review a contracting officer's affirmative determination of responsibility only where there is a showing that the determination was made fraudulently or in bad faith or that definitive responsibility criteria contained in the solicitation were not met. 4 C.F.R. § 21.3(m)(5) (1992); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Here, the protester does not explicitly allege fraud or bad faith, and there is nothing in the record which evidences possible fraud or bad faith on the agency's part.[3]

Zeiders does argue that the solicitation contained definitive responsibility criteria which were misapplied. In this respect, the protester characterizes FAR § 52.229-3, the standard tax clause; FAR § 52.215-26, the integrity of unit prices clause; and clause L.6 of the RFP, submission of price proposals as definitive responsibility criteria. We disagree.

Definitive responsibility criteria are specific and objective standards established by an agency for a particular procurement to measure the offerors' ability to perform the contract. In effect, such criteria reflect the agency's judgment that an offeror's ability to perform in accordance with the statement of work must be measured not only against the traditional and subjectively evaluated responsibility factors such as adequate facilities and financial resources, but also against a more specific requirement, such as a specific number of years of particular specified experience, compliance with which can be measured objectively. PTR-Precision Technologies, Inc., B-243439, Aug. 1, 1991, 91-2 CPD ¶ 110; Management Eng'rs, Inc.; KLD Assocs., Inc., B-233085; B-233085.2, Feb. 15, 1989, 89-1 CPD ¶ 156. None of these requirements--to include all applicable taxes in its offer, to distribute costs within contracts on a basis that ensures that unit prices are in proportion to actual costs, and to submit price proposals in a particular format--constitute specific and objective standards for measuring performance under the contract. Id.

[3]To the extent Zeiders alleges that award to TPC violates Internal Revenue Service (IRS) regulations governing the dual use of assets or facilities, this is primarily a matter between TPC and the IRS, and is not for consideration by our Office, as a bid protest matter.

Finally, Zeiders objects that the agency found TPC responsible without performing a preaward survey, or requesting a preaward audit by the Defense Contract Audit Agency and/or requesting a financial responsibility determination by the Defense Contract Administration Service Management Area.

An agency is not generally required to conduct a preaward survey of an offeror where sufficient information already exists for making the responsibility determination. See FAR § 9.106-1. A preaward survey or preaward audit is not a legal prerequisite to an affirmative determination of responsibility; contracting officials have broad discretion concerning whether to conduct such surveys and may use, as was done here, other information available to them concerning a firm's responsibility.[4] CVD Equip., Corp., B-237637, Mar. 8, 1990, 90-1 CPD ¶ 259. The decision not to conduct a preaward survey/preaward audit does not establish any impropriety on the agency's part. Id.

The protest is denied in part and dismissed in part.

Robert P. Murphy
for James F. Hinchman
General Counsel

[4]The agency considered the audited financial statements submitted with TPC's proposal which generally discloses a firm's actual financial position and operations to recipients of the audited statements, the Dun and Bradstreet Business Information Report and TPC's prior performance on the NFSC contract in making the responsibility determination.