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Decision

Matter of: SumCo Eco-Contracting LLC

File: B-409434; B-409434.2

Date: April 15, 2014

Edward J. Quinlan, Esq., and David T. Keenan, Esq., Quinlan & Sadowski, PC, for the protester.

Ryan T. Killman, Esq., Department of the Army, Corps of Engineers, for the agency. Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's consideration of a prospective subcontractor's experience in making an affirmative responsibility determination is denied, as consideration of such information is permissible.
 2. Protest challenging bid as unacceptable is denied where the bid, on its face, does not evidence any nonconformance to a material term or condition of the solicitation, and was thus acceptable for award.
 3. Protest challenging the agency's affirmative responsibility determination is dismissed where the contracting officer considered available relevant information in making her determination.
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DECISION

SumCo Eco-Contracting, LLC, of Salem, Massachusetts, protests the award of a contract to DCM Engineering & Architecture, LLC, of Camden, New Jersey, by the Department of the Army, Corps of Engineers, under invitation for bids (IFB) No. W912WJ-14-B-0001 for beach erosion control at Prospect Beach, West New Haven, Connecticut. SumCo challenges the agency's affirmative responsibility determination of DCM, arguing that the firm lacks the requisite experience to perform the contract work and will violate the contract's limitation on subcontracting.

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

BACKGROUND

The IFB, issued on October 17, 2013, as a Historically Underutilized Business Zone (HUBZone) small business set-aside, contemplated award of a contract to furnish and place an estimated quantity of 127,000 tons of beach fill as part of a beach erosion control project to the lowest-priced, responsible bidder. IFB at 1-5. As relevant here, the resulting contract incorporates by reference the clauses at Federal Acquisition Regulation (FAR) § 52.219-3, Notice of HUBZone Set-Aside or Sole Source Award (NOV 2011), and FAR § 52.219-14, Limitations On Subcontracting (NOV 2011). IFB at 16. FAR § 52.219-3 requires the HUBZone prime contractor to incur at least 15 percent of the contract cost for personnel with its own employees, and prohibits the prime contractor from subcontracting more than 50 percent of costs incurred for personnel to non-HUBZone small business concerns. FAR § 52.219-3(d)(3)(i)-(iii). FAR § 52.219-14 requires the small business concern to perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees. FAR § 52.219-14(c)(3).

Bids were opened on November 23. While DCM was the second lowest bidder with a price of \$3,789,680.00, the agency determined that the lowest-priced bidder was not a HUBZone small business concern and rejected its bid. Contracting Officer's Statement at 1; Agency Report (AR), Exh. 5, Abstract of Offers, at 1-2. The protester was the third lowest bidder with a price of \$4,343,400.00. Id.

On November 26, the contracting officer sent a notice to DCM informing the firm that its bid was the next responsive bid eligible for award. AR, Exh. 10, Letter of November 26, 2013. The contracting officer asked DCM to provide its most recent financial statements and to fill out a pre-award questionnaire. Id. Also on November 26, SumCo sent an email to the agency questioning whether DCM had the relevant experience to do the work. The protester noted that publicly available information showed that DCM only had experience with vertical build construction, and the firm questioned whether DCM could meet the HUBZone "workforce requirements." AR, Exh. 11, E-mail of November 26, 2013.

In its response to the agency's request for additional information, DCM stated that approximately [DELETED] of the total contract value would be performed by the firm's subcontractor. AR, Exh. 13, DCM Response to Pre-Award Questionnaire, at 2. The nature of the work specified to be performed by the subcontractor was "sand placement, heavy machinery and equipment." Id. The agency also considered information from the Small Business Administration, the government's past performance information retrieval system, a Dun & Bradstreet Federal Information Report, as well as various financial information provided by DCM in making its

responsibility determination. The agency found DCM to be responsible, and, on January 7, 2014, made award to the firm.¹ This protest followed.

DISCUSSION

SumCo challenges the agency's affirmative responsibility determination of DCM, arguing that the firm lacks the requisite experience to have the knowledge and skills to complete the project. Comments at 10. The protester argues that DCM has no direct experience with beach renourishment projects, and that the agency should not consider the experience of its non-HUBZone subcontractor in finding DCM to be responsible. Comments at 10-11.

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who, in making that decision, must necessarily rely on his or her business judgment. Rotech Healthcare, Inc., B-409020, B-409020.2, Jan. 10, 2014, 2014 CPD ¶ 28 at 4. Our Office will generally not consider a protest challenging a contracting officer's affirmative responsibility determination except in circumstances where it is alleged that definitive responsibility criteria in the solicitation were not met, or protests that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); Active Deployment Sys., Inc., B-404875, May 25, 2011, 2011 CPD ¶ 113 at 2.

The record shows that the agency considered three Contractor Performance Assessment Reports for DCM showing that it had demonstrated successful management and technical experience, albeit not in the area of beach renourishment. AR, Exh. 15, Pre-Award Survey – Technical, at 1. While the agency observed that DCM did not have demonstrated past experience with a project similar in scope and size, it also observed that the firm's proposed subcontractor had relevant direct experience with similar projects, including prior projects with the agency. Id.

SumCo has offered no support for its contention that the contracting officer cannot consider the relevant experience, knowledge and skill of DCM's proposed subcontractor in making her affirmative responsibility determination. In this regard,

¹ In making her responsibility determination, the contracting officer explains that in her experience a significant portion of the total cost of beach renourishment projects are material costs. Supp. AR, Exh. 2, Contracting Officer's Affidavit, at 1. She notes that the subcontracting limitations in FAR § 52.219-3, however, only considers personnel costs. Id. at 1-2. Based on her review of DCM's bid, and other submitted documentation, and considering SumCo's concerns raised in the firm's November 26 email, she found DCM to be responsible. Id.

the FAR recognizes that a contractor may obtain sufficient resources to be deemed responsible, including with respect to experience and technical skills, by either possessing such resources, performance by subcontracting or possessing the ability to obtain such resources. FAR §§ 9.104-1(a),(e) and (f); 9.104-3(a). Further, the FAR specifically discusses consideration of a prime contractor's compliance with limitations on subcontracting in the context of the firm's ability to obtain resources. FAR § 9.104-3(a).² We see no reason why the contracting officer here could not consider the experience of DCM's subcontractor in her responsibility determination.

SumCo next argues that the contracting officer had an affirmative responsibility to determine whether DCM could comply with the limitations on subcontracting incorporated into the contract at FAR § 52.219-3 and FAR § 52.219.14. The firm asserts that the agency could not make such an affirmative determination based on DCM's lump sum bid, and that the bid, on its face, should have led the contracting officer to conclude that DCM could not and would not meet the relevant subcontracting limitations. Supp. Comments at 4. SumCo asserts that the agency was required to inquire further of DCM to determine the work allocation between the firm and its subcontractor. Protest at 4; Comments at 3-9. The firm argues that, had it made such an inquiry, the agency would have found that DCM was not a responsible bidder and rejected its bid.³ Comments at 9.

An agency's judgment as to whether a small business offeror can comply with a limitation on subcontracting provision is generally a matter of responsibility.⁴

² Indeed, FAR § 9.104-4 contemplates situations, such as where there is to be substantial subcontracting, that the contracting officer can directly determine a prospective subcontractor's responsibility when it is in the government's interest to do so. FAR § 9.104-4(b). While there is no evidence in the record that the contracting officer directly made a responsibility determination of DCM's prospective subcontractor, such a decision is commended to the contracting officer's broad discretion in this area.

³ SumCo asserts, without elaboration, that DCM's bid, on its face, should have led the contracting officer to conclude that DCM could not and would not meet the relevant subcontracting limitations. Supp. Comments at 4. As discussed below, we conclude to the contrary. The protester goes on to argue that the firm's November 26 email to the contracting officer, and information obtained in the pre-award survey that approximately 70 percent of the work would be subcontracted, "should have [led] the Agency to the conclusion that on its face DCM's [bid] could not and would not comply with the subcontracting limitation." Id. at 4-5.

⁴ In this regard, the FAR states that a small business that is unable to comply with the limitations on subcontracting at FAR § 52.219-14 may be considered nonresponsible. FAR § 9.104-3(d)(2).

Ashridge, Inc., B-408469, Sept. 27, 2013, 2013 CPD ¶ 250 at 6. However, our Office has consistently held that where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. EcoAnalysts, Inc., B- 406233 et al., Mar. 19, 2012, 2012 CPD ¶ 169 at 3. In this regard, a proposal that fails to conform to a material term or condition of the solicitation, such as the subcontracting limitation, is unacceptable and may not form the basis for an award. Id.

The agency responds that DCM's bid did not contain any information on its face that led the agency to conclude that DCM could not or would not comply with the relevant subcontracting limitations. Memorandum of Law at 9. We agree with the agency. The submitted bid was a lump sum bid, which was not broken down into components, such as prime contractor work and subcontractor work. IFB at 3; Supp. AR, Exh. 2, DCM Bid, at 3. Further, nothing else on the face of the bid would lead to the conclusion that DCM could not or would not comply with the relevant subcontracting limitations. See generally Supp. AR, Exh. 2, DCM Bid. The bid, on its face, does not evidence any nonconformance to a material term or condition of the solicitation, and was thus acceptable for award.

Having responded to SumCo's argument that DCM's bid was unacceptable, the agency next responds to the protester's challenge to the scope of information considered by the contracting officer in finding DCM to be responsible. In this regard, the agency asserts that the contracting officer collected all relevant available information addressing the requirements outlined in FAR § 9.104-1, and considered that information in reaching her affirmative responsibility determination, including with respect to whether DCM could comply with the limitation on subcontracting requirements. Memorandum of Law at 8-9; AR, Exh. 12, Contracting Officer's Declaration; Supp. AR, Exh. 1, Supp. Contracting Officer's Statement, at 2. Since the contracting officer considered all relevant available information in making her responsibility determination, the agency contends that we should conclude our review. Supp. Memorandum of Law at 5-6. Alternatively, the agency argues that its responsibility determination was reasonable as nothing in the available information indicates that DCM could not comply with the subcontracting limitations. Id. at 6-7.

The FAR requires the contracting officer to possess or obtain information sufficient to be satisfied that a prospective contractor is responsible. FAR § 9.105-1(a). The amount and scope of the information obtained and considered rests within the broad discretion of the contracting officer. See Rotech Healthcare, Inc., supra at 5 (discussing United States v. John C. Grimberg Co., Inc., 185 F.3d 1297, 1303 (Fed. Cir. 1999)). A dispute as to the amount of information considered by the contracting officer in making a responsibility determination is generally not a matter that our Office will review. Nilson Van & Storage, Inc., B-310485, Dec. 10, 2007, 2007 CPD ¶ 224 at 3. We will not consider such a challenge, even to determine if the contracting officer's review was reasonable, as our review would give too little

weight to the contracting officer's discretion in the area of affirmative responsibility determinations. See Wild Building Contractors, Inc., B-293829, June 17, 2004, 2004 CPD ¶ 131 at 5.

On this record, we have no basis to question the adequacy of the information considered by the contracting officer. To the extent the protester asks that we expand our review to include whether the contracting officer made reasonable inquiries of the prospective contractor in response to information received while conducting a pre-award survey, we decline to do so. As we decline to expand our review and since the protester has not shown that the contracting officer unreasonably failed to consider available information in making her responsibility determination, we dismiss this protest ground as lacking a sufficient legal and factual basis. Systems Dynamics International, Inc.-Recon., B-253957.4, Apr. 12, 1994, 94-1 CPD ¶ 251 at 3; see also 4 C.F.R. § 21.1(c)(4) & (f) (2014).

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel