



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Blocacor, LDA

File: B-282122.3

Date: August 2, 1999

J. Hatcher Graham, Esq., for the protester.

Clarence D. Long, III, Esq., Department of the Air Force, for the agency.

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DIGEST

Where agency presents a reasonable basis for finding protester nonresponsible if it had been in line for award, General Accounting Office will not consider argument regarding technical acceptability of proposal since protester would not be in line for award even if it prevailed.

DECISION

Blocacor, LDA protests the rejection of its offer and the award of a contract to Meneses & McFadden, Cartor and VHC Joint Venture under request for proposals (RFP) No. F61040-99-R-0003, issued by the Department of the Air Force for demolition of a hospital building and dormitory at Lajes Air Base, Azores, Portugal. The protester argues that the agency wrongly found its proposal technically unacceptable based on its failure to submit past performance and other requested information. Blocacor also argues that the agency violated the Federal Acquisition Regulation (FAR) by engaging in discussions with some, but not all, offerors, and that the Air Force improperly failed to allow a reasonable time for the submission of responses to its discussion questions and to request another round of best and final offers (BAFO).

We deny the protest.

BACKGROUND

The RFP provided for award to the offeror whose proposal "meets the solicitation's minimum criteria for acceptable award at the lowest price." RFP at 3. Proposals were to be evaluated on the basis of the following factors:

1. Total overall price of proposal

2. Past performance in providing similar demolition services
3. Submission of the name and address of a qualified shipping company and disposal location for all asbestos and hazardous waste associated with the contract.

Id.

Six proposals were received prior to the January 14, 1999 closing date. Idalecio De Sousa submitted the lowest price, and Blocacor the second lowest; Meneses & McFadden's price was fourth low. The contracting officer found that the three lowest-priced offerors had all failed to furnish the information required by the second and third evaluation factors. He telephoned each of the three companies the following morning and told them that they could have until noon that day "to submit clarifications regarding the missing information." Memorandum of Law at 2. Blocacor did not submit the requested information. The technical evaluation team determined that because Blocacor had "failed to submit records of past performance for similar type of work" and had not submitted the name and location of a qualified shipping company or disposal location, its offer was "non-responsive" (i.e., unacceptable).¹ Technical Evaluation Memorandum, Jan. 18, 1999, at 2. The technical evaluation team also found the offers of De Sousa and the third low offeror nonresponsive and recommended award to Meneses & McFadden as the lowest-priced acceptable offeror. On February 17, 1999, a contract was awarded to Meneses & McFadden.

On February 24, De Sousa protested the rejection of its offer and the award to Meneses & McFadden to our Office. By decision dated April 22, we dismissed the protest on the ground that De Sousa was otherwise ineligible for award and thus was not an interested party to protest.² Within 10 days of learning that we had determined

¹Although the agency refers to the protester's proposal as "nonresponsive," the concept of responsiveness is not applicable to negotiated procurements. Where a proposal submitted under a negotiated procurement fails to meet a material requirement of the RFP, it must ultimately be rejected as unacceptable, not as nonresponsive. Henry G. Kirschenmann, Jr., B-239114, July 23, 1990, 90-2 CPD ¶ 63 at 2 n.1.

²In our decision, Idalecio De Sousa, B-282122, Apr. 22, 1999, recon. denied, B-282122.4, May 20, 1999, we found that De Sousa was otherwise ineligible for award because it had no proposal available for consideration at the time of award, having revoked its original offer by attempting to replace it with a revised one, which could not be considered.

De Sousa ineligible for award, Blocacor filed its protest with our Office, arguing that it was now the lowest-priced offeror otherwise eligible for award, and, as such, was an interested party to protest.³

ANALYSIS

Blocacor argues that its proposal should not have been rejected as technically unacceptable based on its failure to submit past performance information and the name of a qualified shipping company and disposal location because this information bears on its responsibility, and, as such, could have been submitted after the date set for receipt of proposals. The Air Force defends its rejection of the protester's proposal as technically unacceptable and argues that Blocacor would never have been selected for award in any event because it would not have been found responsible. As discussed below, we find that the contracting officer had a reasonable basis for determining Blocacor nonresponsible; accordingly, we need not address the issue of the technical acceptability of its proposal.⁴

The contracting officer states that if he were required to consider Blocacor for award, he would find the firm nonresponsible based on its performance under a prior

³The agency argued in a preliminary request for dismissal that Blocacor's protest, filed on May 3, was untimely because it was not received by our Office within 10 days after the protester's February 18 debriefing. We denied the request for dismissal, agreeing with Blocacor that until De Sousa was declared ineligible for award, the protester had not been an interested party to protest because De Sousa, whose proposal had been declared unacceptable for the same reasons as its own and whose price was lower, would have been in line for award ahead of it were Blocacor's protest to be sustained. See Kato Corp.--Recon., B-250605.2, Mar. 19, 1993, 93-1 CPD ¶ 246 at 5.

⁴With regard to the other arguments raised by the protester, Blocacor is not an interested party to complain about the agency's failure to conduct discussions with offerors other than itself since it suffered no prejudice as a result of the agency's action. See Norfolk Shipbuilding & Drydock Corp., B-248549, B-248549.2, Aug. 26, 1992, 92-2 CPD ¶ 127 at 3-4. Further, we will not consider the protester's arguments that the agency improperly failed to allow a reasonable time for the submission of responses to its discussion questions and to request another round of BAFOs because they were not raised in a timely manner. The protester was informed on the morning of January 15 that it would be given until noon that day to submit the information missing from its proposal; if it wished to protest the length of time that it was given to respond and/or the fact that the agency had not called for another round of BAFOs, it was required to do so at the latest within 10 days after that date, or by January 25. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1999); Merck & Co., Inc., B-248655, May 19, 1992, 92-1 CPD ¶ 454 at 3. Since the protester instead waited until over 3 months later to raise these arguments, they will not be considered.

contract for asbestos abatement, during the course of which Blocacor dumped asbestos at a site behind an elementary school in the Azores, in violation of the terms of the contract and federal and local environmental laws. Declaration of the Lajes Air Base Construction Contracting Officer, May 26, 1999. According to the Air Force, this illegal action demonstrates that Blocacor has neither a satisfactory performance record nor a satisfactory record of integrity and business ethics, as required for a determination of responsibility by FAR §§ 9.104-1(c), (d). Memorandum of Law at 8.

In making a responsibility determination, a contracting officer is vested with a wide degree of discretion and, of necessity, must rely upon his or her business judgment in exercising that discretion. Although the determination must be factually supported and made in good faith, the ultimate decision appropriately is left to the agency since it must bear the effects of any difficulties experienced in obtaining the required performance. For these reasons, we generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the part of the agency, or a lack of any reasonable basis for the contracting officer's determination. Miklin Corp., B-236746.2, Jan. 19, 1990, 90-1 CPD ¶ 72 at 1-2, recon. denied, B-236746.3, June 8, 1990, 90-1 CPD ¶ 540. Here, since the protester has not alleged bad faith on the part of the agency, the only issue for our consideration is whether the contracting officer reasonably found Blocacor nonresponsible based on its performance under the earlier contract for asbestos abatement.

While, because the protester was not in line for award, the agency never had to actually make a determination regarding its responsibility, the agency, as explained above, has submitted a statement that it would have found the firm nonresponsible, and the parties have addressed the issue in some detail, including the submission of relevant documents. The record shows that on April 23, 1998, the Air Force notified Blocacor that hazardous materials containing asbestos, some of which had originated at the site of the asbestos abatement project for which Blocacor was the contractor, had been discovered at a dumpsite behind Lajes Elementary School.⁵ Blocacor responded to the Air Force's letter the same day, denying that any hazardous materials had been dumped at the site behind the school "by BlocAçor or with our permission." Letter from BlocAçor to the Air Force at 1 (Apr. 23, 1998).⁶ Blocacor

⁵Although the type of materials found at the dumpsite which were believed to come from the site of the Blocacor contract was not identified in the contemporaneous documentation, the Air Force noted in a memorandum to our Office dated July 6, 1999, that "[t]ests were conducted and it was found that the tiles dumped illegally were from the Blocacor site."

⁶We note that the record is inconsistent in the spelling of the protester's name, varying between the Portuguese spelling, "BlocAçor," and an Americanized version, "Blocacor"; in our decision, we have used "Blocacor" unless the particular document cited used the Portuguese.

also stated that materials and equipment had been stolen from the project site. On April 29, the Air Force notified Blocacor that it was holding it accountable for the asbestos from the project site discovered at the dumpsite because under the terms of its contract, it was responsible for all aspects of asbestos disposal, including adequate safeguarding and security; as corrective action, the Air Force ordered Blocacor to retrieve from the dumpsite and properly dispose of all asbestos material that it had previously handled.

On April 30, Blocacor's president asked the Air Force to clarify the kind and quantity of asbestos material that was to be retrieved and disposed of. On June 30, the Air Force notified Blocacor that it was still developing a response to its request for clarification. On August 28, 1998, the contracting officer informed Blocacor that:

The obvious health hazards and danger to public health associated with asbestos removal demands that the company entrusted to perform this work exhibit high standards of business ethics, integrity, and ability. It is now the opinion of the contracting officer that your failure to ensure proper asbestos disposal as required under the contract draws into question your commitment to these standards and your ability to perform this type of work. Therefore, based upon the above, I hereby withdraw the opportunity for you to clean up the asbestos discovered at the site. The Government, however, does reserve the right to demand reimbursement against you for costs associated with clean-up due to your improper disposal under this contract.

The agency subsequently awarded a separate contract for clean-up of the dumpsite.

While Blocacor generally denies responsibility for any illegal dumping in connection with its contract, it offers no support for its position.⁷ Based on its discovery of the tiles from the Blocacor worksite in the dump, we think that the Air Force reasonably concluded that Blocacor had not properly handled the hazardous waste from that project. Given the gravity of the matter, we believe that the Air Force had a reasonable basis to determine that Blocacor's performance was seriously deficient

⁷The language in Blocacor's April 23 letter to the Air Force--in which it states that "[n]o hazardous materials from this contract [were] taken to the site behind the Lajes Elementary school by BlocAçor or with our permission"--suggests that, rather than disputing that illegal dumping occurred, Blocacor's position is that any such dumping occurred without its permission. The Air Force points out that, as the contractor on the project, Blocacor was responsible for all disposal of hazardous materials from the site.

and that, as a consequence, the firm was nonresponsible.⁸ See FAR § 9.104-3(b) (contractor who recently has been seriously deficient in contract performance shall be presumed to be nonresponsible).

Accordingly, since Blocacor would have been ineligible for award even if its proposal had been determined technically acceptable, it is unnecessary for us to reach the question of whether the determination of technical unacceptability was proper. Miklin Corp., B-236746.2, supra, at 3.

The protest is denied.

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⁸The April 29, June 30, and August 28 letters from the Air Force are addressed to “Construlages (Blocacor),” which apparently refers to Construlages, LDA and Blocacor, LDA, two companies headed by the same president and sharing the same address. At different points in its protest submissions, Blocacor appears to suggest that Construlages, not Blocacor, was the company accused of illegal dumping by the local government authorities in the Azores. Blocacor offers no evidence to support this assertion, however. Further, despite the form of address used in the Air Force letters, it is clear from those letters and Blocacor’s responses that both parties understood that the illegal dumping at issue concerned Blocacor’s contract.