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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Graves Construction, Inc.

File: B-294032

Date: June 29, 2004

William E. Guy for the protester.
Joseph A. Lenhard, Esq., Department of Energy, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation provision calling on "contractor" to have specified state license establishes a general performance requirement, not a prerequisite for award.

2. Although agency failed to verify whether proposed awardee was registered in Central Contractor Registration (CCR) database prior to award as required by solicitation, protester was not prejudiced as a result given that, even if agency had been aware of the awardee's lack of registration prior to award, the Federal Acquisition Regulation expressly allows contracting agency to delay award until after the awardee has registered in the CCR database, and the record shows that the awardee in fact did register in the CCR database shortly after award.

DECISION

Graves Construction, Inc. protests the award of a contract to The Krog Corporation under request for proposals (RFP) No. DE-RP09-03SR22262, issued by the Department of Energy (DOE) for the construction of a steel-reinforced, concrete vault structure known as Glass Waste Storage Building No. 2 in Aiken, South Carolina. Graves contends that Krog was not eligible for award because, at the time of award, Krog was not a licensed contractor in South Carolina and was not registered in the Central Contractor Registration (CCR) database. The protester also contends that Krog is not a qualified small business concern because of Krog's alleged improper affiliation with its large business teaming partner, and further maintains that the agency has acted in bad faith in various respects.

We deny the protest.

The agency issued the subject solicitation on August 13, 2003 as a small business set-aside for the Glass Waste Storage Building No. 2 project, which required the "design, construction and acceptance testing of a facility for interim storage of [High Level Waste] glass canisters" at a site located in Aiken, South Carolina. RFP § C.3.

As it relates to this protest, the RFP stated that "Contractors shall be licensed in South Carolina" in accordance with "South Carolina Code of Laws, Title 40, Chapter 11." RFP attach. J.5 I. In addition, the RFP incorporated various Federal Acquisition Regulation (FAR) clauses by reference, including FAR § 52.204-7 "Central Contractor Registration," which states in relevant part: "By submission of an offer, the offeror acknowledges the requirement that a prospective awardee shall be registered in the CCR database prior to award . . . ." FAR § 52.204-7(b)(1).

Four proposals were received by the RFP's closing date and award was ultimately made to Krog on March 29, 2004. On April 8, Graves filed an agency-level protest, which the agency dismissed on April 22.[1] Graves filed the instant protest on May 3, essentially raising the same issues it had raised in its agency protest. Principally, Graves contends that Krog's proposal should have been rejected as unacceptable because it did not satisfy the South Carolina licensing requirement quoted above and because Krog was not registered in the CCR database prior to award as required by FAR § 52.204-7(b)(1).[2]

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[1] DOE dismissed the agency-level protest on the ground that it was filed by Graves Environmental and Geotechnical Services, Inc., not Graves Construction, Inc., the actual offeror. DOE sought dismissal of the instant protest arguing that because Graves Construction, Inc. never filed a timely agency-level protest, its protest to our Office was untimely under our Bid Protest Regulations. We denied DOE's request for dismissal because the agency-level protest was at most unclear regarding the identity of the protester, given that it referenced both Graves Construction and Graves Environmental. We concluded that for purposes of determining the timeliness of the subject protest, Graves Construction had filed a timely agency-level protest and therefore a timely protest to our Office. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (2004).

[2] Graves also challenges Krog's status as a small business concern, suggesting that it is improperly affiliated with and controlled by a large business concern. We will not consider this contention because a challenge of a firm's size status is exclusively for review by the Small Business Administration (SBA), not our Office. 4 C.F.R. § 21.5(b)(1). We note that Graves had raised this issue in its agency-level protest and asked the agency to forward the issue to the SBA. On April 15, the agency referred the matter to the SBA for review and the SBA dismissed the size challenge as untimely.

Contrary to the protester's interpretation of the solicitation, compliance with the South Carolina license requirement was not a prerequisite for award. Rather, the solicitation merely required the "contractor" to be licensed in South Carolina. In this regard, the use of the term "contractor" generally indicates that the licensing requirement is a general performance requirement to be addressed by the successful awardee, post-award. Buckeye Park Servs., Inc., B-282282, Apr. 27, 1999, 99-1 CPD ¶ 88 at 2. Thus, the argument that the license requirement rendered Krog's proposal unacceptable is without merit.

With regard to the protester's argument that Krog was ineligible for award because it was not registered in the CCR database at the time of award, Graves has failed to establish that it was prejudiced by this error. Competitive prejudice is necessary before we will sustain a protest; where the record does not demonstrate that the protester would have had a reasonable chance of receiving award but for the agency's actions, we will not sustain a protest, even if deficiencies in the procurement process are found. Leisure-Lift, Inc., B-291878.3, B-292448.2, Sept. 28, 2003, 2003 CPD ¶ 189 at 10; Statistica v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Here, the agency admits that it failed to verify whether Krog was registered in the CCR database prior to making award on March 29. Upon learning that Krog was not registered, the contracting officer instructed Krog to register in the CCR database and Krog promptly complied by April 13. DOE maintains, however, that Krog would have received the award in any event because had it known that Krog was not registered, the agency simply would have delayed the award to allow Krog to register, as authorized by FAR § 4.1103(c)(1), which expressly provides that a contracting officer can delay award until "after the apparently successful offeror has registered in the CCR database."[3] Since Krog would have received the award despite the misstep concerning the timing of Krog's registration in the CCR database, Graves has failed to establish that it was prejudiced by this error.

Graves also alleges that the agency has acted in bad faith as evidenced by the agency's failure to address the various concerns raised in its protests; by the fact that the contracting officer discussed with Graves the possibility of paying its bid and proposal costs in return for Graves waiving potential claims; and by DOE's failure to disclose certain information in connection with a Freedom of Information Act request. Government officials are presumed to act in good faith and, where a protester contends that contracting officials are motivated by bias or bad faith, it must provide convincing proof, since our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or

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[3] The agency further notes that Graves itself was not registered in the CCR database at the time it made award and did not complete its registration until April 8, the date of its agency-level protest.

suppositions. American Artisan Prods., Inc., B-292559, B-292559.2, Oct. 7, 2003, 2003 CPD ¶ 176 at 9. Here, other than innuendo, Graves has provided no support for its bad faith allegation.

The protest is denied.

Anthony H. Gamboa
General Counsel