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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Transcontinental Enterprises, Inc.

File: B-294765

Date: November 30, 2004

Heath Carroll, Esq., Dixon, Doub, Conner & Foster, for the protester.
Brian Koji, Esq., Allen, Norton & Blue, for Call Henry, Inc., an intervenor.
Anthony G. Beyer, Esq., Environmental Protection Agency, 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

Protest challenging an agency's affirmative determination of the awardee's responsibility on the ground that the contracting officer failed to consider the fact that the awardee did not possess a North Carolina unlimited general contractor's license at the time of award, and could not likely obtain the required license in a timely manner, if at all, is dismissed where the record shows that the license was not required to perform most of the work called for under the solicitation, if any work at all; thus, information regarding the awardee's ability to obtain the license is not the type of information that would be expected to have a strong bearing on the awardee's responsibility, and, as a result, an allegation that the agency failed to consider such information is not sufficient to trigger review by GAO of the agency's affirmative responsibility determination.

DECISION

Transcontinental Enterprises, Inc. protests the agency's decision to award a contract to Call Henry, Inc., pursuant to request for proposals (RFP) No. PR-NC-03-10653, issued by the Environmental Protection Agency (EPA) for facilities management and support services for its Research Triangle Park, North Carolina, facilities. The protester challenges the agency's affirmative determination of Call Henry's responsibility.

We dismiss the protest.

On January 29, 2004, the agency issued the subject solicitation as a small business set-aside for the provision of all facilities support services at various EPA facilities

located in the Research Triangle Park area of North Carolina. The RFP's statement of work set forth numerous specific facilities support services requirements.¹ In addition, as it relates to this protest, the RFP, as amended, stated that "[t]he Contractor shall possess a State of North Carolina unlimited general Contractor license and shall establish and maintain a process for identifying, acquiring, and maintaining records of all permits required for performance of the work. Permits shall be obtained from the City/County Building Inspector" RFP, Statement of Work, at 10.

By the March 4 due date for receipt of proposals, the agency had received four proposals. After setting a competitive range, which included the offers of Transcontinental and Call Henry, holding discussions with the remaining offerors, and evaluating revised proposals, the agency decided to make award to Call Henry. As part of the award decision, the agency determined that Call Henry was a responsible firm, as required by Federal Acquisition Regulation (FAR) § 9.103. In making this determination the agency considered Call Henry's financial resources, performance history, representations and certifications, as well as its organization, experience, and technical capability as reflected in its technical proposal. See Agency Report (AR) at 5. Upon learning of the agency's award decision, Transcontinental filed this protest challenging the agency's affirmative responsibility determination with regard to Call Henry.

¹ The statement of work indicated that the facilities support services included, but were not limited to, the following:

- (1) Alterations, modifications of laboratory and office space, and repair of buildings, equipment, and electrical, mechanical/plumbing systems;
- (2) Planning, estimating, engineering and scheduling of Work Orders;
- (3) Review of proposed changes to EPA [Research Triangle Park] Facilities; (4) Shop services: carpenter, machine, and metal;
- (5) Preventive/Predictive maintenance (PM) inspections and repairs;
- (6) Electrical safety inspections and maintenance of electrical services/panels and substation switchgear; (7) Electronic security system maintenance; (8) Fire extinguisher inspections and maintenance; (9) Inspection, maintenance, and repair of Government-owned fire alarm and sprinkler systems; (10) Chapel Hill – building management and control systems maintenance; (11) Building Automation System (BAS) operation and maintenance . . . ; (12) Picture perfect Rusco card access system operation and maintenance (includes issuance of ID/access cards (15) Elevator maintenance;
- (16) Locksmith services; (17) Sign services; (18) Environmental Compliance; (19) Snow removal service . . . ; (20) Roadway/surface parking lot and parking deck maintenance; and (21) Shuttle service.

RFP, Statement of Work, at 12.

Transcontinental argues that the agency unreasonably found Call Henry responsible because the agency failed to consider that Call Henry did not possess a North Carolina unlimited general contractor's license at the time of award; that Call Henry will not be able to timely obtain such a license, if at all; and that, as a consequence, Call Henry will not be able to obtain the necessary state permits to perform the work required under the solicitation.

Our Office will not consider a protest challenging an affirmative determination of responsibility except under limited circumstances, because the determination that a particular contractor is capable of performing a contract is largely committed to the contracting officer's discretion. 4 C.F.R. § 21.5(c) (2004). We recently revised our Regulations in this regard to add as a specified exception 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. *Id.* We explained in the preamble to the revision that it was intended to encompass protests where, for example, the protest includes specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. 67 Fed. Reg. 79,833, 79,834 (2002); see Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4.

Here, the protester's allegations could be viewed as raising serious concerns that the agency may have failed to consider relevant responsibility information since an offeror's ability to meet a license requirement set forth in a solicitation relates to the offeror's general responsibility,² see, e.g., United Seguranca, Ltda., B-294388,

² In its initial protest, Transcontinental also argued that the North Carolina contractor's license requirement constituted a definitive responsibility criterion. While our Regulations provide that we will consider protests alleging that definitive responsibility criteria in a solicitation were not met, see 4 C.F.R. § 21.5(c), we dismissed this basis of protest on the ground that the license requirement did not constitute a definitive responsibility criterion because the solicitation did not specifically require offerors to possess or show the ability to obtain the license prior to award. We concluded that the license issue was a contract performance requirement that would not affect the decision to award the contract other than in the context of a general responsibility determination and thus continued to develop only the subject challenge of the agency's affirmative responsibility determination.

After its initial protest filing, Transcontinental raised a supplemental basis for protest, arguing that Call Henry's key personnel lacked certain specific licenses as required by the solicitation. We dismissed this basis of protest as untimely because the allegation was raised more than 10 days after Transcontinental knew or should have known of this basis of protest. 4 C.F.R. § 21.2(a)(2).

October 21, 2004, 2004 CPD ¶ 207 at ____; Restec Contractors, Inc. B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154 at 4, and the solicitation here specifically called for the contractor to possess a particular license. As explained below, however, information regarding the awardee's ability to obtain the license is not the type of information that would be expected to have a strong bearing on the awardee's responsibility here, so that any contention that the agency failed to consider such information is not sufficient to trigger review by our Office of the agency's responsibility determination.

As a general matter, under North Carolina law, a general contractor's license is required for "the construction of any building, highway, public utilities, grading or any improvement or structure, where the cost of the undertaking is thirty thousand dollars (\$30,000) or more . . ." N.C. Gen. Stat. § 87-1 (2004). Here, the agency maintains that the RFP's requirements are primarily for facility maintenance services, not construction. Specifically, according to the agency, only one area out of the 21 areas described in the statement of work could potentially involve construction work.³ While Transcontinental asserts generally that "the majority of the employees and the value of the work orders are primarily construction in nature," the protester does not explain how, or what part of, the work qualifies as construction under North Carolina law, Protester's Comments at 2-3, and the requirements, on their face, do not suggest that construction work will be required to any significant extent, if at all. In fact, the term "construction" is not used to describe any of the required services under the RFP; rather, virtually all of the requirements are described as repair, inspection, or maintenance activities.

Responsibility ultimately concerns the contracting officer's judgment as to a firm's ability to perform the work and whether the firm has sufficient integrity for the government to rely on its representations and agreement to perform. See generally FAR subpart 9.1. Because the work under the RFP was not primarily for construction—rather, construction appears to be encompassed, if at all, under only one of the 21 requirements set forth in the RFP—it is reasonable to regard the license requirement, as argued by the agency, as having little bearing on Call Henry's ability to perform the required work. As a result, the protester's contention that the

³ The agency does not identify which of the 21 work areas it believes could involve construction; however, based upon a review of the requirements, it seems most likely that the agency is referring to the requirements under "(1) Alterations, modifications of laboratory and office space, and repair of buildings, equipment, and electrical, mechanical/plumbing systems," since they potentially involve work requiring modifications to building space, and none of the other requirements would appear to encompass any construction work.

agency failed to consider information regarding the awardee's ability to obtain the license does not satisfy the threshold requirement for our review of the agency's responsibility determination under 4 C.F.R. § 21.5(c).

The protest is dismissed.

Anthony H. Gamboa
General Counsel