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

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Decision

Matter of: T. F. Boyle Transportation, Inc.

File: B-310708; B-310708.2

Date: January 29, 2008

Jonathan T. Cain, Esq., and Helen Guyton, Esq., Mintz Levin, for the protester. H. Jack Shearer, Esq., Young H. Cho, Esq., and Renee Holland, Esq., Department of Energy; and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Provision in solicitation that required offeror to demonstrate its capability of passing a Department of Energy Office of Transportation “Motor Carrier Evaluation Program” audit did not constitute a definitive responsibility criterion because it does not contain specific and objective standards.
 2. Protest challenging affirmative responsibility determination is denied where the protester’s allegations do not establish that the contracting officer failed to consider available relevant information.
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DECISION

T. F. Boyle Transportation, Inc. protests the award of a contract to Visionary Solutions, LLC under request for proposals (RFP) No. DE-RP30-06EW20001, issued by the United States Department of Energy (DOE), for transportation of transuranic (TRU) waste. Boyle contends that Visionary was improperly determined to be a responsible contractor.

We deny the protest.

The DOE operates a “Waste Isolation Pilot Plant” (WIPP) near Carlsbad, New Mexico, which is an underground repository for radioactive waste generated from the research and production of nuclear weapons at DOE sites. The RFP, issued January 6, 2006, sought proposals to provide the facilities, personnel, equipment, and services to transport TRU waste from various DOE sites to the WIPP across designated highway routes. It contemplated the award of two indefinite-delivery

indefinite-quantity, fixed-price contracts for a base period, with four 12-month and one 2-month option periods. One award was based on full and open competition and the other award was set aside for small businesses. The award in question here was under the set-aside portion of the RFP. The awards were made on a best-value basis considering technical and management approach, past performance, and price.

As initially issued, the RFP required the offeror identified for the award to undergo a “Motor Carrier Evaluation Program” (MCEP) audit as a precondition to receiving the award.¹ RFP § M.6. Amendment No. 0004 to the RFP, issued March 10, deleted this requirement and incorporated the following:

The contractor shall undergo and pass the [MCEP] Audit. The MCEP Audit that is conducted by DOE is an extensive audit of all facets of a carrier’s business operations including an extensive on-site physical review of records and equipment. . . . If the Contractor does not pass the Audit, the Government reserves the right to terminate the contract for default.

RFP amend. 4, § H.21. This amendment also amended the proposal instructions to state, “[i]t is the offerors responsibility to demonstrate its capability to pass the MCEP Audit through completing and submitting the MCEP Audit Prescreening Forms” with its proposal. Id. § L.27.b.iii. Amendment No. 0006 to the RFP, issued March 23, further amended this section of the proposal instructions to add:

In addition it is the Offeror’s responsibility to demonstrate the capability of its teaming partners and/or members, if a newly formed entity, members of the newly formed entity, and subcontractors responsible for transporting TRU waste, to pass the MCEP Audit. Forms shall be submitted for the Offeror, its teaming partners and/or members, if a newly formed entity, members of the newly formed entity, and subcontractors responsible for transporting TRU waste, and shall be submitted with the Offeror’s proposal.

RFP amend. 6, § L.27.b.iii.

Three proposals, including Boyle’s and Visionary’s, were received in response to the set-aside portion of the RFP by the March 31, 2006 closing date. Following

¹ The MCEP is a DOE (Office of Transportation) management tool for ensuring that DOE field offices and contractors use only qualified carriers to transport DOE-owned radioactive materials and hazardous waste. Under the MCEP audit, DOE determines safety evaluation area (SEA) values for transportation carriers. SEA values are calculated by the Department of Transportation Federal Motor Carrier Safety Administration to score transportation carriers for safety.

discussions, DOE received final proposal revisions from the offerors in November 2006. Visionary's final proposal explained that "[a]s a result of finalization of the acquisition [of Interstate Ventures, Inc. in September 2006] [Visionary] is now a transportation and logistics company operating under the motor carrier operating authority granted by the U.S. Department of Transportation (DOT) through USDOT No. 1021543, permit number MC 422210-P Interstate Ventures, Inc. (dba Visionary Solutions), a Visionary Solutions, LLC wholly owned subsidiary." Agency Report, Tab 6, Visionary's Final Proposal (Nov. 9, 2006). vol. IV, at 96. Also included in Visionary's final proposal was a revised MCEP screening form specifying Interstate Ventures, Inc. d/b/a Visionary Solutions as the motor carrier.² *Id.*, attach. D.

The source selection authority (SSA) determined that Visionary's lower-priced, technically inferior proposal offered the best value instead of Boyle's technically superior, higher-priced proposal. However, the contracting officer determined that Visionary was not a responsible contractor, finding that that firm had not complied with the limitations on subcontracting clause in the RFP because of the business relationship between Visionary and Interstate Ventures.³

On March 20, 2007, the matter was referred to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC). On April 12, the SBA determined that Visionary was responsible based upon that firm's proposal of a corrective action plan. The SBA explained:

[Visionary's] corrective action plan is that 100% of the personnel assigned to the WIPP Transportation Services project will be [Visionary] employees. This will include all drivers assigned to perform transportation services, maintenance personnel and office/clerical personnel located at [Visionary's] facility to be located within 70 miles of the WIPP facility. The WIPP transportation services project will be managed by [Visionary's] management. The proposal stated that [Visionary] would lease all equipment, including tractors,

² The initial proposal included MCEP Prescreening Forms identifying Interstate Ventures, Inc. as the carrier with the same USDOT and permit numbers. However, in September 2006, Visionary had requested a name change after acquiring Interstate Ventures, and received approval to operate as Interstate Ventures, Inc. d/b/a Visionary Solutions under the same license and permit numbers as had been held by Interstate Ventures. Agency Report, Tab 6, Visionary's Final Proposal (Nov. 9, 2006), vol. IV, at 64-66.

³ The RFP incorporated by reference Federal Acquisition Regulation (FAR) § 52.219-14, Limitations on Subcontracting, which requires at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern. See FAR § 52.219-14 (b)(1).

maintenance and ancillary equipment and drivers from the Interstate Ventures . . . subsidiary. [DELETED] This modification will ensure that greater than 51% of all personnel and total cost incurred on the WIPP project are directly derived from [Visionary] employees at all times.

Agency Report, Tab 10, SBA E-mail to Contracting Officer (Apr. 13, 2007).

Inasmuch as this was a major change to Visionary's proposal, DOE conducted further discussions with, and obtained final proposal revisions from, Boyle and Visionary. Visionary's final revised proposal included the following:

As of May 1, 2007, Visionary Solutions, LLC has completed the acquisition and assimilation of Interstate Ventures Inc., our wholly owned subsidiary, into our operations. With the total assimilation of Interstate Ventures, Inc. Visionary Solutions, LLC now operates under the U.S. Department of Transportation (DOT) permit number MC 422210-P and USDOT No. 1021543.

Agency Report, Tab 11, Visionary's Final Proposal (June 1, 2007), vol. IV, at 1. This final proposal revision also contained a revised MCEP Prescreening Form and evidence of Visionary's ability to pass a post-award MCEP audit.

After the revised proposals were evaluated, the SSA again determined that Visionary's proposal was the best value. The SSA found that even though Boyle had a superior technical rating, "the comparative advantage in technical and past performance merit of the Boyle proposal is not worth the substantial price differential between the two proposals." Contracting Officer's Statement at 12. Prior to making the award, the contracting officer determined and documented that Visionary was a responsible contractor. In so doing, the contracting officer found:

Visionary has the future capability to pass the DOE MCEP Audit required by Section H.21 of the solicitation. This is based on the pre-screening evaluation performed by the DOE . . . Office of Transportation. That evaluation concluded that Visionary, together with its wholly-owned subsidiary Interstate Ventures, Inc., has the capability to pass the DOE MCEP audit.

Agency Report, Tab 14, Responsibility Determination (Sept. 20, 2007), at 2. DOE made award to Visionary on September 27. After a debriefing, this protest followed.

Boyle argues that Visionary could not demonstrate that it was capable of passing the MCEP audit prior to the award due to the fact that Interstate Ventures, on whose operating experience Visionary relied, had unacceptably high SEA scores, which meant that Visionary was not able to demonstrate its

ability to pass an MCEP audit. Boyle also contends that Visionary, which has no operating experience of its own, could not rely upon Interstate Ventures' experience to satisfy this responsibility requirement because Visionary's final revised proposal indicated that Interstate Ventures would have no role in the performance of the contract services.

Because the determination that an offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO generally will not consider protests challenging affirmative determinations of responsibility except under limited, specified exceptions. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2007); Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 3-4. The exceptions are protests that allege that definitive responsibility criteria in the solicitation were not met and those 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).

A definitive responsibility criterion is a specific and objective standard, qualitative or quantitative, that is established by a contracting agency in a solicitation to measure an offeror's ability to perform a contract. Moreover, in order to be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving the award. Public Facility Consortium I, LLC; JDL Castle Corp., B-295911, B-295911.2, May 4, 2005, 2005 CPD ¶ 170 at 3.

Contrary to Boyle's contentions, the requirement for an offeror to demonstrate in its proposal the capability to pass the MCEP audit by completing and submitting MCEP prescreening audit forms is not a definitive responsibility criterion. This provision did not contain a specific and objective standard. Moreover, amendment 4 to the RFP specifically deleted the requirement that made passing the MCEP audit a precondition to the award, and recognized that passing the MCEP audit would take place after the award. Thus, this provision only concerns the agency's determination of the general responsibility of the awardee, that is, its ability to perform the contract consistent with all legal requirements. Id.

As to the other exceptions to our general rule to not consider protests of affirmative determinations of responsibility, we will consider 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. See Verestar Gov't Servs. Group, supra, at 4; Universal Marine & Indus. Servs., Inc., B-292964, Dec. 23, 2003, 2004 CPD ¶ 7 at 2. However, as previously noted, Visionary's final revised proposal fully disclosed its relationship with

Interstate Ventures, which reflected that Interstate Ventures had been acquired and assimilated into Visionary's operations, including hiring all drivers as Visionary employees who would perform under the contract and that Visionary had been granted the authority to operate under Interstate's Ventures' permit numbers. Thus, the record shows that the contracting officer was aware of the relationship between, Visionary and Interstate Ventures and found that Visionary had demonstrated that it was capable of passing the MCEP process on the basis of Interstate Venture's status as an approved DOE carrier. See Agency Report, Tab 13, DOE E-mail concerning Visionary's MCEP Compliance (Aug. 3, 2007). Although Boyle complains that Visionary should not be allowed to rely solely on Interstate Venture's status as a DOE-approved carrier, we cannot conclude that the contracting officer failed to consider all the relevant information in making its responsibility determination.⁴

The protest is denied.

Gary L. Kepplinger
General Counsel

⁴ DOE reports that Visionary passed the MCEP process on the basis of its status of Interstate Ventures d/b/a Visionary Solutions. We need not address Boyle's contentions questioning whether the agency MCEP audit of Interstate Ventures d/b/a Visionary Solutions after the award, instead of Visionary, was appropriate because whether the agency conducted an appropriate MCEP audit of Visionary is a matter of contract administration that is the responsibility of the contracting agency and is not for consideration of our Office. Public Facility Consortium I, LLC; JDL Castle Corp., supra, at 5.