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Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: A. Prentice Ray & Associates, LLC

File: B-419024.5; B-419024.6

Date: December 22, 2021

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Stephen T. O'Neal, Esq., General Services Administration, for the agency.
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DIGEST

Protest that agency improperly failed to refer protester to the Small Business Administration for a Certificate of Competency review is denied where the contracting officer did not make a nonresponsibility determination, but rather concluded that the protester's proposal was not among the highest technically rated proposals in line for award.

DECISION

A. Prentice Ray & Associates, LLC (APRA), an 8(a) small business of Washington, D.C., protests the decision by the General Services Administration (GSA) not to make an award to APRA under solicitation No. GS00Q-13-DR-0002-8(a) for its One Acquisition Solution for Integrated Services (OASIS) small business multiple award contract solution.[1] The protester contends that the agency failed to implement the corrective action promised in response to APRA's prior protest. In addition, as in its earlier protests, APRA contends that the agency's improper scoring of its proposal under three financial capability factors was tantamount to a nonresponsibility determination that required GSA to refer APRA to SBA for a Certificate of Competency (COC) review.

We deny the protest.

[1] Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) 19.800. This program is commonly referred to as the 8(a) program.

BACKGROUND

OASIS small business contracts consist of seven separate pools of governmentwide multiple-award, indefinite-delivery, indefinite-quantity task order contracts that span 29 North American Industry Classification System codes under economic subsector 541, Professional, Scientific, and Technical Services. Contracting Officer's Statement (COS) at 1. OASIS small business contracts, first awarded in 2014, permit GSA to conduct an open season competition (also referred to as on-ramping or subpool creation) to establish the ability for agencies to conduct 8(a) set aside competitions within the established pools. *Id.* In the procurement at issue in this protest, GSA sought to competitively award multiple subpool contracts to 8(a) businesses under six of the seven pools.[2] *Id.* at 1-2. This protest relates solely to the agency's award decision under subpool 2, where the solicitation stated the agency intended to award eight 8(a) subpool 2 contracts.[3] *Id.* at 2; Solicitation at 122.

On April 29, 2019, the solicitation was posted to the Federal Business Opportunities website (now beta.SAM.gov). COS at 2. The solicitation stated that award would be made to the highest technically rated offerors with a fair and reasonable price. Solicitation at 122. The solicitation provided detailed proposal preparation instructions that required submission of the following six proposal volumes: (1) general; (2) responsibility; (3) relevant experience; (4) past performance; (5) systems, certifications, and clearances; and (6) price. *Id.* at 83-121. The solicitation established a self-scoring system whereby offerors could claim a maximum of 10,000 points under the three evaluation criteria as follows: relevant experience (4,000 points), past performance (4,000 points), and systems, certifications, and clearances (2,000 points). *Id.* at 134-135.

The solicitation stated that proposals would be subject to an initial screening to ensure that proposals conformed to the submission instructions and met all minimum requirements, and any proposal failing to satisfy the minimum requirements would be removed from consideration. *Id.* at 124. The solicitation further explained that the agency would then evaluate the proposals and review the offerors' self-scoring as follows:

> In the event any scored evaluation criteria claimed credit for by the Offeror is unsubstantiated and not given credit for by the evaluation team, the Offeror shall have the point value of the refuted score deducted and the Offeror will be re-sorted based upon their revised evaluated score. If the

[2] The agency also issued a separate on-ramping solicitation for OASIS small business pools 1, 3, and 4 at the same time as the 8(a) solicitation. COS at 2.

[3] The services in subpool 2 include the following: offices of certified public accountants; tax preparation services; payroll services; other accounting services; and research and development in the social sciences and humanities. Agency Report (AR), Tab 2, Solicitation at 45.

> Offeror does not remain in the highest scored offers, the next highest rated Offeror based upon score who passes the acceptability review shall be added in that Offeror's place and evaluation will proceed on that Offeror. This cycle will continue until the evaluation team has verified and validated the highest scored offers for the respective Pools. . . . Once the highest scored offers, including all ties, have been accomplished, evaluations will cease and all successful contract awards will be issued under the applicable SubPool.

Id. at 123.

The agency received 16 proposals for subpool 2 by the June 28, 2019, due date. COS at 2. APRA submitted a proposal for subpool 2 with a self-score of 5,200 points. *Id.* at 3. In addition, APRA submitted proposals to compete for small business pool 1 and 8(a) subpool 1 contracts, and included the same supporting documentation for its systems, certifications, and clearances volume in all three proposals. COS at 2, 5.

During GSA's review of APRA's small business pool 1 proposal, the contracting officer concluded that APRA failed to submit supporting documentation to substantiate that it had an approved purchasing system (500 points), an acceptable estimating system (200 points), and a forward pricing rate agreement or approved billing rates (200 points) under the systems, certifications, and clearances criterion. COS at 4. The contracting officer engaged in clarifications with APRA regarding the missing documentation. AR, Tab 7, GSA Communications with APRA at 1-2. In its response, APRA acknowledged that it did not have additional documentation to provide and requested that GSA proceed with the deduction of all 900 of these points from APRA's score. *Id.* at 3. Because these clarifications occurred prior to the agency's review of APRA's subpool 2 proposal, and the proposals included the same documentation, the contracting officer did not engage in any further clarifications with APRA after its evaluation of APRA's proposal for subpool 2. COS at 4. Rather, on the basis of this prior clarification, the contracting officer similarly deducted 900 points from APRA's subpool 2 self-score, resulting in a score of 4,300 points. *Id.*

In the course of evaluating subpool 2 proposals, GSA first identified four offerors that merited award on a competitive basis without engaging in clarifications; the lowest of the evaluated scores for these offerors was 6,700 points. AR, Tab 9, SubPool On-Ramping Award Decision Document (Phase 1) at 28. Upon further review of subpool 2 proposals that required clarifications, the agency identified the next four highest technically rated proposals with fair and reasonable pricing; of these, the lowest evaluated score was 4,475 points. AR, Tab 9, SubPool On-Ramping Award Decision Document (Phase 3) at 29-30.

On August 12, 2020, the agency notified APRA that its proposal was not selected for a subpool 2 contract award. AR, Tab 7, GSA Communications with APRA at 8. On August 24, APRA filed its first protest with our Office arguing, as it does here, that the agency should have referred APRA to SBA for a COC determination. On November 10,

our Office dismissed the protest because the matter involved was then pending before the U.S. Court of Federal Claims (COFC). *A. Prentice Ray & Assoc., LLC*, B-419024.3, Nov. 10, 2020 (unpublished decision).

On July 12, 2021, following resolution of the COFC litigation, APRA filed a second protest with our Office. On August 5, the agency stated that it would take corrective action and refer APRA to SBA for a possible COC determination, accordingly our Office dismissed the protest as academic. *A. Prentice Ray & Assoc., LLC*, B-419024.4, Aug. 10, 2021 (unpublished decision). On September 7, GSA informed APRA that SBA had concluded it had no basis to proceed with a COC determination. Protest, exh. A, Email from GSA to APRA. This protest followed.

DISCUSSION

The protester argues that GSA failed to implement its promised corrective action. The protester again argues that GSA eliminated its proposal on a pass/fail basis under financial capability factors, which was tantamount to a nonresponsibility determination, and should have referred APRA to SBA for a COC determination. As discussed below, we conclude that the agency's evaluation of APRA's proposal and decision not to select APRA for award are reasonable and consistent with the terms of the solicitation, therefore we find no basis to sustain the protest.

Corrective Action

The protester argues that GSA failed to implement the promised corrective action, and failed to make a valid referral to SBA in a manner that would permit SBA to perform a COC determination for APRA. Protest at 10-12; see also Comments & Supp. Protest at 4 ("Because GSA did not act in accordance with its promised corrective action, more time and resources were expended because APRA was forced to file its Protest yet again."). The agency argues that its corrective action was consistent with its notice of corrective action. Memorandum of Law (MOL) at 17-18.

In its notice of corrective action in response to APRA's immediate prior protest, the agency stated that GSA would "refer [the protester] to [SBA] for a possible [COC] determination to resolve any matters of responsibility." *A. Prentice Ray & Assocs., LLC*, B-419024.4, *supra* at 1. The record shows that on August 31, 2021, GSA sent a communication to SBA, submitting documents "for a possible COC determination as requested by [APRA]" and stating in pertinent part as follows:

> As detailed in the referral package, GSA determined that an Offeror's technical proposal was not rated high enough in comparison to other Offerors to merit award. The unsuccessful Offeror, APRA, has alleged that GSA should have referred their proposal to SBA for a COC determination. Accordingly, GSA is doing so now, despite the fact that GSA did not find that the Offeror was not responsible.

Tab 12, GSA Communications with SBA at 2. On September 1, SBA responded that it did not have a basis to proceed with a COC review because there was no basis for a valid referral under the circumstances. *Id.* at 1 ("Only a contracting officer has the authority to issue a nonresponsibility determination for a firm and refer it to SBA for a [COC]. An Offeror cannot refer itself for a [COC]. SBA has no basis for proceeding with a [COC] without a valid referral based on a valid nonresponsibility determination.").

As an initial matter, we acknowledge that GSA's communication to SBA did not conform to the requirements for making a COC referral. Indeed, the agency knew that SBA does not perform COC determinations without a contracting officer's determination that a firm is nonresponsible, and admits that its communication to SBA did not include a nonresponsibility determination. MOL at 17 ("The referral advised SBA that no non-responsibility determination had been made."); COS at 6 ("FAR 19.602-1 normally requires the referral to include a [contracting officer's] determination of non-responsibility but because that was not applicable here, I included a [contracting officer's] statement of facts as a replacement document in the referral package instead.").[4] Nonetheless, there is no basis to sustain the protest because we find no merit to APRA's challenges to the agency's evaluation of its proposal and decision not to make an award to APRA.

Evaluation of APRA's Proposal

Turning to the merits of the current and earlier protest, APRA argues that GSA violated procurement law and regulations because it downgraded the firm's proposal on the basis of financial capability factors without referring APRA to SBA for a COC determination. Protest at 12-15; Comments & Supp. Protest at 4-16. Specifically, APRA argues that deducting 900 points from its self-score for failing to substantiate that it had an approved purchasing system, a forward pricing rate agreement, or an

[4] The agency also argues that "SBA's refusal to issue a COC determination supports GSA's argument in defense against APRA's Protest." MOL at 18. To the contrary, we think SBA's refusal indicates only SBA's compliance with its regulations since here, GSA's contracting officer did not make a nonresponsibility determination for APRA. *See* 13 C.F.R. § 125.5(a)(2) (requiring a contracting officer to refer a small business concern to SBA for a possible COC where the agency has denied an award to an apparent successful small business offeror on the basis of responsibility, or otherwise refuses to consider a small business concern because of a failure to meet responsibility or responsibility type criteria).

In this regard, GSA's communication to SBA made the same arguments it made here in response to APRA's previous protest, *i.e.*, that the deduction of 900 points from APRA's self-score was not the result of its assessment of APRA's financial capability, and GSA did not find APRA nonresponsible. Since GSA's corrective action was, by design, not likely to result in a COC review, the issue remained unresolved. As a result, APRA filed (and the agency was required to defend) a second protest raising the same arguments as before.

acceptable estimating system, "was tantamount to an adverse responsibility determination on an otherwise successful offeror." Protest at 2. The agency argues that the evaluation of APRA's proposal and decision not to make an award to APRA were reasonable and consistent with the terms of the solicitation, and the contracting officer did not make a nonresponsibility determination that required referral to SBA. MOL at 10-17.

As noted, the solicitation required offerors to include information regarding systems, industry certifications, and facility clearances in volume 5 of their proposals, with the potential to claim up to 2,000 points. Solicitation at 116-119. The solicitation stated that these requirements were "not minimum or mandatory requirements," however offerors submitting the information would be "considered more favorably." *Id.* at 116; *see also id.* at 126 ("If the Offeror chooses to submit Systems, Certifications, and/or Clearances, the Offeror must ensure all the requested proposal submission information is current, accurate, and complete in accordance with Sections L.5.5 through L.5.5.10."). As relevant here, regarding an approved purchasing system, section L.5.5.1 of the solicitation stated as follows:

> "Approved Purchasing System" means the Offeror's systems for purchasing and subcontracting, including make-or-buy decisions, the selection of vendors, analysis of quoted prices, negotiation of prices with vendors, placing and administering of orders, and expediting delivery of materials has been audited and approved by the Defense Contract Management Agency (DCMA) or Cognizant Federal Agency (CFA).

Id. at 116. The solicitation required that offerors claiming credit for this scoring element, *i.e.*, 500 points, "shall submit verification from DCMA or CFA of an approved purchasing system." *Id.*

Section L.5.5.2 of the solicitation defined a forward pricing rate agreement (FPRA), forward pricing rate recommendation (FPRR), and provisional billing rates, further stating: "If claiming credit for this scoring element, the Offeror shall submit verification from the Defense Contract Audit Agency (DCAA), [DCMA, or CFA] of FPRA, FPRR, and/or Provisional Billing Rates that have been audited and determined acceptable for generating estimates of costs and other data included in proposals submitted to the Government." *Id.* at 116. Likewise, section L.5.5.4 of the solicitation defined an acceptable estimating system and stated: "If claiming credit for this scoring element, the Offeror shall submit verification from [DCAA, DCMA, or CFA] of an approved estimating system." *Id.* at 117.

Separately, in two other proposal volumes which were not point-scored, the solicitation required offerors to provide both general information (volume 1), and information regarding responsibility (volume 2), in order to be eligible for award. *Id.* at 83, 97. Among other things, the general information required by volume 1 included pre-award survey information for the agency to assess whether the offeror had an acceptable accounting system, and stated that the contracting officer would rely on the

recommendation of the DCAA, DCMA, and/or other CFA to make this determination. *Id.* at 91 (§ L.5.1.7(c)). Volume 2 required that offerors submit information concerning responsibility, specifically information to demonstrate "adequate financial resources to perform the contract, or the ability to obtain them." *Id.* at 97-99 (§ L.5.2).

Finally, the solicitation further stated: "Failure to provide sufficient evidence within a Contract or Task Order document and/or other verifiable contractual documents to substantiate all minimum requirements/points claimed for any proposal element may result in a deduction of points and/or removal of the proposal from consideration for award." *Id.* at 71; *see also id.* at 122 ("The Government intends to strictly enforce all of the proposal submission requirements outlined in Section L. Failure to comply with these requirements may result in an Offeror's proposal being non-compliant to the Solicitation and rejected.").

APRA submitted identical volume 5 proposals (*i.e.*, the earlier described volume for information regarding systems, industry certifications, and facility clearances) for GSA's small business pool 1, 8(a) subpool 1, and 8(a) subpool 2 competitions. COS at 5. Volume 5 of APRA's proposals did not include any of the verification documents identified in the solicitation to claim credit for an approved purchasing system; an FPRA, FPRR, or provisional billing rates; or an acceptable estimating system. Instead, APRA provided a one-page statement regarding its purchasing system; a May 31, 2019, letter to DCAA requesting provisional billing rates and a June 3, 2019, reply that "DCAA would only review the provisional billing rates if a contractor is submitting vouchers"; and a one-page statement regarding its estimating procedures. AR, Tab 6, APRA Volume 5 Proposal.

As noted, the solicitation stated that the agency intended to make eight 8(a) subpool 2 awards. Solicitation at 122. As also noted, the agency's evaluation of these proposals identified the eight highest technically rated proposals with a fair and reasonable price, and the lowest of these scores was 4,475 points. COS at 5; AR, Tab 9, SubPool On-Ramping Award Decision Document (Phase 3) at 29-30. APRA's self-score of its 8(a) subpool 2 proposal was 5,200 points, however in a clarification regarding its small business pool 1 proposal, the contracting officer advised APRA that its proposal did not include the supporting documentation required to substantiate 900 points as follows: 500 points for an approved purchasing system; 200 points for an approved FPRA, FPRR, or provisional billing rates; and 200 points for an acceptable estimating system. COS at 3-4; AR, Tab 7, GSA Communications with APRA at 1-2.

In response to the clarification, APRA stated:

> APRA acknowledges receipt of the OASIS clarification letter dated 4/2/2020. Based on the feedback received therein, we recognize that our explanations of those items are not considered compliant, and are not acceptable to acquire the related point values. APRA further acknowledges that the firm does not have additional documentation to provide in relation to the non-compliant items, specifically related to the

> following sections: L.5.5.1., L.5.5.2., [and] L.5.5.4. Given such, APRA respectfully requests that the Government proceed with the deduction of these points from its proposal. All other documentation we consider to be fully compliant.

AR, Tab 7, GSA Communications with APRA at 3.

Because APRA submitted identical volume 5 proposals for the various small business pools, the contracting officer concluded that it would be redundant to engage in further clarifications with APRA with respect to its proposals for the 8(a) subpools. COS at 4. Accordingly, on the same basis as stated in the clarification, the contracting officer deducted 900 points from APRA's 8(a) subpool 2 proposal. *Id.* Thus, at the conclusion of the agency's evaluation, APRA's final score of 4,300 points was below the lowest score of 4,475 points credited to the eight highest technically rated proposals.[5]

On this record, we find that the agency deducted 900 points because APRA failed to submit the documentation necessary to substantiate the claimed point totals for each of the systems as required by the solicitation, and therefore the agency was not required

[5] The protester argues that "[a]lthough APRA agreed to the removal of points for [small business] Pool 1, this response did not apply to SubPool 2 nor does it refute the fact GSA assessed the deductions because APRA was unable to substantiate certain financial capabilities to perform, not because APRA failed to submit a complete proposal." Comments & Supp. Protest at 15 n.9. However, the protester does not explain why the contracting officer should not have considered its response to the small business pool 1 clarification as applicable to its identical volume 5 subpool 2 proposal, nor does the protester assert that it would have provided a different response if the contracting officer had engaged in additional clarification.

In any event, this argument is disingenuous. As discussed above, the solicitation was clear that offerors' financial capability would be assessed based on the responsibility information included in volume 2 of proposals. Moreover, submission of the information regarding systems, certifications, and clearances in volume 5 of offerors' proposals was not a minimum or mandatory requirement, though submission of this information could result in a higher point score. Solicitation at 124 ("Offerors that are not deemed responsible will not be considered for award."), 132 ("Offerors who have approved Systems, Certifications and Clearances will be considered more favorably."). Further, the clarification letter unambiguously stated that "the [supporting] documentation [submitted did] not appear to meet the requirements" of the applicable sections of the solicitation, and APRA readily acknowledged that it did not have any additional documentation to provide in order to claim the requisite points. AR, Tab 7, GSA Communications with APRA at 1, 3. To the extent that APRA now argues that its failure to submit the information under volume 5 should have resulted in a nonresponsibility determination by the contracting officer, this argument can only be construed as a challenge to the express terms of the solicitation, and is untimely. 4 C.F.R. § 21.2(a)(1).

to refer APRA to SBA for a COC determination. In this regard, the agency's evaluation stated that APRA "received a point deduction of 900 points for failure to submit documentation to adequately substantiate their claim of an Approved Purchasing System, Acceptable Estimating System, and Forward Pricing Rate Agreement." AR, Tab 9, SubPool On-Ramping Award Decision Document (Phase 3) at 25. The agency concluded that this point deduction "removed [APRA] from the top ranked." *Id.*

A contracting officer must make an affirmative determination of an offeror's responsibility before making award to the firm. FAR 9.103(b). Where the agency determines that a small business that is otherwise in line for award is nonresponsible, the agency must refer the determination to SBA for a COC determination. *Tenderfoot Sock Co., Inc.*, B-293088.2, July 30, 2004, 2004 CPD ¶ 147 at 3. Here, the record confirms that APRA's proposal was not eliminated from consideration for award because the contracting officer made a nonresponsibility determination. Rather, APRA's proposal was considered, but not selected, because 900 points were deducted from its self-score for failure to submit the appropriate substantiating documentation, and as a result, there were eight higher technically rated proposals with fair and reasonable pricing that satisfied the agency's intention to make eight contract awards. Since APRA was not found to be nonresponsible, and was not in line for contract award, the agency was not required to refer APRA to SBA for a COC determination. *Asset Mgmt. Real Est., LLC, et al.*, B-407214.5 *et al.*, Jan. 24, 2014, 2014 CPD ¶ 57 at 14.

The protest is denied.[6]

Edda Emmanuelli Perez
General Counsel

[6] In response to the protest, the agency also asserts that an additional 650 points should have been deducted from APRA's self-score for the failure to substantiate the points associated with one of its projects under the relevant experience factor. The contracting officer states that because APRA's proposal already was not among the highest rated proposals after the 900-point deduction, APRA's score was not further reduced by another 650 points. COS at 5; *see* AR, Tab 8, OASIS 8(a) SubPool 2 Evaluations Tracking Sheet at cells S11, X11. The protester argues that this deduction is erroneous, and that the agency should have sought clarification from APRA to permit it to substantiate that it had properly claimed these points. Comments & Supp. Protest at 16-17; Supp. Comments at 2-10. We need not decide this issue since, as discussed above, we find no merit to the protest.