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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Active Deployment Systems, Inc.

File: B-404875

Date: May 25, 2011

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PilieroMazza PLLC, for the protester.
Lt. Col. Dana J. Chase, Department of the Army, for the agency.
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Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's affirmative determination of responsibility is denied where the record demonstrates that the agency did not fail to consider information concerning the awardee's alleged relationships with other firms that were proposed for debarment.

DECISION

Active Deployment Systems, Inc. (ADS), of Spicewood, Texas, protests the award of a contract to Acme Support Products (ASP), of Chandler, Arizona, by the Department of the Army, under request for proposals (RFP) No. W9124B-11-T0006 for the lease of shower and sink trailers. ADS argues that the award to ASP was improper because the awardee intends to subcontract with firms that are proposed for debarment and because the awardee is affiliated with those firms.

We deny the protest.

BACKGROUND

The RFP was issued on February 23, 2011, and sought proposals to provide shower and sink trailers at Fort Irwin, California. The competition was set aside for small business firms. The RFP stated that award would be made to the offeror that submitted the lowest-priced, technically acceptable proposal.

The Army received proposals from five offerors, including ADS and ASP, by the closing date of February 26. The agency concluded that ASP's proposal was

technically acceptable and offered the lowest price. As relevant here, the contracting officer (CO) reviewed the following sources of information when evaluating ASP's responsibility: the Central Contractor Registry; ASP's entries in the Online Representations and Certifications Application; the Excluded Parties List System (EPLS)¹; and the Past Performance Information Retrieval System. CO Statement at 1. The CO also consulted another CO who had prior experience with ASP. Id. Based on her review, the CO concluded that ASP was not debarred, suspended, or proposed for debarment, and was a responsible contractor. Id.; Agency Report (AR), Tab 11, Responsibility Determination, at 3. The contract was awarded to ASP on February 26.

The Army notified ADS of the award to ASP on February 28. On March 1, ADS contacted the CO and expressed its belief that ASP intended to subcontract with firms that were proposed for debarment. Specifically, the protester argued that ASP was a new firm and that it would rely on the resources and personnel of the following three firms, each of which was included on the EPLS based on pending debarment actions: Golden Equipment Corporation (GEC), Southwest Equipment Solutions, LLC (SES), and Southwest Charter Lines, Inc. (SCL). AR, Tab 14b, Letter from ADS to CO, Mar. 1, 2011, at 1-2.

In response to ADS's contentions, the CO contacted ASP and asked the awardee to identify the subcontractors it intended to use in performing the contract. CO Statement at 2. In reply, ASP identified its intended subcontractors. Id. The CO determined that none of the firms identified by the awardee were on the EPLS, and, on March 8, advised ADS that the agency intended to proceed with the award to ASP. Id.; AR, Tab 14a, E-mail from CO to ADS, Mar. 8, 2011. On March 10, ADS filed this protest.

After receiving this protest, and before submitting the agency report, the CO again contacted ASP and asked the awardee to confirm its earlier-submitted information concerning its proposed subcontractors. On March 11, the awardee confirmed that it would not use any subcontractors that were on the EPLS, but also stated that it had, prior to award, purchased equipment from GEC for use in the contract. CO Statement at 2; AR, Tab 15, E-mail from ASP to CO, Mar. 11, 2011. ASP explained that it purchased the equipment during GEC's bankruptcy proceeding. Id.

DISCUSSION

ADS argues that the Army failed to reasonably evaluate ASP's responsibility because, the protester contends, the awardee intends to subcontract with, and is otherwise

¹ The EPLS is maintained by the General Services Administration and lists all contractors debarred, suspended, or proposed for debarment from federal contracting. See Federal Acquisition Regulation (FAR) § 9.404(a).

affiliated with, three firms proposed for debarment: GEC, SES, and SCL. As discussed below, we find no merit to the protester's arguments.

Agencies may not award contracts to contractors that are debarred, suspended, or proposed for debarment, nor may they award contracts to firms that are affiliated with firms that are debarred, suspended, or proposed for debarment. FAR §§ 9.403, 9.405. Additionally, agencies may not consent to a subcontract with a firm that is debarred or proposed for debarment, unless the agency head states in writing the compelling reasons for this approval action. FAR § 9.405-2.

Our Office views an agency's determination of whether an offeror is affiliated with or is subcontracting to, a firm that is debarred, suspended or proposed for debarment to be matters of offeror responsibility. See Bilfinger Berger AG Sede Secondaria Italiana, B-402496, May 13, 2010, 2010 CPD ¶ 125 at 3-5; Hunt Pan Am Aviation, Inc., B-246092.3, Apr. 8, 1992, 92-1 CPD ¶ 351 at 5; U.S. Constructors, Inc., B-248757, Aug. 31, 1992, 92-2 CPD ¶ 146 at 2. As a general matter, our Office does not review a CO's affirmative determination of responsibility. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2011); Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 20. We will, however, consider a challenge to a CO's affirmative determination of responsibility where it is alleged that definitive responsibility criteria in the solicitation were not met, or where the protester identifies evidence raising serious concerns that, in reaching the responsibility determination, the CO unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); T.F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52 at 5.

Here, we conclude that the protest is within our jurisdiction to consider because ADS has argued that the CO unreasonably failed to consider available relevant information regarding ASP's relationships with firms proposed for debarment.

Subcontracting with Firms Proposed for Debarment

With respect to the merits of ADS's contentions that the Army failed to consider available relevant information regarding ASP's possible use of the resources and personnel of the three firms, we note first that this solicitation did not require offerors to submit subcontracting plans, and ASP did not provide this information. CO Statement at 1-2. Thus, we think the CO had no reason to know, prior to making her pre-award responsibility determination, whether ADS intended to subcontract with firms proposed for debarment.

Nonetheless, in response to allegations raised by ADS prior to filing its protest with our Office, the CO obtained from ASP a list of all of its proposed subcontractors, and was able to verify that none of them were debarred or proposed for debarment. While ASP acknowledged that it had planned to purchase certain assets to be used in performing this contract from GEC—which was proposed for debarment—during that firm's bankruptcy proceeding, the CO reasonably concluded that ASP would not be

subcontracting with a debarred firm to perform this contract.² Thus, this protest ground provides no basis to challenge the agency's determination that ASP was responsible.

Affiliation with Firms Proposed for Debarment

ADS also argues that ASP is affiliated with the three firms proposed for debarment, and is therefore ineligible for award. Specifically, the protester contends that the awardee is a new company "formed by officers and high-ranking employees" of GEC, SES, and SCL. Protest at 9. The protester's arguments concerning ASP's alleged affiliation with the three firms proposed for debarment were first brought to the agency's attention after award, and there is no evidence that the CO considered this matter as part of her pre-award responsibility determination. See AR at 10; CO Statement at 2. The protester thus contends that the responsibility determination was flawed because the CO did not consider whether the firms were affiliated.

The Army contends that this argument lacks merit because the Small Business Administration (SBA) has determined that ASP is not affiliated with these firms, in connection with a size-status protest. As relevant here, on February 25, the Small Business Administration issued a decision concerning a size-status protest filed by ACD challenging the award of a different contract to ASP for lease of shower and sink trailers at Fort Irwin. AR, Tab 12, SBA Size Determination No. 11-03-NTC-12A, at 1. The size protest, filed on January 11, argued that ASP was not a small business due to affiliations with GEC, SES, and SCL. Id. at 2. The SBA acknowledged that individuals who control ASP had "ties" to the three firms, and in some cases those ties were described as "close." Id. at 5-7. The SBA concluded, however, that ASP was not affiliated with any of these firms for purposes of determining its size status under the standards set forth in 13 C.F.R. § 121.103, and that ASP was therefore a small business for purposes of the award of the contract.³ Id. at 7.

² In ADS's comments on the agency report, the protester contends that ASP's purchase of assets under GEC's bankruptcy proceedings was not successfully completed. Protester's Comments at 5 n.3. The ability of ASP to obtain the equipment needed from GEC, or any other source, to perform the contract is a matter of contract administration, which we do not review. 4 C.F.R. § 21.5(a); ARINC Eng'g Servs., LLC, B-403471.2, Nov. 5, 2010, 2010 CPD ¶ 270 at 5.

³ The SBA decision addressed four tests for determining affiliation: General Principles of Affiliation, 13 C.F.R. § 121.103(a); Affiliation Based on the Newly Organized Concern Rule, 13 C.F.R. § 121.103(g); Affiliation Based on Identity of Interest, 13 C.F.R. § 121.103(f); and the Totality of Circumstances, 13 C.F.R. § 121.103(a)(5). AR, Tab 12, SBA Size Determination No. 11-03-NTC-12A, at 5-7.

Because the analysis of a firm's affiliation for purposes of debarment under FAR subpart 9.4 addresses the same considerations as the SBA's affiliation analysis under the SBA's size status regulations, we think that the SBA's ruling here supports the agency's affirmative responsibility determination, even though the CO did not review this matter at the time of award. See Atchison Eng'g Co., B-208148.5, Aug. 30, 1983, 83-2 CPD ¶ 278 at 6. In this regard, the FAR states that firms are affiliates of each other for purposes of debarment if "directly or indirectly, (1) either one controls or has the power to control the other, or (2) a third party controls or has the power to control both." FAR § 9.403. Similarly, the SBA regulations concerning affiliation for purposes of determining a firm's size state that firms are affiliates "when one controls or has the power to control the other, or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1). Indicia of control common to both regulatory provisions, and addressed by the SBA in its decision, include common management, ownership, key employees. See FAR § 9.403; 13 C.F.R. § 121.103; AR, Tab 12, SBA Size Determination No. 11-03-NTC-12A, at 5-7. Thus, the record provides no basis to find that ASP was affiliated with firms that were proposed for debarment.

In sum, we find no basis to question the agency's determination that ASP was responsible.

The protest is denied.

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General Counsel