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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: U.A. Anderson Construction Company

File: B-244711

Date: October 16, 1991

Timothy H. Power, Esq., for the protester.
Robert C. Pool, Esq., Jet Propulsion Laboratory, California Institute of Technology, for the prime contractor.
Darleen A. Druyun, National Aeronautics and Space Administration, for the agency.
Anne B. Perry, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that in awarding a subcontract for a federal agency, a private federally funded research and development center (FFRDC) failed to submit a nonresponsibility determination to the Small Business Administration for certificate of competency consideration is dismissed because there is no requirement for such submission, and the protester has not provided any factual basis to question the FFRDC's nonresponsibility determination.

DECISION

U.A. Anderson Construction Company protests the rejection of its low bid under invitation to bid (ITB) No. M06-9430, issued by the Jet Propulsion Laboratory (JPL), a federally funded research and development center (FFRDC) for the National Aeronautics and Space Administration (NASA), for modernization construction of the South Utility Systems, Pasadena, California. The protester, a small business, asserts that JPL improperly rejected Anderson as nonresponsible without referring the matter to the Small Business Administration (SBA) for consideration under the SBA's certificate of competency (COC) procedures.

We dismiss the protest.

JPL is a federally funded research and development center (FFRDC) sponsored by NASA. JPL's prime contracts with NASA include a development contract and a companion facilities contract. The modernization work in question is to be performed under the facilities contract.

JPL issued the solicitation as a total small business set-aside on March 13, 1991, and received bids on April 30. Anderson submitted the low, responsive bid, and consequently, on May 16, JPL requested further information from Anderson regarding its ability to perform the tasks required under the solicitation. Based on the information supplied by Anderson, JPL procurement officials determined that Anderson did not have the current capability to perform the schedule of work given the size, scope and complexity of the requirement. JPL determined that Anderson had not provided evidence of a satisfactory record of performance on comparable contracts; rather, Anderson merely provided a promise to extend its best efforts. Anderson also did not provide sufficient relevant information regarding its organization, experience, operational controls and construction capacity to satisfactorily perform the anticipated work. Accordingly, JPL determined that Anderson was nonresponsible, and so notified the firm on June 28.

Anderson points out that the Federal Acquisition Regulation (FAR) Subpart § 19.6 requires that where a small business has been determined to be nonresponsible by a contracting officer, the matter must be referred to the SBA for a determination of competency.

NASA and JPL both assert that our Office does not have jurisdiction over JPL's award of subcontracts. In this regard, our Office has jurisdiction under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(1) (1980), to decide bid protests involving contract solicitations and awards by federal agencies. We have interpreted this provision as authorizing us to decide protests of subcontract solicitations and awards only where the subcontract is "by or for the government." 4 C.F.R. § 21.3(m)(10) (1991).

Because of the variety of relationships between federal agencies and FFRDCs, we cannot say that an FFRDC, such as JPL, was acting "by or for" the government simply by virtue of its FFRDC status. Rather, we review the specific contractual relationship between the government and the FFRDC prime contractor to determine whether the contractor is principally operating or managing a government facility or is otherwise providing large scale management services so as to be acting as a conduit between the government and the subcontractor. SRI International, B-237779, Mar. 22, 1990, 90-1 CPD § 318.

While we have previously reviewed the award of a subcontract by JPL without expressly addressing the matter of jurisdiction,¹ the question of jurisdiction is not clear in this case. In view of the issue raised by the protester here, no useful purpose would be served by deciding the jurisdiction question in this case.

The COC program is available to small business concerns which are otherwise qualified for award, but which are determined to be nonresponsible by a government contracting officer. See FAR §§ 19.601 and 19.602. Here, JPL and not the NASA contracting officer, made the nonresponsibility determination. Further, any contractual relationship resulting from this solicitation is between the offeror and JPL, and the applicable caselaw and regulations provide that purchases by such government prime contractors are not subject to all of the requirements applicable to direct federal procurement, but are commercial purchases subject to the fundamental procurement principles which constitute the "federal norm."

The federal norm does not impose an obligation to comply with the FAR requirement concerning the submittal of a small business concerns nonresponsibility determination to the SBA for COC consideration. Miklin Corp.--Recon., 69 Comp. Gen. 509 (1990), 90-1 CPD § 540. In this regard, the SBA has provided a report to our Office stating that it would not have jurisdiction to review the responsibility of a subcontractor of JPL's. Thus, JPL had no obligation to submit the question of Anderson's responsibility to the SBA.

Anderson has provided no basis to challenge to the reasonableness of JPL's nonresponsibility determination beyond noting that it [Anderson] applied to JPL for inclusion on the qualified bidder's list for projects up to a value of \$8,000,000, and then received an invitation to bid on this project. Anderson states that it believes it was included on JPL's bidder's list and, therefore, was qualified for the project. JPL points out that Anderson was not included on a "qualified bidders list," and was merely provided with a solicitation copy on request. Thus, Anderson's assumption that it had been prequalified is factually wrong. Anderson has not refuted any of the stated reasons underlying JPL's nonresponsibility determination, and thus has not provided any basis for challenging JPL's finding.

Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of a protest, 4 C.F.R. § 21.1(c)(4), and that the grounds be

¹ See Hughes Aircraft Co., B-222152, June 19, 1986, 86-1 CPD § 564.

legally sufficient. 4 C.F.R. § 21.1(e). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Robert Wall Edge--Request for Recon., B-234469.2, Mar. 30, 1989, 89-1 CPD § 335. Anderson's protest does not include sufficient factual information to establish the likelihood that JPL violated applicable procurement laws or regulations.

The protest is dismissed.



Paul Lieberman
Assistant General Counsel