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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: McLaughlin Research Corporation

File: B-247118

Date: May 5, 1992

John A. Tarantino, Esq., Adler, Pollock & Sheehan, and Harold J. Maturi, for the protester.
Kenneth L. Crawford, Esq., and Dennis R. Bunty, for General Physics Services Corporation, an interested party.
Lucie-Anne Dionne Thomas, Esq., and Eric A. Lile, Esq., Department of the Navy, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office will review an agency's evaluation of an offer as technically acceptable under a responsibility-type evaluation factor--specifically, the availability of offeror's warehouse facility--where offeror whose evaluation is at issue is not a small business, since policy behind decisions prohibiting use of responsibility-type factors in a go/no-go evaluation scheme--to prevent possible encroachment by contracting agencies on the statutory protection afforded small businesses--does not apply where a small business is not involved.

2. Protest allegation that the awardee's proposal should have been rejected as technically unacceptable because the awardee offered to perform using a warehouse which the protester claims to have leased is denied where the agency reasonably relied on an intent to lease agreement between the owner of the warehouse and the awardee, even though a close reading of the protester's current lease would have shown that the protester had an option right in its lease that could prevent the awardee from gaining access to the warehouse.

DECISION

McLaughlin Research Corporation (MRC) protests the award of a contract to General Physics Services Corporation (GP), under request for proposals (RFP) No. N66604-91-R-4173, issued by the Department of the Navy for logistics support

services related to Navy torpedo programs. MRC argues that the Navy unreasonably concluded that GP's proposal was technically acceptable. According to MRC, since MRC has a current lease for the warehouse offered, the Navy could not properly consider GP's proposal offering the same warehouse to the government.

We deny the protest.

BACKGROUND

The Navy issued the RFP on February 15, 1991, for support services related to Navy research and development efforts, and other efforts, involving torpedo maintenance. In addition to providing services, the RFP requires offerors to provide and maintain a secure warehouse facility for storing torpedoes. The RFP contemplates award of an indefinite quantity contract on a cost-plus-fixed-fee basis to the lowest cost, technically acceptable offeror.

Section M of the RFP advises offerors that proposals must be rated technically acceptable on each of five evaluation factors: technical approach, personnel, management approach, facilities, and corporate experience. Under the facilities factor, the RFP requires offerors to propose an available warehouse facility with the following features: a security clearance at the confidential level; a minimum of 180,000 cubic feet; an area for hazardous waste storage; and a location within commuting distance of Newport, Rhode Island.

The Navy received initial submissions on May 23. MRC, as the incumbent, proposed to continue to store the Navy's torpedoes in the warehouse it currently leases to perform the existing contract. Likewise, GP proposed to use the same warehouse should it receive the award, and GP included with its initial proposal an "Intent to Lease Agreement" between it and the owners of the warehouse. In this agreement, the warehouse owner agreed to negotiate a lease with GP if GP received the Navy contract.

During discussions, the Navy asked MRC to confirm that the warehouse was owned by MRC, or to provide a copy of any proposed leasing agreement for the building. In response, MRC provided a copy of its lease for the warehouse. The base period of the lease runs from July 1, 1990, to September 30, 1990, followed by three successive 1-year option periods--i.e., until September 30, 1993, if all three options are exercised. After receiving best and final offers on October 31, the Navy awarded the contract to GP on December 20, having concluded that GP's proposal was technically acceptable and proposed the lowest evaluated cost.

After learning that it was not selected for contract award, MRC contacted the contracting officer on December 23 to ascertain where it should transfer certain material stored in its warehouse for which the delivery order for storage was due to expire on December 31. The contracting officer advised that there was no need to transfer the material since the awardee had offered to use the same warehouse. This protest followed.

DISCUSSION

MRC argues that the Navy conducted an improper evaluation of GP's proposal because the Navy should not have considered GP's proposal technically acceptable in the facilities area. According to MRC, if GP had no legal right to the warehouse because of MRC's lease, then GP's proposal was fatally flawed in the facilities area. The Navy defends its evaluation but claims that MRC's protest raises a matter of contract administration over which our Office lacks jurisdiction.[1]

According to the Navy, MRC is challenging whether GP will be able to perform as promised or will instead have to substitute another warehouse for the one to which MRC claims it has the exclusive right to occupy. The Navy argues that this contention is a matter of contract administration which our Office does not review. See 4 C.F.R. § 21.3(m)(1). In our view, the Navy misapprehends MRC's protest. Instead of challenging performance, MRC squarely challenges the adequacy and reasonableness of the agency's decision to accept for award an offeror whose warehouse is currently leased by the incumbent.

The RFP called for the evaluation of warehouse facilities, including their availability. In addition, the RFP did not contemplate and the Navy did not perform a comparative evaluation of proposals. Rather, the Navy awarded to the technically acceptable offeror with the lowest evaluated cost. The availability of an offeror's proposed facility is traditionally a responsibility-type factor--i.e., a matter related to an offeror's ability to perform the contract.

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[1]Because MRC and GP are litigating their respective alleged rights to the warehouse in Rhode Island state courts, the Navy also argued that this protest should be dismissed because our Office does not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction. See 4 C.F.R. § 21.3(m)(11) (1992). However, since the litigation at issue involves whether MRC properly exercised its option, and not whether the Navy conducted a proper procurement, we see no reason to dismiss this protest on these grounds.

See Federal Acquisition Regulation (FAR) § 9.104-1(f); Certified Underwater Sys., Inc., B-242943, June 21, 1991, 91-1 CPD ¶ 589; Bender Shipbuilding & Repair Co., Inc., B-225578, Apr. 10, 1987, 87-1 CPD ¶ 398. Where the needs of an agency warrant, traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement, provided that such use is not inconsistent with the requirements of the Small Business Act. See, e.g., Detyens Shipyards, Inc., B-244918; B-244918.2, Dec. 3, 1991, 71 Comp. Gen. ___, 91-2 CPD ¶ 500; Clegg Indus., Inc., 70 Comp. Gen. 679 (1991), 91-2 CPD ¶ 145; Flight Int'l Group, Inc., 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257; Sanford and Sons Co., 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266; Delta Data Sys. Corp., B-213396, Apr. 17, 1984, 84-1 CPD ¶ 430, recon. dismissed, B-213396.2, May 2, 1984, 84-1 CPD ¶ 497.

In each of the cases cited above, the result of the agency's evaluation decision--made on a "go/no-go" basis rather than a comparative or relative assessment basis--was to exclude a small business offeror from award on the basis of an evaluation criterion that would traditionally be a matter of responsibility. Since the Small Business Act, 15 U.S.C. § 637(b)(7) (1988), grants exclusive authority to the Small Business Administration (SBA) to determine the responsibility of small business concerns, the decisions above prohibit agencies from excluding small business concerns from award without providing them the statutory protection afforded by the Act. Specifically, when a procuring agency finds that a small business is nonresponsible, the agency is required to refer the matter to the SBA for a final determination under the certificate of competency procedures. See Flight Int'l Group, Inc., supra; Sanford and Sons Co., supra. Where an agency evaluates on a go/no-go basis the technical proposal of a firm not entitled to the protection of the Small Business Act using traditional responsibility factors, as the Navy did here, we review a protest of that evaluation as we would any other technical evaluation. See Motorola, Inc., B-234773, July 12, 1989, 89-2 CPD ¶ 39, aff'd, B-234773.2, Dec. 7, 1989, 89-2 CPD ¶ 523 (where the General Accounting Office reviewed an evaluation of responsibility factors in a go/no-go procurement because the agency determined in accordance with the evaluation criteria that the awardee was acceptable, and there was no rejection of a small business for failing to meet a responsibility requirement).

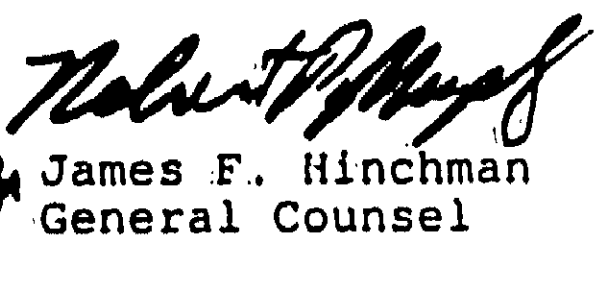
In considering protests against an agency's evaluation of proposals, we examine the record to determine whether the evaluation was reasonable and consistent with the evaluation criteria. Mine Safety Appliances Co., 69 Comp. Gen. 562 (1990), 90-2 CPD ¶ 11. Here, we have considered the two proposals, the "Intent to Lease Agreement" submitted by GP,

the text of the lease submitted by MRC, the discussion questions asked by the agency, and the final determination, as evidenced by award, that GP would be able to perform as promised. As a result of our review, we find no basis for concluding that the evaluation was unreasonable or not in accordance with the stated evaluation criteria.

Only GP submitted evidence of its ability to obtain access to the warehouse with its initial proposal. Since GP submitted an "Intent to Lease Agreement" between it and the owners of the warehouse, the contracting officer reasonably decided to ask MRC for evidence of its ability to obtain the warehouse. As a result, MRC submitted the text of its lease to the Navy; MRC did not, however, offer any information about whether it had exercised its option under the lease. Faced with this information, the Navy concluded that GP would be able to use the warehouse and awarded the contract to GP as the low-cost acceptable offeror.

In our view, the Navy reasonably relied on the "Intent to Lease Agreement" submitted with GP's initial proposal to conclude that GP would have access to the warehouse. FAR § 9.104-3(a) specifically enumerates such agreements as acceptable evidence of a prospective contractor's ability to obtain facilities required for performance.[2] In addition, despite MRC's assertions, the current litigation in the Rhode Island state court regarding whether MRC properly exercised its option indicates that further inquiry about whether MRC had exercised its option would not likely have avoided this dispute. Accordingly, we see no basis to object to the agency's conclusion that GP's proposal was acceptable with regard to the availability of the warehouse it offered.

The protest is denied.



James F. Hinchman
General Counsel

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[2]Although we recognize that Part 9 of the FAR is directed to assisting contracting officers in making determinations of responsibility, since the evaluation criteria incorporated responsibility-type factors, the guidelines for determining the availability of facilities (FAR § 9.104-3(a)) are a useful source for reviewing the evaluation under such a criterion.