Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Mary Kathleen Collins Trust

File: B-261019.2

Date: September 29, 1995

George S. Wright, Esq., Wright, Ray & Maisto, for the protester.
James L. Weiner, Esq., Department of the Interior, for the agency.
Ronald Berger, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where contracting officer waived awardee's failure to meet a definitive responsibility criterion requiring written certification from a local zoning board that the current zoning for the property being offered would permit the type of facility being proposed.

DECISION

The Mary Kathleen Collins Trust (MKC) protests the award of a contract to W.A. Francis Construction by the Bureau of Land Management (BLM), Department of the Interior, under solicitation for offers (SFO) No. 1422-N-651-L-94-21 for office/warehouse space, wareyard, and parking spaces in Lander, Wyoming.

We sustain the protest.

Six firms submitted offers in response to the SFO by the initial closing date. Discussions were conducted and four firms submitted best and final offers by the March 6, 1995, deadline. On March 10, award was made to W.A. Francis. MKC originally filed a protest on April 5, alleging that the awardee did not have the necessary licenses. We dismissed that protest on May 3 because the SFO did not impose a specific licensing requirement. The instant protest was timely filed on June 19, in response to information received from BLM under the Freedom of

Information Act. MKC now alleges, among other things, that the awardee did not provide a required certificate from local zoning authorities that the proposed property is properly zoned.[1]

The SFO provided that offerors must submit with their initial offers a "[c]ertification in writing from local zoning board that property being offered is currently zoned to permit the type of facility being proposed." In response to the protest, BLM does not assert that such a certification was provided. Instead, BLM argues that in light of RKR, Inc., B-247619.2, Oct. 28, 1992, 92-2 CPD ¶ 289, it does not consider the failure to furnish the certification as a basis for proposal rejection.

In RKR, the SFO required offerors to submit evidence that local zoning laws would permit the type of facility being proposed. The contracting officer found the evidence submitted by RKR to be unsatisfactory and rejected the offer. We sustained the protest because we viewed the SFO requirement for evidence concerning zoning to be not a matter of technical acceptability but of offeror responsibility. Because RKR was a small business, we held that the matter should have been referred to the Small Business Administration (SBA) for review under the certificate of competency (COC) program and that rejection of the offer as technically unacceptable was improper. BLM's position in light of RKR, according to the contracting officer, is that zoning requirements are "the responsibility of the offeror" and that "BLM would not use zoning as a reason to withhold award."

BLM's position, however, is inconsistent with its SFO and seems to reflect a misunderstanding of the RKR decision. We did not hold in RKR that a zoning requirement could not be a proper basis for rejection of an offeror. We held only that the failure to refer the matter to the SBA was improper because under the SFO the zoning requirement was a responsibility matter and the contracting officer's rejection of RKR's proposal was tantamount to a determination that RKR was not responsible.

In this case, the SFO again imposes a zoning-related requirement on offerors, and in connection therewith the protester argues that the requirement is "a material term of the solicitation, and, is more a matter of technical acceptability than offeror responsibility." The structure of this SFO, however, is similar to the one used in RKR, and for the reasons set forth in the RKR decision the requirement is one

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[1]MKC also alleges that W.A. Francis did not provide, as required by the SFO, a firm commitment of funds, proof of architect and/or engineer's license, title commitment for the proposed property, and a valid offer to purchase the property that was being proposed. Since we are sustaining MKC's protest with regard to the zoning requirement, no useful purpose would be served in further addressing these other issues.

pertaining to offeror responsibility rather than proposal acceptability. This does not mean, however, that the agency properly could ignore the requirement.

Responsibility is a term used to describe the offeror's ability to meet its contract obligations. See generally Federal Acquisition Regulation (FAR) subpart 9.1. In most cases, responsibility is determined on the basis of what the FAR refers to as general standards of responsibility--such as adequacy of financial resources, ability to meet delivery schedules, and a satisfactory record of past performance and of business integrity and ethics. FAR § 9.104-1. Determinations made pursuant to such standards, which in large measure involve subjective business judgments, are within the broad discretion of the contracting activities. Central Metal Prods., Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD ¶ 64. For that reason, we generally do not consider bid protest challenges to an agency's determination, pursuant to general standards of responsibility, that an offeror is responsible. 4 C.F.R. § 21.3(m)(5) (1995).

In some cases an agency will include in a solicitation a special standard of responsibility, FAR § 9.104-2, which is often referred to as a definitive criterion of responsibility. Definitive responsibility criteria are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor's ability to perform the contract. See FAR § 9.104-2; R.J. Crowley, Inc., B-229559, Mar. 2, 1988, 88-1 CPD ¶ 220. In effect, the criteria represent the agency's judgment that an offeror's ability to perform in accordance with the specifications for that procurement must be measured not only against the traditional, subjective factors such as adequate facilities and financial resources, but also against more specific requirements, compliance with which at least in part can be determined objectively. When such criteria are imposed, they limit the competition to those who meet the qualitative or quantitative qualifications.[2] American Athletic Equip. Div., AMF, Inc., 58 Comp. Gen. 381 (1979), 79-1 CPD ¶ 216.

Because definitive responsibility criteria limit the competition to those who can meet them, and because compliance with them is not a matter of subjective business judgment but can be determined objectively, offerors must meet such criteria as a precondition of award. We consider protests alleging that a contracting officer failed to enforce the criteria in determining responsibility. See Yardney Elec. Corp., 54 Comp. Gen. 509 (1974), 74-2 CPD ¶ 376; T. Warehouse Corp., B-248951, Oct. 9, 1992, 92-2 CPD ¶ 235.

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[2]Common examples of such criteria are that the offeror have a certain kind of experience, Otis Elevator Co., B-196618, Feb. 8, 1980, 80-1 CPD ¶ 117, or have a particular license. Sillco, Inc., B-188026, Apr. 29, 1977, 77-1 CPD ¶ 296.

Here it is clear that the zoning requirement constitutes a definitive criterion rather than a general standard of responsibility. It requires the submission of a certification from the local zoning board concerning the current zoning of the property in question. Compliance with that condition--submission of such a certification--is not a matter of business judgment; it is objectively determinable. As set forth above, BLM does not deny the protester's contention, which is supported by the record, that the awardee did not provide the certification.[3] The contracting officer states only that W.A. Francis officials talked to local zoning authorities and were assured that zoning would not "preclude . . . constructing the BLM project on the site," and that W.A. Francis then so assured BLM. There is no suggestion, however, as to when these assurances were provided, i.e., before or after award, and in any event these assurances fall considerably short of constituting a "certification" from the local zoning board. While in certain cases we have recognized that a definitive responsibility criterion need not be satisfied literally if there is equivalent or comparable compliance, see, e.g., J. Baranello & Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD ¶ 322; Pikes Peak Community College, B-199102, Oct. 17, 1980, 80-2 CPD ¶ 293, the oral assurances received here cannot be considered comparable to what BLM in its SFO said it wanted--a certification from local authorities--to assure itself that zoning would not be an impediment to contractor compliance with SFO performance requirements.

Under these circumstances, BLM should have considered W.A. Francis to be nonresponsible. Since W.A. Francis is a small business, the matter then should have been referred to the SBA for a COC review. [4] See RKR, Inc., supra.

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[3]Although the SFO required submission of the certification with initial offers, since the certification involves a matter of responsibility it could properly be furnished anytime prior to award. Gelco Servs., Inc., B-253376, Sept. 14, 1993, 93-2 CPD ¶ 163.

[4]The Small Business Act, 15 U.S.C. § 637(b)(7) (1994), provides that SBA has the conclusive authority to determine the responsibility of a small business concern and that when a procuring agency finds that a small business is nonresponsible, it must refer the matter to the SBA for a final determination under the COC procedures, even when compliance with a definitive responsibility criterion is at issue. What-mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD ¶ 179; Environmental Growth Chambers, B-201333, Oct. 8, 1981, 81-2 CPD ¶ 286.

Essentially what BLM did here was to waive the SFO requirement for the zoning certification. This it may not do. Accordingly, we sustain the protest. We understand that the awarded lease does not contain a termination for convenience clause. We therefore cannot recommend corrective action. We find that MKC is entitled to recover its proposal preparation costs and the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d).

The protest is sustained.

/s/ Robert P. Murphy
for Comptroller General
of the United States