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Decision

Matter of: Kilgore Flares Company, LLC

File: B-406139

Date: February 2, 2012

Kevin P. Connelly, Esq., Joshua C. Drewitz, Esq., Kelly E. Buroker, Esq., and Caroline A. Keller, Esq., Seyfarth Shaw LLP, for the protester. Richard W. Oehler, Esq., William J. Bainbridge, Esq., and Lee P. Curtis, Esq., Perkins Coie LLP, for Armtec Countermeasures Co., an intervenor. Gary P. Van Osten, Esq., Department of the Navy, for the agency. Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly found protester nonresponsible to perform contract for the manufacture of flares where the record reflects outstanding concerns relating to the safety of the firm's manufacturing facility.

DECISION

Kilgore Flares Company, LLC, of Toone, Tennessee, protests the Department of the Navy's determination that Kilgore was not responsible to provide the requirements under request for proposals (RFP) No. N00104-11-R-K071, issued by the Navy for the provision of SM-875B/ALE infrared simulator flares to support the Navy's Airborne Expendable Training Countermeasures Program. Kilgore argues that the nonresponsibility determination was unreasonable.

We deny the protest.

BACKGROUND

The solicitation, issued June 7, 2011, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for an estimated 574,000 flares. The flares are used to train aircrews in the handling and use of airborne expendable infrared countermeasures. Agency Report (AR), Exhibit (Exh.) 3, Business Clearance Memorandum (BCM), at 2. The guaranteed minimum to be ordered

under the contract was \$6.9 million; the maximum was \$14.7 million. RFP at 2-4, 69.

Award was to be made, without conducting discussions, to the responsible offeror submitting a technically acceptable offer with the lowest evaluated price. Id. at 72-73. The Navy received two proposals, one from Kilgore and one from Armtec Countermeasures Company. Kilgore's evaluated price was calculated at \$[DELETED]; Armtec's as \$15,296,120. AR, Exh. 3, BCM at 3. Both proposals were found to be technically acceptable. AR at ¶ 4.

As the procurement was for flares, the RFP contained the clause at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.223-7002, Safety Precautions for Ammunition and Explosives. RFP at 49. The clause requires a contractor to comply with the requirements of the Department of Defense (DOD) Contractors' Safety Manual for Ammunition and Explosives, DOD 4145.26-M, (Safety Manual). DFARS § 252.223-7002(b). The RFP also contained clause NAVICPKA02, Preaward Survey-Ammunition and Explosives (NAVICP-M) (DEC 1992), notifying offerors that the contracting officer is required to obtain a preaward ammunition and explosives safety survey before awarding any contract involving ammunition and explosives. RFP at 66. Accordingly, on August 1, the contract specialist asked the Defense Contract Management Agency (DCMA) to perform a preaward ammunition and explosives safety survey of both Kilgore and Armtec. AR ¶ 7.

DCMA's preaward survey report for Kilgore recommended "no award" based on the firm's lack of an approved explosive safety site plan. AR, Exh. 6, Preaward Survey Report, at 1. The recommendation stated that, while Kilgore had the production capacity and physical infrastructure to produce the item, the lack of an approved site plan, an open accident investigation from a severe fire 11 months before, and a series of minor incidents indicated a safety program that was not fully functional and lacked the ability to comply with mandatory Safety Manual requirements. DCMA recommended "no award" until the site safety plan was reviewed and accepted. Id.

Finding Kilgore unsatisfactory with respect to safety, the DCMA contract safety manager with oversight responsibility for Kilgore wrote that, in January 2011, he issued Kilgore a corrective action request (CAR) discussing the firm's lack of an approved site plan and was told the site plan would be updated as soon as Kilgore determined the plan of action for the building involved in the accident. The report indicates that Kilgore had submitted an incomplete draft site plan, but was advised its plan would not be reviewed until DCMA received a complete submission, with drawings for the entire site, including the quality test range and scrap explosive burning grounds. The report also notes that part of this procurement is scheduled to occur in a building at Kilgore's facility that was currently out of service and did not have an approved site plan. Id. In a subsequent e-mail, the DCMA contract safety manager gave the agency more detail regarding his concerns with the draft site plan

and the time it might take Kilgore to address those concerns. AR, Exh. 8, Sept. 1, 2011 E-Mail from DCMA Contract Safety Manager to Contract Specialist.

On September 12, the contracting officer determined that Kilgore was not responsible based on DCMA's "no award" recommendation, reiterating the findings in the preaward survey report. AR, Exh. 3, BCM, at 4. The contracting officer stated that award would be made to the next lowest-priced proposal from a responsive, responsible offeror, Armtec; a pre-award survey of Armtec had recommended a complete award.¹ Id. On September 26, the agency notified Kilgore that it was determined to be nonresponsible and that award was made to Armtec. This protest followed.

DISCUSSION

Kilgore argues that the Navy's nonresponsibility determination was unreasonable and relied on inaccurate information in the preaward survey report. Kilgore asserts that it has an approved site plan that it is currently updating and revising, and that if the government had concerns about its site plan it should have raised them prior to making the nonresponsibility determination.

Contracting officers are required by Federal Acquisition Regulation (FAR) § 9.103(b) to make an affirmative determination of responsibility before every award. This determination includes a finding that a prospective contractor has the "necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors)." FAR § 9.104-1(e). In this case, the contracting officer reviewed DCMA's preaward survey report and related information obtained from the DCMA contract safety manager, and concluded that the firm was nonresponsible based on safety considerations. The burden is on a prospective contractor to demonstrate affirmatively its responsibility. FAR § 9.103(c). The FAR requires that, "[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility." FAR § 9.103(b).

¹ Along with its initial comments on the agency report, Kilgore raised a supplemental protest alleging that the preaward survey imposed an unequal level of scrutiny on Kilgore as opposed to Armtec. We dismissed the supplemental protest as lacking a sufficient basis. Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4), (f), 21.5(f) (2011) (a protest may be dismissed for failure to set forth a detailed statement of the legal and factual grounds of protest).

When an agency's nonresponsibility determination is reviewed by our Office, we will not disturb the determination unless a protester can show that the agency had no reasonable basis for its determination; put simply, this is a matter where the contracting officer is vested with broad discretion in exercising his or her business judgment. Kilgore Flares Co., B-292944 et al., Dec. 24, 2003, 2004 CPD ¶ 8 at 6. Our review of such a determination is limited to whether the determination was reasonable when it was made, given the information the agency had before it at the time. Id.; Acquest Dev. LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 3. In making a responsibility determination, the contracting officer may rely on the results of a preaward survey. Where the contracting officer does so, our Office will consider the accuracy of the survey information in determining whether a contracting officer's determination of nonresponsibility was reasonable. Schwendener/Riteway Joint Venture, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ 203 at 3. The contracting officer should give the offeror a reasonable opportunity to offer relevant information with respect to issues raised by the preaward survey if time permits. Id.

The contracting officer's nonresponsibility determination relied on DCMA's preaward survey report and related information from the DCMA contract safety manager. Our discussion begins with a brief review of the backdrop of the preaward survey report's findings--the Safety Manual provisions and DCMA's preexisting concerns with Kilgore's site plan.

The Safety Manual contains a comprehensive set of safety requirements, guidance and information to minimize potential accidents that could interrupt DOD operations, delay DOD contract production, damage DOD property, cause injury to DOD personnel, or endanger the public during DOD contract work involving ammunition and explosives (AE). Safety Manual ¶ C1.1.1. These safety requirements include the directive that AE contractors "shall maintain a current site plan that demonstrates compliance with quantity distance (QD) requirements for all AE locations within their facility."² Id. at ¶ C1.8.1. Contractors are required to prepare and submit site and construction plans for all new construction or major modifications of facilities and for any facilities potentially exposed to AE hazards if improperly located. Id. For contractor-owned, contractor-operated facilities, such as Kilgore's, the contractor shall not begin construction or modification of proposed

² QD is a relationship between a specific quantity of AE at a potential explosion site and the expected effects of an accidental or planned explosion on an exposed site at scaled distances. QDs have been developed to provide separation distances from a potential explosion site that minimize the risk of propagation between potential explosion sites, serious injury to personnel, and property damage. Id. at ¶ C5.2.

facilities until receiving approval. Id. at ¶ C1.8.3. In addition to being “current,” site plans must comply with detailed requirements set forth in the Safety Manual, such as including accurate maps and drawings with specified details; distances between all potential explosion sites; and so on. Id. at ¶¶ C1.8.5.1-C1.8.5.6. During a preaward survey, a contractor is required to provide the government with site plans conforming to the above requirements for proposed facilities to be used in contract performance. Id. at ¶ C1.5.1.1. These are mandatory safety requirements. Id. at ¶ C1.3.

The Safety Manual states that, during preaward surveys, noncompliance with mandatory safety requirements normally results in a recommendation of “no award.” Any noncompliant condition shall be resolved during the preaward survey. In this regard, a contractor may choose to correct the deficiency immediately, offer a letter of intent to correct the deficiency, or request that the procuring contracting officer grant a waiver.³ Id. at ¶ C.1.4.1.1.

The DCMA contract safety manager states that, in September 2010, Kilgore experienced a catastrophic explosive mishap in which three employees were seriously injured (one eventually died from her injuries) and a building was destroyed. AR, Exh. 5, DCMA Contract Safety Manager Statement at ¶ 8. On January 31, 2011 the DCMA contract safety manager issued a CAR to Kilgore requesting corrective action within 30 days on certain deficiencies. One deficiency concerned Kilgore’s failure to comply with a Safety Manual requirement pertaining to the firm’s quality test range and burning grounds. The CAR stated that the quality test range area and burning grounds were not listed on the firm’s current site plan, which was approximately nine years old. The CAR went on to say that this deficiency posed a hazard associated with the entire inventory of the test range being involved in a mishap. The severity was judged to be “catastrophic,” with a frequency of seldom, and given a risk assessment code of “high risk.” The letter informed Kilgore that it needed to provide an updated site plan that included the test range facility.⁴ AR, Exh. 5, Tab A, CAR at 1-2.

³ The Safety Manual defines a waiver as a written authority that provides a temporary exception permitting deviation from Safety Manual mandatory requirements. It is generally granted for a single contract and may apply for a short period during that contract performance until correction of the waived conditions. Safety Manual, Appendix 1, ¶ AP1.79.

⁴ The CAR’s discussion of this deficiency (and the preaward survey report here) referenced paragraph C1.8.3. of the Safety Manual, which states that contractors making major modifications to their facilities must submit for approval a site plan of the modified facility to all buying commands with open contracts at the facility. As the DCMA contract safety manager explains, since Kilgore did not include the test range and burning grounds in its apparently-approved 2002 site plan, there would

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In response, Kilgore stated that it had sent DCMA a document on the test range facility showing the buildings, distances between buildings, and boundary line distances, but that the entire site plan would be updated as soon as the firm determined the plan of action for the building involved in the September incident. AR, Exh. 5, Tab B, Feb. 24, 2011 Kilgore Memorandum to DCMA at 1. DCMA's contract safety manager cautioned Kilgore that until an updated site plan, including the burning grounds, was submitted and approved, the CAR would remain open and would be referenced in all preaward safety survey reports as an open item. AR, Exh. 5, Tab C, Mar. 3, 2011 DCMA Memorandum to Kilgore at 2. The next month, in response to Kilgore's notice that it was meeting with a contractor to finalize site plan revision issues, the DCMA contract safety manager again cautioned Kilgore that until an updated site plan was submitted and approved the CAR would remain open and be referenced in all preaward safety survey reports as an open item. Exh. 5, Tab D, Apr. 26, 2011 DCMA Memorandum to Kilgore at 2. In a June memorandum for the record, the DCMA contract safety manager states that the former DCMA contract safety manager with oversight responsibility for Kilgore--now a Kilgore employee--told him the records for Kilgore's site plan were in disorder and written approvals for site plan modifications were "not universally obtained." AR, Exh. 5, Tab E, June 15, 2011 DCMA Memorandum for the Record at 1.

The DCMA contract safety manager indicates that Kilgore e-mailed him an informal, incomplete draft site plan on July 5. He maintains that he advised Kilgore that DCMA would only review a complete site plan, one which included readable drawings covering the entire site including the quality test range and scrap explosive burning grounds. AR, Exh. 5, ¶ 14. DCMA then conducted a preaward survey meeting with Kilgore concerning this procurement on August 16. The DCMA contract safety manager states that he again advised Kilgore that the lack of an approved, current safety site plan was still an outstanding issue.⁵

On August 26, Kilgore provided the DCMA contract safety manager a draft site plan with readable drawings. The DCMA contract safety manager states that his

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be major modifications to the facility as shown on that site plan. As a result, Kilgore was required to submit for approval an updated site plan. DCMA Contract Safety Manager Supplemental Statement at ¶ 3. Kilgore did not dispute the applicability of this requirement when responding to the CAR and, to the extent it does so now, its arguments are unpersuasive.

⁵ Kilgore maintains that the DCMA contract safety manager advised Kilgore's president, during the preaward survey site visit, that there were "no issues" outstanding. The DCMA contract safety manager denies making such a statement. AR, Exh. 5, ¶ 15; DCMA Contract Safety Manager Supplemental Statement at ¶ 10.

preliminary review disclosed numerous issues with separation distances between buildings and that no supporting data or analysis was provided with the drawings. AR, Exh. 5, DCMA Contract Safety Manager Statement at ¶ 16.

The preaward survey report was completed on August 30 and provided to the Navy. In a follow-up e-mail with the contract specialist, the DCMA contract safety manager explained the site plan review process, the concerns about Kilgore's site and how the firm would have to address them, and advised that there was no set time limit for Kilgore to respond but it could take significant time. AR, Exh. 8, Sept. 1, 2011 E-Mail from DCMA Contract Safety Manager to Contract Specialist.

In making his nonresponsibility determination, the contracting officer relied on the preaward survey report's conclusion that "the lack of approved site plan, an open accident investigation from a severe fire 11 months ago[,] and a series of minor incidents indicate a safety program that is not fully functional and lack of the ability to comply with mandatory [Safety Manual] requirements." AR, Exh. 6, BCM at 4.

Kilgore argues that the information in the preaward survey report is inaccurate because it has a site plan that was approved in 2002 and modified from time to time, and that it has submitted a current site plan. The DCMA contract safety manager acknowledges that Kilgore had a site plan approved in 2002, but contends that Kilgore has failed to "maintain a current site plan that demonstrates compliance with [QD] requirements for all AE locations within their facility." Safety Manual at ¶ C1.8.1; see also id. at ¶ C1.8.3; AR, Exh. 5, DCMA Contract Safety Manager Statement at ¶ 3; DCMA Contract Safety Manager Supplemental Statement at ¶ 3. As noted above, until recently, Kilgore's site plan was not "current" because it did not address "all AE locations" within its facility, and there is no evidence that the draft site plan it submitted in August "demonstrates compliance" with QD requirements.⁶ On this record, we cannot conclude the information in the preaward survey report is inaccurate.

Kilgore also argues that if the government had concerns about its site plan it should have raised them with the firm prior to making the nonresponsibility determination. The Safety Manual, incorporated into the RFP by the relevant DFARS clause, states that, during preaward surveys, noncompliance with mandatory safety requirements normally results in a recommendation of "no award." Safety Manual at ¶ C1.4.11. As a result, Kilgore was clearly on notice that its failure to comply with the Safety Manual's mandatory safety requirements could result in a "no award"

⁶ In an internal memorandum discussing his September 19 meeting with Kilgore to discuss the draft site plan, the DCMA contract safety manager outlined numerous noncompliances and Kilgore's options to address them. AR, Exh. 5, Tab G, Oct. 4, 2011 DCMA Internal Memorandum at 1, 5-6.

recommendation. Moreover, as the record amply demonstrates, Kilgore had long been on notice that until an updated site plan was “submitted and approved,” it would be referenced in all preaward safety survey reports as an open item. The contracting officer knew that Kilgore was on notice of the concerns with its site plan when he made his nonresponsibility determination, and we do not think he was required to further raise the matter with the firm.

Kilgore further contends it should have been given opportunity to resolve the issue during the preaward survey, citing the Safety Manual’s indication that noncompliant conditions shall be resolved during the preaward survey. In this regard, the Safety Manual states that contractors may choose to correct the deficiency immediately, offer a letter of intent to correct the deficiency, or request that the procuring contracting officer grant a waiver. Safety Manual at ¶ C1.4.1.1. The Navy asserts that Kilgore has not shown it was prejudiced in this regard, citing the DCMA contract safety manager’s opinion that these options were not viable under the circumstances here. While Kilgore objects to the DCMA contract safety manager’s opinion in this regard, it has not shown that these options were viable.⁷

Kilgore finally objects that DCMA has approved awards to the firm many times since 2002 and the status of its site plan has not been an issue. However, as a general matter, each procurement stands on its own. JLT Group, Inc., B-402603.2, June 30, 2010, 2010 CPD ¶ 181 at 3. That DCMA did not raise concerns about the status of Kilgore’s site plan in the past does not demonstrate that its decision to do so here was unreasonable.

In sum, Kilgore has not shown that the preaward survey report was inaccurate, or that the contracting officer’s nonresponsibility determination was unreasonable.

The protest is denied.

Lynn H. Gibson
General Counsel

⁷ In his internal memorandum discussing the September 19 meeting with Kilgore on the draft site plan, the DCMA contract safety manager states that Kilgore told him it had [DELETED] for site compliance issues and had elected to request waivers. AR, Exh. 5, Tab G, supra at 5-6. The Navy has given no indication that it was open to a waiver here.