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Decision

Matter of: Orion Technology, Inc.

File: B-405970

Date: January 13, 2012

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Albert B. Krachman, Esq., Jeffery M. Chiow, Esq., and Brian S. Gocial, Esq., Blank Rome LLP, for Katmai Information Technologies, LLC, an intervenor.
Capt. Nicholes Dembinski, Department of the Army, and Meagan K. Guerzon, Esq., Small Business Administration, for the agencies.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer reasonably declined to revisit protester's non-responsibility following the Small Business Administration's (SBA) refusal to issue a certificate of competency (COC) where the only new information consisted of a single unsolicited e-mail from protester's proposed subcontractor providing blanket statements of support, without providing evidence to rebut the basis for the contracting officer's initial non-responsibility determination, or the SBA's refusal to issue a COC.

DECISION

Orion Technology, Inc., of Huntsville, Alabama, protests the award of a contract to Katmai Information Technologies, LLC, of Anchorage, Alaska, by the Department of the Army, under request for proposals (RFP) No. W9124J-11-R-0013, for range operations and support services at Fort Hood, Texas.

We deny the protest.

BACKGROUND

The Army issued the RFP on April 29, 2011, as a set-aside for eligible small business firms under the Small Business Administration's (SBA) 8(a) contracting program. The RFP contemplated the award of a cost-plus-fixed-fee contract with some fixed-price line items. Proposals were to include four volumes: general, cost/price, mission capability, and past performance. RFP at 32. The cost/price volume was to

include four tabs, the fourth of which related to verification of adequate accounting systems. Id. at 35-37. In connection with this tab, the RFP stated that “[t]his contract will include Cost CLINs . . . [and] Prime contractors must have an accounting system that has been determined adequate by the Defense Contract Audit Agency (DCAA) for accumulating and reporting incurred costs under cost type contracts.” Id. at 37. The RFP further stated:

This determination is required in order to comply with [Federal Acquisition Regulation (FAR)] 16.301-3(a)(3), which states that a cost-reimbursement contract may be used only when the contractor’s accounting system is adequate for determining costs applicable to the contract. An opinion rendered by a Certified Public Accountant (CPA) cannot be substituted for the DCAA determination.

The offeror shall provide evidence of an adequate accounting system as determined by the DCAA. Provide the DCAA audit report number, date and results. Also identify any deviations from your standard accounting procedures in preparing this proposal.

If your Accounting System has not been reviewed by DCAA, you shall submit the following information: 1) Company’s Full Name; 2) DUNS Number and Cage Code; 3) Company Point of Contact and Phone Number; 4) Company Address Where Accounting Records are Held; 5) Cognizant DCAA Office (Address, DCAA POC, Phone Number and Email Address); 6) Cognizant DCMA Office (Address, DCAA POC, Phone Number and Email Address); and 7) Indicate if you are proposing as a prime, JV, or team member.

Id.

Proposals were due on June 1. Orion submitted a timely proposal. After completing the technical and price evaluations, the Army concluded that Orion’s proposal was the highest-rated and lowest-priced proposal received. However, the Army’s correspondence with DCAA regarding Orion indicated that DCAA had not, and could not make a positive determination regarding Orion’s accounting system.¹ On this

¹ Orion’s accounting system had previously been reviewed by DCAA in September 2010, and found to be inadequate. In response, Orion developed a corrective action plan that DCAA considered sufficient, and it had begun implementation of that plan. DCAA, however, concluded that portions of Orion’s corrective action had been implemented too recently to provide the necessary accounting history to determine whether Orion had adequately corrected previously cited deficiencies. DCAA Audit Cancellation, at 1. DCAA therefore canceled the audit requested in connection with this procurement, and suggested that a follow-up review be scheduled at a future
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basis, the contracting officer determined that Orion was non-responsible, and ineligible to receive the award. Because Orion is a small business concern, the Army, on August 30, referred the negative responsibility determination to SBA. The SBA then, on August 31, notified Orion of its opportunity to request a certificate of competency (COC), which Orion did.

On September 22, the contracting officer received an e-mail message from Orion's proposed subcontractor, Northrop Grumman, explaining Orion's efforts to reform its accounting system. The e-mail also stated that "Northrop sees Orion as a potential mentor-protégé candidate," and that if the award were made to Orion "Northrop Grumman Technical Services will not let Orion Technology fail here." Agency Request for Dismissal, Tab 1 at 4. The next day, September 23, SBA determined that it would not issue a COC to Orion on the basis that Orion lacked the financial capability to complete the contract.²

Following the SBA's refusal to issue a COC, on October 3, the Army notified Orion that a contract award was made to Katmai. Orion then requested a debriefing, which it received on October 7. Orion filed this protest on October 11.

DISCUSSION

Orion initially argued that SBA's determination not to issue a COC failed to consider vital information that the Army improperly failed to provide, that the Army's final non-responsibility determination was an abuse of discretion, and that the Army's evaluation of Orion's proposal was unreasonable. Following requests for dismissal of the protest filed by the agency and intervenor, Orion withdrew its first and third grounds of protest.

With regard to Orion's remaining ground of protest, Orion essentially argues that, notwithstanding the SBA's refusal to issue a COC, the contracting officer should have reversed his prior negative responsibility determination and made award to Orion after he received the September 22 Northrop Grumman e-mail stating that it would not let Orion fail. In this regard, Orion cites FAR § 19.602-3(c)(3), and the SBA's regulations at 13 C.F.R. § 125.6(n), which state that "[d]enial of a COC by SBA does not preclude a contracting officer from awarding a contract to the referred firm, nor does it prevent the concern from making an offer on any other procurement."

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time. Id. Thus, at the time of this procurement, Orion did not have an accounting system that had been determined adequate by DCAA, as required by the RFP.

² SBA asserts that its refusal to issue a COC also included a determination that Orion's accounting system was inadequate. SBA Response, at 2.

Where, as here, a small business is determined to be non-responsible, the matter must be referred to SBA for review under SBA's COC procedures since, under 15 U.S.C. § 637(b)(7) (2006), SBA has the conclusive authority to determine a small business firm's responsibility by issuing or refusing to issue a COC. Because SBA, not our Office, has conclusive authority to determine a small business firm's responsibility, we generally will not review the SBA's refusal to issue a COC, absent a showing of bad faith or failure to consider vital information. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(2) (2011).

Notwithstanding SBA's conclusive authority to determine a small business firm's responsibility through the COC procedures, our Office has previously concluded that where new information probative of small business responsibility comes to light for the first time after denial of a COC, but before award, the contracting officer may reconsider his or her initial responsibility determination.³ Goshen Excavators, B-279093.2, Apr. 20, 1998, 98-1 CPD ¶ 114 at 3; West State, Inc., B-255692, B-255693, Mar. 23, 1994, 94-1 CPD ¶ 211 at 4. On the other hand, where, after the SBA's denial of a COC, no new information is presented to lead the contracting officer to determine that the concern is responsible, the contracting officer should proceed with award to another appropriately selected and responsible firm. Id.

Here, the contracting officer received the Northrop Grumman e-mail one day prior to SBA's refusal to issue a COC determination. Because the e-mail was not relayed to, or considered by the SBA prior to its refusal to issue a COC, Orion contends that it constitutes new information probative of Orion's responsibility. Orion argues that when the contracting officer received the SBA's refusal to issue a COC on the basis that Orion lacked the required financial capability, the contracting officer should have recognized that the refusal was not consistent with the relevant facts, including "Northrop Grumman's direct assurance to him that it would not let a contract awarded to Orion fail." Orion Comments, at 6. According to Orion, the information in the e-mail should have caused the contracting officer to question the basis for the SBA's refusal to issue a COC as well as his own initial non-responsibility determination.⁴

³ We contacted the SBA to request the SBA's opinion on the scope of a contracting officer's discretion to reverse an initial non-responsibility determination following SBA's refusal to issue a COC. SBA agreed that the FAR and SBA regulations provide that "the [contracting officer] has discretion to award the contract to a firm that SBA has denied a COC, thus providing the [contracting officer] with discretion to change his or her initial responsibility determination when SBA has denied a COC." SBA Response, at 4.

⁴ Orion also challenges the merits of the contracting officer's initial negative responsibility determination and referral of Orion to SBA under COC procedures. We disagree with Orion's challenges in this area, but we need not review them here. Since the SBA has exclusive authority to finally determine the responsibility of a

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The agency responds that the e-mail from Northrop Grumman was not new information probative of Orion's responsibility, in that the e-mail did not include any information directly relevant or pertinent to the contracting officer's negative responsibility determination, or the SBA's refusal to issue a COC. Accordingly, the agency contends that the e-mail did not provide a basis for the contracting officer to reconsider the non-responsibility determination. The agency further contends that, contrary to Orion's assertion, it would have been improper for the contracting officer to have reversed his initial non-responsibility determination on the basis of an unsolicited e-mail "pledge" that "Northrop Grumman would 'not let Orion fail,' in lieu of verification from the DCAA that the offeror has an adequate accounting system," or evidence that Orion possessed the financial capability to perform the contract following the SBA's refusal to issue a COC on that basis.⁵ Agency Comments, at 5.

We agree with the agency that the contracting officer acted reasonably in not revisiting his initial non-responsibility determination on the basis of the Northrop Grumman e-mail. The e-mail in question failed to provide any specific evidence rebutting the findings that Orion lacked an approved accounting system or the financial capability to perform the contract. The e-mail merely made a blanket assertion that Northrop Grumman "will not let Orion Technology fail," without specific evidence to establish the existence of accounting, financial, or other support provided by Northrop Grumman, and without even establishing that the e-mail sender had authority to obligate Northrop Grumman to provide such assistance.

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small business, our Office generally does not review either the contracting officer's decision to refer a responsibility question to the SBA, or the SBA's decision to issue or deny a small business a COC. 4 C.F.R. § 21.5(b)(2). As there is no evidence here that the contracting officer did not give SBA the entire file pertaining to his initial determination that Orion lacked an approved accounting system, and SBA conducted a comprehensive review of Orion's responsibility before refusing to issue a COC, we will not consider Orion's allegations concerning the contracting officer's initial negative responsibility determination. See Goshen Excavators, *supra*, at n.4; 4 C.F.R. § 21.5(b)(2) (2011). Even in cases where an agency considers new information pertaining to the responsibility of a firm which had been denied a COC, our review is limited to whether the agency reasonably assessed the new information. Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5 at 3.

⁵ The intervenor further points out that, to the extent Northrop Grumman was providing actual accounting or financial assistance to Orion, such as financial backing, loan guarantees, or other support, it was Orion's responsibility to submit evidence of that assistance to the SBA under COC procedures.

Under these circumstances, the e-mail message cannot be considered probative of Orion's responsibility, and was properly disregarded by the contracting officer. See UAV Sys., Inc., B-255281, B-255281.2, Feb. 17, 1994, 94-1 CPD ¶ 121.

We deny the protest.

Lynn H. Gibson
General Counsel