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Decision

Matter of: Coastal Environmental Group, Inc.

File: B-407563; B-407563.3; B-407563.4

Date: January 14, 2013

Brian W. Craver, Esq., Person & Craver LLP, for the protester.
Sara McGraw, Esq., Environmental Protection Agency, for the agency.
Laura Mann Eyester, Esq., for the Small Business Administration.
Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee's bid was nonresponsive to the invitation for bid's key personnel experience requirements is denied where such a requirement was related to bidder responsibility, not bid responsiveness, and we see no merit to the protester's claims that the bid took exception to the requirements,

DECISION

Coastal Environmental Group, Inc., of Edgewood, New York, protests the Environmental Protection Agency's (EPA) award of a contract to PK Management Group, of Miami, Florida, under invitation for bids (IFB) No. SOL-R7-12-00016, for remediation of lead contaminated soil in Omaha, Nebraska. The protester asserts that the awardee's bid was nonresponsive and ineligible for award.

We deny the protest.

BACKGROUND

The solicitation, set aside for section 8(a) small business firms, sought bids to perform environmental remediation services for residential properties within the Omaha Lead Superfund Site, in Omaha, Nebraska. The IFB provided for the award of a fixed-price, indefinite-delivery/indefinite-quantity contract with performance incentives, for a 1-year base period with three 1-year options, to "the lowest bidder who is deemed to be both a responsible and responsive bidder." IFB § M-2.

The IFB required bids to include resumes for key personnel responsible for the work specified in the performance work statement (PWS), and provided that the resumes were to demonstrate compliance with specific experience requirements established for each position. IFB § L-6. For example, the Project Manager was required to have a minimum of 3 years of residential remediation or cleanup activities, with at least 2 years spent in managing project activities. Id. The PWS reiterated those requirements and stated that “[f]ailure to identify personnel, for these key positions, meeting these qualifications and experience requirements will be determined to be non-responsive.” PWS § 2.1. Moreover, the PWS precluded changes to key personnel within 180 days of contract award. Id.

The solicitation also required bids to include a Draft Quality Assurance Project Plan, Draft Health and Safety Plan, and Draft Project Management Plan; the IFB set forth minimum requirements for each plan. IFB § L-6. In addition, bids were to include three client references for contracts of a similar size and complexity demonstrating experience in removing hazardous materials from soil in residential yards and the transportation and disposal of hazardous materials. The solicitation further specified that the client references were required to clearly demonstrate experience with equipment decontamination; residential yard excavation, backfilling, grading and revegetation; and storm water and erosion control at construction sites. Id.

Coastal and PK submitted timely bids. The apparent low bidder was PK with a total bid price of \$23,897,255; the second low bidder was Coastal with a total bid price of \$26,774,907. Bid Abstract, May 8, 2012. The agency, however, conducted a review of PK’s bid and concluded that the firm did not meet the solicitation requirements in the following ways: PK was a real estate management company with no experience in removing hazardous materials in soils in residential yards; the majority of the experience for PK’s subcontractor did not involve remediation, and very little of the experience demonstrated experience with equipment decontamination, required residential yard work, and storm water and erosion control; the subcontractor appeared to be performing more than half of the effort; and the resumes of key personnel did not demonstrate the required experience. Project Officer Review Comments, May 10, 2012 at 1-3. In addition, the contracting officer expressed concern that PK, with a Dun and Bradstreet financial rating of “fair,” lacked the financial resources to purchase or rent the necessary equipment to perform the remediation work without severe financial loss. Referral of Non-Responsible Low Bidder, May 22, 2012.

Citing the above reasons, the contracting officer concluded that PK, the low bidder, lacked “certain critical elements of responsibility for [the] subject procurement,” and “simply do[es] not have the appropriate and applicable resources to be successful for this particular project.” Id. The contracting officer therefore referred PK as a “non-responsible low bidder” to the Small Business Administration (SBA) for consideration under SBA’s certificate of competency (COC) process. Id. On June 22, SBA issued PK a COC; concurrently, SBA notified EPA that it considered

PK responsible and that, pursuant to Section 8(b)(7) of the Small Business Act, EPA was required to “let the contract for the aforementioned solicitation to the certified concern.” Letter from SBA to Contracting Officer, June 22, 2012.

EPA appealed SBA’s issuance of the COC to PK, again challenging PK’s responsibility. See Letter from Contracting Officer to SBA, July 17, 2012. On appeal, EPA limited its concerns with PK’s bid to two issues, namely, that PK’s work references failed to demonstrate sufficient prime contractor remediation efforts, and that PK’s key personnel resumes lacked minimum required experience. See Memorandum from Contracting Officer to SBA, July 17, 2012. When SBA denied EPA’s appeal of the issuance of the COC, see Memorandum of the Headquarters Certificate of Competency (COC) Review Committee Recommendation, EPA then made award to PK, and this protest followed.

DISCUSSION

The central issue in this protest is whether certain questions about the compliance of PK’s bid with the solicitation’s key personnel requirements concern the responsiveness of the bid or the responsibility of the bidder. Coastal asserts that the awardee’s bid should have been rejected as nonresponsive for submitting key personnel resumes that failed to demonstrate the required experience.¹ In addition

¹ Alternatively, Coastal argues that the agency did, in fact, find the awardee’s bid to be nonresponsive for failure to provide key personnel resumes containing the required experience, but nevertheless failed to reject the bid on that basis. See Protester’s Comments, Nov. 26, 2012 at 5. In our view, the record read as a whole does not support this assertion. In this regard, EPA’s initial referral to SBA made no mention of the responsiveness of PK’s bid and instead repeatedly states that the firm is not responsible. See ERA Referral of PK to SBA, May 22, 2012 at 2 (listing “responsibility” elements that are lacking), and at 4 (asserting that PK “is not responsible for performance of this particular project” and that “a large remedial soil project is beyond the realm of their responsibility”). Further, in its appeal of the COC grant, EPA again argued that PK had “failed to demonstrate that it is a responsible contractor capable of performing this contract successfully and satisfactorily.” EPA Appeal of COC, July 17, 2012 at 2. The only support for the protester’s assertion is an email from the contracting officer to SBA, responding to the initial COC grant, in which the contracting officer stated that “[i]t is very clear that this company did not demonstrate responsibility or responsiveness?” Email from Contracting Officer to SBA, June 21, 2012. We do not believe that this brief reference, taken out of context, demonstrates that the agency viewed the alleged deficiencies in the awardee’s resumes as a matter of responsiveness. See Protester’s Comments, Nov. 26, 2012 at 6. Rather, the weight of the record, including, as noted above, EPA’s referral to SBA and the subsequent appeal, all indicate that the agency viewed this matter as one of responsibility. Further, we

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to Coastal's arguments that the resumes submitted by PK were so inadequate that PK's bid should have been viewed as taking exception to the IFB's experience requirements, Coastal contends that certain unique performance requirements in the IFB's PWS shifted what might traditionally be viewed as a matter of responsibility to one of responsiveness. We disagree.

Responsiveness concerns a bidder's commitment to provide the required goods or services and must be determined by the agency from the face of the bid at bid opening. Propper Manufacturing Co., Inc.; Columbia Diagnostics, Inc., B-233321, B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58; nonresponsive bids may not be accepted. Sac & Fox Indus., Ltd., B-231873, Sept. 15, 1988, 88-2 CPD ¶ 250. In contrast, responsibility relates to a bidder's capability to perform the contract. Beta Construction Co., B-274511, Dec. 13, 1996, 96-2 CPD ¶ 230 at 2. Specifically, the Small Business Act identifies the elements of responsibility as "including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity." 15 U.S.C. § 637(b)(7)(A) (2006).

Under the Small Business Act, the SBA has conclusive authority to determine the responsibility of small business concerns. In this regard, when a procuring agency finds that a small business is not eligible for award based on a nonresponsibility determination or a failure to satisfy definitive responsibility criteria, the agency is required to refer the matter to SBA for a final determination under its certificate of competency procedures. Federal Acquisition Regulation (FAR) §§ 19.602-1(a)(2), 19.602-4(b); see also Specialty Marine, Inc., B-292053, May 19, 2003, 2003 CPD ¶ 106 at 3.

As an initial matter, we conclude that the solicitation requirements at issue here involved matters of responsibility, not responsiveness. For example, in Joint Venture Conscoop-Meyerinck, B-278243.4, Mar. 18, 1998, 98-1 CPD ¶ 83 at 3, an IFB required bidders for a contract to extend a refueling system to employ an experienced systems integrator, and to submit with their bids a resume for its system integrator with a certification of experience to include three similar projects. We held that the agency properly considered supplemental information about the experience requirement that was furnished after bid opening because the requirement for the use of an experienced systems integrator was a matter of responsibility, that is, the bidder's ability to perform the work.

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note that the fact that the IFB characterized the identification of qualified personnel as a matter of responsiveness is not dispositive, because it is well-settled that a contracting agency cannot change a matter of responsibility into one of responsiveness merely by the terms of the solicitation. D. J. Findley, Inc., B-215083, July 24, 1984, 84-2 CPD ¶ 106 at 3.

Likewise, in DAVSAM Int'l, Inc., B-218201.3, Apr. 22, 1985, 85-1 CPD ¶ 462, an IFB required bidders for a food service contract to submit with their bids resumes of supervisory personnel, as well as information on the bidder's previous experience, the role of the project manager, and management plans and procedures. While the IFB indicated that failure to provide the information would render the bid nonresponsive, we held that such information clearly related to responsibility, that is, the bidder's apparent ability and capacity to perform the contract requirements, and that a contracting agency cannot, merely by the terms of the solicitation, change a matter of responsibility into one of responsiveness. DAVSAM Int'l, Inc., supra, at 3.

Similarly, in Science Applications, Inc., B-193479, Mar. 8, 1979, 79-1 CPD ¶ 167, an IFB required bidders, "[i]n order to be responsive," to submit resumes for professional employees establishing that the employees met specific minimum experience requirements. Science Applications, Inc., supra, at 2. In addressing this requirement, we first observed that a contracting agency cannot make a matter of responsibility into a question of responsiveness by the terms of the solicitation. Id. at 3. We then held that the failure of one of the bidder's resumes to establish that the project coordinator had the required three years of progressively responsible experience in a related educational or technical field concerned the responsibility of the bidder, amounting to a definitive responsibility criteria, and did not relate to responsiveness. In this regard, our Office stated that

[i]t is well settled that solicitation provisions requiring the submission of information necessary to determine compliance with specified bidder experience requirements pertain solely to the bidder's responsibility, i.e., its overall capacity to perform the prospective contract, and that such information need not be submitted with the bid but may be furnished up to the time of award.

Id. at 2-4.

Coastal also argues that the experience requirements in this IFB have been changed to matters of responsiveness in light of the PWS requirement in this solicitation barring any changes to key personnel within 180 days of contract award. PWS § 2.1. In Coastal's view, this requirement creates a performance obligation out of the experience requirement, transforming an otherwise responsibility matter into a responsiveness one.

We disagree with Coastal that the specific language of the PWS here changes the nature of these experience requirements from matters of responsibility to matters or responsiveness. Whenever an agency requests resumes as part of the submission of bids or proposals, there is a reasonable expectation that those individuals for whom resumes have been submitted are the personnel who will perform the contract. For that reason, a firm that knowingly or negligently represents that it

would rely on specific personnel that it did not expect to furnish during contract performance may be found to have established an impermissible bait and switch scheme, where that misrepresentation was relied on by the agency and had a material effect on the evaluation results. Data Mgmt. Servs. Joint Venture, B-299702, B-299702.2, July 24, 2007, 2007 CPD ¶ 139 at 10. In our view, a responsibility-type factor going to the capability of the bidder remains a matter of responsibility, notwithstanding any subsequent, associated, performance obligations.

Coastal's assertion that PK's bid, in essence, took exception to the IFB's experience requirements arises from the fact that, although the bid included resumes and described experience, the resumes, on their face, did not clearly establish the ways in which the experience proffered was related to the experience sought. In TYBRIN Corp., B-298364.6 et al., Mar. 13, 2007, 2007 CPD ¶ 51, our Office held that a proposal which on its face took exception to a limitation on subcontracting was nonresponsive for failure to comply with a material term of the solicitation. We noted in that decision that the issue

does not concern whether a bidder or offeror can or will comply with the subcontracting limitation requirement during performance of the contract (where we recognize that the matter is one of responsibility (or in certain cases, contract administration . . .)), but rather, whether the bidder or offeror has specifically taken exception to the subcontracting limitation requirement on the face of its bid or proposal.

Id. at 6. Because the proposal at issue in TYBRIN specifically took exception to a material term, the limitation on subcontracting, it was unacceptable. Id. at 6-7. Here, in contrast, we do not think that PK's bid, on its face, took exception to the key personnel requirements. While the bid cannot reasonably be described as fully addressing the experience requirements, we are not prepared to conclude that the bid took issue with those requirements, as in TYBRIN.

Finally, Coastal also argues that in negotiated procurements, our Office has treated personnel experience and qualifications requirements as a matter of technical acceptability, akin to a question of responsiveness, and that therefore we must likewise view the key personnel experience requirements in this IFB as a matter of bid responsiveness. We again disagree. Our Office treats questions of responsibility consistently under sealed bidding and under negotiated procurement procedures. See Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38 (when a minimum management experience requirement, a traditional responsibility factor, is evaluated on go/no go basis, rejection of proposals solely on the basis of the offeror's failure to comply with such a factor must be referred to SBA); Paragon Dynamics, Inc., B-251280, Mar. 19, 1993, 93-1 CPD ¶ 248 at 4 (failure on the part of the offeror's proposed software development engineer to meet the minimum experience and capability requirements concerned a responsibility-related factor);

ASR Mgmt. & Tech. Servs., B-244862, B-247422, Apr. 23, 1992, 92-1 CPD ¶ 383 at 7 (noting that, although personnel qualifications are a “responsibility-type factor,” when they are evaluated on a comparative basis, they may properly be considered in an agency’s selection decision). In addition, the Small Business Act requires referral to SBA of questions of responsibility even where negotiated procurement procedures are used. See, e.g., Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003, 2003 CPD ¶ 33 at 5.

In sum, given the above case law with respect to key personnel requirements used to assess the capability of a bidder, we find no basis to object to EPA’s determination to make award to PK following SBA’s issuance of a COC to the firm in response the contracting agency’s nonresponsibility determination.²

The protest is denied.

Susan A. Poling
General Counsel

² The protester argues that SBA here has improperly issued a COC to a bidder who was not responsive to the solicitation and, in so doing, has violated 13 C.F.R. § 125.5(c)(3), which states that a COC referral from a procuring agency must indicate that the offeror has been found responsive to the solicitation. Our Office, however, will not generally review the issuance of a COC by SBA; one exception, which we “will interpret narrowly,” is an allegation that SBA has failed to follow its own published regulations. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(2) (2012). We see nothing in this record to substantiate a claim that the SBA violated its regulations or abused its discretion.