Decision

Matter of:  Mark Dunning Industries, Inc.

File:  B-405417.2

Date:  November 19, 2013

Douglas P. Hibshman, Esq., and Nicholas T. Solosky, Esq., Fox Rothschild LLP, for the protester.
Thomas A. Coulter, Esq., and Nicole Hardin Brakstad, Esq., LeClair Ryan PC, for Container First Services, LLC, an intervenor.
CPT Vera A. Strebel, Department of the Army, and John W. Klein, Esq., and Meagan K. Guerzon, Esq., Small Business Administration, for the agencies.
Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging affirmative determination of responsibility is dismissed where the assertions on which protest is based do not constitute the type of allegation that triggers Government Accountability Office (GAO) review of affirmative responsibility determinations under GAO’s Bid Protest Regulations.

2. Where contract award is delayed for two years to resolve small business size protests, agency award of contract for original potential multi-year term is unobjectionable where there is no change in the statement of work, evaluation scheme, or length of time for which contractor would be obligated.

DECISION

Mark Dunning Industries, Inc. (MDI), of Dothan, Alabama, protests the Department of the Army’s award of a contract to Container First Services, LLC (CFS), of Petersburg, Virginia, under invitation for bids (IFB) No. W91QFS-11-B-0001, a small business set-aside for solid waste services at Fort Lee, Virginia. MDI challenges the agency’s responsibility determination and otherwise asserts that award to CFS was improper.

We dismiss the protest in part and deny the protest in part.
BACKGROUND

The IFB, issued in April 2011, contemplated the award of a fixed-price contract, for a base year, with four 1-year options and one 6-month option, for the collection, recycling, transportation, and disposal of all solid waste and recyclables from Fort Lee. Bidders were required to submit pricing for annual refuse and recycling services, landfill fees, recycling fees, compactor supply, and compactor hauling charges, for the base year and each option. Award was to be made to the responsible bidder whose responsive bid was the lowest priced.

The apparent low bidder at the June 1, 2011 bid opening was CFS ($4,559,499), while MDI was the apparent second low bidder ($4,603,468). Before the Army could make award to CFS, however, MDI filed a protest with our Office challenging the responsiveness of CFS’s bid. Specifically, MDI asserted that CFS had failed to include prices for two sub-line items related to disposal of certain recyclables and the supply and maintenance of compactors. We subsequently denied MDI’s protest finding that CFS’s bid was responsive because it clearly indicated that CFS would provide all of the items required by the solicitation, with the challenged items to be provided at no cost to the government. Mark Dunning Indus., Inc., B-405417, Oct. 6, 2011, 2011 CPD ¶ 207.

The Army did not then award the contract to CFS because MDI had filed a size protest with the Small Business Administration (SBA) which was still pending. Instead, the Army extended MDI’s incumbent contract. The initial size protest was denied on June 30, 2011, but MDI then filed an appeal with the SBA’s Office of Hearings and Appeals (OHA). On September 26, 2011, OHA remanded the matter for a new size determination. SBA Comments at 2.

On April 25, 2013, the SBA issued a new decision determining that CFS qualified as a small business for this procurement. The contracting officer then confirmed with the Fort Lee Directorate of Public Works that all services listed in the IFB, including some which had been reduced under the extension to MDI’s contract on account of increased MDI pricing, were still required. The contracting officer confirmed with CFS that it was willing and able to perform all of the solicitation requirements without any change to its bid price. The contracting officer also informed CFS that the Department of Labor had issued a new wage determination on June 13, 2012; CFS agreed to honor its 2011 bid price and to absorb any increases associated with the new wage determination without increasing the costs to the government.

Although MDI again appealed to OHA on May 10, OHA, on July 23, affirmed the SBA’s determination that CFS was small for this procurement. Prior to making award to CFS, the contracting officer verified the information from the 2011 responsibility determination and, after obtaining additional information, again determined that CFS was responsible. On July 30, the contracting officer awarded the contract to CFS. This protest followed.
DISCUSSION

MDI raises a number of arguments challenging the agency’s award to CFS and asserts that the agency should have recompeted its requirements. We have considered all of the protester’s arguments and find that none provide a basis for questioning the award. We address MDI’s most significant arguments below.

Affirmative Determination of Responsibility

MDI challenges the agency’s responsibility determination, asserting that the determination, made after a two year delay, was based on "old, stale, unreliable, and inaccurate" information, and thus failed to consider available relevant information, including an alleged change in the agency’s requirements. Protest at 5-6. In this regard, MDI notes that during the past two years of performance under MDI’s extended contract, the agency reduced the required number of containers and compactors, and eliminated manning of the recycling center.

Because the determination that an offeror is capable of performing a contract is largely committed to the contracting officer’s discretion, our Office generally will not consider a protest challenging an affirmative determination of responsibility except under limited specified exceptions. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2013); ESCO Marine, Inc., B-401438, Sept. 4, 2009, 2009 CPD ¶ 234 at 13. One exception is where a protest identifies evidence that raises serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c). In this context, we will review a challenge to an agency’s affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. ESCO Marine, Inc., supra; Marinette Marine Corp., B-400697 et al., Jan. 12, 2009, 2009 CPD ¶ 16 at 24; T. F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52 at 5; Verestar Gov’t Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4-5. MDI’s assertions of stale information and changed requirements do not meet this standard.

Contrary to MDI’s claim, the record shows that prior to making the award, the contracting officer made a new determination of CFS’s responsibility based on updated information. Among other things, she determined that CFS possessed the necessary production, construction, and technical equipment and facilities to perform the contract; verified CFS’s financial capability; found no negative performance information; and concluded that CFS had a satisfactory record of integrity and business ethics. Memorandum for Record, Aug. 26, 2013.
With regard to the alleged change in agency requirements, the agency explains that in fact its requirements have not changed and the performance levels will remain the same as set forth in the IFB. Contracting Officer’s Statement ¶¶ 2.d., 3.a. According to the agency, it only reduced the level of service during MDI’s past two years of performance because the agency’s budget could not absorb MDI’s continuous, rapid increase in prices. Contracting Officer’s Statement ¶ 3.a.i. (In contrast, as part of her responsibility determination, the contracting officer verified that CFS will honor its 2011 bid pricing, terms, and conditions. Memorandum for Record, Aug. 26, 2013.) In any case, MDI does not explain, nor does the record otherwise indicate, how a decrease in the required level of performance could be viewed as calling into question CFS’s ability to perform.¹ We therefore dismiss MDI’s challenge to the affirmative determination of CFS’s responsibility.

Award of Full Contract Term

MDI asserts that award of the contract for the base year and 4½ option years was improper because the last option period of performance, according to the IFB’s bid schedule, was to extend only through March 2017, while the contract as awarded could extend until the end of March 2019.

The award of the contract for the full 5½ year potential term was unobjectionable. While the contract, as awarded, has a later start date (and thus a later potential end date), nevertheless, where, as here, the different start date does not change the statement of work, the evaluation scheme, or the length of time for which the contractor would be obligated, there is no requirement that new offers be obtained from the bidders. See Consolidated Eng’g Servs., Inc., B-293864.2, Oct. 25, 2004, 2004 CPD ¶ 214 at 5. Here, CFS’s contract was awarded at the same price, covers the same performance requirements, and extends for the same potential term of 66 months, as with the original IFB. Solicitation Clause 52.217-9. Moreover, in view of the fact that the delay is directly attributable to the protester’s own multiple, unsuccessful size status protests, and MDI itself has performed the contract during the 2-year delay it occasioned, there is no basis to conclude that the protester was prejudiced by the agency’s award of the contract to CFS for the full contract term. See Lifecare Mgmt. Partners, B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 6 (incumbent who delays agency’s ability to award contract cannot protest that alteration of start date represents relaxation of requirements in favor of new awardee); see Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7 (prejudice essential to viable protest).

¹ MDI also asserts that the alleged change in requirements warranted amendment of the IFB or resolicitation of the procurement. However, in view of the agency’s representation that its requirements have not changed and that performance was reduced only temporarily, MDI’s argument furnishes no basis for questioning the award.
CFS Change in Size Status

On August 19, approximately 3 weeks after contract award, CFS and another waste disposal entity (Regional Industries, LLC) closed on a corporate ownership restructuring which resulted in CFS and Regional gaining ownership interests in a previously formed (May 2013) shell holding company, Waste Services Industries, LLC (WSI). Declaration of CFS President ¶¶ 7-8, Sept. 13, 2013. Upon closing the transaction, CFS’s receipts, when combined with those of WSI, are likely to exceed the applicable $35.5 million size standard. CFS accordingly notified the agency that it no longer qualified as a small business. Letter to Contracting Officer, Sept. 13, 2013.

MDI asserts that CFS’s contract should be terminated because the awardee no longer qualifies as a small business. In this regard, MDI argues that because CFS allegedly planned as early as May 2013 to engage in a corporate restructuring that would render it other than small, CFS’s failure to disclose that plan to the agency constituted a material misrepresentation.

As a preliminary matter, the Small Business Act, 15 U.S.C. § 637(b)(6), gives the SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. 4 C.F.R. § 21.5(b)(1); Randolph Eng’g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39 at 3. We therefore will not review a protester’s challenge to another company’s size status, nor will we review a decision by the SBA that a company is, or is not, a small business for purposes of federal procurements. Randolph Eng’g Sunglasses, supra. Thus, MDI’s challenge to the award on these bases is not for review.

Further, MDI’s assertion of a misrepresentation concerning CFS’s change in size status is without merit. As explained by the SBA in its comments on this protest, the time for determining the size status of an entity, including affiliates, is as of the date the concern submits a written self-certification that it is small, as part of its initial offer.2 13 C.F.R. § 121.404(a); Vantex Serv. Corp., B-251102, Mar. 10, 1993, 93-1 CPD ¶ 221 at 2.3 CFS self-certified itself as a small business when it submitted its

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2 In developing this protest, we requested input from SBA on the application of the small business regulations and to CFS’s eligibility to receive the contract award due to its restructuring. SBA concluded that neither the agency nor CFS violated the applicable regulations. SBA Report at 6.

3 We note that where a small business concern is involved in a merger or acquisition, the concern must recertify its size status within 30 days of the final transaction. 13 C.F.R. § 121.404(g)(2); Federal Acquisition Regulation (FAR) § 19.301-2 (mirroring SBA requirement for recertification). Here, CFS reported its changed size status in accordance with these regulations.
bid in 2011. There is nothing in the record, nor does MDI allege, that CFS misrepresented its size at that time. Since CFS's 2013 restructuring came well after the 2011 self-certification, we have no basis to object to the agency's award to CFS on this ground.

The protest is dismissed in part and denied in part.

Susan A. Poling
General Counsel