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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Gaver Industries, Inc., dba Barker & Barker Paving

File: B-412428

Date: February 9, 2016

Christian M. Perrucci, Esq., and Deepak Sharma, Esq., Florio Perrucci Steinhardt & Fader, LLC, for the protester.

Jennifer L. Hedge, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

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

2. Protest challenging bid as nonresponsive is dismissed where the nonconformance alleged by the protester was not a requirement of the solicitation.

DECISION

Gaver Industries, Inc., dba Barker & Barker Paving, of Bethlehem, Pennsylvania, protests the award of a contract to aEONRG, LLC, of Downingtown, Pennsylvania, under invitation for bids (IFB) No. VA244-15-B-1277, issued by the Department of Veterans Affairs (VA) for asphalt paving repairs at the Lebanon VA Medical Center (VAMC), Lebanon, Pennsylvania. Gaver argues that the agency's evaluation of aEONRG's responsibility, as well as the responsiveness of the awardee's bid, were improper.

We dismiss the protest.

BACKGROUND

The IFB, issued on August 25, 2015, as a service-disabled, veteran-owned, small business (SDVOSB) set-aside, contemplated the award of a fixed-price contract for the paving repair of the front drive and various parking lots at the Lebanon VAMC.

In general terms, the contractor was required to provide all labor, material, equipment, and resources necessary to complete the specified repairs.¹ IFB at 1.

Relevant to the protest here, the IFB included Veterans Affairs Acquisition Regulation (VAAR) clause 852.236-72 (Performance of Work by the Contractor). IFB at 35. VAAR clause 852.236-72 is a supplement to Federal Acquisition Regulation (FAR) clause 52.236-1 (Performance of Work by the Contractor), which is inserted into a solicitation by the contracting officer to specify the percentage of work to be performed by the contractor itself.² In turn, VAAR clause 852.236-72 details how to compute the amount of work being performed by the contractor. Here, although VAAR clause 852.236-72 was included in the solicitation, FAR clause 52.236-1 was not; accordingly, the IFB did not specify here what percentage of work, if any, was to be performed by the contractor. Moreover, the IFB did not require bidders to submit any information with their bids indicating the amount of work to be self-performed.

The solicitation established that contract award would be made to the lowest responsive, responsible bidder, i.e., “[t]he Government will evaluate bids in response to this solicitation . . . and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government, considering only price and the price-related factors specified elsewhere in the solicitation.” IFB at 17 (see FAR clause 52.214-19).

Four bidders, including aEONRG and Gaver, submitted bids by the September 24 bid opening date. aEONRG submitted the lowest-priced bid of \$219,496.84, and Gaver submitted the second lowest bid in the amount of \$238,134. Agency Report

¹ The solicitation also established that the magnitude of the project was \$100,000 to \$250,000. IFB at 1.

² FAR clause 52.236-1 states that:

The Contractor shall perform on the site, and with its own organization, work equivalent to at least ____ [insert the appropriate number in words followed by numerals in parentheses] percent of the total amount of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performing the work, the Contractor requests a reduction and the Contracting Officer determines that the reduction would be to the advantage of the Government.

FAR clause 52.236-1. However, FAR clause 52.236-1 is not required to be included in solicitations where, as here, a fixed-price construction contract is contemplated and the contract amount is expected to be \$1.5 million or less. FAR § 36.501-1(b).

(AR), Tab 5, Bid Abstract. The contracting officer subsequently determined that aEONRG's bid complied with and took no exceptions to the solicitation, and that aEONRG was a responsible business concern. Contracting Officer's Statement, Dec. 2, 2015; AR, Tab 7, aEONRG Responsibility Determination, Sept. 24, 2015, at 1-26. The contracting officer found, among other things, that aEONRG had "the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them . . . to perform this contract (see FAR § 9.104-3(a))." AR, Tab 7, aEONRG Responsibility Determination, Sept. 24, 2015, at 1. The agency thereafter made contract award to aEONRG on September 30.

On October 2, Gaver filed an agency-level protest with the VA. Gaver alleged that aEONRG had no prior experience in large scale asphalt paving projects, and that the awardee could not comply with the requirements of FAR § 36.501, FAR clause 52.236-1, and VAAR clause 852.236-72.³ AR, Tab 8, Gaver Agency-Level Protest, Oct. 2, 2015, at 1-2. In response to the Gaver protest, the contracting officer requested that aEONRG submit a work percentage breakdown (WPB), which indicated the amount of direct labor costs to be incurred by aEONRG and its subcontractor. Contracting Officer's Statement, Dec. 2, 2015; AR, Tab 9, aEONRG WPB. On October 22 the VA denied Gaver's agency-level protest.⁴ AR, Tab 10, Agency-Level Protest Decision, Oct. 22, 2015, at 1-2. This protest followed.

DISCUSSION

Gaver's protest raises several issues regarding the agency's evaluation of aEONRG's responsibility and the awardee's bid. In sum, Gaver argues that it was the lowest responsible bidder, and should have therefore received contract award. As detailed below, we find the issues which Gaver raises provide no basis on which to sustain the protest.

Gaver alleges that because the awardee has no past experience in large scale asphalt paving projects, it was improper for the VA to deem aEONRG a responsible contractor. In support thereof, Gaver contends that aEONRG's System for Award Management (SAM) registration does not include the North American Industrial

³ Gaver alleged that the requirement of work to be self-performed by aEONRG was 12 percent, and FAR § 36.501 establishes that, when applicable, generally the minimum amount of work to be self-performed by the contractor is not less than 12 percent.

⁴ Among other things, the contracting officer determined that aEONRG would provide over 15 percent of the labor itself. AR, Tab 10, Agency-Level Protest Decision, Oct. 22, 2015, at 2.

Classification System (NAICS) code applicable to this procurement,⁵ and that the awardee's website does not list any prior asphalt paving projects. Protest, Oct. 30, 2015, at 1-3.

With regard to Gaver's challenge to aEONRG's responsibility, we find no basis to review the contracting officer's affirmative determination of responsibility for the awardee. The FAR provides that a contract award may not be made unless the contracting officer makes an affirmative determination of responsibility. FAR § 9.103(b). In most cases, responsibility is determined based on the standards set forth in FAR § 9.104-1, and involves subjective business judgments that are within the broad discretion of the contracting activities. Reyna-Capital Joint Venture, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. For example, the contracting officer must consider, among other factors, whether the putative awardee has the necessary experience, or the ability to obtain it. FAR § 9.104-1(e). Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility.⁶ 4 C.F.R. § 21.5(c). We will, however, 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. Id.; FCi Fed., Inc., B-408558.4 et al., Oct. 20, 2014, 2014 CPD ¶ 308 at 7.

Gaver's protest fails to meet the threshold for our review in this area, and is therefore dismissed. The allegations that our Office has reviewed in the context of an affirmative determination of responsibility generally pertain to very serious matters such as potential criminal activity. See, e.g., FCI Fed., Inc., supra (considering an allegation that the agency failed to consider an ongoing Justice Department investigation into whether the awardee's parent company defrauded the government when performing background investigations); FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 7-8 (considering an allegation that the agency failed to consider an ongoing investigation into whether the awardee

⁵ NAICS codes classify businesses for statistical purposes and are used by the Small Business Administration to establish business size standards. See www.acquisition.gov; www.census.gov/eos/www/naics (last visited Feb. 8, 2016).

⁶ Further, there is no requirement that contracting officers explain the basis for an affirmative responsibility determination, Bannum, Inc., B-409831, July 30, 2014, 2014 CPD ¶ 232 at 5; a written explanation is only required when a contracting officer makes a determination of nonresponsibility. FAR § 9.105-2(a)(1). Since an affirmative determination of responsibility is largely a matter within a contracting officer's discretion and need not be documented, our Office, as a general matter, will not consider a protest challenging an affirmative determination of responsibility except under limited exceptions.

defrauded the government on a prior contract for the same requirement). In contrast, Gaver's assertions that aEONRG's SAM registration does not include the NAICS code applicable to this procurement, or show any paving experience on its website, do not support the necessary threshold showing to trigger our Office's review of a challenge to an affirmative responsibility determination.⁷ See The GEO Group, Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153 at 7; Hendry Corp., B-400224.2, Aug. 25, 2008, 2008 CPD ¶ 164 at 2-3.

Gaver also asserts that the agency should have determined that aEONRG cannot meet the requirements of FAR § 36.501, FAR clause 52.236-1, and VAAR clause 852.236-72.⁸ The protester essentially argues that aEONRG is required to have sufficient personnel on its payroll, prior to contract award, to be able to perform at least 12% of the project itself. Protest, Oct. 30, 2015, at 3-4.

We dismiss this aspect of Gaver's protest for failing to state a valid basis for protest. Our Bid Protest Regulations, 4 C.F.R. § 21.5(f), contemplate that we may dismiss any allegation that fails to state a legally sufficient basis for protest. As set forth above, the IFB did not include FAR clause 52.236-1, nor was this clause required to be included in the solicitation.⁹ Moreover, the IFB did not require bidders to submit any information with their bids demonstrating the amount of work to be performed by the contractors themselves; thus, the agency could not consider this non-information as part of determining the responsiveness of aEONRG's bid (*i.e.*, its compliance with the material terms of the solicitation, *see* FAR § 14.301(a)).¹⁰ Quite simply, Gaver argues that aEONRG's bid failed to comply with a nonexistent requirement. We therefore dismiss this aspect of the protest.

⁷ We also find no merit in Gaver's assertion that a solicitation's NAICS code constituted a definitive responsibility criteria. Definitive responsibility criteria are specific and objective standards designed to measure a prospective contractor's ability to perform the contract. Reyna-Capital Joint Venture, *supra*, at 2

⁸ To the extent that Gaver alleges that aEONRG will not comply with applicable requirements during contract performance, we find this to be a matter of contract administration which we will not review. See 4 C.F.R. § 21.5(a).

⁹ We also find VAAR clause 852.236-72--which details how to measure the amount of contractor-performed work--to be without effect when FAR clause 52.236-1--which establishes the required amount of contractor-performed work--is absent.

¹⁰ To the extent Gaver believes the IFB should have included FAR clause 52.236-1, or mandated the submission of information demonstrating compliance with same, that protest is untimely. See 4 C.F.R. § 21.2(a)(1).

Lastly, Gaver alleges that aEONRG's plan to subcontract the vast majority of the project work would violate the purpose of the SDVOSB set-aside. Protest, Oct. 30, 2015, at 4. We find this aspect of Gaver's protest to be untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on alleged improprieties in a solicitation must be filed prior to bid opening or the time established for receipt of proposals, 4 C.F.R. § 21.2(a)(1), and all other protests must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Further, a matter initially protested to the contracting agency will be considered timely by our Office only if the initial agency protest was filed within the time limits provided by the Regulations for filing a protest with our Office unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. 4 C.F.R. § 21.2(a)(3); C.L.R. Dev. Group, B-409398, Apr. 11, 2014, 2014 CPD ¶ 141 at 4-5. Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.-- Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

Here, Gaver's allegation that aEONRG's degree of subcontracting would violate the purpose of the SDVOSB set-aside is untimely since the basis of protest was known to Gaver at or before the time of its agency-level protest, but was not protested to the agency, or to our Office, within 10 days thereof. Quite simply, as this challenge was not presented as part of Gaver's agency-level protest, it is therefore untimely when raised for the first time with our Office. See C.L.R. Dev. Group, supra, at 5.

The protest is dismissed.

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General Counsel