



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Brickwood Contractors, Inc.

File: B-290444

Date: July 3, 2002

James J. Tansey, Esq., for the protester.

Carl A. Haberbusch, Esq., and Jane Goetz, Esq., Goetz Fitzpatrick Most & Bruckman, for Spearin, Preston & Burroughs, the intervenor.

J. Stephen Brophy, Esq., and Elaine A. Eder, Esq., United States Coast Guard, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting officer acted properly where the record reflects that he diligently reviewed the protester's responsibility, found the protester nonresponsible, and then promptly referred the matter to the Small Business Administration (SBA) under certificate of competency (COC) procedures, and because of the length of time required to complete these reviews, the bidders were requested to extend their bids; there was no regulation or other legal requirement that provides that a contracting officer's referral of a small business bidder to the SBA for a COC must take place at such a time in the process so as to permit the SBA to make its COC determination prior to the expiration of the bidder's initial bid acceptance period.

2. Bidder that allegedly submitted its bid extension by facsimile transmission assumed the risk of nonreceipt by the agency, and the bidder's evidence of its facsimile transmission does not establish receipt where, as here, the agency denies receipt and there is no other evidence of receipt.

DECISION

Brickwood Contractors, Inc. protests the award of a contract to any other bidder under invitation for bids (IFB) No. DTCGG1-02-B-38T001, issued by the Coast Guard for repairs to the Ambrose Light Tower.

We deny the protest.

The IFB, issued January 3, 2002, provides for the award of a fixed-price contract to repair the Ambrose Light Tower.¹ The agency received six bids by the bid opening date of February 26, 2002, with Brickwood submitting the apparent low bid of \$1,416,000. Protest, exh. 2, Abstract of Bids.

Because the next low bid and the agency's estimate for the contract were much higher than Brickwood's bid (they were \$1,987,000 and \$2,350,000, respectively), the contracting officer, by letter dated February 27, requested that Brickwood confirm its bid. The contracting officer informed Brickwood that "[n]ormally on marine construction projects the bidding community is rather limited" and that he had "never heard of [Brickwood]." The contracting officer added that based upon his preliminary investigation, which included obtaining a Dun & Bradstreet report, it appeared that Brickwood was a painting contractor and that none of the information available referenced "any marine construction experience."² The contracting officer also noted that it appeared that the bid package had been mailed to Brickwood on February 19 (1 week prior to bid opening), and that Brickwood had not attended the site visit. The contracting officer concluded that it appeared that Brickwood may have made a mistake in its bid or misunderstood the scope of work, and further informed Brickwood that should it confirm its bid, the agency would perform "a more extensive responsibility check" to ensure Brickwood's "ability to perform" the contract. Protest, exh. 3, Contracting Officer's Letter to Brickwood (Feb. 27, 2002).

By letter dated March 7, Brickwood confirmed its bid price and provided "three pages of references." The contracting officer reviewed the information submitted and found, however, that most of Brickwood's references were for "painting projects and none were offshore marine projects." Given the contracting officer's continued concerns regarding Brickwood's responsibility, the contracting officer requested, by letter dated March 11, that Brickwood provide "additional information including proposed subcontractors and sources of marine equipment." Agency Report, exh. 6, Contracting Officer's Determination and Findings Regarding Brickwood's Responsibility, at 2-3.

¹ The Ambrose Light Tower, which is located in lower New York Harbor (approximately 7.5 miles offshore in 95 feet of water at low tide), was damaged when a ship collided with it in January 2001. Agency Report, exh. 6, Contracting Officer's Determination and Findings Regarding Brickwood's Responsibility, at 1.

² Dun & Bradstreet is an independent reporting service that makes its reports available to the public for evaluating the financial positions of companies. Such reports are routinely used by contracting agencies in evaluating contractor responsibility. See Federal Acquisition Regulation (FAR) § 9.105-1(c)(6); International Shipbuilding, Inc., B-257071.2, Dec. 16, 1994, 94-2 CPD ¶ 245 at 4-5 n.2.

Brickwood provided the requested information on March 21, and the contracting officer contacted Brickwood's proposed subcontractors. The contracting officer found that two of these three firms had not been informed that the project was for the repair of the Ambrose Light Tower, and that while the other subcontractor had been so informed, it had been provided with only a portion of the specifications and drawings for the project. The contracting officer also contacted a number of Brickwood's references and found that although certain of the references had "positive" or "favorable" opinions regarding Brickwood's performance, none of the referenced projects involved were similar to the Ambrose Light Tower repair project, in that they did not require underwater welding. Id. at 3-4.

While performing the responsibility review, the contracting officer requested, by letters dated April 4, that each bidder extend its bid acceptance period from April 27 to May 31, 2002. Protest, exh. 5, Contracting Officer's Letter to Brickwood (Apr. 4, 2002); Agency Report at 1. The contracting officer did not receive a bid extension from Brickwood, and, by letter dated April 10, again requested that Brickwood furnish "a written extension" to its bid acceptance period. Agency Report, exh. 4, Contracting Officer's Letter to Brickwood (Apr. 10, 2002).

Shortly thereafter, the contracting officer determined that Brickwood was nonresponsible. Because Brickwood is a small business concern, the contracting officer referred the matter to the SBA for consideration under the SBA's certificate of competency (COC) procedures. Agency Report, exh. 6, Contracting Officer's Referral of Brickwood to SBA (Apr. 11, 2002). On that same date, the contracting officer again requested that Brickwood submit a written bid extension, informing Brickwood that "it is imperative that you submit a written extension of your bid acceptance period until 31 May 2002 because without the extension the [SBA] will most likely not entertain your [COC] application unless your bid acceptance period is still active." Agency Report, exh. 5, Contracting Officer's Letter to Brickwood (Apr. 11, 2002).

The SBA informed Brickwood by letter dated April 16 that Brickwood had been determined nonresponsible by the contracting officer and stated the bases for the contracting officer's determination. Agency Report, exh. 7, SBA's letter to Brickwood (Apr. 16, 2002). This letter explained the COC process and invited Brickwood to respond to each of the contracting officer's bases for the nonresponsibility determination. The SBA's letter added:

[A]s of this date, you have not extended your bid. If you intend to participate in the COC process so as to potentially receive award, IT IS IMPERATIVE that you provide a bid extension to the Contracting Officer and include a signed copy with your application materials when submitted to the SBA. The SBA will not perform a COC review on a firm whose bid cannot be accepted due to an expired [bid] acceptance period.

Brickwood submitted its COC application to the SBA on April 23 (1 day before the April 24 filing deadline). Agency Report, exh. 8, Brickwood's COC Application. However, despite the SBA's request, Brickwood did not provide a bid extension. Rather, Brickwood stated that although other surety companies were available to "bond this project" if required, Brickwood's "present bonding company does not want to extend the bid," and that "[t]he request is untimely." Brickwood added that "it is the policy of the Coast Guard to make contract awards in a fair and timely manner," and that "[t]he acceptance time for this bid expires Saturday, April 27, 2002, and we are confident the Coast Guard plans to award the project to us." *Id.* at 2. By letter dated April 25, Brickwood advised the SBA that Brickwood understood that the SBA needed until May 6 to process the COC, and if this was so, the Coast Guard's referral of the matter to the SBA was "untimely." Agency Report, exh. 9, Letter from Brickwood to SBA (Apr. 25, 2002).

By letter dated April 25, the SBA informed the contracting officer that because Brickwood had not extended its bid, it would "not process the case," given that the "SBA's final decision would likely be made no earlier than May 6, 2002," and "any decision (positive or otherwise) would be moot." Agency Report, exh. 10, SBA's Letter to Contracting Officer (Apr. 25, 2002), at 2.

Brickwood states that on April 26, by facsimile to the contracting officer, it extended its bid acceptance period to May 31. Protest at 2; exh. 9, Brickwood Letter to Contracting Officer (Apr. 26, 2002). As discussed below, the contracting officer advises that it did not receive this facsimile on that date, but did not receive this message until May 1, after the bid had expired.

By letter dated April 29, the SBA informed the contracting officer (and Brickwood by copy) that because Brickwood had not extended its bid, "the firm's bid is no longer valid and cannot now be accepted," and accordingly, the SBA was discontinuing its COC review. Agency Report, exh. 13, SBA Letter to Contracting Officer (Apr. 29, 2002).

By letter that same day, Brickwood wrote the Coast Guard "solicitation ombudsman," complaining that the contracting officer's referral of his responsibility determination to the SBA was "untimely," and requesting that the Coast Guard "confirm the contracting officer did not act properly and this contract be awarded to us." Brickwood attached to this letter a copy of the SBA's April 29 letter informing the contracting officer that the SBA had discontinued its COC review. Agency Report, exh. 14, Brickwood's Letter to Coast Guard Solicitation Ombudsman (Apr. 29, 2002).

Also on that date the contracting officer notified Brickwood by facsimile transmission that when he had arrived at work, he had found a facsimile coversheet (dated April 26) from Brickwood with nothing attached to it. Agency Report, exh. 15, Contracting Officer's Facsimile to Brickwood. Brickwood responded by facsimile on May 1, including as an attachment a written bid extension dated

April 26. Agency Report, exh. 16 (Brickwood Facsimile to Contracting Officer (May 1, 2002) and attach. (Brickwood Letter to Contracting Officer (Apr. 26, 2002)).

On May 2, the contracting officer informed Brickwood that he questioned “the legitimacy of the ‘26 April extension letter’” that the contracting officer asserts he first received on May 1, given, among other things, Brickwood’s previous failure to extend the acceptance period as requested as well as its failure to mention its bid extension in any of its previous conversations and correspondence. The contracting officer informed Brickwood that its bid had expired and the bid extension received on May 1 was considered untimely and a “futile attempt . . . to revive an expired bid.” Agency Report, exh. 18, Contracting Officer’s Letter to Brickwood (May 2, 2002). This protest followed.

Brickwood first argues that the “Coast Guard had an obligation to refer in a timely manner [its determination that Brickwood was nonresponsible] to the SBA in order that the SBA would have 15 days to review the referral without requiring that Brickwood extend its bid,” so that the Coast Guard cannot make award to another bidder and must make the award to Brickwood. Protest at 3.

Contracts may only be awarded to responsible prospective contractors, and accordingly, before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. Federal Acquisition Regulation (FAR) § 9.103(a), (b); 50 State Sec. Serv., Inc., B-272114, Sept. 24, 1996, 96-2 CPD ¶ 123 at 4. To be determined responsible, a prospective contractor must, among other things, be able to comply with the required performance schedule, have adequate financial resources, and have the necessary organization, experience, operational controls, and technical skills, or the ability to obtain them. FAR § 9.104; 50 State Security Serv., Inc., supra, at 4-5. The burden is on a prospective contractor to affirmatively demonstrate its responsibility, and in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer must make a determination of nonresponsibility. FAR § 9.103(b); 50 State Security Serv., Inc., supra, at 5.

Where, as here, a contracting officer has made a negative determination of responsibility in regard to a small business, the contracting officer is required to suspend award and refer the matter to the SBA. FAR § 19.602-1; Worthy Indus. Corp., B 240489, Nov. 27, 1990, 90-2 CPD ¶ 428 at 3. The SBA has conclusive authority to review the nonresponsibility determination by issuing or declining to issue a COC. 15 U.S.C. § 637(b)(7)(A) (2000). The SBA is required to issue or deny the COC within 15 business days after referral of the matter by the agency, or a longer period if agreed upon by the SBA and the contracting agency. FAR § 19.602-2; Worthy Indus. Corp., supra.

Section 14.404-1(d) of the FAR provides that:

[s]hould administrative difficulties be encountered after bid opening that may delay award beyond bidders' acceptance periods, the several lowest bidders whose bids have not expired . . . should be requested, before expiration of their bids, to extend in writing the bid acceptance period (with consent of sureties, if any) in order to avoid the need for resoliciting.

In sum, the FAR requires that contracting officers assess the responsibility of prospective contractors, and, if a prospective small business contractor is determined nonresponsible, refer the matter of that contractor's responsibility to the SBA for resolution under COC procedures. The FAR also contemplates that such determinations may take more time than allowed for by the bid acceptance period as initially set forth in the bids received, and provides for this by authorizing contracting officers to request written extensions from the bidders to their bid acceptance periods.

This is precisely what happened here. That is, the record reflects that the contracting officer diligently reviewed the matter of Brickwood's responsibility, determined Brickwood nonresponsible, and promptly referred the matter to the SBA as required. The contracting officer also recognized during this process that there was a possibility that bid extensions might be necessary because of the problems he was encountering regarding Brickwood's responsibility, and accordingly, requested that bidders submit bid extensions--which each requested bidder, with the exception of Brickwood, promptly did. AR, exh. 11, Contracting Officer's Letter to SBA (Apr. 26, 2002).

There is simply no basis for the protester's claim that the contracting officer's referral of Brickwood to the SBA was "untimely." Not only is there no evidence in the record that the contracting officer proceeded in an improper or untimely manner, we find no regulation or other legal requirement that provides that a contracting officer's referral of a small business bidder to the SBA for a COC must take place at such a time in the process so as to permit the SBA to make its COC determination prior to the expiration of the bidder's initial bid acceptance period. Accordingly, we find this basis of Brickwood's protest to be without merit.

Brickwood next argues that it did in fact extend its bid acceptance period as requested by the agency. In support of this assertion, Brickwood has provided our Office with an affidavit from the Secretary/Treasurer of Brickwood wherein she provides that "on Friday, April 26, 2002, I sent a letter by telefacsimile to . . . [the] Contracting Officer for the United States Coast Guard, extending Brickwood's bid on the Ambrose Light Tower project." The Secretary/Treasurer further states that "[t]he transmission was completed without error, and I received a receipt for the fax transmission showing both the cover and letter, a total of two pages, were transmitted properly." Protester's Submission (May 23, 2002), attach., Affidavit of Brickwood's Secretary/Treasurer (May 23, 2002), at 1. Brickwood has also submitted, in support of this assertion, a two-line facsimile receipt, showing the

destination (the Coast Guard's facsimile number), the start time and date (April 26 at 2:58 p.m.), the number of pages (two), and the result ("OK"). Id., attach., Facsimile Receipt.

In response, the Coast Guard has submitted a detailed declaration from its contracting officer, in which the contacting officer explains that he never received Brickwood's bid extension by facsimile or otherwise prior to the expiration of Brickwood's bid. The contracting officer states that the facsimile machine to which Brickwood allegedly transmitted its extension is in the contracting officer's office and "is located immediately adjacent to the printer for [his] computer." The contracting officer adds that "[d]uring a normal workday, [he] check[s] the fax machine on the average at least 5 times an hour when [he] pick[s] up documents from [his] printer or when [he] transmit[s] or receive[s] faxes," and that in his absence, his "co-workers routinely place faxes and mail on [his] desk." The contracting officer continues by stating that he was at his office on April 26 "until just after 4:30 [p.m.]," as evidenced by various e-mails that he transmitted on that date, and that he did not receive any facsimile from Brickwood until April 29, when he received the previously mentioned facsimile coversheet from Brickwood with nothing attached to it. The contracting officer also notes that he is unaware of any problems with the facsimile machine, and has never received any complaints regarding the machine. Agency Supplemental Report, Declaration of the Contracting Officer, at 1-3.

When an agency requests an extension in the bid acceptance period, the burden of ensuring agency receipt of a bid extension is on the bidder. Discount Machinery & Equip., Inc., B-244392, Oct. 15, 1991, 91-2 CPD ¶ 334 at 3. Moreover, bidders using facsimile transmission to file documents assume the risk of nonreceipt by the agency, Comspace Corp., B-277540, Oct. 24, 1997, 97-2 CPD ¶ 111 at 3, and a bidder's evidence of its facsimile transmission does not establish receipt where the agency denies receipt and there is no other conclusive, contemporaneous evidence of receipt. Southern CAD/CAM, B-244745, Nov. 13, 1991, 91-2 CPD ¶ 453 at 3.

Although Brickwood asserts that on April 26, it submitted by facsimile its express extension of its bid to the Coast Guard, and has provided a facsimile receipt evidencing that its transmitted a two-page document to the Coast Guard, the Coast Guard states that it never received this extension on April 26, but rather, received it on May 1, well after Brickwood's bid had expired. Given the Coast Guard's detailed explanation regarding its non-receipt of the protester's facsimile transmission, and the lack of any evidence demonstrating that the Coast Guard actually received Brickwood's transmission before its bid expired, we find no basis to object to the

agency's determination that Brickwood did not timely extend its bid.³ See Discount Machinery & Equip., Inc., supra.

The protest is denied.

Anthony H. Gamboa
General Counsel

³ In its comments on the agency report submitted on May 20 and 23, the protester argues for the first time that the agency should revive and accept Brickwood's bid because the agency failed "to act in a reasonable and timely manner with respect to Brickwood's bid" and because there would be no prejudice to the competitive bid system in reviving Brickwood's bid. This argument could and should have been raised when Brickwood filed its initial protest with our Office on May 6, given that the agency had unequivocally advised Brickwood on May 2 both that its bid had expired and that it would not be permitted to revive its bid. Our Bid Protest Regulations do not contemplate the untimely, piecemeal presentation of protest issues, and in this regard, a protester may not delay raising additional protest issues where, as here, the protester should have been aware of those grounds at the time of filing its initial protest. 4 C.F.R. § 21.2(a)(2) (2002); Robbins-Gioia, Inc., B-274318 et al., Dec. 4, 1996, 96-2 CPD ¶ 222 at 19 n.20; Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co., B-244686 et al., Nov. 7, 1991, 91-2 CPD ¶ 434 at 7. Accordingly, we decline to consider this protest basis on the merits.