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Decision

Matter of: GloTech, Inc.

File: B-416967

Date: January 15, 2019

Thomas K. David, Esq., Kenneth D. Brody, Esq., and Katherine A. David, Esq., David, Brody & Dondershine, LLP, for the protester.
Lawrence M. Prosen, Esq., Gunjan R. Talati, Esq., Jarret Dillard, Esq., and Nicholas J. Nieto, Esq., Kilpatrick Townsend & Stockton LLP, for Facilities Development Corporation, the intervenor.
Kathleen D. Martin, Esq., Department of State, for the agency.
Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's prequalification of the awardee for an overseas embassy construction project under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended, is denied where the record shows that the awardee's submissions satisfied the requirements of the prequalification notice.

DECISION

GLOTECH, Inc., of Rockville, Maryland, protests the award of a contract to Facilities Development Corporation (FDC), of Reston, Virginia, under request for proposals (RFP) No. SAQMMA-17-R-0398, issued by the Department of State for information technology infrastructure rehab (ITIR) in Cairo, Egypt. The protester challenges the agency's decision to prequalify FDC to participate in the procurement.

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

BACKGROUND

On August 4, 2017, the agency issued a notice soliciting prequalification submissions from contractors for Design-Build construction services for the U.S. embassy complex in Cairo, Egypt. See Agency Report (AR), Tab 1, Prequalification Notice, at 1. The ITIR project would be a comprehensive replacement of VOIP (voice over internet protocol) and network cabling throughout the Cairo embassy complex, which consists of four

buildings. Id. The project's scope would include activities in support of the replacement project, such as construction of new telecom rooms, and modifications to electrical and mechanical systems. Id. The notice stated that the project would require significant use of cleared American labor and materials, and significant amounts of nighttime and weekend work. Id.

The prequalification notice explained that the project would be solicited in two phases. Id. Phase I was the announcement soliciting prequalification submissions. Id. at 2. Offerors determined to be prequalified would be issued a formal RFP for the project and would be invited to participate in a site visit and submit technical and pricing proposals in Phase II. Id.

As relevant here, the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act) provides that as long as there is adequate competition, "only United States persons and qualified United States joint venture persons may . . . bid on a diplomatic construction or design project" that is valued at \$10 million or more or involves technical security. 22 U.S.C. § 4852(a)(2). The statute defines a "United States person" as an entity that, inter alia, has performed within the United States or at a United States diplomatic or consular establishment abroad administrative and technical, professional, or construction services similar in complexity, type of construction, and value to the project being bid. See 22 U.S.C. § 4852(c)(2)(D).

The prequalification notice advised that prospective offerors must be "United States Person[s]," as that term is defined under the Security Act, and required that they complete and submit, as part of the offeror's prequalification package, a completed certification pamphlet.¹ AR, Tab 1, Prequalification Notice, at 3. As relevant here, certification question #4 pertained to the Security Act's similar project requirement stated above. See AR, Tab 2, Certification Pamphlet, at 6.² The certification pamphlet also provided relevant definitions applicable to this certification question. Id. at 5. As relevant here, the term "complexity" was defined as the physical and technical size and demands of the project. Id. The phrase "type of construction" was defined as the overall nature of the facilities to be built, including the kinds of materials to be used. Id. Thus, if the contract will require the construction of a multi-story office building, the prospective offeror will be expected to demonstrate experience with facilities of this type. Id. The term "value" was defined as the total contract price of the project, not the profit or loss to the contractor. Id.

The prequalification notice stated that the project's estimated construction cost was between \$24 to \$38 million, but also specifically advised the following:

¹ This pamphlet is titled "Certifications Relevant to Public Law 99-399, Statement of Qualifications for Purpose of Section 402 of The Omnibus Diplomatic Security and Antiterrorism Act of 1986." AR, Tab 1, Prequalification Notice, at 3.

² Our Office added consecutive numbers to the pages of this document.

NOTE: To demonstrate performance of similar construction work for Omnibus Diplomatic Security and Antiterrorism Act of 1986 purposes, the offeror needs to provide information demonstrating that it has successfully completed in the United States or at a U.S. diplomatic or consular mission a construction contract or subcontract involving work of the same general type and complexity as the solicited project and having a contract or subcontract value of at least **\$18 million**. See Section 4 below.

AR, Tab 1, Prequalification Notice at 1 (emphasis in original). See also id. at 3 (repeating the requirement).

The prequalification submissions were due on September 5. Id. at 4. The submissions were to be evaluated on a pass/fail basis; offerors not receiving a pass rating would not be further evaluated. Id. at 3.

Four offerors, including Glotech and FDC, submitted timely prequalification submissions. See Contracting Officer's Statement (COS) at 2. FDC identified two projects and, as relevant here, provided a narrative for interior renovation and technical upgrades performed at the U.S. embassy compound in [DELETED]. AR, Tab 3, FDC Prequalification Submission, at 16, 24-25.³ FDC's narrative identified five projects that included components such as, demolition with the removal of existing building materials, electrical systems, and tele-data and equipment; construction, including nine data-communication rooms, over 550 individual work spaces, and a turn-key tactical operations center with a communications room; installation of various cables, including over 155 miles of CAT 6 Ethernet and fiber optic cable; and modification of architectural, electrical, mechanical and telecommunication/data system infrastructure. Id. at 24. Additionally, the narrative explained that these tasks were completed with a crew of 51 cleared American workers. Id. at 25.

The prequalification submissions were reviewed by the agency's legal counsel to determine whether the firms seeking prequalification satisfied the eligibility requirements of the Security Act. See COS at 2; see also AR, Tab 4, Prequalification Review Memorandum (Memo), at 1.⁴ The agency's counsel concluded that FDC's and GLOTECH's submissions met all requirements for prequalification and that the offerors were eligible to participate in Phase II. AR, Tab 4, Prequalification Review Memo, at 1. As relevant to whether FDC submitted a project of similar complexity, type of construction, and value to the current project, the agency counsel concluded that the upgrades at the U.S. embassy in [DELETED], valued at \$20 million, "exceed[ed] the

³ Our Office added consecutive numbers to the pages of this document.

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\$18 million threshold . . . and [were] similar in terms of type and complexity.”⁵ Tab 4, Prequalification Review Memo, at 13.

The Phase II RFP was issued on November 14 to the prequalified potential offerors, including GLOTECH and FDC.⁶ COS, at 2. Proposals were due on June 21, 2018. Id. As relevant here, GLOTECH and FDC submitted timely proposals. Id. On September 30, GLOTECH was notified that FDC received the award.⁷ Protest at 3. This protest was filed following a debriefing.

DISCUSSION

GLOTECH contends that the agency erred in determining that FDC was qualified because it could not have completed a similar project valued at \$18 million or more.⁸ The agency disagrees, stating that FDC’s projects bore a great deal of similarity to the Cairo project and met the requirements of the Security Act. Memo. of Law at 5. We have reviewed the protester’s arguments and conclude that none provides a basis to sustain the protest.⁹

In reviewing an agency’s prequalification decision under the Security Act, we examine the supporting record to determine whether the decision was rational, consistent with the stated evaluation criteria, consistent with the applicable laws and regulations, and

⁵ The legal counsel’s conclusions on this issue for all four offerors used nearly verbatim language and did not elaborate on the basis for the agency’s conclusions. AR, Tab 4, Prequalification Review Memo, at 9-11, 13.

⁶ The RFP stated that price would be evaluated based on price reasonableness. RFP at M.3.

⁷ GLOTECH was not aware prior to this date that FDC was a prequalified offeror.

⁸ We find unavailing the protester’s assertions that the awardee’s projects failed to demonstrate the complexity of an “IT infrastructure **refurbishment**” project. Protest at 7 (emphasis in original). Here, the Prequalification Notice clearly stated that this requirement was for information technology infrastructure **rehab**, not refurbishment. See AR, Tab 1, Prequalification Notice, at 1 (emphasis added).

⁹ During our development of this protest, we considered requests to dismiss additional arguments that the protester presented as independent bases of protest, but which we understand to be assertions that the agency failed to conduct a price realism analysis. See Protest at 7, 9, 12. In this regard, we dismiss these challenges here for failure to state a valid basis of protest. See 4 C.F.R. § 21.5(f). The Phase II RFP stated that price would be evaluated only for reasonableness, and neither expressly stated that the agency would review prices to determine whether they are so low that they reflect a lack of technical understanding, nor indicated that a proposal could be rejected for offering low prices. See DynCorp Int’l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9.

adequately documented. Caddell Constr. Co., Inc., B-411005, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 8; CCE Specialties, LLC, B-413998, Jan. 18, 2017, 2017 CPD ¶ 28 at 5.

As discussed above, satisfaction of the Security Act requirements, and thus, qualifying as a “United States person,” was a pass/fail evaluated area for prequalification. AR, Tab 1, Prequalification Notice, at 3. Here, the agency considered that “within [the] scope identified in the solicitation notice . . . similar performance [included] rehab work, including demolition, construction, renovation of similar spaces, network cabling, and use of cleared American labor.” Declaration of Prequalification Legal Counsel, at 3.¹⁰ The agency reiterated that the current project would consist of a comprehensive replacement of VOIP and network cabling throughout the Cairo complex and activities in support of the replacement project, such as, construction of new telecom rooms, localized interior demolition and renovation of interior spaces, and modification of electrical and mechanical systems. Id.

The agency found that various descriptions within FDC’s submissions met the requirements of the Security Act. For example, the agency concluded that FDC’s [DELETED] embassy renovation project met the requirements to show work of a similar complexity and type of construction to the ITIR project, as required by the Security Act. This conclusion was based on FDC’s successful completion of project components such as, demolition that required FDC to completely remove and sanitize all existing building materials, electrical systems, tele-data and equipment; construction that included special environment ducting, window treatments, an operations center, 300 tons of cooling, and over 550 individual work stations; FDC’s experience with virtually every type of network, including voice, data, fiber, and wireless environments and installation of over 155 miles of CAT 6 Ethernet and fiber optic cable; and modification of architectural, electrical, mechanical, and telecommunication/data system infrastructure

¹⁰ Our Office concluded that additional information was required to understand the conclusions reached by the agency’s legal counsel in the Prequalification Memo. Accordingly, the GAO attorney responsible for this protest requested that the agency provide the bases for its conclusions in the Prequalification Memo. GAO Request for Additional Briefing at 1. In response, the agency submitted a declaration from the legal counsel who reviewed the prequalification submissions to determine whether the firms satisfied the eligibility requirements of the Security Act. Declaration of Prequalification Legal Counsel. Although the protester argues that we should accord this statement less weight, we disagree. We find the declaration to be entirely consistent with the contemporaneous evaluation record, and find that the declaration merely provides additional details regarding the legal counsel’s previous findings and conclusions. We therefore view the legal counsel’s declarations to be post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and not post-hoc rationalizations. See Northwest Mgmt, Inc., B-277503, Oct. 20, 1997, 97-2 CPD ¶ 108 at 4 n.4.

with a crew of 51 cleared American workers. On this record, we find the agency's conclusions to be reasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel