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Decision

Matter of: All Phase Solutions, LLC

File: B-420376

Date: January 31, 2022

Lawrence J. Sklute, Esq., and Lana Meller, Esq., Sklute & Associates, for the protester. Wade L. Brown, Esq., Carlin R. Walsh, Esq., and Joseph S. Beazley, Esq., Department of the Army, for the agency. Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the Small Business Administration's (SBA) decision not to issue a certificate of competency (COC) is dismissed because the protester's arguments that the SBA failed to follow applicable regulations when SBA did not consider the protester's alternate proposed key personnel is legally and factually insufficient. There is nothing in the applicable regulations that required SBA (or the procuring agency) to accept proposal revisions as part of the COC process.

DECISION

All Phase Solutions, LLC, a small business of Delray Beach, Florida, protests the refusal of the Small Business Administration (SBA) to issue a certificate of competency (COC)¹ to All Phase for its proposal under request for proposals (RFP) No. W56ZTN-19-R-0005, which was issued by the Department of the Army, for the establishment of multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts for maintenance, repair, and minor construction on Aberdeen Proving Ground, Maryland. All Phase alleges that the SBA failed to follow its applicable COC regulations when it failed to evaluate the protester's responsibility based on its proposed substitute key personnel.

We dismiss the protest.

¹ A COC is the certificate issued by the SBA stating that the holder is responsible for the purpose of receiving and performing a specific government contract. Federal Acquisition Regulation (FAR) 19.601(a).

BACKGROUND

The RFP, which was issued on September 17, 2019, and subsequently amended 10 times, sought proposals from SBA 8(a) business development program² participants for the establishment of approximately five multiple-award, IDIQ contracts for maintenance, repair, and minor construction on Aberdeen Proving Ground, Maryland. RFP at 1. The RFP contemplated the award of contracts with 12-month base periods, and four, 12-month option periods. *Id.* at 146. Resulting task orders will be issued on a fixed-price basis, and the total ceiling of the multiple-award IDIQ contracts is \$99.5 million. *Id.* at 16, 33.

For the purposes of award, the agency was to conduct a best-value tradeoff considering three factors: (1) technical; (2) past performance; and (3) price. Protest, exh. 4, RFP, amend. 9 at 23.³ Past performance was slightly more important than the technical factor, which was more important than price. *Id.* The technical factor included four equally weighted subfactors: (a) bonding capacity and rate; (b) safety record; (c) selected key personnel; and (d) contract management plan. *Id.* at 24. Subfactors a, b, and d were to be qualitatively assessed, while subfactor c, key personnel, would only be evaluated for deficiencies on a pass/fail basis. *Id.* at 25. Only the key personnel subfactor is relevant to our resolution of the protest.

Under the key personnel subfactor, offerors were required to submit resumes demonstrating the qualifications, education, and other information required by the RFP for their respective proposed: (1) quality control manager; (2) project manager; (3) superintendents; and (4) contract safety manager/safety consultant. *Id.* at 27-29. Relevant here, as to the superintendent positions, the RFP required that offerors demonstrate the following experience/qualifications for at least two candidates:

- Three years' experience as a site supervisor or superintendent on industrial, Governmental, or commercial construction contracts. Provide proof of site supervisor or site superintendent experience on at least (2) projects in excess of \$500,000. The projects shall be for new building construction and/or building renovations.
- Possess a journeyman level certification in construction trade by a Trade Union, The Associated Builders and Contractors, or other recognized trade certifier. Equivalent military experience with

² Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. FAR 19.800. This program is commonly referred to as the 8(a) program.

³ References to page numbers are to the Adobe PDF pagination of the cited protest exhibit.

documentation may be used as a substitute as outlined in the [questions and answers] from RFP Amendments. Four years of relevant experience and an engineering degree or construction management degree from an Accreditation Board for Engineering and Technology (ABET) college or university may be substituted for the journeymen level trade certification requirement.

Id. at 28.

All Phase submitted a proposal in response to the RFP. The agency subsequently evaluated the proposal as unacceptable under the key personnel subfactor because it found that All Phase failed to propose at least two superintendents with the required experience or qualifications. Specifically, neither of the protester's proposed superintendents appeared to satisfy the journeyman level certification or equivalent requirement. Because the RFP contemplated a pass/fail evaluation of key personnel qualifications, and because the agency proposed to assess a fail in this area, the Army referred the matter to SBA for consideration under the SBA's COC program.⁴ See Protest, exh. 1, SBA Letter to All Phase (Oct. 21, 2021) at 1-2.

On October 21, 2021, the SBA Office of Government Contracting Area 1 notified All Phase of the Army's evaluation and invited the protester to apply for a COC. Among other requirements, the SBA directed All Phase to provide its "rebuttal to the deficiencies finding with any supporting evidence." *Id.* at 2.

On November 5, All Phase, through its outside counsel, submitted its COC application to SBA. The protester's application did not "rebut the deficiencies finding" with respect to the protester's originally proposed superintendents. Rather, the protester submitted resumes for three new superintendents. Specifically, All Phase asserted that "[a]s part of its COC application, [All Phase] is permitted to provide substitute qualified personnel and based on the qualifications/experience of the substitute personnel, [All Phase] believes SBA should find that both these substitute individuals satisfy the solicitation's experience/qualification requirements." Protest, exh. 2, All Phase Response to SBA Letter (Nov. 5, 2021) at 2. In support of its assertion that it was entitled to propose substitute personnel as part of the COC process, the protester cited to our Office's decision in *J&J Maintenance, Inc.*, B-251355.2, B-251355.4, May 7, 1993, 93-1 CPD ¶ 373. *Id.*

⁴ SBA's COC regulations require a contracting officer to refer a small business concern to the SBA for a COC determination when the contracting officer has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (*e.g.*, pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii).

On November 19, SBA responded to the protester's application. SBA informed the protester that "present conditions do not justify issuance of a [COC] in this instance." Protest, exh. 3, SBA Reply to All Phase Response (Nov. 19, 2021) at 1. SBA asserted that it could not consider All Phase's proposed key personnel substitutions as part of the COC process. Specifically, SBA explained that:

Your firm's Technical Proposal submitted to the Army materially influenced the agency's award determination. SBA does not have the authority to accept an offeror's proposal beyond the deadline and during the COC process without consent of the Contracting Officer. The Contracting Officer indicated that they would not allow your firm to propose new key personnel at this point as it would be unfair to the other competitors. The Government is not opening up discussions with Offerors to allow them to submit revised proposals. Your firm failed to affirm the latest Technical Proposal accepted by the Army meets the RFP's key personnel requirements (Subfactor c).

Id.

This protest followed.

DISCUSSION

All Phase argues that SBA violated its applicable regulations by failing to discharge its obligation to independently consider the protester's responsibility. Specifically, the protester contends that SBA erred by not allowing All Phase to amend its proposal by substituting key personnel that satisfied the RFP's minimum qualification requirements. In this regard, the protester contends that it was entitled, as a matter of right, to submit alternate key personnel as part of the COC process, and that SBA was required to evaluate the protester's responsibility on the basis of those proposed substitutions. For the reasons that follow, we find that the protester has failed to state legally and factually sufficient bases of protest, and, therefore, we dismiss the protest.

The Small Business Act, 15 U.S.C. § 637(b)(7), gives the SBA, not our Office, the conclusive authority to review a contracting officer's determination that a small business is not responsible. 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 COC procedures. FAR 19.602-1(a)(2), 19.602-4(b); *Coastal Env'tl. Grp., Inc.*, B-407563 *et al.*, Jan. 14, 2013, 2013 CPD ¶ 30 at 4. We therefore do not review challenges to the SBA's decision not to issue a COC unless there is a showing that the COC denial resulted from (1) possible bad faith on the part of government officials, (2) SBA failing to follow its own published regulations, or (3) SBA failing to consider vital information because of how information was presented to, or withheld from, the SBA by the procuring agency. 4 C.F.R. § 21.5(b)(2); *Trade West Constr., Inc.*, B-418252, Dec. 10, 2019, 2019 CPD ¶ 421 at 3.

Here, All Phase primarily alleges that SBA effectively abdicated its authority--and in turn violated its COC regulations--to independently assess the protester's responsibility when it refused to consider the protester's alternate key personnel proposed in the protester's COC application. As an initial matter, All Phase fails to identify--and we did not independently discern--any aspect of the SBA's applicable COC regulations in 13 C.F.R. § 125.5 authorizing SBA to solicit--or otherwise empowering SBA to accept over an agency's objections--proposal revisions as part of the COC process. In this regard, although the SBA may request additional information bearing on an applicant's responsibility and independently evaluate the application for all elements of responsibility, see 13 C.F.R. §§ 125.5(d)(2) and (f)(1), nothing in those provisions indicates that the SBA must permit an offeror to amend its proposal.

Rather, as noted above, All Phase's assertion that it was entitled to amend its proposal as part of the COC process to propose alternate key personnel is predicated exclusively on our Office's decision in *J&J Maintenance, supra*. In that decision, the low bidder under an invitation for bids utilizing sealed bidding procedures under FAR part 14 was found nonresponsible by the procuring agency because two of its proposed key personnel did not meet the invitation's qualification requirements. The procuring agency then referred the matter to SBA for consideration under the COC process. As part of the COC process, the low bidder changed its key personnel. SBA verified the work and education experience of the two changed individuals, and subsequently found the low bidder responsible and issued a COC. In denying the second lowest bidder's protest, we noted that because the matter of the qualifications of the key personnel ultimately concerned the low bidder's responsibility, we had no basis to question SBA's responsibility determination based on the qualifications of different personnel identified by the low bidder after bid opening and during the COC process. *J&J Maintenance, supra*.

The protester argues that *J&J Maintenance* is controlling in this case, and that SBA was required to permit All Phase to propose alternate key personnel as part of the COC process. The protester's reliance on our decision in *J&J Maintenance* is misplaced. *J&J Maintenance* does not stand for the proposition that SBA is required, in all cases, to consider personnel first identified by a firm during the COC process. As noted above, in *J&J Maintenance* we found no basis to object to the SBA's COC decision based on its consideration of personnel substituted after bid opening. Because SBA's regulations do not specify the information to be considered in the COC process, there was no basis for our Office to find a violation of SBA's regulations. As explained above, our jurisdiction in such cases is limited to examining whether SBA failed to follow its own published regulations when making its COC determination. Where such regulations are silent on the matter, there is no basis for our Office to find a violation. Thus, notwithstanding the protester's argument to the contrary, our conclusion in *J&J Maintenance*, did not, and

could not, create a legal requirement for SBA to, in every case, consider personnel first identified during the COC process.⁵

We also note that the protester does not allege and we do not otherwise independently see any alternative basis to exercise jurisdiction under 4 C.F.R. § 21.5(b)(2) over SBA's refusal to issue a COC in this case. First, the protester does not allege that the Army or SBA engaged in any bad faith.⁶

Finally, outside of its alternate proposed key personnel--which, as discussed above, the SBA was not required to consider--the protester fails to identify any vital information that was ignored by SBA. In this regard, SBA specifically invited All Phase to rebut the assessed deficiencies, but All Phase instead elected to propose alternate key personnel. Thus, the protester does not adequately allege that SBA failed to consider any relevant information that was before it in connection with the protester's COC application. *Cf. A. Finkl and Sons, Co. DBA Finkl Steel*, B-416582.4, Dec. 10, 2018, 2018 CPD ¶ 415 at 8-9 (denying protest challenging an agency's non-responsibility determination based on foreign ownership, control, and influence concerns where the

⁵ Additionally, we note that in the context of a negotiated procurement conducted pursuant to FAR part 15--as was the case here--an offeror may generally only substitute proposed key personnel as part of discussions. *See, e.g., Chenega Healthcare Servs., LLC*, B-416158, June 4, 2018, 2018 CPD ¶ 200 at 3-4, *YWCA of Greater Los Angeles*, B-414596 *et al.*, July 24, 2017, 2017 CPD ¶ 245 at 4. The Army recognized that the qualifications of the protester's proposed personnel presented a question of whether the protester's offer met the government's minimum requirements and advised the SBA that allowing the protester to change its personnel when no other firm had been given a similar opportunity to revise their proposals would be fundamentally unfair. *See YWCA of Greater Los Angeles, supra* (sustaining protest where the agency allowed the awardee an opportunity to revise its proposal by substituting proposed key personnel while not reopening discussions with all offerors). While it is ultimately not a matter for our consideration in this case, it appears the SBA appropriately declined to consider the qualifications of the protester's substituted personnel where such a substitution was not required by the SBA's COC regulations and would potentially be unfair to other small business competitors.

⁶ Government officials are presumed to act in good faith, and a contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials based upon mere inference, supposition, or unsupported speculation. *Blue Origin Federation, LLC; Dynetics, Inc.--A Leidos Co.*, B-419783 *et al.*, July 30, 2021, 2021 CPD ¶ 265 at 28-29 n.14. The burden of establishing bad faith is a heavy one; a protester must present facts reasonably indicating, beyond mere inference and suspicion, that the actions complained of were motivated by a specific and malicious intent to harm the protester. *Undercover Training, LLC*, B-418170, Jan. 9, 2020, 2020 CPD ¶ 25 at 6 n.4.

agency afforded the protester an opportunity to address the agency's concerns, but the protester failed to adequately respond).

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel