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Decision

Matter of: Zero Waste Solutions, Inc.

File: B-423214.2; B-423214.3

Date: March 13, 2025

Jonathan D. Shaffer, Esq., John Tanner, Esq., and Jesse Cardinal, Esq., Haynes and Boone, LLP, for the protester.

Douglas P. Hibshman, Esq., Dana Molinari, Esq., and Jane Jung Hyoun Han, Esq., Fox Rothschild LLP, for Street Legal Industries, Inc., the intervenor.

Major Joseph C. Van Dusen, Department of the Army, for the agency.

Michael P. Price, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging the awardee's bid was nonresponsive for failing to demonstrate the awardee would comply with Federal Acquisition Regulation clause 52.219-14, Limitations on Subcontracting, is denied where the bid does not demonstrate the awardee's intent not to comply with the limitation.

2. Protest challenging the agency's affirmative responsibility determination with respect to the awardee is dismissed where the protester has not alleged the awardee failed to comply with definitive responsibility criteria in the solicitation or otherwise raised evidence of serious concerns that the contracting officer unreasonably disregarded.

DECISION

Zero Waste Solutions, Inc., a women-owned small business of Concord, California, protests the award of a contract to Street Legal Industries, Inc., a women-owned small business of Oak Ridge, Tennessee, pursuant to invitation for bids (IFB) No. W911SF-24-B-0004, issued by the Department of the Army, Mission and Installation Contracting Command, for refuse collection and recycling services at Fort Moore, Georgia. The protester argues that the awardee's bid was nonresponsive and should have been found ineligible for award or, alternatively, that the agency erred in making its affirmative responsibility determination with respect to the awardee.

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

BACKGROUND

The Army issued the IFB on September 26, 2024, pursuant to the procedures of Federal Acquisition Regulation (FAR) part 14. Contracting Officer's Statement (COS) at 1; Agency Report (AR), Tab 3, IFB at 1.¹ The solicitation was set aside for women-owned small business concerns and contemplated the award of a contract for the management of refuse collection services throughout Fort Moore, including a "comprehensive approach to managing non-hazardous solid waste that encompasses green procurement, waste prevention, and disposal programs." IFB at 85; AR, Tab 7, Performance Work Statement at 4. The IFB anticipated a 12-month base period of performance with up to four 12-month options. COS at 1.

The IFB advised that the Army would award the contract to "the responsible bidder whose bid represents the lowest price for the required services[.]" IFB at 80. With respect to responsibility, the IFB included the general responsibility standards found at FAR subsection 9.104-1, advising bidders that to be determined responsible, a prospective contractor was required to meet the general responsibility criteria. *Id.* at 79-80; FAR 9.104-1. These criteria include, for example, "[h]av[ing] adequate financial resources to perform the contract, or the ability to obtain them[.]" and "[h]av[ing] the necessary production, construction, and technical equipment and facilities, or the ability to obtain them." *Id.*

As relevant to the protest, the IFB also incorporated by reference FAR clause 52.219-14, Limitations on Subcontracting, as amended by Department of Defense Class Deviation 2021-O0008.² IFB at 42. The amended clause provides that for services contracts, a contractor, by "submission of an offer and execution of a contract[.]" agrees that it "will not pay more than 50 percent of the amount paid by the [g]overnment for contract performance . . . to subcontractors that are not similarly situated entities." Department of Defense Memorandum, Class Deviation 2021-O0008--Limitations on Subcontracting for Small Business at 3. Furthermore, and as relevant here, the clause states that the contractor shall comply with the limitation on subcontracting "[b]y the end of the base term of the contract and then by the end of each subsequent option period." *Id.* at 4.

The Army received five timely bids in response to the solicitation; the agency eliminated the two lowest-priced bids from the competition as nonresponsive. COS at 2. The next two lowest-priced bids were submitted by the protester and awardee at the following prices:

¹ All page number citations refer to the Adobe Acrobat PDF page numbers of the versions of documents provided by the parties.

² A class deviation affects more than one contract action and allows an agency to use a policy, procedure, or practice in conducting an acquisition that is otherwise inconsistent with the FAR. See FAR 1.401, 1.404.

	Price
Street Legal Industries	\$16,160,550
Zero Waste Solutions	\$19,849,306

Id. Ultimately, the Army selected Street Legal for contract award after determining it was the responsible bidder with the lowest-priced bid. See COS at 2; AR, Tab 40, Award Determination at 2. The Army notified Zero Waste Solutions of its selection of Street Legal and this protest subsequently followed.

DISCUSSION

Zero Waste Solutions argues that Street Legal's bid should have been found nonresponsive and ineligible for award because it showed that the awardee would not comply with FAR clause 52.219-14, and that the agency's determination to the contrary was improper. Protest at 5-7; Comments & Supp. Protest at 9-11. In the alternative, the protester contends that the Army's affirmative determination of Street Legal as a responsible bidder was flawed; the agency instead should have found the awardee nonresponsive and referred it to the Small Business Administration for a certificate of competency determination. Protest at 7-8; Comments & Supp. Protest at 14-20.

We address each of the arguments raised by Zero Waste Solutions in turn and find that none afford a basis on which to sustain the protest.

Responsiveness of Street Legal's Bid

Zero Waste Solutions argues that the awardee's bid took exception to a material solicitation requirement because it demonstrated that the awardee did not intend to comply with the solicitation's limitations on subcontracting clause. Comments & Supp. Protest at 9-11. The protester contends that the awardee in fact intends to predominantly rely on its proposed subcontractor, Mark Dunning Industries, Inc. (MDI) which is not a woman-owned small business, to perform more than 50 percent of the contract requirements. Protest at 5-7; Comments & Supp. Protest at 11-14.

The Army contends that it acted reasonably in finding Street Legal's bid acceptable and responsive to the solicitation's requirements. Memorandum of Law (MOL) at 4. In this regard, the agency argues that the awardee provided all the information required by the solicitation with its bid, and that the bid further demonstrated the awardee intended to comply with the limitations on subcontracting clause. *Id.* at 6; Supp. MOL at 3-5.

As a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility not subject to our review. *Hughes Coleman, JV*, B-417787.5, July 29, 2020, 2020 CPD ¶ 257 at 4-5, n.4. A proposal need not affirmatively demonstrate compliance with the limitation on subcontracting clause; rather, such compliance is presumed unless specifically negated by other language in the proposal. *Morgan Business Consulting*,

LLC, B-418165.6, B-418165.9, Apr. 15, 2021, 2021 CPD ¶ 171 at 10. However, where a proposal, on its face, would lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the offer's acceptability, which GAO will review. *TYBRIN Corp.*, B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

As explained above, the version of FAR clause 52.219-14 included in the solicitation provides that for services contracts, a contractor, by "submission of an offer and execution of a contract," agrees that it "will not pay more than 50 percent of the amount paid by the [g]overnment for contract performance . . . to subcontractors that are not similarly situated entities." Department of Defense Memorandum, Class Deviation 2021-O0008--Limitations on Subcontracting for Small Business at 3. The clause also states that the contractor shall comply with the limitation on subcontracting "[b]y the end of the base term of the contract and then by the end of each subsequent option period." *Id.* at 3-4.

The record demonstrates that, consistent with the terms of the IFB, Street Legal included with its bid package a bid cover sheet, completed pricing utilizing Standard Form 33, and a teaming agreement documenting the terms of its agreement with its teaming partner and subcontractor MDI. AR, Tab 24, Street Legal Bid Cover Sheet; AR, Tab 25, Street Legal Standard Form 33, AR, Tab 27, Street Legal Teaming Agreement. As relevant here, the teaming agreement included language applicable to the division of work between Street Legal and MDI. Specifically, the agreement stated that the "combined [Street Legal]-MDI team will determine the division of onsite work in order to comply with all regulations and FAR clauses." AR, Tab 27, Street Legal Teaming Agreement at 8. The agreement further stated:

It is understood that the clause on limitations on subcontracting for a Small Business set-aside applies to this opportunity. However, the [t]eam does not believe the government intends to enforce this requirement at the [t]ask [o]rder level. Therefore, compliance with [FAR clause] 52.219-14, Limitations on Subcontracting will be achieved over the life of the contract.

Id.

The protester argues that this language demonstrates that the awardee's bid is unresponsive. In this regard, the protester asserts that the limitations on subcontracting clause requires the vendor to meet the subcontracting limit at multiple different time periods, *i.e.*, at the end of the base year and then again at the end of each option year. Comments & Supp. Protest at 7. Zero Waste argues that the statement in Street Legal's bid that compliance with this clause would be achieved "over the life of the contract" indicates that Street Legal intends to meet the requirement only once, at the end of the contract, in violation of the clause. Comments and Supp. Protest at 7; see *also* Supp. Comments at 4 ("The plain language of the FAR and the [Street Legal] bid are unambiguous and in direct conflict: [Street Legal] will meet the requirement once, at the end, yet the IFB and FAR require the bidder to meet it more than once.").

Accordingly, Zero Waste maintains that Street Legal's bid on its face takes exception to this material term of the contract and is therefore unresponsive. *Id.* at 8.

In response, the contracting officer explains that the agency determined Street Legal's bid acceptable and responsive to the solicitation.³ COS at 2; Supp. COS at 1. The agency states that the teaming agreement "acknowledged the limitations on subcontracting and expressly stated that [Street Legal] will comply with the limitations on subcontracting[.]" and that the contracting officer "was satisfied with this language." COS at 2. The agency also explains that the contracting officer reviewed all the information submitted by the awardee and did not find any reason to conclude that the awardee would not comply with this clause. *Id.* The agency asserts that the awardee's "promise to comply over the life of the contract reasonably conveys a commitment to comply throughout the contract" which includes compliance during the base year and each option year.⁴ Supp. MOL at 5.

We find no basis to question the Army's determination that Street Legal's bid was acceptable and responsive to the requirements of the solicitation. Street Legal's bid did not contain any language which, on its face, demonstrated that the awardee did not intend to comply with the limitations on subcontracting clause or should have led the contracting officer to reach such a conclusion. Rather, the bid contained Street Legal's clear representation to "comply with all regulations and FAR clauses," particularly with respect to the "division of onsite work." AR, Tab 27, Teaming Agreement at 8. More specifically, the bid represented that Street Legal would comply with FAR clause 52.219-14 "over the life of the contract." AR, Tab 27, Teaming Agreement at 8. Given

³ We note that our Office has consistently stated that we will consider post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, so long as those explanations are credible and consistent with the contemporaneous record. *See Addx Corp.*, B-417804 *et al.*, Nov. 5, 2019, 2020 CPD ¶ 118 at 5.

⁴ The agency also states that it interpreted the reference in the teaming agreement to enforcement of the limitations on subcontracting clause at the task order level as "not an issue" because the contract is not an indefinite-delivery, indefinite-quantity (IDIQ) contract and thus does not contemplate the issuance of task orders. COS at 2-3. The agency explains that despite this language, it was "satisfied [the awardee would perform in accordance with the terms of the contract] because the agreement acknowledged the limitations on subcontracting and stated that the team would comply 'over the life of the contract.'" *Id.* at 3. As explained above, the protester's argument that the awardee's bid showed it would not comply with this clause is too narrowly focused on the phrase "over the life of the contract." *See, e.g.*, Supp. Comments at 2-13. In this regard, the awardee stated its intent to comply with the requirements of the contract's limitations on subcontracting. As such, because we find the agency's interpretation of this specific language reasonable, that is, that the awardee would comply with the contract's limitations on subcontracting, we need not address the meaning of the awardee's reference to enforcement at the task order level.

this language, we find that the agency reasonably concluded that Street Legal would comply with the limitations on subcontracting clause at the required periods of time. The protester's interpretation of the awardee's bid ignores the statements committing to compliance and instead makes assumptions regarding the meaning of the words "over the life of the contract" that are not supported by the record and do not establish that the awardee does not intend to comply with the limitations on subcontracting clause.

Because the awardee's bid does not indicate on its face that the awardee intends to violate the FAR clause (that is, pay more than 50 percent of the contract price to MDI), we find no basis to question the Army's determination that the awardee's bid was acceptable and responsive to the solicitation. *See Diversified Elevator Service and Equipment Co.*, B-421925, B-421925.2, Nov. 21, 2023, 2023 CPD ¶ 265 at 6. This protest ground is denied.

Affirmative Responsibility Determination

Zero Waste Solutions alternatively challenges the Army's affirmative responsibility determination with respect to Steet Legal. In this regard, the protester contends that Street Legal could not have demonstrated it met several of the general responsibility standards set forth in FAR subsection 9.104-1 and that furthermore, the agency improperly focused its responsibility determination on only the awardee's past performance information. Protest at 7-8; Comments & Supp. Protest at 14-20.

The Army requests our Office dismiss the protester's challenge to the affirmative responsibility determination. The agency contends that "[a]s a general rule, GAO does not consider affirmative responsibility determinations[.]" and that the protester has not demonstrated an exception to the rule is present here, because the protest "fail[s] to establish serious concerns" that would warrant review by our Office. MOL at 9. In the alternative, the agency argues that on the merits, its determination of Street Legal as a responsible contractor was reasonable. *Id.* at 11.

The FAR provides that a contract may not be awarded unless the contracting officer makes an affirmative determination of responsibility. FAR 9.103(b). As our Office has explained, the affirmative determination that a bidder is capable of performing a contract is largely committed to the contracting officer's discretion. *Great Lakes Dredge & Dock Co., LLC*, B-416073, May 24, 2018, 2018 CPD ¶ 194 at 3. Our Office generally will not consider a protest challenging such a determination, except under certain limited exceptions. 4 C.F.R. § 21.5(c); *Newt Marine Service*, B-422968, Nov. 4, 2024, 2024 CPD ¶ 252 at 2. Those exceptions are protests that allege definitive responsibility criteria in the solicitation were not met and protests that identify evidence raising 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. *Id.* at 2-3. As discussed below, we find that neither exception applies here.

With respect to the first exception, Zero Waste Solutions has failed to identify any definitive responsibility criteria from the solicitation that the awardee did not meet because the solicitation doesn't include any definitive responsibility criteria. As explained above, the IFB simply provides that "all contractors must be determined responsible and in compliance with FAR [clause] 9.104-1 – General Standards." IFB at 79. Those standards include, for example, "[h]av[ing] adequate financial resources to perform the contract, or the ability to obtain them[.]" and "[h]av[ing] the necessary production, construction, and technical equipment and facilities, or the ability to obtain them." FAR 9.104-1. Zero Waste Solutions's protest challenges only the agency's review of Street Legal's responsibility under those general standards and does not otherwise identify any definitive responsibility criteria from the solicitation.

The protester also alleges that the agency improperly considered only information relating to the awardee's past performance in determining responsibility, as demonstrated by the record's reference to the agency's review of information from various past performance databases. However, the protester's arguments in this regard again are merely a challenge to the agency's affirmative responsibility determination. In the absence of allegations that the agency failed to consider whether the awardee was responsible pursuant to definitive responsibility established by the solicitation, our regulations do not contemplate a review of the agency's affirmative responsibility determination, and we find no basis to question the contracting officer's exercise of discretion. At any rate, the record shows that the agency considered the responsibility criteria listed in FAR section 9.104-1, and given the awardee's performance of multiple prior contracts that were comparable to this requirement, the agency concluded that Street Legal was responsible. COS at 3; see AR, Tab 44, Determination of Responsibility or Non-Responsibility.

With respect to the second exception, protests raising evidence of serious concerns that the contracting officer did not consider, our Office has stated that this exception was intended to encompass protests raising supported allegations that the contracting officer ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. *Great Lakes Dredge & Dock Co.*, *supra* at 7. The allegations that our Office have reviewed, in the context of an affirmative determination of responsibility, generally pertain to very serious matters such as potential criminal activity. See *Marine Terminals Corp.--East, Inc.*, B-410698.9, Aug. 4, 2016, 2016 CPD ¶ 212 at 12 (identifying fraud, criminal convictions, and improper reporting of earnings as examples of serious matters); *MVM, Inc.*, B-421788.3, B-421788.4, Mar. 5, 2024, 2024 CPD ¶ 63 at 9 (reviewing responsibility determination where allegation included a False Claims Act violation).

Here, the information the contracting officer allegedly should have reviewed primarily involves the same general standards of responsibility discussed above. For example, the protester alleges that the agency "entirely failed to consider relevant factors" including "whether [the awardee] has the necessary capabilities[.]" and whether the awardee has the requisite "experience, past performance, personnel, equipment,

permits, licenses, and other capabilities.”⁵ Comments & Supp. Protest at 20. These are not the types of allegations that contemplate “very serious matters” that our Office will review in assessing the reasonableness of a contracting officer’s affirmative determination of responsibility.

On this record, we find that Zero Waste Solutions has not raised arguments that meet the standards required by either exception to our regulations that would allow for our review of the contracting officer’s affirmative responsibility determination. Accordingly, the protester’s challenges to the awardee’s responsibility are dismissed.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel

⁵ We note that the protester’s allegations that the awardee does not have the capability to perform the contract are based on the awardee’s website, the fact that its proposed subcontractor has performed similar contracts in the past, and that the proposed subcontractor attended the site walk through, among other things. Protest at 4. The protester has not identified any information in the awardee’s bid that would have put the agency on notice that the awardee lacked the capability to perform the contract.