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**Comptroller General
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**United States Government Accountability Office
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Decision

Matter of: Light-Pod, Inc.

File: B-401739; B-401739.2

Date: November 12, 2009

Robert A. DeLuca, Esq., Robert DeLuca & Associates LLC, for the protester.
Catherine Kellington, Esq., Naval Sea Systems Command, for the agency.
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General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where record shows that contracting agency reasonably determined small business protester's proposal technically unacceptable on the basis of factors not related to responsibility, referral to Small Business Administration for Certificate of Competency review was not required, even though agency also found the proposal unacceptable based on responsibility-related considerations.

DECISION

Light-Pod, Inc. (LP), of Philadelphia, Pennsylvania, protests the rejection of its proposal and the award of a contract to Energy Focus, Inc. (EFI), of Solon, Ohio, under request for proposals (RFP) No. N65540-08-R-0033, issued by the Department of the Navy, Naval Surface Warfare Center, Carderock Division for solid state lighting (SSL) fixtures to be installed aboard Virginia Class submarines. The SSL fixtures use light emitting diodes (LED) and are to replace existing fluorescent lighting fixtures. LP argues that the evaluation of its proposal was unreasonable and that EFI's proposal contained material misrepresentations and thus should have been rejected.

We deny the protest.

BACKGROUND

The RFP, which was set aside for small businesses, contemplated the award of a 5-year indefinite-delivery/indefinite-quantity contract for first article and production quantities of 16 different sized SSLs. The solicitation provided for award to the responsible offeror submitting the lowest-priced technically acceptable proposal. To be determined technically acceptable, a proposal had to be determined acceptable

under each of three evaluation factors: technical approach, corporate experience, and past performance. Three subfactors were to be considered under the technical approach factor: design and performance characteristics, shipboard interface, and logistic support (i.e., ability to furnish spare parts).

Three offerors submitted proposals prior to the October 17, 2008 closing date. After evaluation, the contracting officer determined that the proposal of EFI, which had been determined technically acceptable, and the proposal of the protester, which had been determined unacceptable but susceptible of being made acceptable, would be included in the competitive range. The proposal of the third offeror was excluded from further consideration.

By letter of March 11, 2009, the contracting officer initiated discussions with the protester.¹ The discussion letter advised LP that its proposal had been determined acceptable under the corporate experience and past performance evaluation factors, but that for the proposal to be determined acceptable under the technical approach factor, the protester needed to clarify the dimensions of its proposed luminaires, some of which appeared to exceed the dimensions of the legacy fixtures that they would be replacing, in violation of the RFP's requirements.² The letter further advised the protester that "to assist the Contracting Officer in determining contractor responsibility," it needed to furnish "more information and further clarification" as to how it intended to accomplish "mass production" of the luminaires. Contracting Officer's Letter to LP, Mar. 11, 2009, at 2. The letter noted in this connection that although LP's proposal disclosed that the protester intended to subcontract with Hubbell Fixture Company for production of the luminaires, it cited "no example of mass production from Light-Pod via Hubbell," and that the agency would need to arrange a site visit to the Hubbell plant to ensure that Hubbell had "sufficient resources to fulfill contractual obligations." Id. The letter requested that LP personnel coordinate with the contract specialist to set up the visit.

The protester responded by furnishing drawings demonstrating that the dimensions of its proposed luminaires did not exceed those of the legacy fixtures. The protester also advised that it could arrange a tour of the Hubbell manufacturing facility within 7 days if it were awarded the contract. After reviewing LP's response, the evaluators determined its proposal acceptable under all evaluation factors and subfactors. Source Selection Summary, Mar. 24, 2009, at 4-5. The two parties then sought to agree upon a date for the visit to Hubbell facility.

¹ EFI was notified that the agency was conducting discussions with offerors in the competitive range, but that its proposal had been determined technically acceptable.

² Section 2.3.1.1 of the solicitation provided that "[e]ach SSL luminaire under development shall not exceed the external length, width, and height dimensions of a comparable legacy F8T5 luminaire." RFP at 36.

Before the visit occurred, however, LP notified the agency that Hubbell would be unable to perform and that it had decided to subcontract with another firm for manufacture of the proposed units. LP identified its new subcontractor as J&M Manufacturing. In response, the contracting officer asked LP to update the corporate experience section of its technical proposal to include the new subcontractor. The contracting officer requested that the updated information be furnished by April 20. On April 20, LP furnished a revised version of the corporate experience section of its proposal, but the updated information did not identify J&M as the proposed manufacturing subcontractor; rather, the updated proposal identified “AMD Manufacturing” as the manufacturing subcontractor.

Agency personnel conducted a site visit to AMD Plastics, Inc. on April 23 and determined that its facility was unacceptable for the level of effort required by the solicitation. The agency inspectors found that at the time of the inspection, AMD Plastics, Inc. did not have personnel on staff for assembly and testing of electrical hardware; that detailed work instructions for assembly of the final product were not available, nor were there any personnel or procedures in place for anything similar to the final product called for under the instant solicitation; and that applicable production, assembly, test procedures, and cognizant personnel did not appear to be in existence. Report of Travel: Site Visit Trip Report, Apr. 27, 2009.

On May 20, the contracting officer requested final revised proposals from both offerors. The letter to LP summarized the findings of the inspection team and advised the protester that if its final proposal revision did not address these findings and identify “an acceptable subcontractor with manufacturing capabilities that meet the standards of the Navy,” it would be excluded from further consideration. Request for LP Final Proposal, May 20, 2009, at 3. In its final revised proposal, LP furnished additional information regarding AMD’s experience and capabilities, but did not propose to replace it as its manufacturing subcontractor.

After reviewing the final revised proposals, the evaluation team rated LP’s proposal unacceptable under both the design and performance characteristics and the logistic support subfactors of the technical approach factor; in addition, the evaluators rated the proposal unacceptable under the corporate experience factor. With regard to the design and performance characteristics subfactor, the evaluators noted, among other things, that LP had not incorporated into its final proposal the information regarding fixture dimensions that it had furnished in response to agency discussions; the evaluators also noted that there were risks associated with LP’s proposal relating to its manufacturing subcontractor. The evaluators explained the rating of unacceptable under the logistic support subfactor as attributable to “confusion as to current relationship with Hubbell Fixture Company and the unacceptable site visit report on AMD Plastics detailed below under ‘corporate experience’.” Source Selection Summary, July 8, 2009, at 3. The evaluators further explained that LP’s proposal had been rated unacceptable under the corporate experience factor based

on the findings of the site inspection team. The evaluators noted in summary that LP had “no past performance of a large scale production as this solicitation calls out,” and, therefore, that “a significant level of risk [was] associated with [the] company, which result[ed] in a rating of unacceptable in this area.” Id.

EFI’s proposal was determined technically acceptable. While LP’s evaluated price was lower than EFI’s--\$993,322 versus \$1,388,784--EFI’s proposal was selected for award since it was the only technically acceptable offer. On July 14, the contracting officer notified LP that EFI had been selected for award. The agency furnished LP with a written debriefing on August 5, and LP protested to our Office on August 10.

ANALYSIS

LP challenges the agency’s determination that its proposal was technically unacceptable.³ The protester also argues that the agency treated the two offerors unequally by conducting a thorough investigation of its manufacturing subcontractor’s facilities, while failing to visit EFI’s production facility.

At the outset, we note that where an agency determines the proposal of a small business such as the protester to be unacceptable under a responsibility-related factor, that is, a factor pertaining to its ability to perform, such as whether it has adequate corporate experience or production equipment and facilities, the determination is essentially one of nonresponsibility, meaning that referral to the Small Business Administration (SBA), which has the ultimate authority to determine the responsibility of small business concerns, is required. Joanell Labs., Inc.; Nu-Way Mfg. Co., Inc., B-242415.8 et al., Apr. 15, 1992, 92-1 CPD ¶ 369 at 6; Sanford

³ In addition, the protester complained in its initial protest that the agency (1) had improperly reopened discussions with offerors in the competitive range to its competitive disadvantage; (2) had unreasonably focused on its ability to mass produce the luminaires when the RFP required the production of only limited quantities of the fixtures; and (3) had improperly ignored negative past performance information pertaining to EFI. The agency responded to these complaints in its report, and the protester did not seek to rebut or otherwise address the agency response in its comments. Accordingly, we consider it to have abandoned these issues. Akal Security, Inc., B-401469, Sept. 10, 2009, 2009 CPD ¶ 183 at __.

In its initial protest, LP also objected to the findings of the site inspection team. Given our conclusion below that the agency reasonably determined LP’s proposal technically unacceptable based on its failure to demonstrate compliance with the solicitation requirement pertaining to luminaire dimensions and its failure to propose an acceptable approach to furnishing spare parts, we need not consider whether the findings of the site inspection team furnished the agency with an additional basis for finding the proposal unacceptable.

and Sons Co., B-231607, Sept. 20, 1988, 88-2 CPD ¶ 266 at 2-3. Where an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility as well as responsibility-related ones, referral to the SBA is not required, however. Paragon Dynamics, Inc., B-251280, Mar. 19, 1993, 93-1 CPD ¶ 248 at 4.

Here, while it is clear from the record that the agency determination of technical unacceptability was based in large part on concerns pertaining to the manufacturing capabilities of the protester's proposed subcontractor, which are responsibility-related, it is also apparent that those concerns were not the only basis for the determination of technical unacceptability; as a consequence, we conclude that the determination of technical unacceptability was not essentially one of nonresponsibility requiring referral to the SBA. In particular, LP's final proposal failed to demonstrate compliance with the RFP requirement that the dimensions of the proposed luminaires not exceed the dimensions of the legacy fixtures. While the protester furnished an acceptable response to the agency discussion letter notifying it that four of its proposed luminaires exceeded the allowable dimensions, LP did not incorporate this response into its final revised proposal; rather, LP's final proposal repeated the information contained in its initial proposal.⁴ Given that LP's final proposal did not demonstrate compliance with the solicitation requirement pertaining to fixture dimensions, we think that the evaluators reasonably determined it technically unacceptable under the design and performance subfactor. See Capitol CREAG LLC, B-294958.4, Jan. 31, 2005, 2005 CPD ¶ 31 at 7-8.

We also think that the evaluators had a reasonable basis for determining the protester's proposal unacceptable under the logistic support subfactor. The solicitation provided for the evaluation of the offeror's ability to furnish repair and replacement parts under this subfactor. In its initial proposal, LP furnished the following information regarding its capability to provide replacement parts:

Hubbell has agreed to release spare parts which would include LED boards, LED Ballasts, Fluorescent Ballasts, Lids, Latches and screws through electrical distribution in key strategic NAVY based areas around the United States.

LP Initial Proposal at 80. In its initial evaluation, the evaluation team found this response to be acceptable. During discussions, however, LP replaced

⁴ For example, the agency's discussion letter notified LP that the dimensions of its proposed symbol 70.3 fixture (14.3125 x 4.75 x 3) exceeded one of the dimensions of the legacy fixture (17.281 x 4.656 x 3). While LP responded to the letter by proposing a fixture with dimensions of 17.188 x 4.625 x 3 (which would conform to the required dimensions), in its final proposal LP again proposed non-conforming dimensions of 14.3125 x 4.75 x 3 for the symbol 70.3 fixture.

Hubbell as its manufacturing subcontractor, without making any corresponding revisions to its approach to furnishing replacement parts. That is, LP's final proposal still identified Hubbell as the source for its spare parts. We think that the evaluators reasonably determined unacceptable the protester's proposed approach of relying upon Hubbell as its source for spare parts for fixtures that Hubbell was not manufacturing.

Turning then to the protester's complaint that the agency treated the two offerors unequally by conducting a site visit to its manufacturing subcontractor's facilities, but failing to inspect EFI's production facilities, the agency explains that it had concerns regarding the protester's, but not EFI's, production capabilities. To the extent that the protester argues that the agency should have had concerns regarding EFI's production capabilities, it is essentially challenging the agency's affirmative determination of EFI's responsibility, and absent conditions not present here, we will not consider a protest challenging such a determination. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2009).

Finally, LP complains that EFI misrepresented in its proposal that it had an ongoing technical collaboration with LP for development of drivers to be used in the SSLs. The protester maintains that while the parties had entered into a contract in January 2008, EFI had repudiated the contract in December 2008, prior to award of the contract at issue here.

Even assuming the correctness of LP's allegation that in December 2008 EFI repudiated the contract for the development of drivers that the two parties had entered into in January 2008, this would not show that EFI's proposal, which was submitted earlier in October 2008, contained a misrepresentation. Further, while LP has furnished evidence that EFI sought to repudiate the contract in January 2009 by asking LP to return a \$50,000 down payment that EFI had made to it for development of drivers, the protester has furnished no evidence that the down payment was in fact refunded. Also, the agency provided a copy of a July 2009 email from LP to EFI in which LP's president states that in response to EFI's demand for a refund of its \$50,000 down payment, he told EFI that LP "would proceed on delivering on our end of the contract." Agency Report on Supplemental Protest, Oct. 16, 2009, Exh. D at 2. This evidence strongly suggests that LP did not in fact consider the contractual relationship between the two parties to have been terminated by EFI's request for a refund.

The protest is denied.

Lynn H. Gibson
Acting General Counsel