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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Dorado Services, Inc.

File: B-411691.4

Date: November 18, 2016

Joseph M. Goldstein, Esq., and Andrew E. Schwartz, Esq., Shutts & Bowen LLP, for the protester.

Douglas P. Hibshman, Esq., and Nicholas T. Solosky, Esq., Fox Rothschild LLP, for GEO International Management, LLC, the intervenor.

Phillip E. Reiman, Esq., Department of the Air Force, for the agency.

Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee's proposal did not comply with the solicitation's limitation on subcontracting provisions is denied where the proposal, on its face, does not show that the awardee has not agreed to comply with the subcontracting limitation, and whether the awardee will comply is a matter of contract administration, not for review by our Office.

DECISION

Dorado Services, Inc., of Sanford, Florida, protests the award of a contract to GEO International Management, LLC, of San Antonio, Texas, by the Department of the Air Force under request for proposals (RFP) No. FA3047-15-R-0011 for waste collection services. Dorado argues that GEO's proposal was facially non-compliant with the RFP's subcontracting limitations, making the proposal ineligible for award.

We deny the protest.

BACKGROUND

The RFP, issued on June 11, 2015, as a total set-aside for historically underutilized business zone contractors, sought proposals to provide municipal solid waste collection and disposal services at Joint Base San Antonio, Texas. RFP at 1, 14. The RFP contemplated award of an indefinite-delivery, indefinite-quantity contract

consisting of one base year, and four option years, to the responsible offeror who submitted the lowest-priced, technically acceptable offer. Id. at 45-85, 167.

Two proposals were received by the July 27 closing date, one from GEO and one from Dorado. On October 29, 2015, the agency selected Dorado for award of the contract. However, after a protest filed by GEO, the agency decided to take corrective action by reevaluating proposals and making a new award decision. Supp. Protest at 2. On September 13, 2016, the agency awarded the contract to GEO, which resulted in Dorado filing a protest with our Office on September 21, and this supplemental protest on September 22. In its initial protest Dorado argued that GEO's technical proposal did not comply with the limitations on subcontracting provisions found at 13 C.F.R. § 125.6. Protest at 7-8. Our office dismissed the initial protest on September 30, as the allegations were untimely challenges to the terms of the solicitation. However, this supplemental protest remained as a timely challenge to the agency's evaluation of GEO's proposal.

DISCUSSION

Dorado argues that GEO's proposal did not comply, on its face, with the RFP's subcontracting limitations, specifically Federal Acquisition Regulation (FAR) clause 52.219-3, which was to be incorporated into the resulting contract. Supp. Protest at 10. The agency responds that there is nothing on the face of GEO's proposal that should have led the government to conclude that the awardee was not going to comply with the solicitation's subcontracting limitations. We see no basis to question the agency's evaluation.

An agency's judgment as to whether a small business offeror can comply with a limitation on subcontracting provision is generally a matter of responsibility. Ashridge, Inc., B-408469, Sept. 27, 2013, 2013 CPD ¶ 250 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. EcoAnalysts, Inc., B-406233 et al., Mar. 19, 2012, 2012 CPD ¶ 169 at 3. In this regard, a proposal that fails to conform to a material term or condition of the solicitation, such as the subcontracting limitation, is unacceptable and may not form the basis for an award. Id. An offeror, however, need not affirmatively demonstrate compliance with subcontracting limitations in its proposal. Dorado Servs., Inc., B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 12.

The solicitation here incorporates by reference Federal Acquisition Regulation (FAR) clause 52.219-3, Notice of HUBZone Set-Aside or Sole Source Award (Nov 2011), which imposes a contractual requirement that a "HUBZone small business concern agrees that in the performance of the contract . . . at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern or employees of other HUBZone small business concerns." FAR § 52.219-3(d)(1); RFP at 37. The plain language of this clause provides that the act of

proposal submission itself is sufficient to demonstrate agreement to be bound by the limitation.

Accordingly, where an offeror submits a proposal in response to an RFP that incorporates FAR clause 52.219-3, the offeror agrees to comply with the limitation, see Dorado Servs., Inc., *supra*, and in the absence of any contradictory language, the agency may presume that the offeror will comply with the subcontracting limitations. This presumption may be rebutted, but it is the protester that bears the burden to affirmatively demonstrate that the awardee's proposal takes exception to the limitations on subcontracting. Mare Solutions, Inc., B-413238, B-413238.2, Sept. 14, 2016, 2016 CPD ¶ 259 at 11; KAES Enters., LLC, B-408366, Aug. 7, 2013, 2013 CPD ¶ 192 at 3.

A review of the record confirms that GEO's proposal did not contain any information that should have led the agency to conclude that the firm could not or would not comply with the relevant subcontracting limitations. Specifically, nowhere in its proposal does GEO state that it would not comply with the limitations set forth in FAR clause 52.219-3. Moreover, the protester has not shown, and our review has not found, any aspect of GEO's proposal that shows the firm will not comply with these subcontracting limitations.

For instance, while Dorado points to GEO's proposed corporate reach back and manning, stated as a function of full-time equivalent (FTE) personnel, none of these portions of GEO's proposal shows that GEO is necessarily proposing to perform the contract with less than 50 percent of the cost of personnel for contract performance being spent for its own employees or individuals employed by other HUBZone small business concerns, as would be prohibited by FAR clause 52.219-3. In fact, the protester's analysis of GEO's proposal simply refers to personnel charts and FTE numbers, but does not mention cost of personnel at all. Given that GEO's proposal, on its face, does not show a failure to conform to the subcontracting limitations of FAR clause 52.219-3, whether GEO will, in fact, comply with these restrictions during contract performance is a matter of contract administration, and not for our Office's review. 4 C.F.R. § 21.5(a).

The protest is denied.

Susan A. Poling
General Counsel