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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Sohail Global Group

File: B-413132

Date: August 9, 2016

Aashiqullah Zazai, for the protester.

Jenny N. Masunaga, Esq., Department of the Army, Corps of Engineers, for the agency.

Paula J. Haurilesko, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency unreasonably found an Afghan firm non-responsible because it was ineligible for access to a military installation is denied, where the record shows that, based on classified information that could not be disclosed to the protester but was reviewed by our Office, the agency did not abuse its discretion in finding the firm non-responsible.

DECISION

Sohail Global Group (SGG), of Kabul, Afghanistan, protests its elimination from the competition under request for proposals (RFP) No. W5J9JE-16-R-0001, issued by the Department of the Army, Corps of Engineers (USACE), for construction projects in Afghanistan. SGG maintains that USACE unreasonably found the firm non-responsible.

We deny the protest.

BACKGROUND

The RFP, a two-phase solicitation, provided for the award of up to 12 fixed-price indefinite-delivery/indefinite-quantity contracts to support construction projects in the USACE Transatlantic Afghanistan district's area of operations.¹ The procurement

¹ The area of operations includes all 34 provinces in Afghanistan. RFP at 6.

was limited to Afghan firms pursuant to section 886 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. Law No. 110-181). Performance was to occur over a 1-year base period and four option years. RFP at 10.²

The RFP stated that in phase I of the competition, proposals would be evaluated for past performance, specialized experience, organizational management and execution plan, and technical approach for design-build projects. Id. at 22. At the end of phase I the government would invite 15-20 offerors to submit proposals for phase 2. Id. at 21.

The RFP included Central Command (CENTCOM) clause 5152.225-5916, Mandatory Eligibility for Installation Access, which requires the prime contractor and all subcontractors to be initially eligible for installation access to a U.S. and/or Coalition installation, and to remain eligible during the entire period of contract performance. The clause states that, to be eligible for installation access, the offeror must be registered and approved in the Joint Contingency Contracting System (JCCS) database prior to award. The clause further states that failure to be approved in the JCCS database may render the offeror ineligible for award, and that the offeror would be deemed non-responsible until it is deemed eligible by the appropriate access approval authority. Id. at 79.

USACE received over 70 proposals in response to the solicitation. Agency Report (AR) Legal Memorandum at 3. Before evaluating proposals, the contracting officer reviewed offerors' information in the JCCS database. On May 5, 2016, the contracting officer advised SGG that the firm was found to be non-responsible because it was ineligible for installation access in accordance with CENTCOM clause 5152.225-5916, and therefore was ineligible to be considered for award. SGG was further advised that the contracting officer requested reconsideration of SGG's base access ineligibility status from the appropriate access approval authority.³ AR, Tab 6, SGG Determination of Non-Responsibility Letter, May 5, 2016, at 1. SGG protested to our Office.

DISCUSSION

SGG contends that USACE erroneously found the firm non-responsible. SGG maintains that it properly registered in the JCCS database but was given no reason for being found non-responsible. Protest at 3.

² The RFP did not include numbered pages in its entirety. Our Office assigned consecutive numbers to all pages in the RFP. The citations to the RFP in this decision are to the page numbers assigned by our Office.

³ On July 3, USACE advised our Office that the request for reconsideration of SGG's base access ineligibility was denied. USACE E-mail, July 3, 2016.

The agency states that the decision to eliminate SGG from the competition was in accordance with the terms of the solicitation. USACE explains that the contracting officer checked SGG's registration in the JCCS database and found that the firm had been determined ineligible for base access, which mandated a non-responsibility determination. AR Legal Memorandum at 3. The agency states that a determination of installation access is a matter of inherent command authority and is not at the discretion of the contracting officer. Id. at 6.

In making a negative responsibility determination, a contracting officer is vested with a wide degree of discretion and, of necessity, must rely upon his or her business judgment in exercising that discretion. Torres Int'l, LLC, B-404940, May 31, 2011, 2011 CPD ¶ 114 at 4. Although the determination must be factually supported and made in good faith, the ultimate decision appropriately is left to the agency, since it must bear the effects of any difficulties experienced in obtaining the required performance. For these reasons, we generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the part of the agency or a lack of any reasonable basis for the determination. Colonial Press Int'l, Inc., B-403632, Oct. 18, 2010, 2010 CPD ¶ 247 at 2. Our review is based on the information available to the contracting officer at the time the determination was made. Acquest Dev. LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 3.

We recognize that, under these circumstances, the contracting officer's judgment is limited by a military command decision to deny SGG access to a military installation. It is well established that the commanding officer of a military base has wide discretion as to whom he can exclude from the base. Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 893, (1961). Moreover, as the Court of Federal Claims has stated, the requirements of due process vary given the circumstances and, in the environment of a war zone, when the required notice would necessarily disclose classified material and could compromise national security, normal due process requirements must give way to national security. Afghan Premier Logistics, B-409971, Sept. 26, 2014, 2014 CPD ¶ 293 at 3 citing NCL Logistics Co. v. United States, 109 Fed. Cl. 569, 620 (2013).

Here, in considering SGG's protest, and the agency response thereto, our Office reviewed classified information supporting the agency's non-responsibility determination. Based on our review, we find the agency's decision reasonable.

The protest is denied.

Susan A. Poling
General Counsel