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Decision

Matter of: Lawson Environmental Services LLC

File: B-416892; B-416892.2

Date: January 8, 2019

Theodore P. Watson, Esq., Watson & Associates, LLC, for the protester.
William K. Walker, Esq., Walker Reasusaw, for Eagle Eye – Enviroworks Joint Venture, the intervenor.

Kathleen Clever, Esq., and Demetra Salisbury, Esq., Environmental Protection Agency, and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency improperly referred awardee to the Small Business Administration for consideration under certificate of competency procedures is dismissed where allegations do not fall within exceptions that allow for review by our Office.

DECISION

Lawson Environmental Services LLC, a small business of Caledonia, Missouri, protests the award of a contract to Eagle Eye – Enviroworks Joint Venture, a small business of Anchorage, Alaska, under request for proposals (RFP) No. 68HE0718R0009, issued by the Environmental Protection Agency (EPA) for environmental remediation services at the Big River Mine Tailings Site, Operable Unit 1, St. Francois County, Missouri. Lawson argues that the EPA’s decision to refer Eagle Eye to the Small Business Administration (SBA) for a certificate of competency (COC) was in error.

We dismiss the protest.

BACKGROUND

The RFP was issued on April 25, 2018, as a small business set-aside, for the soil remediation of residential properties located within the Big River Mine Tailings

Superfund Site.¹ Agency Report (AR), Tab 1, RFP at 20; Contracting Officer's Statement (COS) at 1. The solicitation provided for the award of a single indefinite-delivery, indefinite-quantity contract, under which fixed-price task orders would be placed, for a base year with two 1-year options. RFP at 8-10, 45. In general terms, the RFP's performance work statement (PWS) requires the contractor to provide all labor, materials, equipment, site management, and office support necessary to successfully accomplish the specified tasks for remediation services. RFP attach. 1, PWS at 53.

The RFP established that award would be made on a lowest-priced, technically acceptable (LPTA) basis, based on two nonprice factors: technical capability and past performance. RFP at 47-50. The technical capability factor consisted of three subfactors: corporate experience; key personnel; and project management plan. Id. at 47-48. Relevant to the protest here, both the corporate experience and key personnel subfactors set forth various minimum requirements, e.g., the "[o]fferor demonstrates at least 5 years of residential earthmoving experience," and "[t]he [project manager] must demonstrate . . . at least five years' experience as a [project manager] in environmental hazardous substance or hazardous waste." Id. at 48.

Ten offerors, including Eagle Eye and Lawson, submitted proposals by the June 15 closing date. When performing its evaluation, the agency began by rank-ordering proposals by price to assess price reasonableness.² COS at 1; AR, Tab 4, Price Evaluation Memorandum, at 259-262. After the lowest-priced offeror withdrew its proposal, an agency technical evaluation panel (TEP) assessed Eagle Eye's technical proposal and found deficiencies under both the corporate experience and key personnel subfactors. COS at 2. Specifically, the evaluators determined that Eagle Eye did not meet the minimum corporate experience requirements, and that its project manager and site superintendent did not meet the minimum key personnel experience requirements. AR, Tab 12, TEP Report (Eagle Eye), at 380-384. The TEP concluded that Eagle Eye's proposal was technically unacceptable. Id. at 380.

The EPA thereafter determined that the matter should be referred to the SBA under its COC procedures. COS at 2-3; AR, Tab 13, SBA Referral (Eagle Eye), at 393-397. On August 24, the SBA issued a COC for Eagle Eye, indicating that the firm was considered responsible to perform the proposed procurement. AR, Tab 14, COC (Eagle Eye), at 399-401. In its affirmative findings, the SBA found that Eagle Eye's COC application included information demonstrating that the offeror met the RFP's corporate

¹ The solicitation was subsequently amended four times. All citations are to the final version of the solicitation. Additionally, references to page numbers throughout the report are to the Bates numbering provided by the contracting agency.

² Eagle Eye and Lawson were ranked second and fourth lowest-priced, respectively. The RFP also established that the EPA would review the lowest-price offeror's proposal for technical acceptability, and that once a proposal was found to be technically acceptable, no further technical evaluations would be performed. RFP at 47.

experience and key personnel requirements, even if that information was not part of Eagle Eye's proposal. Id. at 401.

On September 11, the agency source selection authority found Eagle Eye to be the lowest-price, technically acceptable offeror. AR, Tab 15, Source Selection Decision, at 429. After awarding the contract to Eagle Eye, the EPA provided Lawson with a written debriefing on September 20. This protest followed.

DISCUSSION

Lawson contends the EPA erred by referring Eagle Eye to the SBA for a COC. The protester takes no exception to the agency's determination that Eagle Eye did not meet the minimum corporate experience and key personnel requirements of the solicitation. Rather, Lawson argues that the contracting agency "was misguided in their belief that they were required to request a Certificate of Competency (COC) from the SBA prior to disqualifying the awardee for their failure to meet minimum technical requirements of the RFP." Protest at 2.

The EPA argues that it properly referred Eagle Eye to the SBA for a COC, insofar as the offeror was found to be technically unacceptable under responsibility-type evaluation factors (i.e., corporate experience and key personnel) as part of a non-comparative, LPTA evaluation. EPA Memorandum of Law (MOL) at 3-6. Additionally, the agency and intervenor argue that our Office should dismiss the protest because it alleges violation of a matter that we will not generally review--the referral to the SBA for a COC.³ EPA MOL at 6-7; Eagle Eye Comments at 1-2; see also SBA MOL at 3. We agree.

³ The EPA also asserts that Lawson is not an interested party to challenge the award to Eagle Eye because the protester is allegedly not next in line for award even if its protest were sustained. EPA Dismissal Request, Oct. 5, 2018, at 1-2. In support thereof, the EPA points to the fact that another offeror (Offeror C) is lower-priced than Lawson. Id. at 2. We disagree. Under our Bid Protest Regulations, only an "interested party" may maintain a protest; an interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract, or the failure to award a contract. 4 C.F.R. §§ 21.0(a)(1), 21.1 (a); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Integral Sys., Inc., B-405303, Aug. 16, 2011, 2011 CPD ¶ 161 at 3. As set forth above, the EPA's technical evaluation was limited to the lowest-priced offeror, and ended with the evaluation of Eagle Eye. Inasmuch as the EPA never evaluated the technical acceptability of the next lowest-priced offeror (Offeror C), it is unknown whether this offeror is in fact next in line for award as the agency claims. Quite simply, by limiting its technical evaluation as it did, the EPA cannot now claim that Lawson is not an interested party.

Under the SBA's COC program, agencies must refer to the SBA a determination that a small business is not responsible if that determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; Federal Acquisition Regulation subpart 19.6. Additionally, the SBA's regulations specifically 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); see AttainX, Inc.; FreeAlliance.com, LLC, B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 4; Coastal Env'tl. Grp., Inc., B-407563 et al., Jan. 14, 2013, 2013 CPD ¶ 30 at 4-5; see also Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003, 2003 CPD ¶ 33 at 5-6 (finding past performance to be a responsibility-type evaluation factor when used on a non-comparative basis).

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 concern is not responsible. Consequently, our Bid Protest Regulations set forth challenges that we will not review as follows:

Referrals made to the SBA pursuant to sec. 8(b)(7) of the Small Business Act, or the issuance of, or refusal to issue, a certificate of competency under that section will generally not be reviewed by GAO. The exceptions, which GAO will interpret narrowly out of deference to the role of the SBA in this area, are protests that show possible bad faith on the part of government officials, or that present allegations that the SBA failed to follow its own published regulations or failed to consider vital information bearing on the firm's responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency. 15 U.S.C. 637(b)(7).

4 C.F.R. § 21.5(b)(2); see Hughes Georgia, Inc., B-272526, Oct. 21, 1996, 96-2 CPD ¶ 151 at 6 ("our Office generally does not review either the contracting officer's decision to refer a responsibility question to the SBA, or the SBA's decision to issue a COC"); Bluehorse Corp.--Recon., B-413929.2, B-413929.4, May 16, 2017, 2017 CPD ¶ 149 at 2 (upholding dismissal of underlying protest "because we do not generally review COC referrals to the SBA"); see also E. F. Felt Co., Inc., B-289295, Feb. 6, 2002, 2002 CPD ¶ 37 at 3.

Here, although Lawson protests the EPA's referral of Eagle Eye to the SBA, it raises none of the exceptions that would allow our Office to review the contracting agency's

action.⁴ As set forth above, the EPA found that Eagle Eye's technical unacceptability was on the basis of responsibility-type evaluation factors as part of a non-comparative (LPTA) evaluation and, as required by the SBA's regulations, referred the matter to the SBA for resolution. Lawson's arguments here regarding the agency's "misguided belief" in referring Eagle Eye to the SBA do not amount to an allegation of bad faith meriting review by our Office under the exceptions to our Bid Protest Regulations (nor has the protester alleged that the EPA failed to provide vital information to the SBA as part of its COC referral).⁵ In sum, the protester has not established the elements necessary for our Office to consider a protest of the SBA's decision to issue a COC to Eagle Eye.⁶ We thus have no basis to disturb the finding of the awardee's responsibility. See E. F. Felt Co., Inc., supra, at 4.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁴ We also find no merit in Lawson's assertion that EPA's referral of Eagle Eye to the SBA was improper because the awardee's incomplete proposal was a matter of responsiveness and not responsibility. Supp. Protest at 5-9. As a preliminary matter, the concept of responsiveness generally applies to sealed bidding and not, as here, to negotiated procurements. VETcorp, Inc.--Recon., B-412198.2, May 9, 2016, 2016 CPD ¶ 129 at 7. In any event, both corporate experience and key personnel, when evaluated on a non-comparative basis, are matters of responsibility. 13 C.F.R. § 125.5(a)(2)(ii); Coastal Envtl. Group, Inc., supra.

⁵ Our decisions have consistently explained that 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 consider allegations based on mere inference, supposition, or unsupported speculation. Athena Scis. Corp., B-409486, B-409486.2, May 14, 2014, 2014 CPD ¶ 154 at 9. The burden of establishing bad faith is a heavy one. Evidence establishing a possible defect in an agency's actions generally is not sufficient in itself to establish that the agency acted in bad faith; the protester must also 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. E. F. Felt Co., Inc., supra, at 3-4.

⁶ Lawson also argues the SBA erred by permitting Eagle Eye to present information regarding its corporate experience and key personnel as part of its COC application that the awardee failed to submit as part of its proposal. Supp. Protest at 6 ("The SBA COC essentially gave [Eagle Eye] a pass for submitting a defective proposal."). However, Lawson does not contend that the SBA failed to follow its own published regulations in issuing the awardee a COC nor otherwise raise an exception that would allow our Office to review. See 4 C.F.R. § 21.5(b)(2).