

Decision

Matter of: Butt Construction Company, Inc.

File: B-419156.2

Date: January 26, 2021

Rachel Butt, for the protester.

Nora E. Luftus, Esq., Frantz Ward LLP, for R.J. Runge Company, Inc., the intervenor.
Christopher Lambert, Esq., and Tarrah M. Beavin, Esq., Department of the Army, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rescinded the rejection of competitor's bid as nonresponsive is denied where agency properly recognized that joint certification program registration was a matter of responsibility that could be corrected after bid opening.

DECISION

Butt Construction Company, Inc., of Dayton, Ohio, a small business, protests the award of a contract to R.J. Runge Company, Inc., of Port Clinton, Ohio, also a small business, under invitation for bids (IFB) No. W912QR-20-B-0020, issued by the Department of the Army, Corps of Engineers, for construction of an exterior elevator for the Joint Systems Manufacturing Center in Lima, Ohio. Butt argues that the Army should have rejected Runge's bid as nonresponsive.

We deny the protest.

BACKGROUND

The IFB, issued July 15, 2020, sought bids to perform construction services. The terms of the original IFB did not designate the competition as being set aside for small businesses; an amendment added the set-aside requirement. Agency Report (AR), Tab 5, IFB amend. 1 at 1. As relevant to the protest, among the terms of the synopsis accompanying the IFB was the following:

At the time of bid submission, offerors are required to be registered in the Joint Certification Program (JCP) run by DLIS [Defense Logistics Agency, Logistics Information Services] and must also submit verification that the company is US owned and personnel are US Citizens in order to be considered responsive for this Invitation for Bid (IFB) contract award. JCP information can be found at <http://www.dlis.dla.mil/jcp>. . . .

AR, Tab 4, Synopsis of Solicitation at 3.

The Army subsequently issued three amendments to the IFB; amendment 3 added the following to the IFB itself:

NOTE: At the time of bid submission, offerors are required to be registered in the Joint Certification Program (JCP) run by DLIS and must also submit verification that the company is US owned and personnel are US Citizens in order to be considered responsive for this Invitation for Bid (IFB) contract award. JCP information can be found at <https://www.dla.mil/HQ/LogisticsOperations/Services/JCP.aspx>. . . .

AR, Tab 7, IFB amend. 3 at 2.

The Army received five bids. Runge's was the lowest-priced at \$2.07 million, while Butt submitted the third-lowest bid at \$2.23 million. AR, Tab 8, Bid Opening Results Sheet at 1. Runge's bid included a certification form, which the firm had completed and signed, affirming that the firm was owned and controlled by, and that all personnel on the project were also required to be, United States citizens. AR, Tab 9, Bid Submitted by Runge, at final (unnumbered) page.¹

After bid opening, the Army contract specialist contacted Runge to state that the firm's JCP registration appeared to have been canceled and to request confirmation or proof that an application had been resubmitted by the firm. AR, Tab 12, exh. C, Email from Contract Specialist to Runge (Sept. 9, 2020), at 1. Runge responded that it had applied to have its JCP registration reactivated before the bid opening, and enclosed a copy of the request. AR, Tab 12, exh. D, Email from Runge to Contract Specialist (Sept. 9, 2020), at 1-2 (transmittal email and DD Form 2345).

After reviewing Runge's submission, the contract specialist informed Runge that its bid had been rejected because it did not have a "currently active" JCP registration, and

¹ Butt included the same form certification in its bid for itself. Protest exh. 9, Butt Bid Certification Letter at 1.

therefore the bid did not conform to the IFB requirements.² AR, Tab 12, exh. E, Email from Contract Specialist to Runge (Sept. 10, 2020), at 1.

On September 11, Runge forwarded to the contract specialist a JCP registration approval letter that the firm had received from the Defense Logistics Agency (DLA). AR, Tab 12, exh. F, Email from Runge to Contract Specialist to (Sept. 11, 2020), at 1. The Army considered and rejected the second-lowest bid as ineligible for reasons not relevant here. The Army determined that Butt's bid was responsive, and that the firm was responsible, and informed the firm of that conclusion on September 11.

Runge filed a protest with our Office, arguing that the rejection of its bid as nonresponsive was improper both because it was registered in JCP when bids were due (regardless of its status which, in any event, the firm argued it had applied for reinstatement to active status). Runge also argued that it should have been allowed to correct its JCP registration status because the issue did not fall within the Federal Acquisition Regulation (FAR) definition of responsiveness because active registration was immaterial and did not affect price, quantity, quality, or delivery, and therefore the contracting officer should have waived it or accepted the correction. AR, Tab 12, Runge Protest at 2-3 (citing FAR 14.405).

On October 19, the Army announced that it would take corrective action by rescinding the rejection of the Runge's bid and proceeding to consider it for award. AR, Tab 14, Contracting Officer's Corrective Action Memorandum to File at 1.³ The contracting officer justified this decision on the basis of a conclusion that requirement for JCP registration was a matter of responsibility that could be demonstrated after the closing time for bids, rather than a matter of responsiveness. Our Office dismissed Runge's protest as academic. *R.J. Runge Co.*, B-419156, Oct. 23, 2020 (unpublished decision). Butt then filed this protest, challenging the Army's decision to consider Runge's bid.⁴

² The contracting officer later clarified that Runge's bid had been rejected as nonresponsive due to the JCP registration issue. AR, Tab 11, Email from Contracting Officer to Runge (Sept. 15, 2020), at 1.

³ The contracting officer stated that, in light of the Runge protest, award had not yet been made to Butt. AR, Tab 14, Contracting Officer's Corrective Action Memorandum to File at 2.

⁴ The award process had not been completed when Butt filed this protest, but counsel for the Army confirms that the agency intends to award the contract to Runge. Letter from Counsel for Army to GAO, Nov. 6, 2020, at 2.

DISCUSSION

Butt argues that Runge's bid is unacceptable or nonresponsive because the firm was not registered in the JCP program when bids were due.⁵ Protest at 1. The Army contends that after reviewing the issues raised in Runge's protest, it concluded JCP registration is a matter of responsibility. As such, the agency properly considered the reinstatement of Runge's JCP registration after bids were due. Accordingly, the agency contends that Runge submitted the lowest responsive bid, the firm is responsible, and as a result, the agency contends it is properly preparing to award the contract to Runge.

In the context of sealed bidding, the concepts of responsiveness and responsibility are distinct. Responsiveness regards whether a bidder has unequivocally offered to provide supplies or services in conformity with all material terms and conditions of a solicitation, and must be established in the bid. Responsibility refers to a bidder's apparent ability and capacity to perform all contract requirements, and may be established any time before award. Additionally, a contracting agency cannot convert a matter of responsibility into one of responsiveness by the terms of the solicitation. *Midwest Contractors, Inc.; R.E. Scherrer, Inc.*, B-231101, B-231101.2, Aug. 8, 1988, 88-2 CPD ¶ 118 at 2-3; *recon. denied, R.E. Scherrer, Inc.--Recon.*, B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

The supplies and services required by this IFB were materials and labor to construct an exterior elevator according to the agency's specifications. Butt does not dispute the Army's contention that JCP registration is a separate matter from construction of an elevator, but contends that JCP registration is also unlike other responsibility matters, such as having a license, complying with local laws, or possessing a security clearance. Butt contends that JCP registration cannot be a matter of responsibility because it does not assess the bidder's capability--the firm's ability to perform the contract--whereas other responsibility matters do. Protest at 2.

Butt argues that three of our decisions hold that where an IFB requires a registration similar to the JCP, and the certification does not concern the ability to perform the contract, a bid will be "nonresponsive if the bidder is not actively registered in the program at the time the offer is submitted." *Id.* Two of three decisions cited by Butt in support of this contention regard solicitation terms that required bidders to submit either certification by a local government authority of their minority business status, or small business certification. Those decisions conclude that failing to include the eligibility information in the bid did not render the bid unacceptable; rather, the bidder's eligibility under those set-asides could be determined after bid opening. See Protest at 2 (citing

⁵ Butt also contends that Runge's bid did not include verification that the company is U.S. owned and its personnel are United States citizens. Protest at 1. Butt provides no factual basis for this assertion, and cites to the JCP registration approval letter that DLA sent to Runge. That letter provides no indication that Runge lacks United States ownership and citizenship. Accordingly we dismiss this aspect of the protest as lacking a factual basis, which our Bid Protest Regulations require. 4 C.F.R. § 21.1(c) and (f).

All Weather Contractors, Inc., B-217242, July 23, 1985, 85-2 CPD ¶ 71 at 6-7; *Parker-Kirlin, Joint Venture*, B-213667, June 12, 1984, 84-1 CPD ¶ 621 at 5). The third decision that Butt cites concluded that a bidder's certification that it would not comply with an IFB requirement to supply a small business products rendered the bid nonresponsive because under a small business set-aside that requirement was a performance commitment. See Protest at 2 (citing *Propper Mfg. Co.; Columbia Diagnostics, Inc.*, B-233321, B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58 at 2-3).

Our decisions do not appear to have addressed JCP registration directly. Despite its contention that JCP registration must be treated as a matter of responsiveness, Butt has not shown that JCP registration determines or affects the manner of contract performance; that is, whether construction of the elevator will conform to the material terms and conditions of the IFB. Neither has Butt shown that JCP registration would affect price, quantity, quality, or delivery. In our view, the Army correctly determined that the requirement in the IFB for JCP registration was a matter of responsibility, regardless of the IFB's phrasing of the issue as a matter of responsiveness. This determination is consistent with our assessment in other protests. *E.g.*, *Merrick Eng'g, Inc.*, B-238706.2, June 14, 1990, 90-1 CPD ¶ 564 at 3 (agency properly substituted its own determination that bidder complied with Walsh-Healey Public Contracts Act--now codified as amended at 41 U.S.C. §§ 6501-6511--based on information obtained after bid opening and prior to award, despite defective certification submitted with bid).

The protest is denied.

Thomas H. Armstrong
General Counsel