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## Decision

**Matter of:** Graham Services, LLC

**File:** B-419588; B-419588.2

**Date:** May 12, 2021

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Lynn Patton Thompson, Esq., Biggs, Pettis, Ingram & Solop, PLLC, for the protester. Adam K. Lasky, Esq., and Bret C. Marfut, Esq., Seyfarth Shaw LLP, for NuGate Group, LLC, the intervenor.

Johanna L. Anderson, Esq., Department of the Army, for the agency.

Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest alleging that awardee lacks requisite experience to satisfy a definitive responsibility criterion is denied where the awardee submitted evidence of experience from which the contracting officer could reasonably conclude that the criterion had been satisfied.
  2. Protest alleging awardee failed to meet other definitive responsibility criteria and challenging the agency's review of documentation submitted to support satisfaction of all definitive responsibility criteria is dismissed as untimely where the allegations were raised more than 10 days from the time the protester knew, or should have known, of its basis of protest.
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### DECISION

Graham Services, LLC (Graham), a historically underutilized business zone (HUBZone) small business of Smithville, Tennessee, protests the award of a contract to NuGate Group, LLC (NuGate), a HUBZone small business of San Jose, California, under invitation for bids (IFB) No. W912P521B0001, issued by the Department of the Army, Army Corps of Engineers (Corps), for operation and maintenance services. The protester argues that the awardee failed to satisfy one of three definitive responsibility criteria detailed in the solicitation.

We deny the protest.

## BACKGROUND

The Corps issued the IFB on November 2, 2020, as a set-aside for HUBZone small business concerns, contemplating the award of a requirements contract with a base period of 1 year and four 1-year options. Agency Report (AR), Tab 5, IFB at 1-4, 92. The IFB explained that the prospective contractor would “furnish all necessary management, supervision, inspection, personnel, materials, supplies, parts, tools, tool related hardware, equipment, transportation, vehicles, and fuel except as otherwise provided [], required to perform mowing, cleaning, janitorial, and other maintenance and operations services at the Old Hickory Lake project recreation areas[.]” *Id.* at 5. Award was to be made to the responsible bidder who submitted the lowest-priced responsive bid. *Id.* at 92.

The IFB contained three definitive responsibility criteria. *Id.* at 102. The solicitation advised that the apparent low bidder would be required to satisfy each of the three criteria, all of which related to the bidder’s prior experience with specific facilities maintenance services. *Id.* The IFB explained that after bid opening, the agency would request documentation supporting the apparent low bidder’s satisfaction of the definitive responsibility criteria. *Id.*

The IFB was amended twice, and the final bid opening time was set for 10:00 a.m., Central Time, December 11, 2020. AR, Tab 6, IFB amend. 0001 at 1; AR, Tab 7, IFB amend. 0002 at 1. The Corps received three bids in response to the IFB, one from Graham, one from NuGate, and one from M&P Services, Inc. (M&P), a HUBZone small business of Nashville, Tennessee. AR, Tab 21, Bid Abstract at 1-2. The agency conducted a public bid opening virtually on December 11, and read the following results aloud:

	<b>Graham</b>	<b>NuGate</b>	<b>M&amp;P</b>
<b>Total Price</b>	\$7,112,111	\$7,021,682	\$7,595,957

Contracting Officer’s Statement (COS) at 2; AR, Tab 21, Bid Abstract at 1-2. NuGate was determined the apparent low bidder. COS at 2.

On December 15, NuGate provided the Corps with documentation to demonstrate that it met the IFB’s definitive responsibility criteria. *Id.* A technical review team considered NuGate’s documentation and determined that NuGate satisfied all three definitive responsibility criteria. AR, Tab 16, Technical Review Memorandum at 1-4. The contracting officer, who was not a member of the technical review team, found NuGate to be responsible. AR, Tab 18, Determination of Contractor Responsibility at 1-5.

On February 10, 2021, the agency awarded a contract to NuGate. AR, Tab 19, NuGate Contract at 1. On February 12, Graham filed this protest with our Office.<sup>1</sup>

## DISCUSSION

Graham argues that the agency's award decision was unreasonable because NuGate is unable to satisfy the second definitive responsibility criterion (DRC No. 2).<sup>2</sup> Protest at 4; Comments at 3, 7. The Corps argues that it reasonably determined NuGate satisfied DRC No. 2, and that its award decision was proper. MOL at 3-5, 7. For the reasons explained below, we deny the protest.<sup>3</sup>

The Federal Acquisition Regulation (FAR) requires that contracts only be awarded to responsible contractors. FAR 9.103(a). In most cases, responsibility is determined on the basis of general standards set forth in FAR section 9.104-1. *Reyna-Capital Joint Venture*, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. Such determinations involve subjective business judgments that are within the broad discretion of the contracting activities. *Id.* However, in some solicitations, an agency will include a special standard of responsibility, referred to by our Office as a definitive responsibility criterion. See FAR 9.104-2.

Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement to measure a bidder's ability to perform the contract. FAR 9.104-2; *Reyna-Capital Joint Venture*, *supra*. These special standards of responsibility limit the class of bidders to those meeting specified qualifications necessary for adequate contract performance. *Great Lakes Dredge & Dock Co., LLC*, B-416073, May 24, 2018, 2018 CPD ¶ 194 at 3.

Where a protester alleges that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer could reasonably conclude that the criterion

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<sup>1</sup> Graham's original protest was filed on February 12. Protest at 1. Graham filed an errata on February 17, which made minor factual corrections to its protest. Protest Errata at 1, 3, 6. Our references to the protest cite to the errata filed on February 17.

<sup>2</sup> Graham's protest also alleges that the agency did not conduct a public bid opening, did not publish the bids received, did not allow bidders to inspect the bids, and allowed NuGate to change its bid after bid opening. Protest at 2-3, 5. The agency addressed these allegations in its memorandum of law (MOL) at 2, 5-7, however, Graham failed to rebut the agency's response. See Comments. Accordingly, we consider these grounds to be abandoned. 4 C.F.R. § 21.3(i)(3).

<sup>3</sup> Graham raises other collateral arguments. Although we do not address every argument raised, we have reviewed them all and find no basis to sustain the protest. As discussed below, Graham also raises supplemental protest grounds challenging other aspects of the procurement, which we dismiss as untimely.

has been met. *Reyna-Capital Joint Venture, supra* at 2-3. Generally, a contracting officer has broad discretion in determining whether bidders meet definitive responsibility criteria. *Id.* at 3. Although the relative quality of evidence is a matter within the contracting officer's judgment, the contracting officer may find compliance only with definitive responsibility criteria based on adequate, objective evidence. *Id.*

Here, the IFB required the apparent low bidder to have specific facilities maintenance service experience to satisfy the IFB's three definitive responsibility criteria.<sup>4</sup> IFB at 102. Relevant to Graham's protest, the apparent low bidder was required to produce evidence demonstrating compliance with DRC No. 2, which reads as follows:

At least one (1) contract completed or substantially completed (75%) within the last 10 years valued greater than or equal to \$250,000 that demonstrates the contractor's experience, as a prime contractor or subcontractor, satisfactorily performing the cleaning services provided in Section C-3<sup>5</sup> of the solicitation, which include, but are not limited to, cleaning restrooms and shower houses, outdoor debris removal, and clearing dust, dirt, cobwebs and other debris from outdoor structures[.]

*Id.* After the agency found NuGate to be the apparent low bidder, it requested evidence demonstrating the firm's compliance with the definitive responsibility criteria. In response, NuGate submitted a contractor performance assessment report (CPAR) to show compliance with DRC No. 2.<sup>6</sup> AR, Tab 10, NuGate DRC Information; AR, Tab 11, Honolulu CPAR. NuGate's CPAR details a project performed at U.S. Coast Guard Base Honolulu described as follows:

The Contractor provides professional janitorial services for Base Honolulu, Pier 4 Marine Safety Office (MSO) and Wailupe Housing Recreation Hall which includes over 22 buildings and 3 trailers. Contractor services are cleaning, scrubbing, polishing, dusting, vacuuming, sweeping, mopping, [stripping], waxing and buffing, carpet cleaning, glass and window

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<sup>4</sup> The first definitive responsibility criterion required bidders to demonstrate experience performing grass mowing operations, while the third criterion required bidders to demonstrate experience performing janitorial services. See IFB at 102.

<sup>5</sup> Section C-3 of the solicitation is the performance work statement (PWS).

<sup>6</sup> By email, the agency requested that NuGate submit past performance questionnaires (PPQs) as evidence of its experience. AR, Tab 15, Email from Corps to NuGate, Dec. 11, 2020 (1:45 p.m.). At NuGate's request, the Corps agreed to accept a CPAR for a project completed at U.S. Coast Guard Base Honolulu to show compliance with DRC No. 2. *Id.*, Email from NuGate to Corps, Dec. 12, 2020 (3:32 p.m.); *id.*, Email from Corps to NuGate, Dec. 14, 2020 (7:03 a.m.). NuGate otherwise submitted PPQs to show compliance with the first and third definitive responsibility criteria. AR, Tab 12, Fort Hood PPQ; AR, Tab 13, Schofield Barracks PPQ.

cleaning, disinfecting, and emptying of various waste baskets and recycle containers.

AR, Tab 11, Honolulu CPAR at 1-2. The CPAR further described the work as including “cleaning of restrooms, locker rooms, kitchens and open and close[d] spaces, hallways, corridors, and stairwells.” *Id.* at 2. The CPAR showed that the total value of the contract was \$3,624,477, and that NuGate received a rating of satisfactory for its performance on this contract. *Id.* at 1-2.

In reviewing NuGate’s supporting documentation for compliance with DRC No. 2, the agency’s technical review team found that: (1) NuGate completed or substantially completed a project at U.S. Coast Guard Base Honolulu within the last ten years; (2) the contract was valued in excess of \$250,000; (3) NuGate was the prime contractor; and (4) the project demonstrated the experience required by DRC No. 2. AR, Tab 16, Technical Review Memorandum at 2. Based on NuGate’s financial standing, its past performance references, and the technical review team’s evaluation, the contracting officer found NuGate to be responsible. AR, Tab 18, Determination of Contractor Responsibility at 5.

Graham argues that the agency unreasonably concluded that NuGate satisfied DRC No. 2 because the Honolulu CPAR shows that the work NuGate performed on that contract “bears no resemblance” to the work required to satisfy DRC No. 2. Comments at 7. In this regard, Graham asserts that the work on the Honolulu contract was “standard janitorial work only and no reasonable comparison of this description of work and the services set forth in [the IFB] . . . can be made.” *Id.*

The agency contends that the technical evaluation team reasonably found that the work on the Honolulu contract satisfied DRC No. 2 because it showed NuGate’s experience with “cleaning restrooms and showers, cleaning outdoor areas, removing debris, picking up litter, and emptying trash receptacles.” MOL at 4. The agency also found that the Honolulu contract was “much larger and complex” than the work required by the IFB, and “encompassed significantly more work than just cleaning services and required NuGate Group to provide services at locations across considerable distances.” *Id.* at 5; AR, Tab 16, Technical Review Memorandum at 2.

Here, we find no basis to sustain the protest. As explained above, NuGate’s Honolulu CPAR contained relevant information such as the period of performance, dollar value, NuGate’s role as prime contractor, and a description of work performed. See AR, Tab 11, Honolulu CPAR. We conclude that the Honolulu CPAR is adequate, objective evidence on which the agency could reasonably rely in making its responsibility determination. We further conclude that from the work described in the Honolulu CPAR--such as performing a variety of cleaning services and cleaning multiple different areas, including open and closed spaces--the agency reasonably concluded that NuGate had experience performing the services described in DRC No 2. While the protester may disagree with the relative quality of evidence presented by NuGate, or the contracting officer’s decision regarding NuGate’s responsibility, these are matters within

the contracting officer's discretion. See *Great Lakes Dredge & Dock Co., LLC, supra* at 4-6; *Reyna-Capital Joint Venture, supra* at 2-3. Accordingly, this ground of protest is denied.

#### Untimely Supplemental Protest Grounds

Graham's comments on the agency report include the following supplemental protest grounds: (1) NuGate's supporting documentation does not demonstrate compliance with the IFB's first and third definitive responsibility criteria; and (2) the contracting officer failed to independently verify the information and documentation that NuGate submitted to demonstrate that it met all three definitive responsibility criteria. Comments at 7-10. As explained below, we dismiss these grounds of protest because they were filed more than 10 days after the protester knew, or should have known, its basis of protest. 4 C.F.R. § 21.2(a)(2).

On March 10, 2021, the agency filed its five-day letter specifying documents it intended to provide in response to the protest and also filed documents prior to the date established for document production. Five-Day Letter at 1-3 (early document production filed as an associated document). The early document production included, among other things, NuGate's bid, the agency's technical review memorandum, the contracting officer's determination of responsibility, and NuGate's CPAR and PPQs. Early Document Production, exhs. 1, 4, 5, 8, 10-11. On March 15, the Corps filed its agency report which included a memorandum of law, contracting officer's statement, and supporting documentation. MOL at 7; COS at 7; AR, exhs. 1-21. On March 25, Graham filed comments on the agency report, which included the supplemental grounds of protest described above. Comments at 1. As the protester's comments were filed more than 10 days after the early document production, our Office asked the parties to brief the issue of whether the protester's supplemental grounds of protest were timely filed. GAO Req. for Briefing.

Graham argues that its supplemental protest grounds are timely because they are based on the contracting officer's statement filed on March 15. Graham Timeliness Briefing at 1. According to Graham, since the contracting officer's statement did not explain whether the contracting officer independently verified NuGate's information and documentation, the supplemental grounds raised in the protester's comments are timely filed within 10 days of March 15, the date the agency report was filed. *Id.* at 1-2.

The Corps argues that the supplemental grounds raised in the comments are untimely because they were raised more than 10 days after the protester knew or should have known its basis for protest. Agency Timeliness Briefing at ¶ 10. According to the agency, the early document production provided everything needed for Graham to form its supplemental basis of protest. *Id.* at ¶¶ 10-13. We agree with the agency.

Our Bid Protest Regulations require that protests other than those challenging the terms of a solicitation be filed within 10 days of when a protester knew or should have known its basis of protest. 4 C.F.R. § 21.2(a)(2); *Criterion Sys., Inc.*, B-416553, B-416553.2,

Oct. 2, 2018, 2018 CPD ¶ 345 at 8. Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements. *Fisher Sand & Gravel Co.*, B-417496, July 26, 2019, 2019 CPD ¶ 280 at 10. Allegations raised during the course of a protest constitute new protest grounds when the later-raised allegations are independent from, and provide no support for, the initial protest grounds. *Criterion Sys., Inc.*, *supra*.

We find that both of Graham's supplemental challenges are untimely. As previously discussed, the agency's early document production contained NuGate's bid, the agency's technical review memorandum, the contracting officer's determination of responsibility, and NuGate's PPQs and CPAR. Early Document Production, exhs. 1, 4, 5, 8, 10-11. Based on this document production, Graham knew, or should have known, the basis of its protest alleging that NuGate's documentation did not demonstrate compliance with the first and third definitive responsibility criteria. See Early Document Production. In addition, based on the information in these documents, Graham had sufficient evidence such that Graham knew, or should have known, the basis of its protest alleging that the contracting officer failed to independently verify the information and documentation NuGate submitted to demonstrate compliance with the definitive responsibility criteria. Therefore, these supplemental protest grounds--filed more than 10 days after the early document production--are dismissed as untimely. 4 C.F.R. § 21.2(a)(2).

The protest is denied.

Thomas H. Armstrong  
General Counsel