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Decision

Matter of: Newt Marine Service

File: B-419741; B-419741.2

Date: July 12, 2021

Paul R. Hurst, Esq., and Caitlin Conroy, Esq., Steptoe & Johnson LLP, for the protester. Stephen Foster, Legacy Corporation of Illinois, for the intervenor. Anna Kurtz, Esq., Department of the Army, for the agency. Mary G. Curcio, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. GAO does not review contracting officer's affirmative determination of responsibility where contracting officer did not ignore information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible.
 2. GAO will not review protest that awardee will violate prospective contract's limitations on subcontracting where protester has not pointed to anything in awardee's bid which indicates that awardee will not comply with the limitations.
 3. Protest that agency improperly determined bidder's size status is denied where agency was considering responsibility, not size status.
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DECISION

Dubuque Barge and Fleeting Service Company d/b/a Newt Marine Service (Newt Marine), of Dubuque, Iowa, protests the award of a contract to Legacy Corporation of Illinois, of East Moline, Illinois, under invitation for bids (IFB) No. W912EK20B0013, issued by the Department of the Army, Army Corps of Engineers, for dredging services. Newt Marine challenges the agency's determination that Legacy is a responsible company. Newt Marine also asserts that Legacy will not comply with the limitation on subcontracting requirement, and that the agency improperly determined that Legacy qualifies as a small business concern for this procurement.¹

¹ Newt Marine also protested that the agency: (1) failed to apply definitive responsibility criteria, and (2) failed to forward to the Small Business Administration (SBA) a size

We deny the protest

BACKGROUND

The solicitation, which provided for the award of an indefinite-delivery, indefinite-quantity contract for a 1-year base period, and four 1-year option periods, was issued as a small business set-aside on October 27, 2020. Agency Report (AR), exh. 3, IFB at 5. Bid opening was January 28, 2021. AR, exh. 12, IFB amend 7 at 1. The solicitation requested bids for mechanical dredging, transportation, and placement of dredged materials along part of the Mississippi River. The solicitation provided that the contract would be awarded to the responsible bidder that submitted the lowest-priced bid which met the solicitation requirements. IFB at 23.

As relevant to this protest, the Corps assigned to this procurement North American Industry Classification System (NAICS) code 237990, dredging and surface cleanup activities, with a size standard of \$30 million. *Id.* at 5. The NAICS code further requires that to be considered small for purposes of government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment, or equipment owned by another small dredging concern. 13 C.F.R. § 121.201; *id.* n.2. The IFB also incorporated Federal Acquisition Regulation (FAR) clause 52.219-14, Limitations on Subcontracting (deviation 2020-O0008, March 2020), which requires the contractor to warrant that it will not pay more than 85 percent of the amount paid by the government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. IFB at 78.

The agency received two bids--one from Newt Marine priced at \$28,679,100, and one from Legacy priced at \$24,184,801. AR exh. 14, Bid Summary Sheet. The agency determined that Legacy's bid met the solicitation requirements, that Legacy was a responsible firm, and awarded Legacy the contract on March 31. AR, exh. 29, responsibility determination. This protest followed on April 9.

DISCUSSION

status protest that Legacy submitted to the agency. These issues were dismissed on May 3. Electronic Protest Docketing System No. 18. We dismissed Newt Marine's assertion that the agency failed to apply definitive responsibility criteria because the solicitation provision on which this argument was based was a performance requirement, not definitive responsibility criteria. We dismissed Newt Marine's assertion that the agency failed to forward its small business size status protest to the SBA because, as discussed below, we agreed with the agency that the protester requested that the agency ensure that Legacy was a responsible firm, but did not file a size status protest with the agency.

Newt Marine challenges the agency's determination that Legacy is a responsible company. Newt Marine also asserts that Legacy will not comply with the limitations on subcontracting requirement. In addition, Newt Marine argues that the agency improperly reviewed Legacy's small business size status for this procurement. As discussed below, we find that none of these issues have merit.

Responsibility

Newt Marine protests that the agency unreasonably concluded that Legacy is a responsible firm. Newt Marine notes that the solicitation requires the contractor to:

Furnish clamshell, draglines, backhoe, bucket-ladder, or other suitable mechanical equipment on suitable floating plant capable of a minimum production rate of 2,000 cubic yards per day for the primary plant and 1,500 cubic yards per day for the second plant. In addition to the daily production rates, schedule work to attain 10,000 cubic yards per a 7-day period with the primary dredge and 7,500 cubic yards per a 7-day period for the second plant.

Protest at 7-8; IFB at 361. Newt Marine asserts that according to public records, Legacy does not own the equipment that Newt Marine contends is necessary to meet this requirement, especially since Legacy has been awarded another contract which will require it to use the same equipment. Newt Marine further contends that Legacy has never performed maintenance dredging services of a similar nature and scope and therefore lacks the necessary organization, experience, accounting, and operational control necessary to perform the contract. The protester thus concludes that in determining that Legacy was responsible, the agency failed to consider that Legacy does not have the equipment or experience needed to perform this contract.

As a general matter, our Office does not review affirmative determinations of responsibility by a contracting officer. 4 C.F.R. § 21.5(c); *CapRock Gov't Solutions, Inc. et al.*, B-402490 *et al.*, May 11, 2010, 2010 CPD ¶ 124 at 26; *Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP*, B-401865 *et al.*, Dec. 14, 2009, 2009 CPD ¶ 258 at 20. We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence raising serious concerns that, in reaching the responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); *CapRock Gov't Solutions, Inc., supra*.

In the context of an affirmative determination of responsibility, the issues our Office has reviewed generally pertain to very serious matters such as potential criminal activity. For example, in *FCi Fed., Inc.*, B-408558.4 *et al.*, Oct. 20, 2014, 2014 CPD ¶ 308, our Office sustained a challenge to an agency's affirmative responsibility determination where the contracting officer did not consider specific allegations of fraud alleged by the Department of Justice against the awardee. In *FN Mfg., Inc.*, B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212, our Office reviewed an allegation that the agency failed

to consider an ongoing investigation into whether the awardee defrauded the government on a prior contract for the same requirement. In *Southwestern Bell Tel. Co.*, B-292476, Oct. 1, 2003, 2003 CPD ¶ 177, we reviewed an allegation that the agency failed to consider that the awardee's chief executive officer had been indicted for conspiracy and fraud by the U.S. Attorney for the Southern District of New York. In *Verestar Gov't Servs. Group*, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68, we reviewed an allegation that the agency had failed to consider that the awardee was embroiled in a public accounting scandal and had vastly misstated its earnings.

In contrast, the issues raised by Newt Marine, that Legacy lacked the necessary equipment and experience to perform, are not the kind of issues our Office will review in assessing a contracting officer's responsibility determination. See *Wild Building Contractors, Inc.*, B-293829, June 17, 2004, 2004 CPD ¶ 131 at 4. Moreover, Newt Marine has not pointed to any specific evidence of the kind we have previously considered in assessing a responsibility determination that the contracting officer was aware of but ignored, in determining that Legacy was a responsible firm. Accordingly, we deny this protest ground.

Limitation on Subcontracting

Newt Marine asserts that Legacy does not own the necessary equipment to perform the contract, and Newt Marine is not aware of another small dredging company with the available equipment to perform the contract. Newt Marine therefore concludes that Legacy will be required to subcontract with a large concern to perform most of the work, and most of the complex work, in violation of the limitations on subcontracting clause.

As noted above, the solicitation included the limitations on subcontracting clause which requires that the successful contractor "not pay more than 85 percent of the amount paid by the Government, excluding the cost of materials, to subcontractors that are not similarly situated entities." FAR 52.219-14, Limitations on Subcontracting (Deviation 2020-O0008). An agency's judgment as to whether a small business will comply with the limitations on subcontracting clause is a matter of responsibility, and the contractor's actual compliance is a matter of contract administration. *SumCo Eco-Contracting LLC*, B-409434, B-409434.2, 2014 CPD ¶ 128 at 3. These are issues which our Office generally does not review. 4 C.F.R. §21.5(a), (c). However, where a bid, on its face, should lead an agency to conclude that a bidder has not agreed to comply with the subcontracting limitation, the matter becomes one of acceptability, which our Office will review. See *e.g.*, *SumCo Eco-Contracting LLC*, *supra* at 4.

A bidder need not affirmatively demonstrate compliance with the subcontracting limitations in its bid. See *Dorado Serv., Inc.*, B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶161 at 12 (proposal need not affirmatively demonstrate that offeror will comply with limitations on subcontracting). Rather, such compliance is presumed unless specifically negated by other language in the bid. See *Id.* Here, Newt Marine speculates that Legacy will not comply with the limitations on subcontracting clause. Newt Marine, however, has not pointed to anything in Legacy's bid which should have

led the agency to conclude that Legacy did not intend to comply with the limitations on subcontracting requirement.

Indeed, in response to the protest, the contracting officer explains that “[t]he awardee’s bid did not indicate that it would not comply with [the limitations on subcontracting] clause, or include any information, markings, or other communication that would negate the language in the clause.” Contracting Officer’s Statement (COS) (citing AR, Tab 13, Legacy Bid). Accordingly, because the protester has not shown that Legacy’s bid, on its face, contained any information that would lead the agency to conclude that Legacy would fail to comply with the subcontracting limitation, we deny this protest ground.

Size Status

In its initial protest, Newt Marine asserted that the agency improperly failed to forward to the SBA a size status protest that Newt Marine filed with the contracting officer. As support for this basis of protest, Newt Marine provided an email that it sent to the agency on January 29, the day after bid opening.² Protest exh. 5; AR, Newt Marine emails with Corps; exh. 21, Email from Newt Marine to Agency, Jan. 29, 2021. Newt Marine, however, did not indicate in that email that it was challenging the size status of Legacy; rather, Newt Marine questioned Legacy’s responsibility. The email specifically provided:

In accordance with Federal Acquisition Regulation (FAR) Subpart 9.1, Newt Marine Service asks the USACE [Corps] to confirm that the apparent low bidder [Legacy] is a Responsible Bidder.

* * *

Newt Marine Service urges the United States Army Corps of Engineers to evaluate the apparent low bidder’s capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting as a Responsible Bidder, and ensure that Legacy Corporation will be operating within the strict rules of both the Plans and Specifications as well as the volume dredged requirements listed by the Small Business Administration for Total Small Business Set-Aside for Dredging.

Protest exh. 5, Newt Marine emails with Corps at 6-7; AR, exh. 21, Email from Newt Marine to Agency, Jan. 29, 2021, at 2, 3. The fact that Newt Marine was challenging Legacy’s responsibility, and not its size status, was confirmed by a follow-up email in which Newt Marine states:

To follow up on this email from a few weeks ago, Newt Marine Service noted that Legacy Corporation of IL received an award on Contract W912ES21D0002, Mechanical Island Unloading. Newt Marine Service

² A contracting officer who receives a protest of an offeror’s small business size status is required to promptly forward the protest to the SBA. FAR 19.302(c)(1); 13 C.F.R. §§ 121.1003, 121.1006(a).

sees this award as further taxing the apparent low bidder's ability to meet the contract demands on Solicitation W912EK20B0013.

Thank you for your diligence in confirming the apparent low bidder's ability to be considered a Responsible Bidder under FAR Subpart 9.1.

Protest exh. 5, Newt Marine emails with Corps, at 2; AR exh. 23, Email from Newt Marine to Agency, Feb. 19, 2021 at 1.

Notably, as the protester states in its comments on the agency supplemental report, size standards for small business concerns are addressed in 13 C.F.R. § 121.201, subpart A and FAR section 19.102. The protester, however, in its emails requests the agency to ensure that Legacy is responsible in accordance with FAR subpart 9.1, and FAR subpart 19.6, certificates of competency and determinations of responsibility. Protest, exh. 5, Newt Marine emails with Corps, at 2, 5. We therefore find that the agency reasonably determined that Newt Marine's emails did not constitute a size status protest and dismiss this argument for failure to state a valid basis of protest. While the protester may have intended to challenge Legacy's size status, GAO will not charge the agency with considering the protester's email as a size status protest when the email did not discuss small business size status and moreover, referenced regulations that concern responsibility.

In a supplemental protest, Newt Marine asserts that the agency improperly investigated Legacy's small business size status, an investigation that only the SBA is authorized to conduct. Comments & Supp. Protest at 11-13. In this regard, in its email to the agency, Newt Marine stated that the contract was listed as a total small business set-aside for dredging and used NAICS code 237990, and that "the SBA notes that a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern." AR, exh. 21, Email from Newt Marine to Agency, Jan. 29, 2021, at 2, 3. Newt Marine also questioned Legacy's performance under another dredging contract on the Mississippi River Basin, and whether Legacy had the necessary equipment to perform 40 percent of the volume dredged with Legacy's own equipment. *Id.*

In considering the allegations raised in Newt Marine's email, the contracting officer asked the relevant personnel on the referenced Mississippi River Basin contract whether Legacy was performing 40 percent of that contract. In response, the contracting officer was advised that Newt Marine was performing 40 percent of the work. AR, exh. 22, Email from Contracting Officer to Agency Personnel, at 1; *id.*, Email from Agency Personnel to Contracting Officer; Contracting Officer's Statement at 4. The contracting officer's review of Newt Marine's allegations was documented in a memorandum for the record confirming Legacy's status as a responsible bidder, in which the contracting officer explained the communication with the relevant agency personnel, and concluded that Legacy was "performing at least 40% of the work as required by the NAICS Code 237990." AR, exh. 24, Memo Confirming Legacy as a Responsible Bidder at 2.

Newt Marine maintains that the 40 percent performance requirement is related to whether a business qualifies as a small business under that particular NAICS code, not whether the business is responsible. Accordingly, Newt Marine contends that the contracting officer's inquiry regarding the 40 percent performance requirement confirms that the agency was in fact trying to discern Legacy's size status.

We agree that the requirement in NAICS code 237990 for a firm to perform at least 40 percent of the volume dredged with its own equipment, or equipment owned by another small dredging company, concerns whether a business can be considered small. However, as we noted above, Newt Marine's email to the agency questioned Legacy's responsibility, not its size status. In reviewing the allegations in Newt Marine's email, the agency focused on Legacy's responsibility, and considered Newt Marine's assertion that Legacy was not responsible because Legacy would not perform 40 percent of the contract with its own equipment.³ AR, exh. 24, Memo Confirming Legacy as a Responsible Bidder at 2; Supp. COS at 1-2.

Thus, the record shows that even if the agency considered a standard that was not relevant to Legacy's responsibility, the agency was not trying to discern Legacy's size status for the instant procurement. Indeed, the contracting officer's memorandum for the record concluded that the agency "has completed their responsibility evaluation of the apparent low bidder in accordance with FAR 19.6 and has determined them to be a responsible bidder"; it contained no references to Legacy's size status. AR, exh. 24, Memo Confirming Legacy as a Responsible Bidder at 2; Supp. COS at 2. Moreover, the agency could not have been considering Legacy's size for the current procurement since it was inquiring about Legacy's performance under a different contract, and not whether Legacy would meet the 40 percent performance requirement under this contract. We therefore deny Newt Marine's protest ground that the agency, in essence, conducted a flawed review of Legacy's size.

Thomas H. Armstrong
General Counsel

³ The agency also reviewed the allegations regarding Legacy's performance under the Mississippi River Basin contract and found that they provided no reason to find Legacy was not responsible. AR, exh. 24, Memo Confirming Legacy as a Responsible Bidder at 2.