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Decision

Matter of: Caddell Construction Company, Inc.

File: B-298949

Date: January 10, 2007

James F. Archibald, III, Esq., Bradley Arant Rose & White LLP, for the protester.
Scott M. Heimberg, Esq., Mark J. Groff, Esq., and Andrea T. Vavonese, Esq., Akin Gump Strauss Hauer & Feld LLP, for American International Contractors (Special Projects), Inc., an intervenor.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Linda C. Glass, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that Department of State improperly made award to a company that is not a “United States person” as required by the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852 (2000), is sustained where record shows that agency improperly prequalified the awardee as a “United States person” based on the awardee having a *de facto* joint venture relationship with its parent company, when the awardee specifically certified that it was neither a formal nor a *de facto* joint venture.

DECISION

Caddell Construction Company, Inc. protests the award of a contract to American International Contractors (Special Projects), Inc. (AICI-SP) under request for proposals No. SALMEC-06-R-0009, issued by the Department of State (DOS), Overseas Buildings Operations (OBO), to design and construct a new embassy compound in Djibouti, in eastern Africa. The solicitation was subject to the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended, (Security Act), 22 U.S.C. § 4852 (2000), which provides that only “United States persons” and “qualified United States joint venture persons” are eligible to compete for certain diplomatic construction projects.¹ Caddell contends that the agency unreasonably

¹ Specifically, the Security Act provides: “where adequate competition exists, only United States persons and qualified United States joint venture persons may . . . bid (continued...)

determined that AICI-SP was a “United States person” or “qualified United States joint venture person” within the meaning of the Security Act and, accordingly, that it was improper to award the contract to AICI-SP.

We sustain the protest.

BACKGROUND

On October 27, 2005, the agency posted a “Sources Sought Notice” on the Federal Business Opportunities (FedBizOpps) website, announcing its planned fiscal year 2006 Standard Embassy Design projects and inviting interested firms to file prequalification submissions. The notice stated that potential offerors for the various construction projects “are limited to United States person bidders,” and further provided:

Each company responding to this notice shall contact the DOS Contract Specialist for a copy of the pamphlet “Certifications Relevant to Public Law 99-399, Statement of Qualifications for Purpose of Section 402 of The Omnibus Diplomatic Security and Antiterrorism Act of 1986.” . . . The pamphlet must be completed and included as part of the prequalifications package. If a joint venture is formed, the company having 51 percent or greater interest in the JV [joint venture] must be the one completing the pamphlet. This is a pass/fail evaluated area.

Agency Report (AR), Tab 1, Sources Sought Notice, at 5.

In December 2005, AICI-SP submitted a prequalification package, stating in its cover letter that AICI-SP was established in November 2005 to perform classified contracts for DOS and was wholly owned by American International Contractors, Inc. (AICI). AR, Tab 2, AICI-SP Prequalification Submission Cover Letter. Among other things, AICI-SP’s prequalification submission addressed the requirements regarding a “United States person” or a “qualified United States joint venture person,” and contained the following statements relative to these requirements:

(...continued)

on a diplomatic construction or design project which has an estimated total project value exceeding \$10,000,000.” 22 U.S.C. § 4852(a).

Definitions:

“JOINT VENTURE”—This terms refers to a formal or *de facto* arrangement by and through which two or more persons or entities associate for the purpose of carrying out the prospective contract.

AR, Tab 2, AICI-SP Prequalification Submission at 9.

Directly below this definition, AICI-SP’s prequalification submission stated: “The prospective offeror . . . is not . . . a joint venture.”² Id. Consistent with its statement that it was not a joint venturer, AICI-SP did not respond to two additional requests for information directed at joint venture offerors. First, offerors seeking to qualify on the basis of joint venture status were required to respond to the following:

If the prospective offeror is a joint venture, the U.S. person participant is:³

_____ (name)
_____ (address)
_____ (address)

Id.

AICI-SP’s prequalification submission provided no response to this request for information. Id. Similarly, joint venture offerors were required to respond to the following:

² AICI-SP’s cover letter accompanying the prequalification submission stated that it would “rely on the experience of its parent to prequalify for OBO work,” and that “AICI will guaranty that AICI-SP has the financial resources to perform any project awarded to it by the Department of State.” AR, AICI-SP Prequalification Submission Cover Letter. However, the record shows that AICI is, itself, owned by a foreign corporation. Id.

³ The DOS regulations implementing the Security Act provide that, in order to be considered a “qualified United States joint venture person,” the joint venture must have at least one firm or organization that, itself, meets all of the Security Act’s requirements for a “United States person.” 48 C.F.R. § 652.236-72 (2006).

If the prospective offeror is a joint venture, the names and countries of citizenship for all co-venturers are as follows:

_____ (name) _____ (citizenship)

Id.

Again, AICI-SP's prequalification submission provided no information responding to this informational request. Id.

In January 2006, the agency evaluated AICI-SP's submission with regard to the requirements concerning a "United States person" and "qualified United States joint venture persons." In reviewing AICI-SP's submission, the agency concluded that, because of AICI-SP's recent incorporation, it did not qualify as a "United States person" in its own right.⁴ AR, Tab 3, DOS Legal Memorandum, Jan. 11, 2006, at 10. Nonetheless—and directly contrary to AICI-SP's own statement that it was not part of either a formal or a *de facto* joint venture—the agency concluded that "AICI-SP in de facto joint venture with AICI should be considered eligible as a United States person." Id. at 12. None of the agency's contemporaneous evaluation documents acknowledge, much less discuss, AICI-SP's express statement that it was not part of a joint venture, nor do these documents address any responses to the requests for required information identifying co-venturers.

Six proposals were received from prequalified firms, including proposals from Caddell and AICI-SP. After a technical and price evaluation, only the proposals of Caddell and AICI-SP were included in the competitive range. Revised proposals were received from both offerors. After evaluation of revised proposals, both offerors were determined to be technically qualified, and award was made to AICI-SP with a final evaluated price of \$74,988,000, compared to Caddell's evaluated price of \$90,115,000. AR, Tab 18, Price Negotiation Memorandum at 7. Following a debriefing, Caddell filed this protest and the agency has stayed contract performance pending resolution of Caddell's protest.

DISCUSSION

Caddell maintains that the record does not reasonably support the agency's determination that AICI-SP qualified either as a "United States person" or as a

⁴ Among other things, the Security Act defines "United States person" as a "person" that has been incorporated or legally organized in the United States for more than 5 years before the issuance date of the solicitation. 22 U.S.C. § 4852(c)(2).

“qualified United States joint venture person” and, thus, was not properly eligible for award. We agree.

In reviewing an agency’s source selection decision, we examine the supporting record to determine whether the decision was rational, consistent with the stated evaluation criteria, consistent with applicable laws and regulations, and adequately documented. Johnson Controls World Servs., Inc., B-289942, May 24, 2002 CPD ¶ 88 at 6; AIU N. Am., Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 at 7; Matrix Int’l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 5. Where an agency’s source selection decision is based on conclusions that appear to be directly contrary to the contemporaneous record, and where the agency’s evaluation record provides no explanation regarding the apparent conflict, we cannot conclude that the decision was reasonable. See AIU N. Am., Inc., supra.

As discussed above, the Security Act, and the agency’s stated evaluation criteria regarding the procurement at issue here, limited eligible offerors to “United States persons” or “qualified United States joint venture persons.” The DOS regulations implementing the statement of qualifications for the Security Act provide that:

Organizations that wish to use the experience or financial resources of any other legally dependent organization or individual, including parent companies, subsidiaries, or other related organizations, must do so by way of a joint venture. A prospective bidder/offeror may be an individual organization or a firm, a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a *de facto* joint venture where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. firm that guarantees performance.

48 C.F.R. § 652.236-72.

Here, AICI-SP’s own prequalification submission expressly stated: “The prospective offeror . . . is not . . . a joint venture.” AR, Tab 2, AICI-SP Prequalification Submission at 9. This statement appeared directly beneath a definition of the term “joint venture,” which stated the term “refers to a formal or *de facto* arrangement.” Further, consistent with AICI-SP’s statement that it was not seeking qualification on the basis of either a formal or *de facto* joint venture, AICI-SP declined to provide any of the necessary information regarding identification of the “U.S. person participant” in the joint venture, nor did it identify “all co-venturers,” as was specifically required. Finally, the contemporaneous documentation supporting the agency’s summary conclusion that AICI-SP was eligible to participate in this procurement on the basis of a *de facto* joint venture provides no explanation as to how the agency could reach this conclusion in light of AICI-SP’s expressly contrary representation. On the basis of the record here, we are unable to conclude that the agency’s determination regarding AICI-SP’s eligibility for award was reasonable.

RECOMMENDATION

We recommend that the agency reasonably review the qualification submission of AICI-SP, specifically considering and addressing AICI-SP's statement that it is not part of a formal or *de facto* joint venture, and fully document its review and analysis regarding that matter. In the event the agency concludes that additional information is required, it should seek such information only in a manner that is consistent with applicable procedural requirements. In the event the agency determines that AICI-SP is ineligible for award, it should terminate the contract with AICI-SP and make a new award consistent with the solicitation provisions and applicable law and regulation. In the event, following implementation of our recommendations, the agency establishes, and documents, a reasonable basis for concluding that a joint venture exists between AICI-SP and another entity, it should reasonably consider, and document, whether such other entity qualifies as a "United States person." Finally, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2006). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.⁵

Gary L. Kepplinger
General Counsel

⁵ In addition to the agency's unsupported conclusion that AICI-SP was, contrary to its own representation, part of a *de facto* joint venture with its parent corporation, the contemporaneous record does not demonstrate that the agency properly considered whether the parent corporation, AICI, satisfied all of the requirements to qualify as a "United States person." As noted above, the regulations require that at least one member of a qualifying joint venture must, itself, meet all the requirements for a "United States person." 48 C.F.R. § 652.236-72. Our review of the record indicates that some of the applicable requirements may not have been addressed by the agency with regard to AICI's qualifications, including whether AICI employs United States citizens in at least 80 percent of its principal management positions in the United States. See 22 U.S.C. § 4852(c)(2)(F). In light of our conclusion, above, that the contemporaneous record fails to reasonably support the agency's determination regarding the existence of a joint venture, along with our accompanying recommendations, we need not definitively resolve this matter. Nonetheless, our recommendation addresses the agency's responsibility in this regard.