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Comptroller General
of the United States

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Decision

Matter of: Diversified Elevator Service and Equipment Company, Inc.

File: B-421925; B-421925.2

Date: November 21, 2023

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox II, Esq., Ian P. Patterson, Esq., and Timothy J. Laughlin, Esq., Schoonover & Moriarty LLC, for the protester.

Cyril Iyasele, Black & Loans, LLC, the intervenor.

Andrew J. Smith, Esq., Major Bruce A. Nessler, Captain Dmitrius R. McGruder, and Nolan T. Koon, 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

1. Protest that agency misevaluated awardee's proposal is denied where the record shows the evaluation was reasonable and consistent with the terms of the solicitation.
 2. Protest that awardee would fail to comply with a clause limiting subcontracting is denied where the proposal on its face did not indicate that the awardee intended to violate the limitation.
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DECISION

Diversified Elevator Service and Equipment Company, Inc., of Millbrook, Alabama, a small business, protests the award of a contract to Black & Loans, LLC, of Atlanta, Georgia, also a small business, under request for proposals (RFP) No. W911SF-23-R-0006, issued by the Department of the Army for commercial elevator repairs and services at Fort Moore, Georgia. Diversified argues that the Army misevaluated the awardee's proposal as acceptable and lacked a basis to find the firm satisfied multiple definitive responsibility criteria in the RFP.

We deny the protest.

BACKGROUND

The RFP was issued on April 10, 2023, seeking proposals to provide maintenance and repair for several types of elevators (passenger, freight, dumbwaiter, drum, and vertical lift, plus a jump tower hoist system) at Fort Moore, including Martin Army Community Hospital, for a base year and four option years. Agency Report (AR), Tab 3, Conformed RFP at 4-39. The RFP requested fixed prices for monthly inspection, maintenance, and repair services, and cost reimbursement for parts and labor where the cost of a component part would exceed \$3000. *Id.* at 97. The RFP was set aside for small businesses, and provided that the contract would be awarded to the “lowest responsive and responsible bidder having submitted an acceptable bid. [Offerors would] be evaluated in accordance to standards specified in Federal Acquisition Regulation 9.104-1.” *Id.* at 4. That provision requires contractors to meet general standards of contractor responsibility, such as having adequate resources, having the ability to comply with contract requirements, and having the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them. Federal Acquisition Regulation (FAR) 9.104-1. Although not expressly mentioned in the RFP, the Army explains that the procurement was a simplified acquisition under FAR part 13.

The RFP’s performance work statement (PWS) described the requirements in numbered paragraphs, RFP at 85-98, followed by a Service Contract Act wage determination. *Id.* at 98-108. Among the PWS requirements was that “[t]he contractor shall be regularly engaged in the installation and servicing of elevators of the general type indicated for maintenance and repair service,” “the contractor shall maintain a fulltime service and warehouse operation within 50 miles” of Fort Moore,¹ and it “must have sufficient stock of repair parts, especially common repair parts, . . . circuit boards, elevator light bulbs and materials. . . .” *Id.* at 88, 96.

The RFP also incorporated the clause at FAR 52.219-14, Limitations on Subcontracting, which, in relevant part, specifies that the small business contractor,

will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities [which effectively means other small businesses].

Id. at 72 (incorporating FAR clause 52.219-14). The clause further provides that “[w]hen a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract.” *Id.*

The Army received proposals from four offerors, including Black & Loans and Diversified. A source selection evaluation board (SSEB) evaluated the proposals and

¹ Later in the RFP, another requirement stated that the “contractor must have an office or warehouse within 50 miles” of Fort Moore. *Id.* at 96.

informed the contracting officer that “all bids submissions are capable of executing” the contract. AR, Tab 6, Emails between Contracting Officer and SSEB Chair, at 1.

The contracting officer, who served as the source selection authority, reviewed the proposals and determined that Black & Loans submitted the lowest-priced acceptable proposal, and selected it for award. The contracting officer then reviewed the firm’s record in the system for award management database (known as sam.gov) and determined that the record was active and did not show any exclusions from contracting or ongoing criminal, civil, or administrative proceedings, and on that basis determined that Black & Loans was responsible. AR, Tab 11, Determination of Responsibility or Non-responsibility Memorandum for Actions Under the Simplified Acquisition Threshold at 1-2. Following receipt of notice of the award and a debriefing, Diversified filed this protest.

DISCUSSION

The protester contends that Black & Loans does not meet the RFP requirements of being a regular provider of elevator maintenance and repair services, having a location near Fort Moore, and possessing an adequate supply of spare parts. Protest at 5-6. Diversified also challenges the Army’s evaluation of the awardee’s proposal as technically acceptable. Comments & Supp. Protest at 13-14. Diversified further argues that Black & Loans’s proposal describes performance using a subcontractor that will not comply with the limitations on subcontracting clause. *Id.* at 11; *see also* Protest at 5 n.4. We consider each ground of protest and find that the record does not provide a basis to sustain the protest.

Assessment of Awardee under Responsibility Criteria

Diversified argues in its initial protest that the RFP requires the contractor itself to meet requirements to be “regularly engaged” in providing elevator maintenance, having a physical facility within 50 miles of Fort Moore, and for having a stock of spare parts. Protest at 5-8; Comment & Supp. Protest at 4. Diversified notes that the RFP included in its definition of the word “contractor” that “[t]he term used in this contract refers to the prime.” AR, Tab 3, Conformed RFP at 94. Two of the challenged provisions--for being regularly engaged in elevator service, and having a location near Fort Moore--specifically use the word “contractor” as the subject of those requirements. Comments & Supp. Protest at 4, 7. Diversified contends that Black & Loans meets neither as it does not perform elevator services and offices appear to be 130 miles from Fort Moore. Protest at 5; Comments & Supp. Protest at 5-6. More broadly, Diversified also contends that the record lacks any explanation of how the agency determined that Black & Loans met any of the three challenged requirements, or any reasoning to justify the conclusion that the awardee was generally responsible. Protest at 7; Comments & Supp. Protest at 12-13. As a result, Diversified argues that the protest should be sustained and the Army should follow procedures to refer the responsibility issues to the Small Business Administration (SBA) for its consideration.

The Army argues that the SSEB reasonably concluded that all offerors met the RFP criteria. The Army contends that the protester misreads the challenged requirements as being applicable only to the offeror itself, thereby improperly excluding subcontractors. Memorandum of Law (MOL) at 7; Supp. MOL at 10, 13. The agency argues that the only reasonable interpretation of the RFP was that the requirements could be met by the offeror and its subcontractors, so the agency properly evaluated the awardee's proposal as acceptable by considering the subcontractor's warehouse, spare parts, and experience. *Id.* at 12-13. To adopt the protester's reading of the RFP, the Army argues, would improperly limit competition, and even if reasonable, would raise a patent ambiguity in the terms of the RFP that had to be protested before proposals were due, in order to be considered timely. *Id.* at 8-9. Ultimately, the Army argues, all requirements were adequately addressed in the awardee's proposal. In particular, the final two pages of the awardee's proposal consisted of a statement from a subcontractor that all elevator maintenance and repair services would be provided by that firm's employees, using its nearby facilities, its tools, and its stock of spare parts. *Id.* at 13.

Our Office asked the parties to address the nature of these requirements in their filings, which Diversified contends, in its comments, were definitive responsibility criteria that had to be satisfied before the agency could consider an offeror to be responsible. Comments & Supp. Protest at 2. The Army disagrees and contends that the challenged requirements were not definitive responsibility criteria but instead responsibility-like standards that the awardee was reasonably determined to have met. Supp. MOL at 3-5. The agency argues that our Office's decisions involving definitive responsibility criteria are inapplicable because the criteria at issue are not specific and objective, and the procurement is a simplified acquisition of commercial items and is thus unlike our decisions involving definitive responsibility criteria. *Id.* at 7, 11-13. Additionally, the Army contends that our Office should not consider this aspect of the protest because it challenges an affirmative determination of responsibility of a small business over which the SBA, rather than our Office, has ultimate authority under its certificate of competency process. *Id.* at 16.

Our Office does not review affirmative determinations of responsibility unless either there is evidence raising serious concerns that the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation in making the responsibility determination, or the solicitation contains definitive responsibility criteria that allegedly have been misapplied. 4 C.F.R. § 21.5(c). Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement to measure an offeror's ability to perform the contract. *Shimmick Constr. Co.*, B-420072.3, Mar. 17, 2022, 2022 CPD ¶ 125 at 2 n.1. (citing FAR 9.104-2). Even where a solicitation establishes definitive responsibility criteria and unless the solicitation specified differently, as a general rule the experience of a technically qualified subcontractor may be used to satisfy the requirement. *Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., a Joint Venture*, B-255756, Mar. 29, 1994, 94-1 CPD ¶ 223 at 4-5. In contrast, where a solicitation expressly prohibits using the experience of a subcontractor to meet a requirement, the prime contractor cannot be evaluated as acceptable based on a subcontractor's

experience. *Id.* A contracting officer's signature on a contract generally constitutes an affirmative determination of responsibility. FAR 9.105-2(a)(1).

As applied here, Diversified has not shown that the RFP requirements for the contractor to "be regularly engaged" in providing elevator maintenance and repair services, or that it have "sufficient" stock of spare parts, in either case, would establish a specific and objective standard that could be considered a definitive responsibility criterion. With respect to the requirement that the contractor "maintain" or otherwise have a fulltime service and warehouse operation within 50 miles of Fort Moore, although the requirement by its terms applies to the contractor, we do not read the RFP to preclude the contractor from satisfying the requirement to maintain the warehouse by using its subcontractor's warehouse. In short, Diversified has not shown a factual basis to challenge the Army's conclusion that Black & Loans was responsible generally and would maintain a warehouse proximate to Fort Moore. Accordingly, we deny the protester's challenges to Black & Loans's responsibility.

Technical Acceptability of Awardee's Proposal

The protester also contends that the Army misevaluated Black & Loans's proposal under a technical factor. While the record shows that the proposals were evaluated as acceptable or unacceptable under a technical factor requiring proof that the firm had knowledge and experience to perform the requirement, Comments & Supp. Protest at 14 (quoting AR, Tab 7, Technical Evaluation of Black & Loans at 1), the technical criterion does not appear in the RFP. Instead, as quoted above, the RFP provided that the non-price evaluation was limited to assessing responsibility. *Mil Colores, S.A.*, B-270208, Feb. 16, 1996, 96-1 CPD ¶ 102 at 3 (agency was not required to make a technical evaluation of awardee's proposal where solicitation did not require a technical proposal or provide technical evaluation criteria; submission of the proposal was an offer to perform in accordance with the specifications). We deny this aspect of the protest because the alleged misevaluation of the awardee's proposal under a technical factor not identified in the RFP does not provide a basis to sustain the protest.

Limitations on Subcontracting Clause

Finally, Diversified contends that the Army was required to reject Black & Loans's proposal because it demonstrated that the firm would not comply with the limitations on subcontracting clause. That clause, as described above, effectively commits the prime contractor small business not to pay more than 50 percent of the contract price to non-small subcontractors. Diversified points to a 2-page letter in Black & Loans's proposal, written on the letterhead of a large business, stating that all elevator maintenance and repair services would be provided by that firm's employees, using that firm's facilities, tools, and stock of spare parts. Comments & Supp. Protest at 11. Those circumstances, in Diversified's view, demonstrate that Black & Loans would not comply with the subcontracting limitation, rendering its proposal unacceptable.

The Army argues that Diversified has not shown a basis that would require the Army to reject Black & Loans's proposal. The agency asserts that there is no statement in

Black & Loans's proposal that it would not comply with the limitations on subcontracting clause specifically, so it had no basis to reject the proposal.² Supp. MOL at 18.

Even where a solicitation contains a limitation on subcontracting clause, offerors are not generally required to affirmatively demonstrate compliance with the limitation in their proposals. *Dorado Servs., Inc.*, B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 12. A proposal that, on its face, shows that the offeror does not agree to comply with the subcontracting limitation raises a matter of acceptability because it demonstrates a failure to conform to a material term or condition of the solicitation. *Dorado Servs., Inc.*, B-411691.4, Nov. 18, 2016, 2016 CPD ¶ 337 at 2. Otherwise, the issue is one of responsibility and must be managed by the Army during performance as a matter of contract administration.

Our review of the record shows no basis to conclude that Black & Loans's proposal stated an intention not to comply with the limitations on subcontracting clause in the RFP. Even though the proposal states the subcontractor's intention to provide its own employees to perform the maintenance and repair services, the proposal does not indicate on its face that Black & Loans intends to violate the clause (that is, to pay more than 50 percent of the contract price to that subcontractor). To the extent that Diversified questions how Black & Loans will be able to pay the subcontractor for its services at a price no more than 50 percent of the total price, its concerns represent a matter of contract administration beyond our Office's bid protest jurisdiction. Diversified has not demonstrated facts sufficient for our Office to question the Army's assessment that Black & Loans's proposal was acceptable and did not show, on its face, noncompliance with the limitations on subcontracting clause.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

² The agency notes that a protest of Black & Loans's eligibility under small business requirements is pending before the SBA, which has deferred acting on the protest. Supp. MOL at 18.