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Decision

Matter of: Newt Marine Service

File: B-422968

Date: November 4, 2024

Erin R. Davis, Esq., Taft Stettinius & Hollister LLP, for the protester.
Stephen E. Foster, Legacy Corporation of Illinois, for the intervenor.
Matthew R. Keiser, Esq., Simon Rutherford, Department of the Army, for the agency.
Emily R. O'Hara, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging contracting officer's affirmative determination of responsibility is dismissed where the allegations do not meet the exceptions that trigger a review under our Bid Protest Regulations.

DECISION

Dubuque Barge & Fleeting Service Co. d/b/a Newt Marine Service, of Dubuque, Iowa, protests the award of a contract to Legacy Corporation of Illinois, of East Moline, Illinois, under Invitation for Bids (IFB) No. W912ES24B0007, issued by the Department of the Army, Corps of Engineers (Corps) for habitat rehabilitation construction services. The protester contends that the awardee should not have been found responsible.

We dismiss the protest.

BACKGROUND

The agency issued the solicitation under Federal Acquisition Regulation (FAR) part 14 on June 4, 2024, as a small business set-aside for construction services. IFB at 2. Specifically, the agency required construction of various sized and shaped islands within the Mississippi River to support habitat rehabilitation. *Id.* The solicitation advised that the agency would evaluate bids and award a contract to the responsible bidder whose bid, conforming to the solicitation, would be the most advantageous to the government, considering only price and price-related factors. *Id.* at 16.

The solicitation provided that the agency would determine the responsibility of the apparent low bidder in accordance with FAR subpart 9.1. *Id.* at 12. With regards to responsibility, the IFB required the apparent low bidder to provide: (a) a detailed description of the work to be self-performed and resources to demonstrate the firm is capable of complying with the limitations on subcontracting; (b) financial statements for the past three years; and (c) a bank certification of financial capability. *Id.*

On September 12, the Corps posted a notice on SAM.gov that award had been made to Legacy Corporation. Protest, exh. D, SAM Notice at 3. Newt Marine subsequently protested to our Office on September 23.¹

DISCUSSION

The protester contends that the agency did not review the awardee's responsibility in accordance with FAR section 9.104, and that the agency failed to consider information about the awardee that raised serious concerns about Legacy's responsibility. Protest at 6-8, 12. Newt Marine also alleges that the awardee's low price reflects a lack of understanding of the work to be performed. *Id.* at 9-11.

Prior to the agency report due date, the intervenor requested that our Office dismiss the protest. Intervenor Req. for Dismissal (RFD). The agency joined in the request, asserting that GAO does not have jurisdiction to resolve this protest because the protester challenges an affirmative responsibility determination, which GAO will not review, and that neither of the exceptions to our Bid Protest regulations are applicable to Newt Marine's protest. Agency Resp. to Intervenor RFD. For the reasons discussed below, we dismiss the protest.

Affirmative Determination of Responsibility

The FAR provides that a contract may not be awarded unless the contracting officer makes an affirmative determination of responsibility. FAR 9.103(b). As our Office has explained, the affirmative determination that a bidder is capable of performing a contract is largely committed to the contracting officer's discretion. *Great Lakes Dredge & Dock Co., LLC*, B-416073, May 24, 2018, 2018 CDP ¶ 194 at 3. Our Office generally will not consider a protest challenging such a determination, except under certain limited exceptions. 4 C.F.R. § 21.5(c); *FCi Fed., Inc.*, B-408558.4, *et al.*, Oct. 20, 2014, 2014 CPD ¶ 308 at 7. Those exceptions are protests that allege definitive responsibility criteria in the solicitation were not met and those protests that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or

¹ When the last day of the 10-day period to file a protest with our Office is a Saturday, Sunday, or Federal holiday, for purposes of timeliness, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. 4 C.F.R. § 21.0(d). Here, the last day of the period would fall on Sunday, September 22, 2024. Thus, the period extended to Monday, September 23.

otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); *Great Lakes Dredge & Dock Co., LLC, supra* at 3-4, 7-8. As discussed below, we find that neither exception applies here.

Definitive Responsibility Criterion

With respect to the first exception, the protester has failed to identify any definitive responsibility criteria from the solicitation that the awardee did not meet. As we have explained, definitive responsibility criteria are specific and objective standards, established by an agency for a particular procurement, for use in measuring a bidder's ability to perform the contract. *A-B Comput. Sols., Inc.*, B-415819, Mar. 22, 2018, 2018 CPD ¶ 128 at 4. To be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving award. *T.F. Boyle Transp., Inc.*, B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52 at 5.

Here, the IFB simply states that the agency would review the awardee's responsibility in accordance with FAR subpart 9.1. Section 9.104-1 of the FAR provides general standards that a prospective contractor must meet in order to be determined responsible. FAR 9.104-1. The general standards require, among other things, that contractors have "adequate financial resources," "a satisfactory performance record," and "the necessary production, construction, and technical equipment and facilities, or the ability to obtain them." FAR 9.104-1(a), (c), and (f). In this regard, Newt Marine's protest does nothing more than challenge the agency's review of the awardee's responsibility under those general responsibility standards. See Protest at 8, 10-11 (arguing that agency "failed to properly consider Legacy's financial responsibility and its access to the necessary means of production in making [agency's] responsibility determination"). On this record, we find unpersuasive the protester's attempt to create definitive responsibility criteria where none exists in the solicitation.² *MPC Containment Sys., LLC*, B-416188.2, July 23, 2018, 2018 CPD ¶ 251 at 5-6 (finding solicitation provision that only identifies the FAR's general responsibility standards is not a definitive responsibility criterion).

Matter of Serious Concern

Concerning the second exception, the protester alleges that, in finding the awardee responsible, the Corps failed to consider information regarding Legacy's ability to perform the awarded contract. Specifically, Newt Marine contends the agency failed to

² Moreover, there is no language in the IFB that sets out a specific, objective standard for measuring a vendor's ability to perform, nor does the IFB otherwise require bidders to establish their qualifications to perform requirements prior to award. Because the IFB only identifies the FAR's general responsibility standards and does not identify specific and objective standards that a bidder must comply with prior to award, the protester has not challenged a definitive responsibility criterion that GAO may review. *MPC Containment Sys., LLC, supra*.

consider the awardee's poor performance on prior unrelated contracts and that, in one instance, the Small Business Administration (SBA) refused to issue Legacy a certificate of competency. Protest at 5-7; Protest, exh. F, Protester Email to Agency at 2; Protest, exh. E, Law360 Article.

As noted, our Office will generally not review an affirmative determination of responsibility by the contracting officer. 4 C.F.R. § 21.5(c). One of the circumstances in which we will make an exception to this rule is where a protest identifies 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. *Id.* The exception was intended to encompass protests raising supported allegations that the contracting officer ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. *Great Lakes Dredge & Dock Co., LLC, supra* at 7. The allegations that our Office have reviewed, in the context of an affirmative determination of responsibility, generally pertain to very serious matters such as potential criminal activity. *Marine Terminals Corp.--East, Inc.*, B-410698.9, Aug. 4, 2016, 2016 CPD ¶ 212 at 12 (identifying fraud, criminal convictions, and improper reporting of earnings as examples of serious matters); *MVM, Inc.*, B-421788.3, B-421788.4, Mar. 5, 2024, 2024 CPD ¶ 63 at 9 (reviewing responsibility where allegation included a False Claims Act violation); *Southwestern Bell Tel. Co.*, B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 8-9 (reviewing responsibility where allegation included Securities and Exchange Commission charges).

Here, the primary information that Newt Marine contends the contracting officer failed to review in making his affirmative responsibility determination is information about Legacy's alleged poor past performance. The protester references three prior contracts performed by Legacy that Newt Marine alleges resulted in performance issues. Protest, exh. F, Protester Email to Agency at 2. Further, the protester cites to a news article that indicates the Corps and SBA found Legacy non-responsible in an unrelated procurement because of the firm's poor past performance. Protest, exh. E, Law360 Article at 2. The issues raised by Newt Marine--allegations that Legacy had poor performance on past contracts and that Legacy was found to be non-responsible in an unrelated procurement due to alleged poor performance--are not the kind of allegations our Office will review in assessing the reasonableness of a contracting officer's affirmative determination of responsibility. See, e.g., *PDS Consultants, Inc.*, B-419300, Dec. 16, 2020, 2021 CPD ¶ 137 at 5 (dismissing challenge to affirmative responsibility where "the protester's assertions regarding the awardee's prior performance are not sufficient, without more, to rise to the level needed to trigger a review by our Office"); *Newt Marine Servs.*, B-419741, B-419741.2, July 12, 2021, 2021 CPD ¶ 257 at 4 (finding allegations that awardee lacked the necessary equipment and experience to perform the contract "are not the kind of issues our Office will review in assessing a contracting officer's responsibility determination"); *CASS Prof'l Servs. Corp.*, B-415941, B-415941.2, Apr. 27, 2018, 2018 CPD ¶ 163 at 6 (finding allegations regarding awardee's credit limit "do not rise to the level needed to trigger review by our Office of a contracting officer's responsibility determination"). As our decisions have stated,

assertions of poor past performance do not rise to the level of a serious matter which would trigger review of a contracting officer's affirmative responsibility determination.³ *Marine Terminals Corp.--East, Inc., supra.*

On the record here, we do not find that the protester has met any exception under our regulations that would allow for a review of the contracting officer's affirmative responsibility determination. Consequently, Newt Marine's challenges to the awardee's responsibility are dismissed. 4 C.F.R. § 21.5(c); *Great Lakes Dredge & Dock Co., LLC, supra.*

Price Realism

Lastly, Newt Marine contends that the agency "should also consider whether Legacy's proposed price is so unreasonably low as to pose significant risk to successful performance."⁴ Protest at 9. To the extent that the protester's allegation is that Legacy's bid price is unrealistically low, Newt Marine's argument about the realism of the awardee's price overlooks the inapplicability of price realism concepts to a sealed bid procurement. *Mark Dunning Indus., Inc.*, B-415890.2, B-415890.3, Nov. 5, 2018, 2018 CPD ¶ 382 at 4. An acceptance by the contracting agency of an unreasonably low or below-cost bid is not illegal and, therefore, the possibility of "buying in" does not provide a basis for challenging a responsive bid. *Id.*; *Gulf Coast Def. Contractors, Inc.*, B-212641, Feb. 28, 1984, 84-1 CPD ¶ 243 at 10. Moreover, where, as here, there is no relevant evaluation criterion pertaining to price realism, a determination that an offeror's price on a fixed-price order or contract is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to successfully perform the order or contract at its offered price. See *Louis Berger Power, LLC*, B-416059, May 24, 2018,

³ Further, the protester cannot--and does not--cite to any statute or regulation that would support the proposition that our Office is required to review an agency's affirmative responsibility determination where the information the protester contends the contracting officer failed to review is information solely related to poor performance on unrelated prior contracts. In any event, we note that it is entirely possible, and not inherently improper, for an agency to find a firm responsible under one procurement and non-responsible in a separate, unrelated procurement. See, *e.g.*, *Precise Mgmt., LLC*, B-418359, Feb. 27, 2020, 2020 CPD ¶ 90 at 4-5.

⁴ In arguing that the awardee's price is "unreasonably low," the protester conflates the concepts of reasonableness and realism. Our Office has explained that price reasonableness and price realism are distinct concepts. *Logistics 2020, Inc.*, B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 7. The purpose of a price reasonableness review is to determine whether the prices offered are fair and reasonable, *i.e.*, not too high. See FAR 15.404-1(b); *Sterling Servs., Inc.*, B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. In contrast, a price realism review is to determine whether prices are too low, such that there may be a risk of poor performance. See FAR 15.404 1(d); *C.L. Price & Assocs., Inc.*, B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3.

2018 CPD ¶ 196 at 8. Thus, even if the agency shared the view that the awardee's price was so low as to create a risk of non-performance--and the record does not reflect that the Corps shared this view--the agency's only option would be to conclude that the awardee was not a responsible bidder. See *Gulf Coast Def., supra* (noting allegation that an unrealistically low bid is due to the bidder's failure to understand what may be required under the contract involves the type of agency affirmative responsibility determination that we will not review).

As discussed above, our Office will generally not review an affirmative determination of responsibility by a contracting officer. 4 C.F.R. § 21.5(c). Absent a showing that the agency was required to review the awardee's price under a definitive responsibility criterion, or that the agency failed to consider information that had a strong bearing on responsibility, such as the examples noted above, we have no basis to review the agency's affirmative responsibility determination. Thus, this price realism allegation is also dismissed. *Mark Dunning Indus., Inc., supra*.

The protest is dismissed.

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General Counsel