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Decision

Matter of: James F. Thomson, Jr., DBA American Southwest Electric

File: B-416918

Date: December 20, 2018

Scott R. Sleight, Esq., Ahlers Cressman & Sleight PLLC, for the protester.
Tristan Brown, Esq., Thomas Tracy, Esq., and Stanley E. Tracey, Esq., Department of the Army, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the contracting officer improperly failed to withhold award for 15 business days following the referral of a nonresponsibility determination to the Small Business Administration (SBA) under its certificate of competency (COC) procedure is denied where the record reflects that the SBA did not respond to the contracting officer with a COC determination within 15 business days.
 2. Protest that the contracting officer improperly denied a request by the Small Business Administration for additional time to consider issuing a certificate of competency is denied where the protester has not shown that the contracting officer's action was the result of fraud or bad faith.
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DECISION

James F. Thomson, Jr., doing business as American Southwest Electric (ASE), of Las Vegas, Nevada, protests the award of a contract to Ames Construction, Inc., of Aurora, Colorado, under invitation for bids (IFB) No. W9128F18B0006, issued by the Department of the Army, Corps of Engineers (Corps), Omaha District, for the construction of a replacement irrigation diversion weir and fish bypass channel. The protester argues that the Corps improperly awarded the contract before time had expired for the Small Business Administration (SBA) to issue a certificate of competency (COC) to ASE.

We deny the protest.

BACKGROUND

The agency issued the solicitation on July 17, 2018. Bids were due on August 23. The agency received six bids. The lowest-priced bid was submitted by a large business, Ames Construction, in the amount of \$34,776,560. The second lowest-priced bid was submitted by ASE, a Historically Underutilized Business Zone (HUBZone) small business concern, in the amount of \$35,325,325. On August 24, ASE notified the contracting officer that it bid with the intent that the HUBZone price preference contained in the solicitation--Federal Acquisition Regulation (FAR) clause 52.219-4 (Notice of Price Evaluation Preference for HUBZone Small Business Concerns)--would be applied. After application of the HUBZone preference, ASE was evaluated as having the lowest-priced bid.

However, the contracting officer, determined that ASE was non-responsible to perform under the requirements of the solicitation. Specifically, the contracting officer concluded that "James F. Thomson, Jr. (sole proprietor) cannot perform the requirements in accordance with the contract terms" because "he cannot self-perform 15%, nor will HUBZone concerns complete 50% of contract cost for personnel as required by FAR Clause 52.219-4." Agency Report (AR), Tab 17a, Non-Responsibility Determination, at 5. In addition, "he does not have sufficient bonding capacity, equipment, or tradecraft to perform this contract and must rely extensively on large business for these resources." Id. Consequently, the contracting officer determined ASE to be "non-responsible under the terms of this solicitation only." Id.

Since ASE is a small business, on August 30, 2018, the contracting officer referred his determination of non-responsibility to SBA for that agency's review under its Certificate of Competency procedures. See FAR § 19.602-1(a). The contracting officer sent the referral to the SBA Area Office in two boxes via Federal Express, priority overnight mail. The proof of delivery information for the shipment indicates that it was signed and dated as being received on September 4, 2018. AR, Tab 16, Delivery Confirmation, at 1-2. As relevant here, the COC referral letter advised that "[a]ward of this contract is needed by fiscal year end so any time savings are appreciated." AR, Tab 17, COC Referral (Aug. 30, 2018), at 1.

On September 6, the SBA Area Office emailed a letter to the contracting officer confirming referral of ASE for a COC. AR, Tab 15, Confirmation Letter, at 1. Specifically the letter stated: "In the event an application is received and our survey results in a finding that a COC will be issued, we will advise you accordingly prior to our final action." Id. The letter also advised that "[w]e expect to notify you of our decision on or before September 27, 2018." Id.

The contracting officer responded to SBA with the following inquiry:

[R]egarding the [not later than] September 27th decision date, that is 16 working days from today. The package was delivered on September 4th. I realize it probably did not get processed immediately.

Since this contract requires Congressional reporting, even 1 day makes a difference in my ability to make a fiscal year end award. Is it likely a response will be with[in] 15 working day[s]?

AR, Tab 14, Email from Contracting Officer (CO) to SBA (Sept. 6, 2018), at 1.

In an email response, the SBA Area Office acknowledged that it “began processing [the Corp’s] COC [on September 5th].” AR, Tab 14, Email from SBA to CO (Sept. 6, 2018), at 1. The email noted, however, that “[o]ur Office is overwhelmed with COC referrals right now,” with many that “must be completed before the end of the fiscal year.” Id. The email further stated: “Our 15-day clock begins the day the small business concern receives the application package via overnight mail,” and “I can only guarantee that you will receive the determination on September 27.” Id.

The contracting officer explains that, after receiving the above SBA email, he “hoped that SBA would reply within 15 days,” but “understood it was possible a response would not occur within 15 days.” Id. Accordingly, the contracting officer “decided to prepare for award to both Ames and ASE depending on the outcome of the COC referral in order to be able to accommodate award by the end of the fiscal year.” Id. Specifically, the contracting officer conducted a pre-award survey for both bidders, and also reviewed the small business subcontracting plan submitted by Ames. Id.; Contracting Officer Statement (COS) at 4.

On September 13, the Army issued guidance regarding end-of-fiscal-year contract awards. Specifically, the Army advised that all contract awards “projected to be made” on September 29th or 30th and that “required Congressional Notification”¹ were required to be reported no later than 11:00 a.m. central daylight time on September 27, 2018. AR, Tab 13, Army Memo, at 1. In light of this Army direction, the contracting officer explains that he knew he “had to make an award decision by the morning of September 27, 2018.” COS at 4.

The contracting officer states that, during the period of September 6, through the morning of September 27, neither SBA nor ASE communicated with him in any manner. Id. Accordingly, on the morning of September 27, the contracting officer notified SBA that, because the 15 business days allowed for a COC decision had lapsed, and because the Army Congressional notification deadline for fiscal end-of-year contract awards was noon that day, the contracting officer’s “determination of non-responsibility” for ASE would stand, and the contracting officer would proceed “with [C]ongressional

¹ Department of Defense (DOD) FAR Supplement (DFARS) § 205.303, “Announcement of Contract Awards,” requires, in pertinent part, notification of awards “with a face value of more than \$7 million” by “the close of business the day before the date of the proposed award” to “members of Congress in whose state or district the contractor is located and the work is to be performed.”

notification and award to the next low bidder.” AR, Tab 11, Notice Letter, Sept. 27, 2018, at 1.

DISCUSSION

ASE argues that the contracting officer improperly “preempted the statutory process” by moving forward with the contract award to Ames prior to the end of the prescribed period of time for SBA’s investigation and COC determination, which the protester asserts, violated ASE’s procedural due process rights. Protest at 6. The protester also contends that the contracting officer failed to consider new information concerning ASE’s responsibility, as required by regulation.² For the reasons discussed below, we find no basis to sustain the protest.

When a contracting officer has made a negative determination of responsibility in regard to a small business, the contracting officer is required to suspend award and refer the matter to SBA. FAR § 19.602-1. SBA has conclusive authority to review the nonresponsibility determination by issuing or declining to issue a COC. 15 U.S.C. § 637(b)(7)(A). SBA is required to issue or deny the COC within 15 business days after referral of the matter by the agency, or a longer period if agreed upon by SBA and the contracting agency. FAR § 19.602-2. In this regard, the contracting officer must withhold the contract award “for a period of 15 working days (or longer if agreed to by the SBA and the contracting officer).” 13 C.F.R. § 125.5(c)(2); see also FAR § 19.602-1(e) (“Contract award shall be withheld . . . for a period of 15 business days (or longer if agreed to by the SBA and the contracting officer) following receipt by the appropriate SBA Area Office of a referral that includes all required documentation.”). The determination whether to grant an extension of the 15-day period is a matter within the contracting agency’s discretion, which our Office will not review absent a showing that the decision to deny the request may have been made fraudulently or in bad faith. N3 Gov’t Sols., LLC, B-411303.2, Sept. 9, 2015, 2015 CPD ¶ 283; Worthy Indus. Corp., B-240489, Nov. 27, 1990, 90-2 CPD ¶ 428 at 3.

As an initial matter, the protester asserts that SBA received the referral for the COC on September 6, 2018, and therefore, that the contracting officer was prohibited from awarding the contract prior to “the end of business” on September 27, 2018. Protest at 6. The agency disagrees, and maintains that the SBA Area Office received the referral package on September 4, 2018--the date the package was delivered by Federal Express--which would make the 15th business day thereafter, September 25. AR at 7; id., Tab 16, at 1-2. In response, the protester contends that the September 4th delivery did not start the 15-day clock because it was made to a “large commercial building,” rather than to the actual SBA office.³ Comments at 3.

² Although this decision does not address all of the protester’s arguments in detail, we have considered each and find that none provides a basis to sustain the protest.

³ To the extent the protester contends in its comments responding to the agency report that the agency’s referral to SBA did not include “all required documentation,” this

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As relevant here, and referenced above, FAR § 19.602-1(e) provides that “contract award shall be withheld . . . for a period of 15 business days (or longer if agreed to by the SBA and the contracting officer) following receipt by the appropriate SBA Area Office of a referral that includes all required documentation.” While the record here reflects that the referral package was delivered and signed for on September 4, the record does not specify whether that delivery was made directly to the SBA Area Office or only to the lobby of a large commercial building. AR, Tab 16, Delivery Confirmation, at 1-2. In this regard, it is not clear from the record whether the SBA Area Office actually received the referral on September 4.

However, it is clear from the record that the SBA Area Office began processing the Corp’s COC referral on September 5. AR, Tab 14, Email from SBA to CO (Sept. 6, 2018), at 1 (acknowledging receipt and processing of referral as of September 5, 2018). Accordingly, we can conclude that, as of September 5, the SBA Area Office had received the referral. Based on receipt of the referral by September 5, the SBA’s time for processing the referral expired on September 26th. Thus, although the protester contends that the contracting officer improperly preempted the SBA’s COC process, the record shows that as of the 15th business day (September 26), the SBA had not responded to the contracting officer with a COC determination.

The protester alternatively asserts that, even if the 15 business days for processing the COC expired, email correspondence between the Corps and SBA should be interpreted as evidence showing that there was an agreement to extend the deadline to September 27, and that a COC issued on September 27 would be deemed timely. We disagree.

As referenced above, the determination whether to grant an extension of the 15-day period is a matter within the contracting agency’s discretion, which our Office will not review absent a showing that the decision to deny the request may have been made fraudulently or in bad faith. N3 Gov’t Sols., B-411303.2, supra. To establish bad faith, the courts and our Office require the presentation of very substantial proof that government officials had a specific and malicious intent to injure the protester. The Pepperdine Corp., B-225490, Dec. 24, 1986, 86-2 CPD ¶ 717 at 4.

Although the protester contends that email correspondence demonstrates agreement between the Corps and SBA of an extension of the deadline, we do not agree with the protester that the contracting officer’s alleged silence (or failure to respond) constituted agreement to an extension. Rather, it appears that the contracting officer consistently articulated a concern that time was of the essence. For example, the COC referral

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argument is untimely. Specifically, ASE was provided with a copy of the referral package on September 7, 2018. Protest at 4. Accordingly, to the extent ASE believed the referral omitted required documentation, the protester was required to raise this allegation in its initial protest. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1).

cover letter stated that “[a]ward of this contract is needed by fiscal year end so any time savings are appreciated.” AR, Tab 17, COC Referral, at 1. In addition, in response to the SBA Area Office’s confirmation of the referral, which advised that “[w]e expect to notify you of our decision on or before September 27, 2018,” AR, Tab 15, SBA Confirmation Letter (Sept. 6, 2018), at 1, the contracting officer explained that “even 1 day makes a difference in my ability to make a fiscal year end award” because “this contract requires Congressional reporting.” AR, Tab 14, Email from CO to SBA (Sept. 6, 2018), at 1. As such, the contracting officer asked if it was “likely a response will be with[in] 15 working day[s]?” Id.

Although the SBA Area Office response noted concerns regarding administrative backlog and indicated that the SBA Area Office would make a determination by September 27, there is nothing in the record to indicate that the contracting officer agreed to an extension. Rather, as the contracting officer explains, he decided to prepare for award to both Ames and ASE depending on the outcome of the COC referral in order to be able to accommodate award by the end of the fiscal year. COS at 4.

We conclude that the Corps did not act in bad faith, and that the award to Ames was therefore proper. The record here simply does not demonstrate an agreement by the contracting officer to extend the SBA’s COC processing deadline, even by one day. Rather, the contracting officer’s actions were consistent with the Army Congressional notice requirement, which specified that all fiscal-end-of-year contract awards had to be reported no later than 11:00 a.m. central daylight time on September 27, 2018. AR, Tab 13, Army Memo, at 1. Consistent with this requirement, on September 27, the contracting officer notified SBA that his determination of nonresponsibility for ASE would stand, and that the contracting officer would proceed with Congressional notification and award to the next low bidder. AR, Tab 11, Notice Letter, Sept. 27, 2018, at 1. The fact that the contracting officer would not accept the SBA’s later offer to issue a COC on behalf of ASE, because he had already moved forward with the award to Ames, did not constitute bad faith. Rather, the Corps’ position was entirely consistent with the statutory and regulatory framework that empowers SBA, not the contracting agency, to make a formal, binding responsibility determination by either issuing or not issuing a COC within 15 working days. Here, the Corps was not required to accommodate SBA’s inability to meet this deadline by missing the required Congressional notification deadline.

The protest is denied.

Thomas H. Armstrong
General Counsel