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Decision

Matter of: Trade West Construction, Inc.

File: B-418252

Date: December 10, 2019

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DIGEST

1. Protest challenging the Small Business Administration's (SBA) decision not to issue a certificate of competency (COC) is dismissed because the protester's arguments concern the merits of the SBA's COC decision, which are not for consideration by our Office.
2. Post-award protest challenging the SBA's reliance on a solicitation provision requiring specialized experience is dismissed as untimely because the protester's argument that the provision is an unenforceable qualification requirement under 10 U.S.C. § 2319 contests an alleged impropriety apparent on the face of the solicitation.

DECISION

Trade West Construction, Inc., a small business of Mesquite, Nevada, protests the refusal of the Small Business Administration (SBA) to issue a certificate of competency (COC)¹ to Trade West for its bid under invitation for bids (IFB) No. W912BU-19-B-0001, issued by the Department of the Army, Corps of Engineers for repair of a seawall. The protester also argues that the specialized experience requirement included in the IFB is an unenforceable qualification requirement under 10 U.S.C. § 2319.

¹ A COC is the certificate issued by the SBA stating that the holder is responsible for the purpose of receiving and performing a specific government contract. Federal Acquisition Regulation (FAR) § 19.601(a).

We dismiss the protest.

The agency issued the IFB on July 12, 2019, seeking bids for the repair of 470 feet of seawall along Hereford Inlet in North Wildwood, New Jersey. Request for Dismissal, Encl. 2, IFB, at 5, 87.² The IFB required the use of articulated concrete block marine mattresses in the repair of the seawall.³ See e.g., Id. at 87, 331-337. The IFB included a section titled “Definitive Responsibility Criteria,” which provided that the apparent low bidder “must demonstrate compliance with the standards set forth in this section as a precondition to receiving award and will be required to submit pre-award survey information relating to Specialized Experience.” IFB at 31. Immediately following the paragraph including this statement, the IFB contained a section titled “Specialized Experience on Similar Type Work and Project Experience.” Id. As relevant to the protest, this section provided:

To demonstrate specialized experience, the apparent low Bidder shall provide documentation of the following as part of the pre-award survey information package:

- a. Demonstrate experience with at least 1 completed satisfactory project of a similar nature in constructing a seawall with large capstone with multiple stone layers that require accurate placement to achieve an integral structure and articulated concrete block or similar marine mattresses, in a coastal environment subject to damage from storm surge and wave action. The satisfactory project must have been completed within the last 8 years and have a minimum contract value of \$5,000,000.

Id.

The IFB closed on August 21, and the agency received three bids. Request for Dismissal, Encl. 2, IFB Amend. 1; Encl. 6, Bid Abstract. Trade West submitted the lowest-priced bid. Request for Dismissal, Encl. 6, Bid Abstract. After reviewing the

² Citations to the IFB are to the sequential page numbers of the document titled “Encl 2 Solicitation Specs W912BU19B0001-Specs1.pdf” produced by the agency at Docket Entry No. 19 in the Electronic Protest Docketing System (EPDS) for this protest, B-418252.

³ The solicitation explains that “[c]oncrete is the main component of the specified articulated concrete block revetment system[,]” that “[i]t is made of a matrix of interconnected concrete block units of varying dimension mattresses, which are placed side by side and clamped together prior to final placement, to provide one homogenous erosion protection system[,]” and that “[u]nits are comprised of blocks, connected by stainless steel cables . . . with geotextile and geogrid attached to its underside.” IFB at 332.

pre-award survey information submitted by Trade West, the agency requested additional information demonstrating Trade West's experience working with articulated concrete block or similar marine mattresses. Request for Dismissal, Encl. 3b, Agency Request for Additional Pre-Award Survey Information, Sept. 10, 2019. The agency noted in its request that "[t]he placement of the articulated concrete block mattresses is a critical element of this project." Id. After reviewing Trade West's additional submission, the contracting officer (CO) concluded that Trade West lacked experience with similar contracts of similar capacity, and failed to meet the IFB's definitive responsibility requirement. Request for Dismissal at 3. Because Trade West is a small business, the CO referred the matter to the SBA pursuant to the COC procedures. Id.

Trade West timely applied for a COC with the SBA. On October 23, the SBA Area Director for Government Contracting declined to issue a COC, finding that Trade West had not overcome the capacity issues of non-responsibility for which it was referred by the CO. Request for Dismissal, Encl. 5, SBA COC Denial Letter. The area director noted that Trade West had not completed a similar project of \$5,000,000 or more in the last eight years as required by the solicitation to indicate the capacity to perform the contract. Id. The area director found that "[w]hile [Trade West] was able to demonstrate that it possessed experience in constructing seawalls . . . utilizing armor stone and gabion baskets"⁴ the information it provided "did not specifically demonstrate that [Trade West] had constructed similar seawalls and articulated concrete block or similar marine mattresses as required." Id.

Trade West challenges the SBA's decision denying the COC, alleging that the SBA "failed to follow statutes and regulations as well as consider vital information." Protest at 4. Trade West also challenges the underlying agency determination of non-responsibility, arguing that it lacked a reasonable basis. Id. Further, Trade West contends that both the agency and SBA violated 10 U.S.C. § 2319 by using an unenforceable qualification requirement to disqualify Trade West for lacking experience working with articulated concrete block or similar marine mattresses. Id.

The Small Business Act, 15 U.S.C. § 637(b)(7), gives the SBA, not our Office, the conclusive authority to review a contracting officer's determination that a small business is not responsible. We therefore do not review challenges to the SBA's decision not to issue a COC unless there is a showing that the COC denial resulted from possible bad faith on the part of the government official, or from a failure to consider vital information because of how information was presented to, or withheld from, the SBA by the procuring agency. 4 C.F.R. § 21.5(b)(2); E. F. Felt Co., Inc., B-289295, Feb. 6, 2002, 2002 CPD ¶ 37 at 3. As discussed below, the protest does not meet this standard. In support of its argument that the agency's non-responsibility determination lacked a reasonable basis and that the SBA failed to consider vital information, Trade West presents the documents it submitted to the agency during its pre-award survey review

⁴ A gabion is "a basket or cage filled with earth or rocks and used especially in building a support or abutment." See www.merriam-webster.com (last visited Nov. 26, 2019).

and to the SBA during the COC process. Protest, Exh. 1, Pre-Award Survey Submission; Exh. 2 Letter to SBA, Sept. 17, 2019; Response to Request for Dismissal Exh. 1, COC Application; Exh. 2, Additional Pre-Award Survey Information Submitted to Agency and SBA; Exh. 3, Equipment List; Exh. 4, Key Personnel List. Trade West couples this documentation with an explanation of why even though its “experience is not the same as the work required by this solicitation” it is similar, in Trade West’s opinion. Protest at 2-3; Response to Request for Dismissal at 2-5. These facts and arguments, however, concern the merits of the SBA’s COC decision, which are not for consideration by our Office. As explained above, SBA has conclusive authority to review the CO’s non-responsibility determination here. See 15 U.S.C. § 637(b)(7); E. F. Felt Co., Inc., supra, at 3.

Additionally, Trade West’s arguments do not show that the alleged error by the SBA in concluding that Trade West lacked the requisite specialized experience was caused by the manner in which the information was presented to or withheld from the SBA by the procuring agency. To the contrary, the record reflects that the firm itself submitted the cited information to the SBA in connection with its COC application. See e.g., Response to Request for Dismissal at 4 n. 2 (noting that the documents contained in Exh. 2 were submitted to the agency on September 17 and to the SBA on October 2); Exh. 1, COC Application. Trade West has established that it disagrees with the SBA’s conclusion, but such disagreement does not constitute a showing that SBA failed to consider vital information in reaching its conclusion regarding the protester’s responsibility. Bullard-Lindsay Contracting Co., Inc., B-252027, May 18, 1993, 93-1 CPD ¶ 392 at 5; see also Vetsummit, LLC, B-405187, Aug. 29, 2011, 2011 CPD ¶ 172 at 4 (denying protest because protester’s disagreement with the procuring agency’s poor past performance assessment was insufficient to invoke GAO jurisdiction over a resulting denial of a COC).

Trade West also asserts that the SBA failed to follow its statutes and regulations when it declined to issue the COC. In support of this assertion, Trade West alleges that an unidentified SBA employee initially “told Trade West that she was going to recommend issuance of the COC,” “candidly admitted” that she “had no experience in construction or coastal protection,” knew “little or nothing” about articulated concrete block mattresses, and “sought out the very agency whose decision she was “independently” reviewing” rather than seeking out an independent third party expert. Protest at 3. Trade West maintains that the SBA violated “the letter and spirit of the COC statute and regulations” when it “slavishly accepted the Agency’s recommendations during a secret meeting with a seven member team from the [agency] whos[e] goal was to disqualify Trade West[.]” Id. Trade West also cites to an October 22 e-mail exchange in which the SBA asked the agency to confirm, “based on our conversation yesterday,” that it was the agency’s opinion that experience gained from working with armor layers or gabion baskets was not similar in scope or complexity to the work with articulated

concrete block mattresses required by the solicitation. Response to Request for Dismissal at 8-9.⁵

The protester does not cite to, nor are we aware of, any statutory or regulatory provision prohibiting the SBA from meeting or communicating with the agency about a non-responsibility determination and subsequent COC referral. Rather, Trade West cites generally to the preamble of the Small Business Act and to the SBA's authority to decide whether a small business is responsible. Response to Request for Dismissal at 6-7. These cited provisions, however, do not address the matter. Trade West further cites to the SBA's standard operating procedures (SOP) for the COC program,⁶ arguing that they require the SBA to perform an independent and thorough evaluation of the capacity and capability of a small business and not "merely defer to the Government agency[.]" Id. at 8. Again, none of the cited provisions prohibit SBA from meeting or communicating with the referring agency during the COC process. Further, the SBA's standard operating procedures represent internal agency policies and guidelines that do not have the force and effect of law, and we generally do not review the SBA's compliance with them. E. F. Felt Co., Inc., supra, at 4.⁷ Accordingly, the protest lacks any support for its claim that the SBA failed to follow its statutes and regulations when it declined to issue the COC

Last, Trade West argues that both the agency and the SBA erred in finding it non-responsible for failing to meet the solicitation's specialized experience requirement related to articulated concrete block or similar marine mattresses because, Trade West contends, the provision is an unenforceable qualification requirement under 10 U.S.C.

⁵ The referenced October 22 e-mail exchange between the SBA and the agency was first produced as Encl. 4 to the agency's request for dismissal, and then re-produced as Exh. 7 to the protester's response to the request for dismissal.

⁶ Trade West cites to SBA SOP 60 04 4, Certificate of Competency Program, Apr. 24, 1998, excerpts of which were produced as Exh. 5 to the protester's response to the request for dismissal.

⁷ To the extent Trade West's argument regarding the SBA secretly meeting, or otherwise communicating, with the agency alleges bad faith, Trade West has not made the requisite showing of possible bad faith on the part of the SBA that would allow us to consider its protest. To establish bad faith, a protester must present convincing evidence that the officials involved had a specific and malicious intent to harm the firm. E. F. Felt Co., Inc., supra, at 3-4. The burden of establishing bad faith is a heavy one. Evidence establishing a possible defect in an agency's actions generally is not sufficient in itself to establish that the agency acted in bad faith; the protester must also present facts reasonably indicating, beyond mere inference and suspicion, that the actions complained of were motivated by a specific and malicious intent to harm the protester. Id. The October 22 e-mail exchange between the SBA and the agency does not show that the SBA acted with intent to harm the firm, nor has Trade West presented any other allegations or facts showing such intent.

§ 2319.⁸ Protest at 3-4; Response to Request for Dismissal at 9-10. This allegation, however, constitutes an untimely challenge to the terms of the solicitation. Id. at 7. Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial submissions be filed before that time. 4 C.F.R. § 21.2(a)(1); see AmaTerra Envtl. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

Trade West argues that its qualification requirement should not be dismissed as untimely because “[w]hen bidding this project, Trade West did not believe that the Agency would violate the procurement statutes” and “did not reasonably anticipate that the Agency was adopting a requirement clearly in violation of 10 U.S.C. § 2319.” Response to Request for Dismissal at 9-10. The specialized experience requirement, however, was clear from the face of the IFB. See IFB at 31. Thus, to the extent Trade West considered the inclusion of such a requirement to be in violation of applicable procurement statutes and regulations, or otherwise improper, it should have raised the matter prior to time set for receipt of bids. See 4 C.F.R. § 21.2(a)(1); Marc Avenue Corp., B-261968, B-261968.2, Jan. 11, 1996, 96-1 CPD ¶ 79 at 4. Having waited to raise this matter until after the closing time for receipt of bids, the protest arising from the alleged solicitation impropriety is untimely.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁸ Section 2319 of Title 10 of the United States Code, and its implementing regulations in FAR subpart 9.2, set forth the process by which an agency may establish a qualification requirement, which the statute defines as “a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.” 10 U.S.C. § 2319(a).