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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Capitol CREAG LLC

File: B-294958.4

Date: January 31, 2005

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Gary F. Davis, Esq., General Services Administration, and John W. Klein, Esq., and Kevin R. Harber, Esq., Small Business Administration, for the agencies.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a solicitation uses traditional responsibility factors as technical evaluation criteria and where the proposal of a small business concern which otherwise would be in line for award is found ineligible for award based on an agency's evaluation under those criteria, the agency has effectively made a determination that the small business offeror is not a responsible contractor capable of performing the solicitation requirements; accordingly, the agency must refer the matter of the firm's responsibility to the Small Business Administration (SBA) for the possible issuance of a certificate of competency (COC).

2. Where the proposal of a small business concern is not selected for award because the agency concludes that the concern's approach to management and staffing creates a high risk of unacceptable performance, the agency's determination is not tantamount to a nonresponsibility determination and there is no requirement for referral to the SBA for the possible issuance of a COC.

DECISION

Capitol CREAG LLC, a small business concern, protests the decision by the General Services Administration (GSA) not to award the firm a contract under request for proposals (RFP) No. GS-04P-02-BVD-0035 for the provision of national real estate broker services to support GSA's National Office of Realty Services and 11 regional offices in the acquisition of leasehold interests and related real estate services for

GSA's federal tenants. CREAG contends that GSA improperly failed to refer an issue involving the firm's responsibility to the Small Business Administration (SBA) for the possible issuance of a certificate of competency (COC).

We deny the protest.

BACKGROUND

As explained in the RFP, which was issued on March 5, 2004, GSA provides workspace for more than one million Federal workers through GSA's Public Building Service (PBS). Whenever possible, GSA satisfies tenant agency needs in existing GSA-controlled owned or leased space. When suitable space is not available within the existing inventory, GSA acquires space in privately-owned buildings through leases. GSA's National Office of Realty Services is the PBS entity responsible for the acquisition and administration of leasehold interests.

In 1997, GSA awarded eight regional real estate broker service contracts; GSA subsequently awarded additional regional contracts for similar services, but with varying terms and conditions. GSA, in support of its strategic goal of "Operating Effectively and Efficiently," identified a need to award fewer real estate broker service contracts to achieve national consistency and to better manage its realty services program. RFP § C.1, at 14. The contracts awarded under this RFP, when compared to the previous contracts awarded by GSA for similar services, will include substantial changes to the contract terms and conditions. For example, under this RFP, the contractors will collect as their payments the real estate commissions paid by building owners in lieu of receiving direct payments or reimbursements from the government for services rendered under the contracts. Id.

The RFP stated that GSA intended to make multiple awards of approximately four "no cost,"[1] indefinite-delivery/indefinite-quantity contracts, with one contract being set aside for award to a qualified small business concern. RFP § L.1, at 113. (Each contract would be for a base period and four 1-year option periods and each contract

[1] In explaining the nature of the "no cost" contracts to be awarded, the RFP stated that GSA would not make any direct payment or reimbursement to a contractor for contract services including, but not limited to, any expense associated with the performance of the services, such as travel. The RFP further explained that under the terms and conditions of the contracts and in accordance with industry practice, a contractor would have the opportunity to obtain a substantial monetary benefit by collecting the real estate commissions paid by building owners/landlords. In order to be considered for award, the RFP required that an offeror's price proposal be based on a stated percentage of commissions that the firm would "forego" to the government in the form of a rental credit to the lease. RFP § B.2.1, at 11; RFP § M.2, at 138.

was estimated to have a total contract value of approximately $33,103,000 based on estimated annual commission amounts as included in the RFP. RFP § B.2.2, Pricing Worksheet, at 13.) The RFP advised, however, that in the event that no small business concern was "eligible" for the set-aside award, GSA reserved the right to make this award to other than a small business concern. RFP § L.1, at 113; RFP § M.1, at 137. The RFP also stated that the "[a]ward of these contracts [would] not preclude the Government from awarding additional contracts for similar services in the future in the event GSA determines additional contracts are necessary." RFP § B.1, at 9.

The RFP stated that the awards would be made to the offerors whose proposals represented the best values to the government, technical evaluation factors and price considered. The RFP provided that the technical evaluation factors were significantly more important than price. RFP § M.1, at 137. The RFP listed, in descending order of importance, the following technical evaluation factors: (1) experience; (2) management and organizational approach; (3) past performance; and (4) small business subcontracting participation. For each technical evaluation factor/subfactor, an offeror's technical proposal would receive one of the following adjectival ratings with corresponding numerical scores: excellent/5 points; very good/4 points; acceptable/neutral/3 points; marginal/2 points; and unacceptable/1 point. "Marginal" (the rating at issue in this protest) was defined as follows:

> Does not fully meet the evaluation standard. Deficiencies and/or significant weaknesses, which may be correctable. High risk of unsuccessful contract performance.

Final Source Selection Evaluation Board (SSEB) Report to the Source Selection Authority (SSA) at 5. The adjectival ratings/numerical scores were to be supported by narratives addressing the strengths, significant weaknesses, deficiencies, and risks in each offeror's proposal. To arrive at a total weighted technical score for each proposal, the agency would multiply the raw points for each technical evaluation factor/subfactor by the appropriate weighted percentage; the agency then would add the weighted scores together. The RFP further explained that an offeror's price would be evaluated in terms of the proposed percentage of an offeror's estimated commissions that would be credited against the lease rental rates. RFP § M.2, at 138-43.

Eighteen firms submitted proposals. As relevant to this protest, CREAG (a nine-member consortium comprised of one 8(a) small disadvantaged business concern, three small business concerns, four women-owned small business concerns, and one veteran-owned small business concern) was one of three small business concerns that submitted a proposal. Ten proposals, including CREAG's proposal and the proposal from one other small business concern, were included in the competitive range.[2] Following discussions and the submission of final revised proposals, the SSA determined that neither CREAG nor the other small business concern was "eligible for award due to the high risk of unacceptable performance associated with the small business concerns['] proposals." Source Selection Decision at 2.

More particularly, in the final SSEB report to the SSA, the SSEB recommended to the SSA that no award be made to CREAG (or to the other small business concern). The SSEB stated as follows:

> Even though Capitol CREAG's overall average score of 3.18 appears to be acceptable and their price is within the Government estimate, the Marginal rating for the second most important factor, Factor 2, leads us to conclude that this offeror presents an unacceptable risk of unsuccessful contract performance.[3] Therefore, it is determined by the SSEB that . . . neither offeror[4] is eligible for award because of the unacceptable risks, significant weaknesses and deficiencies that remain in their proposals for Factor 2, Management and Organizational Approach. The Contracting Officer is not required to request a certificate of competency from the Small Business Administration because this is a negotiated procurement and the evaluation factors were evaluated on a comparative basis. It is recommended that no award be made to a small business in this procurement because of the significant risks for unsuccessful contract performance arising from the significant weaknesses and deficiencies that remain in the proposals of the two firms for Factor 2 after final proposal revisions. We further recommend that an award be made to other than a small business.

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[2] The third small business concern withdrew its proposal for reasons that are not relevant here.

[3] For the technical evaluation factors/subfactors, CREAG's raw scores ranged from 2 points to 5 points, which corresponded to the marginal through excellent adjectival ratings. As will be discussed below, for technical evaluation factor 2--management and organizational approach--CREAG's proposal received a raw score of 2 points for both subfactors 2(a), management and organizational plan, and 2(c), staffing plan; these scores corresponded to the marginal adjectival rating.

[4] The other small business concern filed a protest with our Office. However, after reviewing GSA's administrative report addressing the issues raised in its protest, the firm withdrew its protest.

Final SSEB Report to the SSA at 88.

With respect to the management and organizational approach technical evaluation factor, for subfactor 2(a), CREAG's proposal received a marginal rating. The SSEB believed that CREAG's decentralized management and organizational approach "raise[d] question[s] about whether [CREAG] [would] deliver a consistent product for GSA's nationwide account." Id. at 85-86. In addition, the SSEB stated that CREAG's proposal did not demonstrate "how [it] [would] interface internally (and it appears that many of the team members have not worked together before), or who within [the] consortium is responsible for specific functions or duties relating to the GSA account." Id. at 86. With respect to subfactor 2(c), for which CREAG's proposal also received a marginal rating, the SSEB believed that CREAG's staffing plan--where a different small-business consortium member is to provide services in each of GSA's regional cities, and each member has the right to hire subcontractors--"pose[d] a high risk of unacceptable contract performance for the GSA nationwide account, as consistency in delivery of services [would] likely be compromised." Id. at 87. The SSEB continued that this "may not enable team members to deliver the level of services required under the RFP, which could result in high risk of unsuccessful contract performance." Id.

By letter dated September 23, GSA's contracting officer advised the SBA's Procurement Center Representative (PCR) that "[i]n accordance with Federal Acquisition Regulation [(FAR)] 19.506, Withdrawing or Modifying Small Business Set-Asides," she had determined that "a set-aside award for the solicitation . . . would be detrimental to the public interest due to the high risk of unsuccessful contract performance associated with the technical proposals submitted by small business concerns as documented in the Source Selection Evaluation Board (SSEB) report. This decision has been coordinated with the Public Buildings Service, Small Business Technical Advisor[,] and the GSA Office of Small Business Utilization." Letter from GSA's Contracting Officer to SBA's PCR, Sept. 23, 2004, at 1. Referencing the "Recommendation Not to Award to a Small Business" from the SSEB report, GSA's contracting officer stated that "both proposals still presented a high risk to the Government of unsuccessful contract performance and were not eligible for award." Id. at 2. Accordingly, GSA's contracting officer advised the SBA's PCR that GSA's SSA intended to make four awards to other than small business concerns. In addition to GSA's "Recommendation Not to Award to a Small Business," as quoted above where GSA stated that it was not going to refer the matter to the SBA for a COC, GSA also furnished, at the PCR's request, the evaluations of the final revised proposals of all offerors in the competitive range.

By e-mail of September 28, SBA's PCR wrote to GSA's contracting officer, "Please accept this message as SBA's approval of your request dated September 23, 2004 to withdraw the set-aside portion of RFP GS04P02BVD0035, National Real Estate Broker Services." E-mail from SBA's PCR to GSA's Contracting Officer, Sept. 28, 2004.

By letter dated October 1, GSA advised CREAG that the SBA had approved GSA's request to withdraw the set-aside. GSA stated that after proposal revisions were considered, "significant weaknesses remained in [CREAG's] proposal which presented a high risk of unsuccessful contract performance." GSA Letter to CREAG, Oct. 1, 2004.

On October 4, after considering the initial and final SSEB reports, the SSA awarded contracts to four large business offerors whose proposals were determined to represent the best values to the government, considering technical evaluation factors and price. Source Selection Decision at 2.

ISSUE AND ANALYSIS

CREAG, a small business concern, argues that prior to withdrawing the small business set-aside, GSA improperly failed to refer an issue involving the firm's responsibility to the SBA for the possible issuance of a COC. In this regard, CREAG points out, based on the contemporaneous evaluation and source selection record, that GSA did not determine that CREAG was ineligible for award based on the submission of a technically unacceptable proposal. Rather, the record shows that CREAG's proposal was technically acceptable. CREAG maintains that the basis upon which GSA determined that the firm was not eligible for award--that CREAG presented an "unacceptable risk of unsuccessful contract performance" based on two marginal ratings for two subfactors under the management and organizational approach technical evaluation factor--involves the matter of whether CREAG was a responsible contractor capable of successfully performing the RFP requirements. CREAG contends that GSA, prior to withdrawing the small business set-aside, was required to refer this matter involving CREAG's responsibility to the SBA for the possible issuance of a COC.[5]

Under the Small Business Act, agencies may not find a small business nonresponsible without referring the matter to the SBA, which has the ultimate authority to determine the responsibility of small businesses under its COC procedures. 15 U.S.C. § 637(b)(7) (2000); FAR Subpart 19.6; Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003, 2003 CPD ¶ 33 at 5. Responsibility concerns, among other factors, whether a prospective contractor will be able to comply with the required or proposed delivery or performance schedule, and whether it has the

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[5] Our Office solicited comments from the SBA on the COC referral issue raised by CREAG. The SBA supports CREAG's position that under the facts of this protest, GSA improperly failed to refer the issue of CREAG's responsibility to the SBA for the possible issuance of a COC. SBA's Initial and Supplemental Administrative Reports, Dec. 3 and 21, 2004.

necessary organization, experience, and technical skills (or the ability to obtain them). FAR § 9.104-1(b), (e).

It is true that the reasons for GSA's concern about CREAG arose in connection with the evaluation under the solicitation (not post-evaluation, when a responsibility review is normally conducted). This, however, is not determinative. We have long recognized that agencies may use responsibility-type factors as evaluation criteria. See, e.g., Nomura Enters., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148 at 3. Here, the evaluation criteria related to management and staffing are at issue, and both can be viewed as "traditional" responsibility factors. See Clegg Indus., Inc., B-242204.3, Aug. 14, 1991, 91-2 CPD ¶145 at 2. Where a solicitation uses traditional responsibility factors as technical evaluation criteria and where the proposal of a small business concern which otherwise would be in line for award is found ineligible for award based on an agency's evaluation under those criteria, the agency has effectively made a determination that the small business offeror is not a responsible contractor capable of performing the solicitation requirements.[6] In those circumstances, because of the offeror's small business size status, the agency must refer the matter of the firm's responsibility to the SBA for the possible issuance of a COC.

Here, however, we conclude that the basis for GSA's ultimate decision not to make award to CREAG was not a responsibility determination. As noted above, management and staffing are sometimes responsibility criteria. In this procurement, though, GSA's concern was not that CREAG lacked adequate management and staffing (which might well have been a responsibility concern), but rather that CREAG's proposed management and staffing plan--CREAG's approach to performing the contract work--created a high risk of unacceptable performance. This was not due to doubt about CREAG's ability or capability to perform (again, potentially a responsibility concern), but rather to the decentralized approach that CREAG

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[6] Earlier decisions of our Office, such as Advanced Res. Int'l, Inc.--Recon., B-249679.2, Apr. 29, 1993, 93-1 CPD ¶ 348 at 2-3, include language suggesting that no SBA referral is required, even where a small business proposal is rejected solely due to an "unacceptable" rating under a responsibility-type evaluation criterion, so long as the rating was "comparative." It appears from the final SSEB report to the SSA, as quoted above, that GSA relied on the language in these earlier decisions in deciding that no SBA referral was required here. We continue to hold that no SBA referral is needed where the small business offeror is not selected for award merely because, while its proposal is evaluated as acceptable, another offeror's proposal is evaluated as superior under a comparative analysis or because of a cost/technical tradeoff analysis. Where, however, a finding that a small business offeror's proposal is unacceptable under a responsibility-type criterion precludes such a comparative or tradeoff analysis, it is tantamount to a nonresponsibility determination. To the extent our Office's earlier decisions can be read to be inconsistent with the rule as stated here, they will no longer be followed.

proposed to use to perform GSA's requirements. As the SSEB wrote, "The offeror did not present an adequate resolution to adequately managing the scope of the contract." Final SSEB Report to the SSA at 59. Because GSA's negative assessment was based on the way that CREAG proposed to perform, rather than on CREAG's capabilities, we conclude that what occurred was not tantamount to a nonresponsibility determination, and we therefore find that no referral to the SBA was required.

Finally, we turn to the question of whether GSA could properly find CREAG's proposal ineligible for award when, in fact, the evaluation record shows that the proposal received an overall rating in the acceptable range. Notwithstanding that overall acceptable rating, the marginal rating assigned to CREAG's proposal under two technical evaluation subfactors indicated that the proposal was found to create a "high risk of unacceptable contract performance" with regard to CREAG's approach to management and staffing. That finding is consistent with the evaluation criteria, and is not unreasonable. In our view, there is nothing in the solicitation or in procurement statutes or regulations that would bar GSA from deciding, notwithstanding the overall rating assigned to CREAG's proposal, not to award a contract to CREAG on the basis of the risk associated with its proposal, in light of GSA's articulated goals for this procurement.

The protest is denied.

Anthony H. Gamboa
General Counsel