G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Liberty Power Corporation

File: B-295502

Date: March 14, 2005

J. Alex Ward, Esq., and Kali N. Bracey, Esq., Jenner & Block, for the protester.
Alison L. Doyle, Esq., and Jason N. Workmaster, Esq., McKenna, Long & Aldridge, for Pepco Energy Services, Inc.; Thomas C. Wheeler, Esq., Carl L. Vacketta, Esq., and Eliza P. Nagle, Esq., DLA Piper Rudnick Gray Cary, for Constellation NewEnergy, Inc., intervenors.
Richard R. Butterworth, Esq., General Services Administration, and Kenneth Dodds, Esq., Small Business Administration, for the agencies.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation established an evaluation scheme providing for application of price evaluation adjustment on behalf of eligible small disadvantaged business (SDB) offerors, and agency, through its exchanges with protester prior to the submission of price proposals, led firm to believe that adjustment would be applied in the event that protester established its eligibility, agency cannot defend its failure to accord protester the preference on the basis that the preference in fact is not authorized; rather, having led protester to base its price proposal on the expectation that it would benefit from the SDB price evaluation adjustment if it established its eligibility, if agency believes adjustment is not authorized for this procurement, agency should amend the solicitation to delete adjustment and reopen discussions so as to permit offerors to submit revised proposals.

2. Contracting officer's determination to deny a small disadvantaged business (SDB) concern the benefit of an SDB price evaluation adjustment essentially on the basis that the SDB could not comply with this provision must be referred to the Small Business Administration for final determination.

DECISION

Liberty Power Corporation protests the General Services Administration's (GSA) award of contracts to Pepco Energy Services, Inc. and Constellation NewEnergy, Inc., under request for proposals (RFP) No. GS-00P-05-BSC-0335, for electric power supply to various federal and non-federal facilities. Liberty, a small disadvantaged business (SDB) concern, asserts that GSA improperly failed to accord it an SDB price evaluation adjustment.

We sustain the protest.

The RFP, issued on September 22, 2004, contemplated award of a contract, for a base period of 10 months with 2 option years, to the responsible offeror or offerors whose technically acceptable proposal or proposals offered the low total evaluated price for electricity supply commodity components up to the delivery point, including energy, capacity, ancillary services, and network firm transmission, necessary for the firm supply of electricity to a number of federal and non-federal facilities in the Pepco service territory in Maryland and the District of Columbia. The solicitation reserved to the government the right to make separate awards for the Maryland and District of Columbia requirements.

The solicitation required offerors to furnish evidence of technical qualifications, including evidence that the offeror possessed the requisite licenses, network transmission agreements, comparable experience, risk management measures related to providing retail electric supply, and plans to supply the energy required by this contract to the delivery point. RFP § C.1(c). Technical proposals from eight offerors, including Liberty, were received by the October 21 closing time. Although the contracting officer was concerned that Liberty's experience was limited, such that "there is a question as to whether Liberty has the capability to handle two large load groupings," he ultimately determined that Liberty met the minimum qualifications and was "responsible for purposes of submitting pricing." Solicitation Summary and Award Decision at 7.

This protest concerns the evaluation of the subsequently submitted price proposals. In this regard, the RFP provided that "[o]ffers will be evaluated by adding a factor of ten percent to the price of all offers, except offers from [SDB] concerns that have not waived the adjustment. For details regarding the application of the evaluation adjustment, see subpart 52.219-23 of the Federal Acquisition Regulation [(FAR)]." Section 52.219-23(d), as relevant, provides as follows:

> (d) Agreements.

> (1) A small disadvantaged business concern, that did not waive the adjustment, agrees that in performance of the contract, in the case of a contract for--
>
> . . . .
>
> (ii) Supplies (other than procurement from a nonmanufacturer of such supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern;
>
> . . . .
>
> (2) A small disadvantaged business concern submitting an offer in its own name shall furnish in performing this contract only end items manufactured or produced by small disadvantaged business concerns in the United States or its outlying areas. This paragraph does not apply to construction or service contracts.

Liberty, an SDB, did not waive the SDB evaluation preference.

On November 11, GSA asked Liberty whether it would be buying, rather than generating, the power it proposed to provide. Liberty responded later that day that

> Liberty Power will be the manufacturer of at least 50% of the electricity that will supply this solicitation and thus will perform at least 50% of the cost of manufacturing. In addition, for any supplemental electricity that is required, Liberty Power will secure supply from one or more of our existing suppliers who include:
>
> [DELETED]

In response, GSA requested as follows:

> In order to ensure that Liberty Power meets the requirements of FAR Clause 52.219-23, please provide us with details as to what power plant(s) you plan to provide the power from, location(s), your ownership interests, date purchased, and any other information that we can review so that we may substantiate your statements.

E-mail from GSA to Liberty, Nov. 11, 2004. Liberty responded that it was its understanding that qualification for the SDB pricing evaluation adjustment could be shown by "a firm commitment to purchase the facilities, equipment and manpower necessary to meet at least 50 % of the requirements of the solicitation." Letter from Liberty to GSA, Nov. 11, 2004. Liberty then advised GSA that "[t]o that end, Liberty Power has secured a commitment to purchase a power plant that will supply sufficient levels of electricity to meet the SDB manufacturing obligation set forth in

FAR 52.219-23." Id. When GSA subsequently asked again for documentation to support Liberty's proposal to manufacture at least 50 percent of the electricity, Liberty responded on November 16 that

> over the last few weeks Liberty Power has been in negotiations with several power plant owners in the PJM [Interconnection, LLC] territory to acquire the necessary manufacturing capability. We are attaching a recent Letter of Intent for one of the assets currently under negotiation. Please note: we ask that you not contact the asset owner as this may adversely impact our negotiations. We will provide you with any additional information you may need about this asset.

Letter from Liberty to GSA, Nov. 16, 2004.

On November 22, GSA determined that Liberty was not entitled to the benefit of the 10-percent SDB evaluation price adjustment on the basis that Liberty did not currently own any power generation assets and had not shown that it had a firm commitment to purchase generating assets sufficient to meet the requirement in FAR § 52.219-23(d)(1)(ii) that it perform at least 50 percent of the cost of manufacturing, excluding the cost of materials. Although Liberty had furnished a letter of intent with respect to its purchase of a generating asset in [DELETED], the contracting officer did not consider this to be adequate to support application of the SDB price evaluation adjustment since the letter of intent had already expired (on October 31) at the time it was furnished and, in any case, was interpreted by the contracting officer as not being a definitive, binding purchase agreement. Contracting Officer's Determination of Applicability of 10% Price Preference for Liberty Power Corporation, Nov. 22, 2004.

Upon examining the initial price proposals received on November 22, GSA decided to request revised proposals for the District of Columbia requirement (with the intent of obtaining better pricing and because of a suspected mistake in Pepco's proposal). Based upon the resulting offers, GSA made award on November 23 to Pepco as the low-priced, responsible, technically-qualified offeror for the District of Columbia requirement, and to Constellation as the low-priced, responsible, technically-qualified offeror for the Maryland requirement. Liberty thereupon filed this protest with our Office.

Liberty asserts that it proposed to generate at least 50 percent of the required power, and that GSA therefore unreasonably denied it the benefit of the SDB price evaluation adjustment. Liberty further asserts that, in any case, GSA was required to refer the question of Liberty's ability to comply with the SDB manufacturing requirement to the Small Business Administration (SBA).

GSA responds, as a preliminary matter, that the protest is essentially academic because the contracting officer lacked the authority to include the SDB price

evaluation adjustment in the solicitation, so that it could not be applied to Liberty or any offeror. In this regard, the agency notes that the SBA, as well as the Civilian Agency Acquisition Council, has advised civilian agencies that the statutory authority for civilian agencies to apply the SDB price evaluation adjustment expired, and no longer was available, as of December 9, 2004. See Civilian Agency Acquisition Council Letter 2004-04. Indeed, according to GSA, the statutory authority for civilian agencies to apply the SDB price evaluation adjustment in fact expired after September 30, 2003, that is, well before the September 22, 2004 issuance of the solicitation. In any case, argues the agency, even if the authority did not expire until December 2004, that would preclude its applying the adjustment for Liberty even if we otherwise agreed with Liberty's argument.

We find GSA's position to be without merit. While agencies have broad discretion in making source selection decisions, their decisions must be rational and consistent with the solicitation's stated evaluation scheme; an agency may not announce one basis for evaluation and award in the RFP and then evaluate proposals and make award on a different basis. Marquette Med. Sys., Inc., B-277827.5, B-277827.7, Apr. 29, 1999, 99-1 CPD ¶ 90 at 5-6. Here, whether or not the SDB price evaluation adjustment was properly included in the solicitation, the fact remains that the solicitation expressly provided for application of such an adjustment on behalf of eligible SDB offerors, and GSA, through its exchanges with Liberty prior to the submission of price proposals, affirmatively led the firm to believe that the adjustment would be applied in the event that Liberty established its eligibility under FAR § 52.219-23. In this regard, Liberty's chief operating officer has furnished a sworn affidavit stating that Liberty submitted its price proposal with the expectation that it would receive the SDB price evaluation adjustment. We conclude that, having established an evaluation scheme providing for an SDB preference, and having affirmatively led Liberty to base its price proposal on the expectation that it would benefit from the SDB price evaluation adjustment if it established its eligibility, the agency cannot defend its failure to accord Liberty the preference on the basis that the preference in fact is not authorized.

GSA asserts that, in any case, Liberty was not entitled to the benefit of the SDB price evaluation adjustment. However, we think that the authority to make the final determination in this regard belongs not to GSA, but to the SBA. In this regard, the Small Business Act, 15 U.S.C. § 637(b)(7) (2000), provides that it is the exclusive responsibility of the SBA to

> certify to Government procurement officers . . . with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer . . . may not, for any reason specified in the preceding sentence preclude any small business concern or group of such concerns from

> being awarded such contract without referring the matter for a final disposition to the Administration.

15 U.S.C. § 637(b)(7)(A). Thus, we have previously recognized with respect to the limitation on subcontracting clause at FAR § 52.219-14, governing eligibility for consideration for requirements set aside for small business concerns and 8(a) contractors, that, as a general rule, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation is a matter of responsibility, to be finally determined by the SBA in connection with its Certificate of Competency (COC) proceedings. See, e.g., Mechanical Equip. Co., Inc.; Highland Eng., Inc.; Etnyre Int'l, Ltd.; Kara Aerospace, Inc., B-292789.2 et al., Dec. 15, 2003, 2004 CPD ¶ 192 at 18.

FAR § 52.219-23(d)(1)(ii) likewise contains a limitation on subcontracting provision, providing that the SDB agrees that in the performance of a supply contract, at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern. While the result here may be a matter of entitlement to a price evaluation adjustment rather than eligibility for award, the underlying determination--whether the offeror has the ability to perform as an SDB--is similar. Accordingly, we agree with the SBA (SBA Comments, Jan. 26, 2005, at 3-4) that a contracting officer's determination to deny an SDB the benefit of an SDB price evaluation adjustment on the basis that the SDB could not comply with this provision must be referred to the SBA. See FAR § 19.601(d) ("When a solicitation requires a small business to adhere to the limitations on subcontracting, a contracting officer's finding that a small business cannot comply with the limitation shall be treated as an element of responsibility and shall be subject to the COC process.").

GSA and Pepco assert that Liberty's proposal evidenced a defective commitment to complying with the subcontracting limitation, and that this therefore was a matter of acceptability, and not responsibility. See Ecompex, Inc., B-292865.4 et al., June 18, 2004, 2004 CPD ¶ 149 at 5; Mechanical Equip. Co., Inc.; Highland Eng., Inc.; Etnyre Int'l, Ltd.; Kara Aerospace, Inc., supra; KIRA Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3. We disagree. As an initial matter, the contracting officer in fact determined that Liberty's proposal was acceptable; the only question was whether Liberty was entitled to the SDB preference. Further, while GSA asserts that the generating asset in [DELETED] for which Liberty submitted an expired letter of intent could not generate sufficient power to meet the 50-percent rule, the agency fails to take into account the fact that Liberty stated that it had "been in negotiations with several plant owners in the PJM territory to acquire the necessary manufacturing capability," Letter from Liberty to GSA, Nov. 16, 2004, and not merely with the owner of the generating asset in [DELETED]. Consequently, this is not an instance where the offeror's proposal, on its face, reasonably indicated that the offeror would not comply with a subcontracting limitation, see, e.g., Orincon Corp., B-276704, July 18, 1997, 97-2 CPD ¶ 26 at 4; rather, it involves a question of the

offeror's capability to comply with a subcontracting limitation and, thus, its responsibility. As such, this was a matter for the SBA.

GSA now asserts that Liberty also failed to meet the requirement set forth in FAR § 52.219-23(d)(2) that states: "A small disadvantaged business concern submitting an offer in its own name shall furnish in performing this contract only end items manufactured or produced by small disadvantaged business concerns in the United States or its outlying areas." The agency notes in this regard that in its November 11 response to the agency's inquiries, Liberty stated that it would obtain supplemental electricity from one or more firms on a list of its existing suppliers, which includes large businesses. However, as noted by the SBA in its comments on this matter, SBA Comments, Feb. 2, 2005, at 3, while the provisions of FAR § 52.219-23(d)(1) apply to manufacturers, those of FAR § 52.219-23(d)(2) clearly apply to SDBs that are nonmanufacturers, that is, SDBs that intend to furnish the products of other SDB concerns. See distinction between manufacturer and nonmanufacturer in 15 U.S.C. § 637(a)(17)(A); 13 C.F.R. § 121.406; FAR §§ 19.001, 19.102(f), 19.601(d). Here, Liberty essentially claimed that it would qualify as a manufacturer under FAR § 52.219-23(d)(1); thus, FAR § 52.219-23(d)(2) was irrelevant to determining Liberty's SDB status and entitlement to the preference, and the final determination as to whether that in fact is the case is for the SBA, as discussed above. Accordingly, we sustain the protest.

Ordinarily, under the circumstances, we would recommend that GSA refer the matter of Liberty's entitlement to the benefit of the SDB price evaluation adjustment to the SBA. However, as the authority for civilian agencies to apply the SDB adjustment has expired, we decline to do so. We recommend instead that GSA amend the solicitation to delete the SDB price evaluation adjustment and reopen discussions to permit offerors to submit revised proposals. We also recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d) (2004). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel