Comptroller General
of the United States

Washington, D.C. 20548

91-1 CPD 237

Decision

PR

Matter of: Ktech Corp.; Physical Research, Inc.

File: B-241808; B-241808.2

Date: March 1, 1991

D.V. Keller for Ktech Corp., and John C. Garvin, Jr., Esq., Rigney, Garvin & Webster, for Physical Research, Inc., the protesters.
Bill Miera for Fiore Industries, Inc., an interested party.
Millard F. Pippin, Department of the Air Force, for the agency.
Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office (GAO) will not consider allegation that awardee under a procurement set-aside for small business competition is other than a small business since Small Business Administration, not GAO, has conclusive authority to determine matters of small business size status for federal procurements.

2. Whether a contractor can obtain required personnel security clearances is a matter pertaining to its responsibility which General Accounting Office will not review.

3. Where solicitation contains definitive responsibility criterion that overstates the agency's requirements and agency's actual needs can be met through award to an offeror that has not met the requirement without prejudice to other offerors, agency may waive the definitive responsibility criterion.

4. General Accounting Office will not consider allegations concerning an awardee's business record or financial capacity since these matters concern its responsibility.

DECISION

Ktech Corp. and Physical Research, Inc. (PRI) protest the award of a contract for high power microwave research and experiments to Fiore Industries, Inc. under request for proposals (RFP) No. F29601-90-R-0005, issued as a total small business set-aside by the Air Force Space Technology Center,

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Kirtland Air Force Base, New Mexico. The protesters contend that Fiore is not a small business; that it failed to comply with solicitation requirements concerning personnel and facility security clearances; and that the contracting officer reasonably could not have determined that Fiore was a responsible prospective contractor.

We dismiss the protests in part and deny them in part.

The RFP contemplated the award of a cost-plus-fixed-fee contract and provided that in the evaluation of proposals, technical and management factors would be more important than cost, although cost would be a substantial factor. The solicitation listed, in descending order of importance, nine topics to be addressed in each offeror's technical/management proposal, and indicated that the offeror's approach to each would be evaluated based on the understanding of technical requirements demonstrated, the soundness of approach, and the qualifications of the personnel and experience of the company related to that topic.

Five offerors submitted proposals by the August 22, 1990, closing date. After two separate competitive range determinations, two proposals were eliminated as technically unacceptable, leaving Fiore, PRI, and Ktech in the competitive range. Written and oral discussions were held with each offeror and best and final offers (BAFO) requested. After evaluation of the BAFOs the source selection authority determined that Fiore's proposal, which had received the highest technical rating and was second highest in price, represented the best overall value to the government. On October 17, the agency awarded a contract to Fiore.

AWARDEE'S SIZE STATUS

Ktech argues that Fiore is not a small business and thus is ineligible for award under the RFP, which was set aside for small business competition. We dismiss this basis of protest because our jurisdiction does not extend to reviews of size determinations. The Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives the Small Business Administration (SBA), not our Office, the conclusive authority to determine matters of small business size status for federal procurements. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(2) (1990); Survice Eng'g Co., B-235958, July 20, 1989, 89-2 CPD ¶ 71. Here, the SBA Office of Hearings and Appeals determined that Fiore was a small business concern under the size standard established for this procurement, and we will not review that determination.

PERSONNEL SECURITY CLEARANCES

Ktech argues that Fiore failed to comply with the solicitation requirement that certain contractor personnel obtain "secret" security clearances by October 1990. In this regard, the solicitation, as revised by Amendment 0001, provided that "[t]hree technicians and three engineers and one senior scientist will be required to have a SECRET clearance by October 1990, and a TOP SECRET/SCI clearance by October 1991." Ktech contends that no Fiore employees, with the possible exception of its president, had obtained secret clearances prior to October 1990.

In response, the agency contends that the requirement that the clearances be obtained by October 1990 meant that they had to be obtained prior to the end of that month, not by October 1. The agency explains that it concluded that Fiore would be able to obtain the requisite clearances by the end of the month based on the fact that Fiore's proposed employees already held secret clearances under their current employer; that Fiore had prepared the paperwork necessary for transfer of the clearances; and that the cognizant Defense Investigative Service office had indicated that the transfer could be accomplished within a week to 10 days of submittal.

Whether a prospective contractor has the ability to obtain any necessary security clearances concerns the firm's ability to perform and is therefore a matter of responsibility. Protective Materials Co., Inc., B-225495, Mar. 18, 1987, 87-1 CPD ¶ 303. We will not review an affirmative determination of responsibility by the contracting officer absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m)(5). Here, there is no evidence of fraud or bad faith on the part of procuring officials, and the requirement for personnel security clearances did not constitute a definitive responsibility criterion since it did not require that the clearances be obtained prior to award. Telos Field Eng'g, B-233285, Mar. 6, 1989, 89-1 CPD ¶ 238; Cumberland Sound Pilots Assn.--Recon., B-229642.2, June 14, 1988, 88-1 CPD ¶ 567. Accordingly, we dismiss this basis of protest.

FACILITY SECURITY CLEARANCE

Both protesters argue that Fiore failed to comply with the solicitation requirement that each offeror obtain a facility security clearance prior to award. A facility security clearance is an administrative determination by the Department of Defense that from a security viewpoint, a facility is eligible for access to classified information of the same or lower classification category as the clearance

being granted. The agency concedes that Fiore did not have a facility clearance at the time of award, but argues that it otherwise satisfied the requirement.

The RFP provided that:

> "The offeror must possess, or acquire prior to award of a contract, a facility clearance equal to the highest Classification Specification stated on the contract Security Classification Specification (DD Form 254) attached here to."

The attached Form 254 indicated that the facility clearance required was top secret.

As previously noted, although we ordinarily will not review affirmation determinations of responsibility by the contracting officer, we will undertake such a review where it is alleged that a definitive responsibility criterion in the solicitation was not met. Here, the requirement for a facility security clearance prior to award constituted a definitive responsibility criterion since it was a specific, objective standard, compliance with which was a prerequisite for contract award. Stocker & Yale, Inc., B-238257, May 16, 1990, 90-1 CPD ¶ 475.

The agency argues that the requirement for a facility security clearance prior to award placed Fiore, which, as a newly incorporated company, had not previously worked on a government contract, in a "Catch 22" situation: since the Defense Investigative Service would not process its clearance until it had performed work on a government contract, it could not get a facility security clearance until it had been awarded the contract--but it could not meet the RFP's requirements unless it obtained a clearance before award. The agency contends that although Fiore had not obtained the clearance by the date of award, it otherwise satisfied the requirement by demonstrating that it would in all likelihood be able to obtain a clearance shortly after award1/ and by proposing to rely on the secret clearance of its first tier subcontractor, Voss Scientific, until its own was obtained.

PRI argues in response that Fiore could not have satisfied the facility security clearance requirement by relying on Voss's secret clearance until it had obtained its own clearance because the RFP (1) required a clearance of top secret rather than secret, and (2) did not permit a prime contractor to rely on its subcontractor's clearance.

1/ Fiore was in fact granted a clearance on October 30, less than 2 weeks after award.

We agree that the RFP required a clearance of top secret. As discussed in detail below, it is apparent from the record that both the requirement for a top secret clearance and the requirement that the clearance be obtained prior to award exceeded the agency's actual needs, and that award to Fiore, which had demonstrated that it would in all likelihood be able to obtain a secret clearance shortly after award (and did in fact obtain one), would meet its true needs.2/ Since no other offerors were prejudiced by the agency's decision not to require a facility security clearance of top secret prior to award, we will not object to the agency decision in effect to waive the definitive responsibility criterion.

With regard to the level of clearance required, the agency states that it realized prior to the preproposal conference that the requirement for a facility clearance of top secret overstated its needs. According to the agency, it notified offerors that the level of clearance required had been reduced from top secret to secret at the preproposal conference by responding to a question raised by one of the offerors as follows:

> "Q: Is it permissible to use a subcontractor's top secret facility clearance until the prime contractor has a top secret facility clearance in place?"
>
> "A: Top Secret facility clearance is not required."

The agency failed to amend the DD Form 254 or the RFP to reflect this change, however.3/ Thus, the solicitation, through incorporation of the DD Form 254, continued to require a facility clearance of top secret although the agency had determined that this level of clearance exceeded its needs.

2/ In view of our finding that the requirement for a preaward clearance overstated the agency's requirements, we need not determine whether or not Fiore could have satisfied that requirement through reliance on its subcontractor's clearance.

3/ Although the minutes of the preproposal conference, including this Question and Answer, were furnished to offerors as part of Amendment 0001 to the RFP, the Amendment explicitly advised that "remarks and explanations at the conference shall not qualify the terms of the solicitation, and terms of the solicitation and specifications remain unchanged unless the solicitation is amended in writing."

Where a solicitation contains a definitive responsibility criterion that overstates the agency's minimum needs, competition may have been inhibited by the overstated requirement and firms that did in fact compete may have been prejudiced. See Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398. Where there is a likelihood that full and open competition has been significantly compromised by an improperly restrictive solicitation, our Office does not require a showing of specific prejudice to the protester before it will sustain a protest against the improper relaxation of the solicitation requirements for the benefit of one offeror. See Mantech Advanced Sys. Int'l, Inc., B-240136, Oct. 26, 1990, 90-2 CPD ¶ 336. Otherwise, an awardee's deviation from RFP requirements, including definitive responsibility criteria, warrants sustaining a protest only if there is resulting prejudice to the protester, e.g., if the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to altered requirements. See Astro-Med, Inc.--Recon., B-232131.2, Dec. 1, 1988, 88-2 CPD ¶ 545; see generally Federal Computer Corp., B-239432, Aug. 29, 1990, 90-2 CPD ¶ 175. We will resolve any doubts concerning the prejudicial effect of the agency's action in favor of the protester; the reasonable possibility of prejudice is a sufficient basis to sustain the protest. See Logitek, Inc.--Recon., B-238773.2; B-238773.2, Nov. 19, 1990, 90-2 CPD ¶ 401.

Here, five offers were received, and there is no evidence in the record to suggest that any firms were excluded from the competition by the requirement for a top secret facility security clearance. Nor is there any indication that the content or pricing of any of the offers that were submitted would have been different if the requirement had not been included. The protesters merely argue that Fiore's proposal should have been eliminated from the competition. Since award to a firm with a secret clearance would meet the agency's actual needs without prejudice to other offerors, we think that it was not objectionable for the agency to waive the requirement for a clearance of top secret.

Along the same lines, we see no basis to object to the agency's decision to waive the requirement that the facility security clearance be obtained prior to award, since it is apparent that this requirement also overstated the agency's actual needs. It was not necessary for performance that the contractor obtain a facility clearance prior to award; it was necessary only that it obtain one prior to undertaking any activities under the contract that would have involved access to classified information. Again, we do not think that cancellation is required here since the award to Fiore, which had demonstrated that it would be able to obtain a clearance

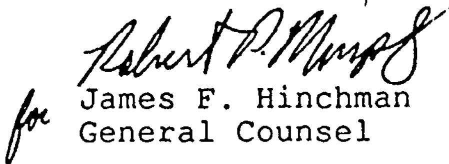
shortly after award (and did in fact obtain such a clearance), would serve the agency's actual needs and there is no evidence that any firms elected not to compete because they thought that a preaward clearance would be required, or that the protesters would have altered their proposals.

AWARDEE'S RESPONSIBILITY

Both PRI and Ktech argue that the contracting officer could not reasonably have determined that Fiore was a responsible prospective contractor since, as a newly incorporated company, it did not have a performance record or record of integrity and business ethics. In addition, the protesters allege that Fiore had not demonstrated, at the time of award, that it would be able to obtain the financial resources necessary for performance.

As previously noted, the contracting officer determined that Fiore was a responsible contractor, and we will not review such a determination absent an allegation of fraud or bad faith or that definitive responsibility criteria in the solicitation have not been applied. Here, neither protester has alleged fraud or bad faith on the part of contracting personnel and no other definitive responsibility criteria are involved. We therefore dismiss this basis of protest.

The protests are dismissed in part and denied in part.



for James F. Hinchman
General Counsel