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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Fabritech, Inc.

File: B-298247; B-298247.2

Date: July 27, 2006

Shlomo D. Katz, Esq., and Kenneth B. Weckstein, Esq., Epstein, Becker & Green, PC, for the protester.
J. Michael Slocum, Esq., Slocum & Brodie, PC, for The Purdy Corporation, an intervenor.
Vera Meza, Esq., and Amy S. Meredith, Esq., Department of the Army, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.
Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging rejection of small business protester's offer on the ground that the agency's decision constituted a nonresponsibility determination that should have been referred to the Small Business Administration is sustained where the basis of the agency's determination--that protester would be unable to obtain the required parts--relates directly to the firm's capability to perform the contract.

DECISION

Fabritech, Inc., a small business, protests the award of a contract to The Purdy Corporation under request for proposals (RFP) No. W58RGZ-04-R-0686, issued by the U.S. Army Aviation and Missile Command (AMCOM) for overhaul of tail rotor gearboxes for the AH-64 helicopter. Fabritech argues that the agency improperly failed to refer the determination of Fabritech's responsibility to the Small Business Administration (SBA) under the certificate of competency (COC) program. Fabritech also asserts that the agency treated it and the awardee unequally in that the agency either failed to verify that the awardee would provide certified parts--as Fabritech was asked to do--or the agency held discussions with the awardee without also holding discussions with Fabritech.

We sustain the protest.

BACKGROUND

AMCOM issued the RFP on December 20, 2004 to acquire the overhaul of a minimum of 95 and a maximum of 500 tail rotor gearboxes for the AH-64 helicopter. The RFP was initially issued as a total small business set-aside. By amendment 3, issued on February 16, 2006, the agency changed the RFP to restrict competition to approved sources for the gearboxes; in this regard, the amendment stated that "[c]urrently, the only approved sources for this item" are Purdy and Fabritech. Supplemental Agency Report (Supp. AR), Tab 5, RFP amend. 3 at 2. The amendment also changed the original evaluation factors for award to provide that award would to be made to the "responsive and responsible offeror whose proposal is evaluated at the lowest total cost to the government."[1] Id. at 12.

With regard to Fabritech's status as an approved source, the agency notified Fabritech by letter dated December 7, 2005, that it was approved as a source of repair and overhaul of the gearboxes provided that Fabritech met several contingencies, including agreeing to purchase all critical safety item (CSI)[2] replacement parts from AMCOM-approved and -tested sources. AR, Tab A, attach. 3, at 2. In a letter to the protester dated March 13, 2006, the contracting officer requested that Fabritech provide documentation that it met the contingencies, including the requirement that all CSI replacement parts be purchased from AMCOM-approved and -tested sources, so that the agency could "adequately evaluate and make a determination of Fabritech's responsibility." Supp. AR, Tab 10, attach. 4,

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[1] As originally issued, the RFP provided for award to the offeror whose proposal was found to offer the best value to the government based on three evaluation criteria, technical, past performance, and price. Under the technical factor, proposals were to be evaluated on a pass/fail basis based on whether the offeror demonstrated that it had or would have access to special tools and equipment specified in the RFP. Agency Report (AR), Tab A, attach. 1, RFP at 54.

[2] An aviation CSI is "a part, an assembly, installation equipment, launch equipment, recovery equipment, or support equipment for an aircraft or aviation weapon system if the part, assembly, or equipment contains a characteristic any failure, malfunction, or absence of which could cause

(1) A catastrophic or critical failure resulting in the loss of or serious damage to the aircraft or weapon system;

(2) An unacceptable risk of personal injury or loss of life; or

(3) An uncommanded engine shutdown that jeopardizes safety."

Defense Federal Acquisition Regulation Supplement (DFARS) § 209.270-2.

Letter from Contracting Officer to Protester, Mar. 13, 2006, at 1-2.[3] Fabritech responded by letter dated March 24, noting that it expected to receive approval of its source approval request for the new manufacture of the gearbox in September 2006. Fabritech asserted that approval on or near that date would allow it ample time to manufacture the parts necessary to perform the contract. Fabritech asserted that, in what it considered the highly unlikely event that its approval to manufacture the parts in-house were delayed, it could borrow useable parts from items that were slated for later overhaul for use in earlier overhauls. The parts that had been borrowed would then be obtained or manufactured in time to be used in the later overhauls. AR, Tab A, attach. 5.

The agency made award to Purdy on April 17. By letter dated April 18, the agency informed Fabritech that its assertion that it was working to become a qualified source for the CSI items "does not supply current proof of your ability to meet this requirement" and that therefore Fabritech's proposal "cannot be considered at this time." AR, Tab A, attach. 10, Letter from the Army to Protester, Apr. 18, 2006, at 2. This protest followed.

DISCUSSION

Fabritech asserts that the agency's rejection of its proposal was based on a determination that Fabritech is not a responsible offeror in view of its perceived inability to obtain the required parts from an approved source, and thus that the Army was required to refer the matter to the Small Business Administration (SBA) pursuant to the certificate of competency (COC) procedures. See 15 U.S.C. § 637(b)(7) (2000).

The term "responsibility" refers to a firm's apparent ability and capacity to perform contract requirements. See Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297 at 3. If a small business concern's offer that would otherwise be accepted is to be rejected because of a determination of nonresponsibility, the contracting officer must refer the matter to the SBA, which has exclusive authority to decide whether or not to issue a COC. Federal Acquisition Regulation (FAR) § 9.104-3(d)(1). Here, the protester has represented that it will obtain the parts either by manufacturing them itself--given that the protester expects to receive approval in time to do so--or, failing that, by borrowing parts that are slated for later overhaul to use in earlier overhauls. Protest, exh. 2, Letter from Protester to Contracting Officer, Mar. 24, 2006, at 1-2. The protester argues that it has proposed an acceptable means

[3] In a post-protest filing to our Office, the contracting officer describes "responsibility" as a poor choice of words, and suggests that the intent was to "evaluate Fabritech's ability to comply with the contingencies outlined in the 7 Dec 2005 letter." Supp. AR, Contracting Officer's Statement, at 2.

of furnishing the necessary parts, and that any dispute with the agency over the protester's ability to do so is a matter of responsibility.

We agree that the decision to reject Fabritech's proposal constituted a determination of nonresponsibility. The record shows that the reasons given for the agency's rejection relate directly to the protester's ability or capability to perform, and the agency's concerns clearly align with the description in the relevant FAR provisions of elements bearing on responsibility. See FAR § 9.104-1(b) (firm must "[b]e able to comply with the required or proposed delivery or performance schedule"); § 9.104-3(a) (the contracting officer "shall require acceptable evidence of the prospective contractor's ability to obtain required resources"; that evidence "normally consists of a commitment or explicit arrangement, that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel"). See also Noah Howden, Inc., B-227979, Oct. 22, 1987, 87-2 CPD ¶ 386 at 3.

The agency asserts that the decision to reject Fabritech's proposal was based not on a finding of nonresponsibility, but on a finding that the proposal was unacceptable for failure to meet a qualification requirement, and thus there was no requirement for referral to the SBA. The term "qualification requirement" means "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) (2000). In support of its position here, the agency relies on 10 U.S.C. § 2319(c)(4), which provides as follows:

> Nothing contained in this subsection requires the referral of an offer to the [SBA] pursuant to [15 U.S.C. § 637(b)(7)] if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

Because, as explained above, we conclude that the basis of the agency's decision relates to responsibility, not compliance with a qualification requirement,[4] the statutory exception to the requirement for referral to the SBA in 10 U.S.C.

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[4] FAR § 9.206-2 requires that the contracting officer insert FAR § 52.209-1 in solicitations that are subject to a qualification requirement. That clause, which does not appear in this RFP, supplies notice to offerors that a qualification requirement applies and furnishes additional detail about the means to meet the requirement. We have held that where, as here, FAR § 52.209-1 is not expressly incorporated in a solicitation, an agency may not enforce any qualification requirements. Gentex Corp., B-271381, June 18, 1996, 96-1 CPD ¶ 281 at 4. In response, the agency points to other clauses that are included in the RFP which, in the agency's view, serve the purpose of providing notice and additional detail regarding the qualification requirements here. We need not address this issue, however, given our conclusion

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§ 2319(c)(4) does not apply. This conclusion is consistent with our cases addressing the distinction between findings relating to compliance with qualification requirements and those relating to an offeror's responsibility.[5] See Stevens Tech. Servs., Inc., B-250515 et al., May 17, 1993, 93-1 CPD ¶ 385 at 10 (exception to referral requirement is not applicable where the solicitation qualification requirements relate to the firm's capability to perform rather than product testing or specification compliance); Goodyear Tire & Rubber Co., B- 247363.6, Oct. 23, 1992, 92-2 CPD ¶ 315 at 7 (the ability of an offeror to supply a qualified product--but not whether a product was properly qualified–concerns the offeror's responsibility).

The agency also asserts that the dispute here is not whether the protester is capable of performance, which the agency concedes would be a responsibility determination, but rather relates to the agency's concern regarding the protester's proposed method of performance, which can--and in this case did--render the proposal unacceptable. Specifically, the protester's "current inability to meet the requirements of the solicitation and technical documentation" rendered the protester's proposal technically unacceptable, the agency argues. Supp. AR, Legal Memorandum, at 3.

The agency distinguishes the protester's "proposed ways to perform the solicitation requirements" from its "capabilities," citing Capital CREAG LLC, B-294958.4, Jan. 31, 2005, 2005 CPD ¶ 31. In CREAG, we concluded that because the agency's unfavorable evaluation of the protester's proposal was based on its proposed approach to performing the contract requirements (specifically, a decentralized approach to management and staffing), rather than on the protester's ability or capability to perform, the agency's decision not to make award to the firm was not tantamount to a nonresponsibility determination, and therefore no referral to the SBA was required. Capital CREAG LLC, supra, at 7-8. Here, in contrast, the agency is challenging the protester's ability to obtain the parts from approved sources; in this regard, the contracting officer states that "Fabritech cannot be awarded a maintenance and overhaul contract because Fabritech did not provide evidence of their ability to purchase CSI parts from approved sources nor is it approved as a 'manufacturing source.'" Supp. AR, Contracting Officer's Statement, at 11. We therefore find unpersuasive the agency's argument that its challenge is to the protester's unacceptable methodology rather than the firm's responsibility.

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that the basis for rejecting Fabritech's proposal did not involve a qualification requirement.

[5] We asked the SBA for its views on this issue; by letter dated June 16, 2006, the SBA agreed that the matter involved a question of responsibility rather than a qualification requirement, and thus that referral under the COC procedures was required.

Further, the agency fails to point to any provision in the RFP calling for consideration of an offeror's approach to obtaining parts as part of a technical evaluation of the offer. On the contrary, as noted above, the RFP was amended to change the original basis for award--which provided for award to the offeror whose proposal was found to offer the best value to the government--to provide for award to the "responsive and responsible offeror whose proposal was evaluated at the lowest total cost to the government." Supp. AR, Tab 5, RFP amend. 3 at 12. The RFP also was amended to delete the evaluation factors set out in the original RFP and substitute DFARS § 52.215-4008, which addresses only the evaluation of price, not any technical factors. Thus we see no support in the terms of the RFP for the argument that the assessment of the protester's ability to obtain the required parts related in any way to the technical evaluation of its proposal.

The agency also asserts that since Fabritech is not yet an approved source, the agency is precluded from making award to the firm. In support of this argument, the agency points to the following statutory provision, which in relevant part states as follows:

> [T]he head of the contracting activity for an aviation critical safety item [may] enter into a contract for the procurement, modification, repair, or overhaul of such item only with a source approved by the design control activity in accordance with section 2319 of title 10, United States Code.

National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 802(b)(2), 117 Stat. 1392, 1540 (2003), reprinted in 10 U.S.C.A. § 2302 note. See also DFARS § 209.270-3(a) (implementing regulation).

The agency argues that since Fabritech has not demonstrated to the agency's satisfaction that it has the ability to obtain required parts from a qualified source, it has not met a qualification requirement; the firm therefore cannot be an approved source for the part, and the agency thus may not award a contract to the firm. The premise of the agency's argument here is flawed, however, because, as explained in detail above, the requirement on which the argument is based--Fabritech's ability to obtain required parts from other sources--is not a qualification requirement. As a result, any concern about the protester's ability in this area does not relate to a qualification requirement and does not trigger application of the statute limiting contracts for CSIs to approved sources.

In sum, because the agency made a responsibility determination without referring the matter to the SBA, the protest is sustained.

The protester also argues that the agency either conducted discussions with the awardee and not with the protester or failed to verify that the awardee would provide certified parts, and thereby applied relaxed solicitation requirements to the awardee. The contracting officer asserts that part of the confusion regarding

whether the awardee had offered to comply with the RFP requirements was caused by agency misclassification of a part, and that the awardee has, in fact, satisfied the agency that the awardee will purchase parts from approved sources. Supp. AR, Contracting Officer's Statement, at 1. The evidence cited by the protester that discussions took place between the awardee and the agency--that the only explanation the protester can see to explain how the awardee could have satisfied the agency's inquiry so quickly is if discussions had taken place--is speculative. Moreover, the protester has not asserted that it suffered any prejudice as a result of the alleged discussions, and we see none. In this regard, the record is clear that the protester had been given ample opportunity by the agency to address the agency's concerns, and there is no assertion that, if discussions had been held with it, the protester would have made any material changes to its offer. Likewise, we see no evidence that the agency relaxed the RFP requirements for the awardee.

RECOMMENDATION

We recommend that, consistent with this decision, the matter be referred to the SBA for review under the COC procedures. If the SBA issues a COC and Fabritech is otherwise in line for award, the agency should terminate the award to Purdy and make award to Fabritech. We also recommend that Fabritech be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2006). Fabritech should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receiving this decision.

The protest is sustained.

Gary L. Kepplinger
General Counsel