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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Chem-Spray-South, Inc.

File: B-400928.2

Date: June 25, 2009

Stanley A. Millan, Esq., Jones Walker Waechter Poitevent Carrere & Denegre LLP, for the protester.

Gerard E. Wimberly, Jr., Esq., McGlinchey Stafford PLLC, for Dauterive Contractors, Inc., an intervenor.

Capt. Thomas J. Warren, U.S. Army Corps of Engineers, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly made award without engaging in discussions is denied where solicitation provided for award without discussions and agency was able to discern relative merits of proposals from initial submissions.

2. Protest challenging propriety of agency's evaluation of proposals is denied where record shows that evaluation was consistent with terms of solicitation, applicable statutes, and regulations.

DECISION

Chem-Spray South, Inc., of Gonzales, Louisiana, protests the award of a contract to Dauterive Contractors, Inc., of New Iberia, Louisiana, under request for proposals (RFP) No. W912P8-08-R-0072, issued by the U.S. Army Corps of Engineers for aquatic plant control in southern Louisiana. Chem-Spray maintains that the agency miscalculated Dauterive's proposal and improperly failed to consider a price revision it offered in connection with its own proposal.

We deny the protest.

The RFP, a small businesses set-aside, contemplated the award of an indefinite-delivery, indefinite-quantity, fixed-price contract for a base year, with four 1-year options, for aquatic plant control over an estimated 30,000 acres in southern Louisiana. Award was to be made to the firm whose proposal was deemed to offer the "best value," considering two equally-weighted evaluation factors--past

performance and technical proposal--and price.¹ RFP at 70. The two non-price factors combined were equal in weight to price. Id. The RFP advised that the agency anticipated making award based on initial proposals, without engaging in discussions. RFP at 72.

The agency received five proposals, including Chem-Spray's and Dauterive's (the only proposals relevant here). Based on the evaluation, the agency rated the protester's proposal excellent under the technical proposal factor, and exceptional/high confidence under the past performance factor, while it rated the awardee's proposal good and satisfactory/confidence under the two factors. AR, exh. 5, at 1. Chem-Spray offered a price of \$6,931,710, while Dauterive's price was \$5,610,000. AR, exh. 11, at 2. Based on these evaluation results, the agency concluded that it was unnecessary to engage in discussions, and that award to Dauterive represented the best value to the government. AR, exh. 11, at 3.

Prior to award, by letter dated November 24, 2008, the agency advised Chem-Spray that Dauterive was the apparent successful offeror. After receiving this pre-award notice, Chem-Spray filed a challenge to Dauterive's small business size status with the agency on December 1. On December 9, the agency provided Chem-Spray with a pre-award debriefing. Thereafter, on December 12, Chem-Spray filed a protest with our Office challenging the agency's source selection decision. On December 16, the Small Business Administration (SBA) issued a size determination finding that Dauterive was small for purposes of this acquisition.

While its protest was pending at our Office, Chem-Spray sent the contracting officer a letter, dated January 14, 2009, forwarding what it characterized as adverse past performance information relating to Dauterive's performance of a 2008 state of Louisiana contract for aquatic plant control work. AR, exh. 19. Thereafter, following a motion to dismiss filed by the agency, we dismissed Chem-Spray's protest for failing to state a valid basis for protest (B-400928, Feb. 25, 2009). Subsequently, by letter dated March 3, Chem-Spray advised the contracting officer that, if she would open discussions, it would lower its price to \$5,125,755. AR, exh. 21.

The agency declined to consider Chem-Spray's two letters. It instead prepared a revised price negotiation memorandum and a source selection decision document in which it determined to make award to Dauterive. The agency found that the price proposed by Dauterive was reasonable, and that the cost savings associated with

¹ Each non-price factor included subfactors, which are not relevant here. RFP at 70. Proposals were assigned adjectival/confidence ratings of exceptional/high confidence, very good/significant confidence, satisfactory/confidence, marginal/little confidence or unsatisfactory/no confidence under the past performance factor, Agency Report (AR), exh. 9, attach. B, and ratings of excellent, good, satisfactory, marginal, or unsatisfactory under the technical proposal factor. Id., attach C.

Dauterive's proposal outweighed any technical advantage associated with Chem-Spray's proposal. AR, exhs. 15, 16. By letter dated March 16, the agency advised Chem-Spray of the award decision, AR, exh. 23; this protest followed.

Chem-Spray raises numerous arguments. We have considered all of these arguments and find that they are without merit. We discuss the principal arguments below.

PRICE REVISION

Chem-Spray asserts that the agency erred in failing to consider its revised price submitted on March 3. According to the protester, this was a late modification to an otherwise successful proposal that the agency was required to consider pursuant to Federal Acquisition Regulation (FAR) § 15.208 (b)(2). This argument is without merit. Chem-Spray's proposal was not found to be the successful proposal. On the contrary, the record shows that Dauterive's proposal was identified as the successful proposal from the time of the initial evaluation until the award decision was made. AR, exhs. 11, 15, 16, 18. Consequently, FAR § 15.208 (b)(2) does not apply.

Alternatively, Chem-Spray asserts that the agency abused its discretion in failing to conduct discussions based on the firm's offer to lower its price. However, where, as here, a solicitation expressly advises offerors that the agency intends to make award without discussions, the agency generally is free to make award on the basis of initial proposals, and is not required to hold discussions, provided there is a reasonable basis to distinguish between the proposals. Silynx Comm., Inc., B-310667, B-310667.2, Jan. 23, 2008, 2008 CPD ¶ 36 at 7. As noted, the record shows that the agency had a basis for distinguishing between the proposals—although Chem-Spray's proposal was higher-rated than Dauterive's, this advantage was not worth its proposal's higher price.²

² The protester suggests that the agency was required to conduct discussions because it established a competitive range. See FAR § 15.306(c) (agencies must establish a competitive range where they intend to conduct discussions). In support of its position, the protester cites the agency's November 13, 2008 price negotiation memorandum, in which, on page 2, the contracting officer uses the phrase "competitive range." However, this reference notwithstanding, this document actually articulates the agency's decision not to engage in discussions, and recommends award to Dauterive. AR, exh. 11, at 3. It is clear from the record that discussions were not required or even contemplated here.

TECHNICAL ACCEPTABILITY

Chem-Spray asserts that the agency improperly found Dauterive's proposal technically acceptable. According to the protester, Dauterive did not offer an adequate number of certified or licensed herbicidal applicators; it maintains that 12 certified/licensed applicators were required, and that Dauterive specifically identified only 7 in its proposal and merely promised to have the balance at the time of performance. In support of its position, the protester cites RFP § M-3.B.1, under the solicitation's evaluation criteria, as requiring the agency to consider the qualifications of proposed personnel, and to require rejection of a proposal as unacceptable for failing to propose what it maintains is the required number of certified/licensed applicators.

We find no merit to this aspect of Chem-Spray's protest. The evaluation criterion relied on by the protester provides:

Technically Acceptable Contractor Experience is one that: Provides a brief overview of employees experience and qualifications that provides clear insight into each proposed employee's ability, training, work history, certifications, licenses, number of years experience.

RFP § M-3.B.1. This provision does not require a specific number of licensed applicators in order for a proposal to be found acceptable. Rather, it requires only that a proposal include a "brief overview" of a firm's proposed employees, sufficient to provide the agency with "clear insight" into the offerors' proposed personnel's qualifications. In evaluating proposals under this criterion, the agency made note of the differences between the Dauterive and Chem-Spray proposals, and these differences ultimately led the agency to rate Chem-Spray's technical proposal superior to Dauterive's (excellent versus good). AR, exh. 5, at 2; exh. 6, at 2; exh. 15, at 3. The agency's methodology and conclusion were consistent with the evaluation criterion.

Chem-Spray maintains that portions of the performance work statement required a particular number of licensed/certified applicators. These provisions detail the requirements for crews operating boats during performance of the contract, and specify that each sprayer and boat operator shall be certified under applicable state and federal requirements.

This argument is similarly without merit. Again, we find nothing in the RFP that established firm requirements that offerors had to meet in order for their proposal to be found technically acceptable. Specifically, regarding the number of applicators, the statement of work provides that the number of spray crews (comprised of one boat operator and one applicator) noted in the solicitation is only a recommendation, and that the actual number of spray crews could differ during performance. RFP § C-6.3.

Moreover, the RFP provides at section C-6.2:

The contractor shall obtain any necessary licenses and permits, at his/her own cost, and shall comply with all applicable Federal, State and municipal laws, codes and regulations.

Elsewhere, at section C-7.2 (one of the provisions relied on by Chem-Spray³), the solicitation provides:

The Contractor shall provide personnel who are experienced and who demonstrate proficiency in the skills required to perform the work required. Each sprayer and boat operator shall be certified in EPA Category 5A, Aquatic Pest Control, holding a valid Commercial Pesticide Applicator's certification from the State of Louisiana or a state which has reciprocal agreement with the State of Louisiana. The Contractor shall provide the TPOC [technical point of contact] with a current list of certified employees, copies of their certification, and if necessary a copy of the State of Louisiana's approval of reciprocity before those employees perform any spraying operations.

Finally, RFP section H-9 provides:

The Contractor shall, without additional expense to the Government, obtain any and all necessary licenses and permits, and shall be responsible for complying with all applicable Federal, State and municipal laws, codes, and regulations pertaining to the performance of work under this contract.

Provisions such as these that require the "contractor" to obtain all necessary permits, licenses or certifications, establish performance requirements that must be satisfied by the successful offeror during contract performance; as such, offerors are not required to satisfy the requirements prior to award, and they do not come into play in the award decision, except as a general responsibility matter. United Seguranca, Ltd., B-294388, Oct. 24, 2004, 2004 CPD ¶ 207 at 4. Our Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2009), generally preclude our review of a contracting officer's affirmative determination of an offeror's responsibility, except in circumstances not alleged or demonstrated here. (Moreover, since the awardee is a small business, any

³ Another section relied on by the protester, section C-7.1, also does not specify a particular number of employees; it provides only that the contractor shall provide "sufficient" employees to operate all boats and related equipment in order to perform the required work, and details that each applicator crew is to consist of a boat operator and a sprayer.

issue concerning its responsibility is a matter for the Small Business Administration under its certificate of competency program. Federal Acquisition Regulation, part 19.6.) Ultimately, whether Dauterive complies with these requirements is a matter of contract administration, which we will not review. 4 C.F.R. § 21.5(a). This argument therefore provides no basis for questioning the evaluation.

PAST PERFORMANCE

Chem-Spray asserts that the agency improperly failed to consider what it characterizes as negative information that it furnished regarding Dauterive's performance of the Louisiana contract. This argument is without merit. The record shows that the contracting officer decided not to consider the information because it was submitted so late--it was not forwarded to the agency by Chem-Spray until January 14, 2009, well after the agency had completed its evaluation of proposals and identified the apparently successful offeror (in November 2008)--and because the RFP did not contemplate consideration of past performance information submitted by a competitor. Contracting Officer's Statement, Apr. 15, 2009, at 14. The agency's judgment in this regard was reasonable. We are aware of no requirement in applicable regulations or elsewhere--and Chem-Spray cites none--that an agency reopen an evaluation to consider information that became available only after it completed the evaluation and selected the successful offeror.⁴

Chem-Spray also maintains that the agency improperly considered a 1995 Corps of Engineers contract in Dauterive's past performance evaluation, because it fell outside the 3-year timeframe for past performance information requested from offerors under the RFP. This argument is without merit. While contracts cited by offerors were to have been performed within the past 3 years, nothing in the evaluation criteria, or elsewhere in the RFP, precluded consideration of information obtained by the agency that was more than 3 years old. In this regard, section M-3.A.2 provided:

The Government will consider the relevancy, recency, and extent of past performance, and the size and complexity of the past performance relative to this solicitation's requirements. More recent and relevant

⁴ Moreover, it appears that the alleged problem under the 2008 contract, which related to the "kill rate" being achieved, in fact was not viewed by Dauterive as its fault. AR, exh. 19. In this regard, Dauterive indicated to the cognizant Louisiana officials that the "kill rate" problem was attributable to its use of an herbicide recommended by the Louisiana Department of Wildlife and Fish, *id.*, and the record shows that Dauterive subsequently (on March 11, 2009) was awarded another contract by the state of Louisiana. Intervenor's Supp. Comments, May 11, 2009, exh. A.

performance will have a greater impact on the performance confidence assessment than a less recent or relevant effort.

In any case, the record shows that consideration of the 1995 contract had no significant effect on Dauterive's past performance rating. In this connection, there is only a passing reference to the 1995 contract in the source selection decision document, as follows:

It is noted that in 1995 a division of Dauterive was awarded a contract from this agency for the control of aquatic vegetation in south Louisiana. However, given the date of the contract award and performance, this fact does not significantly enhance Dauterive's experience rating.

AR, exh. 15, at 4-5. This reference indicates the contract was given little weight, and the agency's evaluation of it was consistent with the RFP's emphasis on more recent past performance information.

The protest is denied.

Daniel I. Gordon
Acting General Counsel