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Decision

Matter of: TMG Construction Corporation

File: B-407190

Date: November 19, 2012

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Madeline Shay, Esq., Department of the Army, for the agency.
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DIGEST

Protest arguing that solicitation requirement for top secret facility site clearance at time of award and requirement that contractor be capable of providing “safeguarding” (i.e., classified storage) capability at top secret level should be read together to require safeguarding approval at time of award is denied where it is clear from governing guidance that facility clearance determination is separate from storage capability determination.

DECISION

TMG Construction Corporation (TMG), of Purcellville, Virginia, protests the award of a contract to JS Global, LLC (JSG), of Upper Marlboro, Maryland, under request for proposals (RFP) No. W912DR-12-R-0013, issued by the Department of the Army, Corps of Engineers, for repair, renovation, and construction projects in the District of Columbia’s National Mall area. The protester argues that JSG’s proposal should have been rejected as technically unacceptable because the awardee lacks a top secret safeguarding clearance. TMG also challenges the technical evaluation of its own proposal.

We deny the protest.

BACKGROUND

The RFP, which was set aside for small businesses, contemplated the award of a 5-year indefinite-delivery/indefinite-quantity (ID/IQ) contract with a maximum value of \$49.99 million to the offeror whose proposal represented the best value to the government. Proposals were to be evaluated based on price and the following six equally-weighted non-price factors: (1) experience in task order construction contracts; (2) experience with historical/monumental buildings; (3) past performance in task order construction contracts; (4) past performance in historical/monumental buildings; (5) work plan; and (6) seed project.¹ The non-price factors, when combined, were of significantly greater importance than price. In their price proposals, offerors were to propose coefficients for 24 project categories, which the agency would use to calculate an average weighted coefficient.²

Of significance to this protest, the RFP required each offeror to possess “an active top secret facility site clearance”³ at the time of proposal submission, at the time of award, and throughout the life of the contract. RFP at 30. The solicitation further provided (in amendment No. 3 furnishing responses to offeror questions) that the

¹ The RFP provided that proposals would be assigned adjectival ratings under factors 1, 2, 5, and 6, and risk ratings under factors 3 and 4. An adjectival rating of outstanding was to be assigned if a proposal’s strengths far outweighed its weaknesses and the risk of unsuccessful performance was very low; a rating of good if strengths outweighed weaknesses, with a low risk of unsuccessful performance; a rating of acceptable if strengths and weaknesses were offsetting, and the risk of unsuccessful performance no worse than moderate; a rating of marginal if weaknesses were not offset by strengths, and the risk of unsuccessful performance high; and a rating of unacceptable if the proposal had deficiencies and was unawardable. Performance risk ratings were substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence.

² The selected contractor’s coefficients were to be multiplied by RS Means unit costs to arrive at task order prices. The *RS Means Facilities Construction Cost Data Book* is a trade publication that provides annually-updated construction cost information to assist professionals in estimating construction-related costs. See www.constructioncostestimating.net/rs-means-estimating.shtml.

³ As explained by the agency, the National Industrial Security Program (NISP) Operating Manual, Department of Defense (DoD) 5220.22-M, Feb. 28, 2006, provides the standards for the protection of classified information released or disclosed to industry in connection with classified contracts. AR, at 7 n.1. According to this manual, a facility clearance is “an administrative determination that a company is eligible for access to classified information or award of a classified contract.” NISP Operating Manual, at 2-1-1.

contractor would be required to provide “safeguarding” (i.e., classified storage capability) at the top secret level. RFP, amend. 3, at 6.

The agency received seven timely proposals, including those from TMG and JS Global. The record reflects that evaluation panels evaluated both the technical proposals and offerors’ proposed coefficients. A source selection evaluation board (SSEB) reviewed the evaluators’ findings and revised some of the ratings in accordance with its analysis of the proposals’ strengths and weaknesses. The SSEB rated the proposals of the protester and the awardee as follows:

	JS Global	TMG
TO Construction Contract Experience	Outstanding	Marginal
Historical/Monumental Buildings Experience	Good	Marginal
Past Performance--TO Constr. Contracts	Very Relevant/ Substantial Confidence	Relevant/ Satisfactory Confidence
Past Performance-- Historical/Monumental Buildings	Very Relevant/ Substantial Confidence	Somewhat Relevant/ Satisfactory Confidence
Work Plan	Outstanding	Good
Seed Project	Good	Good
Price Coefficient	1.2311	1.1823

Agency Report (AR), Tab 8, SSEB Report at 28.

Because TMG’s technical ratings and its aggregate weighted coefficient were lower than JSG’s, the source selection authority (SSA) performed a tradeoff analysis between the two proposals, and concluded that JSG’s proposal represented a better overall value to the government. In this regard, the SSA found that TMG had less relevant experience and past performance than JSG, which increased the risk to the government. The SSA further noted that TMG’s seed project price was significantly higher than both JSG’s price and the government estimate, which raised concerns that TMG’s slightly lower average coefficient might not “bring actual better value to the Government over the course of subsequent task orders.” Source Selection Decision at 17.

The agency awarded the contract to JSG on July 23, 2012, and notified the protester the following day. TMG requested a debriefing, which the agency furnished on August 15. TMG protested to our Office on August 17.

DISCUSSION

The protester alleges that all offerors, except itself, failed to meet the solicitation’s definitive responsibility security clearance requirements, thus rendering all

proposals, other than its own, ineligible for award. Specifically, TMG contends that the RFP required offerors to demonstrate that they possessed top secret level safeguarding clearance (top secret storage capability) approved by a cognizant security agency prior to award. In this connection, TMG asserts that the RFP's express requirement for a top secret facility clearance at the time of award, and the subsequent indication in Amendment 3 that "safeguarding is required at the Top Secret level" are "coextensive and must be read in conjunction with one another." Protester's Comments, Sept. 28, 2012, at 8. Accordingly, TMG contends, the requirement that compliance with the top secret facility clearance be demonstrated prior to award applied equally to the top secret storage capability requirement.

The agency and intervenor argue that the top secret storage capability requirement noted in amendment 3 was not a definitive responsibility requirement since the RFP did not expressly require offerors to demonstrate compliance with this capability prior to award. In this regard, they dispute the notion that the requirement for the contractor to provide "safeguarding at the top secret level," was coextensive with the separately stated pre-award requirement for a top secret facility clearance. The agency explains that while a contractor must have a facility clearance in order to apply for storage capability approval, the facility clearance determination is separate from storage capability approval--meaning that, for example, a contractor with a top secret facility clearance could be approved for storage capability at a level other than top secret. The agency further explains in this connection that there are many cases in which document safeguarding by the contractor is not necessary because physical control of documents remains with the agency. The agency also notes that the DD Form 254 (Contract Security Classification Specification) attached to the contract awarded to JSG here provided that the level of storage associated with the forthcoming task orders could vary from none to top secret, and that individual task orders would specify if classified storage were needed.

As a general matter, where a dispute exists as to the meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of the provisions; to be reasonable, an interpretation must be consistent with such a reading. ArmorWorks Enters. LLC, B-405450, Oct. 28, 2011, 2011 CPD ¶ 242.

Here, we agree with the agency and the intervenor that the requirement to possess a top secret facility clearance at the time of proposal submission did not imply a similar requirement for top secret safeguarding approval. In reaching this conclusion, we note that the solicitation did not include any language expressly linking the requirement for top secret safeguarding with the stated requirement that offerors possess a top secret facility clearance at the time of proposal submission. Moreover, it is apparent from the NISP Operating Manual that a facility clearance determination, which indicates access eligibility, is separate from a storage capability determination. This separation is evident where the manual establishes that a facility clearance affords contractors "access" to classified information,

whereas for a contractor to maintain “custody” of classified material, the contractor must have both a facility clearance and storage capability approved by a cognizant security agency. See NISP Operating Manual, at 2-1-1. Thus, notwithstanding the protester’s assertions to the contrary, the security requirements at issue were not “coextensive” and the solicitation’s specific pre-award requirement for a top secret facility clearance did not extend to the more general indication that the selected contractor will be required to provide safeguarding at the top secret level during contract performance.

Because the solicitation did not require offerors to possess top secret storage capability at the time of proposal submission, the requirement that the contractor be capable of providing top secret storage was not a definitive responsibility criterion as TMG has argued. See Rohmann Servs., Inc., B-405171, B-405171.2, Sept. 8, 2011, 2011 CPD ¶ 177 at 8 (the ability to obtain a security clearance generally is a matter of responsibility, absent an express requirement in the solicitation to demonstrate the ability prior to award). Rather, the only determination regarding a safeguarding clearance that the agency was required to make prior to contract award was that the prospective awardee had the capability to obtain the required level of clearance, a determination that the agency effectively made when it determined JSG responsible. See Ktech Corp.; Physical Research, Inc., B-241808, B-241808.2, Mar. 1, 1991, 91-1 CPD ¶ 237 at 3 (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).⁴

The protester also challenges the ratings assigned its proposal under the task order contract experience and seed project factors. TMG argues that the agency unreasonably rated its proposal as marginal under the former factor based on an erroneous finding that it had failed to demonstrate adequate RS Means estimating

⁴ The protester has not argued that JSG will be unable to obtain a safeguarding clearance; its argument was simply that JSG should have been required to demonstrate that it already had the clearance prior to award. We would not consider the former argument in any event, given that we do not consider challenges to affirmative determinations of responsibility, except in circumstances not present here. See Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2012). Moreover, it should be noted that under the Small Business Act, 15 U.S.C. § 637(b)(7) (2006), the Small Business Administration (SBA) has conclusive authority to determine the responsibility of small business concerns, such as JSG. In this regard, when a procuring agency finds that a small business is not eligible for award based on a nonresponsibility determination or a failure to satisfy definitive responsibility criteria, the agency is required to refer the matter to the SBA for a final determination under its certificate of competency procedures. Specialty Marine, Inc., B-292053, May 19, 2003, 2003 CPD ¶ 106 at 3.

experience. Similarly, the protester argues that the agency unreasonably rated its proposal as marginal under the seed project factor based on a finding that it improperly used a non-scheduled price when unit prices were available in RS Means.

In reviewing protests objecting to an agency's technical evaluation, our role is limited to ensuring that the evaluation was reasonable and consistent with the terms of the solicitation. KBS, Inc., B-402365.3, Feb. 2, 2011, 2011 CPD ¶ 37 at 5.

With regard to the protester's first complaint, the record shows that the weakness in dispute is only one of four weaknesses found by the evaluators under the task order contract experience factor. That is, in addition to attributing TMG's proposal a weakness based on its "minimal experience with RS Means," the evaluators also identified weaknesses based on the proposal's lack of detail regarding the types of construction involved in the protester's earlier projects, the poor organization of the protester's response, and the absence of verifiable SCADA [Secure Supervisory Control & Data Acquisition] experience.⁵ AR, Tab 7, Technical Evaluation Report, at 39. Because the record also reflects that the agency did not assign TMG's proposal any strengths under this factor, TMG's marginal rating was appropriate even without the finding of weakness that the protester disputes.⁶ Accordingly, we have no basis to question the protester's "marginal" rating under the task order contract experience factor.

Regarding the protester's second complaint, TMG has challenged one of three evaluated weaknesses assigned its proposal under the seed project factor. Id. at 44. Even assuming the protester is correct that the weakness in question was improper and it should have received higher than a marginal rating under the seed project factor, the record reflects that it would still have been lower-rated than the awardee's proposal under each of the other five factors. Since the RFP provided that technical factors were significantly more important than price in the determination of best value, we fail to see any reasonable possibility under these circumstances that the protester's proposal would have been selected for award notwithstanding the alleged error. Accordingly, we have no basis to sustain TMG's protest in this regard. See Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192 at 9-10 (competitive prejudice is an

⁵ The RFP instructed offerors that their earlier projects should demonstrate experience with a variety of different types of construction (e.g., electrical, plumbing, HVAC, security, and SCADA systems).

⁶ As noted above, the RFP provided for a "marginal" rating if weaknesses were not offset by strengths and there was a high risk of unsuccessful performance. See note 2, supra.

essential element of a viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain a protest).

The protest is denied.

Lynn H. Gibson
General Counsel