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Decision

Matter of: A.I.A. Costruzioni S.P.A.

File: B-289870

Date: April 24, 2002

Stuart B. Nibley, Esq., and Robert F. Pezzimenti, Esq., Seyfarth Shaw, for the protester.

Vicky E. O'Keefe, Esq., Naval Facilities Engineering Command, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation did not convert Italian anti-mafia certification statement into technical evaluation consideration, certification was matter of responsibility that could be submitted any time prior to award, even though solicitation required that it be submitted with proposal; agency therefore properly determined that it should not have rejected low-priced offeror's proposal solely for failure to include certification with initial proposal and, after that firm furnished the statement, properly terminated protester's contract and made award to low-priced offeror.

DECISION

A.I.A. Costruzioni S.P.A. protests the Department of the Navy's decision to terminate its contract, and instead award a contract to Lotos Costruzioni S.R.L., under request for proposals (RFP) No. N33191-00-R-0217, for construction work at the Naval Air Station II, Sigonella, in Sicily, Italy. AIA maintains that the agency improperly determined that it initially had wrongly rejected Lotos's proposal for failing to include a required Italian anti-mafia certificate.

We deny the protest.

The RFP advised that award would be made "on the basis of the lowest evaluated price," RFP at § 1.2(b), at 120, and contemplated award without discussions. The RFP required offerors to submit, with their proposals, a current "Certificato Iscrizione alla Camera di Commercio, Industria, Agricoltura ed Artigianato" (hereinafter, CCIAA). *Id.*, § 1.8 (c)(2), at 201-6. The CCIAA certificate, which is issued by the Italian Chamber of Commerce, provides basic information about the company, and also includes a statement (hereinafter, a "nulla osta" statement) that

the named contractor has not violated Italian anti-mafia laws, and is eligible to perform on public contracts. Protest at 4. (In the alternative, the contractor could provide a Family Status and Resident Certificate for each firm member as listed in the Chamber of Commerce Certificate of Membership.)

Lotos submitted the low-priced offer, but its CCIAA certificate did not include the nulla osta statement (or a Family Status and Resident Certificate). Agency Report (AR) at 2. The Navy rejected Lotos's offer on this basis and made award to AIA, whose price was next low. Subsequently, Lotos protested to the Navy that its proposal should not have been rejected but, rather, that it should have been permitted to submit the nulla osta statement any time prior to award. The Navy agreed; deciding that the nulla osta statement was a matter of responsibility, it concluded that it should have permitted Lotos to submit it even though it was not included with its initial proposal. AR at 3. The Navy therefore permitted Lotos to submit the statement, and then terminated AIA's contract and made award to Lotos.

AIA protests that the Navy improperly determined that Lotos's nulla osta statement was a matter of responsibility, and that it therefore could be submitted up until the time of award. Specifically, AIA argues that, because the solicitation required the statement to be submitted with the initial proposal, Lotos's proposal properly was rejected for failure to include it. AIA concludes that its contract should be reinstated.

Matters of an offeror's integrity, such as involvement in criminal activities, generally concern the offeror's responsibility. Federal Acquisition Regulation (FAR) § 9.104-1(d); see Coast Waste Mgmt., Inc., B-251167.3, June 10, 1993, 93-1 CPD ¶ 460 at 4. However, in a negotiated procurement, an agency generally may incorporate traditional responsibility criteria as technical evaluation criteria, and then evaluate proposals under that criterion according to the rules established for technical evaluations. McLaughlin Research Corp., B-247118, May 5, 1992, 92-1 CPD ¶ 422 at 4. The question here, then, is whether the nulla osta statement requirement was converted into a technical evaluation matter that warranted rejecting Lotos's proposal as unacceptable.

There is nothing in the RFP indicating that the agency intended to convert the nulla osta statement into a matter of technical acceptability. Rather, it is fairly clear from the RFP that the agency viewed the entire CCIAA certification as a responsibility matter. In this regard, the solicitation provided that "[e]ach offeror must submit (1) an offer, (2) other information to be used in the determination of responsibility." RFP, § 1.8, at 201-6(a). The "other information" required under (2) was listed under section 1.8(c), and this listing included the CCIAA certificate. RFP, § 1.8(c) at 201-6. Since the RFP identified the CCIAA certificate, which was to include the nulla osta statement, as information to be used in determining responsibility, the agency properly concluded that it could be submitted up until the time of award, despite the

solicitation requirement that it be submitted with the proposal. See NFI Mgmt. Co., B-238522, B-238522.2, June 12, 1990, 90-1 CPD ¶ 548 at 5. It follows that the agency properly provided Lotos an opportunity to submit the statement, and properly terminated AIA's contract after Lotos submitted it.

AIA asserts that, notwithstanding the designation of the solicitation as an RFP, the solicitation was structured as an invitation for bids (IFB), and that we should treat it as such. Specifically, it maintains that the nulla osta statement should be considered a matter of responsiveness, and thus had to be included in the initial offer, since that is the legal status we accorded procurement integrity certifications formerly required under the Office of Federal Procurement Policy Act, 41 U.S.C. § 423(e)(1) (1994) (the certification requirement was eliminated by Pub. L. No. 104-106, § 4304, 110 Stat. 642, 659-665 (1996); Sonic Dry Clean, Inc., B-275929, Apr. 21, 1997, 97-1 CPD ¶ 145 at 4 n.4).

This argument is without merit. Since this acquisition was designated as a negotiated, not a sealed bid, procurement, the concept of responsiveness does not apply.¹ See Blocacor, LDA, B-282122.3, Aug. 2, 1999, 99-2 CPD ¶ 25 at 2 n.1. In negotiated procurements, the procurement integrity certification was not required to be furnished by offerors with their proposals; rather, only the successful offeror was required to furnish it. See Worldwide Servs., Inc./Perry Mgmt. Corp., a Joint Venture, B-261113, Aug. 18, 1995, 95-2 ¶ 73 at 2-3. We further note that we considered the procurement integrity certification a matter of responsiveness in sealed bid procurements only because the terms of the certificate imposed substantial legal obligations on the contractor (including reporting any violations), to which it would not be bound without a completed certification. See Mid-East Contractors, Inc., B-242435, Mar. 29, 1991, 91-1 CPD ¶ 342 at 6. The nulla osta statement here imposed no such legal obligations on the contractor.

The protest is denied.

Anthony H. Gamboa
General Counsel

¹ To the extent AIA believes the procurement should have been conducted on a sealed bid basis, the protest relates to an alleged solicitation impropriety. Such allegations must be filed prior to the closing date for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2002); Fiber-Lam, Inc., B-237716.2, Apr. 3, 1990, 90-1 CPD ¶ 351 at 5.