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Decision

Matter of: TYBRIN Corporation

File: B-298364.6; B-298364.7

Date: March 13, 2007

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Maj. John G. Terra, and Martin C. O'Brien, Esq., Department of the Air Force, and John W. Klein, Esq., and Laura Mann Eyester, Esq., United States Small Business Administration, for the agencies.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's award of a contract under a solicitation set aside for small businesses was improper where the awardee's proposal as submitted clearly did not meet the material solicitation requirement that at least 50 percent of the cost of contract performance incurred for personnel be expended for employees of the small business awardee, notwithstanding the United States Small Business Administration's (SBA) issuance of a Certificate of Competency to the small business awardee because SBA found that the awardee would be able to comply with the subcontracting limitation during the performance of the contract.

DECISION

TYBRIN Corporation protests the award of a contract to The CENTECH GROUP under request for proposals (RFP) No. FA9300-04-R-0040, issued by the Department of the Air Force, for advisory and assistance services to support the Aerospace Research, Development, Test and Evaluation (RDT&E) activities at the Air Force Flight Test Center, Edwards Air Force Base, California. TYBRIN argues, among other things, that CENTECH's proposal was unacceptable because it exceeded the limitation on subcontracting included in the RFP.

We sustain the protest.

The RFP, issued on February 28, 2005 as a total small business set-aside, provided for the award of a contract for the Aerospace Research, Development, Test and Evaluation Advisory and Assistance Services (ARDTEAS) program. The ARDTEAS program provides “non-personal advisory and assistance services” to support the RDT&E activities at the Flight Test Center. RFP at 3. The solicitation’s performance requirements document (PRD) described the numerous tasks to be performed by the successful contractor, including, for example, the provision of “assistance with business management in support of ground test, flight test and other associated test and support activities,” the support of “all phases of acquisition from identification of needs through contract performance,” as well as the provision of systems engineering and technical assistance “required to support ground and flight test and related activities.” RFP PRD at 4-5, 8.

The RFP provided for the award of a “hybrid” contract on a cost-plus-fixed-fee basis for the non-personal advisory and assistance services, a cost basis for other direct costs such as travel and materials, and a fixed-price-plus-award-fee basis for the phase-in period. The solicitation stated that award of the contract would be made to the offeror submitting the proposal representing the best value to the government, based upon various identified evaluation factors.

The RFP incorporated by reference the “Notice of Total Small Business Set-Aside” clause, Federal Acquisition Regulation (FAR) § 52.219-6, and the “Limitation on Subcontracting” clause, FAR § 52.219-14. RFP at 29. These clauses put the offerors on notice that the procurement was set aside exclusively for small business concerns, and with respect to the limitations on subcontracting, that “[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.” FAR § 52.219-14(b)(1).

The agency received proposals from four small business offerors, including TYBRIN and CENTECH. The proposals were evaluated, discussions were conducted, and final proposal revisions were requested and received from the four offerors. The agency selected CENTECH’s proposal for award, and after requesting and receiving a debriefing, TYBRIN filed a protest with our Office on May 26, 2006, challenging virtually every aspect of the agency’s evaluation of proposals and the selection of CENTECH’s proposal for award. After receiving the agency report in response to its protest, TYBRIN filed supplemental protests with our Office on June 29, July 6, and July 14.

In its first supplemental protest, filed on June 29, TYBRIN argued, among other things, that CENTECH’s proposal should have been found unacceptable by the agency because the proposal provided that approximately 44 percent of the cost of contract performance incurred for personnel would be for CENTECH personnel, with the remaining 56 percent of the cost of contract performance for personnel being incurred for CENTECH’s subcontractors.

In response, the Air Force conceded that CENTECH's proposal provided that only 43.2 percent of the cost of contract performance incurred for personnel would be for CENTECH personnel. The Air Force noted, however, that two of CENTECH's proposed subcontractors were also small businesses, and that an additional 23 percent of the cost of contract performance incurred for personnel would be for the personnel of these two small businesses. The Air Force concluded that because CENTECH's proposal provided that the "collective efforts" of CENTECH and its small business subcontractors would amount to "66.2% of the cost of contract performance for personnel," the proposal evidenced compliance with the Limitation on Subcontracting clause. Agency Report (AR) (B-298364.2) at 2; Contracting Officer's Statement (B-298364.2) at 4.

As support for this conclusion, the Air Force pointed to a memorandum issued by the Air Force Materiel Command (AFMC) on August 17, 2004, entitled "Policy Coverage and Rationale for Interpretation to Allow Small Business Prime Contractors and First Tier Small Business Subcontractors to Perform the Minimum Work in the 'Limitation on Subcontracting' Rule." This memorandum provided an analysis of the Limitation on Subcontracting clause, FAR § 52.219-14(b)(1), and essentially concluded that the performance of work requirement imposed by that clause could be "met by the cooperative efforts of the small business prime contractor and the small business members of the subcontractor group." AR (B-298364.2), Tab 77, AFMC Memorandum (Aug. 17, 2004), at 3.¹

Our Office solicited the views of the United States Small Business Administration (SBA) on this matter. The SBA advised that, contrary to the AFMC Memorandum, "in general, a small business receiving a prime contract award as a result of a solicitation set aside for [small business concerns] must meet the subcontracting limitation set forth in statute and regulations itself." SBA Memorandum (Aug. 2, 2006) at 8. In this regard, the Small Business Act provides that a concern may not be awarded a contract "as a small business concern unless the concern agrees that-- (A) in the case of a contract for services (except construction), at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern." 15 U.S.C. § 644(o) (2000); see also 13 C.F.R. § 125.6(a)(1) (2006) (SBA's regulations implementing this statute).

Shortly after its receipt of the SBA's memorandum, the Air Force informed our Office and the parties that it had "decided to reconsider whether CENTECH meets the requirements for award of the contract . . . to include the standards articulated in SBA's [memorandum]," and that the Air Force would "stay performance on this

¹ The AFMC policy memorandum setting forth the Air Force's interpretation of the Small Business Act's limitation on subcontracting by small business concerns was posted on the Federal Business Opportunities web site on August 20, 2004. AR (B-298364.2) at 3.

contract until this issue is resolved.” AR (B-298364.6), Tab 5, Notice of Corrective Action. Given that, as a result of the Air Force’s corrective action, it was no longer clear whether CENTECH would remain the awardee, our Office dismissed TYBRIN’s protests as academic.²

The cognizant Air Force contracting officer subsequently executed a “Determination of Non-Responsibility,” stating that “[b]ased solely on the information received from [CENTECH] with [its] proposal, CENTECH will perform 43.2% of the work with personnel of their concern.” The contracting officer concluded here “that CENTECH does not meet the subcontracting limitation requirements as set forth in statute and regulation and as such is considered nonresponsible and is not eligible to receive the contract award for the ARDTEAS effort.” AR (B-298364.6), Tab 9, Determination of Non-Responsibility.

Two days later, the contracting officer informed CENTECH that “[b]ased solely on the information received with your proposal, CENTECH will perform 43.2% of the work,” and that because of this, “the CENTECH GROUP does not meet the subcontracting limitation requirements set forth in statute and regulation.” This memorandum added that the Air Force had “decided to rescind the award” of the contract to CENTECH, and that the matter of CENTECH’s compliance with the subcontracting limitation would be referred to the SBA for consideration under the SBA’s certificate of competency (COC) procedures. AR (B-298364.6), Tab 10, Memorandum from the Contracting Officer to CENTECH, Rescission of Contract (Sept. 8, 2006).

By memorandum dated September 15, 2006, the Air Force referred the matter of CENTECH’s compliance with the subcontracting limitation to the SBA for consideration under the SBA’s COC procedures. In this memorandum, the contracting officer, consistent with her prior determination, informed the SBA that based “solely on the information received with CENTECH’s proposal, the Air Force has determined that CENTECH will perform 43.2% of the work,” and that “the two small business subcontractors will perform 18.1% and 4.9% respectively for a total small business performance of 66.2%.” The memorandum added that the contracting officer had “found that the CENTECH GROUP did not meet the subcontracting limitation requirements set forth in statute and regulation and on 5 September 2006, rescinded the award.” AR (B-298364.6), Tab 12, Request for COC (Sept. 15, 2006), at 2.

By letter dated December 4, 2006, the SBA, while conceding that “the Centech Group’s numbers” set forth in its proposal provided that “around 42%” of the cost of contract performance incurred for personnel would be expended for CENTECH employees, nevertheless informed the Air Force that, in the SBA’s view, CENTECH

² The Air Force subsequently rescinded the AFMC policy memorandum.

would indeed comply with the subcontracting limitation during its performance of the contract, and that the SBA found CENTECH responsible and had issued a COC to CENTECH. This conclusion was based in part on the SBA's consideration of material provided by CENTECH during the COC process (including its plans for staffing the contract), from which the SBA found that CENTECH would be able to meet this limitation. AR (B-298364.6), Tab 16, SBA COC and Rationale.³

On December 21, 2006, the Air Force reinstated the award to CENTECH based upon the SBA's issuance of the COC. AR (B-298364.6), Tab 19, Air Force Memorandum to CENTECH Reinstating Award. These protests followed.

TYBRIN argues that because CENTECH's proposal clearly provided that only 43.2 percent of the cost of contract performance incurred for personnel would be expended for CENTECH employees, the proposal should have been evaluated as unacceptable by the Air Force, such that CENTECH's proposal could not form the basis for award. We agree.

As a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility for review by the SBA. See 13 C.F.R. § 125.6(f); Spectrum Sec. Servs., Inc., B-297320.2; B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. However, our Office has consistently held that where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. Continental Staffing, Inc., B-299054, Jan. 29, 2007, 2007 CPD ¶ 18 at 6; KIRA Inc., B-287573.4; B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3; National Med. Staffing, Inc.; PRS Consultants, Inc., B-238694; B-238694.2, June 4, 1990, 90-1 CPD ¶ 530 at 4. Our Office has also long held that a proposal that fails to conform to a material term or condition of the solicitation, including the subcontracting limitation, is unacceptable and may not form the basis for an award. KIRA Inc., supra; National Med. Staffing, Inc.; PRS Consultants, Inc., supra, at 3-4 (sustaining protest that the award of a contract was improper where the awardee's proposal evidenced noncompliance with the subcontracting limitation); see Vanderbilt Shirt Co., B-236016, Oct. 10, 1989,

³ The record reflects that in accordance with the SBA's COC procedures, CENTECH applied for a COC, and its application (which was considered by the SBA in issuing the COC) included numerous documents not included in CENTECH's proposal, such as narratives, a "compliance matrix," and spreadsheets, all of which purported to demonstrate that CENTECH would comply with the requirements of the Limitation on Subcontracting clause during its performance of the ARDTEAS contract. SBA Report (B-298364.6), Tab B, CENTECH COC Application (Sept. 29, 2006). The record also includes an additional submission by CENTECH to the SBA, submitted at the SBA's request, which included "new analysis and detail." SBA Report (B-298364.6), Tab A(2), CENTECH Submission to SBA (Oct. 31, 2006).

89-2 CPD ¶ 333 at 2 (agency properly rejected the protester's bid as nonresponsive where the bid provided that the protester would not comply with the subcontracting limitation).

As set forth above, the record establishes that it was clear to the Air Force that CENTECH's proposal as submitted and as evaluated provided that 43.2 percent of the cost of contract performance incurred for personnel would be expended for CENTECH employees and, accordingly, that "the CENTECH GROUP did not meet the subcontracting limitation requirements set forth in statute and regulation." AR (B-298364.6), Tab 9, Determination of Non-Responsibility; see Tab 10, Memorandum from the Contracting Officer to CENTECH, Rescission of Contract (Sept. 8, 2006); Tab 12, Request for COC (Sept. 15, 2006); AR (B-298364.2) at 2; Contracting Officer's Statement (B-298364.2) at 4. Given the Air Force's determination that CENTECH's proposal failed to comply with a material term of the solicitation (the subcontracting limitation) and, accordingly, that the proposal could not form the basis for award under the RFP, the agency should have found CENTECH's proposal to be unacceptable, rather than finding CENTECH nonresponsive and forwarding the matter to the SBA for its consideration. See Continental Staffing, Inc., supra; National Med. Staffing, Inc.; PRS Consultants, Inc., supra.

The fact that the SBA has now determined CENTECH to be a responsible contractor does not alter our view here. Although the SBA's determinations of responsibility and its issuance of COCs are generally not for review by our Office, Bid Protest Regulations, 4 C.F.R. § 21.5(b)(2) (2006), the issues of a proposal's acceptability and the award of a contract to an offeror based upon a proposal that fails to comply with a material term of a solicitation are matters initially within the purview of the contracting agency and subject to review by our Office. See, e.g., L-3 Communications Westwood Corp., B-295126, Jan. 19, 2005, 2005 CPD ¶ 30 at 5; CACI Techs., Inc., B-296946, Oct. 27, 2005, 2005 CPD ¶ 198 at 5.

The SBA disagrees with our Office's view that where a proposal, on its face, should lead the contracting agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability, rather than the offeror's responsibility. SBA Submission (Jan. 23, 2007) at 4. Specifically, the SBA points out here that "[w]ith respect to whether or not a [small business concern] will meet its subcontracting limitation requirement, the SBA's regulations provide that '[c]ompliance will be considered an element of responsibility.'" Id.; see 13 C.F.R. 125.6(f). Again, as set forth above, the issue here does not concern whether a bidder or offeror can or will comply with the subcontracting limitation requirement during performance of the contract (where we recognize that the matter is one of responsibility (or in certain cases, contract administration, see, e.g., Raloid Corp., B-297176, Nov. 10, 2005, 2005 CPD ¶ 205 at 4)), but rather, whether the bidder or offeror has specifically taken exception to the subcontracting limitation requirement on the face of its bid or proposal. Given that the determination in this latter, limited circumstance involves the evaluation of a

bid or proposal for compliance with a material term of the solicitation, the determination is one of responsiveness or acceptability, rather than responsibility. Continental Staffing, Inc., supra; KIRA Inc., supra; National Med. Staffing, Inc.; PRS Consultants, Inc., supra; Vanderbilt Shirt Co., supra.

Accordingly, we sustain the protest on this basis. While we find that CENTECH's proposal could not form the basis for award under this RFP, the record reflects that CENTECH submitted its proposal with the understanding that it would be found to meet or exceed the subcontracting limitation requirement, given the AFMC memorandum that allowed for the performance of work requirement imposed by the Limitation on Subcontracting clause to be met by the "cooperative efforts" of CENTECH and its small business subcontractors. Additionally, although discussions were held with the four offerors that had submitted proposals, the matter of CENTECH's proposal's compliance with the requirements of the Limitation on Subcontracting clause was never raised with CENTECH during discussions because of the Air Force's reliance on the AFMC memorandum. Accordingly, CENTECH was deprived of meaningful discussions regarding its proposal's failure to comply with the requirements of the Limitation on Subcontracting clause. See FAR § 15.306(d)(3); Lockheed Martin Corp., B-293679 et al., May 27, 2004, 2004 CPD ¶ 115 at 7; see Special Operations Group, Inc., B-287013; B-287103.2, Mar. 30, 2001, 2001 CPD ¶ 73 at 7 (awardee whose proposal should have been rejected for failing to comply with a material term of the solicitation was deprived of meaningful discussions where this issue was not raised by the agency during its conduct of discussions).

We recommend that the Air Force reopen discussions and request and review revised proposals, evaluate those submissions consistent with the terms of the solicitation, and make a new source selection decision.⁴ In the event a proposal other than CENTECH's is found to represent the best value to the government, CENTECH's contract should be terminated and the contract awarded to the successful offeror in accordance the terms of the RFP. We also recommend that the

⁴ Because we sustain TYBRIN's protest and recommend the reopening of discussions, we need not resolve TYBRIN's allegations regarding the evaluation of its and CENTECH's proposals and the selection of CENTECH's proposal for award, or its allegations that the evaluation evidences bias against TYBRIN, that CENTECH has an organizational conflict of interest that renders it ineligible for award, that CENTECH was improperly permitted by the SBA to alter its proposal and status after the agency had received and evaluated the offerors' proposal revisions, or that the Air Force had deprived TYBRIN of meaningful discussions. However, as the Air Force proceeds with its corrective action, it may want to be mindful of the issues raised by TYBRIN in its protests, including TYBRIN's assertion that the agency failed to adequately consider potential organizational conflicts of interest related to [DELETED] (one of TYBRIN's proposed subcontractors).

agency reimburse TYBRIN for its costs of filing and pursuing its protest challenging the award to CENTECH, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). TYBRIN's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the Air Force within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Gary L. Kepplinger
General Counsel