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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:** MANCON

**File:** B-405663

**Date:** February 9, 2012

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Michael L. Sterling, Esq., William M. Dozier, Esq., and William E. Franczek, Esq., Vandeventer Black LLP, for the protester.

Gregory Kreuzberg, Esq., Department of the Navy, for the agency.

Gary R. Allen, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

In a negotiated procurement that provided for the evaluation of small business subcontracting plans on a pass/fail basis, the rejection of the protester's proposal as technically unacceptable on the basis of the acceptability of its small business subcontracting plan was unreasonable.

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### DECISION

Management Consulting Inc. d/b/a MANCON, of Virginia Beach, Virginia, protests the rejection of its proposal under request for proposals (RFP) No. N00189-11-R-0006, issued by the Department of the Navy for the operation of a retail store at the Naval Air Station Norfolk, Virginia.

We sustain the protest.

### BACKGROUND

The RFP provided for the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for the operation of a walk-in retail store (the Norfolk Super SERVMART) for a base year and 4 option years. A detailed performance work statement (PWS) was provided that described the required services. See RFP, PWS, at 8-29. In addition to operating the SERVMART, the contractor will operate a mobile store to service government activities in the Hampton Roads area; provide free delivery within the area; and operate an internet store. PWS at 9.

Offerors were informed that award would be made on a best-value basis, considering the following evaluation factors: technical performance plan, past performance, socio-economic, and price. RFP amend. 4, at 2. The technical performance plan factor was stated to be more important than the past performance factor, and both factors combined were more important than price. Id. Offerors were informed that the socio-economic factor would be evaluated on a pass/fail basis. Id. at 4.

The RFP instructed offerors to submit a separate volume for each of the evaluation factors. In addition, offerors were required to submit either a Standard Form 1449 or an Online Representations and Certifications Application, the completion and submission of which would “indicate the offeror’s unconditional assent to the terms and conditions of the solicitation and any attachments hereto.” RFP at 73. With respect to the socio-economic factor (volume IV), the RFP required offerors to submit a small business subcontracting plan as described by Federal Acquisition Regulation (FAR) clause 52.219-9 Alternate II, addressing specific elements identified in FAR § 19.704(a)(1)-(11).<sup>1</sup> RFP at 76. As relevant here, FAR § 19.704(a)(10) requires that offerors’ small business subcontracting plans include “assurances” that the offeror will:

(v) Provide its prime contract number and its DUNS number and the e-mail address of the Government or Contractor official responsible for acknowledging or rejecting the reports, to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS<sup>2</sup> when submitting their reports; and

(vi) Require that each subcontractor with a subcontracting plan provide the prime contract number and its own DUNS number, and the e-mail address of the Government or Contractor official responsible for acknowledging or rejecting the reports, to its subcontractors with subcontracting plans.

The Navy received proposals from {deleted} offerors, including MANCON’s (the incumbent contractor). MANCON’s proposal was rated [deleted](the [deleted] rating) under the technical performance plan and past performance factors.

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<sup>1</sup> FAR § 19.702 implements the requirements of the Small Business Act (15 U.S.C. § 637(d)) for submission and negotiation of small business subcontracting plans. With respect to negotiated acquisitions, solicitations for contracts over a certain dollar threshold that have subcontracting possibilities “shall require the apparently successful offeror” to submit an acceptable subcontracting plan, and if such offeror fails to negotiate a plan acceptable to the contracting officer within the time limit set by the contracting officer, the offeror will be ineligible for award. FAR § 19.702(a)(1).

<sup>2</sup> “eSRS” is an electronic subcontracting reporting system. See <http://www.esrs.gov/>.

However, MANCON's proposal was found unacceptable under the socio-economic factor, because the agency found that it did not provide the exact assurances concerning its small business subcontracting plan contained in FAR § 19.704(a)(10) (v) and (vi). AR, Tab 14, Contract Review Presentation, at 19.

The agency conducted discussions with the offerors. MANCON was informed, among other things, that it had failed to provide assurances with respect to the requirements in subparagraphs (v) and (vi) of FAR § 19.704(a)(10).<sup>3</sup> AR, Tab 15, Discussions Letter, attach. at 2. In response to discussions, MANCON submitted a revised socio-economic factor volume. AR, Tab 16, at 7. Rather than reciting verbatim sections (v) and (vi), MANCON assured the agency that its first-tier subcontractors would comply with the provisions of section 19.704(a)(10) and clause 52.219-9(d)(10) of the FAR; that it had contacted and confirmed that its subcontractors would report their small business sales through eSRS; and that its subcontractors would provide summary reports to MANCON to the effect that eSRS reporting had been completed. Id.

Following discussions, the Navy concluded that MANCON's proposal was still unacceptable under the socio-economic factor. In this regard, the contracting officer states that because the acceptability of offerors' small business subcontracting plans was evaluated under the socio-economic factor, it was a matter of technical acceptability, not responsibility. She also stated that she could not further discuss the issue with MANCON without reopening discussions with all of the offerors. Contracting Officer's Statement at 12. MANCON's proposal was rejected as technically unacceptable. Following a debriefing, MANCON protested to our Office.

## DISCUSSION

MANCON challenges the agency's rejection of its proposal as unacceptable, arguing that since the RFP's small business subcontracting plan evaluation factor was to be assessed on a pass/fail basis, the matter concerns the firm's responsibility, and not the evaluation of its technical acceptability. Protest at 19-21. MANCON also contends that the agency unreasonably determined that the firm had not provided adequate assurance that its subcontractors would comply with all of the requirements of FAR § 19.704.

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<sup>3</sup> The Navy conducted both written and oral discussions. The record contains no documentation of the oral discussions. Although the contracting officer contends that MANCON stated during oral discussions that it "understood the issues related to the missing elements of the small business subcontracting plan," she does not state how the agency addressed this issue (other than to note that the conversation focused on other matters). Contracting Officer's Statement at 10.

We agree with MANCON. Because the requirement for an acceptable small business subcontracting plan generally is applicable to the “apparently successful offeror,” this requirement relates to an offeror’s responsibility, even where the solicitation requests the offeror to submit its plan with its offer. See, e.g., General Dynamics-Ordnance & Tactical Sys., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 at 10; see also Southwest Mobile Sys. Corp., B-223940, Aug. 21, 1986, 86-2 CPD ¶ 213 at 2. In addition, while an agency may provide for the technical evaluation of responsibility-type factors, such as a small business subcontracting plan, it may only do so when it is making a comparative assessment of those plans. See Computer Sciences Corp.; Unisys Corp.; Northrop Grumman Info. Tech., Inc.; IBM Business Consulting Services-Federal, B-298494.2 et al., May 10, 2007, 2007 CPD ¶ 103 at 10. A comparative evaluation means that competing proposals will be rated on a scale relative to each other rather than on a pass/fail basis. Zolon Tech, Inc., B-299904.2, Sept. 18, 2007, 2007 CPD ¶ 183 at 8. Here, the plans were evaluated on a pass/fail basis, and therefore, the agency’s evaluation of those plans concern an offeror’s responsibility.

Responsibility is to be determined based upon information received by the agency up to the time award is proposed to be made. PMO Partnership Joint Venture, B-401973.3, B-401973.5, Jan. 14, 2010, 2010 CPD ¶ 29 at 5. The determination of a prospective contractor’s responsibility rests within the broad discretion of the contracting officer, who, in making that decision must rely upon his or her business judgment in exercising that discretion. We therefore generally will not question a negative determination of responsibility unless the determination lacked any reasonable basis. Id.; see also Torres Int’l, Inc., B-404940, May 31, 2011, 2011 CPD ¶ 114 at 4. A negative responsibility determination will not be found to be reasonable where it is based primarily on unreasonable or unsupported conclusions. PMO Partnership Joint Venture, supra., at 6.

Here, it appears that the agency’s insistence upon the use of the exact wording concerning the provision of DUNS numbers and addresses so that its subcontractors can properly report certain information puts undue emphasis on form over substance. The record nowhere indicates that MANCON did not intend to comply with these sections. Rather, MANCON’s revised submission assures the agency that its first-tier subcontractors will comply with all of FAR § 19.704(a)(10), confirms that the subcontractors will report their small business sales in eSRS and confirms that summary reports will be provided once eSRS reporting has been completed. See MANCON Revised Volume IV at 8. Other than stating that MANCON failed to parrot the exact language of section 19.704(a)(10) of the FAR, see Navy Response to Comments at 2, the Navy does not explain why MANCON’S assurances were inadequate.

We also believe that the agency erred in its belief that further exchanges with MANCON concerning its subcontracting plan would constitute discussions. We have found that where acceptability of a small business subcontracting plan is a responsibility issue, exchanges between the agency and an offeror concerning such

plans are not discussions. General Dynamics-Ordnance & Tactical Sys., supra. To the extent that the contracting officer believed the agency needed additional assurances from MANCON, these communications would not have constituted discussions requiring the reopening of discussions with all offerors. Therefore, the contracting officer's refusal to have further communication with MANCON was based primarily upon the unreasonable and unsupported conclusion that such an exchange would constitute discussions.

#### CONCLUSION AND RECOMMENDATION

In sum, we find that the Navy failed to recognize that the adequacy of the protester's small business subcontracting plan was a matter of responsibility, and unreasonably rejected MANCON's proposal as technically unacceptable. We recommend that the Navy include MANCON's proposal in the competition and consider the firm's responsibility consistent with this decision. We also find that MANCON is entitled to the costs of pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (2011). MANCON's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson  
General Counsel