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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Jay Shapiro & Associates, Inc.

File: B-411174

Date: June 5, 2015

Jay Shapiro, Jay Shapiro & Associates, Inc., for the protester.
Robert J. McCall, Esq., General Services Administration, for the agency.
Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contention that agency improperly failed to award a contract to the protester, after the Small Business Administration issued the protester a Certificate of Competency, is denied where the agency's subsequent decision to award contracts to firms other than the protester was not based on matters relating to the protester's responsibility.

DECISION

Jay Shapiro & Associates, Inc. (JS&A), of Far Hills, New Jersey, a small business, protests the decision by the General Services Administration (GSA) to not award it one of the multiple contracts awarded under request for proposals (RFP) No. GS-03P-14-DX-C-0031 for construction management services. JS&A asserts that it should have received one of the anticipated awards because the Small Business Administration (SBA) issued the protester a Certificate of Competency (COC).¹

We deny the protest.

¹ A COC is a written decision issued by the SBA to a contracting officer certifying that a small business concern is responsible for the purpose of receiving and performing a government contract. Federal Acquisition Regulation (FAR) § 19.601; 13 C.F.R. § 125.5(a).

BACKGROUND

The RFP, issued on July 2, 2014, contemplated the award of two categories of multiple-award indefinite-delivery, indefinite-quantity (ID/IQ) contracts: one group of multiple-award contracts would be set aside for small businesses, and anticipated the issuance of task orders valued at less than \$750,000 or less; the second group of multiple-award contracts would be awarded on an unrestricted basis, and anticipate the issuance of task orders valued at over \$750,000. RFP at 9 and 221. The RFP contemplated awards for a 1-year base period with four 1-year options. Id. at 8. This protest concerns the unrestricted component, as JS&A elected to compete only for the unrestricted component.²

The RFP stated that contract awards would be made on a “best value” basis. Proposals submitted in response to the unrestricted component of the RFP were to be assessed under the following technical factors and weights: (1) relevant past experience (30 percent), (2) relevant firm past performance (30 percent), (3) management plan (20 percent), (4) key personnel (10 percent), and (5) small business subcontracting methodology (10 percent). RFP at 221; AR, Tab 12, Final SSEB Report at 2. The RFP stated that the agency would calculate prices by adding the total price for all options to the total price for the base period. Id. at 228. For purposes of award, the solicitation stated that the non-price factors were approximately equal in importance to price. Id.

Seventeen firms, including JS&A, responded to the RFP for the unrestricted component of the procurement, by the August 6 due date. The agency’s source selection evaluation board (SSEB) evaluated the technical proposals. Based on a price evaluation they considered only offerors’ base year prices, the source selection authority determined that five offerors, including JS&A, offered the best value. Agency Report (AR), Tab 4, Evaluation of Base Year Pricing. The contracting officer, however, found that JS&A was not a responsible contractor after reviewing the firm’s financial resources, and referred the protester to the SBA for a COC review. AR, Tab 8, GSA Request for COC for JS&A (Nov. 25, 2014). The SBA concluded that JS&A was a responsible contractor, and informed GSA that a COC had been issued to the protester. AR, Tab 9, SBA Notification of COC for JS&A (Dec. 17, 2014).

² Our Office did not issue a protective order in connection with this protest because JS&A elected not to retain counsel who could be admitted to a protective order. A redacted version of the agency report was furnished to the protester. Consequently, our discussion regarding the agency’s evaluation of offerors’ proposals is general in nature because information in those evaluations and the source selection decision reference materials may be proprietary to the offerors.

In late December 2014, a new contracting officer and source selection authority were assigned to this procurement. AR at 4. After reviewing the evaluation, the new agency officials concluded that the evaluations and award decisions were flawed because they did not rely on total evaluated prices, as required by the solicitation, but instead were based on an evaluation of base year pricing. Contracting Officer Statement at 3. The agency also found another error regarding the evaluation of another offerors' past performance. Id. After correcting these errors, the agency made new award decisions, concluding that five proposals merited award; JS&A was not selected for award. AR, Tab 14, Source Selection Decision (Jan. 26, 2015), at 4. The agency's evaluation of the proposals of the five awardees and JS&A were as follows:³

	Total Evaluated Price	Overall Technical Evaluation Score⁴
AFG, Group	\$22,586,180.81	Very Good
Jacobs Project Mgmt.	\$22,876,290.99	Very Good
JS&A	\$23,042,544.67	Very Good
Hill Int'l, Inc.	\$23,682,806.17	Exceptional
Heery Int'l, Inc.	\$23,769,399.00	Very Good
URS Group	\$24,188,017.49	Exceptional

AR, Tab 14, Source Selection Decision (Jan. 26, 2015), at 2; AR, Tab 16, GSA Debriefing for JS&A (Feb. 20, 2015). JS&A was notified of the awards to these firms, and, after a timely debriefing, this protest to our Office followed.

DISCUSSION

JS&A contends that GSA had determined that JS&A was in line to receive one of the awards, as evidenced by its referral of the firm's responsibility to the SBA for a COC review. JS&A argues therefore that because the SBA subsequently issued a COC to the protester, GSA "had an obligation" to make the award to the protester. Protester's Comments (April 8, 2015), Attach. A, at 14. For the reasons discussed below, we find no merit to this argument. Additionally, as discussed below, the protester raises other untimely arguments concerning the evaluation of proposals and the award decision, which we dismiss.

³ The SSEB assigned the proposals overall technical ratings of excellent, very good, acceptable, marginal, poor or neutral. AR, Tab 12, Final SSEB Report, Appendix A.

⁴ For each proposal, the SSEB assigned a consensus rating for each non-price evaluation factor and then assigned an overall rating, based on the ratings and weight/importance for the individual factors. AR, Tab 12, Final SSEB Report at 42.

A contracting officer may not make an award to an offeror unless it is found to be responsible. FAR § 9.103(a). In making a responsibility determination, the contracting office must determine, among other things, that the contractor has “adequate financial resources to perform the contract, or the ability to obtain them.” FAR § 9.104-1(a). Where a small business concern’s offer would otherwise be accepted for award, but the firm is found by the contracting officer to be nonresponsible, the contracting officer must refer the matter to the SBA for consideration of a COC. FAR §§ 9.104-3(d); 19.601(c). Where the SBA issues a COC, agencies are required to make award to the concern, without requiring it to meet any other responsibility or eligibility requirement. 15 U.S.C. § 637(b)(7)(C); FAR § 19.602-4.

Our Office has held, however, that while the SBA’s COC provisions and the FAR preclude an agency from denying award to an offeror that has received a COC based on responsibility matters, an agency is not required to make award to that offeror if there are other reasons for denying the award that are not related to its responsibility. See Tenderfoot Sock Co., Inc., B-293088.2, July 30, 2004, 2004 CPD ¶ 147 at 3 (although protester was issued a COC, the agency reasonably awarded a contract to a different offeror because the COC request was premature, as the agency had not yet determined whether the protester was in line for award); The Gerard Co., B-274051, Nov. 8, 1996, 96-2 CPD ¶ 177 at 3 (agency properly obtained best and final offers--due to issuance of amendment--after COC was issued to protester); Mechanical Equip. Co. Inc., B-239208, Apr. 25, 1990, 90-1 CPD ¶ 428 (in a solicitation restricted to qualified sources, the agency reasonably considered another offeror as a source of supply after the SBA had issued a COC for the protester).⁵

Here, as stated above, the RFP provided for award of contracts on a best-value basis. Based on the issuance of a COC to the protester, GSA could not deny the protester the award based on matters relating to its responsibility. Consistent with our Office’s decisions, however, the agency could select offerors other than JS&A, provided the basis for doing so was unrelated to the protester’s responsibility. The record here shows that the agency conducted a best-value tradeoff between JS&A and the three offerors who proposed higher prices than the protester: Hill, Heery, and URS. AR, Tab 14, Source Selection Decision (Jan. 26, 2015), at 4, 7, 9; Tab 16, GSA Debriefing for JS&A (Feb. 20, 2015), at 2. In each instance, the agency concluded that the three awardee’s proposals provided strengths under the non-price factors which merited award despite JS&A’s lower price. Id. On this

⁵ The SBA’s view, solicited at our request, is consistent with our conclusion in this matter. Email from SBA to GAO (Apr. 10, 2015) (“SBA’s regulations provide that the issuance of a COC precludes a procuring agency from denying award based on responsibility. However, here, the contracting officer appears to have denied the contract for reasons unrelated to responsibility.”).

record, we conclude that the agency was not required to award the contract to JS&A based solely on the issuance of the COC.

In addition to its argument that GSA was required to award JS&A a contract based on the SBA's issuance of a COC, the protester also argues that the award decisions were unreasonable based on the tradeoffs between the protester's and the other offerors' proposals. This argument is untimely.

Under our Bid Protest Regulations, protests other than those based on alleged solicitation improprieties generally must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

JS&A's challenge to the agency's best value tradeoff and award decision was first raised in its April 8 comments on the agency report. For example, the protester argued that the agency had not "sufficiently shown" the basis of its best value determination. Protester's Comments (April 8, 2015) at 1; Attach. A, at 18. The protester, however, was provided the prices and evaluation ratings for the awardees in its February 20, 2015, debriefing. AR, Tab 16, GSA Debriefing for JS&A (Feb. 20, 2015), at 1. This debriefing advised the protester that although its proposal was lower-priced and had received the same overall very good rating as Heery, the agency found that the "Heery['s] proposal offered additional strengths that indicated a greater likelihood of successful performance." Id. at 2. Despite the fact JS&A was provided information concerning the other awardees and the award decision in its debriefing, its initial protest to our Office was limited to the argument that GSA was required to award the protester a contract after the issuance of a COC. For this reason, the protester's challenge to the best value tradeoff and award is untimely, as it was not raised within 10 days of the debriefing. See Foundation Eng'g Scis., Inc., B-292834, B-292834.2, Dec. 12, 2003, 2003 CPD ¶ 229 at 3 n.2.⁶

The protest is denied.

Susan A. Poling
General Counsel

⁶ The protester also requested in comments on the agency report that the agency provide source selection sensitive information that was withheld from JS&A's redacted copy of the agency report. Protester's Comments (April 8, 2015), Attach. A, at 5. Because the protester elected not to retain counsel that could be admitted to a protective order, we find that the documents sought by the protester were properly excluded from the protester's redacted agency report.