



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

Decision

Matter of: N3 Government Solutions, LLC

File: B-411303.2

Date: September 9, 2015

Christopher R. Shiplett, Esq., Danielle N. Hart, Esq., and Nishat Azam, Esq., Randolph Law, PLLC, for the protester.

Eric S. Lipsetts, Esq., Eric Lipsetts, P.A., for Veteran Solutions, Inc., the intervenor. Steven P. Cullen, Esq., Defense Threat Reduction Agency; John W. Klein, Esq. and Meagan K. Guerzon, Esq., Small Business Administration, for the agencies.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the contracting officer improperly denied a request by the Small Business Administration for additional time to consider issuing a certificate of competency is denied where the protester has not shown that the contracting officer's action was affected by fraud or bad faith.

DECISION

N3 Government Solutions, LLC (N3GS), of Fayetteville, North Carolina, a small business, protests the award of a contract to Veteran Solutions, Inc. (VSI), of Glen Burnie, Maryland, by the Department of Defense, Defense Threat Reduction Agency (DTRA), under request for proposals (RFP) No. HDTRA1-14-R-0018 for administrative support services at various DTRA locations. N3GS argues that DTRA unreasonably failed to allow the Small Business Administration (SBA) additional time to consider N3GS under the SBA's certificate of competency process.

We deny the protest.

BACKGROUND

DTRA issued the RFP on October 20, 2014, seeking proposals from service-disabled veteran-owned small businesses (SDVOSB) to provide administrative support services at DTRA locations in Fort Belvoir, Virginia; Eglin Air Force Base, Florida; Albuquerque, New Mexico; West Point, New York; Travis Air Force

Base, California; and Kleber Kaserne, Kaiserslautern, Germany. The services included clerical and secretarial support, desktop publishing services, and event coordination, which were to be provided under an indefinite delivery/indefinite quantity (ID/IQ) contract. RFP at 5-10. The RFP specified that the contract would have a 5-year ordering period and a maximum value of \$50 million. Id. at 14, 22. The RFP provided that a contract would be awarded to the offeror that submitted the lowest-priced technically acceptable proposal. The evaluation of technical acceptability was to be assessed under two factors: technical and past performance. Id. at 95. The technical factor, in turn, consisted of two subfactors: management approach; and qualifications, personnel, and clearances. Id. at 96. In order to be eligible for award, an offeror's proposal had to be rated acceptable under both factors and, in turn, under both technical subfactors. Id. at 95, 97. With respect to the qualifications, personnel, and clearances subfactor, among other things, the RFP provided that the evaluation would consider

the offeror's ability to hold a TOP SECRET facility clearance at time of proposal submission. Facility security clearance must have been obtained or updated within the past 10 years for a TOP SECRET clearance. All personnel utilized in the performance of the contract must be U.S. citizens and have at minimum a secret clearance.

Id. at 96 (¶ L.2.6).¹

DTRA received proposals from 24 SDVOSB offerors, of which 18 were evaluated as technically acceptable and had acceptable past performance. Contracting Officer's Statement at 2. Although N3GS offered the lowest price, its proposal was rated unacceptable under the qualifications, personnel, and clearances subfactor (and therefore unacceptable under the technical factor), because the firm stated that it had an interim top secret facility security clearance, rather than a final clearance. Id.; see also AR, Tab 4, N3GS Proposal (excerpt), at 1 ("Interim / Top Secret" clearance listing). On March 23, the contracting officer awarded the contract to VSI as the lowest-priced technically acceptable offeror. Contracting Officer's Statement at 2.

After DTRA notified N3GS of the basis for the rejection of its proposal, the company filed a protest with our Office, arguing that DTRA's determination that N3GS had an unacceptable facility security clearance was an adverse determination of

¹ The contracting officer explains that contract performance will require the contractor to access secure compartmented information (SCI), in which case the applicable Department of Defense policy specifies that only a contractor with a final top secret facility security clearance may have access to SCI. As a result, an interim top secret facility security clearance could not be accepted. Contracting Officer's Statement at 1.

responsibility, and that DTRA had failed to comply with the requirement to refer a finding of non-responsibility of a small business, such as N3GS, to the SBA for consideration under its certificate of competency (COC) process. DTRA informed our Office that the agency would take corrective action by referring the issue to the SBA under its COC procedures, so our Office dismissed N3GS's protest as academic on April 17.

On May 8, the SBA received the contracting officer's formal referral of N3GS's responsibility for consideration under the COC process. AR, Tab 7, COC Referral Letter to SBA, May 7, 2015, at 1-2; AR, Tab 9, Overnight Courier Delivery Record, at 1. On May 18, the SBA procurement center representative sent an e-mail to the president of N3GS, stating that although the firm had been referred to the SBA under its COC process, the SBA would decline to issue a COC because possession of a final top secret clearance at the time of proposal submission was required by the RFP. Protest exh. 4, E-mail from SBA Procurement Center Representative to N3GS President, May 18, 2015, at 1-2.

On May 20, N3GS confirmed to the SBA that the firm wished to continue with the COC process, to which the SBA responded that it would send the application letter and instructions. Protest exh. 4, E-mails between N3GS President and SBA Procurement Center Representative, May 20, 2015, at 1-2.

On the morning of June 3, the contracting officer notified the SBA by e-mail that DTRA had decided to proceed with the contract award to VSI because more than 15 working days had passed since the referral to the SBA, and DTRA had not received a response from the SBA. Contracting Officer's Statement at 3. The SBA's COC coordinator asked the contracting officer to agree to allow the SBA until June 12 to consider the COC referral. Id. The contracting officer declined the SBA's request. Id. at 4.

On June 4, the SBA COC coordinator sent an e-mail to N3GS, asking the firm to verify that it had received the COC application letter, and stating that because the SBA had not received a response, the COC file would be closed. Protest exh. 5, E-mail from SBA COC Coordinator to President of N3GS, June 4, 2015, at 1. The president of N3GS replied that the firm had never received the COC application materials, and stated that it remained determined to pursue a COC. Protest exh. 5, E-mail from President of N3GS to SBA COC Coordinator, June 4, 2015, at 1; Protest exh. 4, E-mail from N3GS President to SBA Procurement Center Representative, June 4, 2015, at 1.

Also on June 4, the SBA area director sent a letter to the contracting officer, stating that the SBA was closing its file because N3GS had not applied for a COC. Protest exh. 6, Letter from SBA Area Director to Contracting Officer, at 1. The contracting officer then called VSI to direct it to resume contract performance. Contracting Officer's Statement at 5.

On June 12, the SBA informed N3GS that the contracting officer had refused to grant the SBA additional time to conduct the COC review, and therefore the SBA would take no further action. Protest at 2. N3GS then filed this protest.

ANALYSIS

N3GS does not dispute that, as stated in its proposal, it possessed an interim top secret security clearance, rather than a final one, and that this remained the case through at least June 12. Nevertheless, the protester argues that DTRA failed to fulfill the corrective action announced in response to N3GS's earlier protest because the contracting officer lacked a valid basis to deny the SBA additional time to consider issuing a COC. Protest at 6-7.

DTRA argues that the unacceptability of a small business offeror's facility security clearance should not be a matter for which referral to the SBA is required. Agency Report at 5. Even if referral is required, DTRA argues that the contracting officer had broad discretion whether to allow additional time for the SBA to consider N3GS's COC, and properly declined the extension request here. Id. at 6.

Our Office invited the SBA to provide its views on the protest issues. The SBA argues that questions over whether a small business has met a pass/fail requirement for a facility security clearance, as here, are properly matters of responsibility that must be referred to the SBA for consideration of a COC, as DTRA did when it took corrective action in response to N3GS's first protest. SBA Brief at 4-5. On the other hand, the SBA argues that the contracting officer's decision not to grant an extension to the SBA to further consider the COC referral was a matter within the contracting officer's discretion, and that N3GS could not have received a COC in any event because the firm did not have the required final facility security clearance. Id. at 6-7.

Under SBA regulations, when an agency refers a question over the responsibility of a small business to the SBA to consider issuing a COC, the contracting officer must withhold the contract award "for a period of 15 working days (or longer if agreed to by SBA and the contracting officer)." 13 C.F.R. § 125.5(c)(2) (2014); see also Federal Acquisition Regulation (FAR) § 19.602-2 ("15 business days," or longer by agreement). If no COC is issued in the 15-day period (or longer period agreed between SBA and the contracting officer), the contracting officer is directed to make award to the next firm in line. FAR § 19.602-4(c).

Although the SBA asked the contracting officer to agree to more time to consider issuing a COC, there was no agreement by the contracting officer to do so. Our Office has held that "the granting of such extensions is entirely discretionary with [the contracting agency]." Eagle Sec., Inc., B-242397, Apr. 29, 1991, 91-1 CPD ¶ 415 at 4. We will not review the contracting officer's discretion in denying an extension absent a showing that the decision to deny the request may have been influenced by fraud or bad faith. Worthy Indus. Corp., B-240489, Nov. 27, 1990,

90-2 CPD ¶ 428 at 3.² Here, N3GS has not shown, or even alleged, that the failure of the SBA to complete the COC process within 15 days, or the contracting officer's decision not to extend that time, was caused by fraud or bad faith. To the contrary, N3GS describes the delay as being caused by "an admitted clerical or process error and through no fault of the Agency and no fault of [N3GS]." Protester's Opposition to Dismissal, at 2.

In short, the record here shows that DTRA referred the question of N3GS's responsibility to the SBA for consideration under its COC process, as DTRA agreed to do as corrective action in response to N3GS's earlier protest. The SBA sought, but was denied, an extension of the 15-day period to consider the COC, as to which there is no allegation that fraud or bad faith played any role. As a result, we have no basis to question the contracting officer's decision to proceed with the contract award to VSI, as provided in FAR § 19.602-4.

The protest is denied.

Susan A. Poling
General Counsel

² We do not agree with the protester that the standard here should be different depending on whether the COC referral is before a contract has been awarded (as in Worthy Industries, supra), or is after an initial contract award because it resulted from corrective action, as here. See Protester's Response to SBA Views, at 2-4.