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**Comptroller General
of the United States**

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

Decision

Matter of: Robert F. Hyland & Sons, LLC

File: B-411726

Date: September 22, 2015

Michael Zink for the protester.

Debra J. Talley, Esq., Department of the Army, for the agency.

Jonathan T. Williams, Esq., Piliero Mazza PLLC, for Check 6, LLC, the intervenor.

Lois Hanshaw, Esq., Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's affirmative responsibility determination is dismissed where protester has not identified any available relevant information the contracting officer failed to consider in making his determination.

DECISION

Robert F. Hyland & Sons, LLC (Hyland), of Rochester, New York, protests the award of a contract to Check 6, LLC, of Brigham City, Utah, by the Department of the Army, Army Materiel Command under invitation for bids (IFB) No. W25G1V-15-B-0001 for the construction of an enclosed walkway between buildings at Tobyhanna Army Depot in Tobyhanna, Pennsylvania. Hyland contends that the agency's affirmative determination of the awardee's responsibility unreasonably failed to consider available relevant information.

We dismiss the protest.

On February 24, 2015, the IFB was issued as a set-aside for service-disabled, veteran-owned small businesses (SDVOSB). IFB at 1, 5. As relevant here, the IFB stated that award would be made to the responsible bidder who submits the lowest-priced, responsive bid. IFB at 64. Additionally, the IFB stated that prior to award, the bidder shall provide three references demonstrating successful performance within the last three years of projects similar in scope and magnitude to the current procurement. IFB at 18. When bids were timely submitted and opened on April 14, Check 6 was determined to be the apparent low bidder.

On April 16, the protester filed a size protest challenging Check 6's size based on the allegation that Check 6 was overly reliant on its subcontractor. The protest also challenged Check 6's status as an eligible SDVOSB. On May 26, the SBA regional office found that Check 6 was a small business. AR, Tab 7, SBA Size Determination, at 9. The decision noted that Check 6 was overly reliant and, therefore, affiliated with its subcontractor. However, despite this affiliation, Check 6 qualified as a small business because even when the revenue of Check 6 and its affiliate were combined, it was within the applicable size standard. Id. at 8. On June 5, the SBA concluded that Check 6 was an SDVOSB. AR, Tab 8, SBA SDVOSB Determination, at 1. Hyland appealed the SDVOSB determination to the Office of Hearings and Appeals (OHA). AR, Tab 9, Appeal of SDVOSB Determination. On June 29, OHA dismissed the appeal. AR, Tab 10, OHA Decision, at 2. After determining that Check 6 was responsible, the agency awarded the contract to Check 6.

On July 2, Hyland protested to our Office. Hyland claimed that the CO's responsibility determination for Check 6 unreasonably failed to consider available relevant information regarding Check 6's past performance information.¹ Protest at 1-2.

On August 3, the agency submitted its report in response to the protester's allegations. The report included the agency's determination finding Check 6 to be responsible. As relevant here, the agency's responsibility determination discusses Check 6's past performance, noting that Check 6 had not successfully completed any government contracts, but that its President had previously served as a project manager on over 40 projects totaling more than \$3 million in construction services at Hill Air Force Base in Ogden, Utah. AR, Tab 12, Check 6 Responsibility Determination, at 3. The determination also states that the awardee's subcontractor has completed numerous projects with the agency and is "more than capable of assisting Check 6 in successfully completing this project." Id.

¹ The protester also alleged, similar to its SBA size protest, that the agency's responsibility determination unreasonably failed to consider Check 6's alleged overreliance on its subcontractor. The agency's legal memorandum substantively responded to Hyland's arguments and alleged that Hyland's protest was untimely. When the protester filed its comments, it failed to substantively respond to the agency's discussion of Check 6's alleged overreliance and addressed only the agency's procedural discussion of timeliness. Accordingly, we consider the protester to have abandoned this argument and will not consider it further. enrGies, Inc., B-408609.9, May 21, 2014, 2014 CPD ¶ 158 at 4.

The protester challenges the agency's responsibility determination and asserts that it unreasonably failed to consider the past performance offered in Check 6's proposal. Specifically, Hyland alleges that the projects offered were for IT projects and were completed by the President of Check 6, rather than by Check 6. Protest at 1-2; Comments at 2.

Our Office generally will not consider a protest challenging an affirmative determination of responsibility except under limited specified exceptions. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2013); Triple H Services, B-298248, B-298248.2., Aug. 1, 2006, 2006 CPD ¶ 115 at 2. One exception is where a protest identifies evidence that raises serious concerns that, in reaching a particular responsibility determination, the CO unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c) (2015). In this context, we will review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the CO may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible.

As an initial matter, we note that it is undisputed that the agency's responsibility determination acknowledged that Check 6 had not completed any government contracts and that Check 6's past performance was based on its President's prior personal experience. See AR, Tab 12, Check 6 Responsibility Determination, at 3.

Despite the protester's assertions to the contrary, the record shows that the CO specifically considered this past performance in making his responsibility determination.² Additionally, we find unpersuasive the protester's unsupported assertions that the projects presented by Check 6's president were IT, rather than construction projects. As the protester has not shown that the CO failed to consider

² To the extent Hyland is challenging the CO's consideration of the relevant experience, knowledge, and skill of Check 6's President, or even its proposed subcontractor, in making his affirmative responsibility determination, we see no reason--and the protester has not offered any--why this information could not be considered. In this regard, the Federal Acquisition Regulation (FAR) recognizes that a contractor may obtain sufficient resources to be deemed responsible, including with respect to experience and technical skills, by either possessing such resources, proposing performance by subcontracting, or possessing the ability to obtain such resources. FAR §§ 9.104-1(a), (e) and (f); 9.104-3(a); SumCo Eco-Contracting LLC, B-409434, B-409434.2, April 15, 2014, 2014 CPD ¶ 129 at 3-4.

any available information in making his responsibility determination, the protest fails to state a sufficient legal or factual basis for consideration.

The protest is dismissed.

Susan A. Poling
General Counsel