



Decision

Matter of: MPC Containment Systems, LLC

File: B-416188.2

Date: July 23, 2018

Benjamin Beiler, for the protester.

Eric C. Selke, Esq., Pamela Cooper, Esq., and Robin Ciulla, Esq., Defense Logistics Agency, and Meagan K. Guerzon, Esq., Small Business Administration, for the agencies.

Pedro E. Briones, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the Small Business Administration (SBA) failed to consider vital information bearing on the awardee's responsibility in issuing a certificate of competency is denied where the allegedly vital information does not concern the awardee's compliance with definitive responsibility criteria and where there is no evidence that the procuring agency provided incorrect information, or withheld information, from the SBA.

DECISION

MPC Containment Systems, LLC, of Chicago, Illinois, protests the award of a contract to North American Fuel Tanks, Inc. (NAFTI), of Mansfield, Texas, under request for proposals (RFP) No. SPRDL1-16-R-0348, issued by the Department of Defense, Defense Logistics Agency (DLA), for collapsible fuel storage tanks. The contract was awarded after the Small Business Administration (SBA) issued a Certificate of Competency (COC) to NAFTI. MPC contends that SBA failed to consider vital information bearing on NAFTI's responsibility in issuing the COC.

We deny the protest.

BACKGROUND

The RFP, which was set aside for small businesses, was issued on February 24, 2017, pursuant to Federal Acquisition Regulation (FAR) part 15 to procure collapsible fuel tank assemblies (or fuel bladders) for the U.S. Army, Tank-automotive & Armaments Command (TACOM). Agency Report (AR), Tab 4, RFP, at 1-2, 38, 59-61, 66; DLA

Contracting Officer’s Statement & Memorandum of Law (COS/MOL) at 1.¹ The solicitation provided for the award of up to two fixed-priced, 5-year indefinite-delivery, indefinite-quantity (IDIQ) contracts based on lowest evaluated price.² RFP at 7, 69, 96, 103-5. Offerors were to propose fixed prices for each performance period for specified numbers of fuel bladders in three capacities (3,000, 20,000, and 50,000 gallon), as well as a fixed price for first article testing (FAT) of each size of fuel bladder. See id., Sched., at 8-37. If an offeror requested, and DLA approved, a FAT waiver for any size fuel bladder, then the proposed price for the corresponding FAT contract line item number would be deducted from the offeror’s total evaluated price.³ RFP at 103.

DLA received proposals from five offerors by the September 22 deadline, including from NAFTI, GTA, and MPC, whose proposals were evaluated by the contracting officer as follows:

	NAFTI	GTA	MPC
Total Evaluated Price	\$30,028,303	\$36,213,230	\$41,283,825

Id. at 6; COS/MOL at 2; see AR, Tab 5, Abstract of Offers (Abstract), at 1-5; Tab 10, CO’s Decl., ¶ 3; DLA Email to Parties, July 13, 2018. Among the five offerors, NAFTI, GTA, and MPC had the lowest, second-lowest, and third-lowest total evaluated prices, respectively. See Abstract. NAFTI was also granted a partial FAT waiver for its 3,000 gallon fuel bladder based on it having successfully passed more rigorous testing by the Department of the Air Force. AR, Tab 3, NAFTI Contract, at 2; see Tab 6, Pre-Award Survey (Survey), at 5-6.

As part of her responsibility determination, the contracting officer requested a pre-award survey of NAFTI by the Defense Contract Management Agency (DCMA). CO’s Decl. ¶ 3. Three DCMA individuals conducted the survey: an industrial specialist who performed an on-site visit of NAFTI’s facilities to assess the contractor’s technical and production capabilities; a quality assurance specialist who performed a separate on-site visit to assess NAFTI’s quality assurance program and packaging capability; and a financial analyst who performed a financial capability survey. Survey at 1-39.

¹ Our citations to the RFP are to the conformed version of the solicitation provided in DLA’s agency report. In addition, our citations to the COS/MOL are to DLA’s combined request for dismissal and contracting officer’s statement.

² MPC does not protest the award of the second contract to GTA Containers Inc., of South Bend, Indiana.

³ The RFP required the contractor to submit one of each size fuel bladder to the Army within 60 days after contract award for testing, but allowed an offeror to request a waiver if it had previously supplied identical or similar fuel bladders that were accepted by the government. RFP at 49, 67-68, 98; § J, attach. 1, 1st Art. Waiver Worksheet, at 1-3.

DCMA recommended against contract award because it determined NAFTI was not financially capable of performing the contract. Id. at 1-3. Based on the results of its financial audit, DCMA concluded that the contractor currently lacked the financial resources, or the ability to obtain them, to fund a 5-year, \$30 million contract. Id. at 2-3. DCMA otherwise concluded that NAFTI had the technical, production, quality, and packaging capability to successfully perform the contract. Id. at 2. The survey stated that should NAFTI successfully obtain its proposed financing, then DCMA's recommendation against award may no longer be applicable. Id. at 1.

Based on DCMA's pre-award survey and recommendation, the contracting officer determined that NAFTI did not have the capability to adequately perform the contract and was therefore nonresponsible. AR, Tab 7, CO's Nonresponsibility Determination, at 1-2; CO's Decl. ¶¶ 4-5. Because the procurement was set aside for small businesses, the contracting officer referred her negative responsibility determination to SBA for review under its certificate of competency (COC) procedures.⁴ CO's Decl. ¶¶ 6.

SBA issued a certificate of competency to NAFTI on January 11, 2018, and DLA awarded contracts to NAFTI and GTA on March 9 at their respective prices listed in the table above. AR, Tab 2, COC, at 1; COS/MOL at 3. Unaware of the contracting officer's initial nonresponsibility determination, MPC filed a timely post-award protest with our Office purporting to challenge DLA's affirmative responsibility determination. Protest B-416188, Mar. 24, 2018, at 1-15. MPC contended that the contracting officer failed to consider the past performance of NAFTI's predecessor (Reliance Aero products International), which the protester alleged had previously provided "highly inferior and short-lasting" fuel bladders to the Army. Id. at 3-4.

DLA requested that our Office summarily dismiss MPC's previous protest because the contracting officer had not, in fact, made an affirmative responsibility determination, but referred the matter to SBA as set forth above. Req. for Dismissal, B-416188, at 2. On April 30, we dismissed the protest as it failed to set forth a valid basis of protest.⁵ MPC Containment Sys., LLC, B-416188, Apr. 30, 2018 (unpublished decision), citing, inter alia, 4 C.F.R. § 21.5(f).

⁴ Where a small business is determined to be nonresponsible, the matter must be referred to SBA, which has the conclusive authority to determine a small business firm's responsibility by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7); FAR § 19.602-1(a); see, e.g., Orion Tech., Inc., B-405970, Jan. 13, 2012, 2012 CPD ¶ 89 at 4.

⁵ We also dismissed MPC's generalized allegations of bad faith as factually insufficient, because the protester had adduced no evidence of wrongdoing and its claims amounted to nothing more than unsubstantiated allegations, which did not meet our standard for demonstrating bad faith or bias by a procuring agency. MPC Containment Sys., LLC, supra, at 2-3, citing Onésimus Def., LLC, B-411123.3, B-411123.4, July 24, 2015, 2015 CPD ¶ 224 at 5-6 n.9. In addition, we dismissed MPC's untimely objections to the RFP as amended. MPC Containment Sys., LLC, supra, at 3.

In its response to DLA's request for dismissal, MPC challenged for the first time SBA's issuance of the COC to NAFTI; we docketed MPC's response to DLA's request for dismissal as the supplemental protest (B-416188.2) presently before us.

DISCUSSION

MPC contends that the "Certificate of Competency issued by the SBA is probably invalid inasmuch as it is based on unverified information contained in the [DCMA] Survey."⁶ Supp. Protest at 2. The protester alleges that the survey results "were for the most part parroting information supplied to the surveyor[s] by NAFTI, and that the surveyor[s] did not independently verify most of the crucial information," included with respect to NAFTI's and Reliance's past performance. Id. at 8, 10. In this respect, MPC argues that SBA did not consider "vital information" bearing on NAFTI's responsibility, because DLA accepted the survey results without any meaningful investigation. Id. at 2-4.

Because SBA, not our Office, has conclusive authority to determine a small business firm's responsibility, we generally will not review the SBA's refusal or decision to issue a COC. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(2); Integrity Mgmt. Servs., Inc., B-283094.2, May 3, 2000, 2000 CPD ¶ 67 at 3. The exceptions, which GAO will interpret narrowly out of deference to the role of the SBA in this area, are protests that show possible bad faith on the part of government officials, or that present allegations that the SBA failed to follow its own published regulations or failed to consider vital information bearing on the firm's responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency. 4 C.F.R. § 21.5(b)(2).

Where, as here, an offeror protests the issuance of a COC to a competitor on the ground that the SBA failed to consider "vital information" bearing on a firm's responsibility, we will consider the protest only where the solicitation contains definitive responsibility criteria and the issue raised concerns the competitor's compliance with those criteria. Integrity Mgmt. Servs., Inc., supra.

⁶ The survey stated, among other things, that NAFTI: (1) had experience manufacturing water and fuel tanks; (2) had vast knowledge of various sizes and configurations of fuel tanks; (3) had a proprietary manufacturing process and a teaming agreement with a major company; (4) had manufactured a fuel tank that had successfully passed vigorous Air Force testing; (5) had manufactured identical or similar items for the U.S. Navy and performed successfully on previous government contracts, with no corrective action requests or product quality deficiency reports issued; (6) had personnel that not only had manufacturing experience, but also had experience repairing tanks under NAFTI's sister company, Reliance; (7) had equipment that was well maintained; (8) had enough material on hand and certified suppliers to meet the delivery schedule; (9) was fully aware of military standards for preserving, packaging, packing, and marking government shipments; and (10) had controls in place to prevent defects. See Survey at 2, 6-7, 15, 22, 36.

MPC recognizes this narrow exception and contends that the following RFP provision establishes definitive responsibility criteria:

CONTRACTOR RESPONSIBILITY AND ELIGIBILITY FOR AWARD . . .

(a) The Government may award up to two (2) contracts to the offerors that:

(1) submits [sic] the lowest evaluated offer if award is based on price only, or the offer that provides the best value to the Government if factors in addition to price are identified elsewhere in this solicitation; and

(2) submits [sic] a bid or proposal that meets all the material requirements of this solicitation, and

(3) meets [sic] all the responsibility criteria at FAR 9.104.

(b) To make sure that you meet the responsibility criteria at FAR 9.104 we may:

(1) arrange a visit to your plant and perform a preaward survey;

(2) ask you to provide financial, technical, production, or managerial background information.

(c) If you don't provide us with the data we ask for within 7 days from the date you receive our request, or if you refuse to have us visit your facility, we may determine you nonresponsible.

(d) If we visit your facility, please make sure that you have current certified financial statements and other data relevant to your bid or proposal available for our team to review.

Supp. Protest at 2; RFP at 104 (emphasis in original). According to MPC, by explicitly incorporating a reference to section 9.104, the solicitation "made the enumerated requirements of FAR 9.104" definitive responsibility criteria. Protester's Comments at 6.

We disagree with the protester that this provision establishes definitive responsibility criteria. Solicitation provisions such as the one above establish performance requirements that must be satisfied by the successful offeror during contract performance and do not affect the award decision, except as a matter of a contractor's general responsibility. See, e.g., HBC Mgmt. Servs., Inc., B-407585, Jan. 14, 2013, 2013 CPD ¶ 32 at 4. Definitive responsibility criteria are specific and objective standards designed to measure a prospective contractor's ability to perform the contract. Reyna-Capital Joint Venture, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. Here, as DLA and SBA both point out, the provision above only identifies the FAR's

general responsibility standards and do not identify specific and objective standards. COS/MOL at 4-5; SBA's Comments at 4.⁷

While traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement when the agency's needs warrant a comparative evaluation of those areas, here the RFP did not include technical evaluation factors. RFP at 103-5; see, e.g., Hughes Georgia, Inc., B-272526, Oct. 21, 1996, 96-2 CPD ¶ 151 at 5. Moreover, offerors were not required to submit technical proposals or specific information regarding past performance or experience that could be objectively measured.⁸ See RFP at 96-105. Rather, the RFP, by its plain terms, afforded the contracting officer discretion to request a pre-award survey, including financial, technical, production, or managerial information in that regard. Id. at 104.

MPC's arguments to the contrary are unpersuasive. For example, MPC contends that the provision above was intended to limit which offerors were eligible to compete for the procurement. Protester's Comments at 6. However, the provision did not require offerors to submit any information in order to compete. See, e.g., Action Serv. Corp., B-246413, B-246413.2, Mar. 9, 1992, 92-1 CPD ¶ 267 at 3-4 (denying protest of a small business' responsibility determination where no submissions were requested or contemplated to establish compliance with the RFP criteria in question). Furthermore, contrary to MPC's assertion, the RFP was not amended to "explicitly" incorporate the reference to FAR section 9.104. See Protester's Comments at 7. Instead, the record shows that the RFP, as originally issued, incorporated the same FAR reference, in the same solicitation provision. Compare RFP (original version) at 103, with RFP Amend. 2 at 2, and RFP (conformed version) at 4-5, 104.

Here, because we find that the RFP did not include definitive responsibility criteria, we will not consider the protester's allegation that SBA did not take into account "vital information" bearing on NAFTAI's responsibility when issuing a COC. Integrity Mgmt. Servs., Inc., supra (noting that our Office will not consider protest that SBA failed to consider vital information in issuing a COC, where the alleged vital information does not concern awardee's compliance with a definitive responsibility criterion). Accordingly, we have no reason to question SBA's issuance of a COC to NAFTAI.

In any event, even if MPC were correct (it is not) that the RFP provision above establishes definitive responsibility criteria, the protester's allegations still do not meet the requirements for invoking our jurisdiction to review SBA's issuance of a COC. In

⁷ Our Office requested SBA's views on this matter. SBA urged that we dismiss or deny MPC's protest because, among other things, the solicitation does not contain definitive responsibility criteria, and therefore, does not invoke our jurisdiction to review SBA's issuance of a COC under our "vital information" exception. SBA's Comments at 1-5.

⁸ The RFP provided that the contractor's past performance meeting delivery orders under the IDIQ contract award shall be considered when placing an order. RFP at 64.

this respect, the protester has not shown that the alleged error by SBA in issuing the COC was caused by DLA's failure to adequately inform the SBA of the information. E. F. Felt Co., Inc., B-289295, Feb. 5, 2002, 2002 CPD ¶ 37 at 4. The record here reveals that, in referring her nonresponsibility determination to the SBA for review, the contracting officer provided SBA a copy of her nonresponsibility determination, the solicitation (including all amendments), NAFTI's proposal, the abstract of offers, DCMA's survey report, and various technical data, including specifications for the fuel bladders. AR, Tab 8, DLA Referral Letter to SBA, at 1-2; CO's Decl. ¶ 6

We thus agree with DLA that the "protester has not identified any information that was wrongfully withheld from SBA, nor any information that was presented in a misleading or inaccurate way. [MPC] simply do[es] not agree with the results of the [pre-award survey] or the methodology followed in compiling the information" COS/MOL at 6. MPC's disagreement with the survey assessment does not establish that DLA's presentation of information to the SBA was inaccurate, incomplete, or misleading. Vetsummit, LLC, B-405187, Aug. 29, 2011, 2011 CPD ¶ 172 at 4 (denying protest where the protester's arguments reflect only its disagreement with the agency's assessment, which is inadequate to invoke our Office's limited jurisdiction to review SBA's COC determination); LCPtracker, Inc.; eMars, Inc., B-410752.3 et al., Sept. 3, 2015, 2015 CPD ¶ 279 at 7 (denying protest of the issuance of a COC where the procuring agency provided SBA with virtually all potentially relevant information in its possession).

The protest is denied.

Thomas H. Armstrong
General Counsel