



GAO

Accountability * Integrity * Reliability

Decision

Matter of: Specialty Marine, Inc.

File: B-292053

Date: May 19, 2003

Robert E. Korroch, Esq., Williams Mullen Clark & Dobbins, for the protester.
Scott Garner, Esq., Military Sealift Command, and Kenneth Dobbs, Esq., Small Business Administration, for the agencies.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected protester's quotation based on protester's failure to hold an Agreement for Boat Repair (ABR), where presolicitation synopsis put potential vendors on notice that ABR was a precondition to receiving award.

DECISION

Specialty Marine, Inc. protests the award of a contract to AEPCO under request for quotations (RFQ) No. N2105130275001, issued by the Military Sealift Command (MSC), Department of the Navy, for pre-deployment maintenance and repair of the USNS MOHAWK. Specialty, a small business, principally argues that MSC's rejection of its quotation amounted to a finding of nonresponsibility that the agency improperly failed to refer to the Small Business Administration (SBA) for review under its certificate of competency (COC) procedures.

We deny the protest.

The agency synopsized the requirement at the Governmentwide Point of Entry on the Internet on January 29, 2003. The synopsis specified that the requirement was open only to holders of an Agreement for Boat Repair (ABR),¹ and provided two

¹ MSC maintains a qualification program under which ship repair contractors enter into advanced agreements that establish that the contractor has a specified level of ship repair capability and contains certain clauses and conditions applicable to contracts issued under the agreements. Agency Report at 5. There are two types of
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contacts from which further information and the bid package could be requested. The notice also indicated that quotations were due on February 6. On February 7, the agency awarded a contract to AEPCO. Specialty was notified that its quotation was not considered because Specialty did not hold and was not seeking an ABR.

Specialty asserts that the solicitation it received did not indicate that it was restricted to ABR holders, and that MSC could not reject its quotation for failing to meet an unstated requirement. The agency responds that Specialty should have been aware from the synopsis that the solicitation was open only to ABR holders. Specialty further argues that, in any case, the requirement is unnecessary, and is therefore unduly restrictive of competition.

The ABR was not an unstated requirement. As noted above, the agency published the requirement on the Internet at the Governmentwide Point of Entry in a synopsis that specifically provided that the solicitation was open only to ABR holders. This announcement was sufficient to put Specialty on notice of the restriction, and to constitute a requirement that offerors needed to meet. See Digicomp Research Corp., B-262139, Dec. 1, 1995, 95-2 CPD ¶ 246 at 7. This is the case even if, as Specialty asserts, it never saw the notice; prospective contractors are on constructive notice of the contents of procurement announcements. Id. This being the case, Specialty's protest that the restriction unduly restricts competition is untimely, since it involves an apparent impropriety on the face of the solicitation and was filed after the closing date for the receipt of quotations. 4 C.F.R. § 21.2(a)(1) (2003); Navigation Servs. Corp., B-255241, Feb. 10, 1994, 94-1 CPD ¶ 99 at 3.

Specialty argues that the requirement for an ABR was a responsibility criterion, and that MSC's rejection of its quotation amounted to a nonresponsibility determination. Since Specialty is a small business, it claims that MSC's determination had to be referred to SBA for a COC review.

Responsibility is a term used to describe an offeror's ability to meet its contract obligations. See generally Federal Acquisition Regulation (FAR) subpart 9.1. In most cases, responsibility is determined on the basis of general criteria such as adequacy of financial resources, ability to meet delivery schedules, and a satisfactory record of past performance. FAR § 9.104-1. In some cases, however, an agency will include in a solicitation a special standard of responsibility, which is often referred to as a definitive responsibility criterion. Such criteria are specific and objective standards established by an agency as a precondition to award, which are designed

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agreement that are used, depending upon the nature and complexity of the work the contractor is qualified to perform--an ABR, as here, and a Master Ship Repair Agreement.

to measure a prospective contractor's ability to perform the contract. FAR § 9.104-2; The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164 at 3.

Generally, the contracting agency determines in the first instance whether a business is responsible, and a business that is found not responsible is not eligible for award. However, where a small business is concerned, the agency must refer any nonresponsibility determination to SBA under its COC procedures; SBA has the authority to review an agency's negative determination of responsibility and to finally determine the small business concern's responsibility by issuing or refusing to issue a COC. Deval Corp., B-272001, Aug. 14, 1996, 96-2 CPD ¶ 67 at 3. This is true even where compliance with a definitive responsibility criterion is at issue. The Mary Kathleen Collins Trust, *supra*, at 3.

Both MSC and SBA (we requested SBA's views in connection with the protest) take the position that the ABR requirement is a prequalification, such that vendors were required to hold or to have applied for an ABR in order to be eligible for award. In support of this view, the agencies cite our decision Stevens Tech. Servs., Inc., B-250515.2 *et al.*, May 17, 1993, 93-1 CPD ¶ 385 at 7, where we found that an offeror was not eligible to receive an award where it did not hold, and had not applied for, a required ABR. *Id.* at 3-4 n. 4. However, our prior decision and the agencies' view notwithstanding, as we assess the nature of the ABR requirement in this case, we are more inclined to adopt the protester's view, since the requirement possesses all of the principal characteristics of a definitive responsibility criterion—it concerns the capability of the offeror, not a specific product, and is an objective standard established by the agency as a precondition to award. It is not clear—and neither agency explains—why a firm's failure to apply for an ABR should change the essential nature of a requirement from one concerning responsibility.

However, under the circumstances here, we need not decide whether the ABR is a definitive responsibility criterion. In this regard, as noted above, it is SBA's view that an ABR requirement is not a responsibility matter that falls within its COC process. Whether or not we ultimately agreed with SBA, in similar situations where SBA has declined to consider a matter on the basis that it is not appropriate for review under its COC procedures, we will review the agency's determination instead. Wallace & Wallace, Inc., Wallace & Wallace Fuel Oil, Inc.—Recon., B-209859.2, B-209860.2, July 29, 1983, 83-2 CPD ¶ 142 at 2. Thus, even if we determined that the ABR requirement here is a definitive responsibility criterion, given SBA's position we would review the agency's determination that Specialty did not meet the requirement. Turning to the merits, since an ABR was required, and Specialty does not hold and did not apply for an ABR, the agency properly rejected Specialty's quotation, whether or not the requirement was a definitive responsibility criterion.

The protest is denied.

Anthony H. Gamboa
General Counsel