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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Nilson Van & Storage, Inc.

File: B-310485

Date: December 10, 2007

Alan F. Wohlstetter, Esq., Denning & Wohlstetter, for the protester.

H. Addison Winters, The Yarborough Law Firm, P.A., for A+ Relocation Services, Inc. dba A+ Moving & Storage, an intervenor.

Maj. William J. Nelson, Department of the Army, for the agency.

Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting officer improperly determined awardee to be responsible, notwithstanding awardee's failure to supply all information requested by solicitation regarding previous performance of comparable contracts, is dismissed, where information request did not constitute definitive responsibility criterion, and there is no evidence raising serious concern that contracting officer ignored relevant responsibility information.

DECISION

Nilson Van & Storage, Inc. protests the award of a contract to A+ Relocation Services, Inc., dba A+ Moving and Storage under request for proposals (RFP) No. W91247-07-R-0004, issued by the Department of the Army for moving and storage services at Fort Bragg.

We dismiss the protest.

The solicitation was issued on August 3, 2007 for services related to the moving and storage of household goods of service members and their dependents. The requirement was divided into three separate schedules: schedule I for outbound moves, schedule II for inbound moves, and schedule III for intra city and intra area moves. Agency Report at 2. Award was to be made on the basis of price. RFP at 115.

The Army awarded three separate contracts, including schedule II to Nilson and schedule III to A+ Relocation. Nilson, the incumbent on the schedule III

requirement, protests the schedule III award to A+ Relocation on four grounds: 1) the solicitation improperly failed to include past performance as an evaluation factor; 2) the awardee failed to comply with solicitation clause 52.212-2(b), which called for offerors to provide information on up to three contracts “of comparable magnitude and similar in nature to the work required” under the solicitation; 3) the Army failed to conduct a preaward survey and thereby make a proper responsibility determination; and 4) an alleged criminal conviction of the president of the awardee violated a performance work statement (PWS) provision requiring background checks of contractor employees.

The Army requested summary dismissal of the protest by letter of October 19. We concluded, and advised the parties, that three of Nilson’s arguments failed to state valid protest grounds: the first issue was untimely because it concerned an alleged solicitation impropriety, and thus had to be filed prior to the closing time, Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(1) (2007); the third issue concerned an affirmative responsibility determination that was not for our review, under 4 C.F.R. § 21.5(c); and the fourth issue was a matter of contract administration that was not for our review, under 4 C.F.R. § 21.5(a). GAO Memorandum to the Parties, Oct. 25, 2007.

We did not dismiss the second protest ground—that A+ Relocation’s failure to comply with RFP clause 52.212-2(b) rendered the agency’s affirmative responsibility determination improper—concluding that further development of the record was necessary. However, we now find that this argument, too, is not for our review.

RFP clause 52.212-2(b) advised offerors to provide specific information on up to three contracts “of comparable magnitude and similar in nature to work required” under the RFP, that were performed within the past 3 years. RFP at 115. Past performance was not an evaluation factor, and the agency states that the requested information was intended to assist the contracting officer in making her responsibility determination. See AR at 5. In response to the clause, A+ Relocation provided a list of names, addresses, and telephone numbers regarding three prior contracts, but did not identify the contract values and descriptions of the services performed, as requested by the clause. AR, Tab 7, at 5-6.

In a document entitled “Determination of Responsibility,” dated September 19, the contracting officer memorialized the bases of her finding that A+ Relocation was a responsible offeror. AR, Tab 7, at 1. She noted that providing “packing and crating services to Fort Bragg and Pope AFB, NC are within the firm’s line of business as verified by previous customers,” acknowledged A+ Relocation’s bank reference, and also noted that “to the best of [her] knowledge and past performance of previous contracts, A+ Relocation Services Inc. is experienced and knowledgeable in this field.” Id.

Nilson challenges this determination, pointing out that the Federal Acquisition Regulation (FAR) requires a contract awardee, in order to be determined

responsible, to be “able to comply with the required or proposed delivery or performance schedule” and have “a satisfactory performance record.” Nilson Submission, Oct. 24, 2007, at 2; FAR § 9.104-1(b),(c). Nilson contends that it is “inconceivable” that the contracts listed by A+ Relocation were similar and comparable in magnitude to work under the RFP, and that the contracting officer’s findings are conclusory, and thus provide no basis for finding that A+ Relocation has the capability to perform the contract. Id. at 2-4.

We will consider protests challenging affirmative determinations of responsibility only under limited, specified circumstances: 1) where it is alleged that definitive responsibility criteria in the solicitation were not met, or 2) where evidence is identified that raises serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); American Printing House for the Blind, Inc., B-298011, May 15, 2006, 2006 CPD ¶ 83 at 5-6; Government Contracts Consultants, B-294335, Sept. 22, 2004, 2004 CPD ¶ 202 at 2.

Nilson’s allegation falls under neither of the exceptions. First, it is clear that the clause is not a definitive responsibility criterion, which is a specific and objective standard, qualitative or quantitative, that is established by a contracting agency in a solicitation to measure an offeror’s ability to perform a contract. In order for a standard to constitute a definitive responsibility criterion, the solicitation must make demonstration of compliance with the standard a precondition to receiving award. Public Facility Consortium I, LLC; JDL Castle Corp., B-295911, B-295911.2, May 4, 2005, 2005 CPD ¶ 170 at 2-3; SDA, Inc.--Recon., B-249386.2, Aug. 26, 1992, 92-2 CPD ¶ 128 at 2-3. Here, rather than specifying a minimum, the clause only provided that offerors will provide information on “up to” three contracts—and it did not state that similarity of work and magnitude were preconditions for award. SDA, Inc.--Recon., supra. Under these circumstances, the clause was merely an informational requirement, noncompliance with which was not a basis for eliminating an offeror from consideration for award. See VA Venture; St. Anthony Med. Ctr., Inc., B-222622, B-222622.2, Sept. 12, 1986, 86-2 CPD ¶ 289 at 4-5; Patterson Pump Co., B-204694, Mar. 24, 1982, 82-1 CPD ¶ 279; compare Charter Envtl., Inc., B-297219, Dec. 5, 2005, 2005 CPD ¶ 213 at 2-3 (standard was definitive responsibility criterion where it required offeror to have successfully completed at least three projects that included certain described work, and at least three projects of comparable size and scope).

Nilson’s allegation also does not raise a serious concern that the contracting officer “unreasonably failed to consider available relevant information or otherwise violated statute or regulation.” Such circumstances could occur where the protester presents evidence, for example, that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. See, e.g., Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 7-11 (GAO reviewed allegation where

evidence was presented that the contracting officer failed to consider serious, credible information regarding awardee's record of integrity and business ethics); Verestar Gov't Servs. Group, *supra*, at 4; Universal Marine & Indus. Servs., Inc., B-292964, Dec. 23, 2003, 2004 CPD ¶ 7 at 2. Nilson has identified no such specific information. Rather, it alleges that the agency should have verified the information provided or obtained additional information. A dispute over the amount of information upon which an affirmative responsibility determination was based, or disagreement with the contracting officer's determination, does not fall within the circumstances under which our Office will review such a determination. *See, e.g., Brian X. Scott*, B-298568, Oct. 26, 2006, 2006 CPD ¶ 156 at 4.

Nilson also challenges our finding that the third and fourth allegations in its original protest failed to state valid protest grounds. We find no basis for changing our conclusions. As to the third allegation--that no preaward survey or investigation was conducted before finding the awardee responsible--an agency is not required to conduct such a survey or investigation in making an affirmative determination of responsibility. *See CMT Assocs.*, B-242644, B-242644.4, Nov. 1, 1991, 91-2 CPD ¶ 417. In any case, this allegation ultimately questions the propriety of the agency's affirmative responsibility determination, and, for the same reasons discussed above, falls outside of the circumstances under which we will review such a determination. 4 C.F.R. § 21.5(c); GAO Memorandum to the Parties, Oct. 25, 2007.

It also remains our view that the fourth protest ground--that the alleged criminal conviction of the president of the awardee made A+ Relocation ineligible for award under section 1.2.1 of the solicitation's performance work statement (PWS)--concerns a matter of contract administration. Section 1.2.1 reads as follows:

All Contractors are required to perform a background check on all personnel before hiring to insure persons accepted for employment do not have a serious misdemeanor or felony conviction such as sex offense, drug offense, larceny, robbery or other crime of violence.

RFP at 71. Section 1.2.1 is included in the PWS under "General Requirements," and imposes a requirement on the contractor, as part of performance of the contract, to conduct a background check on prospective employees. This being the case, the awardee's compliance with section 1.2.1 is plainly a matter of contract administration, subject to oversight by the Army, rather than a requirement that offerors were required to meet in order to be eligible for award. *See Evergreen Fire & Sec.*, B-296510, Aug. 22, 2005, 2005 CPD ¶ 165 at 3. GAO does not review matters of contract administration under our bid protest function. 4 C.F.R. § 21.5(a); *see, e.g., Sealift, Inc.*, B-298588, Oct. 13, 2006, 2006 CPD ¶ 162 at 2-3.

Nilson also argues that the alleged criminal conviction of the president of A+ Relocation bears on the propriety of the contracting officer's responsibility determination. This allegation is untimely; under our Regulations, protest grounds

such as this must be raised no later than 10 days after the protester knew or should have known them. 4 C.F.R. § 21.2(a)(2). Nilson was aware of the alleged conviction more than 10 days before raising this argument in its November 5 submission. In any case, there is no evidence that the contracting officer was aware of this information prior to award and, moreover, a criminal conviction would not preclude an affirmative determination of responsibility. In this latter regard, as the Army notes, the alleged conviction here occurred outside the 3 year threshold for convictions established in the "Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters," required by FAR § 9.409(a), and was not the typical fraud or procurement-related offense normally the subject of debarment and responsibility determinations. Agency Submission, Oct. 19, 2007.

The protest is dismissed.

Gary L. Kepplinger
General Counsel