G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Public Facility Consortium I, LLC; JDL Castle Corporation

File: B-295911; B-295911.2

Date: May 4, 2005

Richard L. Moorhouse, Esq., Dorn C. McGrath III, Esq., David T. Hickey, Esq., and Pang Khou Yang, Esq., Greenberg Traurig LLP, for Public Facility Consortium I, LLC; Victor G. Klingelhofer, Esq., Andrew J. Mohr, Esq., David S. Cohen, Esq., and Catherine K. Kroll, Esq., Cohen Mohr, LLP, for JDL Castle Corporation, the protesters.
James H. Roberts, III, Esq., and Carrol H. Kinsey Jr., Esq., Van Scoyoc Kelly PLLC, for Damon Harwood Company, Inc., the intervenor.
Harry E. Hamilton, Esq., and Robert J. McCall, Esq., General Services Administration Service, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Evidence of compliance with zoning laws relates to ability of successful offeror to perform, rather than whether offer is acceptable and, therefore, is a matter of responsibility.

2. A definitive responsibility criterion is established where solicitation requires specific zoning so that requirement itself is an aspect of contract work; thus, general requirement for zoning approval does not constitute definitive responsibility criterion.

3. Allegation that contracting officer improperly made affirmative determination of responsibility does not raise serious concern that contracting officer failed to consider available relevant information where record shows, contrary to the protesters' assertions, that contracting officer did not ignore or disregard any available relevant information in making his responsibility determination.

DECISION

Public Facility Consortium I, LLC (PFC) and JDL Castle Corporation protest the award of a lease to Damon Harwood Company, Inc. under solicitation for offers (SFO) No. 2VA0401, issued by the General Services Administration (GSA) for the

lease of a building to be constructed for use by the Social Security Administration (SSA) in Roanoke, Virginia. The protesters both assert that the award was improper because Harwood's offered site was not compliant with the solicitation's zoning requirements.

We deny the protests.

As amended, the SFO anticipated the award of a 10-year lease for approximately 67,314 rentable square feet of office and related space to the offeror that submitted the offer found to be most advantageous to the government considering price and non-price evaluation factors, which were approximately equal in weight. The SFO advised that price could become more important than the non-price evaluation factors as the offers became more technically equivalent. SFO, amend. 2, § 3.0. As it relates to these protests, the SFO, in a section entitled "Evidence of Capability to Perform," stated that offerors must submit with their initial offers evidence of "[c]ompliance with local zoning laws or evidence of variances, if any, approved by the proper local authority." SFO § 3.16.A.4. This section was entirely separate from the section identifying the evaluation factors and basis for award.

Twelve firms submitted offers in response to the SFO by the extended closing date. The offers were evaluated, discussions were conducted, and best and final offers were requested, received, and evaluated. The agency found that the offers submitted by Harwood and JDL were technically equivalent and determined that Harwood's offer was most advantageous to the government in that it offered the lowest price. Subsequently, the agency awarded the lease to Harwood. Contracting Officer's (CO) Statement of Facts at 2.

PFC and JDL argue that it was a material SFO requirement that each offeror submit with its initial offer evidence that the offered site was properly zoned and, therefore, capable of being leased by the agency. Both protesters contend that Harwood failed to comply with this requirement in that, by its own admission, Harwood's offered site was not in compliance with the zoning laws of the City of Roanoke, and required special use approval as an administrative office building before the offered site could be used for the solicitation's intended purpose. In support of their arguments, PFC and JDL point out that Harwood did not provide evidence of an approved special use exception with its initial offer and, in fact, did not seek or receive, prior to award, special use approval from the City of Roanoke's zoning board. According to the protesters, Harwood submitted its application for a special use exception to the zoning board only after the firm had received the award and that application was subsequently denied by the zoning board. The protesters conclude that Harwood was ineligible for award on the basis that the zoning requirement quoted above established a definitive responsibility criterion with which Harwood did not provide evidence of compliance prior to award. See PFC's Comments at 2-4; JDL's Comments at 9-22.

The protesters' arguments are premised on the assumption that the SFO's zoning provision established a definitive responsibility criterion that required each offeror to have obtained the necessary approval prior to award so as to ensure that zoning would not be an impediment to contractor compliance with SFO performance requirements. We need not consider the specifics of the protesters' arguments concerning Harwood's alleged failure to meet the solicitation's zoning requirements because we find that, contrary to the protesters' contentions, the provision does not establish a definitive responsibility criterion.

A definitive responsibility criterion 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 to be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving award. SDA, Inc.--Recon., B-249386.2, Aug. 26, 1992, 92-2 CPD ¶ 128 at 2-3.

Here, the zoning provision cited by the protesters is not, in our view, sufficiently specific to establish a definitive responsibility criterion; rather, the provision essentially requires, in general terms, that each offeror comply with unspecified and unidentified "local zoning laws." Further, the provision does not in any way reasonably inform offerors that the SFO imposes on offerors mandatory compliance with a specifically identified zoning law as a definitive precondition for award. SDA, Inc.--Recon., supra. Rather, as GSA and the intervenor argue, this zoning provision concerns the agency's determination of the general responsibility of the awardee, that is, its ability to perform the contract consistent with all legal requirements. In this regard, it is clear that the SFO provision is not a matter of technical acceptability, since evidence of compliance with zoning laws was not a technical evaluation factor; compliance with the solicitation's general requirement for zoning approval could be satisfied by the offeror as late as the time of performance. VA Venture; St. Anthony Med. Ctr., Inc., B-222622, B-222622.2, Sept. 12, 1986, 86-2 CPD ¶ 289 at 4-5.

The real question, then, is whether GSA should have found Harwood to be nonresponsible. Because the determination that an offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO generally will not consider protests challenging affirmative determinations of responsibility except under limited, specified exceptions. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2005); Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 3-4. One specific exception is where a protest identifies "evidence raising 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." Id. This includes protests where, for example, the protest includes specific evidence 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. Verestar Gov't Servs. Group,

supra, at 4; Universal Marine & Indus. Servs., Inc., B-292964, Dec. 23, 2003, 2004 CPD ¶ 7 at 2.

While both protests were sufficient to satisfy the threshold requirement that a protest raise serious concerns that the contracting officer may have failed to consider relevant responsibility information suggesting that Harwood would not be able to obtain the necessary special exception, the fully developed record in this case shows that the protesters' challenge is unfounded; the record shows that the contracting officer did consider the available information furnished in Harwood's offer and reasonably determined Harwood's capability to perform.

In this regard, the record shows that the contracting officer was aware of, and specifically considered, the fact that, although Harwood's offered site currently was zoned for light manufacturing permitting office space no greater than 20,000 square feet, local zoning laws permitted use of the site for the proposed SSA building with special exception. In this connection, Harwood's proposal disclosed the zoning status of Harwood's proposed site, and Harwood described the process it intended to follow to obtain the special exception from the City of Roanoke. The contracting officer reports that he considered the likelihood of Harwood obtaining the special exception approval in the context of Harwood's representations of a probable rezoning by the City of Roanoke of its offered site from light manufacturing to industrial permitted use development, such that office buildings larger than 20,000 square feet would be permitted as of right. The contracting officer therefore concluded that Harwood had submitted acceptable evidence of its capability to perform. CO Statement of Facts at 2.

There simply is nothing in the record here to suggest that there was countervailing information reasonably known to the contracting officer at the time he was making his responsibility determination that should have created doubt as to Harwood's ability to obtain all necessary and applicable zoning approvals for its offered site. Under these circumstances, given all of the information available to the contracting officer, it is clear from the record not only that the contracting officer considered the information in Harwood's offer that PFC and JDL argue was ignored, but also that its significance was reasonably considered in conjunction with the overall information he obtained supporting the firm's responsibility. Further, we will not consider the protesters' claim that the post-award denial by the local zoning board of Harwood's application for special exception establishes that the contracting officer's affirmative responsibility determination was unreasonable; whether a contractor in fact

performs in accordance with solicitation requirements is a matter of contract administration that is the responsibility of the contracting agency and is not for consideration by our Office. 4 C.F.R. § 21.5(a); see AJT & Assocs., Inc., B-284305, B-284305.2, Mar. 27, 2000, 2000 CPD ¶ 60 at 5-6.

The protests are denied.

Anthony H. Gamboa
General Counsel