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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Pernix-Serka LP

File: B-407656; B-407656.2

Date: January 18, 2013

J. Randolph MacPherson, Esq., and Rebecca Bailey Jacobsen, Esq., Halloran & Sage LLP, and Douglas L. Patin, Esq., Bradley Arant Boult Cummings LLP, for the protester.
Lawrence M. Prosen, Esq., Daniel F. Edwards, Esq., G. Brent Connor, Esq., Kyle G. Baker, Esq., Christian F. Henel, Esq., and Robert S. Lewis, Esq., Thompson Hine LLP, for Desbuild-Limak-Group 77 Joint Venture, an intervenor.
Dennis J. Gallagher, Esq., Department of State, for the agency.
Paul N. Wengert, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency failed to require compliance with definitive responsibility criterion in solicitation is denied where solicitation's standard clause, stating that the contractor warranted that it possessed a license to do business in the country, did not impose a definitive responsibility criterion.

2. Protest that awardee did not qualify for price evaluation preference under Percy Amendment, 22 U.S.C. § 302, is denied where agency reasonably determined that awardee qualified as an American-owned firm based on experience that included performance of similar construction work on a United States consulate project abroad.

DECISION

Pernix-Serka LP, doing business as Pernix-Serka Joint Venture (PS), of Lombard, Illinois, protests the award of a contract to Desbuild-Limak-Group 77 Joint Venture (DLG), of Hyattsville, Maryland, under request for proposals (RFP) No. SAQMMA-12-R-0271, issued by the Department of State (DOS), for design-build construction at the United States embassy compound in Baghdad, Iraq. PS argues that DOS failed to apply a requirement that DLG be licensed to do business in Iraq, and that DOS incorrectly determined that DLG was entitled to a price evaluation preference applicable to American-owned firms.

We deny the protest.

BACKGROUND

This procurement involves the award of a fixed-price design-build construction contract for a new power plant and compound-wide life safety and utility infrastructure upgrades at the United States embassy in Baghdad, Iraq. The contract contemplated a 30-month period of performance. Agency Report (AR), Tab 7, RFP, at 20.

The procurement was subject to section 11 of the Foreign Service Buildings Act of 1926, now codified at 22 U.S.C. § 302 (2006) and commonly referred to as the Percy Amendment. AR, Tab 2, Prequalification Solicitation, at 2. The Percy Amendment limits eligibility for award of certain overseas construction contracts to "American-owned bidders" and foreign offerors satisfying certain criteria (which are not at issue in this protest). 22 U.S.C. § 302(a). The Percy Amendment directs that the price proposed by an "American-owned" company be reduced by 10 percent for evaluation purposes. 22 U.S.C. § 302(b)(2). Under the Amendment, qualification as an "American-owned" company requires:

> evidence of (A) performance of similar construction work in the United States or at a United States diplomatic or consular establishment abroad, and (B) either (i) ownership in excess of fifty percent by United States citizens or permanent residents, or (ii) incorporation in the United States for more than three years and employment of United States citizens or permanent residents in more than half of the corporation's permanent full-time professional and managerial positions in the United States.

22 U.S.C. § 302(b)(4).

The procurement here was conducted in two phases: phase 1 (prequalification) and phase 2 (evaluation and award). AR, Tab 2, Prequalification Solicitation, at 1-2. Only those firms that were prequalified during phase 1 were eligible to compete in phase 2; the solicitation stated that award would be made on a low-priced, technically acceptable basis at the conclusion of phase 2. AR, Tab 7, RFP, at 125.

One of the factors to be considered in the prequalification phase (phase 1) was whether the offeror had a valid license to do business in Iraq. In this regard, the phase 1 solicitation required the offeror to "[d]escribe the entities in the [joint venture] which have a valid license to do business in Iraq" and to provide copies of these licenses. AR, Tab 2, Prequalification Solicitation, at 4. In phase 2, licenses were not to be evaluated; however, the solicitation included a contract clause (DOSAR § 652.242-73, Authorization and Performance) that required the contractor to warrant that it had obtained all necessary licenses and permits required to perform the contract. AR, Tab 7, RFP, at 81.

In its phase 1 proposal, DLG explained that the firm was organized as a joint venture in which Desbuild Inc. would hold a [**deleted**] percent interest, while Limak Construction Inc. and 77 Construction Ltd. (both described as Turkish firms) would hold the remaining shares, [**deleted**] percent each. AR, Tab 4, Joint Venture Agreement. Of these three joint venture members, only 77 Construction Ltd. was licensed to do business in Iraq; DLG submitted the required license for this company in its proposal. Id., at 4-8.

Another matter to be considered in the phase 1 evaluation was whether an offeror was to be considered "American-owned" under the Percy Amendment for purposes of applying the 10 percent price evaluation preference during phase 2. AR, Tab 2, Prequalification Solicitation, at 8. As the majority member of the joint venture, Desbuild Inc. completed the Percy Amendment certification form in DLG's phase 1 proposal, identifying three projects as similar construction work: design-build construction of classrooms at Quantico, Virginia, valued at $6.9 million; design-build construction of office space at New Delhi, India, valued at $9.7 million; and design-build construction of an embassy at Kingston, Jamaica, valued at $12.7 million.[1] AR, Tab 4, DLG Percy Amendment Form, at 1-2. Elsewhere, however, DLG explained that Desbuild Inc. had served as a prime contractor (performing [**deleted**] percent of the work) on an $82.3 million design-build construction project involving a United States consulate in Mumbai, India. AR, Tab 4, DLG Phase 1 Proposal, at 9.

From the information provided in DLG's phase 1 proposal, DOS determined that the firm was prequalified and that it was American-owned for purposes of applying the price evaluation preference during phase 2.[2] At the conclusion of phase 2, DOS determined that DLG submitted the lowest-priced, technically acceptable proposal. In this regard, with the 10 percent price evaluation preference, DLG's evaluated price was $75.9 million, whereas PS's evaluated price was $76.0 million. AR, Tab 12, Price Negotiation Memorandum, at 10.

On October 1, PS received notice of the award to DLG at a price of $84.4 million. Protest at 2. PS requested a debriefing, which was held on October 9. After the debriefing, PS filed this protest.

DISCUSSION

PS raises two arguments: that DLG was ineligible for award because it lacked a license to do business in Iraq, and that DOS improperly found DLG to be an

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[1] The Percy Amendment form lists this project value as "$12,700.00," however as the protester notes, the project value can be presumed to be $12.7 million. Protester's Comments at 6 n.3.

[2] PS was also determined by DOS to be American-owned.

American-owned firm under the Percy Amendment and therefore erroneously applied the 10 percent price evaluation preference. Neither argument provides a basis to sustain the protest.

With regard to the license requirement, PS asserts that DLG did not comply with a phase 2 solicitation provision (clause I.77) that required each offeror to possess a license to do business in Iraq.[3] PS argues that the license must be held by the joint venture, not just one of the joint venture members, and that the clause imposes a definitive responsibility criterion that DLG did not satisfy.

Normally, a general solicitation provision mandating that the contractor obtain all necessary licenses or permits needed to perform the work does not require that a bidder or offeror demonstrate compliance prior to award. Mid-America Mgmt. Servs., Inc., B-244103, June 5, 1991, 91-1 CPD ¶ 537 at 1-2. Instead, the securing of licenses and permits is a performance requirement that may be satisfied during contract performance and does not affect the award decision except as a general responsibility matter. HAP Constr., Inc., B-278515, Feb. 9, 1998, 98-1 CPD ¶ 48 at 2-3. Our Bid Protest Regulations generally preclude our review of a contracting officer's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c) (2012).

However, there is an exception to that rule where a protester shows that a definitive responsibility criterion in the solicitation was not met. Id. 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. Supreme Foodservice GmbH, B-405400, B-405400.2, Oct. 31, 2011, 2011 CPD ¶ 244 at 14. 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 the award. Public Facility Consortium I, LLC; JDL Castle Corp., B-295911, B-295911.2, May 4, 2005, 2005 CPD ¶ 170 at 3. As applied to a requirement for licensing, if the solicitation does not obligate a bidder to possess or show the ability to obtain a particular license before award, it is not a definitive responsibility criterion; rather, it is a contract performance requirement that does not affect a decision to award a contract. Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154 at 4; see also Evergreen Int'l Airlines, Inc., B-244284, Aug. 15, 1991, 91-2 CPD ¶ 154 at 3 (solicitation clause requiring a government approval document was not a definitive responsibility criterion because clause was addressed to "contractor," rather than "bidders," and did not state that requirement applied before award).

[3] As noted above, the phase 1 solicitation required DLG only to submit licenses for those entities in the joint venture that had valid licenses to do business in Iraq. AR, Tab 2, Prequalification Solicitation, at 4. DLG complied with this requirement.

Our review of the RFP does not support PS's argument that clause I.77 imposes a definitive responsibility criterion. As noted above, clause I.77 appeared in section I of the RFP, which was a list of "contract clauses." AR, Tab 7, RFP, at 74. Clause I.77 by its own terms states that the "contractor warrants" that it has various licenses to do business in the relevant country, and has other licenses needed to perform. Id. In our view, such a standard warranty--particularly one that, by its terms, states that the "contractor" (rather than the "offeror") is to make the representation--is not a definitive responsibility criterion. See Evergreen Int'l Airlines, Inc., supra, at 3. Clause I.77 does not reasonably inform offerors that they must demonstrate compliance before award. Accordingly, PS's challenge to the award on the basis that DLG failed to meet a definitive responsibility criterion in clause I.77 is denied.

Next, PS argues that DLG did not qualify for the price evaluation preference because the three projects listed by DLG in its Percy Amendment form were not similar to the work required under the solicitation. The agency explains that it considered work by DLG's majority joint venture member on the Mumbai consulate project, which was referenced elsewhere in DLG's proposal, and found it to be similar. PS contends that DOS should not have considered information that was not listed on DLG's Percy Amendment form and that, in any event, the Mumbai consulate project does not qualify as similar construction work under the Percy Amendment.

In assessing protests under the Percy Amendment, our decisions reflect a limited and deferential review; we will not overturn an agency's subjective evaluation judgments unless they are unreasonable or inconsistent with applicable procurement laws, regulations, or the solicitation. See Perini Mgmt. Servs., Inc., B-404261, et al., Dec. 17, 2010, 2011 CPD ¶ 11 at 5 (GAO denies protest where DOS found that an awardee was an American-owned firm based on at least one example the DOS determined was similar); American Int'l Contractors, Inc., B-260727, May 31, 1995, 95-1 CPD ¶ 266 at 6-7 (DOS has discretion to qualify firms for "American owned bidders" price preference that are joint ventures of American-owned and non-American firms); see also Fischbach & Moore Int'l Corp., B-254225, Dec. 2, 1993, 93-2 CPD ¶ 305 at 7 (GAO defers to DOS discretion in awarding contract to foreign firm although DOS had not investigated whether foreign country gave equal access to American bidders for diplomatic and consular building projects).

Here, DOS based its determination that Desbuild Inc. (DLG's majority joint venture member) had shown evidence of similar construction work on a design-build contract at the United States consulate at Mumbai, India. Although Desbuild Inc. did not list that contract among the three provided in the agency's Percy Amendment form, the work was referenced in DLG's proposal. Nothing in the Percy Amendment or solicitation prohibited the agency from considering information outside the form submitted by offerors. In our view, it was within DOS' discretion to consider this information from elsewhere in the proposal when determining whether there was

evidence that DLG should be considered an American-owned firm based on the work performed by its majority joint venture member.

With regard to the protester's argument that the construction project in Mumbai was dissimilar to the work required here, we find the agency's analysis unobjectionable. The Percy Amendment does not provide a definition for "similar construction work," but DOS' implementing regulation required that offerors show the similarity of their projects to the work procured here by describing the location, complexity, type of construction, and value of one or more projects. 48 C.F.R. § 652.236-71(d)(1). DOS' legal counsel reviewed the projects listed by DLG and specifically determined that the Mumbai project qualified as similar work. AR, Tab 5, Memorandum from Agency Counsel, July 10, 2012, at 3. The agency's legal counsel also relied upon earlier Percy Amendment reviews, in which it was also determined that Desbuild Inc.'s work on the Mumbai consulate project qualified for the price preference. Supp. AR, at 4. Under these circumstances, we find no basis to question the reasonableness of DOS' determination that Desbuild Inc.'s construction experience was similar to the requirements here.

The protest is denied.

Susan A. Poling
General Counsel