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## Decision

**Matter of:** Promotions Plus, Inc.

**File:** B-409318

**Date:** March 10, 2014

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Frank V. Reilly, Esq., Frank V. Reilly Attorney at Law, for the protester.  
Marc Lamer, Esq., Kostos & Lamer, P.C., for the intervenor.  
Joseph R. Weidenburner, Esq., Defense Logistics Agency, for the agency.  
Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest alleging that awardee's proposal violates applicable limitation on subcontracting is denied where the proposal does not show, on its face, that the awardee will not comply with the limitation.

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### DECISION

Promotions Plus, Inc., of North Royalton, Ohio, protests the award of a contract to M&M Manufacturing, LLC of Lajas, Puerto Rico, by the Defense Logistics Agency (DLA) under request for proposals (RFP) No. SPE1C1-13-R-0001 for the supply of green and tan Summer Flyer's Gloves. Promotions argues that M&M's proposal is unacceptable because it did not comply with the limitation of subcontracting provisions set forth in the RFP, which was partially set aside for small businesses.

We deny the protest.

### BACKGROUND

The RFP requirements were divided into two lots: Lot 0001 for 50 percent of the requirement was solicited on an unrestricted basis, and Lot 0002 for the remaining 50 percent of the requirement was solicited as a total small business set-aside. This protest concerns the award of Lot 0002, the total small business set-aside portion. The solicitation contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity contract with a 1-year base period and two 1-year options. RFP at 4, 43-44. The RFP advised offerors that award would be made on a best-value basis, considering price and the following two evaluation factors listed in

descending order of importance:<sup>1</sup> (1) product demonstration models, and (2) past performance confidence.<sup>2</sup> RFP at 62-63.

The RFP incorporated the “Notice of Total Small Business Set-Aside” provision of Federal Acquisition Regulation (FAR) clause 52.219-6, and the “Limitations on Subcontracting” provision of FAR clause 52.219-14. RFP at 44-45. As relevant here, the small business set-aside notice clause stated as follows:

(d) Agreement. A small business concern submitting an offer in its own name shall furnish, in performing the contract, only end items manufactured or produced by small business concerns in the United States or its outlying areas.

FAR clause 52.219-6

The limitations on subcontracting clause included, in pertinent part:

(c) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for--

(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(2) Supplies (other than procurement from a nonmanufacturer of such supplies). The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

FAR clause 52.219-14.

The agency received proposals from four offerors, including Promotions Plus and M&M, by the amended due date of February 28. Agency Report (AR) at 4. M&M’s

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<sup>1</sup> The RFP also included a third evaluation factor, socioeconomic proposal, that applied only to the unrestricted portion of the RFP. RFP at 72.

<sup>2</sup> The solicitation advised offerors that adjectival ratings of outstanding, good, acceptable, marginal, and unacceptable would be assigned for the product demonstration model factor and the past performance factor. RFP at 73. The RFP also stated that the assessment process would result in a past performance confidence level rating of substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence. Id. at 77.

proposal included details of its manufacturing processes and procedures. AR, Tab 7, M&M's Technical Proposal, at 10-12. As relevant here, M&M stated that it will perform 100 percent of the manufacturing and shipping in its [DELETED], and that cutting would be performed at [DELETED]. AR, Tab 6, M&M's RFP Response, at 71. M&M's proposal showed that it would be responsible for bundling component parts for traceability throughout the entire construction process. AR, Tab 7, M&M's Technical Proposal, at 11. Its proposal highlighted that M&M would inspect the manufacturing goods at several different points throughout the construction process, including a 100 percent final inspection of the end product. Id. M&M's proposal outlined the packing and shipping methods that it would utilize. Id. at 12. M&M did not take exception to the limitations on subcontracting clause, nor did it indicate in its proposal that it would be unable to comply with the applicable small business requirements.

M&M's price was \$9,967,019.40, and its proposal received an acceptable rating for its PDM, and an outstanding past performance rating with a satisfactory confidence level. AR at 5-6. Promotions' price was \$11,879,684.40, and its proposal received an acceptable rating for its PDM, and an outstanding past performance rating with a satisfactory confidence level. Id. The agency concluded that M&M's proposal represented the best value, and awarded a contract to that firm on November 21. This protest to our Office followed.

## DISCUSSION

Promotions argues that DLA should have rejected M&M's proposal as unacceptable because, on its face, the awardee's proposal did not comply with the RFP's limitation on subcontracting. Specifically, the protester argues that M&M will not perform more than 50 percent of the cost of manufacturing, as required by the RFP, because M&M intends to subcontract the cutting to [DELETED]. The protester also contends that the awardee's proposed subcontract with [DELETED], which is not a small business, renders its proposal unacceptable. For the reasons discussed below, we find no basis to sustain the protest.

As a general matter, an agency's judgment as to whether a small business vendor will be able to comply with a subcontracting limitation presents a question of responsibility, and the contractor's actual compliance with the provisions is a matter of contract administration. KIRA, Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3. However, where a proposal, on its face, should have led the agency to conclude that the concern could not and would not comply with the subcontracting limitation, this is a matter of technical acceptability. Id. A submission that fails to conform to a material term or condition of the solicitation, such as a limitation on subcontracting clause, is unacceptable and may not form the basis for an order. Id.

DLA argues that nothing in M&M's proposal, on its face, showed that the awardee would not comply with the requirement to perform at least 50 percent of the cost of manufacturing. AR at 9. Although M&M proposed to use [DELETED] to perform the cutting requirements, the agency notes that nothing in M&M's proposal indicated that these costs would exceed 50 percent of the manufacturing costs for the end item to be provided. *Id.* at 10-11. Instead, as discussed above, the awardee's proposal stated that it would perform the manufacturing, inspection, bundling and shipping. AR, Tab 6, M&M's RFP Response, at 71; Tab 7, M&M's Technical Proposal, at 11-12.

In our view, nothing on the face of M&M's proposal takes exception to the RFP's limitation on subcontracting, or suggests that the awardee will not comply with that limitation in performing the contract. As relevant here, M&M's proposal states that it will be responsible for overall contract performance; that it will make the gloves; and that it will be responsible for all of the manufacturing and shipping. AR, Tab 6, M&M's RFP Response, at 71. The agency states that after analyzing M&M's proposal, it determined that M&M will manufacture and produce the end items in accordance with the small business set-aside clause, as well as perform work for at least 50 percent of the costs of manufacturing the supplies of the end item in accordance with the limitations on subcontracting requirements. AR at 10-11. Under these circumstances there is no basis for us to conclude that M&M's proposal, on its face, should have led the agency to conclude that M&M could not and would not comply with the limitation on subcontracting clause.

Promotions also argues that M&M's proposed use of [DELETED] as a subcontractor violates FAR clause 52.219-6, because, the protester contends, that provision requires that the provided end item be manufactured by the small business offeror, without any work performed by a large business.

Promotions initially argued that the M&M violated the limitation on subcontracting, based on language included in the presolicitation synopsis, but not included in the solicitation. Protest at 3. We will not address this argument as the protester abandoned this argument by failing to address it in its comments on the agency report. *See Accumark, Inc.*, B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 at 2 n.1. In its comments on the agency report, Promotions raised for the first time a new argument concerning its interpretation of FAR clause 52.219-6. In this regard, the protester argues that the clause requires offerors to provide an end product manufactured by a small business, and that this requirement prohibits non-small firms from performing any part of the work. Protester's Comments at 3. This allegation is untimely as it was not raised in its initial protest. *Comprehensive Health Servs., Inc.*, B-292858.3 *et al.*, Apr. 27, 2004, 2004 CPD ¶ 165 at 8 n.4 (piecemeal presentations of protest grounds are untimely).

In any event, we are not persuaded by the protester's argument that M&M's proposal, on its face, fails to comply with FAR clause 52.219-6 because the

proposal states that [DELETED], a large business, will do the cutting. Comments at 2. As stated above, M&M has committed to performing at least 50 percent of the costs of manufacturing the end item, in accordance with the applicable limitations on subcontracting. AR at 10-11. The protester does not cite any authority for the proposition that use of a large business subcontractor for any portion of the work violates the requirement to provide a small business end product under FAR clause 52.219-6. In fact, as our Office has held, the requirement to provide an end item manufactured by a small business does not preclude the small business from using components or raw materials furnished by a large business. Test Sys, Assoc., Inc., B-256813, B-256813.5, Oct. 14, 1994, 94-2 CPD ¶ 153 at 6 n.5.

The protest is denied.

Susan A. Poling  
General Counsel