



GAO protest challenging exclusion from a small business set-aside competition is sustained where the (1) agency found the protestor's proposal unacceptable because it did not demonstrate required capabilities in health-related mission and (2) the agency failed to refer the small business protestor to the SBA under the SBA's certificate of competency program. *Competitive Range Solutions, LLC*, B-413104.10, April 18, 2017.

According to the GAO, the Small Business Act provides that it is the SBA's duty to certify to government procurement officers with respect to all elements of contractor responsibility (capability, competency, capacity, credit, integrity, perseverance, and tenacity) of any one or a group of small business firms to receive and perform a specific government contract. 15 U.S.C. Sec. 637(b)(7)(A). The SBA's regulations specifically require a contracting officer refer a small business concern to the SBA for consideration of a certificate of competency (COC) when the contracting officer "refuses to consider a small business concern for award of a contract or order after evaluating the concern's offer on a **non-comparative basis** (e.g., a pass/fail, no/no-go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 CFR 125.5(a)(2)(ii).

In this case, the GAO found that since the agency was evaluating proposal on a go/no-go basis (non-comparative) and the agency's argument that the proposal was evaluated on a responsive basis was not persuasive, the agency should have referred the protestor to the SBA for a COC determination. Simply put, the GAO found the agency evaluated the proposal on the protestor's capability to perform the contract, not on the adequacy or completeness of the proposal. In so doing, the correct thing to do when performing such an evaluation in a go/no-go situation, is to refer it to the SBA for a COC determination.

Protest Decision Attached



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Competitive Range Solutions, LLC

File: B-413104.10

Date: April 18, 2017

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Seeta Rebbapragada, Esq., Department of Health and Human Services, for the agency. Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging exclusion from small business set-aside competition is sustained where the agency found the protester's proposal unacceptable because it did not demonstrate required capabilities in health-related missions and the agency failed to refer the small business protester to the Small Business Administration (SBA) under the SBA's certificate of competency procedures.

DECISION

Competitive Range Solutions, LLC (CRS), of O'Fallon, Illinois, protests the Department of Health and Human Services, National Institutes of Health (NIH)'s exclusion of the protester's proposal from further consideration under request for proposals (RFP) No. NIHJT2016015, for information technology (IT) supplies and services. The protester argues that the agency's exclusion of its proposal based on its failure to have sufficient capabilities in health-related missions amounted to a nonresponsibility determination that should have been referred to the Small Business Administration (SBA) under SBA's certificate of competency (COC) procedures.

We sustain the protest.

BACKGROUND

Pursuant to Section 5112(e) of the Clinger-Cohen Act of 1996, 40 U.S.C. § 11302(e), the Office of Management and Budget has designated NIH as an executive agent for

government-wide IT acquisitions. RFP at B-1.¹ The RFP, issued on March 14, 2016, contemplated the award of up to 35 additional indefinite-delivery, indefinite-quantity (IDIQ) contracts for NIH's existing Chief Information Officer-Solutions and Partners 3 small business (CIO-SP3 SB) government-wide acquisition contract (GWAC), a 10-year IDIQ contract for IT solutions and services. Id. The solicitation contemplated the issuance of fixed-price, time-and-materials, or cost-reimbursement task orders during the period of performance, which would correspond with the current GWAC contracts, and would end in 2022. Id. at B-1, F-1, G-6 to G-8. The maximum order amount established for the contracts was \$20 billion, with a guaranteed minimum of \$250 per awardee. Id. at B-2.

The solicitation advised offerors that the government would evaluate proposals in two phases. Id. at M-1. During phase 1, the government would evaluate the proposals based on four "Go/No-Go" requirements.² Id. at M-3, M-4. As relevant here, factor 2, management approach, subfactor 1, domain-specific capability in a health-related mission, was one of the go/no-go requirements to be evaluated during phase 1.³ Id. at M-4.

As relevant here, the solicitation stated that under this subfactor the government would evaluate whether the offeror "demonstrates an inherent domain-specific capability in a health-related mission This capability can be demonstrated through experience examples or internal resources with substantial relevant experience." Id. at M-8. The solicitation also stated that health-related missions were "broadly defined as those that contribute directly to human health and may include corporate expertise in fields such as healthcare, health-related/biomedical research and health science, clinical analytics and intelligence, health policy, health-related grant making, and regulation of health industries." Id. The solicitation warned that proposals that fail to demonstrate domain-

¹ The solicitation was amended four times. All citations to the RFP are to the conformed RFP provided by the agency.

² Proposals found acceptable in phase 1 would be evaluated during phase 2 using the following non-price factors and price: technical capability and understanding; management approach; and past performance. Id. at M-4-M-11.

³ The solicitation stated that under the management approach factor, the offeror's capability to perform task orders under the contract would be assessed. See RFP at M-8. This would be done by evaluating the offeror's management experience and capabilities to determine the offeror's likelihood of successful performance under the contract. Id. In addition to subfactor 1, domain-specific capability in a health-related mission, which was evaluated on a go/no-go basis in phase 1, this factor also included three other equally-weighted subfactors (resources, program management, and corporate commitment) and their respective elements, which were to be evaluated in phase 2. See id. at M-8-M-10. In the second phase of the procurement, these subfactors and elements were to be rated using the following adjectival ratings: highly acceptable, very acceptable, acceptable, and unacceptable. Id. at M-5.

specific capability in a health-related mission would be deemed unacceptable and ineligible for further consideration for award. Id.

The agency received 552 proposals, including a proposal from CRS. Agency Report (AR), Contracting Officer Statement of Facts (COS) at 2; AR, Memorandum of Law (MOL) at 4. The agency evaluated the protester's proposal under the service-disabled veteran-owned small business (SDVOSB) grouping.⁴ AR, MOL at 4.

As relevant here, the agency found CRS's proposal unacceptable under the management approach factor, domain-specific capability in a health-related mission subfactor. See AR, Tab 7, Go/No-Go Assessment, Factor 2, Subfactor 1- Domain Specific Capability in a Health-Related Mission Socioeconomic Group: SDVOSB, at 4, 10. Specifically, the agency found that the examples CRS provided in its proposal all involved "provision of IT services and solutions, which [was] not sufficient to demonstrate inherent capabilities in health-related missions." Id. at 10. The agency also noted that CRS's proposal also did not demonstrate that it possessed the requisite capability through "internal resources with substantial relevant experience." Id. As a result, the agency found CRS's proposal ineligible for further consideration for award. Id.

After being informed of its elimination from the competition on January 13, 2017, CRS filed this protest with our Office.

DISCUSSION

CRS contends that the agency's exclusion of its proposal based on its failure to have sufficient capabilities in health-related missions amounted to a nonresponsibility determination that should have been referred to the SBA under SBA's COC procedures.⁵ See Protest at 7.

⁴ The solicitation provided that the government would establish "contractor groups" (historically underutilized business zone (HUBZone), SDVOSB, section 8(a), and small business), and projected the number of anticipated awards for each group. See RFP at M-2, M-3.

⁵ The protester also argues that the agency's evaluation of its proposal under factor 2, management approach, subfactor 1, domain-specific capability in a health-related mission, was flawed because the agency unreasonably interpreted the solicitation. See Protest at 5-7; Comments at 2-4; Supp. Comments at 3. In this regard, the protester contends that reading the term "inherent domain-specific capability in a health-related mission" as requiring offerors to possess experience in providing services that directly contribute to human health--which the protester concedes it does not possess--was unreasonable. See Comments at 2-3; Supp. Comments at 3. Instead, the protester argues that because CRS is an IT support company and the purpose of the contract is to provide IT solutions and services (and not healthcare services), offerors were required only to demonstrate their capability in providing IT services in

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In response, the agency explains that the agency reasonably found CRS's proposal unacceptable under the management approach, domain-specific capability in a health-related mission subfactor. See AR, MOL at 7; see also AR, Supplemental (Supp.) MOL at 1-2. The agency further argues that this assessment was not a determination that CRS lacked the requisite capabilities to perform health-related missions, and therefore was not a responsibility determination. See AR, MOL at 8-9. In this regard, the agency contends offerors eliminated under the management approach, domain-specific capability in a health-related mission subfactor were eliminated because their proposals were not responsive to the solicitation as reflected in the agency's evaluation. Id.

The Small Business Act provides that it is the SBA's duty to certify to government procurement officers with respect to all the elements of contractor responsibility (including capability, competency, capacity, credit, integrity, perseverance, and tenacity) of any one or group of small business concerns to receive and perform a specific government contract. 15 U.S.C. § 637(b)(7)(A). SBA's implementing regulations specifically require a contracting officer to refer a small business concern to SBA for consideration for a COC when the contracting officer "[r]efuses to consider a small business concern for award of a contract or order after evaluating the concern's offer on a non-comparative basis (e.g., a pass/fail, go/no-go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii).

Here, the solicitation provided that in phase 1 of the evaluation, proposals were to be evaluated on a go/no-go basis, i.e., non-comparative basis. See RFP at M-3, M-4. The solicitation further provided that if rated unacceptable under any factor in phase 1, the entire proposal would be rendered unacceptable and ineligible for award. See id. at M-4. Further, the record provides no support for the agency's argument that CRS's proposal was eliminated because it was not responsive to the solicitation. Contrary to the agency's arguments, the record shows that the agency found that the examples provided by CRS in its proposal were "not sufficient to demonstrate inherent capabilities in health-related missions" and that CRS's proposal did not demonstrate that it possessed the requisite capability through "internal resources with substantial relevant experience." See AR, Tab 7, Go/No-Go Assessment at 10. On this record, we find that the agency's conclusion relates to CRS's capability to perform the contract, not simply the adequacy or completeness of its proposal submission. See 22nd Century Team,

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health-related fields, which the protester asserts it did. See Protest at 5-7; Comments at 2-3; Supp. Comments at 3. We disagree. Here, the solicitation stated that offerors were required to demonstrate "an inherent domain-specific capability in a health-related mission," i.e., missions that contribute directly to human health. See RFP at M-8. Accordingly, on this record and reading the solicitation as a whole, we do not find that the plain language of the solicitation provides support for the protester's argument that the agency's interpretation of the requirement was unreasonable.

LLC--Costs, B-412742.4, Dec. 15, 2016, 2016 CPD ¶ 369 at 6. Accordingly, the Small Business Act requires that the agency should have referred CRS to the SBA for a COC review in accordance with 13 C.F.R. § 125.5(a)(2)(ii). Cascadian Am. Enters., B-412208.3, B-412208.4, Feb. 5, 2016, 2016 CPD ¶ 29 at 7-8.

In sum, the agency evaluated the small business offerors on an acceptable/unacceptable basis, as opposed to a comparative basis, with respect to relevant experience, a responsibility-type evaluation factor, and found CRS's proposal unacceptable under that factor. See 13 C.F.R. § 125.5(a)(2)(ii). As such, rejection of CRS's proposal based on its rating of unacceptable under the management approach, domain-specific capability in a health-related mission subfactor, without first referring the matter to the SBA for a COC determination, was improper. Accordingly, we sustain the protest.

RECOMMENDATION

As set forth above, we agree with the protester's assertion that the agency's exclusion of its proposal based on its failure to have sufficient capabilities in health-related missions amounted to a nonresponsibility determination that should have been referred to the SBA under SBA's COC procedures. As a result, we recommend that the agency refer this matter to the SBA for review. If the SBA issues a COC, the agency should evaluate CRS's proposal under phase 2. We also recommend that the agency reimburse CRS its reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Susan A. Poling
General Counsel