Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Orincon Corporation

File: B-276704

Date: July 18, 1997

Nancy O. Dix, Esq., Gray Cary Ware & Freidenrich, for the protester.
James H. Haag, Esq., Department of the Navy, for the agency.
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Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a proposal is unacceptable as submitted for failing to comply with the small business set-aside solicitation's subcontracting limitation, and would require major revisions to become acceptable, the proposal may properly be excluded from the competitive range and the contracting agency is under no obligation to conduct discussions with the offeror.

DECISION

Orincon Corporation protests the actions of the Department of the Navy, Space and Naval Warfare Systems Command in eliminating Orincon from the competition for the small business set-aside contract to be awarded under request for proposals (RFP) No. N00039-96-R-0086(Q), for technology, analytical, engineering, program management, and administrative services in support of agency command, control, communications, computers, and intelligence programs.

We deny the protest.

The RFP, issued on June 10, 1996, contemplated the award of a cost-plus-fixed-fee level-of-effort contract for a base year with 3 option years to the responsible offeror offering the best overall value to the government, technical and management approach and price considered. In the procurement information section of the RFP cover sheet, the Navy checked the boxes indicating that the procurement is 100 percent set aside for small business.

As issued, however, the RFP omitted the clause found at Federal Acquisition Regulation (FAR) § 52.219-6, Notice of Total Small Business Set-Aside, which is required by FAR § 19.508(c) to be inserted in solicitations for total small business set-asides. This clause, among other things, provides that "[o]ffers are solicited only from small business concerns" and that "[a]ny award resulting from this solicitation

will be made to a small business concern." The RFP, as issued, also omitted the clause found at FAR § 52.219-14, Limitations on Subcontracting, which FAR § 19.508(e) requires to be inserted in the solicitation for a small business set-aside, and which reads, in relevant part, as follows:

> (b) 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--
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> > (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.[1]

The RFP informed offerors that the government intended to evaluate proposals and award a contract without discussions, but reserved the right to conduct discussions if necessary with offerors determined to be in the competitive range.

The Navy received proposals, including Orincon's, by August 7. Orincon, which certified itself to be a small business concern, proposed to team with two subcontractors, also small businesses, to perform 70 percent of the work under the contract. During the course of evaluating Orincon's proposal, the contracting officer discovered that Orincon's proposal indicated that it would not itself incur at least 50 percent of the personnel costs of performance with its own employees. Thereupon, the contracting officer reviewed the solicitation and realized that the required Notice of Small Business Set-aside and Limitations on Subcontracting clauses had been inadvertently omitted from the RFP.

On February 4, 1997, the Navy issued amendment 0005 to Orincon and the other offerors to incorporate those two clauses into the solicitation. The amendment informed offerors that any proposal updates directly caused "by this action" were to be received by the Navy by February 18, and that no other proposal updates would be considered. According to the Navy, Orincon was the only offeror which needed to take advantage of the opportunity to revise its proposal in response to amendment 0005.

Orincon, however, did not revise its proposal. The contracting officer then determined that Orincon was "nonresponsible" for proposing to subcontract out more than 50 percent of the work under the contract, and, on February 26, referred his nonresponsibility determination to the Small Business Administration (SBA)

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[1]This provision implements 15 U.S.C. § 644(o)(1) (1994), which is designed to prevent small business concerns from subcontracting to large businesses the bulk of a contract set aside for small businesses. Diversified Computer Consultants, B-230313; B-230313.2, July 5, 1988, 88-2 CPD ¶ 5 at 6.

pursuant to Certificate of Competency (COC) procedures.[2] SBA contacted Orincon to advise it that the contracting officer had determined Orincon to be nonresponsible and to provide Orincon with an opportunity to appeal the contracting officer's determination by applying for a COC.

In a letter dated March 10 to the contracting officer, Orincon complained that the belated addition of the Limitations on Subcontracting clause by amendment 0005

> had the effect of leaving offerors such as Orincon with no opportunity to adequately restructure its entire proposal to respond to this clause, and potentially makes Orincon's proposal nonresponsive, despite the fact that it clearly exceeds the intent of the requirement with 70 percent of the work being performed by small businesses.

Orincon also requested "a waiver from the express requirement of FAR § 52.219-14, that the offeror must itself perform 50 percent of the work."

The contracting officer denied Orincon's request for a waiver from the limitation on subcontracting in a letter dated March 18, explaining that, although the omission of the limitation on subcontracting clause from the original solicitation was an administrative oversight, he had no authority to waive this statutory requirement, and that "[t]he law requires that any proposal not meeting the requirement be deemed nonresponsible."

SBA declined to issue Orincon a COC, explaining in correspondence dated March 31 that it could not reverse the contracting officer's determination of nonresponsibility, because Orincon's proposal did not comply with the requirement of the solicitation's Limitations on Subcontracting clause that a concern must perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.

The Navy then rejected Orincon's proposal. This protest followed. The Navy states that it has neither made a competitive range determination nor conducted

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[2]FAR § 19.602-1 requires a contracting officer to refer a nonresponsibility determination involving a small business to SBA. SBA now considers compliance with the limitations on subcontracting an element of responsibility and applies its COC procedures, where, as here, a contracting officer determines noncompliance, the procurement is a full or partial small business set-aside, and the contracting officer refers the matter to SBA for a COC. 13 C.F.R. § 125.6(c), (f) (1997). SBA previously considered compliance with the limitations on subcontracting to be a component of size eligibility. See CSR, Inc., B-260955, Aug. 7, 1995, 95-2 CPD ¶ 59 at 4.

discussions with any of the offerors, and has not yet decided whether it will award the contract without discussions, as permitted by the solicitation.

Orincon argues that its proposal was in fact acceptable and that it did not need to take any action in response to amendment 0005 because under the terms of the Limitations on Subcontracting clause itself, Orincon, by submitting an offer, agreed that in performing the contract at least 50 percent of the cost of contract performance incurred for personnel would be expended for its own employees.

As a general matter, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation is a matter of responsibility, and the contractor's actual compliance with the provision is a matter of contract administration. Ann Riley & Assocs., Ltd., B-271741.2, Aug. 7, 1996, 97-1 CPD ¶ 120 at 3; Global Assocs. Ltd., B-271693; B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100 at 5. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror could not and would not comply with the subcontracting limitation, we have considered this to be a matter of the proposal's technical acceptability; a proposal that fails to conform to a material term and condition of the solicitation such as the subcontracting limitation is unacceptable and may not form the basis for an award. National Medical Staffing, Inc.; PRS Consultants, Inc., 69 Comp. Gen. 500, 502 (1990), 90-1 CPD ¶ 530 at 3-4; Ann Riley & Assocs., Ltd., supra.

Here, it is undisputed that Orincon's proposal on its face showed that Orincon would not incur at least 50 percent of the personnel costs of performance with its own employees. Indeed, the protester itself admits that "the percentage of work required by the Limitations on Subcontracting clause was not met by Orincon's proposed performance."[3] Thus, Orincon's proposal did not offer to comply with the Limitations on Subcontracting clause incorporated into the amended RFP. Since Orincon's proposal took exception to the RFP's mandatory subcontracting limitation, which could not be waived, Orincon's proposal was unacceptable as submitted. See National Medical Staffing, Inc.; PRS Consultants, Inc., supra, at 4.

Orincon nevertheless contends that, given the Navy's belated addition of the Limitations on Subcontracting clause to the RFP after Orincon had already submitted its proposal, the Navy had an obligation to conduct discussions so as to

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[3]Orincon argues that because it and two other small business contractors would perform 70 percent of the contract that it complied with the "intent" of the limitation of subcontracting clause, which is designed to prevent a small business awarded a set-aside contract from subcontracting the bulk of the work to a large business. However, the plain language of both the statutory and regulatory limitations on subcontracting require that the offeror itself, not merely small businesses, incur at least 50 percent of the personnel costs of contract performance. 15 U.S.C. § 644(o)(1); FAR § 52.219-14.

provide Orincon an opportunity to revise its proposal, rather than simply determining that Orincon was nonresponsible and referring the matter to SBA for a COC.

We agree with the protester that where discussions are contemplated or conducted, an offeror's compliance with the subcontracting limitation is an appropriate topic for discussions so as to allow the offeror to modify or clarify its proposal in this regard. See, e.g., Ann Riley & Assocs., Ltd., supra, at 5-6; Global Assocs. Ltd., supra at 4-6; Diversified Computer Consultants, supra, at 7. However, where a proposal is technically unacceptable as submitted and would require major revisions to become acceptable, the agency is not required to include the proposal in the competitive range.[4] Laboratory Sys. Servs., Inc., B-256323, June 10, 1994, 94-1 CPD ¶ 359 at 2; Yankee Mach., Inc., B-249183, Oct. 29, 1992, 92-2 CPD ¶ 294 at 3.

As described above, Orincon itself admits that its proposal could not conform to the subcontracting limitation without major revisions. According to Orincon, this was the reason that it elected not to modify its proposal when it was provided the opportunity to do so by amendment 0005. Thus, because Orincon's proposal was unacceptable as submitted and would require major revision to become acceptable, the proposal could properly be excluded from any competitive range that may be

[4]FAR § 15.609(a) defines the competitive range as including all proposals that have "a reasonable chance" of being selected for award, that is, those proposals which are technically acceptable as submitted or which are reasonably susceptible of being made acceptable through discussions. DBA Sys., Inc., B-241048, Jan. 15, 1991, 91-1 CPD ¶ 36 at 5.

established and the Navy would be under no obligation to conduct discussions with Orincon regarding its proposal's noncompliance with the RFP's mandatory subcontracting limitation.[5]

The protest is denied.

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[5]We note that SBA states that its regulations "assume that ultimate responsibility is determined after discussions have been completed with offerors in the competitive range and an apparent successful offeror has been selected." See 13 C.F.R. § 125.5(c)(1) (requires referral to SBA of a contracting officer's determination that "an apparently successful offeror" that has certified itself to be a small business lacks any element of responsibility). However, SBA also states that it will consider a referral of a small business concern that is not the apparent successful offeror where the concern's offer will not receive further consideration because the contracting officer has determined the concern to be nonresponsible. Here, even if Orincon believes that the Navy referred the matter of Orincon's responsibility to SBA prematurely, Orincon (which, we note, participated in the COC process without objection) was not prejudiced by the agency's or the SBA's actions, because its proposal could properly be eliminated from the competitive range unless SBA issued a COC.