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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Tessa Structures, LLC

File: B-298835

Date: December 14, 2006

Raymond J. Sherbill, Esq., and Stuart A. Schwager, Esq., Ridberg, Sherbill & Aronson LLP, for the protester.

Julia L. Perry, Esq., Federal Highway Administration, and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

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DIGEST

Agency's rejection of protester's bid based on determination that protester could not perform in the number of days specified in its bid constituted a finding of nonresponsibility--rather than one of nonresponsiveness, as characterized by the agency--which, because protester was a small business, had to be referred to Small Business Administration for certificate of competency review.

DECISION

Tessa Structures, LLC protests the award of a contract to Fort Myer Construction Co. under invitation for bids (IFB) No. DTFH71-06-B-00014, issued by the Department of Transportation, Federal Highway Administration (FHWA), for bridge-related repairs. Tessa maintains that the agency improperly rejected its bid as nonresponsive.

We sustain the protest.

The IFB, issued on May 26, 2006, contemplated the award of a fixed-price contract for construction and painting on three bridges on the George Washington Memorial Parkway in Washington, D.C. and Arlington, Virginia. The IFB stated that award would be based on the lowest total project price, which would be the sum of the bid price and the contract administrative costs associated with the length of the performance period stated in the bid (\$2,200 per calendar day bid). In this regard, the bid schedule included a summary page on which bidders were to state the number of calendar days it would take to complete the work starting from the notice

to proceed, or from the date stated in the notice to proceed. The IFB stated that the performance period could not exceed 305 days, but the IFB did not specify a minimum number of days. The IFB also informed bidders that the performance period calculation should take into account work limitations found in the solicitation, such as holidays, weekends, rush hours, night work, and no-work periods, and weather sensitive items, such as ambient air temperature requirements, minimum surface temperature requirements, and specific planting seasons. Finally, the IFB stated that cleaning and painting operations--the last work to be performed--could not be performed between January 1 and April 1, 2007.

Three bids were received by the July 13 opening date. Tessa's evaluated price of \$2,542,730--based on a bid of \$2,278,730 and a performance period of 120 days--was the lowest, and Fort Myer's evaluated price of \$2,546,430--based on a bid of \$1,996,430 and a performance period of 250 days--was second lowest. (The third bidder's evaluated price was \$3,024,415, based on a bid price of \$2,386,415 and a performance period of 290 days.)

By letter dated July 21, the agency informed Tessa that it was "very concerned" with the 120-day performance period it had submitted in its bid. Protest, exh. 2. The letter noted that the other bidders and the government estimate used longer performance periods, that the heavy volume of traffic on the highway would limit daily construction time, and that the construction limitations contained in the solicitation would be strictly enforced. The letter requested that Tessa submit a construction schedule and a written explanation of how it expected to complete all work within the 120-day time period. Id.

Tessa responded by providing the agency with its preliminary critical path method (CPM) schedule, as well as a list of some of the assumptions the firm had made in creating the schedule. One of those assumptions was that the firm would start performance on August 28, and thus be finished by December 25, 120 days later. Protest, exh. 3.

By letter dated August 3, the agency informed Tessa that its August 28 start date was contrary to the requirements of the IFB, since the performance period "starts with the [n]otice to [p]roceed," which could occur as late as 104 days after bid opening, that is, October 24. Protest, exh. 4, at 1. According to the agency, Tessa should have used this date as the start date, not August 28. The letter went on to state that Tessa had not shown how it could complete the work in as few as 68 days--from October 24 to January 1, 2007. It further noted that, as stated in the solicitation, liquidated damages (in the amount of \$2,200 a day) would be assessed against Tessa once its performance period passed, and concluded by informing Tessa that either it could withdraw its bid or the agency could find the bid nonresponsive.

Tessa responded on August 9, outlining why it believed it could still perform the work even if it could not start the work until October 24. Protest, exh. 5. Tessa explained that it would use a later completion date (December 29), work 7 days a

week, work multiple shifts if necessary, and use tents and heating for various aspects of the painting work if inclement weather were encountered. Tessa further stated that it had funds in its bid amount to account for exposure to possible liquidated damages if they should be assessed.

By letter dated September 6, the agency advised Tessa that it was rejecting its bid as nonresponsive. The letter stated that Tessa had failed to address all of the government's concerns regarding its 120-day schedule, and that this time period was not realistic given the special weather conditions that were to be taken into consideration. The agency further stated that "an assumption that the work can be performed under liquidated damages is a failure to comply with the requirements of the contract." Protest, exh. 1. This protest followed.

Tessa asserts that its bid did not take exception to the contract requirements and that the agency therefore improperly rejected its bid as nonresponsive. Tessa maintains that the agency's determination here constitutes a finding of nonresponsibility, and that the agency was required to allow Tessa, a small business, to challenge this determination through the Small Business Administration's (SBA) certificate of competency (COC) procedures.

Responsiveness concerns whether a bidder has unequivocally promised, as shown on the face of its bid, to provide the items or services called for by the material terms of the IFB. A bid is nonresponsive where it takes exception, or fails to conform, to the requirements of the IFB. CardioMetrix, B-255748.2, June 13, 1994, 94-1 CPD ¶ 364 at 2. Bidder responsibility, on the other hand, concerns whether a bidder can perform as promised in its bid. Red John's Stone, Inc., B-280974, Dec. 14, 1998, 98-2 CPD ¶ 135 at 3. Furthermore, under the Small Business Act, 15 U.S.C. § 637(b)(7) (2000), agencies may not deny award to a small business based on a finding that the firm is nonresponsible without referring the matter to SBA, which has the ultimate authority to determine the responsibility of a small business under its COC procedures. Federal Acquisition Regulation (FAR) subpart 19.6; Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003, 2003 CPD ¶ 33 at 5.

Tessa's bid was responsive. The only restriction the solicitation placed on the schedule was that the specified number of days could not exceed 305 days. Since the IFB thus permitted bids for any performance period shorter than 305 days, Tessa's bid of a 120-day performance period was not inconsistent on its face with any IFB requirement. Tessa's bid also did not take exception to performing the work consistent with the limitations contained in the solicitation, including the weather restrictions and the prohibition on certain tasks between January 1 and April 1, 2007. While the agency may believe that the protester failed to allow a sufficient number of days to perform the work, the IFB simply was not structured in a manner to permit the agency to reject a bid as nonresponsive based on the sufficiency of the number of days specified for performance.

The agency argues that Tessa's bid was nonresponsive because its specified 120-day performance period was not based on starting from the notice to proceed, as required by the solicitation. This argument is without merit. The IFB did not specify a particular notice to proceed date, and Tessa's bid did not specify a particular start date. This being the case, Tessa's bid could not be read as taking exception to any IFB requirements; Tessa's bid obligated Tessa to perform the contract in a period of 120 days from the notice to proceed, exactly as called for by the IFB.¹

In our view, the agency's decision to reject Tessa's bid clearly was based on considerations relating to whether Tessa would be able to perform the contract in the 120 days specified in its bid. Since, again, rejection of a bid based on a determination that a bidder will not be able to perform as promised in its bid concerns the bidder's responsibility, we conclude that Tessa was denied the award here based on a nonresponsibility determination.

The agency cites decisions of our Office as holding that an agency properly may reject a bid as nonresponsive for specifying an inadequate number of days to complete construction work. The agency misreads our decisions. In Paulsen Constr. Co., B-231393, Sept. 13, 1988, 88-2 CPD ¶ 230, recon. denied, B-231393.2, Jan. 24, 1989, 89-1 CPD ¶ 63, for example, one of the cases cited, we held that the agency reasonably determined that a 210-day performance schedule was so short that the bidder had not complied with the IFB's requirement to submit a practicable construction schedule. Unlike the case here, that decision did not involve rejection of a small business bid. Since rejection of a large business bidder as nonresponsive does not require referral to SBA, it made no difference there whether the agency's actions were based on responsiveness or responsibility, and the decision does not characterize the rejection as one or the other. Rather, the decision holds that the rejection was proper "regardless of how one characterizes the deficiency in Paulson's offer." Id. at 3. Thus, Paulson and the other cited cases do not support the agency's position.

Our Office informed FHWA at an outcome prediction alternative dispute resolution (ADR) conference that Tessa's protest was likely to be sustained for the reasons explained above. FHWA declined to take corrective action in response to the ADR conference, and instead responded by advancing a new legal argument—that Tessa's

¹ While in response to the agency's questions after bid opening, Tessa indicated that it assumed work would begin on a specific date when it formulated its schedule, Tessa never conditioned its performance on any particular start date. To the contrary, in responding to the agency's questions, Tessa accepted that the notice to proceed could be issued as late as 104 days after bid opening, and expressly maintained that it nonetheless could perform the contract in the time remaining before January 1.

bid is materially unbalanced, and, therefore, is unacceptable, because a number of its contract line item prices significantly exceed the awardee's.

Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly over- or understated, as indicated by the application of cost or price analysis techniques. FAR § 15.404-1(g)(1). The mere allegation that a firm has submitted high line item prices does not establish unbalanced pricing; the contracting officer also must consider whether the pricing presents a risk to the government (in particular, that award to the firm will result in the government's paying an unreasonably high price for contract performance); a bid properly may be rejected where the agency determines that the lack of balance pricing poses an unacceptable risk to the government. FAR § 15.404-1(g)(2); FAR § 14.404-2(g); Burney & Burney Constr. Co., Inc., B-292458.2, Mar. 19, 2004, 2004 CPD ¶ 49 at 2.

Here, the agency presented no evidence that it has performed a risk analysis; accordingly, there would be no basis for it, or for our Office, to conclude that award to Tessa would present an unacceptable risk to the government. Moreover, Tessa's was not the only bid with line item prices that significantly exceeded those of other bids and the government estimate. For example, Fort Myer's price for the line item "contractor testing" was \$50,000, while Tessa's was \$25,000 and the government estimate was \$25,000. Likewise, the combined amount for two line items relating to the crash cushion (the crash cushion itself and moving the crash cushion) were \$2,150 (Fort Myer), \$3,260 (Tessa), and \$55,500 (government estimate). It thus is not apparent from the face of the bids how Tessa's pricing would present any greater risk than the awardee's.

We conclude that the agency's finding that Tessa could not perform within the number of days specified in its bid constituted a determination of nonresponsibility and that, since Tessa is a small business, the agency improperly denied Tessa the award without referring the matter to SBA.² Accordingly, we recommend that the agency now refer its determination to SBA for review under the COC procedures.³

² Although this procurement was not set aside for small business concerns and Tessa did not identify itself as a small business in its bid, Tessa states that it is a small business for purposes of this procurement and the agency does not assert otherwise. We note that Tessa is registered in the Central Contractor Registration database as a small business under the North American Industry Classification System code applicable to this procurement.

³ In response to our request for its views, by letter dated December 8, 2006, SBA agreed that the matter here involved a question of Tessa's responsibility rather than responsiveness, that Tessa appears to qualify as a small business, and that referral under the COC procedures, therefore, was required.

We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2006). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel