

INCOMPLETE PROPOSAL IS NOT A MATTER OF RESPONSIBILITY

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The Government Accountability Office (“GAO”) recently considered a protest by a small business that its failure to submit required information in its proposal was essentially a non-responsibility determination that should have been referred to the Small Business Administration (“SBA”) for possible issuance of a Certificate of Competency (“COC”). *Los Alamos Tech. Assoc., Inc.*, B-421034, Nov. 30, 2022.

The issue concerned a solicitation that was a total small business set-aside by the National Aeronautics and Space Administration (“NASA”) for environmental support services at the Johnson Space Center in New Mexico. The solicitation required offerors to submit five volumes in its technical proposal, and further stated that a proposal would be unacceptable and would not be evaluated when “it contains major deficiencies or omissions.” NASA’s initial review of Los Alamos’ proposal deemed it noncompliant with the solicitation because it failed to submit volume 5, the required “model contract.” The proposal of Los Alamos was eliminated and excluded from further evaluation.

Los Alamos did not dispute that it failed to submit the required model contract with its proposal, but argued that the model contract had no impact on the technical evaluation, and was merely an administrative “check-the-box exercise.” Los Alamos further argued that its proposal was rejected solely due to its failure to submit responsibility information, and was essentially a determination of nonresponsibility. NASA stated that it had not made a nonresponsibility determination but merely rejected the proposal because of the failure to submit required information.

Under the SBA’s COC program, any determination of non-responsibility must be referred to the SBA, if that determination would prevent the small business from receiving award. (The COC is a certificate that states the contractor is responsible for a specific government contract.) See 15 USC 637(b)(7), 13 CFR § 125.5, FAR subpart 19.6. The SBA’s regulations requires the referral for a COC or non-COC after evaluating an offer on a noncomparative basis under one or more responsibility type evaluation factors (e.g. experience of the company, key personnel, or past performance). However, GAO noted that when an agency deems a proposal unacceptable based on the offeror’s failure to submit required information, that finding is not a responsibility determination that necessitates a referral to the SBA. In this case, the agency rejected the proposal because it did not comply with solicitation requirements for submission (missing the model contract)—not because of any responsibility related factor.

Takeaway. Be sure to fully comply with all solicitation requirements. When a solicitation requires a submission of something (like a model contract), you have only three choices:

- (1) Provide the required submission in your proposal;
- (2) Protest the required submission before the closing date, stating why that submission violates the Federal Acquisition Regulation or exceeds agency minimum needs, or is otherwise unlawful; or

- (3) If you can't provide the required submission, do not bother to submit a proposal because it will be incomplete.

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