

Responsibility vs. responsiveness: A critical difference saves flawed initial bid

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As a general matter, an agency should reject a bid out of hand if it is deemed defective due to problems with bidder responsiveness. However, flawed bids determined on account of issues with bidder responsibility can be supplemented with the requested information any time before award.

On May 18, the GAO wrangled with that critical difference in operative language, finding in favor of a bidder who successfully demonstrated the requested information dealt with a question of responsibility, rather than one of responsiveness, in J.E. McAmis, Inc., B-420518; B-420518.2.¹

On July 28, 2021, the Army issued an Invitation for Bids (IFB) to repair a jetty on the Oregon coast. The IFB contained “special instructions” requiring information evidencing a contractor’s prior completion of a breakwater along the Pacific coast “with a total contract value of more than \$15 million” within the last 15 years. Contractors failing to provide this information “will be determined nonresponsive and ineligible for award.”

The GAO distinguished between responsibility — the bidder’s capability to deliver on the contract — and responsiveness — the bidder’s commitment to providing the services or goods stipulated in the bid.

The Army received two bids. One of which came from Trade West Construction, a Nevada-based marine construction company and the lowest-priced bidder. However, their bid failed to provide information satisfying the requirements stipulated in the IFB’s “special instructions.”

Upon the Contracting Officer (CO)’s request to supplement the bid, Trade West provided additional yet similarly insufficient information. The CO subsequently found that Trade West failed to meet the threshold of the responsibility standard and referred the issue to the Small Business Administration (SBA) according to FAR 19.602-1(c) certificate of competency (COC) procedures.

Following an SBA investigation into the matter, the agency determined that Trade West possessed “the technical experience, capacity, financial resources, capability, quality assurance and operational wherewithal to perform the repairs,” and issued the COC.

The SBA decision put Trade West back in the running, and on February 2, 2022, the Army awarded the contract to the Nevada-based company.

While questions of bidder responsibility can be remedied any time before award, matters related to responsiveness may render an initial bid dead in the water.

The second bidder, McAmis, Inc., filed a protest with the GAO arguing Trade West’s initial defective bid should have been found nonresponsive and rejected. Further, the losing bidder argued the SBA’s determination failed to consider crucial information and deviated from the agency’s evaluation procedures. The GAO disagreed.

The GAO distinguished between responsibility — the bidder’s capability to deliver on the contract — and responsiveness — the bidder’s commitment to providing the services or goods stipulated in the bid. While information related to responsibility may be provided any time before award, information demonstrating a bidder’s responsiveness must be furnished on the face of the complaint.

Here, GAO held that the solicitation clearly stated the “special instructions of responsibility” were a matter of responsibility. As such, the GAO agreed it was proper for the agency to evaluate Trade West’s additional information any time before award.

Further, the protester argued the SBA improperly issued a COC to Trade West, partly due to how information about responsibility was presented to the SBA. McAmis argued that Trade West giving the contractor report to the SBA, rather than the Army providing it, was improper.

The GAO pointed to facts in the administrative record indicating the CO provided a “voluminous record of information” to the SBA, which the protester failed to prove misleading or inaccurate. Similarly, GAO argued that McAmis did not prove the presentation process led to the SBA failing to review and consider requisite information or that the SBA violated its own published rules during the COC process.

The difference between responsibility and responsiveness in government procurement may represent contractual life or death. While questions of bidder responsibility can be remedied any time

before award, matters related to responsiveness may render an initial bid dead in the water.

Agencies determine responsiveness from the face of the proposal, while responsibility is an amalgam test designed to ascertain an organization’s actual capability to perform a contract. Contractors must understand the difference and act accordingly to ensure their ability to compete.

Notes

¹ <https://bit.ly/3yUB2Zt>

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