

**AGENCY THAT FINDS SMALL BUSINESS' PROPOSAL HAS HIGH RISK OF UNACCEPTABLE PERFORMANCE IS NOT REQUIRED TO SEEK SBA CERTIFICATE OF COMPETENCY**

**Summary:** In a recent bid protest, the Government Accountability Office ("GAO") found that an agency's determination that a small business concern's approach to management and staffing create a high risk of unacceptable performance was not the same as a nonresponsibility determination. Therefore, the agency was not required to refer its determination to the Small Business Administration ("SBA") for the possible issuance of a certificate of competency ("COC"). *Capital CREAG LLC*, B-294958.4, January 31, 2005.

**Background:** Capitol CREAG, LLC ("CREAG"), a nine-member consortium comprised of small businesses, submitted a proposal in response to an RFP issued by the General Services Administration ("GSA") for four "no cost" indefinite-delivery indefinite-quantity contracts for real estate brokering services. The RFP provided that one contract was set aside for a qualified small business concern. Under the RFP, award was to be made to the offerors whose proposals represented the best value to the government, technical evaluation and price considered.

The Source Selection Evaluation Board ("SSEB") found that while CREAG's proposal was acceptable in terms of overall average score and price, it received a marginal rating for management and organizational approach, the second most important factor, because it failed to demonstrate how the consortium would interface internally. The SSEB recommended that no award be made to CREAG. GSA's contracting officer advised the SBA Procurement Center Representative that because the procurement was negotiated, it intended to award the contract that had been set aside for small business concerns to an other than small business without referring the matter to the SBA for a possible COC. CREAG protested arguing that GSA's determination that it was not eligible for award because it presented an "unacceptable risk of successful contract performance" was a nonresponsibility determination and as such required GSA to refer the issue to the SBA before withdrawing the small business set-aside contract.

**Decision:** The GAO found that while the evaluation factor at issue is typically one that concerns responsibility, this alone is not determinative of whether the agency must seek a COC because the GAO has "long recognized that agencies may use responsibility-type factors as evaluation criteria." The GAO specifically found that:

- "Where the solicitation uses traditional responsibility factors as technical evaluation criteria and where the proposal of a small business concern which otherwise would be in line for award is found ineligible for award based on an agency's evaluation under those criteria, the agency has effectively made a determination that the small business offeror is not a responsible contractor capable of performing the solicitation requirements," the agency is required to refer the matter of the firm's responsibility to the SBA.
- In CREAG's case, however, in finding that no referral to the SBA was necessary, the GAO concluded that because GSA's negative assessment was based on the manner in which CREAG proposed to perform the contract, including its management and staffing plan, not on CREAG's capabilities to perform, GSA's reasons for deciding not to award to CREAG was not a responsibility determination.

**Practitioner Tips:** Although CREAG does provide useful guidance as to when an agency will be required to seek a COC before canceling a small-business set-aside, it also underscores the caution that small businesses must employ in competing for contracts.

- If entering into a teaming agreement or joint venture, small business concerns should make sure that their management approach includes designating a central point of contact for the management of the contract.
- In drafting proposals where teaming arrangements are proposed, small business offerors should be very clear about how they intend to perform the contract responsibilities and how the group will function or interface internally.
- Small business concerns should not assume that simply because a solicitation or RFP uses evaluation factors that are of a type used to make a responsibility determination that a negative determination will automatically be referred to the SBA for a COC.
- If the small business team members have worked together on prior projects, this should be highlighted in the proposal in order to further allay agency concerns with respect to risk of unacceptable performance.

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