



# Decision

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**Matter of:** J.E. McAmis, Inc.

**File:** B-420518; B-420518.2

**Date:** May 18, 2022

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Deena G. Braunstein, Esq., and Nathaniel S. Canfield, Esq., Department of the Army, for the agency.  
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest alleging that the lowest-priced bid was nonresponsive because it failed to include certain information at the time of bid submission is dismissed as legally insufficient where the information pertains to bidder responsibility, which may be provided any time prior to contract award, and therefore does not establish a valid basis of protest.
  2. Protest that the Small Business Administration (SBA) failed to consider vital information bearing on the protester's responsibility in the issuance of a certificate of competency is dismissed where there is no evidence that the procuring agency provided incorrect information or withheld information from the SBA.
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## DECISION

J.E. McAmis, Inc., a small business located in Chico, California, protests the award of a contract to Trade West Construction, Inc., a small business of Mesquite, Nevada, under invitation for bids (IFB) No. W9127N21B0022, issued by the Department of the Army, U.S. Army Corps of Engineers, for the Coos Bay North Jetty project. The protester argues that the Army should have found Trade West's bid nonresponsive and ineligible for award. The protester also contends that the Small Business Administration (SBA) erred in issuing Trade West a certificate of competency (COC) because the procuring agency failed to present vital information to the SBA bearing on the firm's responsibility and the SBA failed to follow its own regulations.

We dismiss the protest.

## BACKGROUND

The Army issued the IFB on July 28, 2021, seeking bids to perform necessary repairs to the Coos Bay North Jetty located on the southern end of the Coos Bay North Spit on the south-central Oregon coast near Charleston, Coos County, Oregon. Contracting Officer's Statement (COS), encl. 1a, IFB at 1. The IFB included a section titled "Special Instructions," which provided that "[i]n accordance with [Federal Acquisition Regulation] 9.104-2, the Government is using special standards of responsibility for this procurement." IFB at 16. The IFB, as amended, explained that "[t]o be found responsible, a bidder must provide information demonstrating" completion of one (a) jetty or breakwater or heavy marine construction project; (b) on the [P]acific shore of the United States to include Alaska; (c) with a total contract value greater than \$15M (d) performed within the last 15 years; and (e) that required procurement, delivery, and placement of individual stones weighing at least 22 tons."<sup>1</sup> COS, encl. 1b, IFB amend. 0005 at 2; Req. for Dismissal at 2. The IFB cautioned that "[i]f a bidder cannot or does not provide this information meeting the minimum standards, it will be determined nonresponsible and ineligible for award." *Id.*

The IFB closed on September 1, 2021, and the agency received two bids. COS at 1; Request for Dismissal at 2. Trade West submitted the lowest-priced bid. Request for Dismissal at 2. The contracting officer requested that Trade West submit information to demonstrate that it satisfied the special standards of responsibility set forth in the IFB. COS at 1. After reviewing the additional information provided by Trade West, the contracting officer concluded that Trade West lacked experience with similar contracts of similar capacity and failed to meet the special standards of responsibility. COS at 1; COS, attach. 1e, Nonresponsibility Determination at 1-2.

Because Trade West is a small business, the contracting officer referred the matter to the SBA in accordance with FAR section 19.602-1(c) certificate of competency (COC) procedures. *Id.* Trade West timely applied for a COC with the SBA. Intervenor's Comments at 5.

On October 28, 2021, the SBA Area Director for Government Contracting issued a COC, finding that Trade West had overcome the issues of non-responsibility for which it was referred by the contracting officer. COS, attach. 4. The area director explained that he "investigated the specific responsibility criteria [ ] identified as lacking in the [ ] Certificate of Competency referral[.]" and "determined [that] Trade West Construction, Inc. is responsible for the proposed procurement[.]" COS, attach. 4, COC at 1. The area director found that Trade West "has the technical experience, capacity, financial resources, capability, quality assurance and operational wherewithal to perform the [r]epairs to the Coos Bay North Jetty[.]" *Id.* at 4.

On February 2, 2022, the Army notified McAmis that the contract had been awarded to Trade West. COS at 2; Protest, exh. 2, Bidder Letter at 2. This protest followed.

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<sup>1</sup> The IFB was amended five times. COS, encl. 1a-1e, IFB amendments.

## DISCUSSION

The protester challenges the Army's award of the contract to Trade West, arguing that the agency should have found Trade West's bid nonresponsive and ineligible for award. Alternatively, the protester challenges the SBA's decision to issue Trade West a COC, alleging that the SBA failed to consider vital information and follow its own regulations. For the reasons discussed below, we dismiss both arguments.

### Responsiveness and Responsibility

McAmis argues that the Army should have found Trade West's bid nonresponsive and ineligible for award because its bid did not include information addressing the special standards of responsibility. Comments & Supp. Protest at 6. The protester further asserts that by allowing Trade West to submit information pertaining to the special standards of responsibility following bid opening, the Army engaged in improper discussions with Trade West. *Id.* The agency and intervenor both request dismissal of these allegations, arguing that the solicitation requirement concerns responsibility, not responsiveness. We agree.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551–3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Techs., Inc.*, B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Responsiveness concerns a bidder's commitment to provide the required goods or services and must be determined by the agency from the face of the bid at bid opening. *Propper Manufacturing Co., Inc.; Columbia Diagnostics, Inc.*, B-233321, B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58 at 2. A nonresponsive bid may not be accepted by the agency. *Sac & Fox Indus., Ltd.*, B-231873, Sept. 15, 1988, 88-2 CPD ¶ 250 at 1-2. In contrast, responsibility relates to a bidder's capability to perform the contract. *Beta Construction Co.*, B-274511, Dec. 13, 1996, 96-2 CPD ¶ 230 at 2. This type of information may be furnished any time prior to contract award. *ECI Constr., Inc.*, B-250630, Oct. 9, 1992, 92-2 CPD ¶ 239 at 1-2.

As noted above, the solicitation included a section titled "Special Instructions," which provided that "[i]n accordance with FAR 9.104-2, the Government is using special standards of responsibility for this procurement." IFB at 16. This provision further advised that "[i]f a bidder cannot or does not provide this information [evidencing compliance with the Special Standards of Responsibility] meeting the minimum

standards, it will be determined nonresponsible and ineligible for award.” IFB, amend. 0005 at 2.

Here, the solicitation on its face clearly articulated to bidders that the “special standards of responsibility” requirement was a matter of responsibility. As previously referenced, information concerning a bidder’s responsibility may be provided and considered by the agency at any time prior to contract award. *ECI Constr., supra*. Further, the rules relating to clarifications and discussions have no application to possible inquiries regarding matters of responsibility. See *Engility Corp.*, B-413202, B-413202.2, Sept. 2, 2016, 2016 CPD ¶ 251 at 8. As such, there was nothing improper with Trade West submitting, and the Army considering, Trade West’s information pertaining to the special standards of responsibility after bid opening. McAmis therefore has failed to raise a valid basis for protest challenging Trade West’s bid as nonresponsive. 4 C.F.R. §§ 21.1(c)(4), (f).

### Certificate of Competency

McAmis challenges the SBA’s decision to issue a COC to Trade West, alleging that the Army failed to present vital information to the SBA bearing on the firm’s responsibility. The protester also asserts that the SBA failed to follow its own regulations in assessing Trade West’s responsibility.

The Small Business Act, 15 U.S.C. § 637(b)(7), gives the SBA, not our Office, the conclusive authority to review a contracting officer’s determination that a small business is not responsible. In this regard, when a procuring agency finds that a small business is not eligible for award based on a nonresponsibility determination or a failure to satisfy definitive responsibility criteria, the agency is required to refer the matter to the SBA for a final determination under its COC procedures. FAR 19.602-1(a)(2), 19.602-4(b); *Coastal Env’tl. Grp., Inc.*, B-407563 *et al.*, Jan. 14, 2013, 2013 CPD ¶ 30 at 4. We do not review challenges to the SBA’s decision whether to issue a COC unless there is a showing that the COC issuance or denial resulted from (1) possible bad faith on the part of government officials, (2) SBA failing to follow its own published regulations, or (3) SBA failing to consider vital information because of how the information was presented to, or withheld from, the SBA by the procuring agency. 4 C.F.R. § 21.5(b)(2); *Trade West Constr., Inc.*, B-418252, Dec. 10, 2019, 2019 CPD ¶ 421 at 3; see *MPC Containment Sys., LLC*, B-416188.2, July 23, 2018, 2018 CPD ¶ 251 at 4. As discussed below, we find that the protester’s allegations do not meet this standard.

In challenging the SBA’s issuance of a COC to Trade West, the protester first contends the SBA erred in concluding that Trade West possessed the requisite specialized experience because vital information bearing on the firm’s responsibility--*i.e.*, the solicitation’s “ProjNet Bid Inquiry Contractor Report”--was provided to the SBA by Trade West rather than by the contracting agency.<sup>2</sup> Protest at 3-4. In support of this

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<sup>2</sup> The Army gave bidders an opportunity to seek clarification or request changes to solicitation requirements using a web-based system, called ProjNet. Response to Req.

allegation, the protester alleges generally that “[h]ow vital information is presented . . . is key” and that the Army “was required to provide this information to SBA.” Comments at 3.

We find this argument to be unpersuasive. The record reflects that the contracting officer provided the SBA with a voluminous record of information that included the contracting officer’s determination of nonresponsibility; the solicitation, including all amendments; Trade West’s bid; the abstract of bids, and the information submitted by Trade West to demonstrate its responsibility. COS at 1; COS, attach. 1, Referral Letter, Sept. 3, 2021 at 1-3; *id.*, encl. 1a-1f.<sup>3</sup> The record further indicates that Trade West submitted additional information to the SBA on its behalf with its COC application. Intervenor’s Comments at 13; Response to Req. for Dismissal of Supp. Protest, Mar. 2, 2022, exh. 1, Decl. of Trade West Director at 1. In addition, on October 19, 2021, while the SBA area office was still considering Trade West’s COC application, Trade West provided the SBA with a copy of the “ProjNet Bid Inquiry Contractor Report,” which contained the pre-bid inquiries and answers for all bidders. Intervenor’s Comments at 5, 12-13; Intervenor’s Response to Req. for Dismissal of Supp. Protest, Mar. 2, 2022, exh. 1, Decl. of Trade West Director at 2; *id.*, exh. 1a, Trade West Email, Oct. 19, 2021, at 1 (email providing ProjNet Bid Inquiry Contractor Report to the SBA).

Although the protester alleges that the Army, rather than Trade West, was required to provide the SBA with the ProjNet Bid Inquiry Contractor Report information, the protester has not established that the Army’s presentation of information to the SBA was inaccurate, incomplete, or misleading. Moreover, as noted above, the record reflects that the information in question was provided to the SBA in connection with the COC application. In sum, the protester has not shown that the SBA failed to consider vital information because of how information was presented to or withheld from the SBA. This protest ground is dismissed.

Likewise, the record provides no support for the protester’s assertion that the SBA failed to follow its own published regulations in issuing the COC to Trade West. In making this argument, McAmis fails to identify--and we did not independently discern--any SBA regulation that SBA violated in the COC process. Rather, McAmis cites to FAR section 9.104-2, which provides that special standards of responsibility developed by a contracting officer shall apply to all offerors, and argues that the “SBA must be held to

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for Dismissal & Supp. Using the ProjNet system, bidders were able to see the questions and answers that had been submitted by all bidders via a “ProjNet Bid Inquiry Contractor Report.” *Id.*; Protest, exh. 5, ProjNet Bid Inquiry Contractor Report at 1-3; Decl. of Trade West Director; exh. 1a, ProjNet Bid Inquiry Contractor Report at 1-3.

<sup>3</sup> The contracting officer also used the SBA’s COC referral checklist to ensure that a complete COC referral package was provided to the SBA for its review in accordance with FAR section 19.602-1(c). COS at 1; COS, attach. 1, COC Referral Letter at 1.

the same procurement rules as the procuring agency.”<sup>4</sup> Comments at 3. This argument does not support the protester’s claim that the SBA failed to follow its regulations when it decided to issue the COC to Trade West. To the extent the protester’s argument concerns the merits of the SBA’s COC decision, such is not for consideration by our Office. As explained above, the SBA has conclusive authority to review the contracting officer’s non-responsibility determination. See 15 U.S.C. § 637(b)(7); *Coastal Envtl.*, *supra* at 4.

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel

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<sup>4</sup> Specifically, this provision provides:

When it is necessary for a particular acquisition or class of acquisitions, the contracting officer shall develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors.

FAR 9.104-2(a).