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**Comptroller General
of the United States**

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

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Decision

Matter of: Reliable Builders, Inc.

File: B-402652; B-402652.3

Date: June 28, 2010

Phillip Torres, Esq., Teker Torres & Teker, PC, for the protester.

David A. Rose, Esq., Rose Consulting LLC, for Guam Pacific International, LLC, an intervenor.

Richard Huber, Esq., Department of the Navy, Naval Facilities Engineering Command, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that two offerors' proposals under solicitation set aside for small businesses should have been rejected as unacceptable based on noncompliance with limitation on subcontracting clause is denied where record fails to support protester's allegation that proposals, on their faces, demonstrated that offerors would not or could not comply with limitation on subcontracting clause.
 2. Protest challenging evaluation of protester's proposal is denied where record shows evaluation was reasonable and consistent with solicitation.
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DECISION

Reliable Builders, Inc. (RBI), of Tamuning, Guam, protests the rejection of its proposal and the award of contracts to Guam Pacific International, LLC (GPI), of Barrigada, Guam, and Overland Corporation, of Ardmore, Oklahoma, under request for proposals (RFP) No. N40192-10-R-2800, issued by the Department of the Navy, Naval Facilities Engineering Command for the award of multiple contracts for new construction, renovation, and repair of government facilities on Guam. The protester argues that the proposals of GPI and Overland should have been rejected because neither firm is capable of complying with the solicitation requirement that at least 15% of the cost of the contract be performed with the firm's own employees. RBI also objects to the evaluation of its own proposal.

We deny the protest.

BACKGROUND

The RFP, which was set aside for small businesses, provided for the award of up to five indefinite-delivery/indefinite-quantity design/build contracts to the offerors whose proposals were determined to represent the best value to the government, with technical factors of significantly greater weight than price in the determination of best value. Technical factors (of equal weight) were offeror and lead design team experience; past performance; safety; workforce housing and logistics (WH&L); and technical approach (to performance of a specified seed project).¹ Price was to be evaluated on the basis of pricing for the seed project.

Thirteen proposals were received by the November 24, 2009 closing date. Evaluation panels reviewed the technical and price proposals; technical ratings and rankings (along with seed project prices) were as follows:

Technical Ranking	Overall Technical Rating²	Seed Project Price
1. GPI	Good	\$12,959,699
2. Niking Corp.	Good	[deleted]
3. Bulltrack-Watts JV	Good	[deleted]
4. Pacific West Builders	Good	[deleted]
5. P&S Constr.	Good	[deleted]
6. Overland	Good	[deleted]
7. Offeror A	Satisfactory	[deleted]
8. Offeror B	Satisfactory	[deleted]
9. RBI	Satisfactory	\$12,356,920
10. Offeror C	Satisfactory	[deleted]
11. Offeror D	Satisfactory	[deleted]
12. Offeror E	Satisfactory	[deleted]
13. Offeror F	Satisfactory	[deleted]

¹ The seed project was for construction of a combat support vehicle maintenance facility at Andersen Air Force Base.

² The rating scale used was excellent (E), good (G), satisfactory (S), and marginal (M).

The ratings for the individual technical factors were as follows:

Firm/Rank	Experience	Past Perf.	Safety	WH&L	Tech. Approach	Overall
1. GPI	E	G	S	E	G	G
2. Niking Corp.	G	E	E	G	S	G
3. Bulltrack-Watts JV	G	G	G	G	S	G
4. Pacific West Builders	G	G	S	S	G	G
5. P&S Constr.	G	G	G	S	S	G
6. Overland	E	G	S	S	S	G
7. Offeror A	G	E	S	G	M	S
8. Offeror B	G	E	G	M	S	S
9. RBI	G	G	S	S	S	S
10. Offeror C	G	G	M	S	S	S
11. Offeror D	G	G	M	G	M	S
12. Offeror E	S	E	G	M	M	S
13. Offeror F	G	G	S	M	M	S

Agency Memorandum of Law at 2-3. A source selection board (SSB) reviewed the findings of the evaluation panels and determined that the proposals of GPI, Niking, Bulltrack-Watts, Pacific West, and P&S represented the best value to the government; accordingly, the SSB recommended award to these firms. The source selection authority (SSA) concurred in the recommendation and also decided to make a sixth award to Overland based on his finding that there were only slight technical differences between its proposal and the fifth-ranked offeror's proposal. The SSA noted that in deciding to make a sixth award to Overland, he considered the lower-priced, lower-ranked proposals from RBI and Offerors A, C, D, and E, but determined that the cost savings associated with those proposals did not outweigh the technical benefits of Overland's proposal. The agency awarded contracts to the selected firms on March 10, 2010.³ After making a timely request for, and receiving, a debriefing, RBI protested to our Office on March 26.⁴

³ A task order for the seed project was issued to GPI.

⁴ In addition to the arguments that we address below, RBI argued in its initial protest that the agency had ignored price in its determination of best value. The agency persuasively rebutted this allegation in its report with documentation that demonstrated that both the SSB and the SSA had considered price in their trade-off determinations.

DISCUSSION

While the agency made awards to six offerors, RBI is protesting only the awards to GPI and Overland. RBI argues that the proposals of GPI and Overland should have been determined unacceptable because they take exception to the limitation on subcontracting clause, Federal Acquisition Regulation (FAR) § 52.219-14 (incorporated into the solicitation by reference). That clause provides that by submitting an offer for award of a construction contract, the offeror agrees that it will perform at least 15% of the cost of the contract, not including the cost of materials, with its own employees. In the alternative, the protester contends that GPI and Overland should have been determined nonresponsible for taking exception to the limitation on subcontracting clause. In connection with the latter argument, the protester acknowledges that our Office generally will not consider a protest challenging an affirmative determination of an offeror's responsibility, but argues that the exception for protests that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information, applies here. See 4 C.F.R. § 21.5(c) (2010).

In its initial protest, RBI alleged that GPI could not and would not comply with the limitation on subcontracting clause because neither GPI—which is a joint venture between Custom Mechanical Systems Corporation (CMS), an 8(a) small business, and Toltest, a large business⁵—nor CMS has its own office space, and neither GPI nor CMS has a business license or a license from the Guam Contractors License Board. In addition, the protester asserted that Toltest has no job force on Guam and “basically subcontracts all of its awards.” Protest at 6. In support of its argument that Overland could not and would not comply with the subcontracting limitation, the protester noted that Overland “has just three local employees who only recently joined the firm from a large business subcontractor.” Id.

After receipt of the agency report, which included copies of both awardees' proposals, the protester further argued that both proposals demonstrated noncompliance with the limitation on subcontracting clause. Specifically, the protester noted that nine of the ten projects cited by GPI under the experience and past performance factors had been performed by a large business; that GPI's proposal represented that all construction would be performed by large business subcontractors; and that GPI's proposal indicated that it would rely upon a large business subcontractor for the housing of laborers. Similarly, with regard to Overland, the protester noted that all of the projects submitted under the experience factor had been performed by a large business.

⁵ According to GPI's proposal, the company was formed under an approved Small Business Administration (SBA) mentor-protégé agreement between CMS and Toltest.

While, as a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility not subject to our review, see 13 C.F.R. § 125.6(f) and 4 C.F.R. § 21.5(b)(2), (c), where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability, which we will review. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5. The proposals of the two awardees were not the source of the information cited by RBI in its initial protest as evidence that GPI and Overland did not intend to comply with the limitation on subcontracting; thus, even assuming that the protester's allegations pertaining to lack of office space, licenses, and staff are true, this information does not furnish a basis for finding that either firm took exception to the clause in its proposal.

Further, we do not think that the content of the awardees' proposals cited by the protester may reasonably be construed as taking exception to the subcontracting limitation clause. The fact that most of the relevant prior projects cited by the two offerors had been performed by large businesses does not demonstrate an intention not to comply with the limitation on subcontracting clause, nor does GPI's representation that it will rely upon a large business subcontractor for the housing of workers. Similarly, GPI's representation that it intends to subcontract with a large business for all construction services does not demonstrate an intention not to comply given that GPI also represented that it would "self-perform the overall task order management, including procurement, scheduling, logistics, safety, and quality control," GPI Technical Proposal at 5-1, which work, the contracting officer maintains, could easily represent more than 15% of the cost of the contract. With respect to Overland, the firm explicitly affirmed its intention to comply with the limitation on subcontracting clause in its proposal, stating that it "under[stood] and intend[ed] to comply with the Government's requirement that Overland self-perform a portion of the work proposed under this RFP in accordance with FAR requirements." Overland Technical Proposal, Executive Summary, at 1.

Based on the record here, we are not persuaded that either GPI's or Overland's proposal included content that should have led the agency to conclude that the offeror could not and would not comply with the subcontracting limitation. Along the same lines, there is no evidence that in determining both GPI and Overland to be responsible, the contracting officer failed to consider the above information.

The protester also argues that Overland will be unable to perform without complete reliance upon a large business subcontractor, and that Overland and the subcontractor should therefore have been considered joint venturers (and thus

affiliates for size determination purposes), pursuant to 13 C.F.R. § 121.103(h)(4).⁶ We will not consider this argument because challenges to an offeror's size status are reviewed solely by the SBA. See 4 C.F.R. § 21.5(b)(1).⁷

RBI also challenges the evaluation of its own proposal, arguing that it should have been rated as better than satisfactory under the safety, WH&L, and technical approach factors.⁸ In reviewing a protest objecting to an agency's evaluation, we will not evaluate the proposals anew or substitute our judgment for that of the agency; rather, we will examine the record to determine whether the agency's judgment was reasonable and in accord with the RFP evaluation criteria and with applicable procurement statutes and regulations. Colson Servs. Corp., B-310971 et al.,

Mar. 21, 2008, 2008 CPD ¶ 85 at 5. As explained below, based on our review of the record here, we find the agency's evaluation to be reasonable.

⁶ 13 C.F.R. § 121.103(h)(4) provides, in relevant part, as follows:

A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant.

⁷ With regard to the protester's related argument that the contracting officer should have questioned both offerors' size representations and referred the matters to SBA pursuant to FAR § 19.301-1(b), that provision requires the contracting officer to refer a small business representation to the SBA only where she has reason to question the representation. The contracting officer maintains that none of the information that she reviewed here led her to question either GPI or Overland's size representation.

⁸ In a supplemental protest filed on May 6, the protester also challenged the rating of its proposal as good, rather than excellent, under the past performance factor. This complaint is untimely given that the protester was informed of the good rating at its March 18 debriefing. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2). In any event, the record demonstrates that the assignment of a rating of good to the protester's proposal under the past performance factor was consistent with the evaluators' rating of other proposals under the factor; that is, the evaluators assigned a rating of excellent under the past performance factor only where an offeror received ratings of excellent or outstanding on most of its relevant projects, and the protester received such ratings on many—but not most—of its projects.

The protester argues that its proposal should have received a rating of better than satisfactory under the safety factor because its DART rates are very favorable.⁹ RBI also argues that it was unequal treatment for the evaluators to compare its record of safety incidents over 33 years with the records of “newly created corporations with no record of construction.” Protest at 8.¹⁰

The RFP instructed offerors that under the safety factor, they should furnish the following information for the 3 most recent years: DART rates, Occupational Health and Safety Administration (OSHA) citations, and safety awards. The solicitation provided that a DART rate of 1 or less was considered very low; a rate of 1.1 to 2 was considered low; and rates of 2.1 to 3, 3.1 to 4, and greater than 4 were considered moderate, high, and very high, respectively. The evaluators assigned RBI a rating of satisfactory under the safety factor, noting as a strength that the protester’s DART rate for 2006 was 0; for 2007, 1.65; and for 2008, .90. This strength was offset by a significant weakness, however, which was that RBI had been issued eight OSHA citations over 2007 and 2008, with repeated findings pertaining to a lack of eye protection, which appeared to demonstrate ineffective corrective actions. Given that in addition to the finding of strength, the evaluators found that the protester’s proposal contained the above significant weakness, we think that the assignment of a rating of satisfactory under the safety factor was clearly reasonable.

With regard to the protester’s complaint that it was unequal treatment for the evaluators to compare its safety record over 33 years with the records of newly created corporations, we first point out that RBI, GPI, and Overland received identical ratings (of satisfactory) under the factor. Moreover, the record shows that, contrary to the protester’s allegation, the evaluators did not consider RBI’s safety record over the company’s entire history; consistent with the terms of the RFP, they

⁹ The acronym DART stands for “Days Away, Restricted or job Transferred.” DART rates reflect the number of incidents resulting in employees being off the job. The rate is calculated by dividing the number of incidents by the total number of hours worked by all employees during the calendar year, and then multiplying the quotient by 200,000.

¹⁰ The protester also argued that the agency should have considered the safety records of offerors’ proposed subcontractors under the safety factor given that it considered prior contracts performed by proposed subcontractors under the experience and past performance factors. The RFP provided for the evaluation of only the offeror’s safety record; that is, it neither provided for the evaluation of, nor requested information pertaining to, the safety records of proposed subcontractors. To the extent that the protester is arguing that the RFP should have provided for consideration of subcontractor safety information, its complaint is essentially an objection to the terms of the solicitation, which, to be timely, should have been filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

considered the protester's safety record for the past 3 years only. The record also shows that in evaluating GPI under the safety factor, the evaluators considered the safety record of both joint venture partners over the past 3 years, which was consistent with the terms of the RFP;¹¹ thus, GPI did not receive an advantage as a result of its lack of history. Similarly, while it is unclear whether the protester's reference to "newly created corporations" was intended to include Overland, which is not a newly created corporation, the record shows that Overland's DART scores, OSHA citations, and safety awards for the past 3 years were considered by the evaluators. Thus, the record does not support the protester's contention that the agency evaluated offerors' safety records on an unequal basis.

Next, RBI argues that its proposal should have received a rating of better than satisfactory under the WH&L factor.

Under the WH&L factor, the RFP instructed offerors to submit plans addressing workforce transportation, medical services, food, housing, and safety and security requirements for a workforce of 100 H-2B (*i.e.*, foreign) employees. The solicitation provided that the plans would be evaluated both to determine the offeror's ability to provide the required services and to assess any potential negative impact on Guam's limited food, housing, transportation, and medical networks. Of relevance to this protest, offerors were instructed that their transportation plans should address the location of emergency shelters and their plans for transporting their workforce to such shelters in the event of a natural or man-made disaster. The RFP further instructed offerors that in describing their food service plans, they should describe how meals would be served at jobsites and furnish a plan for providing food and dining services during disasters, and that in describing their plans for housing the workers, they should discuss how they would ensure that all housing facilities meet the regulations and policies of the government of Guam.

The evaluators assigned RBI's proposal a rating of satisfactory under the WH&L factor, finding that it had both strengths and weaknesses pertaining to the factor. Specifically, the evaluators identified the following weaknesses:

- Serving of meals at jobsite was not adequately addressed; RBI indicated that lunch meals will be transported to the various jobsites with no explanation how [the] meals will be served
- Limited discussion on compliance of housing facilities with [Government of Guam] regulations and policies
- Designated emergency shelter will not [be] able to house all 100 workers

¹¹ The solicitation instructed that if the offeror was a joint venture, and no safety information for the joint venture existed, information should be submitted for each joint venture partner. RFP at 25.

- Daily transporting of catered food to workforce will adversely impact community.

Technical Evaluation Board Report at 54. The protester disputes each of the findings of weakness.

The protester contends that it adequately described its plan for serving meals at the jobsites by explaining that it planned to have a caterer transport hot meals to the various sites. In response, the agency explained that the weakness was not that the protester had failed to explain how the food would be conveyed to the jobsites, but that it had not explained how, once there, it would be served to the workers. It was clearly consistent with the terms of the RFP—which, as previously noted, specifically instructed offerors to explain their plans for serving meals at jobsites—for the evaluators to consider the protester’s failure to provide this information as a weakness.

The protester further argues that it adequately addressed compliance with Government of Guam housing regulations by stating that it would obtain all necessary permits and licenses. The agency responded that this was not a sufficient approach since it did not address how the protester would ensure that the requirements pertaining to housing were continuously met, that is, how compliance would be ensured after the permits had been issued. We think that the agency’s explanation—and thus its finding of weakness—are reasonable.

Next, RBI argues that the evaluators lacked a basis for their finding that its emergency shelter would be unable to house all 100 workers. The agency explains that its basis for the finding was that RBI identified its company headquarters in Tamuning as its emergency shelter, and then, elsewhere in its proposal, stated that the capacity of this particular facility was 90. The protester argues that the fact that the facility’s capacity is 90 does not mean that 100 individuals could not be sheltered there for the duration of a short-term emergency. The flaw in the protester’s argument is that there is no evidence that all emergencies are anticipated to be short-term. We think that the evaluators could reasonably have concluded that a facility with a stated capacity of 90 would not be able to house 100 workers for emergencies of more than short-term duration and on that basis attributed a weakness to the protester’s proposal.

Lastly, the protester disputes the evaluators’ finding that the daily transporting of catered food to its workforce would have a negative impact on the local community. The protester argues that it proposed to deliver all midday meals with a single vehicle and thus that its proposed approach will have a negligible impact on traffic volume. The agency points out in response that the protester proposed to transport not simply midday meals to jobsites, but also morning and evening meals to several of its proposed housing facilities, which would “amount to additional traffic congestion.” *Id.* Since the evaluators had a reasonable basis for finding that the protester’s approach to providing food to its workers would contribute to traffic

congestion (and thus have a negative impact on Guam's limited transportation network), we think that they had a reasonable basis for this finding of weakness.

Next, RBI argues that its proposal should have received a rating of better than satisfactory under the technical approach factor.

The evaluators assigned the protester's proposal a rating of satisfactory for technical approach based on their finding that the proposal had no strengths and one weakness pertaining to the factor. The weakness was that the protester's proposed project schedule had not adequately addressed the design phase. While the protester disputes the agency's finding, it has not demonstrated that the agency's judgment was unreasonable. In any event, as pointed out by the agency, there is no evidence that the protester was prejudiced by the finding of weakness because a finding of strength would have been required for the proposal to be rated as better than satisfactory, and the evaluators found no strengths in the protester's technical approach. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (prejudice is an essential element of any viable protest).

Finally, in its supplemental protest, RBI raised a number of objections to the evaluation of Overland's proposal—*i.e.*, Overland's teaming agreement with its principal subcontractor was not binding, and thus this subcontractor's experience should not have been considered in evaluating Overland's proposal under the experience and past performance factors; Overland's proposal should have been determined unacceptable because Overland's proposed housing facility will not be available in time for performance of the seed project; and Overland's proposal should have been determined unacceptable for failing to identify the location of the company's emergency shelter and a plan for transporting workers to it.

With regard to the teaming agreement, the protester's argument is essentially that the agreement is non-binding because it does not bind the subcontractor to perform every task order. We do not think that such a commitment by the subcontractor is required for a teaming agreement to be considered binding. In addition, the solicitation did not require a binding teaming agreement for subcontractor experience and past performance information to be considered; rather, it gave the contracting officer the discretion to discount such information in the absence of a binding teaming agreement. Further, the record shows that the agency reasonably evaluated Overland's proposed housing facility, recognizing that it was not yet constructed. As the contracting officer explains, the solicitation does not require that the proposed housing be available at the time of award, as the agency does not anticipate a need for foreign workers (and thus a need for a facility to house them) until a significant volume of work is ordered under the contract, which will not occur until a decision is made later this year regarding transfer of Marines from Okinawa, Japan to Guam. Contracting Officer's Supp. Statement, May 14, 2010, at 3-4. Also, the protester has not demonstrated that it was unreasonable for the

evaluators to consider Overland's failure to identify the location of its emergency shelter as a weakness, as opposed to a deficiency.

The protest is denied.

Lynn H. Gibson
Acting General Counsel