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Decision

Matter of: Ashridge, Inc.

File: B-408469

Date: September 27, 2013

Michael H. Payne, Esq., Cohen Seglias Pallas Greenhall & Furman PC, for the protester.

Henry P. Wall, Esq., Bruner, Powell, Wall & Mullins, LLC, for the intervenor.

John E. Ballard, Esq., Corps of Engineers, for the agency.

Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging an agency's evaluation of the awardee's past performance and corporate experience is denied where the record establishes that the evaluation was reasonable and consistent with the solicitation's evaluation criteria.
2. Protest that an awardee's proposal violates a solicitation's subcontracting limitation is denied where the awardee's proposal does not, on its face, indicate that the awardee would not comply with the limitation.

DECISION

Ashridge, Inc., of St. Stephen, South Carolina, protests the award of a contract to Moorhead Brothers, Inc., of Blacksburg, South Carolina, under request for proposals (RFP) No. W912HN-13-R-0011, issued by the U.S. Army Corps of Engineers for construction services. Ashridge challenges the agency's evaluation of Moorhead's past performance and corporate experience, and argues that Moorhead's proposal failed to comply with the RFP's subcontracting limitation.

We deny the protest.

The RFP, issued as a historically underutilized business zone (HUBZone) small business set-aside, provided for the award of a fixed-price contract for construction services to raise the elevation of an existing containment dike, construct a new dike with a stability berm/counterweight, and make repairs to weirs. The RFP included

options for constructing an island within the area contained by the dike and for adding a new weir. RFP at 15. The RFP stated that performance was to commence within 10 calendar days, and be completed within 330 calendar days of notice to proceed. RFP at 1. The estimated value of the contract was stated to be between \$5 million and \$10 million. Id.

The RFP provided for award on a best value basis, considering the following factors: past performance, corporate relevant specialized experience, and price. Id. at 19-25. Offerors were informed that past performance was more important than corporate experience, and that the non-cost factors, when combined, were equally important to price. Id. at 24.

With respect to the past performance factor, offerors were instructed to submit up to eight examples of relevant past performance for themselves and team members that were to perform a major or critical role on the project. Id. at 19, 21. In this regard, the RFP provided that the relevance of an offeror's past performance would be evaluated as very relevant, relevant, somewhat relevant, or not relevant based upon the following criteria:

	Very Relevant	Relevant	Somewhat Relevant
Scope of Work	Clearing and grubbing; ditching and dewatering; excavation, conditioning/drying, and placement of on-site borrow material classified as soft, silty, wet soils interbedded with sand lenses for earthen embankment construction	Clearing and grubbing; ditching and dewatering; excavation, conditioning/drying, and placement of on-site borrow material for earthen embankment construction	Clearing and grubbing; excavation and placement of earthen embankment construction
Magnitude	Earthwork construction involving the placement of >500 thousand cubic yards (CY) of fill material	Earthwork construction involving the placement of 300 to 500 thousand CY of fill material	Earthwork construction involving the placement of 100 to 299 thousand CY of fill material
Contract Environment	Earthwork construction within a Dredge Material Containment Area overlying marsh deposits	Earthwork construction within a Dredge Material Containment Area	Earthwork construction of water retaining earthen embankments

Current/Recent Performance	Project performed within 3 years of proposal submission, and project at least 80 percent complete	Project performed within 5 years of proposal submission, and project at least 80 percent complete	Project performed within 8 years of proposal submission, and project at least 80 percent complete
Contract Dollar Amount	Greater than \$5 million	\$2 to 5 million	\$1 to 1.99 million

Id. at 20.

Offerors were informed that, based upon the offerors' relevant past performance, the agency would assess past performance as substantial confidence, satisfactory confidence, limited confidence, and no confidence. Id. at 22.

With respect to the corporate experience factor, the RFP provided that the agency would also evaluate offerors' experience based upon their past performance examples. Offerors were informed that the experience requirement could be satisfied by a primary subcontractor that had a significant role in performing the contract requirement. Id. at 23. The RFP stated that proposals would be rated under this factor as outstanding, good, acceptable, marginal, or unacceptable. Id. at 23-24.

The RFP included Federal Acquisition Regulation (FAR) clause 52.219-3, Notice of HUBZone Set-Aside. Id. at 79-81. Under this clause, an offeror for general construction work agrees to perform at least 15 percent of the personnel costs with its own employees, and to perform at least 50 percent of the personnel costs with a combination of its own employees and the employees of HUBZone subcontractors. FAR clause 52.219-3(d)(3).

The agency received proposals from 13 firms, including Ashridge and Moorhead. Contracting Officer's (CO) Statement at 2. Moorhead proposed to team with L-J, Inc., of Columbia, South Carolina, and Corey Enterprises, of Murrells Inlet, South Carolina, Inc. (both non-HUBZone businesses) as significant subcontractors. Agency Report (AR), Tab 3, Moorhead Proposal, Tab G, Signed Team Agreement, at 45-46. Ashridge proposed to perform the contract itself.

Proposals were evaluated by the agency's source selection evaluation board (SSEB), which assigned adjectival ratings supported by narrative discussion.

Ashridge and Moorhead submitted the two highest-rated proposals, which were evaluated as follows:

	Ashridge	Moorhead
Past Performance	Substantial Confidence	Substantial Confidence
Corporate Experience	Outstanding	Outstanding
Price	\$4,678,990	\$4,589,321

AR, Tab 4, SSEB Report, at 6; AR, Tab 5, Source Selection Decision, at 2. Ashridge’s substantial confidence rating was based upon its performance of three very relevant projects, for which it received two very good and one satisfactory performance ratings. AR, Tab 4, SSEB Report, at 8-9. Moorhead’s substantial confidence past performance rating was based upon six projects (two were very relevant, one was relevant, and three were somewhat relevant) performed by its subcontractors. Id. at 14-15.

The CO, as the source selection authority, recognized that the two firms had identical adjectival ratings, but reviewed the underlying technical merit of the proposals. The CO noted that, although Ashridge had its own relevant past performance, Moorhead demonstrated relevant past performance through its teaming partners and key personnel. The CO concluded that Ashridge’s advantage of having itself performed relevant work did not outweigh Moorhead’s \$89,669 price advantage.

Award was made to Moorhead, and this protest followed.

DISCUSSION

Ashridge challenges the agency’s evaluation of Moorhead’s past performance and corporate experience, and alleges that Moorhead’s proposal does not comply with the RFP’s subcontracting limitations. We have considered all of Ashridge’s arguments, although we only discuss the primary ones, and find that none provide a basis to sustain the protest.

Past Performance and Corporate Experience Evaluation

Ashridge challenges Moorhead’s substantial confidence and outstanding ratings under the past performance and corporate experience factors, respectively, arguing that Moorhead does not itself have relevant past performance and that the proposed subcontractors’ experience, as set forth in the submitted past

performance questionnaires, did not warrant these ratings. Protest at 10; Comments at 4. For example, Ashridge disagrees with the agency's assessment that L-J (one of Moorhead's major subcontractors) demonstrated very relevant past performance and experience on two projects. Comments at 4.

The agency responds that the RFP expressly provided for consideration of proposed major subcontractors' past performance and experience. Legal Memorandum at 8. The Corps states that Moorhead received a substantial confidence rating because the team submitted past performance information that demonstrated a trend of successful performance for work that was considered very relevant and exceeded the RFP requirements. Id. at 8-9.

Here, the RFP stated in paragraph 4.2.7:

The Government will consider past performance of the prime construction contractor. The Government may also consider the past performance information submitted on any other team member. However, in accordance with paragraphs 2.2 and 2.3, above, the consideration and weight given to past performance information concerning other than the prime contractor will be based on the extent of involvement of the team member in the project and the adequacy of the proposal in identifying and addressing such arrangements and roles. Past performance information submitted on a team member who does not perform a major or critical role on the project or whose role has not been clearly or adequately described as required will not be considered. . . .

RFP at 21-22.

Ashridge contends that "the project" referenced in this RFP paragraph is the project identified in the past performance questionnaires, not the RFP project. Comments at 6. Therefore, Ashridge argues that the agency erred in finding L-J's past performance to be very relevant because (1) the past performance questionnaires did not describe the work performed in the same detail as the RFP, and (2) L-J performed only 30 percent of the work in each project, so the extent of its involvement did not amount to a "critical" or "major" role. Id.

Ashridge's interpretation of this RFP paragraph is unreasonable. As noted above, the RFP provides that consideration of a team member's past performance must be in accordance with paragraphs 2.2 and 2.3. Paragraph 2.2 discusses the requirement of the proposal to identify the arrangements and major and critical aspects of the RFP requirement to be performed by the team member. RFP at 16. Similarly, paragraph 2.3 explains that the past performance information of subcontractors that "will perform **major or critical aspects of this requirement**"

will be evaluated. Id. at 16 (emphasis in original). Thus, the references concerning the extent of the involvement of the team member, and the adequacy of the description of that involvement clearly concern the RFP project. The end of paragraph 4.2.7 also makes it evident that the extent of a subcontractor's involvement and the adequacy of the description of that involvement in any relevancy determination concern the RFP requirement, not the information in the past performance questionnaires:

Where the Government views an Offeror's role, or that of its team members, if any, as not significant or as not clearly defined, the Government reserves the right to view this lack of involvement, or clarity, as affecting the determination of relevancy and the usefulness of the information in determining a confidence rating despite the quality of recent, relevant past performance information.

Id. at 21 (emphasis added).

We find nothing in the RFP that requires a past performance questionnaire to specifically detail identical work to that in the RFP. Similarly, the RFP nowhere requires a subcontractor to have performed more than 50 percent of the past performance questionnaire work, to be reasonably considered very relevant. Here, the record indicates that both of L-J's very relevant projects involved dike and weir improvements for the Corps in Savannah Harbor, South Carolina, the same area as the RFP requirement. AR, Tab 3, L-J Past Performance Questionnaires, at 64, 71. The prime contractor for one of the projects was Corey Enterprises, Moorhead's other subcontractor, and the contracting officer described this work as being "nearly identical to the submission project." Id.

Ashridge disagrees with the agency's assessment, arguing that the descriptions of the work in the past performance questionnaires for two of L-J's projects are vague. Comments at 6. The protester also contends that the agency inconsistently rated another of L-J's projects as both relevant and very relevant. Id. at 5. We note that all three projects were performed for the Corps, and involved dike and weir improvements in the same area as the RFP requirement. AR, Tab 3, L-J Past Performance Questionnaires, at 64, 71. In considering challenges to an agency's proposal evaluation we do not reevaluate proposals, but, rather, review the agency's evaluation to ensure that it was reasonable, and consistent with the terms of the RFP, and applicable statutes and regulations. Phillips Med. Sys. of N. Am. Co., B-293945.2, June 17, 2004, 2004 CPD ¶ 129 at 2. Here, the record shows that the subcontractors Moorhead proposed had very relevant past performance in accordance with the RFP evaluation criteria. Ashridge's disagreement does not show that the agency's evaluation was unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7.

Subcontractor Limitation

Ashridge also complains that Moorhead's proposal does not satisfy the RFP's subcontracting limitations. In this regard, the protester cites 13 C.F.R. § 126.700 for two contentions: first, that Moorhead is too small to satisfy the requirement to perform at least 15 percent of the personnel costs with its own workforce; and second, that because its two major subcontractors are not HUBZone small business concerns, Moorhead cannot satisfy the requirement that at least 50 percent of the personnel costs must be performed using HUBZone contractor personnel.¹ Protest at 12. The protester also argues that, by its own calculations, the prices Moorhead lists for the contract line items (CLINs) indicate that the awardee would only perform approximately eight percent of the work. Comments at 17.

The agency responds that Moorhead affirmatively stated that it would perform the required percentage of the total work, describing both the work it would perform in a primary capacity, and the work it would perform in conjunction with the subcontractors. Memorandum of Law at 12; AR, Tab 3, Moorhead Proposal, Tab G, Teaming Agreements and Narratives, at 44. The agency also argues that the agency's affirmative determination that Moorhead could comply with the subcontracting limitation is a matter of responsibility, because there is nothing on the face of the proposal that should have led the agency to conclude otherwise. Memorandum of Law at 11. In this regard, the agency notes that Ashridge's line item price calculations are meaningless because, although the RFP's subcontracting limitations are based upon percentages of performance incurred for personnel, the RFP's price schedule did not require offerors to break out their pricing into separate line items for materials and labor. Id. at 11-12.

An agency's judgment as to whether a small business offeror can comply with a limitation on subcontracting provision is generally a matter of responsibility and the contractor's actual compliance with the provision is a matter of contract administration. See Coffman Specialties, Inc., B-284546, B-284546.2, May 10, 2000, 2000 CPD ¶ 77 at 5. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror could not and would not comply with the subcontracting limitation, the proposal may not form the basis for an award. See KIRA, Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3.

Here, contrary to Ashridge's contentions, there is nothing on the face of Moorhead's proposal that evidences that the firm will not comply with the RFP's subcontracting limitation provision. In its proposal, Moorhead affirmatively stated that it was aware of the subcontracting provision, and that it intended to comply with the requirements. AR, Tab 3, Moorhead Proposal, Tab G, Teaming Agreements and

¹ The requirements stated in 13 C.F.R. § 126.700 are the same as those contained in FAR clause 52.219-3(d)(3), which was included in the RFP.

Narratives, at 44. The awardee described the work it would primarily perform itself, as well as that for which it would assist the subcontractors. Id. Also, we agree with the Corps that Moorhead's CLIN pricing does not indicate the awardee will not comply with the solicitation's subcontracting limitations. Offerors provided unit and extended prices for supplies and services under the RFP's CLINs, but did not break out their costs or prices for labor and material. For example, CLIN 0001 requires the construction of a temporary silt fence, with unit and total linear foot costs, but no breakdown concerning materials and labor. RFP at 3. There are similar CLINs for clearing and grubbing, dike and ramp embankment, geotextile, weir improvements, grassing, etc. Id. at 4-8. Thus, Moorhead's CLIN pricing does not provide a basis to determine its personnel costs, or to conclude that Moorhead does not intend to comply with the solicitation's subcontracting limitation.

We deny the protest.

Susan A. Poling
General Counsel