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Decision

Matter of: Atherton Construction, Inc.

File: B-412846.2

Date: October 18, 2016

Mark G. Jackson, Esq. and Stowell B. Holcomb, Esq., Jackson Rosenfield LLP, for the protester.

Annette B. Kuz, Esq., Department of the Army, Corps of Engineers, for the agency. Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency unreasonably evaluated the awardee's proposal under the experience/capability and past performance factors is denied where the record shows that the agency's evaluation was reasonable and in accordance with the solicitation's evaluation criteria.

DECISION

Atherton Construction, Inc., of Henderson, Nevada, protests the award of a contract to Hal Hays Construction, LLC, of Riverside, California, by the Department of the Army, Corps of Engineers, under request for proposals (RFP) No. W91238-15-R-0063 for construction services. Atherton argues that the agency improperly evaluated the awardee's proposal under two of the three non-price factors.

We deny the protest.

BACKGROUND

The RFP, issued on July 31, 2015, sought proposals to construct a temporary lodging facility at Beale Air Force Base, located in Yuba County, California. RFP at 1. Award of one fixed-price contract was to be made to the offeror whose proposal represented the best value to the government, considering price and the following non-price factors, in descending order of importance: experience and capability, technical approach, and past performance. *Id.* at 21-22. The non-price factors, when combined, were to be approximately equal to price. *Id.* at 21.

The experience and capability factor included two subfactors: prime contractor/key subcontractor example projects demonstrating experience and capability (experience and capability subfactor), and prime contractor/key subcontractor corporate resumes. Id. at 36. The past performance factor included two subfactors: prime contractor/key subcontractor example projects past performance, and key subcontractor authorization letters. Id.

The experience and capability factor was to be evaluated and assigned one of the following technical/risk ratings: outstanding, good, acceptable, marginal, and unacceptable. Id. at 24. As relevant here, outstanding was defined as “proposal meets requirements and indicates an exceptional approach and understanding of the requirements. Strengths far outweigh any weaknesses. Risk of unsuccessful performance is very low.” Id. A rating of acceptable was defined as “proposal meets requirements and indicates an adequate approach and understanding of the requirements. Strengths and weaknesses are offsetting or will have little or no impact on contract performance. Risk of unsuccessful performance is no worse than moderate.” Id.

Offerors were to submit example projects and resumes for evaluation. For example projects, the evaluation factor states:

The more similarities an example project has with the prospective contract, the greater the degree of relevancy. Relevant is defined as projects similar in project type/scope, physical size, complexity; dollar value, contract type and degree of subcontract/teaming. The more relevant the experience is, the more favorable the evaluation rating.

Id. at 38. The experience and capability factor also states that, “[t]he Government is especially interested in relevant experience in projects of comparable size, scope and complexity” and provides the following four “key elements”: (1) construction apartments, multi-family housing or lodging, (2) facilities similar in size, scope and complexity, (3) maintaining pedestrian and vehicular circulation for adjacent occupied buildings, and (4) sequencing/phasing. Id.

Under the experience and capability subfactor offerors were required to submit example projects for two capability areas. The first capability area required, “[a]t least two with no more than three example projects demonstrating the offeror’s project management experience and capability as a prime contractor on a project of similar size, scope and complexity.” Id. (emphasis in original). The second capability area required the submission of one or two example projects for key subcontractors on “a construction effort of similar size scope and complexity.” Id.

The evaluation criteria for the experience and capability subfactor states that the government was to evaluate the experience and capability of the offeror’s example projects demonstrating, “prime contractor/project management experience and

capability on similar project type/scope, physical size, complexity, dollar value, contract type, and degree of subcontract/teaming with the requirements of this acquisition.” Id. at 41. The evaluation criteria also states that “example projects that most closely resemble the project requirement identified in this solicitation and building site environment will receive higher consideration.” Id. Other elements that were to receive favorable treatment were demonstrated experience with Department of Defense (DOD) construction projects, recent projects, greater self-performance, and prior subcontract/teaming experience. Id.

Under the past performance factor, the agency was to evaluate an offeror’s probability of meeting the solicitation’s requirements, considering the demonstrated recent and relevant record of performance in supplying products and services that meet the contract’s requirements. Id. at 23. One performance confidence assessment rating was to be assigned after evaluating the offeror’s recent past performance, and focusing on performance that is relevant to the contract requirements. Id. Past performance relevancy was to be evaluated on a scale of not relevant to very relevant. Offers were to be assigned one of the following confidence ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral). Id. at 24. As relevant here, the RFP states that, “in general, example projects that the Government did not consider relevant for the purposes of evaluating experience will not be considered relevant for the purposes of evaluating past performance.” Id. at 55.

Five proposals were received by the proposal due date, including those from Atherton and Hal Hays. Agency Report (AR), exh. 23, Source Selection Decision (SSD), at 1. After an evaluation of proposals, the agency decided to make award to Hal Hays, in a decision dated October 14, 2015. Id. After receiving a debriefing, Atherton filed a timely protest with our Office on March 11, 2016, which resulted in the agency taking corrective action on April 6. AR, exh. 28, Protest, dated March 11, 2016; exh. 30, Notice of Corrective Action. On April 8, our Office dismissed Atherton’s protest as academic based on the agency’s notice of corrective action and request for dismissal.

The agency conducted a new evaluation and a new source selection decision on June 29, 2016, reaffirming the decision to award the contract to Hal Hays. See generally AR, exh. 33, SSD. The relevant results of the new evaluation were:

	Atherton	Hal Hays
Experience and Capability	Outstanding	Acceptable
Technical Approach and Schedule	Good	Good
Past Performance	Satisfactory Confidence	Satisfactory Confidence
Price	\$17,534,469	\$15,762,891

Id. at 18.

The source selection authority (SSA) assigned an acceptable rating to Hal Hays' proposal under the experience and capability factor. Id. at 5. This rating was based on an evaluation of three example projects submitted by Hal Hays to demonstrate prime contractor experience, and two example projects each to demonstrate the experience and capability of the firm's proposed electrical and mechanical subcontractors. Id. As part of her evaluation, the SSA noted the following two strengths under the experience and capability factor:

The Prime and key subcontractors have DOD project experience as well as familiarity with the [Leadership in Energy and Environmental Design] process. The renovation and dormitory repair projects at both Point Magu, CA and Twenty Nine Palms, CA; along with a design build Childcare Development Center [(CDC)] demonstrate the Prime's somewhat relevant experience and capability

Although only the CDC is new construction, altogether these projects demonstrate the minimum experience and capability and understanding of basic construction requirements of the TLF.

Id.¹

The SSA ultimately decided to reaffirm the award to Hal Hays, finding that Atherton's technical superiority did not warrant the price premium over Hal Hays' offer. AR, exh. 33, SSD, at 19. After a debriefing, this protest followed.

DISCUSSION

Atherton challenges the agency's evaluation of Hal Hays' proposal under the experience and capability and the past performance factors. With respect to the experience and capability factor, Atherton argues that the awardee did not submit example projects demonstrating experience with projects similar to those described in the solicitation. Comments at 2. The protester argues that none of Hal Hays' projects were similar in dollar value to the independent government estimate. Id. Atherton also argues that none of the awardee's projects were similar in scope or complexity, noting that none involved construction of apartments, multi-family

¹ The SSA disagreed with the source selection evaluation board's (SSEB) assignment of a good rating to Hal Hays' proposal under this factor. She also recognized as a weakness, "[l]ack of relevant experience with new construction for lodging" where the SSEB had noted that Hal Hays' experience was somewhat relevant rather than not relevant. Id.

housing or lodging, and that two were renovation projects, and not new construction. Id. at 2-3. Finally, the protester objects to the SSA's consideration of Hal Hays' example experience as a whole, arguing that the solicitation required each example project to be similar in size, scope and complexity to the instant requirements, and that the agency unreasonably considered experience with individual construction elements of smaller projects to support its determination that the awardee was capable of completing the larger project here.

Our Office reviews an agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and applicable statutes and regulations. L&J Bldg. Maint., LLC, B-411827, Oct. 27, 2015, 2015 CPD ¶ 344 at 3. An agency has broad discretion when evaluating an offeror's experience and past performance, to determine whether a particular contract is relevant. Id. The evaluation of experience and past performance is, by its very nature, subjective, and an offeror's disagreement with an agency's evaluation judgements, without more, does not demonstrate that those judgments are unreasonable. Id.

Atherton relies on our decision in Marathon Construction Corporation, B-284816, May 22, 2000, 2000 CPD ¶ 94, to support its argument that it was unreasonable for the agency to consider various elements of Hal Hays' example projects to support its overall experience and capability rating. In this regard, Atherton points to our rejection of Marathon's argument that the agency unreasonably discounted that firm's submitted projects (in that case finding them to be not relevant and assigning a neutral rating for past performance), which Marathon asserted included construction elements relevant to the project in that procurement. Id. at 4-5. However, our decision in Marathon does not stand for the proposition that it is unreasonable for an agency to consider aspects of projects in an overall evaluation of experience (or past performance for that matter). Our decision in Marathon simply stands for the proposition that under that procurement's evaluation scheme, it was reasonable for the agency to give a more favorable rating to the awardee based on its performance of more relevant contracts.²

Atherton also argues that the agency's evaluation was inconsistent with the stated evaluation criteria. In this regard, the protester states:

² Moreover, in Marathon we were asked to consider whether it was unreasonable for the agency not to favorably consider various aspects of the protester's past performance in an overall evaluation of past performance. Here, we are asked to decide whether it was unreasonable for the agency to consider various aspects of the awardee's experience in an overall evaluation of experience. These are significantly different questions given the broad discretion afforded to agencies in conducting evaluations.

The Agency's approach of combining individual construction elements from one example project with different elements from another project treats the requirement to provide example projects "of similar size, scope and complexity" as though it read "similar size scope or complexity." Since the Solicitation provided that the agency would consider projects demonstrating "similar size, scope and complexity," it was improper for the Agency to consider work that was similar only in terms of size, or scope, or complexity.

Comments at 4.

Atherton bases its arguments on two sections of the experience and capability factor. First, the protester cites to the language that states, "[t]he Government is especially interested in relevant experience in projects of comparable size, scope and complexity" and details four key elements, one of which was facilities similar in size, scope and complexity. Protest at 4-5; RFP at 38. Atherton also cites to language under the experience and capability subfactor, where offerors were required to submit at least two example projects showing project management experience and capability as a prime contractor "on a project of similar size, scope and complexity." Id.

The agency argues that the solicitation contemplated a collective experience submission and evaluation, permitting offerors to demonstrate experience and capability through more than one contract. Supp. Memorandum of Law at 1. The agency argues, in essence, that the solicitation provided for the evaluation of degrees of relevance and similarities in the various example projects, and that this was to be evaluated in assigning one combined adjectival rating for the factor. Supp. Contracting Officer's Statement of Facts at 2-3. We agree with the agency.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluvium LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2.

Under the experience and capability factor, the agency was to evaluate submitted example projects for relevance, and was to assign more favorable ratings to more relevant experience. RFP at 38. Relevancy was defined not merely in terms of size, scope and complexity, but also was to consider dollar value, contract type and degree of subcontract/teaming. Id. The RFP provided for higher assessments of relevancy based on more similarities between the example project and the instant requirement. Id. Nothing in this language would suggest that each example project need be similar in terms of size, scope and complexity. In fact, the assessment of degrees of similarity between the example project and the instant requirement based on six dimensions, not limited to size, scope and complexity, suggests to the

contrary. This language, found in the general section of the factor, is substantially the same as the language found in the evaluation criteria, which also provides for consideration of various aspects in assessing relevancy, not limited to size, scope and complexity. Id. at 41.

Moreover, the language cited by Atherton--that the government is especially interested in relevant experience in projects of comparable size, scope and complexity--does not preclude consideration of projects that are not comparable in size, scope and complexity. While the term "especially" modifying "interested" shows a preference for projects of comparable size, scope and complexity, it also necessarily provides for the consideration of projects that are not comparable in size, scope and complexity, albeit to a lesser degree. Finally, while the RFP requires the submission of at least two projects demonstrating the offeror's project management experience and capability as a prime contractor on a project of similar size, scope and complexity, reading the solicitation as a whole and in a manner that gives effect to all of its provisions, we cannot conclude that the protester's interpretation of the evaluation factor is reasonable.

In sum, we conclude that the agency's evaluation of Hal Hays' collective experience was reasonable under the stated evaluation criteria. The SSA reasonably assigned the awardee's proposal an acceptable rating based on her assessment that the firm's example projects were collectively somewhat relevant to the instant requirement. Moreover, we have reviewed Atherton's challenges to the agency's evaluation of the awardee's past performance, and consistent with the analysis, above, find no basis to question the agency's evaluation. Having considered each of the protester's arguments, we conclude that the agency's evaluation and decision to award the contract to Hal Hays was reasonable.

The protest is denied.

Susan A. Poling
General Counsel