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Decision

Matter of: The Communities Group

File: B-283147

Date: October 12, 1999

Kenneth Martin, Esq., Martin & Rylander, for the protester.
Bruce Kasson, Esq., Department of Housing & Urban Development, for the agency.
Charles W. Morrow, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that procuring agency failed to conduct meaningful discussions is denied where protester was generally led into area of its proposal that required amplification.
2. Protest that agency did not consider recent performance problems of subcontractor of awardee in evaluating past performance is denied where the problems were under investigation at time of past performance evaluation and record shows that the agency was favorably impressed by the subcontractor's prompt and appropriate response to the problems.

DECISION

The Communities Group (TCG) protests the award of a contract to Management Solutions of America, Inc. under request for proposals (RFP) No. R-OPC-21303, issued by the Department of Housing and Urban Development (HUD), for real property inspections. TCG contends that HUD failed to conduct meaningful discussions and properly evaluate proposals.

We deny the protest.

The RFP is to procure real property inspections in three geographic areas for the HUD Real Estate Assessment Center.¹ The RFP contemplated the award for each area of an indefinite-quantity contract for 1-year with two 1-year options. RFP Cover Letter, § B. The inspections will be performed on HUD-insured and HUD rental assisted multifamily properties using a data collection device with special HUD software. Agency Report at 1-2. Among other things, the contractor was required to provide a contract manager, available during normal duty hours, that would be responsible for the performance of the work, with full authority to act for the contractor on all contract matters relating to daily operations of the contract. RFP amend. 3, § C.1.3.

Offerors were requested to submit separate proposals for each geographic area for which they were interested in being considered for award. RFP Cover Letter. The RFP provided for award on a best-value basis and technical factors were said to be more important than price. RFP § M.4.A. The following technical evaluation factors and their weights were listed:

1. PRIOR EXPERIENCE - Demonstrated experience of the offeror's staff and proposed subcontractors in performing physical inspections of multifamily housing. (20 points)
2. PAST PERFORMANCE - Documented evidence of the offeror and subcontractors in successfully performing physical inspections within established schedules. (20 points)
3. MANAGEMENT CAPABILITY - Demonstration of the offeror's capability to adequately staff and execute the contract and managing the performance of staff and subcontractor over geographically disbursed areas. (30 points)
4. TRAINING AND QUALITY CONTROL - Documented evidence of the offeror's ability to establish and maintain initial and ongoing training and quality control programs. (30 points)

RFP § M.5A. In addition, the RFP provided that proposals could also receive up to 10 points for proposing an acceptable small business subcontracting plan. RFP § M.5.B. Offerors' prices were not to be separately scored, but were to be evaluated for reasonableness and unbalancing. RFP §§ M.4.A, M.6.B.

¹The center is responsible for obtaining physical inspections and financial information of HUD-insured and assisted housing as part of HUD's 2020 Management Reform Plan. RFP amend. 3, § C-1.1.1.

In response to the RFP, 45 proposals from 25 offerors were submitted, including proposals from TCG and Management Solutions for Area 2. A technical evaluation panel (TEP) performed an initial evaluation of proposals, which resulted in the proposals of TCG and Management Solutions and two other firms being placed in the competitive range for Area 2. Both written and oral discussions were conducted with the competitive range offerors, after which HUD received final proposal revisions (FPR). Management Solutions' FPR priced at \$10,772,056 received the highest technical score for Area 2 of 106 points. TCG's FPR priced at \$9,652,745 received the third highest score of 82.2 points. One of the other competitive range offerors submitted an FPR priced at \$10,084,192 with a point score of 90.1 points and the remaining competitive range offeror submitted the lowest-priced FPR, which was, however, rated substantially inferior to the other FPRs. Agency Report, exh. 11E, Final Technical Evaluation Report, at 51.

HUD concluded that Management Solutions' highest-rated proposal represented the best value for Area 2 and that the significant technical advantages reflected by its point score were worth the price premium over accepting one of the lower-rated proposals. Id. at 51-53.

For example, HUD found that, while TCG's proposal was significantly lower in price, it was significantly inferior to Management Solutions' proposal because TCG's proposal contained "several confusing and unresolved issues regarding its subcontracting arrangements and questions regarding its management capability and commitment of its contract manager." Id. at 51. Specifically, HUD was concerned about the lack of information in TCG's proposal regarding the role of Sverdrup Facilities, one of TCG's identified subcontractors, and about TCG's project manager devoting only 70 percent of his time to this contract while devoting the rest of his time to two subcontracts to offerors in the other areas encompassed by this RFP, which HUD believed did "not demonstrate a clear understanding of the magnitude of the contract requirements." Id. at 18-21.

In contrast, HUD found that Management Solutions' proposal "demonstrated little or no risk to successful contract performance" because of its "extensive corporate and subcontractor experience performing the same inspections as that required by the RFP, its demonstrated successful past performance of the same type of inspections required by the RFP, its clear ability to staff and execute the mechanics of the contract, its strong organization and understanding of the magnitude of the contract tasks for area 2, and its strong initial and ongoing training and [quality control] programs," as well as its stronger commitment to small business subcontracting. Id. at 52. Based on the foregoing, HUD made award to Management Solutions for Area 2. This protest followed.

TCG first contends that HUD failed to conduct meaningful discussions with TCG. It asserts that during the agency debriefing HUD for the first time identified that TCG's proposal was downgraded because it failed to provide sufficient information regarding a relationship with Sverdrup and was only dedicating 70 percent of its

contract manager's time to the contract, and that these alleged weaknesses were not mentioned to TCG during discussions.

The Federal Acquisition Regulation (FAR) requires that contracting officers discuss with each offeror being considered for award "significant weaknesses, deficiencies, and other aspects of its proposal . . . that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR § 15.306(d)(3). The statutory and regulatory requirement for discussions with all competitive range offerors (41 U.S.C. § 253b(d)(1)(A) (1994); FAR § 15.306(d)(1)) means that such discussions must be meaningful, equitable, and not misleading. For discussions to be meaningful, they must lead offerors into the areas of their proposals requiring amplification or revision; the agency is not, however, required to "spoon-feed" an offeror as to each and every item that could be revised so as to improve its proposal. LB&B Assocs., Inc., B-281706, Mar. 24, 1999, 99-1 CPD ¶ 74 at 7.

The record here confirms that HUD conducted legally sufficient discussions with TCG. With regard to TCG's subcontractors, HUD advised all competitive range offerors, including TCG, to "assure that all required information had been provided on [proposed] subcontractors" and specifically advised TCG that its proposal was "not clear on the role and responsibilities between [TCG] and its subcontractors." Agency Report, exh. 8. TCG argues that the discussions were insufficient because HUD did not specifically identify the Sverdrup subcontract arrangement as an area of concern. This argument has no merit. Since HUD did not specifically exclude any of TCG's three proposed subcontractors from its concern with TCG's proposal, the onus was on TCG to examine each subcontracting arrangement presented in its proposal, including its subcontract with Sverdrup to determine if supplementation was appropriate. Thus, TCG's failure to clearly identify Sverdrup's role was not the result of a lack of meaningful discussions.²

TCG also argues that the discussions were not meaningful because the agency did not identify the allocation of its contract manager's time as a weakness. However, the record shows that this weakness was first introduced by TCG's FPR and was not in TCG's initial proposal.³ HUD was not required to reopen discussions to permit

²TCG argues that it was treated unequally because the agency identified a specific subcontractor to Management Solutions during its discussions. However, the agency was concerned about the role of all of TCG's proposed subcontractors, but had concern only about the one identified subcontractor in Management Solutions' proposal.

³The record shows that HUD raised questions with TCG regarding "individual accountability/responsibility," given that TCG was proposed as a subcontractor in Areas 1 and 3. Agency Report, exh. 8. TCG's initial proposal did not indicate whether the project manager for this contract (who TCG stated would be the

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TCG to address this weakness. Ouachita Mowing, Inc., B-276075, B-276075.2, May 8, 1997, 97-1 CPD ¶ 167 at 4.

TCG also questions the agency's downgrading of its proposal because the contract manager was only dedicated to this contract 70 percent of the time. TCG argues that the downgrading was unreasonable because it proposed to make the contract manager available as necessary for the other 30 percent of the time, other TCG management personnel were available for this purpose, and TCG stated that it was capable of providing additional management resources as necessary at no additional cost. HUD responds that the agency did not consider TCG's proposal of devoting 70 percent of the contract manager's time to the contract to be sufficient to manage the Area 2 contract, given TCG's role as a subcontractor under the other contracts on which the contract manager had responsibility. We note that the evaluation of proposals is within the discretion of the agency, since it is responsible for defining its needs and the best method of accommodating them, and must bear the burden arising from a defective evaluation. See LB&B Assocs., Inc., supra, at 5. In light of the requirement to make the contract manager available during normal duty hours, the agency could reasonably view TCG's proposed splitting of the contract manager's time as posing a possible performance risk. Thus, we find that the agency's evaluation is reasonable.

Next, TCG contends that HUD, in rating Management Solutions' past performance, improperly failed to consider the negative past performance of the firm's subcontractor, MTB Investments, Inc., on a current HUD contract for similar services.⁴ TCG asserts that MTB, which had been proposed to perform a substantial portion of Management Solutions' contract, had to replace 20 of 100 inspectors for poor performance under a current HUD contract for similar services; that as a result of this performance the MTB had to reinspect approximately 89 sites; and that MTB's rejection rate was three to six times higher than TCG's under its current contract. As with proposals in general, it is not the function of our Office to evaluate offerors' past performance de novo. Rather, we examine the agency's evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since assessing the relative merit of competing offerors' past performance (and of their proposals overall) is primarily a matter of

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contract manager) would be devoting time to the subcontracts in the two other areas, nor did it indicate that there would be less than a full allocation of time for the Area 2 contract. Agency Report at 10-11. TCG's FPR then indicated that the contract manager would be dedicated to this contract 70 percent of the time. Agency Report, exh. 10A, TCG FPR, at 8.

⁴The RFP stated that the past performance evaluation would consider the performance of the offeror, as well as any proposed subcontractors who would perform a major portion of the work. RFP § M.2.A.

administrative discretion. A protester's mere disagreement with the agency's judgment does not establish that the evaluation was unreasonable. See BFI Waste Sys. of Nebraska, Inc., B-278223, Jan. 8, 1998, 98-1 CPD ¶ 8 at 2.

HUD reports that MTB's past performance information was viewed favorably because the company had a significant amount of direct experience conducting HUD-certified inspections of HUD properties and that the performance problems alleged by the protester were not before the agency at the time past performance was evaluated because this matter was being investigated. Further, HUD advises that the protester's characterization of the alleged problems is inaccurate and that consideration of the matter would not have resulted in a negative past performance rating because MTB undertook prompt and appropriate remedial action. In this regard, HUD advises that it was discovered that a non-licensed individual was conducting inspections on properties using the credentials of a HUD-certified inspector employed by MTB, and that when apprised of the problem MTB took the prompt corrective action of reinspecting 83 properties, terminating the MTB employee involved, and reporting this matter to the relevant state authorities for appropriate disciplinary action. Agency Report at 18-20, exh. 16, Affidavit of Chairman of TEP.

We have reviewed the protester's allegations, as well as the agency's detailed response, and cannot say that Management Solutions' past performance rating was unreasonably high in light of MTB's past performance. As indicated, the incident had not been investigated when the past performance evaluation was done; in any event, the record indicates that TCG's version of MTB's problems is inaccurate and that HUD was favorably impressed with MTB's prompt and appropriate response when the problem was discovered. We note that under the technical evaluation plan employed to evaluate proposals under this RFP an offeror could still receive a high rating for past performance so long as problems identified during performance were handled to the satisfaction of the client. Agency Report, exh. 3, Technical Evaluation Plan, Individual Score Sheet for Past Performance.

Finally, TCG challenges the propriety of the best-value decision that Management Solutions' proposal was technically superior and argues that HUD failed to consider price. However, as discussed above, the agency did consider price under the evaluation scheme that gave more weight to the technical factors, and determined and documented why the strengths in Management Solutions' proposal were worth the associated cost premium.

The protest is denied.

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