



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Addx Corporation

File: B-404888

Date: May 4, 2011

William Millward for the protester.

Patrick A. Genzler, Esq., and Michael L. Sterling, Esq., Vandeventer Black LLP, for MYMIC LLC, an intervenor.

Mitzi S. Phalen, Esq., Department of the Navy, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester's cost proposal for performance of a task order indicated that approximately 78 percent of its personnel costs would be incurred for subcontractor personnel, agency reasonably rejected the task order proposal for taking exception to the limitation on subcontracting clause, which requires that at least 50 percent of the cost of contract performance incurred for personnel be expended for employees of the concern.

DECISION

Addx Corporation, of Alexandria, Virginia, protests the rejection of its proposal and the issuance of a task order to MYMIC LLC, of Portsmouth, Virginia, under task order proposal request (TOPR) No. N00024-11-R-3058, issued by the Department of the Navy, Naval Surface Warfare Center for information technology, modeling and simulation services. The protester argues that the agency improperly rejected its proposal as technically unacceptable.

We deny the protest.

BACKGROUND

The TOPR, which was issued on November 18, 2010 as a small business set-aside, sought proposals from firms holding Seaport-E contracts for Zone 2 (National Capital Zone). The solicitation contemplated the issuance of a cost-plus-fixed-fee task order to the contractor whose proposal represented the best value to the

government considering three technical factors (technical approach, personnel resources, and corporate relevant experience), past performance, and evaluated cost.

The underlying Seaport-E contracts summarize the process for issuance of task orders. As it relates to this protest, the underlying contracts state that when competition under a TOPR is restricted to small businesses, as was the subject TOPR, “the Prime Contractor must perform at least 50% of the Work (See FAR 52.219-14).” Agency Report (AR), Tab 10, at 24. In this regard, the underlying Seaport-E contracts incorporate by reference Federal Acquisition Regulation (FAR) clause 52.219-14 (Limitations on Subcontracting), which provides in relevant part as follows:

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for –

(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

Id. at 41.

The TOPR also incorporated, by reference, all the clauses from the underlying Seaport-E contract, to include the Limitations on Subcontracting clause. See TOPR, amend. 2, at 27.

Under the personnel resources factor, offerors were required to demonstrate in their technical proposals a commitment to assign appropriately skilled and experienced individuals to tasks identified in the TOPR’s Performance Work Statement by submitting a matrix cross referencing proposed individuals by name, education, level of security clearance, and experience, with the required tasks. The TOPR also identified 17 suggested labor categories (e.g., program manager, senior software engineer, subject matter expert, etc.) and a minimum security clearance level for each position, but advised that it would be acceptable for offerors to propose different labor categories.

With respect to cost, the TOPR advised that the agency would evaluate offerors’ proposed costs for realism to include comparing offerors’ cost proposals with their technical proposals. TOPR, amend. 2, at 43. For the purpose of evaluating cost proposals, the TOPR included a table, which established the “Government’s best estimate” of the number of labor hours for each of the 17 anticipated labor categories. The TOPR explained that the estimated hours would be used “to establish the ceiling of the task order,” but that the government could not guarantee the estimated quantities and that “the definitive level of effort [would] be determined

at the task order kick-off meeting and throughout the life of the task order.” Id. at 37.

In their cost proposals, offerors were required to provide, among other things, detailed personnel cost information, to include employee names, number of hours, and the hourly rate for each labor category. The TOPR also specifically required offerors to identify the labor category, employee name, and hours, and to provide detailed cost information, for all proposed subcontractor personnel. Id.

Six contractors submitted proposals prior to the December 21, 2010 closing date. Addx proposed a team consisting of itself (as prime) and several subcontractors. As reflected in its cost proposal, 22 percent of Addx’s personnel costs were associated with Addx’s own employees while the remaining 78 percent were allocated to costs for Addx’s subcontractors. AR, Tab 12, Addx Cost Information. According to its technical proposal, Addx employees accounted for approximately 24 percent of the total number of employees proposed by Addx—the remaining 76 percent was comprised of employees from Addx’s subcontractors. Addx Technical Proposal, at 101-102. After evaluating the proposals, the agency assigned the protester’s proposal a technical rating of unsatisfactory, finding as follows:

Addx Corporation failed to adhere to the requirements of FAR 52.219-14, Limitations on Subcontracting, which required the offeror to incur at least 50 percent of the personnel costs of contract performance. This is a material failure to conform to the terms and conditions of the solicitation, which is a deficiency. With this deficiency, the proposal is technically unacceptable and may not form the basis for an award.

AR, Tab 6, Business Clearance Memorandum at 22. On March 2, 2011, the agency issued a task order to MYMIC LLC at an evaluated cost slightly higher than the protester’s (\$29,945,770 vs. \$29,649,340). On March 7, the agency furnished Addx with a written debriefing explaining the basis for rejection of its proposal. Addx protested to our Office on March 15.

DISCUSSION

The protester argues that the agency improperly relied upon an unstated evaluation factor in rejecting its proposal for failure to comply with the limitation on subcontracting clause. Addx further argues that until the agency issues technical instructions definitively determining the required level of effort under the task order, it lacks a basis for concluding that the protester will not comply with the limitation.

The protester’s first argument is without merit. Where a proposal, on its face, demonstrates that an offeror is taking exception to the subcontracting limitation clause, the proposal is technically unacceptable. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5. This is so because the limitation on

subcontracting is a material term of the solicitation, and a proposal that fails to conform to a material term or condition of a solicitation is unacceptable and may not form the basis for an award. Id. To the extent that the protester is arguing that the TOPR did not notify offerors that it incorporated the limitation on subcontracting clause, as previously noted, the protester's underlying Seaport-E contract provided it with notice that the limitation on subcontracting clause would be incorporated into any TOPR set aside for small business. AR, Tab 10, at 24. In addition, the TOPR itself advised offerors of the clause's incorporation. TOPR, amend. 2, at 27.

Turning to the protester's second argument—i.e., that until the agency definitively decides the required level of effort under the task order, it lacks a basis for concluding that the protester will not comply with the limitation—we think the agency reasonably concluded that Addx had not agreed to comply with the limitation on subcontracting clause. While it is true that the precise level of effort under the task order is to be defined at the task order kick-off meeting and throughout the life of the task order (making it impossible for the agency to determine the precise percentage of work to be performed by Addx's subcontractors), this does not render meaningless, as Addx suggests, the information concerning Addx's proposed staffing mix (prime vs. subcontractor) set forth in Addx's technical and cost proposals. The protester's proposal was based on the "best estimate" of the government's labor hour requirements, TOPR, amend. 2, at 37; in addition, the protester's cost proposal indicated that it would perform the estimated requirements using largely a subcontractor work force (78 percent of its labor costs were for subcontractor employees). Given the information Addx provided in its proposal, the agency had a reasonable basis to conclude that Addx was not agreeing to expend at least 50 percent of personnel costs for its own employees in performance of the contract.

The protest is denied.

Lynn H. Gibson
General Counsel