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

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Decision

Matter of: Archer Western Federal JV

File: B-410168.2; B-410168.3

Date: November 12, 2014

Joseph J. Dyer, Esq., Caroline A. Keller, Esq., and Rebecca Woods, Esq., Seyfarth Shaw LLP, for the protester.

Steven J. Koprince, Esq., and Amanda M. Wilwert, Esq., Petefish, Immel, Heeb & Hird, LLP, for SGS, LLC, the intervenor.

Cindy E. Shimokusu, Esq., Department of the Army, Corps of Engineers, for the agency.

Peter D. Verchinski, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the awardee's proposal violates the 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.
2. Protest alleging that the agency unreasonably considered the experience of the awardee's subcontractors in its evaluation of the awardee's experience factor is denied where the solicitation allowed for the use of subcontractors to perform portions of the contract and the agency's consideration of the subcontractors' experience was contemplated by the terms of the solicitation.
3. Protest that the agency improperly permitted the awardee to clarify its intent to comply with the subcontracting limitation is denied where the exchange did not constitute discussions nor was it otherwise improper.

DECISION

Archer Western Federal JV, of Chicago, Illinois, protests the award of a contract to SGS, LLC, of Oklahoma City, Oklahoma, by the Department of the Army, Corps of Engineers, under request for proposals (RFP) No. W9126G-14-R-0019 for construction services. The protester alleges that the awardee failed to comply with the solicitation's subcontracting limitation; argues that the agency improperly

evaluated the awardee's proposal under the experience factor; and asserts that the agency engaged in improper discussions.

We deny the protest.

BACKGROUND

The RFP, issued on May 2, 2014, provided for the award of a fixed-price contract for the construction of an unmanned aerial vehicle launch and recovery complex at Fort Bliss, Texas. Offerors were informed that award would be made on a lowest-priced, technically acceptable basis considering price and the following three technical evaluation factors: experience, personnel, and past performance. RFP amend. 2, at 14, 16-20. The RFP established that a proposal rated unacceptable under any of the three technical evaluation factors would be ineligible for award. Id. at 14.

With regard to the price, the RFP incorporated by reference Federal Acquisition Regulation (FAR) clause 52.219-4, notice of price evaluation preference for HUBZone small business concerns. This clause provides that the agency will add 10 percent to the price of all offerors, except offers from HUBZone small business concerns that have not waived the evaluation preference. FAR § 52.219-4(b)(1). As relevant here, the clause also requires HUBZone small businesses that do not waive the preference to agree to certain subcontracting limitations in the performance of general construction contracts, as follows: (1) at least 15-percent of the cost of contract performance to be incurred for personnel will be spent on the prime contractor's employees; (2) at least 50-percent of the cost of contract performance to be incurred for personnel will be spent on the prime contractor's employees or a combination of the prime contractor's employee's and employees of HUBZone small business concern subcontractors; and (3) no more than 50-percent of the cost of contract performance to be incurred for personnel will be subcontracted to concerns that are not HUBZone small business concerns. FAR § 52.219-4(d)(3)(i)-(iii).

With regard to the experience factor, the solicitation required an offeror to demonstrate "the experience of the offeror and/or proposed team, including subcontractors, on projects [that are the] same/similar to that described in the solicitation." RFP amend. 2, at 16. The RFP specified that an offeror must demonstrate experience with at least one runway and one hangar project that was similar to the work being solicited. Id. The solicitation provided that in evaluating experience, the agency would consider the project experience of the offeror, including subcontractors, on the projects provided. Id.

The agency received nine proposals in response to the solicitation, including proposals from Archer Western and SGS, by the June 9 closing date. The agency's technical evaluation of the proposals concluded that both Archer Western and SGS submitted technically acceptable proposals. Agency Report (AR), Tab 27, Source Selection Decision, at 2. The agency found that Archer Western provided the

lowest-priced proposal, and awarded the contract to the company on July 24. Id. at 10.

On July 30, SGS protested to our Office alleging that award to Archer Western was improper because the agency failed to apply the HUBZone price evaluation preference as required by the terms of the solicitation. SGS maintained that, as a HUBZone small business concern, SGS was entitled to the price preference provided by FAR § 52.219-4. In response to the protest, the agency decided to take corrective action. In this regard, the agency's notice of corrective action stated that it intended to reevaluate offerors' price proposals after applying the HUBZone price evaluation preference. Our Office dismissed SGS's protest as academic on August 4. SGS, LLC, B-410168, Aug. 4, 2014, at 1.

The agency completed its reevaluation of price proposals, which included applying the price preference. This resulted in SGS becoming the lowest-priced technically acceptable offeror.¹ AR, Tab 28, Price Reevaluation. On August 6, the Army notified Archer Western of the termination of its contract and the Army's intent to award to SGS. After receiving a debriefing, Archer Western filed this protest.

DISCUSSION

Archer Western argues that SGS failed to comply with the solicitation's subcontracting limitation. The protester also argues that the Army's evaluation of SGS's experience was unreasonable, and the agency engaged in improper discussions with SGS. For the reasons discussed below, we find no basis to sustain the protest.

First, Archer Western contends that SGS's proposal, on its face, violated the solicitation's subcontracting limitation because SGS's primary subcontractors are two large businesses. Archer Western also asserts that the agency was aware that SGS's proposal violated the subcontracting limitation because the contracting officer asked SGS whether it intended to waive the HUBZone price evaluation preference.

As a general matter, an agency's judgment as to whether a small business offeror will comply with a subcontracting limitation presents a question of responsibility not subject to our review. Dorado Servs., Inc., B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 11; Spectrum Sec. Servs., Inc., B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the

¹ SGS's price was \$32,968,419, while Archer Western's new adjusted price was \$33,216,700. Agency Legal Memorandum (Sept. 10, 2014), at 6.

subcontracting limitation, the matter is one of the proposal's acceptability. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

Here, contrary to Archer Western's allegations, we conclude there is nothing on the face of SGS's proposal that should have led the agency to the conclusion that SGS did not agree to comply with the subcontracting limitation. In this regard, SGS's proposal--under the experience factor--states that as the prime contractor "SGS will be responsible to fulfill [] all of the requirements of the contract . . . for the complete construction of the facility, including project management, quality control, scheduling, project safety, and subcontractor coordination." AR, Tab 18, SGS Technical Proposal, Experience, at 1. While SGS stated that it teamed with two large business subcontractors, who will [DELETED] and will [DELETED], there is nothing in SGS's proposal that demonstrates that it will not comply with the subcontracting limitation. Id.

Moreover, we cannot find the agency's communications with SGS, during the pendency of its corrective action, demonstrate that SGS did not agree to comply with the subcontracting limitation. In this regard, the record shows that the agency sent SGS's counsel an email asking whether SGS intended to waive the price evaluation preference. AR, Tab 29, Agency Email (Aug. 4, 2014). The agency further asked whether SGS "completely understand[s]" that it will be held to the agreements in FAR § 52.219-4(d)(3) if SGS did not intend to waive the price preference. Id. The agency's email additionally noted that SGS is "relying on two primary subcontractors," neither of which appears to be a small business. Id. SGS's counsel replied that SGS did not waive the price preference; that SGS is "well-aware" of the performance requirements under FAR 52.219-4(d)(3); and that SGS will "fully comply" with the requirements. AR, Tab 29, SGS Emails. SGS's counsel further noted that, while the two subcontractors were not HUBZone firms, the subcontractors will perform "far less than 50 percent of the cost of contract performance incurred for personnel," and that SGS's team includes other HUBZone subcontractors that "were chosen to ensure that SGS will satisfy" the necessary requirements. Id.

On this record, we conclude that the agency's communications, which were for the limited purpose of verifying SGS's intent to comply with the subcontracting limitation, do not establish that the agency had a basis to conclude that SGS would not comply with the limitation. The fact that the awardee's proposal did not contain sufficient information to demonstrate compliance does not show that the proposal should have led the agency to the conclusion that SGS did not agree to comply with the subcontracting limitation. See Dorado Servs., Inc., supra, at 12. Given the absence of any express exception to the subcontracting limitation, and the absence of any clear evidence that SGS would not meet the requirement, we find no basis to question the agency's conclusion that SGS agreed to perform as required. See Ecomplex, Inc., B-292865.4 et al., June 18, 2004, 2004 CPD ¶ 149 at 6.

Next, Archer Western challenges SGS's acceptable rating under the experience evaluation factor. Specifically, Archer Western argues that, in concluding that SGS had the required hangar and runway experience, it was improper for the agency to consider the corporate experience of Archer Western's subcontractors, since the subcontractors will be performing "far less than 50% of the cost of contract performance incurred for personnel." Protester's Comments at 6, quoting AR, Tab 29, SGS Emails.

An agency may base the evaluation of an offeror's experience on the experience of its subcontractors when the subcontractors are to do the work to which the experience is applicable, so long as the solicitation allows for the use of subcontractors and does not prohibit the consideration of a subcontractor's experience in the evaluation. See Kellogg Brown & Root Servs., B-298694.7, June 22, 2007, 2007 CPD ¶ 124 at 12; Loral Sys. Co., B-270755, Apr. 17, 1996, 96-1 CPD ¶ 241 at 5; The Arora Group, B-293102, Feb. 2, 2004, 2004 CPD ¶ 61 at 6. Where a solicitation allows for the use of subcontractors and does not prohibit the consideration of a subcontractor's experience in the evaluation, the significance of, and the weight to be assigned to, a subcontractor's experience is a matter of contracting agency discretion. See Loral Sys. Co., *supra*.

Here, the solicitation stated that in evaluating experience, the agency would consider the project experience of the offeror, including subcontractors, on the projects provided. The RFP did not call for any specific weighting of experience or require that an offeror have experience as a prime contractor in each performance area. Thus, we conclude that absent an express prohibition, it was not unreasonable for the agency to include SGS's subcontractors' experience in evaluating the awardee's ability to perform the RFP's requirements. To the extent the protester objects to the solicitation's terms, which permit the Army to consider subcontractor experience, Archer Western's objection is an untimely challenge to the terms of the solicitation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014).

Finally, Archer Western argues that the agency's corrective action email exchange with SGS regarding whether SGS intended to comply with the FAR's HUBZone subcontracting requirements was improper because the exchange went beyond mere clarifications and constituted discussions by allowing SGS to revise its proposal. We disagree.

Clarifications are "limited exchanges" between an agency and an offeror for the purpose of clarifying certain aspects of a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR § 15.306(a)(2); Lockheed Martin Simulation, Training & Support, B-292836.8 *et al.*, Nov. 24, 2004, 2005 CPD ¶ 27 at 8. Discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. Highmark Medicare Servs., Inc., *et al.*,

B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 11; see FAR § 15.306(d). In situations where there is a dispute regarding whether an exchange between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. Id.; Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

The agency's exchange with SGS here did not constitute discussions. The agency's August 4 email to SGS's counsel merely sought verification of the offeror's intent to comply with its subcontracting obligations during performance, and did not provide for the submission of a revised proposal. See FAR § 15.306(a); LOGMET LLC, B-405700, Dec. 14, 2011, 2011 CPD ¶ 278 at 3 (agency letter seeking confirmation of understanding of subcontracting obligations during performance constituted clarifications). Accordingly, we find no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel