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Decision

Matter of: NEIE Medical Waste Services, LLC

File: B-412793.2

Date: August 5, 2016

William E. Hughes III, Esq., and Emily A. Constantine, Esq., Whyte Hirschboeck Dudek SC, for the protester.

Harold W. Askins III, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

1. Protest that awardee's proposal demonstrates the firm cannot meet the limitation on subcontracting is denied, where the protester identifies nothing on the face of the awardee's proposal that indicates an intention not to comply with the limitation.
 2. Protest that awardee's proposal does not comply with a definitive responsibility criterion is denied, where the identified solicitation provision lacks the specificity required of a definitive responsibility criterion.
 3. In a procurement where award is to be made on a lowest-priced, technically acceptable basis, protest that awardee cannot meet the past performance requirement to be regularly established in the business of providing the services is denied, where awardee's proposal would be technically acceptable even with a neutral past performance rating.
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DECISION

NEIE Medical Waste Services, LLC, of Blairsville, Pennsylvania, protests the award of a contract to REG Products, LLC, doing business as VETUS Environmental Services, LLC, of Ponte Vedra Beach, Florida, by the Department of Veterans Affairs (VA) under request for quotations (RFQ) No. VA248-16-Q-0235 for pick-up and disposal of general, recyclable, and regulated medical waste. NEIE maintains that REG Products cannot comply with the limitation on subcontracting or with a definitive responsibility criterion.

We deny the protest.

BACKGROUND

The RFQ, issued under the simplified acquisition procedures for commercial items of Federal Acquisition Regulation (FAR) subparts 12.6 and 13.5, was set aside for service-disabled, veteran-owned small business (SDVOSB) concerns. The RFQ contemplated award of a fixed-price requirements contract for the pick-up and disposal of general, recyclable, and regulated medical waste at VA medical facilities in Florida, over a 1-year base period and four option years. RFQ at 1-2.

Award was to be made to the responsible vendor that submitted the lowest-priced, technically-acceptable quotation, based on two evaluation factors: technical and past performance. Id. at 68. Under the technical factor, the prime contractor was to provide, among other things, a completed price schedule and labor mix table; a copy of a current, active Florida Department of Health Medical Waste Transporters permit; a copy of the driver's license for each transporter used to perform the required services; a copy of the Blood Borne Pathogen Training Certification for each transporter to be used to perform the services; and a copy of the vendor's last Biomedical Waste Transporter Annual Report submitted to the Florida Department of Health. Id. at 68-69. Vendors were also required to include the following statement: "The terms and conditions in the RFQ are acceptable to be included in the award document without modification, deletion, or addition." Id. at 67.

With respect to past performance, the RFQ required that "[c]ontractors shall be regularly established in the business of providing the services in [sic] identified in the Performance Work Statement; who have experience with commercial contracts of similar size or larger; with conditions and scope as required for this contract." Id. at 70. Vendors were required to provide a past performance questionnaire for "up to five or more" past performance references of the same size and scope. Id. at 71. Past performance was to be evaluated on an acceptable or unacceptable basis, and vendors without a record of relevant past performance, or for whom past performance was not available, would receive a "neutral/unknown confidence" rating. Id.

Relevant to this protest, the RFQ stated that the contractor must comply with FAR clause 52.219-14, Limitations on Subcontracting, which requires the contractor to agree that, in the performance of a contract for 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 12.

The VA received three quotations, including those of NEIE and REG Products. REG Products submitted, among other things, a copy of its operating permits both as a biomedical waste transporter and for biomedical waste storage. Agency Report (AR), Tab 4, REG Products Quotation, at 53. REG Products also submitted its most recent Biomedical Waste Transporter Annual Report, which reported that the firm collected and treated 19,364 pounds of biomedical waste in Florida during

the reporting year. Id. at 69. REG Products' quotation provided reference information for two contracts for residential trash, recycling collection, yard waste collection, and commercial garbage, which were valued at \$11 million and \$1.2 million per year, respectively. Id. at 112, 114. REG Products submitted additional past performance information identifying contracts ranging from \$1,025 and \$2.98 million in value. Two of these contracts, valued at \$1,025 and \$2,730, were for pharmaceutical waste disposal for Florida veterans' nursing homes--one of which specified that the contract included the disposal of hazardous pharmaceutical waste. Id. at 52. The contracting officer concluded that REG Products met the requirement for being regularly established in the business of providing the services identified in the RFQ. Contracting Officer's Statement at 2.

All three quotations were found to be technically acceptable. REG Products submitted the lowest-priced quotation of \$3,237,556.4 and NEIE submitted the next lowest-priced quotation of \$3,600,077.14.¹ AR, Tab 7, Award Decision Documentation Form, at 2. REG Products was selected for award as offering the lowest-priced, technically acceptable quotation. After being notified of the award to REG Products, NEIE filed a protest with our Office.

DISCUSSION

NEIE maintains that REG Products cannot comply with the limitation on subcontracting because the VA's Vendor Information Page (VIP) database indicates that the awardee has only one employee and the firm lacks sufficient experience or expertise to perform the requirement without relying on subcontractors.² Protest at 1; Comments at 7.

The VA states that the awardee's quotation reflected the vendor's intent to meet the terms and conditions of the contract through including the statement that "The terms and conditions in the RFQ are acceptable to be included in the award document without modification, deletion, or addition." AR Legal Memorandum at 4 (citing AR, Tab 4, REG Products Quotation, at 2). The VA also states that REG Products is specifically licensed for the type of work required under the RFQ, and the awardee's listing in the VA's Vendor Information Page (VIP) database states that the firm is the only self-performing SDVOSB medical waste transporter in Florida. Id. at 3-4.

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

¹ The independent government cost estimate was \$2,455,958.55. AR, Tab 7, Award Decision Documentation Form, at 1.

² The VIP database also is known as the Center for Verification and Evaluation (CVE) database.

contractor's actual compliance with the provision is a matter of contract administration. See Ashridge, Inc., B-408469, Sept. 27, 2013, 2013 CPD ¶ 250 at 7. Neither issue is one that our Office generally reviews. 4 C.F.R. § 21.5(a), (c); Geiler/Schrudde & Zimmerman, B-412219 et al., Jan. 7, 2016, 2016 CPD ¶ 16 at 7-8. However, where a quotation, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitations, the matter is one of the quotation's acceptability. KAES Enters., LLC, B-408366, Aug. 7, 2013, 2013 CPD ¶ 192 at 2.

An offeror need not affirmatively demonstrate compliance with the subcontracting limitations in its proposal. Dorado Servs., Inc., B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 12. Rather, such compliance is presumed unless specifically negated by other language in the proposal. Express Medical Transporters, Inc., B-412692, Apr. 20, 2016, 2016 CPD ¶ 108 at 6. It is the protester who bears the burden of demonstrating that the awardee's proposal should have led the agency to conclude that the awardee did not comply with the limitations. KAES Enters., LLC, supra., at 3.

Here, NEIE has not met its burden. The protester has identified nothing on the face of the awardee's quotation that indicates that REG Products does not intend to comply with the subcontracting limitation. Instead, NEIE looks to extrinsic information to support its position. As indicated by the VA, the awardee's quotation expressly states that the RFQ's terms and conditions were acceptable without modification, deletion, or addition. AR, Tab 4, REG Products Quotation, at 2. In the absence of NEIE identifying language in the awardee's quotation negating this blanket acceptance, we find no basis to sustain this protest ground.

NEIE also maintains that the awardee's quotation does not comply with a definitive responsibility criterion because it does not meet the RFQ requirement to "be regularly established in the business of providing the services identified" in the performance work statement; who have experience with commercial contracts of similar size or larger; with conditions and scope similar to instant requirement. Protest at 4; Comments at 2.

Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement for the measurement of an offeror's ability to perform the contract. These special standards of responsibility limit the class of offerors to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance, e.g., unusual expertise or specialized facilities. Fluor Daniel, Inc., B-262051, B-262051.2, Nov. 21, 1995, 95-2 CPD ¶ 241 at 11.

The solicitation provision in question does not meet the definition of a definitive responsibility criterion. The requirement that a vendor "be regularly established in the business of providing the services in [sic] identified in the Performance Work

Statement; who have experience with commercial contracts of similar size or larger; with conditions and scope as required” in this procurement, RFQ at 70, does not set out a specific, objective standard measuring the vendor’s ability to perform. See M&M Welding & Fabricators, Inc., B-271750, July 24, 1996, 96-2 CPD ¶ 37 at 2 (requirement that a bidder be “regularly engaged in the business” is not a definitive responsibility criterion); compare Townsco Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313 at 3 (requirement that offeror be regularly engaged in airfield pavement work for three years is a definitive responsibility criterion).

Underlying NEIE’s argument is its contention that REG Products does not meet the RFQ requirement to be regularly established in the business of providing the services identified in the Performance Work Statement; who have experience with commercial contracts of similar size or larger; with conditions and scope as required by the solicitation. Comments at 3. NEIE contends that the awardee’s Biomedical Waste Transporter Annual Report does not provide sufficient information to permit the VA to determine whether REG Products is regularly established in the business of providing the services in question. In this regard, NEIE states that the volume of biomedical waste REG Products reported is too small and the report does not identify the type of waste the awardee handles. Id. at 4. Additionally, NEIE maintains that the two past performance questionnaires REG Products submitted were for residential trash and did not constitute the collection, transport, and disposal of regulated medical waste as identified in the RFQ. Id. at 3-4.

The VA states that the contracting officer concluded that REG Products was regularly engaged in the type and nature of work contemplated under the solicitation after considering the awardee’s past performance and the company’s licensing, certification, and capabilities. AR Legal Memorandum at 5-6; Contracting Officer’s Statement at 2.

The evaluation of past performance is a matter within the discretion of the contracting agency, which our Office will review only to ensure that the agency’s judgment was reasonable and consistent with the solicitation criteria and applicable statutes and regulations. United Terex, Inc. – Protest & Costs, B-405070.3, B-405070.4, Sept. 27, 2011, 2011 CPD ¶ 197 at 4. An offeror’s disagreement with an agency’s judgment, without more, is insufficient to establish that the agency acted unreasonably. DynCorp International LLC, B-406523.2, B-406523.3, Dec. 16, 2013, 2014 CPD ¶ 7 at 6.

We agree with NEIE that the VA erred in concluding that the awardee’s proposal demonstrated past performance with contracts of similar size, conditions, and scope as the instant requirement. While REG Products identified one large dollar value contract, the contract was for residential trash, recycling collection, yard waste collection, and commercial garbage. The two contracts involving pharmaceutical waste disposal identified in the awardee’s proposal were of significantly smaller value than the instant requirement. The record does not show how the VA

concluded that the awardee's past performance met the solicitation requirement for contracts of similar size, condition, and scope.

We nonetheless conclude that the protester's argument does not provide a basis for sustaining the protest. Although NEIE argues that the requirement that "[c]ontractors shall be regularly established in the business . . .", RFQ at 70, does not relate to past performance, Protest at 5, we disagree. While the subject provision is unartfully worded, we read this provision, together with the solicitation as a whole, to constitute a past performance criterion. Elsewhere in the section related to past performance, the RFQ specifically stated that offerors without a record of relevant past performance would receive a "neutral/unknown confidence" rating for past performance. RFQ at 71. In the absence of relevant past performance information, the VA should have assigned the awardee's proposal a neutral past performance rating.

We have found that, where an award will be made on a lowest-price, technically acceptable basis, assigning a neutral past performance rating to offerors without relevant past performance will be, effectively, no different than assigning an acceptable rating to that offeror's past performance. See Y&K Maintenance, Inc., B-405310.2, Oct. 17, 2011, 2011 CPD ¶ 239 at 7. As a result, even though the VA erred in finding the awardee's prior contracts were of similar size, condition, and scope, based on the record before us REG Products would nevertheless remain the lowest-priced, technically acceptable vendor with a neutral past performance rating.

The protest is denied.

Susan A. Poling
General Counsel