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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Knightsbridge Construction Corporation

File: B-291475.2

Date: January 10, 2003

Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd, for the protester.
Phillipa L. Anderson, Esq., Kenneth MacKenzie, Esq., and Charlma Quarles, Esq., Department of Veterans Affairs, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation requires that to be considered technically acceptable, an offeror must demonstrate experience in completing at least three projects of similar type and magnitude within the last 5 years on a contract similar in size and scope to the project being awarded, the agency reasonably considered whether the past projects referenced in proposals were comparable in dollar value as well as complexity. Where protester had not performed three projects of contract dollar value comparable to that of the requirement being solicited, agency reasonably rejected protester's proposal as unacceptable.

2. While agency improperly conducted exchanges with offerors in a manner that favored other offerors over protester, GAO will not sustain protest where it is clear that agency's improper actions did not prejudice protester.

DECISION

Knightsbridge Construction Corporation protests the rejection of its proposal and the award of a contract to TCL Contractors Corporation under request for proposals (RFP) No. 10N3-131-02, issued by the Department of Veterans Affairs (VA) for renovation of the dermatology clinic area of a VA Medical Center in New York. Knightsbridge maintains that it submitted the lowest priced, technically acceptable proposal and should have received the award, and that the agency improperly conducted exchanges with other offerors, which prejudiced Knightsbridge.

We deny the protest.

On June 7, 2002, the VA issued this RFP for the renovation of the 8th floor dermatology clinic. The work was to include general construction, alterations, removal of some existing structures, asbestos abatement and monitoring, and mechanical, electrical and plumbing renovations. RFP ¶ 1.2. Award was to be made to the lowest priced technically acceptable offeror. RFP amend. 4, at 1.

As relevant here, to be considered technically acceptable, an offeror was required to "[d]emonstrate experience in completing at least three projects of similar type and magnitude within the last five years in active, occupied medical facilities on a contract similar in size and scope to this project." The RFP also notified offerors that the government estimate for this project was from $2 to $5 million. The solicitation required that offerors identify each project, the project title, location, and a brief description of the design and construction of the project, including the contracting method, the start and completion dates, the square footage and the cost. Id. at 2.

Several proposals, including those of Knightsbridge and TCL, were received by the closing date for receipt of proposals. With respect to the requirement for having completed three projects of similar type and magnitude in occupied medical facilities, Knightsbridge's proposal listed six projects, ranging from $300,000 to $500,000. The VA found that a number of offerors, including TCL, had failed to provide the required dates, size and scope of the projects they identified. Because the lack of information "prevented a fair and reasonable evaluation," on September 24, 2002, the VA contacted these offerors requesting the required information. Agency Report, (AR), Tab 8, Reports of Contact. TCL responded and furnished the required information.

On September 26, the technical evaluation board (TEB) evaluated all proposals. Knightsbridge's proposal was found technically unacceptable because the evaluators found that Knightsbridge had failed to identify three projects in occupied medical facilities of similar size and scope. The evaluators specifically found that Knightsbridge's listed projects were small in dollar value and therefore not similar in size to the current requirement. The largest dollar value of any single project listed by Knightsbridge for occupied medical facilities was $516,000, as compared to the government estimate range of $2 to $5 million for the current project. Award was made to TLC at $1,720,400, as the offeror that submitted the low priced, technically acceptable proposal. After receiving a debriefing, Knightsbridge filed this protest.

Knightsbridge first argues that its listed projects met the experience requirements. Knightsbridge argues that it understood "similar in size and scope" to mean square footage and that all its identified projects involved square footage that was greater than the subject project. Knightsbridge's position is that the evaluators improperly considered size to include dollar value.

Knightsbridge's challenge to the evaluation is without merit. As stated above, the RFP required offerors to demonstrate experience completing at least three projects

in the past 5 years similar in size and scope to this project. The solicitation explicitly asked offerors to identify the cost of the projects identified, as well as the square footage and other criteria. In our view, it was reasonable and consistent with the evaluation criteria for the evaluators to view cost as a factor in determining whether the projects identified by Knightsbridge were comparable in size to the work contemplated under the proposed contract. Cf. Marathon Constr. Corp., B-284816, May 22, 2000, 2000 ¶ 94 at 5 (noting that language similar to that used by the VA here--requiring experience with "projects of the same or similar size, scope and complexity"--could reasonably include consideration of whether the projects were comparable in value to the project being awarded). Nothing in the RFP at issue here limited the assessment of size to square footage, and the request that offerors identify the dollar value of their past projects put Knightsbridge on notice that those dollar values, and their comparability to the anticipated value to the current project, would be evaluated.

Accordingly, while the projects Knightsbridge listed were similar in square footage to the current project, we do not find unreasonable the agency's conclusion that those projects, when measured by the dollar values that Knightsbridge listed, did not meet the RFP experience requirements, and that Knightsbridge's proposal was therefore unacceptable. As previously stated, the dollar value of Knightsbridge's projects was significantly less than the dollar value of the current project.

Knightsbridge also protests as improper the exchanges between TCL and the agency regarding the required project information, and the agency's failure to engage in similar exchanges with Knightsbridge. We agree with Knightsbridge that the agency's decision to conduct exchanges with the other offerors was improper, especially in light of the fact that the discussions centered on providing information necessary to evaluate the acceptability of the offers, that is, whether the identified projects were similar in size and scope to the contract being awarded--essentially the very concern the VA had with Knightsbridge's proposal. The Federal Acquisition Regulation (FAR) provides that, in conducting exchanges with offerors, agency personnel "shall not engage in conduct that . . . favors one offeror over another." FAR § 15.306(e)(1); see Chemonics Int'l, Inc., B-282555, July 23, 1999, 99-2 CPD ¶ 61 (agency conducted discussions in manner which unreasonably favored awardee over protester in violation of FAR § 15.306(e)).

However, while we believe the record shows that the agency's actions were improper, we will, as the agency points out, sustain a protest only where there is a reasonable possibility that the protester was prejudiced by the agency's actions, that is, that, but for the agency's actions, the protester would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). As explained below, we conclude that the record demonstrates that Knightsbridge was not prejudiced here.

Our Office conducted a conference call with the parties to discuss the case. During that call, the GAO attorney asked counsel for Knightsbridge to address whether his client could have identified the required minimum of three projects similar to the scope and size of the procurement at issue here, had it been advised that dollar value would be considered in assessing similarity. In response, Knightsbridge provided our Office and the VA comments, including a document entitled "Technical Information As It Would Have Been Submitted Had Discussions Been Held." In that submission, the protester addressed, in particular, three of its six previously identified projects that were performed at the VA Medical Center in Montrose, New York, and two that were performed at the VA Medical Center in East Orange, New Jersey.

It is Knightsbridge's position that, although the Montrose projects were three separate contracts in separate buildings, the three contracts were performed in one medical facility, at the same time (or in overlapping timeframes), and with much of the same work crew and supervisory staff. On that basis, the protester contends that it would have advised the agency, if discussions had been held, that those three contracts represent one project with a value of $1,151,000. Knightsbridge makes a similar argument with respect to the two East Orange projects, which it contends it would have identified as one combined project with a value of $854,000.

In our view, the protester's submission establishes that it was not prejudiced by the agency's failure to give the firm an opportunity to provide further information on the dollar value of its past projects. If we were to accept the protester's position concerning the combining of the projects, Knightsbridge still cannot claim even a single project with a value between $2 and $5 million, which was the RFP's estimated value for this project, nor a single project near the value of the prices proposed by the offerors here (as noted above, the awardee's price was over $1.7 million, and Knightsbridge's own proposed price was over $1.6 million). Moreover, even if we further assumed, arguendo, that the protester should have been given credit for these two projects, despite their being considerably smaller than the current procurement in terms of dollar value, that would still leave Knightsbridge with only two projects that meet the size standard in terms of dollar value, not the three required by the RFP.

The protest is denied.

Anthony H. Gamboa
General Counsel