



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: L&N/MKB, Joint Venture

File: B-403032.3

Date: December 16, 2010

Nanthawan Huse for the protester.

Pamela Reiner Waldron, Esq., Department of the Interior, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's evaluation of awardee's experience is denied where the record shows that the awardee had relevant experience.

DECISION

L&N/MKB, Joint Venture, of Kirkland, Washington, protests the award of a contract to Larkor-MZT Team II, a Joint Venture, of Homedale, Idaho, under request for proposals No. N2011101190 issued by the Department of the Interior, National Park Service, for a wastewater treatment system.

We deny the protest.¹

BACKGROUND

The RFP, issued as a competitive section 8(a) small business set-aside, provided for the award of a fixed-priced contract for the installation of a new vacuum-assisted wastewater collection system within the Lower Elwha Klallam Indian Tribe Reservation in the state of Washington. This work consists of converting tribal residences from septic tank waste systems to a reservation-wide waste collection system. The new collection system is composed of approximately four miles of vacuum mainlines, approximately three miles of service lateral lines, structures to convert from gravity to vacuum collection, and a vacuum and lift station pump house

¹ Because a protective order was not issued in connection with this protest, our discussion is necessarily general.

to pump the wastewater several miles into an existing wastewater collection system.² Contracting Officer's (CO) Statement at 1.

A brand name vacuum system (manufactured by AIRVAC, Inc.) was identified, but offerors were allowed to propose an equal vacuum system. Offerors were informed that a manufacturer's field representative of AIRVAC or the offeror's approved "equal" vacuum system supplier must be proposed to satisfy the requirement that the representative be present during installation of the system to supplement the agency's inspection of the system. RFP, Specifications, § 02537, at 30-32, see also RFP amend. 3, at 6.

The RFP stated that award would be made on a best value basis, considering the following evaluation factors: technical, past performance, and price. The technical and past performance evaluation factors, when combined, were stated to be approximately equal in importance to price. RFP § M.1, at 118. The technical factor included the following subfactors, listed in descending order of importance: technical approach, proposed construction schedule, prime contractor experience, and key subcontractors.

With respect to the prime contractor experience subfactor, the RFP provided that the offeror's experience in construction projects of similar scope, type, and size would be evaluated. Offerors were requested to submit no more than five projects demonstrating its experience as a prime contractor on projects of similar type and size. RFP § M.1, at 118. With respect to the key subcontractors subfactor, offerors were informed that subcontractors "with more relevant and similar experience to this project" would be rated more favorably. Id.

The agency received nine proposals, including the protester's and the awardee's. After evaluating the proposals, the agency established a competitive range of four proposals, including that of Larkor, L&N, and Bulltrack-Watts II, Joint Venture (BTW). The agency conducted discussions, and received revised proposals. Initially, the award was made to L&N.

BTW protested the initial award to our Office, and the agency elected to conduct further discussions with the competitive range offerors, obtain and evaluate revised proposals, and make a new selection decision. Based on this corrective action, we dismissed BTW's protest on July 9, 2010, as academic.

L&N was informed on July 15 that Interior was reopening the competition. L&N was provided with the agency's evaluation ratings for the firm's proposal under each of the technical evaluation subfactors and under the past performance factor. L&N was

² Unlike a gravity-based system, a vacuum system uses differential air pressure to move wastewater.

also provided with a narrative description of the evaluated strengths and weaknesses in its proposal for the technical evaluation subfactors. Agency Report (AR), Tab 16, Interior’s Discussions Letter to L&N, at 1-2. Proposal revisions were required to be provided by July 20.

L&N responded to the agency’s discussions on July 20, and revised its proposal, but not its proposed price. The agency evaluated L&N’s and Larkor’s revised proposals as follows:³

		L&N	Larkor
Technical		EXCELLENT	EXCELLENT
	Technical approach	Excellent	Excellent
	Construction schedule	Excellent	Excellent
	Prime contractor experience	Good	Good
	Key subcontractors	Excellent	Excellent
Past Performance		EXCELLENT	EXCELLENT
Price		\$8,324,588	\$8,281,600

AR (B-403032.2; B-403032.4), Tab 19, Technical Evaluation Panel (TEP) Report, at 2-3.⁴ The TEP’s adjectival ratings were supported by narratives that identified respective strengths and weaknesses in the offerors’ proposals.

The contracting officer (CO), the source selection authority for this procurement, met with the TEP and reviewed the TEP’s evaluation of the offerors’ revised proposals. CO’s Statement at 5. He concluded that Larkor’s lower-priced proposal reflected the best value to the agency. AR, Tab 20, Amended Source Selection Memorandum at 10. The CO noted that both Larkor and L&N had excellent ratings under the technical approach and past performance factors and had proposed the same subcontractor, a firm which “has successfully accomplished this same type of work before on a larger scale, [and] will complete the vacuum system, as well as the force main and gravity piping.” *Id.* at 6. He found that L&N’s proposal did not provide any technical benefit that would justify the firm’s higher price, and selected Larkor’s proposal on the basis of its low price. *Id.* at 7.

³ Under the prime contractor experience subfactor, an excellent rating reflected a proposal showing excellent experience managing construction projects of similar type and size, and having exceptional strengths, no significant weaknesses or deficiencies. A good rating reflected a proposal showing good experience managing construction projects of similar type and size and having strengths and minor weaknesses that are more than offset by strengths. Source Selection Plan, at 7.

⁴ L&N was not provided with a copy of the TEP Report.

This protest followed.

DISCUSSION

As an initial matter, L&N complains that Interior should not have reopened the competition because L&N's award price had been disclosed. L&N contends that this resulted in an improper "auction." Protest at 5. L&N asserts that the agency, in response to BTW's earlier protest, should have limited its corrective action to simply reevaluating the firm's proposals. Id. We find this objection to be untimely.

Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (2010); see also Continental Staffing, Inc., B-299054, Jan. 29, 2007, 2007 CPD ¶ 18 at 4-5. L&N's objections to the agency's reopening of the competition is a challenge to the announced ground rules for the recompetition, which is essentially to a challenge to the terms of a solicitation. See Sherman Plaza, Inc., B-402310.6, Aug. 4, 2010, 2010 CPD ¶ 188 at 7. Therefore, to be timely, L&N's challenge to the agency's conduct of the recompetition was required to be filed by the July 20 closing date for receipt of revised proposals.

Here, L&N knew that Interior was reopening the recompetition, conducting discussions, and inviting revised proposals by July 20. L&N, however, did not protest the agency's conduct of this recompetition by the July 20 closing date. While we note for the record that L&N included statements in its revised proposal taking "exception" to the agency's corrective actions, even if we view these "exceptions" as an agency-level protest, including a protest within a proposal submitted by the closing time for receipt of proposals does not constitute a timely pre-closing date protest to the agency. See Tower Corp., B-254761.3, Mar. 8, 1994, 94-1 CPD ¶ 186 at 4. Under our Regulations, where a protest is first filed with the contracting agency, a subsequent protest to our Office will be considered only if the initial protest to the agency was timely filed. 4 C.F.R. § 21.2(a)(3).

L&N also protests Larkor's good rating under the prime contractor experience subfactor, arguing that the awardee lacks relevant experience in contracts of size and scope similar to this project.⁵

⁵ L&N also argues that Larkor and its joint venture partner, MZT, do not have a mentor/protégé relationship, and thus the agency was required to evaluate the experience of each member of the joint venture separately. The record shows, however, that the two firms have such a relationship. See Agency Letter to GAO, Oct. 7, 2010, attach. A, Statement of Business Development Specialist, Small Business Administration (noting that Larkor and MZT have a mentor-protégé agreement through August 24, 2011).

In reviewing protests of alleged improper evaluations and source selection decisions, it is not our role to reevaluate submissions; rather, we examine the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Panacea Consulting, Inc., B-299307.4, B-299308.4, July 27, 2007, 2007 CPD ¶ 141 at 3. A protester's mere disagreement with an agency's judgment is not sufficient to establish that an agency acted unreasonably. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

The TEP found, under the prime contractor experience subfactor, that both Larkor and L&N had some experience with projects of similar size and scope. See AR, Tab 19, TEP Report, at 4-5. Specifically, the TEP found that Larkor identified for its experience five construction projects that were somewhat relevant. The TEP also found that although L&N identified a project that the TEP found very relevant in size and scope, the protester also identified two projects that were not relevant and two that were found somewhat relevant. We find that the TEP and SSA reasonably concluded that Larkor's and L&N's identified experience warranted a good rating under the prime contractor experience subfactor.

L&N also complains that the agency used information from its proposal concerning the experience of its subcontractor in evaluating the awardee's offer of the same subcontractor.⁶ Protest at 4. We find no merit to L&N's apparent belief that it should have received a higher rating than Larkor for the experience of the subcontractor that both firms offered, because L&N did a better job explaining that experience in its proposal. We have found that where, as here, two firms propose the same subcontractor, an agency may not ignore the subcontractor's experience or past performance in evaluating the firms' proposals, even where one firm provided more information concerning the subcontractor in its proposal. See Consolidated Eng'g Servs. Inc., B-279565.2, B-279565.3, June 26, 1998, 99-1 CPD ¶ 75 at 6.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁶ The protester's proposal included a letter from the subcontractor highlighting experience it had with the AIRVAC vacuum system, and identifying projects the subcontractor had completed.