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United States General Accounting Office
Washington, DC 20548

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Decision

Matter of: KIRA Inc.

File: B-287573; B-287573.2; B-287573.3

Date: July 23, 2001

J. Patrick McMahon, Esq., William T. Welch, Esq., Barton, Baker, McMahon & Tolle, for the protester.
David J. Taylor, Esq., Tighe Patton Armstrong Teasdale, for Environmental Management, Inc., an intervenor.
Sharon A. Jenks, Esq., Department of the Air Force, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly failed to downgrade awardee's technical proposal because of the possibility that one of its subcontractors might file for bankruptcy is denied where solicitation does not provide for the evaluation of proposals based on financial stability.

2. Protest that agency did not engage in meaningful discussions with protester is denied where record shows that all significant deficiencies were brought to protester's attention and firm was afforded an opportunity to address those concerns.

DECISION

KIRA, Inc. protests the award of a contract to Environmental Management, Inc. (EMI) under request for proposals (RFP) No. F24604-01-R-0001, issued by the Department of the Air Force for consolidated facilities maintenance services at Malmstrom Air Force Base. KIRA argues that the agency misevaluated EMI's and its proposal, and failed to conduct adequate discussions with the firm.

We deny the protest.

The RFP sought proposals to perform numerous requirements, including facilities and grounds maintenance, custodial services, refuse and recycling removal services and simplified acquisition for base engineering requirements (SABER). Offerors were advised that the agency would make award to the firm submitting the proposal

deemed to offer the best overall value, considering both cost and non-cost factors. For evaluation purposes, the RFP provided that proposals would be rated either blue (exceptional), green (acceptable), yellow (marginal) or red (unacceptable), and also would be rated either low, moderate or high proposal risk, under five subfactors included within a mission capability factor: program management, SABER sample project technical evaluation, quality, increased coverage and cost visibility. The proposals also were to be evaluated for past performance (equal in weight to mission capability), under which factor they would be assigned adjectival/confidence ratings of exceptional/high confidence, very good/significant confidence, satisfactory/confidence, neutral/unknown confidence, marginal/little confidence, or unsatisfactory/no confidence. Cost was to be evaluated for reasonableness and realism. Mission capability, past performance and proposal risk, together, were significantly more important than cost.

After receiving and evaluating initial proposals, engaging in discussions and obtaining final proposal revisions, the agency assigned identical adjectival and past performance ratings to the proposals submitted by KIRA and EMI. Agency Report (AR) Exh. 10 at 7. Specifically, both proposals received green/low risk ratings for the program management, SABER sample project and cost visibility subfactors and blue/low risk ratings under the quality and increased coverage subfactors of the mission capability criterion. Both proposals also received very good/significant confidence past performance ratings and both firms' proposed costs--EMI's was $41.3 million and KIRA's $44.3 million--were found to be reasonable and realistic. In addition to the adjectival ratings, the agency evaluators prepared narrative materials in which they further distinguished among the competing proposals. As is relevant here, those narrative materials show that EMI's was found to be the best proposal under the quality and increased coverage subfactors. Specifically, under the quality subfactor, the agency found that EMI offered enhanced service levels and also provided the best justification to achieve those increased service levels. Id. at 3-4. Under the increased coverage subfactor, the agency found that EMI provided more coverage at a lower overall cost than KIRA. Id. at 4-5. The agency concluded that EMI's lower cost, coupled with its proposed enhanced service levels and increased coverage, made its proposal the best value; the agency thus made award to EMI. AR Exh. 10 at 7.

KIRA argues that EMI's proposal evaluation is flawed because the agency failed to take into consideration that one of EMI's significant subcontractors, Washington Group International, Inc. (WGI), was facing the possibility of bankruptcy. (WGI was to perform the SABER portion of the requirement and, together with EMI, the facilities maintenance function.)

We deny this aspect of the protest. The financial stability of an offeror or one of its subcontractors (and thus its ability to successfully perform a requirement) generally is a matter of responsibility, Federal Acquisition Regulation § 9.104-1, although an RFP may provide for the evaluation of such a traditional responsibility factor within

the context of its technical evaluation. See Dual, Inc., B-280719, Nov. 12, 1998, 98-2 CPD ¶ 133 at 8. Here, although the record suggests that the agency may have considered WGI's financial posture during its technical review of the proposals (the agency asked EMI a question relating to WGI's financial status during discussions), none of the technical evaluation factors included in the RFP identified financial stability of offerors or their subcontractors as an area encompassed by the technical evaluation.[1] The financial stability of WGI therefore was relevant only for purposes of determining whether EMI was a responsible prospective contractor. KIRA does not allege that the agency improperly found EMI to be responsible and, in any event, our Office, with certain exceptions not relevant here, does not consider such allegations.[2] 4 C.F.R. § 21.5(c) (2001).

KIRA alleges that the evaluation improperly failed to account for the superiority of its program manager compared to EMI's. According to the protester, the differences in the quality of the two proposed individuals was not reflected in the agency's assignment of past performance ratings, and was not taken into account by either the source selection evaluation team or the source selection official.

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[1] To the extent that an agency may properly consider an unstated evaluation criterion, it may only do so where the unstated criterion it is reasonably related to or encompassed by the stated evaluation criteria. Techsys Corp., B-278904.3, Apr. 13, 1998, 98-2 CPD ¶ 64 at 9. Here, none of the evaluation criteria could reasonably be viewed as encompassing consideration of a firm's financial stability. Under the mission capability criterion, none of the five subfactors dealing with the offerors' proposed technical approach (program management, SABER sample project, quality, increased coverage or cost visibility) relate to consideration of the offerors' financial stability. Under past performance, the agency was to have evaluated a firm's performance of prior or ongoing contracts; consideration of the prospective financial posture of an offeror obviously would have been improper under this criterion. Finally, under the proposal risk criterion, the agency was to consider the risk inherent in a firm's proposed technical approach (for example, its proposed staffing mix). Again, consideration of the prospective financial posture of an offeror or its subcontractors is not reasonably related to this criterion.

[2] KIRA contends that EMI's very good/significant confidence past performance rating was unreasonable, because it was inconsistent with the ratings EMI received on its past performance surveys. This argument is untimely. KIRA was provided the documents on which this argument is based no later than May 24, 2001, but it did not raise this argument until it filed its consolidated comments in response to the agency's reports on June 29, more than 10 days later. Accordingly, we decline to consider this argument. 4 C.F.R. § 21.2(a)(2) (2001); RAMCOR Servs. Group, Inc., B-276633.2 et al., Mar. 23, 1998, 98-1 CPD ¶ 121 at 9 n.9.

This allegation is without merit. The RFP did not contemplate a separate evaluation of past performance for proposed personnel. Rather, the RFP clearly advised offerors that the proposed team's past would be evaluated, and that an integrated assessment and rating based on all past performance surveys would be developed by the agency. RFP at 44. This is precisely what the agency did, and there is nothing in the record to indicate that KIRA's project manager's alleged superiority was not properly factored into the firms' resulting adjectival ratings. In this regard, while the agency noted that EMI's proposed project manager performed on a contract for which EMI received an overall [deleted] rating, Supplemental Documents, May 25, 2001, Exh. S5 at 1, and that KIRA's project manager performed on a contract for which KIRA received an [deleted] rating, AR Exh. 7 at 1, those two surveys were not the sole basis for the past performance evaluation. The record shows that numerous other past performance surveys were evaluated for each firm, and that the proposed program managers did not work on these other contracts. KIRA does not challenge the evaluation conclusions with respect to these contracts. We conclude that the evaluation in this area was reasonable.

KIRA alleges that EMI's technical proposal evaluation is invalid because EMI does not intend to perform using the personnel and/or subcontractors it offered in its proposal. KIRA claims in this regard that, after contract award, EMI asked KIRA's proposed grounds maintenance and custodial subcontractors if they would be interested in joining the EMI team.

This argument is unsupported in the record. KIRA has offered no evidence to support its contention that EMI attempted to recruit its subcontractors. In contrast, both the agency and EMI explain that, while EMI did contact the subcontractors, it did so only to inquire about purchasing equipment to use in performing the contract, and as to whether they could recommend incumbent employees who might be worth interviewing. This explanation is supported by an affidavit in which EMI's chief executive officer represents that this was the purpose of their approaching the subcontractors, and that no equipment was purchased, but that a number of the incumbent employees were hired for contract performance. EMI Comments, July 9, 2001, Affidavit at 8. EMI's chief executive officer further represents that the same two subcontractors it proposed are the only firms currently working on the contract. Id. Given these uncontroverted representations, we find no merit to this aspect of KIRA's protest.

KIRA asserts that EMI's proposed increased level of coverage in the grounds maintenance and custodial services areas cannot be accomplished at the wage rates required under the RFP. According to the protester, EMI either proposed wage rates below the wages mandated by the Department of Labor (DOL) and specified in the RFP, or is currently paying wage rates that are below those specified.

This assertion is without merit. The record shows that EMI proposed wage rates that were compliant with the DOL rates specified in the solicitation, Supplemental

Agency Report (SAR), June 15, 2001, Exh. 5, and this fact was confirmed by the Defense Contract Audit Agency (DCAA), which reviewed the proposal as part of the agency's cost evaluation. Supplemental Documents, May 25, 2001, Exh. S3; SAR, June 15, 2001, Exh. 6 at 2. The record also includes payroll records for EMI for the first month of contract performance--the agency overrode the stay of performance in connection with the protest--which confirm that EMI is paying wages consistent with the RFP rates. SAR, June 15, 2001, Exh. 10.[3]

KIRA contends that the agency failed to conduct adequate discussions. In its initial letter protesting this aspect of the agency's actions, KIRA stated that the agency identified during KIRA's debriefing five weaknesses in its proposal which the protester asserted should have been the subject of clarifying discussions. KIRA maintained that its proposal rating would have been materially increased had it been afforded an opportunity to address these weaknesses. In its comments responding to the agency's report on this question, KIRA takes issue with only two of the alleged weaknesses--the proposed salary for the firm's program manager was unreasonably high during the phase-in period of contract performance compared to his salary during the remainder of the contract, and its grounds maintenance subcontractor's past performance was limited in scope.

As a general rule, agencies are required to conduct meaningful discussions with offerors in the competitive range. Du & Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156 at 7; I.T.S. Corp., B-280431, Sept. 29, 1998, 98-2 CPD ¶ 89 at 6. For discussions to be meaningful, they must lead offerors into the areas of their proposals requiring amplification or revision; however, agencies are not required to "spoon-feed" an offeror as to each and every item that could be revised to improve

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[3] In its comments responding to the agency's reports filed on June 29 and July 5, KIRA argues for the first time that the cost evaluation–and in turn its source selection decision--was flawed because the agency did not consider the increased cost associated with the increased coverage proposed by EMI. KIRA also alleges for the first time in its comments that the agency unreasonably concluded that EMI's proposed costs were reasonable and realistic, because neither the Air Force nor DCAA was able to evaluate EMI's subcontractors' indirect rates. These arguments are untimely. KIRA was provided the agency's source selection decision document on May 17, and that document clearly outlined the source selection authority's conclusion that one of the distinguishing aspects of the EMI proposal was its offer to provide increased coverage at the lowest proposed cost. AR Exh. 10 at 3, 6. Since KIRA did not raise this allegation until June 29, more than 10 days after May 17, the allegation is untimely. 4 C.F.R. § 21.2(a)(2). Similarly, KIRA was provided with the DCAA materials upon which it bases its allegation concerning EMI's subcontractors' indirect rates on May 25, Supplemental Documents, May 25, 2001, Exhs. S3, S4; its allegation in this regard, also filed on June 29, therefore is untimely as well.

its proposal. Du & Assocs., Inc., supra, at 7-8; Applied Cos., B-279811, July 24, 1998, 98-2 CPD ¶ 52 at 8.

The discussions with KIRA were adequate. The record shows that one of the two weaknesses, the proposed program manager's excessive salary during the phase-in period, was in fact the subject of discussions. SAR, June 15, 2001, Exh. 15. The agency directed KIRA's attention to the issue with a discussion question, and further clarified the matter during an oral clarification telephone conference. During the telephone conference, the contracting officer expressly stated:

> Again, [the agency] is not telling you to remove those salaries, we're just saying they appeared excessive in comparing . . . it[']s like [deleted] salary is [deleted] of the normal month['s] salary and we're asking for an explanation, basically.

Id., Transcript of Oral Teleconference, at 8. KIRA's representative responded by stating: "Not a problem, we can deal with this. And we understand what you're asking for." Id. Notwithstanding this expression of understanding, however, the program manager's salary was not changed, and no explanation was offered in KIRA's proposal revision. (KIRA did make changes in its proposal with respect to other salaries that had been included in its phase-in costs.) We conclude that the agency adequately advised KIRA of this weakness.

As for the second weakness--its grounds maintenance subcontractor's limited experience--the record shows that the agency did not consider this a material weakness. In particular, the materials presented to the source selection official expressly provided: "Exceptional past performance [of the grounds maintenance subcontractor] mitigates limited scope of grounds experience." SAR, June 15, 2001, Exh. 17, at Slide No. 83. Elsewhere in the same materials, the evaluators state: "The grounds contractor's previous exceptional performance mitigates the risk of his ability to perform at this larger scope." Id. at Slide 93. We conclude that the agency was under no obligation to discuss this matter with KIRA. DAE Corp., B-259866, B-259866.2, May 8, 1995, 95-2 CPD ¶ 12 at 5-6.

The protest is denied.

Anthony H. Gamboa
General Counsel