Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ann Riley & Associates, Ltd.

File: B-271741.2

Date: August 7, 1996

Ronald K. Henry, Esq., and Mark A. Riordan, Esq., Kaye, Scholer, Fierman, Hays & Handler, LLP, for the protester.
Matthew S. Perlman, Esq., and Tenley A. Carp, Esq., Arent Fox Kintner Plotkin & Kahn, for Bayley Reporting, Inc., an intervenor.
George C. Brown, Esq., Ilene F. Citrin, Esq., and Valerie G. Preiss, Esq., Securities and Exchange Commission, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation that agency unreasonably identified five weaknesses in the protester's proposal is dismissed for failure to state a basis of protest where the protester did not identify the weaknesses and offered no specific challenge to the agency's assessment even though the protester received a debriefing during which the agency explained its evaluation conclusions.

2. Where circumstances indicate that a small business bidder or offeror may not comply with the statutorily-mandated requirement in solicitations for services set aside for small business participation that at least 50 percent of the cost of personnel incurred must be for employees of the small business concern, an agency has a duty to inquire into the likelihood of compliance. This duty is satisfied when the agency receives explanations and assurances from the bidder or offeror reasonably indicating that the bidder or offeror will comply.

DECISION

Ann Riley & Associates, Ltd. protests the award of a contract to Bayley Reporting, Inc. under request for proposals (RFP) No. SECHQ1-94-R-0008, issued by the Securities and Exchange Commission (SEC) for court reporting and transcription services. Ann Riley contends that the SEC's selection of the Bayley proposal was improper because: (1) "Bayley could not, would not, and did not intend to comply" with the mandatory Limitations on Subcontracting clause in the RFP; (2) the agency unreasonably evaluated the Bayley proposal under certain evaluation subfactors

related to the subcontracting limitation; (3) the agency unreasonably identified five weaknesses in Ann Riley's technical proposal; and (4) the agency applied different evaluation standards in its review of the Ann Riley and Bayley proposals.

We deny the protest.

BACKGROUND

The RFP, set aside for small business, contemplated award of a fixed-price requirements contract for a base period with four 1-year options to the offeror whose proposal was evaluated most advantageous to the government, price and other factors considered. Section M.3 of the RFP advised offerors that technical expertise would be weighted at 60 percent and price would be weighted at 40 percent. The RFP identified two technical evaluation factors--management plan and evidence of the ability of the prime contractor and proposed subcontractors to fulfill contract requirements. Within these two factors were several subfactors, set forth in abbreviated form below:

Management Plan

(i) plan to manage widely fluctuating workloads
(ii) security plan
(iii) plan to monitor subcontractor performance

Evidence of Ability to Fulfill Contract Requirements

(i) ability to manage widely fluctuating workloads
(ii) ability to accurately record proceedings
(iii) experience of key individuals
(iv) ability to record via steno mask or stenotype

The RFP also included the "Limitations on Subcontracting" clause set forth at Federal Acquisition Regulation (FAR) § 52.219.14, required for all solicitations reserved for exclusive small business participation, pursuant to the requirements of 15 U.S.C. § 644(o)(1) (1994). The clause provides that:

> "[b]y submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for--
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> "(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern."

This requirement exists to prevent small business concerns from subcontracting to large businesses the bulk of a contract reserved for small business participation. CSR, Inc., B-260955, Aug. 7, 1995, 95-2 CPD ¶ 59; Diversified Computer Consultants, B-230313; B-230313.2, July 5, 1988, 88-2 CPD ¶ 5.

As discussed in greater detail below, after submission of initial offers, discussions, submission of two best and final offers (BAFO), and a preaward survey, the SEC concluded that the Bayley proposal represented the best value to the government. Although the Bayley proposal received a lower technical score than Ann Riley's proposal--i.e., 48.6 points versus 52 (out of 60 possible points)--Bayley's lower price resulted in more points for Bayley under the cost factor. Thus, the overall scores were 88.6 for Bayley, and 87.1 for Ann Riley. After notifying Ann Riley of the selection decision on April 17, 1996, the SEC provided a debriefing to the company on April 22. This protest followed.

PROCEDURAL ISSUES

The SEC sought dismissal of Ann Riley's protest on the basis that the agency's conclusion that Bayley would comply with the Limitations on Subcontracting clause is either an affirmative determination of an offeror's responsibility, or a matter for resolution by the Small Business Administration (SBA), not our Office. The SEC also argued that Bayley's actual compliance with the requirement is a matter of contract administration, and hence not appropriate for our review. Under the circumstances here, we denied the SEC's dismissal request.

As a general matter, an agency's judgment as to whether a small business offeror will comply with the subcontracting limitation is a matter of responsibility, and the contractor's actual compliance with the provision is a matter of contract administration. Corvac, Inc., B-254757, Jan. 11, 1994, 94-1 CPD ¶ 14; American Bristol Indus., Inc., B-249108.2, Oct. 22, 1992, 92-2 CPD ¶ 268; Little Susitna, Inc., B-244228, July 1, 1991, 91-2 CPD ¶ 6. However, the protest allegation here challenges the agency's determination that Bayley's proposal was acceptable, and contends that the proposal, on its face, should have led the agency to the conclusion that Bayley could not and would not comply with the requirement. Where a protester alleges that an offer or bid indicates that the offeror or bidder will not comply with the subcontracting limitation, we will consider the matter. See, e.g., National Medical Staffing, Inc.; PRS Consultants, Inc., 69 Comp. Gen. 500 (1990), 90-1 CPD ¶ 530 (proposal indicating noncompliance with the subcontracting limitation should have been rejected as technically unacceptable); Vanderbilt Shirt Co., Inc., 69 Comp. Gen. 20 (1989), 89-2 CPD ¶ 333 (bid taking exception to the subcontracting limitation was properly rejected as nonresponsive); Diversified Computer Consultants, supra (contracting officer reasonably inquired into whether offeror would comply with the subcontracting limitation--and reasonably concluded that it would--where the offeror's proposal raised doubts about its compliance).

In addition, although the SEC is correct in its assertion that the SBA reviews a small business concern's compliance with the subcontracting limitation, or the "50 percent rule," as part of its responsibility to determine matters of small business size status, see CSR, Inc., supra, there is no suggestion that Bayley does not meet the applicable size standard for this procurement. Thus, the SBA's role as the arbiter of size status has no application here.

The agency's request for dismissal also challenged Ann Riley's contention that its proposal was unreasonably evaluated in five areas. Although Ann Riley complained that five weaknesses were assessed against its proposal, it did not identify these weaknesses and it offered no explanation for why the agency was wrong in its assessment. Instead, Ann Riley states only that the weaknesses "were non-existent, and if properly scored, would have resulted in a substantially higher score" for the proposal. According to the SEC, the contention is so vague that it fails to state a basis for protest.

Our Bid Protest Regulations require protesters to provide a "detailed statement of the legal and factual grounds of protest including copies of relevant documents." 4 C.F.R § 21.1(c)(4) (1996). Our regulations further advise that we will summarily dismiss a protest that fails to include such a statement. 4 C.F.R. § 21.5(f). In this regard, a protester's allegation, at a bare minimum, must be accompanied by an explanation of why the protester should prevail in its claim of improper agency action. Federal Computer Int'l Corp.--Recon., B-257618.2, July 14, 1994, 94-2 CPD ¶ 24.

The record here shows that during Ann Riley's debriefing, it was specifically advised of these five weaknesses, and was given at least some explanation for the agency's conclusions. Where, as here, a protester fails to provide any details to support its challenge--especially after an agency has provided a debriefing to explain its selection decision--we will not entertain a protest, or a segregable protest issue, that fails to provide even a minimal explanation for the basis for the challenge. Id. Accordingly, this issue was dismissed during a status call early in the protest process, and the agency was relieved of any requirement to address this issue in its agency report, or to produce documents related to this issue.

DISCUSSION

Bayley's Capacity to Perform and its Reliance on Subcontractors

As stated above, Ann Riley's protest raises two issues related to the subcontracting limitation--i.e., whether the agency could reasonably conclude that Bayley's proposal evidenced its intent to comply with the mandatory limitations on subcontracting clause, and whether the agency reasonably evaluated the proposal under the evaluation subfactors related to the use of subcontractors and the ability to

perform. The protest generally raises the same issues in both areas, and in both we find that the agency acted reasonably.

The record shows that in reviewing Bayley's proposal, agency evaluators identified several potential problems in the company's ability to adequately perform the contract and, at the same time, comply with the subcontracting limitations requirement. For example, the evaluators were concerned that Bayley lacked sufficient employees to handle the workload under this contract without an excessive reliance on subcontractors. In this regard, the record shows that Bayley was formed in 1990, and that at the time it submitted its initial proposal on February 8, 1995, it generally provided financial information related to the year ending December 31, 1993. According to the founder of the company, Mr. Brett Bayley, his company employed three people at this time.[1]

Given Bayley's apparent lack of capacity, the evaluators prepared discussion questions for the company that clearly indicated concerns about its ability to perform the contract without violating the subcontracting limitations clause, and its ability to manage the kind of growth that would be required for successful performance. Although we will not quote each question in detail, the record shows that on the subject of the subcontracting limitation, the agency asked Bayley[2] the following question:

> "Section L.5.3(5), pg. 111 of the RFP, asks for a general overview of your subcontracting plan in compliance with the Limitations on Subcontracting Clause found in Section I.1, pg. 77. Please specify how you intend to comply with this clause."

In addition, in discussions Bayley was asked to explain how it would handle its increased workload if awarded the contract; how it would assure that proposed subcontractors would perform adequately; how it would provide coverage for services required in Washington, Los Angeles, New York City and San Francisco while preparing to open new offices as promised in its proposal; the number of employees currently working for Bayley; and how much "start up" time would be required between the date of award and the start date. Each of these questions reflects a reasonable concern on the part of the agency about Bayley's ability to

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[1]This information is corroborated by accompanying documents such as Bayley's application to the SBA for a Certificate of Competency, dated September 21, 1993, and appended to the Management Plan portion of Bayley's proposal as Attachment F.

[2]The record also shows that this question was asked of Ann Riley.

perform the contract requirements without an impermissible violation of the mandatory limitations on subcontracting.

In response to these questions, Bayley's BAFO indicated that it is currently performing seven contracts for the federal government and that each includes the subcontracting limitation at issue here. Bayley explains that its compliance with the clause has been monitored by the SBA and that it intends to open additional offices and hire additional employees to continue to assure that the requirements of the clause are met. With respect to the specific question quoted above, Bayley explains that its proposed combination of "[s]ubcontracting firms and/or [i]ndependent [c]ontractors will comprise no more than 30 percent of the cost of [c]ontract performance incurred for personnel." The proposal acknowledged that at the inception of contract performance this percentage might be higher than 30 percent, but would at no time exceed the 50 percent level. Finally, Bayley's BAFO states that the company employed 14 people at that time and intended to engage a number of new hires in the event it is awarded the contract.[3]

Upon evaluation of the final round of BAFOs, Ann Riley's proposal (and the proposal of another offeror that did not participate in this proceeding) continued to receive a higher technical rating than Bayley's proposal, and the evaluation panel recommended selection of whichever of the two highest-rated proposals represented the greatest value to the government. However, the panel recognized that Bayley also had submitted a strong proposal and expressly concluded that the company appeared to have a strategy to handle the growth that would occur if it was awarded the contract. Based on this possibility, the evaluation panel advised the contracting officer that if, after receipt of prices, Bayley's proposal received the highest overall score, the contracting officer should "carefully review [Bayley's] financial capability to handle the increased workload that would result from the award of this contract."

After receipt of BAFO prices, it became clear that Bayley's proposal had, in fact, received the highest overall total score (considering both technical factors and price). The contracting officer followed the recommendation of the evaluation panel and requested a preaward survey of Bayley. To this end, an outside accounting firm, M.D. Oppenheim & Company, P.C., was tasked to review Bayley's financial and operational capabilities to perform the SEC contract. The March 29 preaward survey report shows, among other things, that the accounting firm reviewed Bayley's:

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[3]In a sworn statement prepared during the course of this protest and dated July 2, Mr. Bayley identifies 64 Bayley employees. He explains that 42 new employees have been hired to perform the SEC contract, and that he anticipates hiring 8 to 10 more.

> "[p]ersonnel staffing plan, including the use of employees vs. independent contractors; maintenance of the 50% minimum of work by Bayley (employees vs. contractors), including FAR requirements; and the staffing of future office locations; use of independent contractors."

Although Ann Riley correctly points out that the conclusion portion of the Oppenheim report does not expressly state that Bayley will comply with the subcontractor limitation, the report, as quoted above, states that it reviewed this matter before it concluded that "it appears that Bayley Reporting, Inc. has both the financial and operational capability to provide the services which the SEC requires." Based on the recommendation of the evaluators, and the preaward survey, the contracting officer selected Bayley for award.

In sum, the SEC evaluators identified Bayley's potential problems with managing the growth required to perform this contract, and took steps to see that those questions were answered. In addition, Bayley's responses to the SEC, at each juncture, showed that it understood the mandatory requirement for subcontracting limitations and that it would take steps to ensure that its performance was compliant. Under these circumstances, we find nothing unreasonable about the SEC's review.

Ann Riley, in essence, asks our Office to conclude that the SEC failed to diligently pursue leads in Bayley's initial and BAFO proposals, in the evaluations, and in the preaward survey, that would have supported a conclusion that Bayley lacked the capacity to perform this contract without violating the mandatory limitation on subcontracting. Ann Riley complains, for example, that Bayley was less than truthful when it stated in its BAFO that it had five offices. During the course of this protest, Bayley admitted that its five offices were, in fact, residences of two Bayley principals, and the sites of answering machines located in three other cities. Similarly, Ann Riley complained that Bayley lacked telephone listings in the cities where it claimed offices, and Bayley admitted that the telephone numbers were listed in the names of individuals and not under the company's name.

Despite these apparent instances of puffery on Bayley's part, the record shows that during the preaward survey, representatives of Oppenheim visited Bayley's "facilities"--personal residences all--in Washington, D.C., New York, and Los Angeles. Also, the record shows that an SEC auditor accompanied the Oppenheim team on at least one of these reviews. Under these circumstances, there is no evidence that the SEC was misled by the proposal, or that it did not recognize the embryonic nature of the company it was selecting to perform its reporting requirements.

In our view, while the SEC was presented with a close call in selecting Bayley, the record shows that the agency adequately considered Bayley's lack of current capacity, and Bayley's promises to expand if awarded the contract, as well as the potential difficulties of managing the growth required of this company to avoid an

excessive, and impermissible reliance on subcontractors. Given that an agency is permitted wide discretion in this area, we see no basis to conclude that the SEC abused its discretion in selecting Bayley for award. Diversified Computer Consultants, supra.

Other Issues

In addition to its challenges related to the subcontracting limitation, Ann Riley also argues that the SEC applied different standards in evaluating the Ann Riley and Bayley proposals, and failed to hold meaningful discussions about perceived weaknesses in Ann Riley's proposal. We have reviewed each of these contentions in detail and conclude that none of the issues raised would cause us to overturn the SEC's selection decision. Set forth below is a sampling of Ann Riley's issues in each category.[4]

With respect to whether the proposals were evaluated equally--a basic requirement in any agency evaluation, see RJO Enterprises, Inc., B-260126.2, July 20, 1995, 95-2 CPD ¶ 93--Ann Riley complains that it was required to produce a written commitment from its proposed subcontractors, while Bayley was not. However, the record again does not support Ann Riley's contention. The SEC asked offerors to provide evidence of subcontractor commitments; the agency did not specify the form of that evidence. Our review shows that Ann Riley produced better evidence--written commitments generally--and received a better score than Bayley. We find nothing unreasonable about this result.

Ann Riley also alleges that the agency failed to hold meaningful discussions with it to identify weaknesses within its proposal. In this regard, Ann Riley argues that it was unfair for Bayley to receive more discussion questions than Ann Riley, and sets

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[4]As stated earlier, Ann Riley also argues that the agency unreasonably evaluated Bayley's proposal under certain evaluation subfactors when the agency concluded that Bayley's proposal demonstrated the ability and capacity to perform the requirements of this contract. The issues raised therein are generally the same issues raised with respect to Ann Riley's complaint that Bayley's proposal was unacceptable. We need not repeat each of these arguments. For the same reasons we conclude that the SEC properly discharged its obligation to investigate Bayley's capacity to perform the contract, we conclude that the SEC's evaluation of these issues was reasonable as well. For the record, however, we note that many of Ann Riley's claims throughout this protest are simply not supported by the record. For example, despite Ann Riley's contention that "Bayley utterly failed to designate any capacity to perform in . . . Washington," Bayley identified potential subcontractors in Woodbridge, Fairfax, Reston, and Alexandria, Virginia, and in Rockville and College Park, Maryland.

forth every negative comment found in the evaluator scoresheets and claims that discussions should have included each of these items.

We review the adequacy of agency discussions to ensure that agencies point out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award. Department of the Navy--Recon., 72 Comp. Gen. 221 (1993), 93-1 CPD ¶ 422. There is no requirement that an agency advise an offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor when two closely-ranked proposals are compared. Volmar Constr., B-270364; B-270364.2, Mar. 4, 1996, 96-1 CPD ¶ 139. Ann Riley's listing of every less than favorable comment written by the evaluators during their review is an ineffective substitute for a substantive analysis of the adequacy of discussions. Our review of the evaluation materials shows that the list of evaluator comments includes minor concerns that need not have been pointed out during discussions. The questions that were raised--related to the subcontractor limitation, timely delivery, subcontractor availability, proofreading, and Ann Riley's default on a prior contract--were related to more substantive concerns. In our view, these questions--and not whether Ann Riley got five questions and Bayley got eight--reflect a meaningful attempt to alert Ann Riley to the areas of its proposal of greatest concern to the evaluators.

With respect to the actual number of discussion questions asked of Bayley, there is no requirement that all offerors receive the same number or type of questions. Textron Marine Systems, B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63. Here, the record shows that the Bayley proposal received more questions because it had a significantly greater number of weaknesses than Ann Riley's initial proposal.

In conclusion, nothing in the record suggests that Ann Riley was unfairly evaluated, or that Bayley was given an unfair helping hand. In fact, our review shows that agency evaluators probably expected Ann Riley to prevail in this protest until consideration of Bayley's second BAFO price.

The protest is denied.

Comptroller General
of the United States