Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Commercial Building Service, Inc.

File: B-237865.2; B-237865.3

Date: May 16, 1990

Kevin M. Allison, Esq., Payne, Gates, Farthing & Radd, P.C., for the protester.
William E. Franczek, Esq., Vandeventer, Black, Meredith & Martin, for George G. Sharp, Inc., an interested party.
Charles J. McManus, Esq., Maryann L. Grodin, Esq., and Michael J. Cunningham, Jr., Esq., Office of the General Counsel, Department of the Navy, 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. Solicitation provision barring subcontracting without written permission of contracting officer by its terms applies only to additional subcontracting proposed after award and therefore did not prohibit offerors from proposing the use of subcontractors in initial proposals.

2. Corporate experience requirement in solicitation was an evaluation factor, not a definitive responsibility criterion, because consideration for award was not contingent upon offeror's showing of 5 years of experience, rather, the quality of such experience was to be evaluated as to its acceptability.

3. Agency's consideration of a subcontractor's experience under the relevant evaluation factor was proper where solicitation did not prohibit use of subcontractors to perform the contract, or use of subcontractor to satisfy experience requirement.

DECISION

Commercial Building Service, Inc. (CBS), protests the award of a contract to George G. Sharp, Inc., under request for proposals (RFP) No. N00140-89-R-1901, issued by the Department of the Navy as a total small business set-aside,

for engineering and technical advisor services in support of the Naval Sea Support Center (NAVSEA) Habitability Self-Help Program. CBS argues that the Navy improperly permitted offerors to propose subcontractors and to utilize the experience of such subcontractors to meet the solicitation's requirements for corporate experience. CBS also argues that Sharp improperly proposed a subcontractor with whom it did not have a subcontracting agreement, and thus caused the Navy to unfairly credit Sharp's proposal with that subcontractor's experience during evaluation.

We deny the protest.

The Navy issued the RFP on March 29, 1989, for a 1-year base period with four 1-year options. The RFP sought offers for an indefinite quantity, time and materials contract, with fixed hourly labor rates, under which specific tasks would be performed pursuant to delivery orders. The estimated level of effort for this project was 243,000 hours during the base year and each of the option years. Offerors responding to the RFP were directed to submit their technical and price proposals separately, and each offeror was also required to submit cost and pricing data with its proposal.

CBS responded to the RFP along with Sharp and Research Management Corporation (RMC). After discussions, all three offerors were found technically acceptable and included in the competitive range. By letters dated October 18, the contracting officer requested best and final offers (BAFOs) from all three offerors, and reminded each offeror that award would be made to the lowest priced, technically acceptable offeror, as explained in the RFP. BAFOs were received on October 25, with Sharp submitting the lowest price of $28,150,377, while CBS and RMC offered $28,943,218 and $30,765,426, respectively.

After receiving notification from the Navy advising that Sharp was the apparent successful offeror, CBS, on November 20, protested to the contracting officer that Sharp and its "teaming partner," International Marine Engineering, Inc. (IME), together exceeded the applicable size standard for this procurement.1/ By letter dated December 20, the

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1/ Upon receiving similar notification from the Navy, RMC, the other unsuccessful offeror, filed a protest with our Office concerning this procurement. Research Management Corp., B-237865, Apr. 3, 1990, 90-1 CPD ¶ ___. During the course of the protest, on December 28, the Navy informed our (continued...)

Small Business Administration (SBA) determined that Sharp and IME were not engaged in a teaming agreement, but in a contractor-subcontractor relationship, and determined that Sharp did not exceed the applicable size standard of $13.5 million in average annual gross revenues for the last 3 fiscal years.

Based on the SBA determination, CBS protested to the contracting officer on December 29 that both Sharp's and RMC's proposals violated the solicitation prohibition against subcontracting. On January 3, 1990, the Navy denied CBS' agency protest, claiming that the solicitation did not prohibit proposing the use of subcontractors, but only restricted post-award additional subcontracting not identified in the offeror's proposal. On January 12, CBS protested to our Office.

CBS initially alleges that the solicitation prohibited the use of subcontractors and that the Navy erred in considering proposals from Sharp and RMC that offered subcontractors. Specifically, CBS argues that Sharp's proposal violates clause C8 of the RFP which provides that "[n]one of the services required by this contract shall be subcontracted to or performed by persons other than the contractor or the contractor's employees without the prior written consent of the Contracting Officer."2/

When disputes arise as to the meaning of a solicitation requirement, we read the solicitation as a whole and in a

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1/(...continued)
Office that it would proceed with award to Sharp, notwithstanding the RMC protest, pursuant to Federal Acquisition Regulation (FAR) § 33.104(b). The instant protest, however, was filed in our Office more than 10 calendar days after award, and thus no further determination to proceed with performance was required under our Bid Protest Regulations. 4 C.F.R. § 21.4(b) (1989).

2/ In its initial protest, CBS also argued that the Navy failed to properly evaluate the offerors' costs and improperly failed to perform a cost realism analysis. The Navy fully responded to these issues in its agency report; however, CBS failed to rebut the response on these two points. Accordingly, we consider the issues to have been abandoned by the protester. Herman Miller, Inc., B-234704, July 10, 1989, 89-2 CPD ¶ 25.

manner that gives effect to all its provisions in an effort to resolve the dispute. Med-National, Inc., B-232646, Jan. 12, 1989, 89-1 CPD ¶ 32. As discussed below, we find that CBS' interpretation of the subcontracting provision is unreasonable, and is not consistent with the solicitation as a whole.

First, the award of a contract to an offeror proposing that some portion of the work be performed by a subcontractor is consistent with the clause because contract award constitutes the agency's written permission to engage in subcontracting to the extent identified in the proposal. Second, the placement of this provision in the statement of work rather than in section L of the RFP, entitled "INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS," indicates that it applies after the contract has been awarded and governs how work will be performed. In addition, if clause C8 of the RFP operates as a complete bar to subcontracting, two other provisions of the solicitation are rendered meaningless--the requirement in clause L46 that cost or pricing data furnished by a subcontractor or prospective subcontractor be submitted to the prime contractor or a higher-tier subcontractor, and the requirement in clause L64 for an on-site equal opportunity compliance review for subcontractors with awards or intended awards of $1 million or more. Thus, the only interpretation of clause C8 that gives meaning to all the provisions of the solicitation is that the clause applies to the contract once awarded, and not as a bar to including subcontractors in the initial proposal.

CBS next argues that Sharp is not a responsible offeror because Sharp does not meet the definitive responsibility criteria set forth in the RFP. CBS alleges that the RFP contains specific corporate experience requirements and that Sharp itself does not meet those requirements because Sharp has no experience in providing Technical Advisory Services in support of the NAVSEA Habitability Self-Help Program. Further, CBS argues that Sharp may not properly use a subcontractor's experience to meet the experience requirements Sharp cannot meet on its own.

Clause L71, section III of the RFP, requires offerors to submit with their proposals information detailing efforts under previous contracts within the past 5 years that are applicable to the statement of work and the NAVSEA Habitability Self-Help Program. The clause also provides that "[a]s a minimum, offerors must demonstrate that they understand the procurement objectives and have the organizational experience necessary to perform the scope of work," and that an offeror "must demonstrate, by specific evidence

of previous efforts and by commitment of the personnel performing these efforts, that he has experience and organization to fulfill each of the requirements of [the statement of work]." Offerors were also advised by clause M31 that award would be made to the low-priced responsible offeror whose offer is deemed technically acceptable in meeting, among other things, the corporate experience requirements described above.

In our view, the issue CBS raises relates not to Sharp's responsibility, as CBS argues, but to the reasonableness of the agency's evaluation of the technical proposals under the corporate experience element. Where, as here, responsibility-type factors such as experience are included among the technical evaluation criteria in a negotiated procurement, as they properly may be, we do not regard them as definitive responsibility criteria.3/ AeroVironment, Inc., B-233712, Apr. 3, 1989, 89-1 CPD ¶ 343. In such cases, as with any other evaluation factor, an agency's assessment and scoring of experience must be reasonable and in accord with the RFP's evaluation scheme. Supreme Automation Corp.; Clay Bernard Systems Int'l, B-224158; B-224158.2, Jan. 23, 1987, 87-1 CPD ¶ 83.

Sharp's initial proposal offered both Sharp's experience and that of its subcontractor, IME, as evidence of prior corporate experience, explaining in detail how the experience of both firms would benefit the Navy and meet the corporate experience requirements of the RFP. The Navy, in its technical evaluation of Sharp's proposal, concluded that the proposed team of Sharp and IME possessed an acceptable level of corporate experience, as required by the RFP, although Sharp's reliance on IME's corporate experience contributed significantly to the Navy's conclusion that the Sharp proposal should be rated "acceptable" in this area. We find no basis in the record for concluding that the combined experience of Sharp and IME was other than acceptable. In this regard, CBS does not challenge IME's experience, but contends only that Sharp, standing alone, cannot meet the experience requirement. We need not decide whether Sharp itself possessed the corporate experience called for by the RFP, however, since contrary to CBS'

3/ This solicitation provision would have constituted a definitive responsibility requirement if it had limited consideration for award to only those offerors who had 5 years of previous contract experience performing similar services. Here, although the RFP requested information about similar experience in the previous 5 years, award was not contingent upon such previous experience.

argument, the agency properly credited Sharp's proposal with the experience of IME.

It is well-established that the experience of a proposed subcontractor properly may be considered in determining whether an offeror meets an experience requirement in the solicitation where, as here, it is not prohibited by the evaluation plan. AeroVironment, Inc., B-233712, supra; CDI Marine Co., B-219934.2, Mar. 12, 1986, 86-1 CPD ¶ 242. Thus, the agency acted properly in evaluating the corporate experience of the Sharp team, including IME, to determine the proposal's acceptability in this area.

Finally, CBS alleges that Sharp misled the Navy evaluators by including IME as a subcontractor in its proposal even though there was no written subcontracting agreement between Sharp and IME. In support of its position, CBS' president states that IME's president indicated during a recent telephone conversation that IME never intended to perform as a subcontractor for Sharp on this contract.

As a preliminary matter, we note that agencies are not required to insist that offerors possess written subcontracting agreements for subcontractors identified in their proposals prior to conducting evaluations. See National Biomedical Research Found., B-208214, Sept. 23, 1983, 83-2 CPD ¶ 363. Nevertheless, in response to CBS' allegation, Sharp produced for our in camera review a copy of its "Preproposal Subcontracting Agreement" with IME. This agreement granted Sharp the right to name IME as its intended subcontractor for this procurement, and contains promises that both Sharp and IME will make a good faith attempt to negotiate a subcontract should Sharp receive the contract award.

In light of the "Preproposal Subcontracting Agreement," we see no basis on the current record for questioning Sharp's representations regarding its subcontracting plans, or the agency's reliance on them. Neither the fact that IME told CBS after award was made that it never intended to enter into a subcontract with Sharp, nor the fact that Sharp is now performing without IME because the parties could not come to terms on a subcontract, is sufficient to show that Sharp acted in bad faith in submitting its proposal based on the assumption that it ultimately would reach an agreement with IME on a subcontracting arrangement pursuant to the terms of the "Preproposal Subcontracting Agreement." Similarly, the agency properly relied on the representations

in Sharp's proposal with regard to its subcontracting plans, in the absence of any evidence to question the proposal in this regard.

The protest is denied.

James F. Hinchman
General Counsel