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Decision

Matter of: EBA Ernest Bland Associates, P.C.

File: B-404825.5; B-404825.6

Date: October 11, 2011

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DIGEST

Protest challenging agency's selection of firms with which to negotiate contracts for architect/engineering services is sustained where agency's final selections were based solely on results of oral interviews and did not consider specific evaluation factors established by terms of solicitation.

DECISION

EBA Ernest Bland Associates, P.C., of Silver Spring, Maryland, protests the failure of the Department of Veterans Affairs (VA) to select it as one of the firms with which to negotiate a contract for architect/engineering (A/E) services for the eastern region of the United States under solicitation No. VA-101-10-RP-0063. The protester argues that the agency's selection process was flawed.

We sustain the protest.

BACKGROUND

This procurement was conducted pursuant to the Brooks Act, 40 U.S.C. § 1101 *et seq.* (2006) and its implementing regulations, Federal Acquisition Regulation (FAR) subpart 36.6. In accordance with these regulations, on March 17, 2010, the VA posted a solicitation on the Federal Business Opportunities website inviting interested small

business firms to submit information regarding their qualifications.¹ The solicitation advised that the VA intended to award multiple indefinite-delivery/indefinite-quantity contracts (ID/IQ) for A/E services in each of three regions (eastern, western, and central).² The solicitation provided for award to the firms determined to be most highly qualified based on the agency's consideration of the following evaluation factors (listed in "order of importance"): professional qualifications, key personnel; specialized experience, past performance; capacity; location; commitment to small business; sustainable design; and volume of work previously awarded to the firm by the VA. Solicitation at 5.

The eastern region received timely submissions from 28 firms. An evaluation board scored and ranked the qualification packages. Although the solicitation did not advise that the VA intended to conduct interviews with selected firms—and did not provide guidance as to how the agency intended to consider such interviews in the selection process—the agency, nonetheless, invited the six highest-scoring firms to an interview round. Because the protester's qualification package received the second highest score, the protester was among the firms invited to an interview.

The interview notification letter instructed EBA that it should plan to make a presentation of no more than 45 minutes, which would be followed by questions and answers. With the notification letter, the agency enclosed a copy of an "A/E interview score sheet," which identified the following eight "factors": team proposed for this project; proposed management plan; relevant project experience of proposed team; project control; sustainable design; miscellaneous experience and capabilities; awards; and insurance/litigation.

After the interviews, the evaluation panel re-ranked the six firms; EBA's post-interview ranking was sixth. The agency selected the top three firms for negotiation and notified the remaining firms, including EBA, that they had not been selected. When EBA protested to our Office, the agency decided to take corrective action by conducting a reevaluation. We dismissed the protest as academic. EBA Ernest Bland Assocs., P.C., B-404825, B-404825.3, Apr. 26, 2011.

During the reevaluation, the contracting officer recalculated the scores assigned the original qualification packages. In this regard, during the original evaluation, the contracting officer assigned all the factors equal weight. However, because the

¹ While the solicitation here solicited responses from small businesses only, the VA simultaneously issued a separate solicitation seeking responses from large businesses.

² The solicitation advised that the agency intended to award six contracts per region, but that the number of awards could vary based on demonstrated level of interest in the procurement. Solicitation at 1.

solicitation provided that the evaluation factors were listed in order of importance, the contracting officer reassigned the factors progressively diminishing weights.³ Based on this change, the same six firms received the six highest point scores, with the only difference being that the protester's qualification package was now ranked third (and the firm that had originally been ranked third was now ranked second.)

The contracting officer also recalculated the interview round point scores. Because the copy of the interview score sheet furnished to the interviewees had not provided information regarding the weighting of the listed factors, the contracting officer recomputed the scores using equally weighted factors. (In his original computation, he had assigned each of the first four factors a weight of 15 points, sustainable design a weight of 20 points, miscellaneous experience and capabilities a weight of 30 points, and the two final factors weights of 5 points each.) The order in which the firms were ranked did not change as a result of the recalculated interview round scores--EBA was again ranked sixth. By letter of June 13, 2011, the contracting officer notified the protester that the original results remained unchanged. EBA promptly requested, and was furnished, a debriefing, at which the contracting officer informed the protester that the main reason it did not score high enough to be selected was that, as determined during the interview, it did not have a cemetery consultant as part of its team. EBA protested to our Office on July 5.

DISCUSSION

EBA challenges the agency's selection process, arguing that responding firms were not adequately notified that the agency expected them to provide cemetery designers as part of their teams and would rate them significantly lower if they failed to do so. The protester also argues that it was inconsistent with the terms of the solicitation for the agency to assign equal weights to the interview factors, and that it was improper for the agency to base its selection decision solely on the interview round scores.

In reviewing an agency's selection of a contractor (or contractors) for A/E services, our Office will consider whether the agency's selection was reasonable and in accordance with the published criteria. OLBN Architectural Serv., Inc., B-402444.4, B-402444.5, Oct. 4, 2010, 2011 CPD ¶ 55 at 3.

Turning first to EBA's argument about the agency's improper reliance on the interview scores to make its selection decisions, we agree with the protester, and we

³ The contracting officer assigned the factors the following weights: professional qualifications (14 points); key personnel (13); specialized experience (12); past performance (11); capacity (10); location (9); commitment to small business (8); sustainable design (7); and volume (6).

sustain the protest.⁴ At the outset, it is apparent from the record that the agency, in essence, used a two-step evaluation and selection process. Specifically, for the first step, the agency considered the information submitted by the firms per the solicitation instructions, and used the nine evaluation criteria established in the solicitation to winnow the field down to the six most-highly-rated firms. For the second step, the agency used the scores from the interview round as the sole basis for the agency's final selection, effectively abandoning any consideration of the evaluation criteria established by the solicitation. In this regard, the VA explicitly acknowledges in its report that "[its] final evaluation consisted of the evaluation of the oral interviews of the six short-listed firms." Agency Report at 11. Moreover, the selection decision memorandum solely discusses the interview results, and the final interview ratings mirror the final ranking for selection.⁵

In its defense, the agency argues that the selection was not based solely on the interview round scores since the scores on the written qualification packages determined which firms were interviewed and asserts that ranking firms based solely on their interview scores was proper, citing our decision in Brooks Range Contract Servs., Inc., B-401231, June 23, 2009, 2009 CPD ¶ 129. The agency's arguments are without merit.

First, our decision in Brooks Range is inapposite since the issue before us in that case was whether, based on the terms of the solicitation (which expressly provided for oral presentations), the agency properly considered the content of oral presentations as one element of its selection decision. Here, the issue before us is whether it was proper for the agency to consider only the content of the oral presentations in its final selection analysis, and thereby abandon the solicitation's stated evaluation factors.

⁴ Although the agency did not challenge the timeliness of the protester's argument, we, nonetheless, find the issue on which we are sustaining the protest to have been timely filed. To the extent the agency's notice regarding the interviews may have raised some ambiguity regarding how the interviews were to be considered and integrated in the evaluation and selection process, any such ambiguity did not suggest that the agency would entirely abandon the solicitation's stated evaluation factors as part of its final selection. Since it is the propriety of this abandonment that is at issue, the issue was timely raised after the protester learned of the agency's improper actions in this regard.

⁵ In this regard, the record reflects that one firm, which ranked sixth after the agency's consideration of the evaluation criteria, and third after the interview, was ranked third overall after the interview without any further consideration given to its evaluation under the nine factors established by the solicitation.

Second, the fact that the scores assigned to the written packages were used to determine which firms would be interviewed fails to acknowledge that the ultimate selection decision was determined entirely by the interviews. Abandonment of the solicitation's stated evaluation factors in favor of the interview scores was inconsistent with the terms of the solicitation, which established nine specific criteria that would be considered for selection, and never advised offerors that interview scores would be of paramount significance in the selection process (or advised of an interview round at all).

Moreover, the nine announced evaluation factors differed materially from the interview evaluation factors. For example, the solicitation's evaluation factors of commitment to small business, and volume of work previously awarded to the firm by the VA, were not considered in the evaluation of the interviews. Thus, as explained above, when the agency based its selection decision exclusively on the content of the oral interviews, it failed to properly consider the specific evaluation factors established by the solicitation.⁶

RECOMMENDATION

We recommend that the agency reevaluate the qualifications of the six short-listed firms, taking into consideration both the written packages and the oral presentations in a manner that is consistent with the terms of the solicitation. On the other hand, if

⁶ We find the protester's remaining arguments to be without merit. With regard to EBA's argument that the solicitation did not adequately notify firms that they needed to include cemetery designers as part of their teams, the solicitation advised firms that their expertise/experience should include national cemetery expansion. Solicitation at 1. In addition, in response to a question asking whether "National Cemetery designers" were required, the agency advised that firms would be required to meet the agency's requirements for, among others, the National Cemetery Administration. Amend. 0003 at 17. While the VA could have been clearer in its guidance, we nonetheless think that the information furnished was sufficient to place firms on notice that work under the contracts to be awarded would include cemetery design, and, as a consequence, the agency would consider the extent to which their qualifications packages included information demonstrating their qualifications to perform such work. With regard to the protester's argument that it was inconsistent with the terms of the solicitation for the agency to weigh the interview evaluation factors equally, it is clear from the interview score sheets that the protester suffered no prejudice as a result of the equal weighting. We also find no merit to the protester's arguments that the evaluators did not adequately document the basis for their ranking of the firms and improperly relied upon an unstated evaluation factor (pertaining to the personality of its president) in their evaluation of its oral presentation.

the agency intended for the interviews to be used as the sole basis for determining award--after limiting the pool of competition by evaluating the written materials against the nine stated evaluation factors--the agency should amend the solicitation accordingly, conduct a new round of interviews with the six most-highly-ranked firms, and conduct a reevaluation based on the new interviews. If--under either approach--the agency's reevaluation results in a different ranking of the firms, we further recommend that the agency reconsider its selection of firms with which to conduct negotiations. We also recommend that EBA Ernest Bland be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2011). The protester's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receipt of the decision.

The protest is sustained.

Lynn H. Gibson
General Counsel