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Decision

Matter of: ANHAM FZCO

File: B-415969; B-415969.3; B-415969.5

Date: May 8, 2018

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DIGEST

1. Agency's substitution of an experience reference submitted in the awardee's final proposal revision (FPR) with a prior reference provided by the awardee from a previous round of discussions, violated the terms of the solicitation and constituted an improper revision of the awardee's final proposal.
2. Agency's evaluation of awardee's affiliates' contracts under the experience evaluation factor is improper where the terms of the solicitation provided that only two teaming members' contracts would be considered.

DECISION

ANHAM FZCO, of Dubai, United Arab Emirates, protests the award of a contract to KGL Food Services WLL (KGLFS), of Shuwaikh, Kuwait, under request for proposals (RFP) No. SPE300-15-R-0042, issued by the Defense Logistics Agency, (DLA) Troop Support, for the supply and distribution of food products to locations throughout the Middle East. ANHAM raises various challenges to the agency's conduct of the procurement and evaluation of the proposals.

We sustain the protest in part and deny the protest in part.

BACKGROUND

The RFP, which was issued on December 18, 2015, and amended 15 times, sought a full-line food distributor (also known as a “Subsistence Prime Vendor” (SPV)) responsible for the supply and delivery of food items to approximately 26 military and other federally funded customers located in Kuwait, Iraq, Syria, and Jordan. RFP at 10, 147.¹ The procurement is being conducted pursuant to the commercial item acquisition procedures of Federal Acquisition Regulation (FAR) part 12. RFP at 120-150. The solicitation sought the award of a single indefinite-delivery, indefinite-quantity fixed-price contract with economic price adjustment, for 60 months. *Id.* The RFP initially provided that the estimated annual dollar value of the contract was \$90,237,903, and the number of customers supported on a routine basis was 26. AR, Tab 2, Initial RFP, at 147.

Award was to be made on a best-value tradeoff basis to the offeror whose proposal was determined to be the most advantageous to the government considering price, past performance, and five technical evaluation factors: (1) warehouse location and capacity; (2) experience; (3) quality control, assurance, and warehouse management system/procedures; (4) resource availability (cash flow, equipment, and carrier agreements); and (5) implementation and management plans. RFP at 124. The RFP provided that each of the technical evaluation factors and past performance were of equal importance to each other, and significantly more important than price. RFP at 145.

The RFP provided proposal preparation instructions that directed offerors to submit their proposal in four volumes.² In the technical volume, offerors were to submit their response to each of the five technical evaluation factors and the past performance evaluation factor. RFP at 127-134. Under factor 1, warehouse location and capacity, offerors were instructed to discuss whether their outside the contiguous United States (OCONUS) facility was owned or leased, and, if leased, provide a copy of each lease agreement or memorandum of understanding as well as a detailed narrative explaining the nature and duration of each agreement. RFP at 128.

Under factor 2, experience, the RFP instructed offerors as follows:

For purposes of evaluating Factor II only, offerors that are proposing a joint venture, partnership or a teaming approach may provide experience information on their team members (e.g. partners, key subcontractors or other affiliates that will perform essential functions of the contract). Offerors that are relying on the experience information of their team

¹ All citations here are to the consolidated RFP, unless otherwise noted.

² Volume I was to consist of the solicitation, volume II was the technical proposal, volume III was the pricing/business proposal, and volume IV was the Joint Contingency Contracting System (JCCS) registration. RFP at 123-144.

members must clearly demonstrate that the team member will have meaningful involvement in the performance of the resultant contract for that experience to be considered. The most relevant experience, and that which will receive the most credit, however, is the information directly related to the offering entity.

Provide a brief performance record of up to five (5) of your highest dollar value and most comparable contracts . . . **Note:** No more than 2 team member contracts may be included in the 5 (selected contracts).

RFP at 129 (emphasis in original). For the past performance section of the technical volume, the RFP provided the exact same instructions as the instructions provided under factor 2, experience, above. RFP at 132. The RFP also provided under past performance that offerors were to have their five contract references fill out past performance questionnaires and submit the completed questionnaires directly to the agency. RFP at 133.

In addition to the proposal preparation instructions, the RFP explained how each non-price factor would be evaluated. RFP at 145-150. Under factor 1, warehouse location and capacity, the agency would evaluate (among other things) the location of the offeror's warehouse and facilities, and the risk associated with the offeror's access to and control over the warehouses. RFP at 146. In this regard, the RFP stated:

Proposals containing OCONUS facilities that are owned and existing as well as those with legally-binding long term lease agreements or commitments to enter into a long term agreement that provide full use of facilities conforming to the requirements of the solicitation are likely to result in a higher rating than a proposal containing a proposed or contingent arrangement, or one which provides only partial use of a facility or otherwise raises questions concerning whether the offeror will have complete facilities available or capacity for contract performance when needed. Proposals containing existing facilities that are owned by the offeror will be rated more favorably than those proposals providing facilities that are either under construction or leased due to the lower risk involved with ownership.

RFP at 146. Under factor 2, experience, the government would evaluate the offeror's experience through its written proposal. Id. If an offeror submitted more than five comparable contracts, then "only the 5 highest dollar value contracts will be used for evaluation." Id. Furthermore, the RFP stated:

In establishing what is relevant for experience, consideration will be given to those aspects of an offeror's contract history which provide the most confidence that the offeror will satisfy the current procurement. Those aspects of relevancy include experience performing deliveries as a full line

food service distributor, experience performing deliveries in contingency operations, dollar value, and number of customers.

Id. In evaluating experience, the agency would assign adjectival ratings of outstanding, good, acceptable, marginal, or unacceptable. Agency Report (AR), Tab 25, Source Selection Plan Addendum (SSPA), at 17. As relevant to this protest, the SSPA defined acceptable as:

The primary offeror (or team member if applicable) provided evidence of experience as a full line food distributor on contracts that collectively (if concurrently performed) meet at least 80% of the annual dollar value as required by the instant solicitation. The primary offeror (or team member if applicable) provided evidence of experience performing deliveries in contingent operations on contracts that collectively (if concurrently performed) meet the number of customers supported on a routine schedule as required by the instant solicitation.

Id. at 17. The SSPA defined marginal as:

Collectively, if concurrently performed, the contracts do not meet at least 80% of the dollar value requirement of the instant solicitation; however, they include full line food distribution in a contingency environment in support of the similar number of customers supported on a routine schedule as required by the instant solicitation.

Id.

Under past performance, the RFP provided that the agency would evaluate the offeror's record of past performance through its written proposal, government in-house records, and information provided by the references designated by the offerors. RFP at 147. The RFP also stated that the government may consider past performance information from sources other than those identified by the offeror. Id. at 148. The RFP further explained that there were two aspects to the past performance evaluation: a relevancy determination and a determination as to how well the offeror performed. Id. at 148. With regard to relevancy,

consideration will be given to those aspects of an offeror's contract history which provide the most confidence that the offeror will satisfy the current procurement requirements. Those aspects of relevancy include similarity

of experience performing as a full line food distributor in contingency operations, dollar value, and number of customers supported.

Id. at 148. Based on the past performance ratings for relevant contracts, the agency would assign an overall past performance confidence assessment of substantial, satisfactory, limited, no, or unknown confidence.³ AR, Tab 25, SSPA, at 32-33.

The agency received seven proposals by the solicitation's February 8, 2016, closing date, including proposals from ANHAM and KGLFS. AR, Tab 61, Source Selection Decision Document (SSDD), at 3. The source selection evaluation board (SSEB) evaluated the proposals under the non-price evaluation factors and identified strengths, weaknesses, and significant weaknesses in each proposal. In its initial evaluation of KGLFS's proposal under experience, the agency noted several strengths and weaknesses. AR, Tab 58, Final Technical Evaluation of KGLFS, at 27-37. One weakness was that KGLFS's five contracts failed to demonstrate that the collective value of the contracts reflect "at least 80% of the dollar value requirement of the instant solicitation." Id. at 36. The agency assigned KGLFS a marginal rating. Id. In its evaluation of ANHAM's experience, the agency noted that ANHAM had experience on contracts that exceeded the dollar value and number of customers (including the current SPV contract for Iraq, Jordan, and Kuwait) of the current requirement, and assigned ANHAM an outstanding rating. AR, Tab 57, Final Technical Evaluation of ANHAM, at 25-26.

The agency initiated discussions on September 13, 2016. The agency provided KGLFS with items to address under each of the non-price factors and price. AR, Tab 44, KGLFS Discussions Letter, at 1-6. Under factor 2, experience, KGLFS was informed (among other things) that the five contracts it had provided were, collectively, "only 57% of the total annual dollar amount required by the solicitation." Id. at 3.

On October 7, 2016, KGLFS submitted its response to the agency's discussions letter. KGLFS revised its proposal to address the agency's concerns, including removing two of its five experience contract references and replacing them with new contracts. AR, Tabs 45-45.18. The protester also made the same changes to its past performance contract references in its revised proposal. AR, Tab 45.16, Revised Section B Past Performance, at 1-28. The agency subsequently evaluated offerors' revised proposals. With regard to KGLFS's experience, the agency noted several weaknesses, and

³ The SSPA also provided definitions for the relevancy determinations (very relevant, relevant, somewhat relevant, or not relevant), and definitions for the past performance ratings for relevant contracts (outstanding, good, acceptable, marginal, unacceptable, or neutral). AR, Tab 25, SSPA, at 32. Furthermore, the SSPA defined "substantial confidence" as a high expectation that the offeror will successfully perform the contract; "satisfactory confidence" as a reasonable expectation that the offeror will successfully perform; and "limited confidence" as a low expectation that the offeror will successfully perform. Id. at 32-33.

assigned an overall rating of “acceptable.” AR, Tab 58, Final Technical Evaluation of KGLFS, at 37-42.

On November 22, 2016, the agency engaged in a second round of discussions. The agency informed KGLFS of each of the weaknesses under the experience evaluation factor.⁴ For example, KGLFS was informed that it “did not provide a single contract that meets or exceeds the dollar value and customers supported on a routine schedule as required by the instant solicitation.” AR, Tab 47, KGLFS Discussions Letter, at 1-2. On the same date, the agency issued Amendment 11, which increased the annual dollar value of the contract to \$137,906,259.⁵ AR, Tab 13.1, RFP, amend. 11, at 17.

On January 19, 2017, KGLFS submitted its response to the agency’s second round of discussions. The awardee again revised its proposal to address the agency’s concerns, including removing one of its three original experience contract references (that is, one of three contracts that were not replaced in the prior round of discussions) and replacing it with a new contract reference, contract A.⁶ AR, Tabs 48-48.6. In keeping with the revisions to its proposal under the experience evaluation factor, the awardee made the same changes in the past performance section of its revised proposal. AR, Tab 48.5, Revised Section B Past Performance, at 1-28.

The agency subsequently evaluated the offerors’ revised proposals. With regard to the changes that KGLFS made to its experience, the agency noted that contract A failed to meet the annual dollar value and the number of customers provided in the solicitation; that KGLFS still had failed to provide a single contract as a full line food service distributor operating in a contingency area that meets or exceeds the solicitation annual dollar value and number of customers supported on a routine basis; and that:

Due to the increased Annual Dollar value requirement of \$137.9M for the [] contract, KGL does not demonstrate experience that collectively is at least 80% of the Annual Dollar Value of this requirement. Taken collectively, KGL[FS]’s annual dollar value of their reference experience contracts is [DELETED], which

⁴ The discussions letter did not label the items as weaknesses. Rather, the letter asked KGLFS to “acknowledge or comment” on each item. AR, Tab 47, KGLFS Discussions Letter, at 1-2.

⁵ The number of customers supported on a routine schedule remained 26. Id.

⁶ The contract that was being replaced had an annual value of [DELETED] million and serviced [DELETED] customer locations. AR, Tab 58, Final Technical Evaluation of KGLFS, at 42. Contract A had an annual value of [DELETED] million and serviced [DELETED] customer locations. Id. at 49.

demonstrates experience performing a scope of work that is only [DELETED] of the value of this requirement.

AR, Tab 58, Final Technical Evaluation of KGLFS's Proposal, at 49 (emphasis in original). As a result, the agency assigned a marginal rating to KGLFS's proposal under the experience factor. Id.

On May 22, 2017, the agency engaged in another round of discussions with the offerors.⁷ Under the experience factor, the agency informed KGLFS that "[c]ollectively, KGL[FS]'s annual dollar value for its selected contracts is only [DELETED] of the solicitation requirement. Please acknowledge or comment." AR, Tab 55, Agency Letter to KGLFS, at 2. The letter also informed KGLFS that, under the past performance factor, the agency found contract A was not relevant, as it contained only [DELETED] of the total yearly solicited requirement and the number of customers was "far below" the solicited requirement. Id. The letter requested that KGLFS submit its final proposal revisions by May 31, 2017. Id.

KGLFS submitted its final proposal revision by the due date, and again provided various revisions to its proposal, including removing contract A from both the experience and past performance sections of its proposal.⁸ In its place, KGLFS provided a new contract, contract B, which had an annual value of [DELETED] million and provided for deliveries to [DELETED] customer locations. Contract B was not performed by the offeror; therefore, KGLFS included a teaming agreement with the firm (company X) that performed contract B. AR, Tab 58, Final Technical Evaluation of KGLFS, at 62.

The agency evaluated final proposals. With regard to KGLFS's proposal, under the experience factor, the agency found that contract B could not be considered to be part of KGLFS's experience. In this regard, the agency determined that, based on the teaming agreement, "it [was] not clear what exactly the meaningful involvement in the performance of the resultant contract will be for [company X] as a team member and could not be accepted." Id. at 62. The agency then decided to "retain" contract A in place of contract B. Specifically, the agency concluded that:

[r]etaining [contract A], and adding the [DELETED] million dollar increase in [another contract], taken collectively, the annual dollar value of KGL[FS]'s reference experience contracts is [DELETED], which demonstrates experience performing a scope of work that is [DELETED]

⁷ According to the agency record, this was the fifth round of discussions. Rounds three and four are not relevant to this protest. See AR, Tabs 34-39, 50-54.

⁸ KGLFS also increased the annual contract value of one of its prior contracts from \$10 million to [DELETED] million.

of the value of this requirement. This warrants an ACCEPTABLE under Factor II.

Id. at 64.

The agency's final evaluation of KGLFS's and ANHAM's proposals was as follows:

Technical Factors	ANHAM	KGLFS
Warehouse Location and Capacity	Good	Outstanding
Experience	Outstanding	Acceptable
Quality Control Assurance and Warehouse Management System/Procedures	Outstanding	Outstanding
Resource Availability (Cash Flow, Equipment and Carrier Agreements)	Good	Good
Implementation and Management Plans	Outstanding	Good
Overall Technical Rating	Good	Good
Past Performance	Satisfactory Confidence	Satisfactory Confidence
Evaluated Price	\$150,815,549	\$132,288,115

AR, Tab 61, SSDD, at 5, 10.

The source selection authority (SSA), reviewed the evaluators' results and conducted a comparative assessment of the proposals. AR, Tab 61, SSDD, at 1-23. With regard to comparing ANHAM's and KGLFS's proposals, the SSA examined the strengths of each proposal. Id. at 12-15. The SSA found, among other things, that:

[a]lthough ANHAM's experience offers some higher assurance of successful performance, KGL[FS]'s collective experience [under technical factor 2] does demonstrate that it can successfully perform the requirements of the contract.

Id. at 14. The SSA ultimately concluded that benefits offered by ANHAM's proposal under technical evaluation factor 2, experience, and factor 5, implementation and management plans, did not "significantly outweigh the equality of performance in the remaining [technical] factors and past performance, and therefore does not justify a 14% price premium given the level of technical competence and concomitant ability to perform demonstrated by KGL[FS]." Id. at 15.

The agency made award to KGLFS, and this protest followed.

DISCUSSION

ANHAM raises numerous challenges to the agency's conduct of the procurement and evaluation of proposals. The protester alleges that the agency failed to properly evaluate KGLFS's proposal under each of the non-price evaluation factors and further failed to properly evaluate KGLFS's responsibility. The protester also challenges the agency's evaluation of its own proposal under the warehouse location and capacity factor, asserting that the agency failed to provide ANHAM with meaningful discussions. We have reviewed all of the protester's allegations and, as explained below, we sustain the protest because the agency improperly evaluated KGLFS's proposal under the experience factor. While we do not address each of the remaining allegations, we have reviewed them and, other than those issues discussed below, find that none provides a basis to sustain the protest.⁹

Experience

ANHAM first alleges that the agency's evaluation of KGLFS under the experience factor was improper because the agency could not consider contract A as included in KGLFS's final proposal. ANHAM asserts that it was unreasonable for the agency to "revert back to the contract reference included in the previous version of KGLFS's proposal," and that the agency's actions were prohibited by the terms of the solicitation. ANHAM points out that the solicitation instructions permitted offerors to submit only five contracts, and, since KGLFS's final proposal contained five contracts, the agency could not consider what was, in effect, a sixth contract. Protester Comments at 44.

The agency responds that, since the SSEB had evaluated contract A in an earlier submission and had concluded that contract A could be considered under the experience evaluation factor, it was reasonable for the agency to consider this information as part of its evaluation of KGLFS's final proposal. While the agency recognizes that KGLFS had removed the reference to contract A from KGLFS's final proposal revision, the agency argues that it was nevertheless aware that the awardee, in fact, had this experience, and thus "it would have been more unreasonable for the Agency to ignore that experience information in rating KGL[FS]." Agency Supp. Memorandum of Law (MOL), at 49. In this regard, the agency explains that this information was "close at hand" information regarding KGLFS's experience, and thus it was proper for the agency to consider it.

The agency further argues that it was permitted to consider contract A under the terms of the solicitation because the contract was, in effect, a "sixth" contract submitted by the

⁹ For example, ANHAM raised numerous additional challenges to the agency's evaluation of KGLFS's proposal, such as challenging KGLFS's outstanding rating under factor 3, quality control, assurance, and warehouse management system procedures. Protester Comments at 54-86. We have reviewed these challenges and find they provide no basis to sustain the protest.

offeror. The agency points out that the solicitation's evaluation language under the experience factor stated that "[i]f the offeror submits more than 5 comparable contracts, only the 5 highest dollar value contracts will be used for evaluation." RFP at 146. The agency asserts that the awardee effectively submitted more than five contracts because it submitted more than five contracts in total as part of its various proposal revisions during the multiple rounds of discussions.

In reviewing agency evaluations of experience, our Office does not reevaluate offers, but rather reviews the agency's evaluation to ensure that it was completed in accordance with the terms of the solicitation and applicable procurement laws and regulations. Guideline Instruments, Inc., B-409924.2, Jan. 13, 2015, 2015 CPD ¶ 36 at 3. Here, the agency argues that contract A was close at hand information that it considered under the experience factor in accordance with decisions of our Office finding that agencies have discretion under the experience factor to consider "close at hand information" known to the agency and not found in an offeror's proposal. Nuclear Production Partners, LLC; Integrated Nuclear Production Solutions, LLC, B-407948 et al., Apr. 29, 2013, 2013 CPD ¶ 112 at 20; see SNAP, Inc., B-409609, B-406909.3, June 20, 2014, 2014 CPD ¶ 187 at 8. However, our Office has also explained that this discretion may be limited by the specific terms of a solicitation. Nuclear Production Partners, supra, at 20 n.50.

Here, the solicitation instructions limited the submission of contracts to be considered under the experience factor to five of an offeror's highest dollar value and most comparable contracts. Furthermore, the solicitation provided that the agency would evaluate the offeror's "record of [e]xperience through its written proposal." RFP at 146. Given these limitations, the agency's experience evaluation was confined to the contracts submitted by the offeror in its proposal, and the solicitation did not allow for the consideration of other contracts--that is, contracts not contained in the proposal. Thus, the agency's evaluation of the awardee's final proposal was limited to the five contracts the awardee included in its final proposal. The agency's evaluation effectively removed a contract from the offeror's final proposal, and replaced it with a contract that the protester had, in fact, affirmatively chosen not to include in its final proposal.¹⁰ Under these circumstances, where the solicitation limited the number of references and evaluation to the written proposal, the agency has overridden the offeror's business judgment as to which contracts the offeror should include in its final proposal--in essence, revising the awardee's final proposal under the experience factor.¹¹

¹⁰ The agency's actions here had the practical effect of finding the awardee had met the 80 percent threshold needed for an acceptable rating under the experience factor.

¹¹ We note that the agency, which also "retained" contract A in the past performance portion of the offeror's proposal after final proposal revisions, found that contract A was not relevant under past performance even though the language in the solicitation regarding what would be considered when determining whether a reference was relevant was the same under both the experience and past performance factors.

In addition, we do not find that the language of the solicitation allowed the agency to pick and choose which of the “comparable” contracts--contracts that were submitted across multiple rounds of discussions--that it would consider. Rather, the language in the solicitation provided that, if an offeror’s proposal contained more than five comparable contracts, the agency would evaluate the five contracts with the highest dollar value. Since KGLFS’s final proposal did not contain more than five contracts, we find that this provision did not permit the agency to consider contract A to be, effectively, a “sixth” contract submitted along with KGLFS’s final proposal. In sum, the agency’s evaluation considered a contract that it was not permitted to consider under the terms of the solicitation, and therefore we sustain the protest on this basis.

ANHAM next asserts that the agency’s evaluation of KGLFS’s proposal under the experience factor was flawed because the agency credited KGLFS for all five of the contracts the awardee submitted with its proposal, even though three of those contracts were performed by KGLFS related entities and two were performed by KGLFS’s team member. In this regard, ANHAM points out, and the agency does not contest, that none of the contracts was performed by the offering entity here, KGLFS. ANHAM argues that the solicitation, under the experience factor, permitted offerors to submit only two contracts from its teaming members, and that affiliated companies were to count as teaming members under the solicitation language regarding the evaluation of experience. Thus, according to ANHAM, only two of the five contracts that KGLFS submitted could be considered under this factor.

In response, the agency argues that KGLFS was not relying on team members’ experience for three of its five contracts. Agency Supp. MOL at 45. Rather, these three contracts were performed by KGLFS related entities, which would be providing resources for use in performance of the contract and were therefore properly attributable to KGLFS. The agency points to KGLFS’s proposal, where the firm explained it is “a Kuwait company and part of a larger family of KGL companies,” and that “[e]ach affiliate company within the entire KGL enterprise has committed itself to providing all available resources to ensure the success of the contract.” *Id.* at 48 (quoting AR, Tab 43.1, KGL Technical Proposal, at 7).

It is well-settled that an agency may consider the experience or past performance of an offeror’s parent or affiliated company under certain circumstances when the proposal demonstrates that the resources of the parent or affiliate will affect contract performance. *See, e.g., Perini/Jones, Joint Venture*, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4. However, our Office has consistently recognized that reliance on a third party’s experience, even if otherwise permissible, is contingent upon the absence of any solicitation provision precluding such consideration. *Ma-Chis Kawv V, LLC*, B-409344, Mar. 20, 2014, 2014 CPD ¶ 101 at 5.

As noted above, the solicitation stated, under the experience factor that:

[O]fferors that are proposing a joint venture, partnership or a teaming approach may provide experience information on their team members (e.g. partners, key subcontractors or other affiliates that will perform essential functions of the contract). . . . The most relevant experience, and that which will receive the most credit, however, is the information directly related to the offering entity.

Provide a brief performance record of up to five (5) of your highest dollar value and most comparable contracts. . . . **Note:** No more than 2 team member contracts may be included in the 5 (selected contracts).

RFP at 129 (emphasis in original). Given that the solicitation stated that “no more than 2 team member contracts” may be provided as part of the five contracts, and also provided that examples of “team members” are “partners, key subcontractors or other affiliates,” we find that the solicitation allowed offerors to submit no more than two contracts from other than the offering entity. Here, as defined by the solicitation, the offering entity did not include sister/parent/other affiliated companies of the offeror. The record shows that the awardee submitted three contracts performed by the parent/affiliate corporations of the awardee, and two contracts performed by a team member, rather than submitting any contracts performed by the awardee itself. The record further shows that the agency used all five of these contracts in evaluating the awardee’s experience. As noted, the solicitation did not permit the agency to consider more than two team members under the experience factor; here, the agency considered five.¹² Under these circumstances, we find the agency’s evaluation of experience in this regard to be inconsistent with the solicitation and sustain the protest on this basis.¹³

¹² The agency argues that the term “affiliate” here “simply refers to other firms performing on the contract designated by the offeror as its team member.” Agency Supp. MOL at 47 n.17. We disagree. A straightforward reading of the solicitation provision provides that team members includes firms such as partners, key subcontractors, and other firms such as affiliates of the offeror. Indeed, this is consistent with the solicitation’s explanation that the “most relevant experience” is that provided by the offering entity. RFP at 129. Here, the agency is in privity of contract with KGLFS--the offering entity--and not the “KGL family of companies.”

¹³ The protester also alleges that the agency improperly evaluated KGLFS’s past performance. The past performance factor included the same language as the experience factor regarding the provision of only two team member contracts and included the same description of what constituted a team member. However, the past performance factor did not limit the evaluation to the offeror’s written proposal. KGLFS provided the same five contract references under the past performance factor as it did under the experience factor. On the record here, it is unclear how the agency would have evaluated these references if it had considered the references to be from entities
(continued...)

Responsibility Determination

ANHAM contends that the agency improperly determined that KGLFS was a responsible contractor because, according to the protester, the contracting officer improperly failed to consider information showing that the awardee has an unsatisfactory record of integrity and business ethics. See Supp. Protest at 38-43. Specifically, ANHAM points to Kuwaiti criminal charges against the chairman of the parent company of KGLFS (“Mr. D”).

DLA maintains that, with regard to the principal associated with the KGLFS parent company, the record demonstrates that the contracting officer did not ignore or fail to consider available, relevant information regarding KGLFS’s responsibility. Agency MOL at 65-69.¹⁴ We agree.

As a general matter, our Office does not review affirmative determinations of responsibility, which are typically matters within the agency’s broad discretion. 4 C.F.R. § 21.5(c). Our Office will review a challenge to an agency’s affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Id.; T. F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52 at 5; Verestar Gov’t Servs. Grp., B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4-5. We therefore have reviewed circumstances such as: credible allegations that an agency failed to properly consider that a contractor committed fraud, FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 11-12; allegations that the agency failed to consider that principals of a contractor had criminal convictions, Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 5; or allegations that the agency failed to consider information about a contractor engaged in improper financial practices and improperly reported earnings. Verestar Gov’t Servs. Grp., supra.

(...continued)

other than KGLFS. In implementing our recommendation, the agency may want to reevaluate the awardee’s past performance and its evaluation of relevant references.

¹⁴ The protester also alleges that the agency’s responsibility determination failed to consider certain information: namely, that the Kuwaiti Port Authority (KPA) had revoked KGLFS’s licenses to perform as a contractor at certain ports, and that the KPA has “blacklisted” various entities related to KGLFS. The agency maintains that it only learned of these allegations due to ANHAM’s protest, and the protester has failed to show that the agency should have been aware of these allegations. We agree. The protester provides no basis for us to conclude that this information was ignored by the contracting officer; consequently, we decline to sustain the protest on this ground. 4 C.F.R. § 21.5(c).

Our review of the record here does not support the conclusion that the contracting officer ignored relevant information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. See 4 C.F.R. § 21.5(c). Rather, the record demonstrates that the allegations relating to the chairman were known to the agency and considered by the contracting officer. See AR, Tab 62, Responsibility Determination, at 2-3.

While the protester essentially challenges the adequacy of the contracting officer's review of these allegations--arguing that the record fails to show that the contracting officer considered various pieces of information relating to Mr. D and his relationship with KGLFS's parent company--we find that the protester's allegations amount to no more than a request that our Office second-guess the contracting officer's subjective business judgment regarding the responsibility of the awardee. In this regard, contrary to ANHAM's assertions, the record shows that the contracting officer conducted a thorough responsibility determination that was consistent with the FAR. AR, Tab 62, Responsibility Determination, at 1-4; see FAR § 9.104-1. Specifically, the contracting officer was aware of the charges against Mr. D (including reviewing a copy of the indictment against Mr. D); reviewed various articles from a government-watchdog organization related to the charges against Mr. D; presented various specific questions relating to Mr. D to the chief legal officer of a KGL affiliated company, and then reviewed and considered the answers received; and finally consulted various other government entities regarding KGLFS's responsibility. AR, Tab 62, Responsibility Determination, at 1-4; AR, Tab 63.1-63.10. The record shows therefore that the contracting officer was aware of and considered the allegations against Mr. D. Given this, we have no basis to sustain this protest ground.

Material Misrepresentation

ANHAM also challenges the agency's evaluation of KGLFS's proposal under the warehouse location and capacity factor, arguing that the evaluation was based upon a material misrepresentation. Specifically, ANHAM asserts that KGLFS proposed specific warehouses for its OCONUS facility, but failed to inform the agency that the Kuwaiti Port Authority (KPA) had issued an administrative order in 2016 that, in effect, revoked KGLFS's right to use the warehouses. ANHAM asserts further that in November, 2017, the KPA "blacklisted" all KGL entities, such that KGLFS was prevented from having any "dealings" with the KPA. As discussed below, we find no merit to the protester's allegation.

Although ANHAM asserts that KGLFS's proposal materially misrepresented that it will provide this warehouse, the protester merely speculates that KGLFS did not intend to perform the contract as proposed. See Crown Point Sys., B-413940, B-413940.2, Jan. 11, 2017, 2017 CPD ¶ 19 at 10 (to prevail on a claim of material misrepresentation, the record must show that the information at issue is false). In this regard, the protester has failed to provide sufficient evidence to demonstrate that KGLFS's proposal misrepresented the firm's intention to provide the warehouses at issue. There is no indication in KGLFS's proposal, or otherwise, that KGLFS will not, or does not intend to,

provide the warehouses as presented in its proposal. While ANHAM asserts that the Kuwaiti legal system has rendered it impossible for KGLFS to perform, the record shows that KGLFS has represented to DLA, and continues to represent to DLA, that it will perform the contract as proposed.

ANHAM continues to assert that, under its understanding of the Kuwaiti legal system as it relates to the various legal actions and resolutions, KGLFS cannot perform the contract. The agency and awardee, however, explain that KGLFS is ready and able to perform. In this regard, the agency states that it asked KGLFS at its onboarding meeting following award if it was able to perform, and the agency further received a letter during the pendency of this protest from the awardee, stating it was willing and able to perform as laid out in its proposal. Moreover, the agency independently verified that the KGLFS affiliated entity is still performing warehousing duties at its facility in Kuwait.¹⁵ Thus, given that the record does not show that KGLFS's offer to provide its warehouses or otherwise perform the contract in accordance with the terms of the contract was false, we find no basis to sustain this protest ground. Furthermore, to the extent that future actions by Kuwait or the KPA prevent KGLFS from using the warehouse (or otherwise successfully perform the contract), that would be a matter of contract administration, which our Office does not review. Supreme Foodservice GmbH, B-405400.6, B-405400.7, Mar. 27, 2013, 2013 CPD ¶ 93 at 8.

Warehouse Location and Capacity

Finally, the protester challenges the agency's evaluation of proposals and conduct of discussions under the warehouse location and capacity factor. The protester argues that the agency engaged in misleading discussions because it failed to inform the protester that its proposed warehouse solution, which involved leased warehouses, constituted a significant weakness. In this regard, the agency notified ANHAM during discussions that: "Factor I – Warehouse, Location, and Capacity. OCONUS operations will be performed from leased rather than owned facilities. Please acknowledge or provide comments." AR, Tab 28, Discussions Letter to ANHAM, Sept. 13, 2016. ANHAM asserts that this was insufficient to notify the protester of the serious nature of the agency's concerns, as this was the only weakness ANHAM received under the factor and was cited by the SSA in the tradeoff decision as a determining factor for award to KGLFS. Protester's Comments at 69.

With regard to FAR part 12 procurements conducted under the negotiated procedures of FAR part 15, as here, agencies are authorized to use in conjunction with part 12 the

¹⁵ The intervenor also notes that the intervenor's family of companies ("KGL") "are engaged in ongoing civil litigation regarding various issues," and that it would be premature to speculate how they will ultimately be resolved. Intervenor Comments at 7. While the protester argues that the November 28, 2017, "blacklisting" at issue here is "final," the intervenor points out that it is continuing to operate normally in the areas where it is supposedly prevented from operating.

policies required for solicitation, evaluation, and award prescribed in FAR part 15. See FAR § 12.203. Under FAR part 15, when conducting discussions, an agency is not required to raise with each offeror every possible area where its proposal could be improved. See, e.g., PWC Logistics Servs., Inc., B-299820, B-299820.3, Aug. 14, 2007, 2007 CPD ¶ 162 at 6. Rather, discussions need only be meaningful, that is, they must identify deficiencies, significant weaknesses, and adverse past performance to which the offeror has not yet had an opportunity to respond. FAR § 15.306(d)(3).

Here, we find that the weakness cited by the protester did not rise to the level of a significant weakness or deficiency, and thus the agency was not required to inform ANHAM of the weakness during discussions. While the record shows that the agency's evaluation found ANHAM's leased facilities to be a weakness, the protester nevertheless received a "good" rating under this evaluation factor, and there is nothing in the record to indicate that the agency viewed ANHAM's approach in this regard to be a significant weakness or deficiency. Given this, the agency was not required to notify ANHAM of this weakness, and the agency's conduct of discussions, by notifying ANHAM to "acknowledge" or "comment," was not improper.

In addition, the agency's notification to ANHAM that the agency had found its proposal to consist of "leased rather than owned" warehouses was sufficient to notify the protester that the agency viewed this as a weakness (even if the agency did not view it as a significant weakness). We note that because the RFP specifically informed offerors that the agency would view owned facilities "more favorably" than leased facilities, the agency's discussions letter provided ANHAM with notice of this issue.¹⁶ In sum, we find nothing improper with the agency's conduct of discussions.

RECOMMENDATION

We recommend that the agency either reevaluate KGLFS's final proposal under the experience factor in accordance with the terms of the solicitation and document a new source selection decision, or revise the solicitation to reflect the agency's requirements

¹⁶ ANHAM also challenges the reasonableness of the agency's determination that the awardee provided warehouse facilities that were owned by the awardee. ANHAM points out that KGLFS's proposal did not present its warehouses as owned by KGLFS, and, in fact, specifically provided that the warehouses were to be leased from a separate KGLFS affiliated company. While the agency explains that its evaluation recognized that the warehouses were owned by a KGLFS affiliated company--and not KGLFS--the agency nevertheless found that, since both firms were owned by a common parent company, it was appropriate to give KGLFS ownership credit for the warehouses. However, the record is unclear as to whether the agency reasonably found that the ownership of the warehouses by an affiliated company can be attributed to the offeror, which is a separate legal identity. Thus, in implementing our recommendations, the agency may wish to consider reviewing the reasonableness of its determination that KGLFS should be give ownership credit for its warehouses.

and obtain revised proposals. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

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