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Decision

Matter of: AJT & Associates, Inc.

File: B-284305; B-284305.2

Date: March 27, 2000

Rodney A. Grandon, Esq., and Richard M. Stolbach, Esq., Patton Boggs, for the protester.

Donald J. Kinlin, Esq., and John H. Beasley, Esq., Thompson Hine & Flory, for Quantum Technology Services, Inc., an intervenor.

John E. Lariccia, Esq., and Martin F. McAlwee, Esq., Department of the Air Force, for the agency.

C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's consideration of the resources and experience of large business subcontractor, in a solicitation restricting competition to socially and economically disadvantaged small business concerns in accordance with section 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a) (1994), was reasonable and consistent with the terms of the solicitation.
2. Solicitation provisions requiring contractor to furnish, among other personnel, a project manager qualified to sit for professional engineer examination do not constitute definitive responsibility criteria--since they neither set out specific, objective standards for determining an offeror's capability to perform or require offerors to demonstrate compliance prior to award--but are performance obligations, compliance with which is a matter of contract administration.
3. Agency did not mislead high-priced offeror during discussions by advising it only of Defense Contract Audit Agency (DCAA) opinion that the offeror's overhead rate was understated; the agency advised offeror of its concerns based on DCAA opinion, and there was no obligation to advise the protester that its cost/price was higher than that of other offerors, where the agency determined that the cost/price was reasonable for the approach taken.

DECISION

AJT & Associates, Inc. protests the award of a contract to Quantum Technology Services, Inc. (QTSI) under request for proposals (RFP) No. F08650-99-R-0101, issued by the Department of the Air Force for engineering services. AJT asserts that the evaluation of QTSI's proposal and the selection decision were flawed primarily because the agency improperly considered the resources of QTSI's large business subcontractor, General Physics Corporation, in its evaluation.

We deny the protest.

On August 18, 1999, the agency issued the solicitation for a 1-year multitype contract (fixed-price, labor hour, cost-reimbursement, and fixed-price delivery orders) for technical engineering and spacelift services (TESS), with seven 1-year option periods. RFP amend. 4, § L, at 1, and amend. 4, § B, at 1-8. Each performance period included fixed-price line items for project management services and data, an indefinite-quantity line item for on-call engineering and inspection services, and a line item for subcontract management. RFP § B, at 1-8.¹

The successful offeror, whom the agency would select on a best value basis, would provide services including project management, engineering design and analysis, environmental compliance support, and subcontract management. RFP amend. 4, attach. 1, at 1. These services would support repair, modification, and construction of launch facilities at Cape Canaveral, Patrick Air Force Base, and the Jonathan Dickinson and Malabar missile tracking annexes in Florida, Antigua Air Station in the West Indies, Ascension Auxiliary Airfield in the South Atlantic, and Ramey Solar Observatory, Puerto Rico. Id.

The RFP provided for conducting the procurement competitively pursuant to section 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a) (1994), restricting competition to Small Business Administration (SBA) § 8(a) firms in the north and south Florida Districts. RFP Cover Letter. It provided for evaluation against four factors--mission capability, past performance, proposal risk, and price. RFP amend. 5, § M, at 1. Price would be approximately equal to the other evaluation

¹ For cost/price evaluation purposes, the RFP provided that offerors furnish fixed prices for certain line items such as phase-in and technical engineering services. The RFP also provided estimated hours and overall ceilings for those estimated hours of the cost reimbursable on-call engineering/inspection services in each performance period, as well as a list of anticipated labor classifications for those services. Offerors proposed rates for the anticipated labor classifications. Those rates were then multiplied by the estimate of hours for each labor classification for cost evaluation purposes. RFP amend. 4, § B, at 10-18. Offerors were asked to propose a coefficient, or markup for subcontract management.

factors in the selection decision but nonprice factors, when combined, would be significantly more important than price. RFP amend. 5, § M, at 1, amend. 4, § M, at 5.

Factor one, mission capability, contained five subfactors as follows: project management plan, technical support staff, quality control and safety plan, subcontract management, and model project development/execution.² RFP amend. 4, § M, at 2-4. The RFP provided for assigning each proposal a color/adjectival rating for the mission capability subfactor ratings, and a proposal risk rating based on the “potential for disruption of schedule, increased cost, degradation of performance and the need for increased government oversight as well as the likelihood of unsuccessful contract performance.” *Id.* at 6. Under the cost/price factor, the “cost/price proposal [would] be evaluated . . . to determine if it [was] realistic and reasonable. *Id.* at 5.

The agency received three proposals by the due date of October 13 and referred them to a team of evaluators. The agency eliminated one offeror from the competitive range and conducted discussions with the remaining two offerors, through evaluation notices (ENs) tailored to each proposal, followed by oral discussions. The protester and the awardee received an “acceptable/low risk” rating for each of the mission capability subfactors, except for an “exceptional” rating for the protester under the model problem subfactor, and a marginal risk rating for the awardee under the technical staff subfactor. QTSI’s Initial Evaluation at 1; AJT and Associates’s Initial Evaluation at 1. The awardee had failed to identify personnel for the support staff, and, although QTSI’s hiring criteria were acceptable, the local job market created a risk that QTSI might not be fully staffed by the start date. QTSI’s Initial Evaluation at 1. Both offerors received “very good/significant confidence” ratings for past performance. QTSI’s Initial Evaluation at 1; AJT and Associates’s Initial Evaluation at 1. The protester’s evaluated price, \$31,976,085, was significantly higher than QTSI’s proposed price of \$25,722,331. QTSI’s Initial Evaluation at 3; AJT and Associates’s Initial Evaluation at 3.

During discussions, QTSI identified additional personnel to serve on the contract and referred to its expectation of retaining some of the incumbent inspectors. Offeror Response to EN T-QTSI-2, at 1. QTSI also noted its use of General Physics, a large business subcontractor, to expand its capabilities.

Our approach for obtaining, training, and maintaining sufficient qualified staffing to meet the On-Call Engineering and Inspection requirements . . . is to use the local corporate resources of QTSI and General Physics Since QTSI is corporately based in the local area

² Section L-907 and attachment 4 to the solicitation contained two model problems for offerors to address in their proposals. RFP amend. 4, § L, at 10; RFP attach. 4, at 1-6.

and General Physics has maintained a local office here since 1986, both firms employ personnel who have relevant . . . experience. . . .

Id. at 2.

Based on the discussions, the evaluators revised QTSI's risk rating from marginal to low risk for the subfactor of technical staff. QTSI's Final Evaluation at 1.

The Defense Contract Audit Agency (DCAA) had advised the agency that QTSI's general and administrative (G&A) rate and AJT's direct labor overhead rate appeared low. QTSI's Initial Evaluation at 3; AJT and Associates's Initial Evaluation at 3. The agency provided EN's to the two offerors, both of whom essentially explained the low rates by anticipated increases in their cost bases. Id. Although evaluators initially considered QTSI's price/cost to present a moderate risk, they subsequently determined after discussions that the risk was low. QTSI's Initial Evaluation at 3.

The two offerors submitted final proposal revisions, and evaluators briefed the source selection authority (SSA) on their findings. The only significant difference that evaluators found between the two proposals, apart from QTSI's price advantage, was AJT's "exceptional" rating for the model project subfactor, versus QTSI's "acceptable" rating. SSA Decision Briefing at 9-13. The SSA selected QTSI for the award, concluding that AJT's "exceptional" rating for the model problem alone did not justify a 24.3 percent difference in price/cost. Source Selection Decision at 2. This protest to our Office followed.

AJT contends that evaluators gave improper consideration and weight to the resources and capabilities of QTSI's large business subcontractor, General Physics. AJT asserts that it reasonably understood the RFP as limiting offerors to their own in-house resources, experience, and past performance; if the agency intended otherwise, AJT argues, the RFP contained a latent ambiguity. Either the evaluation was inconsistent with the solicitation, AJT asserts, or it was prevented from competing with QTSI on a common basis.

We find without merit the protester's argument that the solicitation did not permit offerors to propose, and the agency to evaluate, subcontractors to perform the work. AJT identifies no language in the solicitation that can reasonably be construed as prohibiting use of subcontractors. To the contrary, the solicitation specifically provides for consideration of subcontractor management, to include the "qualifications, experience, and performance history of subcontractors specifically proposed to support the TESS contract" and "[a]ny joint venture or teaming arrangements." RFP amend. 4, § M, at 4. It required offerors to describe any joint venture or teaming arrangements, and subcontractor relationships. RFP § L, at 9. Further, for past performance, the RFP provided that, "[the] government will evaluate the contractor's and their subcontractor's ability to successfully complete multi-discipline A-E efforts and subcontract management, based on . . . past performance." RFP amend. 4, § M, at 4. We think the agency's consideration of

QTSI's proposal to use General Physics was permissible under the RFP. Further, in its own proposal, AJT states, "we are a single entity and are not proposing a teaming arrangement [or] joint venture because of the potential for increased costs, schedule delays due to prime, subcontractor, and construction subcontractor coordination and management inconsistencies." AJT Proposal, vol. 1, at 8. AJT also stated that it "proposes no on-site subcontractors on the primary [line items] . . . which will reduce performance risk." *Id.*, vol. 3, at 23. AJT's own proposal shows that AJT did not propose subcontractors not because it believed the RFP prohibited their use, but because it believed its proposal of in-house resources had more merit. Clearly, AJT understood the RFP permitted use of subcontractors.

The protester also alleges that certain portions of the SOW are definitive responsibility criteria, with which QTSI failed to comply. The protester points out that the SOW generally requires "the contractor" to provide the personnel and resources required. RFP amend. 4, attach. 1, at 5-6. The protester notes specifically that SOW §§ 3.1.5.1 through 3.1.5.5 require a project manager with "the education, experience and knowledge to qualify to sit for the Professional Engineer examination," and argues that QTSI's proposed project manager does not have the required education to sit for the examination in Florida, where at least some of the work will be performed. The SOW requires that the contractor be experienced in military and aerospace design and construction practices, provide an experienced and knowledgeable staff capable of performing various engineering tasks, and ensure that a sufficient number of personnel with required professional registration are retained for work oversight. RFP amend. 4, attach. 1, at 5. It requires a licensed mechanical engineer, electrical engineer, civil/structural engineer, and architect. RFP amend. 4, attach. 1, at 5-6. It also requires that documentation (plans, specifications, design analysis, cost estimates, environmental permit applications and certificates of completion, reports, and studies) be signed "by licensed professionals with experience in the relevant disciplines" and that professional licenses be maintained as required by the states and possessions where services are performed. RFP amend. 4, attach. 1, at 6. The protester essentially argues that QTSI does not have the required experience and cannot supply personnel with the qualifications required by the SOW.

Definitive responsibility criteria are specific and objective standards, qualitative or quantitative that are established by a contracting agency in a solicitation to measure an offeror's ability to perform a contract. *AT&T Corp.*, B-260447.4, Mar. 4, 1996, 96-1 CPD ¶ 200 at 5. In order to be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving award. *Id.* Here, the provisions pointed to by the protester are not sufficiently specific to establish definitive responsibility criteria; rather the provisions essentially require in general terms that each offeror have the appropriate expertise, training and licenses in order to successfully perform the contract requirement. The cited provisions do not specify any particular experience level or specify any particular time, prior to award, by which an offeror must demonstrate the necessary experience or meet the licensing

requirement. Accordingly, the cited provisions do not represent preconditions to award, but rather performance obligations, enforceable by the agency as a matter of contract administration. Compro Computer Servs., Inc., B-278651, Feb. 23, 1998, 98-1 CPD ¶ 58 at 4.

The solicitation requires offerors to demonstrate their understanding of the requirements and their “approach” to obtaining, training, and retaining qualified personnel. RFP § L, at 9, and § M, at 2. Here, evaluators were concerned that QTSI’s recruiting plans were optimistic, given the job market, but they ultimately determined that the availability of General Physics personnel at the outset of performance would result in a low performance risk for the technical support staff subfactor. QTSI’s Final Evaluation at 1. We find the evaluation of the mission capability factor, which considered QTSI’s reliance on General Physics’ resources, was reasonable and consistent with the solicitation.³

AJT also questions the agency’s evaluation of General Physics’ experience and past performance. As a general rule, the experience of a proposed large business subcontractor properly may be considered in evaluating a proposal submitted in response to a solicitation set-aside for small business concerns, where the RFP allows it. Hago-Cantu Joint Venture, B-279637.2, July 20, 1998, 98-2 CPD ¶ 99 at 11. In fact, FAR § 15.305(a)(2)(iii) states that evaluations of past performance should take into account information regarding subcontractors who will perform major or critical aspects of the requirement. Here, as noted above and quoted more fully below, the RFP specifically provided for consideration of such experience, as well as past performance, as follows:

The government will evaluate the contractor’s and their subcontractor’s ability to successfully complete multi-discipline A-E efforts and subcontract management, based on demonstrated past experience

The government will evaluate performance using the following criteria:
. . . (d) Does offeror’s proposal describe relevant and recent performance history for proposed subcontractors? (e) Does the proposal provide evidence of subcontractor success for recent and relevant projects?

RFP amend. 4, § M, at 4-5.

³ The protester also asserts that QTSI’s dependence on General Physics could violate the subcontracting limitation at Federal Acquisition Regulation (FAR) § 52.219-14. We note that the clause was not in the solicitation. In any event, QTSI committed to comply with the substance of the clause, and we do not believe that the contracting officer had a basis for concern that QTSI would not do so.

The evaluators recognized that, apart from certain of the non-key personnel, QTSI had no relevant contract experience. QTSI's Initial Evaluation at 2-3. They ultimately rated the awardee's past performance as "very good/significant confidence" primarily based on General Physics' experience and past performance. QTSI's Final Evaluation at 1. Specifically, the evaluators noted that QTSI received good references, although the contracts involved were not directly relevant to the TESS SOW. QTSI's Initial Evaluation at 2-3. They also noted that, under the proposed arrangement with General Physics, QTSI would be responsible primarily for management of the overall effort and business management aspects of the project, while General Physics would be responsible for technical and construction management aspects of the statement of work. *Id.* at 2. General Physics had a "history of success in managing large multi-discipline projects"; evaluators concluded that, by staffing engineering and construction management positions with General Physics personnel, QTSI would have the necessary relevant past performance experience. *Id.*; QTSI's Final Evaluation at 2. The agency's evaluation of past performance, which considered General Physics' experience with relevant contracts in rating QTSI's proposal as "very good/significant confidence" notwithstanding QTSI's own lack of relevant experience, was consistent with the RFP.

AJT also asserts that the agency failed to consider the risk associated with QTSI's cost/price, which, the protester contends, is unreasonably low. DCAA noted that the awardee's subcontract management coefficient did not provide for a profit; also, as noted above, DCAA advised the agency that QTSI's G&A rate (as well as AJT's direct labor overhead rate) appeared understated. DCAA Audit Report No. 1301-2000M28000004, Nov. 15, 1999, at 1-3; QTSI's Initial Evaluation at 3. AJT argues that the agency essentially ignored these warnings.

Initially, we note that QTSI recognized, in communications with DCAA, that its markup (subcontract management coefficient) would not allow the awardee to recover its cost as well as profit. DCAA Audit Report No. 1301-2000M28000004, Nov. 15, 1999, at 1-3. We have consistently held that an offeror, in its business judgment, properly may decide to submit a fixed price that is extremely low. Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶ 124 at 4. We will not consider a claim that an offeror submitted an unreasonably low price, since the issue of whether a contractor can perform at the offered price is part of the contracting officer's affirmative determination of responsibility, which we will not review absent factors not present here. 4 C.F.R. § 21.5(c) (1999). We think this reasoning applies here to QTSI's markup rate.

With regard to QTSI's G&A rate, while the protester contends that the Air Force ignored DCAA's advice, we disagree. The record shows that the agency initially considered the awardee's proposal to present a moderate risk in the area of price. QTSI's Initial Evaluation at 3. The agency questioned the awardee's estimated future total cost base, which QTSI used to justify its G&A rate, and the agency sought in discussions an explanation from QTSI. QTSI EN Control No. C2. It was ultimately

determined that QTSI's business plan, which anticipated a shift to multiyear contracts such as TESS, could reasonably be expected to result in the projected G&A rate. QTSI's Initial Evaluation at 3. The agency raised the issue of the low G&A rate during discussions and received an explanation that it believed was reasonable. The protester's disagreement with the agency's business judgment provides no basis to find the agency's conclusions objectionable. Moreover, even if the awardee understated its markup and G&A rate, AJT has not established that it was prejudiced in view of the significant difference in overall price/cost between the two proposals.

The protester argues that, if the agency intended to use price as the ultimate discriminator in its selection decision, it was obligated to inform AJT, during discussions, that it considered the protester's price too high. Instead, the protester contends, the contracting officer misled it by urging it to increase its overhead rates. This, the protester claims, violated FAR § 15.306(d)(3), which requires a contracting officer to discuss, with each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal such as price that could be altered or explained to enhance materially the proposal's potential for award.

The record does not support AJT's allegations that the contracting officer urged AJT to raise its overhead rates. The agency's questions in this regard were based on the DCAA report, as noted above, and the protester's response, like QTSI's response to questions about its G&A rate, was that an anticipated greater volume of business would lower the rate by increasing the base upon which it was calculated. The agency accepted this explanation in both cases.

With respect to AJT's price overall, the agency notes that, given the protester's strategy, discussed above, of using its own personnel instead of partnering with a large business, AJT's costs appeared reasonable for the approach taken. In other words, the protester would essentially have had to rewrite its proposal to achieve any significant cost reduction. Contracting Officer's Statement at 5.

As noted above, the agency issued the solicitation here on August 18, 1999, after the January 1, 1998 effective date of the revised discussion rules of Part 15 of the FAR. Those revised rules, at § 15.306(e)(3), provide that "the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion." This language clearly gives the contracting officer discretion to inform the offeror that its cost/price is too high, but does not require that the contracting officer do so, especially where, as here, the agency does not consider the cost/price a significant weakness or deficiency that the offeror could alter or explain to enhance the

proposal's potential for award. See National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ ____ at 5. See also KBM Group, Inc., B-281919, B-281919.2, May 3, 1999, 2000 CPD ¶ ____ (agency did not mislead protester during discussions, even though award was ultimately made based on price and agency did not inform protester that its price was higher than awardee's price, where agency did not believe that protester's price was too high for the approach taken).

The protest is denied.

Comptroller General
of the United States