



Decision

Matter of: Brican Inc.

File: B-402602

Date: June 17, 2010

Brian Gibbons for the protester.

Neil J. Nulty, Esq., Department of Veterans Affairs, for the agency.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the agency evaluated the awardee's and the protester's proposals unequally by crediting the awardee for the experience and past performance of a specialty subcontractor, but not similarly crediting the protester, which proposed the same subcontractor.

DECISION

Brican, Inc., of Springfield, Massachusetts, protests the award of a contract to Legion Construction, Inc., of Chelmsford, Massachusetts, under request for proposals (RFP) No. VA-241-10-RP-0004, issued by the Department of Veterans Affairs (VA) for construction of a radiology imaging center at the VA Medical Center (VAMC) in White River Junction, Vermont.

We sustain the protest.

BACKGROUND

The RFP, issued as a service-disabled veteran-owned small business set-aside, sought proposals for construction services to expand and replace the VAMC's radiology imaging center, including a room for Magnetic Resonance Imaging (MRI). See RFP at 1, 16. The RFP provided for award on a price/technical tradeoff basis, without conducting discussions, under the following evaluation factors: past performance, management approach, and price. Id. at 16-17. The past performance and management approach factors were stated to have equal weight, and when combined, to be more important than price. Id.

With respect to the past performance factor, the RFP provided for the evaluation of both experience and past performance. In this regard, the RFP provided that the offeror must have at least three projects completed within the last 3 years demonstrating experience with imaging center construction, and that these three projects must involve renovations or new construction of similar size, scope, and complexity. Id. at 19. Offerors were also informed that the agency would consider the experience and past performance of subcontractors performing major or critical aspects of the requirement. See id. at 21. The RFP encouraged offerors to have former clients submit a questionnaire for each project directly to the agency by the date and time set for receipt of proposals. See id. at 18-19, 95. The RFP provided that the agency would assess the probability of an offeror's successful accomplishment of the work. Id. at 20.

The VA received eight proposals, including Brican's and Legion's, which were evaluated by the agency's source selection evaluation board (SSEB). Brican's proposal identified 14 completed or ongoing projects. See Protester's Proposal, Vol. I, at 15-24. Brican's proposal also included a proposal and technical specifications from a specialized subcontractor to provide and install copper shielding for the radiology rooms. See id. at 25-40. Legion's proposal identified 11 completed or ongoing projects, including one completed and one on-going project involving construction of MRI suites at other VAMCs. See Awardee's Proposal, Vol. I, at 8-10. Although Legion did not identify or propose to use a shielding subcontractor in its proposal, its descriptions of the two imaging center construction projects provided for the past performance evaluation reveal that Legion used the same shielding subcontractor that Brican proposed here. Id. at 9-10, 65-66; Protester's Proposal, Vol. II, at 25.

The SSEB rated Brican's proposal under the past performance factor as unacceptable with moderate overall risk, because Brican did not have at least three projects of similar size, scope, and complexity involving image center construction. See Agency Report (AR), Tab D, SSEB Report and Selection Decision, at 6. With regard to experience, the SSEB noted that, although Brican identified one project of similar size, the project did not involve construction of an MRI room. See id. With regard to past performance, the SSEB noted that the agency had received only two past performance questionnaires on behalf of Brican, which cited "very good to excellent" client satisfaction. Nonetheless, the SSEB concluded that these projects were not relevant to the project at issue here because they were of much smaller size and scope. Id. The SSEB also noted that Brican's proposal included copies of its subcontractors' proposals. Id. Despite rating Brican's proposal as unacceptable under the past performance factor,¹ the SSEB assigned an overall "green/average

¹ The SSEB report indicates that the SSEB may not have evaluated proposals in accordance with the RFP's evaluation factors. The RFP provided that proposals would be evaluated on the basis of three factors: past performance, management

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risk” rating to the protester’s proposal. Id. Brican’s proposed price of \$4,625,830 was found reasonable and realistic by the SSEB. Id.

The SSEB rated Legion’s proposal under the past performance factor as overall acceptable with moderate risk. See id. at 7. With regard to experience, the SSEB found that Legion had demonstrated specialized experience involving construction of MRI and radiology rooms. Id. Specifically, the board found that Legion had provided five projects of similar size, scope and complexity, and “all of the projects were of the specialized work as required by the solicitation.”² Id. With regard to past performance, the SSEB found that Legion “provided questionnaires for these relevant projects and the satisfaction level is very good to excellent.” Id. The SSEB also noted that Legion did not provide proposals or quotations from subcontractors. See id. Legion’s proposal received an overall “blue/very low risk” rating. Id. In addition, the SSEB found Legion’s price of \$4,774,700 to be reasonable and realistic.

The source selection authority (SSA) considered the proposals of the four offerors, including Legion and Brican, whose proposals were judged not to pose an unacceptable risk to the government. See id. at 8. The SSA determined that Legion’s higher-rated proposal provided the best value to the government, outweighing the price advantage of Brican’s lower-priced proposal. In deciding that Legion’s proposal was the highest rated, the SSA noted that Legion’s proposal was the only one with specific MRI and radiology construction experience.

Award was made to Legion, and, following a debriefing, Brican protested to our Office. VA has stayed performance of the contract pending our decision resolving the protest.

DISCUSSION

Brican protests that, contrary to the solicitation, the agency did not consider the experience of its subcontractor that would perform the specialized shielding for the radiology rooms. In this regard, Brican contends that the main difference between general clinic construction and the imaging center construction here is the shielding of the radiology rooms, which Brican asserts is specialized work that a general contractor would not itself perform. See Comments at 2.

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approach, and price. RFP at 16-17. Although the SSEB report recognizes this evaluation scheme at the outset, elsewhere the report states that “proposals were evaluated for the following two factors”—past performance and price. See SSEB Report and Selection Decision at 1, 5.

² As discussed below, the record shows, contrary to the SSEB’s finding, that the awardee’s proposal only identified two imaging center construction projects and that only one of those projects was completed at the time of award.

It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. CRAssociates, Inc., B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63 at 5. In reviewing protests against allegedly improper evaluations, our Office examines the record to determine whether the agency's judgment was reasonable, in accord with the evaluation factors set forth in the RFP, and whether the agency treated offerors equally in its evaluation of their respective proposals and did not disparately evaluate proposals with respect to the same requirements. Marinette Marine Corp., B-400697, et al., Jan. 12, 2009, 2009 CPD ¶ 16 at 11.

Here, the record shows that the VA did not reasonably evaluate Brican's proposal in accordance with the RFP's requirements and evaluation factors. As noted above, the SSEB and the SSA determined that Brican did not have any specialized imaging center construction experience. See, e.g., SSEB Report and Selection Decision, at 6, 8. In fact, the SSA specifically noted in his tradeoff analysis that Legion was the only offeror with specific imaging center construction experience. See id. at 8. Brican, however, proposed an experienced subcontractor to perform the specialized shielding of the radiology rooms. See Protester's Proposal, Vol. II, at 25. The record shows that this same subcontractor was identified in the awardee's proposal as the specialty subcontractor that the awardee had used in two imaging center construction projects for the VA, for which the agency credited the awardee's proposal. Awardee's Proposal, Vol. I, at 9, 65-66. Although the RFP specifically provided for consideration of the past performance/experience of major subcontractors, there is no evidence in the contemporaneous record that the agency considered the past performance/experience of Brican's shielding contractor. In this regard, VA has not addressed or rebutted Brican's arguments that the difference between general construction services and imaging center construction services is attributable to the construction and installation of radiology shielding, which is generally done by a specialty subcontractor.

Moreover, the record establishes that the VA did not reasonably evaluate Legion's proposal under the past performance factor. The SSEB concluded that Legion had completed five projects of similar size, scope and complexity involving imaging center construction services. See SSEB Report and Selection Decision, at 7. Legion's proposal, however, only identified two specific projects involving imaging center construction and only one of those projects was completed at the time of award.³ See Awardee's Proposal, Vol. I, at 9, 65-66. Thus, the record shows Legion did not satisfy the RFP requirement for three completed imaging center construction

³ As noted above, Legion used the same shielding subcontractor on both of these projects as was proposed by Brican. Legion's proposal here, however, did not propose or identify a shielding subcontractor it would use in performance of the contract.

projects, and there is no evidence in the contemporaneous record that either the SSEB or SSA recognized that Legion had not satisfied this requirement. Nor does the record show that the agency recognized that Legion had used the same subcontractor that Brican proposed to perform the critical shielding construction.

In sum, we conclude that the VA did not reasonably evaluate Brican's and Legion's proposals and did not treat the two offerors equally, and we sustain Brican's protest. Ahtna Support & Training Servs., LLC, B-400947.2, May 15, 2009, 2009 CPD ¶ 119 at 7 (protest sustained where agency treated offerors differently under past performance factor by failing to consider protester's subcontractor); see also Meridian Mgmt. Corp.; Johnson Controls World Servs., Inc., B-281287.10; B-281287.11, Feb. 8, 2000, 2001 CPD ¶ 5 at 8 n. 5 (selective application of staffing evaluation is evidence of unequal treatment); U.S. Prop. Mgmt. Serv. Corp., B-278727, Mar. 6, 1998, 98-1 CPD ¶ 88 at 6 (protest sustained where agency emphasized protester's lack of corporate experience, but disregarded similar lack of experience for the awardee by substituting experience of the awardee's key personnel).

We recommend that the VA reevaluate proposals, make a new selection decision, and if a proposal of an offeror other than Legion is selected for award, terminate Legion's contract and make award to that other offeror. Also, given that no offeror appears to have satisfied the RFP's requirement for three completed imaging center construction projects, the agency may wish to consider amending the solicitation and obtaining revised proposals. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2010). The protester's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Lynn H. Gibson
Acting General Counsel