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United States Government Accountability Office
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Decision

Matter of: The Ross Group Construction Corporation

File: B-405180.2

Date: November 28, 2011

Henry E. Steck, Esq., Harrison Steck, P.C., for the protester.

Johnathan M. Bailey, Esq., Bailey & Bailey, P.C., for Blackhawk Ventures, LLC, an intervenor.

Martin Chu, Esq., and Charles L. Webster, Esq., Department of the Army, Corps of Engineers, for the agency.

Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency had no reasonable basis for its selection of awardee's higher-priced proposal is sustained where the source selection decision was based on the awardee's evaluated superiority for past performance, even though the awardee's proposal failed to comply with the solicitation's stated requirements under the past performance factor.

DECISION

The Ross Group Construction Corporation, of Tulsa, Oklahoma, protests the Department of the Army, Corps of Engineers' award of a task order to Blackhawk Ventures, LLC, under request for proposals (RFP) W9126G-11-R-0004 for the construction of a battle command training center at Fort Sam Houston, Texas.¹ Ross protests, among other things, that the agency unreasonably justified the selection of Blackhawk's higher-priced proposal based on Blackhawk's evaluated past

¹ The solicitation was issued to holders of a small business multiple award task order contract (MATOC), including Ross and Blackhawk. While we recognize that the solicitation here was, in actuality, a request for task order proposals, we are adopting the language of the agency in referring to the "RFP," "offerors," and "proposals."

performance superiority, even though Blackhawk's proposal failed to demonstrate compliance with the solicitation's past performance requirements.

We sustain the protest.

BACKGROUND

The solicitation was issued in November 2010 and provided for award of a fixed-price design-bid-build contract to construct a battle command training center (BCTC) at Fort Sam Houston, Texas. Agency Report, Tab 7, RFP § 00-22-11, at 2. The solicitation contemplated award on a best value basis, provided that price was of equal importance to all technical factors combined, and established the following technical evaluation factors, listed in descending order of importance:²

(1) construction past performance; (2) corporate relevant specialized experience; (3) management effectiveness; and (4) construction duration. *Id.* at 13-14.

Of relevance to this protest, with regard to past performance, the solicitation stated:

3.1 FACTOR 1: CONSTRUCTION PAST PERFORMANCE. . . .

Offerors shall submit projects that are at least \$5 Million dollars and/or greater than 25,000 square feet. Projects shall be the same or similar in nature to the project requirements solicited under this RFP. Projects similar include other Battle Command Training Centers, office buildings with extensive telecom, other types of training centers, schools, and other facilities with higher technology. . . .

3.1.1.1 Project Information Worksheets. Offerors shall provide project information on at least 3 . . . projects . . . that reflect prior past performance in the construction elements referenced in paragraph 3.1 above. The examples should be similar to this solicitation in project type and scope. As stated above, similar projects are considered at least \$5 Million dollars and/or greater than 25,000 square feet.

Id. at 5.

On or before the December 17, 2010 closing date, proposals were submitted by six offerors, including Ross and Blackhawk. Thereafter, the agency evaluated the proposals, conducted discussions with the offerors, requested and received revised proposals, and evaluated the revised proposals. Based on that evaluation, Blackhawk's proposal was selected for award. Thereafter, Ross requested and received a debriefing. At that debriefing, Ross learned that its proposal had been

² The second and third factors, corporate relevant specialized experience and management effectiveness, were of equal importance.

rated as “neutral/unknown risk” under the past performance factor—even though the agency’s evaluation documentation expressly acknowledged that Ross’ proposal provided information on five prior projects, that all five projects met the solicitation’s past performance requirements regarding “\$5 Million dollars and/or greater than 25,000 square feet,” and that three of the projects were similar to the BCTC “with telecom and higher technology.” AR, Tab 2, Contracting Officer’s Statement, at 2. On June 8, 2011, Ross filed a protest with this Office.

By letter to this Office dated June 23, the agency stated that it was taking corrective action in response to Ross’ protest, elaborating that it intended to “revise Ross Group’s evaluation and reconsider the Best Value trade-off analysis.” Letter from Army to GAO, June 23, 2011, at 1. We dismissed that protest based on the agency’s pending corrective action. The Ross Group Construction Corp., B-405180, June 29, 2011.

The agency’s reevaluation of Ross’ proposal resulted in a rating of “good, risk low” under the past performance evaluation factor. AR, Tab 16, Revised Ross Evaluation. Blackhawk’s proposal also received a rating of “good, risk low” under the past performance evaluation factor. AR, Tab 15, Revised Blackhawk Evaluation. Blackhawk’s proposal offered a price of \$13,749,100; Ross’ proposal offered a price of \$13,549,700. Thereafter, the SSA again selected the higher-priced Blackhawk proposal for award stating, among other things, that:

Blackhawk . . . and Ross Group have a “good, low risk” rating for Factor 1 [past performance]. Though the adjectival description is the same, I determine after comparison of the particular strengths of each proposal that Blackhawk is the lowest risk. . . . In particular, this is because Blackhawk received [deleted]. While Ross Group . . . ha[s] a lower price than Blackhawk, I determine that the [deleted] justifies the extra \$200,000.

AR, Tab 14, Revised Source Selection Decision, at 4.

On August 22, the agency again notified Ross of Blackhawk’s selection. This protest followed.

DISCUSSION

Ross’ protest challenges various aspects of the agency’s source selection decision. Following the agency’s submission of a report responding the protest, Ross further asserts that Blackhawk’s proposal failed to comply with the solicitation requirements regarding past performance. We agree.

The evaluation of proposals, including the evaluation of past performance, is a matter largely within the contracting agency’s discretion. DRA Software Training, B-289128, B-289128.2, Dec. 13, 2001, 2002 CPD ¶ 11 at 2. In reviewing a protest

against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. While we will not substitute our judgment for that of the agency, we will sustain a protest where the the agency's conclusions are inconsistent with the solicitation criteria, undocumented, or not reasonably based. See Sonetronics, Inc., B-289459.2, Mar. 18, 2002, 2002 CPD ¶ 48 at 3.

Here, as discussed above, the solicitation provided that, for purposes of evaluation under the past performance factor, each offeror must submit information on "at least 3" prior projects of "at least \$5 Million dollars and/or 25,000 square feet." Agency Report, Tab 7, RFP § 00-22-11, at 5. The record shows that, in responding to this requirement, Blackhawk submitted information regarding 5 prior projects. However, the record further shows that, with regard to four of the five projects, Blackhawk's proposal failed to demonstrate compliance with the requirements regarding the magnitude of the effort that it performed.

Specifically, two of the five projects submitted with Blackhawk's proposal reflect contracts that were awarded to another firm--[deleted]. Yet, the record is devoid of any information regarding what portion of those projects--either in terms of dollar value or square footage--that Blackhawk performed. Indeed, Blackhawk is not mentioned in the information regarding these projects. Second Supp. Agency Document Production, (submitted on Nov. 14, 2011), BlackHawk Final Revised Proposal, at Revised 4-4b. Accordingly, the record provides no basis for the agency to conclude that either of these projects warranted consideration in evaluating Blackhawk's proposal under the past performance factor.

Further, Blackhawk's proposal expressly acknowledges that one of the three remaining projects submitted for consideration had a value of only [deleted] and involved only [deleted] square feet. First Supp. Agency Document Production (submitted on Sept. 30, 2011), Blackhawk Proposal, at 1. Finally, the record shows that the fourth project Blackhawk submitted for consideration had a value of [deleted]--an amount slightly below the threshold established by the solicitation.³ Second Supp. Agency Document Production (submitted on Nov. 14, 2011),

³ The information submitted by Blackhawk for this project also states that it was for [deleted]. Second Supp. Agency Document Production (submitted on Nov. 14, 2011), Blackhawk Final Revised Proposal, at Revised 3. However, the information provided further makes clear that the project did not involve renovation of the entire building, and it provides no information regarding the amount of renovation that was actually performed. Thus, there is no way to determine from the record if this project involved renovation of at least 25,000 square feet, as required by the solicitation.

Blackhawk Final Revised Proposal, at Revised 3. Accordingly, the record provides no basis for the agency to conclude that either of these projects warranted consideration in the evaluation of Blackhawk's proposal under the past performance factor.⁴

In summary, only one of the 5 past performance projects submitted by Blackhawk complied with the solicitation's specific requirements for consideration under the past performance evaluation factor. Nonetheless, in justifying the selection of Blackhawk's higher-priced proposal, the SSA expressly referenced the alleged superiority of Blackhawk's past performance. Since Blackhawk's proposal failed to comply with the solicitation requirements regarding demonstrated past performance of at least 3 projects involving at least \$5 million or 25,000 square feet, it was unreasonable for the agency to rely on Blackhawk's purportedly superior past performance in selecting that higher-priced proposal.

The protest is sustained.

RECOMMENDATION

Based on our review of the record, it appears the agency may believe the solicitation's past performance requirements do not reflect its minimum needs. Accordingly, we recommend that the agency consider its needs and, if appropriate, amend the solicitation. In the event the solicitation is amended, the procurement should be re-opened to permit all offerors to compete against the agency's actual requirements. Alternatively, if the agency concludes that the terms of the solicitation accurately reflect its minimum needs, the evaluation of Blackhawk's proposal should be revised to reflect its failure to comply with the stated past performance requirements, and a new source selection decision should be made. We also recommend that the protester be reimbursed the reasonable costs of filings and pursuing its protest. 4 C.F.R. § 21.8(d)(1) (2011). The protester should file its certified claim for costs, detailing the time expended and the costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Lynn H. Gibson
General Counsel

⁴ The fifth past performance project submitted by Blackhawk for consideration reflected work that Blackhawk had performed with a value of [deleted], slightly over the requisite threshold for consideration.