



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: EcoAnalysts, Inc.

File: B-406233; B-406233.2; B-406233.3

Date: March 19, 2012

Holly A. Roth, Esq., Michael Bhargava, Esq., and Diana Kwok, Esq., Manatt, Phelps & Phillips, LLP, for the protester.

Joseph J. Petrillo, Esq., and Karen D. Powell, Esq., Petrillo & Powell, P.L.L.C., for EnviroScience, Inc., the intervenor.

Jeffrey M. Herrema, Esq., Environmental Protection Agency, and John W. Klein, Esq., and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester's proposal, on its face, indicated that it would not comply with subcontracting limitation included in the solicitation, which required that at least 50 percent of the cost of contract performance incurred for personnel be expended for employees of the offeror, the agency properly rejected the proposal as unacceptable.

DECISION

EcoAnalysts, Inc., of Moscow, Idaho, protests the rejection of its proposal and the award of contracts to EnviroScience, Inc., of Stow, Ohio, and PG Environmental, LLC, of Herndon, Virginia, under request for proposals (RFP) No. SOL-CI-11-0023, issued by the United States Environmental Protection Agency (EPA), for technical support services.

We deny the protest.

The RFP, issued on May 31, 2011 as a total small business set-aside, sought to procure technical support services to support the EPA Office of Water on National Aquatic Resource Surveys. These services include research and planning, field sampling-related activities, sampling logistics, laboratory analyses, analytical techniques and modeling, and reporting. The solicitation contemplated the award of multiple indefinite-delivery/indefinite-quantity (ID/IQ) task order contracts. Task

orders could be issued under the ID/IQ contracts on either a fixed-price or cost-plus-fixed-fee basis.

The RFP incorporated by reference the "Limitation on Subcontracting" clause set forth at Federal Acquisition Regulation (FAR) § 52.219-14. RFP at 43. As relevant here, with respect to the limitation on subcontracting for services, this clause requires that "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern." FAR § 52.219-14(c)(1).

Award was to be made on a best-value basis, considering five evaluation factors: (1) adequacy of past performance, (2) adequacy of quality assurance, (3) demonstrated technical approach, (4) adequacy of facilities and equipment, and (5) demonstrated qualifications of project manager. The combined weight of the non-price/cost factors was significantly more important than cost/price. Cost/price was not separately weighted but the RFP provided for a cost analysis, a price analysis, and a realism analysis.

Four offerors submitted proposals in response to the RFP by the June 30 closing date, including EcoAnalysts, EnviroScience, and PG. Based on the evaluation of technical and cost proposals, the two most highly rated offerors were EcoAnalysts and EnviroScience. However, during the cost evaluation, the cost auditor found that neither EcoAnalysts nor EnviroScience had held cost contracts with the government, had accounting systems which had been approved by a government agency, or addressed in their proposals the adequacy of their accounting systems as it related to accounting for costs under cost-type contracts. Because of the auditor's findings, the contracting officer stated that she was unable to determine these firms had adequate accounting controls to support a cost contract, as required by FAR § 9.104-1(e), and found both offerors to be non-responsible. Agency Report (AR), Tab H, Non-responsibility Determination, at 1-2. Following the non-responsibility determinations, on September 13, the contracting officer referred the matters to the Small Business Administration (SBA) to be considered under the SBA's Certificate of Competency (COC) process. AR, Tab J.2, COC Request, at 2.

On October 7, the SBA declined to issue EcoAnalysts a COC.¹ The SBA determined that, based on the evidence that EcoAnalysts provided, the firm did not demonstrate that it has the ability to implement the cost accounting system required of a cost-type contract. Further, the SBA concluded that it appeared that EcoAnalysts was unable to meet the requirements imposed by the RFP's limitation on subcontracting clause, and expressed concern with respect to EcoAnalyst's relationship with its large business subcontractor, [DELETED]. AR, Tab M.2, SBA Letter to EPA, at 1; Tab M.3, SBA Letter to EcoAnalysts at 1.

¹ The SBA did issue a COC determining that EnviroScience was responsible.

EcoAnalysts requested permission to provide further information to the contracting officer pertaining to its responsibility, which the contracting officer permitted. AR, Tab S1, Contracting Officer's Reconsideration of Non-Responsibility Determination, at 2. On November 22, EcoAnalysts offered, among other things, the following additional information regarding its proposal's noncompliance with the RFP's limitation on subcontracting clause:

The SBA's letter informing EcoAnalysts of its denial to issue COC notes that EcoAnalysts' original proposal to EPA suggests we would not be able to meet the subcontracting limitations for small business set aside contracts under [FAR §] 52.214-19. EcoAnalysts is fully capable of meeting the subcontracting limitations by performing the majority of labor on a cost basis. When EcoAnalysts prepared the cost proposal for submittal to EPA using the cost exercise template provided, we allocated [DELETED] of the total direct labor hours to EcoAnalysts, [DELETED] (subcontractor), and [DELETED] (subcontractor) with the intent of demonstrating that EcoAnalysts was responsible for the majority of the work (on an hours basis). However, SBA correctly pointed out that limits on subcontracting are based on cost, not hours, and because [DELETED] rates are on average higher than EcoAnalysts', EcoAnalysts inadvertently proposed to do less than 50% of the direct labor (on a cost basis). We stand corrected in our approach to labor allocations among our team and commit to allocating resources in a manner that ensures EcoAnalysts is responsible for a minimum of 51% of the direct labor costs.

AR, Tab R.2, EcoAnalysts Letter to EPA, at 1-2.

In response to the admission by EcoAnalysts that its proposal was noncompliant with the subcontracting limitation, the EPA's cost auditor again reviewed EcoAnalysts' proposal for compliance with the limitation on subcontracting requirement. For this purpose, the auditor properly utilized the SBA's regulations governing the requirement, which defines the "cost of contract performance incurred for personnel" as "[d]irect labor costs and any overhead which has only direct labor as its base, plus the concern's General and Administrative (G&A) rate multiplied by the labor cost. See AR, Tab A.3, Auditor's Statement (Dec. 19, 2011); 13 C.F.R. § 125.6(e)(2) (2011). The auditor found that EcoAnalysts' proposal indicated that the firm would only be incurring 46.47 percent of the costs of the contract for personnel with its own employees. AR, Tab A.3, Auditor's Statement (Dec. 19, 2011). Based on the auditor's findings, the contracting officer concluded that EcoAnalysts' proposal, as submitted, did not meet the limitation on subcontracting requirements, and was therefore technically unacceptable. See AR, Tab S.1, Contracting Officer's Reconsideration of Non-Responsibility Determination. On November 29, the agency eliminated EcoAnalysts' proposal from the competition

because of its noncompliance with the subcontracting limitation.² AR, Tab T, Contracting Officer Letter to EcoAnalysts, Nov. 29, 2011. On December 13, the EPA awarded contracts, without conducting discussions, to EnviroScience and PG.³ This protest by EcoAnalysts followed.

EcoAnalysts contends that the EPA's decision to reject its proposal as technically unacceptable on the basis that it did not meet the RFP's limitation on subcontracting requirement was unreasonable.⁴

As a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility for review by the SBA. See 13 C.F.R. § 125.6(f); Spectrum Sec. Servs., Inc., B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. However, our Office has consistently held that where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. Continental Staffing, Inc., B-299054, Jan. 29, 2007, 2007 CPD ¶ 18 at 6; KIRA Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3; National Med. Staffing, Inc.; PRS Consultants, Inc., B-238694, B-238694.2, June 4, 1990,

² The contracting officer also determined EcoAnalyst still had not shown that it had an adequate accounting system and was thus still considered non-responsible. AR, Tab S.2, Supplement to Contracting Officer's Reconsideration of Non-Responsibility Determination (Jan. 5, 2012).

³ While EcoAnalysts argues that in executing its contract with PG, the agency conducted discussions with PG by allowing the firm to change its ceiling rates, the record does not support this contention. As explained by the agency, the contracting officer inadvertently incorporated all three of PG's proposed indirect rates as ceiling rates in the initial "G-4 Indirect Costs Clause," rather than the one rate proposed by PG. The record reflects that the contracting officer merely corrected her mistake to conform to PG's proposal, by revising the information in this clause. See Supp. AR (Feb. 3, 2012) at 1-2. In any event, the record does not demonstrate, nor has EcoAnalysts shown, that PG's proposal was otherwise technically unacceptable, as was the case with EcoAnalysts' proposal as submitted.

⁴ EcoAnalysts also protests the EPA's initial determination that EcoAnalysts was non-responsible, the referral of the matter to the SBA, the SBA's decision not to issue a COC, and the agency's ultimate determination that EcoAnalysts was non-responsible because it did not show that it had an adequate accounting system for a cost contract. We do not consider these issues, and the numerous variants of them, because, for the reasons set out below, we find that the EPA properly eliminated EcoAnalysts' proposal as technically unacceptable for its noncompliance with the subcontracting limitation.

90-1 CPD ¶ 530 at 4. In this regard, a proposal that fails to conform to a material term or condition of the solicitation, such as the subcontracting limitation, is unacceptable and may not form the basis for an award. TYBRIN Corp., B 298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

Here, the agency reasonably found, and our review confirms that, EcoAnalysts' proposal included only 46.5 percent of the firm's personnel cost in its direct labor base. EcoAnalysts admitted to the EPA that it proposed to incur less than 50 percent of the direct labor, and in its protest, EcoAnalysts acknowledges that its proposal reflected that its share of the direct labor costs incurred for personnel was only 46.5 percent, which is less than required to comply with the limitation on subcontracting requirement. See AR, Tab R.2, EcoAnalysts Letter to EPA, at 1-2; Protest at 17 n.4.

EcoAnalysts nevertheless argues that it was unreasonable for the EPA to conclude that EcoAnalysts "could not and would not comply with the subcontracting limitation" and reject its proposal, given EcoAnalysts' assurances to the EPA in its November 22 letter (and previously to the SBA) that EcoAnalysts would comply with the subcontracting limitation requirements. EcoAnalysts also argues that in determining that the firm would not incur at least 50 percent of the costs of personnel, the EPA and the SBA unreasonably ignored the bulk of the personnel costs for laboratory services to be performed under the contract by EcoAnalysts personnel, which were included in its cost proposal as other direct costs (ODC).

As noted above, for purposes of complying with the subcontracting limitation requirement, the applicable regulation requires the cost incurred for personnel to be based on direct labor costs and any overhead which has only direct labor as its base, plus the concern's G&A rate multiplied by the labor costs. 13 C.F.R. § 125.6(e)(2). This definition does not appear to include the consideration of labor costs embedded in ODCs. The ODCs here are for laboratory services and were a plug number (\$22,050,000) included in all offerors' cost proposals. The ODC plug number accounts for such elements as labor, equipment, supplies, materials, and other non-labor costs. In any case, EcoAnalysts provided no information in its proposal as to the personnel costs for its own employees for the laboratory services that would allow the agency to consider them in determining whether that firm would satisfy the subcontracting limitation. Thus, the agency reasonably disregarded the ODCs in determining EcoAnalyst's compliance with the subcontracting limitation. See Addx Corp., B-404888, May 4, 2011, 2011 CPD ¶ 89 at 4 (for purposes of determining compliance with subcontracting limitation the agency should rely upon the contents of the proposal).

Although EcoAnalysts offered to, and states that it could, comply with the requirement, the proposal was reasonably found to be technically unacceptable as submitted. EcoAnalysts' offers to comply with the subcontracting limitation do not render acceptable a proposal that is noncompliant on its face. TYBRIN Corp.,

supra, at 5-6. To make EcoAnalysts' proposal acceptable would have required the EPA to conduct discussions and allow EcoAnalysts to revise its cost proposal. However, the agency was not obligated to conduct discussions with EcoAnalysts for this purpose, where, as here, the agency made award without discussions to other offerors with technically acceptable proposals. See Orincon Corp., B-276704, July 18, 1997, 97-2 CPD ¶ 26 at 4-6.

The protest is denied.

Lynn H. Gibson
General Counsel