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Decision

Matter of: Ma-Chis Kawv V, LLC

File: B-409344

Date: March 20, 2014

John P. Ahlers, Esq., and Lindsay K. Taft, Esq., Ahlers & Cressman PLLC, for the protester.

Alan I. Saltman, Esq., and Stephen J. Kelleher, Esq., Smith, Currie & Hancock LLP, for SBH Services & CORE Construction JV II, the intervenor.

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Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's evaluation of the protester's past performance is denied where the record shows the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Ma-Chis Kawv V, LLC, of Paducah, Kentucky, protests the award of a contract to SBH Services & CORE Construction JV II, of Gallatin, Tennessee, under request for proposals (RFP) No. W912QR-13-R-0037, issued by the Department of the Army, Corps of Engineers, for construction of a school.¹ Ma-Chis challenges the agency's evaluation of its past performance and selection decision.

We deny the protest.

¹ Ma-Chis Kawv V, LLC is a Small Business Administration-approved mentor-protégé joint venture, consisting of Ma-Chis Lower Creek Indian Tribe Enterprises, Inc. and Vanguard Contractors, LLC.

BACKGROUND

The RFP, issued as a competitive section 8(a) small business set-aside, provided for the award of a fixed-price contract for the construction of an elementary school at Fort Campbell, Kentucky. Offerors were informed that award would be made on a best-value basis considering the following factors: past performance, technical, and price. The solicitation stated that past performance was more important than the technical factor, and that these two factors combined were significantly more important than price. RFP amend. 1, at 11.

Subfactors were identified for the past performance and technical factors. With respect to past performance, the RFP stated the following two equally-weighted subfactors: prime contractor experience and prime contractor past performance. Id. at 10-11. Offerors were informed that the agency would assess prime contractor experience as very relevant, relevant, somewhat relevant, or not relevant,² and assess prime contractor past performance as substantial, satisfactory, limited, no confidence, or unknown confidence (neutral).³ Id. at 8-9. The RFP instructed offerors to describe up to 5 projects performed by the prime contractor that were similar in size and scope of work. In this regard, the RFP stated:

For purposes of evaluating Prime Contractor Past Performance, the Prime Contractor is defined as the contractor identified in Block 14 of the Standard Form 1442. If more than one contractor is listed in Block 14, then a signed joint venture must be submitted with the proposal Projects performed by other contractors than the offeror, such as teaming partners or subcontractors, will not be evaluated as prime contractor experience or prime contractor past performance, unless those other contractors are part of a joint venture offeror as demonstrated by a signed joint venture agreement.

² Very relevant experience was defined as an effort that involved essentially the same scope and magnitude of effort and complexities as this RFP. Relevant experience was defined as an effort that involved similar scope and magnitude of effort and complexities. Somewhat relevant experience was an effort involving some of the scope and magnitude of effort and complexities, and not relevant experience was an effort that involved little or none of the scope and magnitude of effort and complexities. RFP amend. 1, at 8.

³ Substantial confidence reflected a high expectation of successful performance, satisfactory confidence reflected a reasonable expectation of successful performance, limited confidence reflected a low expectation, no confidence reflected no expectation, and unknown confidence reflected a record that was so sparse no meaningful rating could be given. RFP amend. 1, at 8-9.

Id. at 11.

With respect to the technical factor, the RFP identified the following two subfactors, in descending order of importance: management (management plan and schedule) and safety (safety initiatives and safety performance record). Id. at 8.

As relevant here, the RFP also identified a target ceiling price. Specifically, the RFP advised that

[t]he target ceiling for contract award is \$35,750,000 based on funds made available for this project. The Government cannot guarantee that additional funds can be made available for award. Offerors are under no obligation to approach this ceiling.

Id. at 6.

The agency received proposals from nine firms, including Ma-Chis and SBH, which were evaluated by the agency's source selection evaluation board (SSEB). The SSEB found that Ma-Chis had not identified any relevant past performance projects that were performed by either of the two joint venturers. Specifically, the SSEB found that Ma-Chis had identified five projects for its past performance and experience, but all five projects were performed by Vanguard's parent company, Absher Construction Company. See Agency Report (AR), Tab 16, Summary Evaluation Report, at 13-14.

The agency decided to conduct discussions and included the proposals of seven offerors, including Ma-Chis, in the competitive range. AR, Tab 9, Competitive Range Determination. Ma-Chis was informed, among other things, that its submitted projects could not be considered because they were performed by a company that was not a member of the Ma-Chis's approved mentor-protégé joint venture. AR, Tab 10, Discussions Letter, at 1. Ma-Chis was also informed that its total price (base plus options) exceeded the RFP's target ceiling, and that "[a]dditional funds cannot be guaranteed and an award cannot be made to an offer that exceeds funding limitations." Id. at 2.

Ma-Chis acknowledged in response to discussions that Absher Construction was "not a signatory to the Mentor-Protégé Agreement" Protest, exh. B, Ma-Chis Discussion Letter to Agency, at 1. Ma-Chis nevertheless did not identify other past performance projects but stated that the Corps should consider the projects performed by Absher Construction because that firm would be providing significant resources. Id. at 1-2. Ma-Chis also lowered its proposed total price, but stated "that our revised base bid is still in excess of the contract target ceiling price." Id. at 3.

The agency conducted a second round of discussions. The agency again informed Ma-Chis that its submitted projects could not be considered because Absher

Construction was not a member of the joint venture and that its revised total base and option price exceeded the target ceiling price. AR, Tab 14, Discussions Letter, at 1. The agency repeated its statement that “[a]dditional funds cannot be guaranteed and an award cannot be made to an offer that exceeds funding limitations.” Id.

Ma-Chis responded to the agency’s concerns about its past performance projects by pointing the agency to its response in the first round of discussions. Protest, exh. D, Ma-Chis Discussion Letter to Agency, at 1. Ma-Chis also lowered its proposed base price to below the RFP’s target ceiling price, but its total base and option price exceeded the ceiling. Id. at 2.

Ma-Chis and SBH’s final revised proposals were evaluated as follows:

		Ma-Chis	SBH
Past Performance			
	Prime contractor experience	Not Relevant	Very Relevant
	Prime contractor past performance	Unknown	Substantial
Technical		Good	Acceptable
Total Price (Base plus Options)		\$39,454,979	\$41,631,715

AR, Tab 17, Source Selection Decision (SSD), at 2-3.

The contracting officer, who was the source selection authority, reviewed the evaluation results and concluded that SBH’s proposal reflected the best value to the agency. The contracting officer recognized the protester’s lower price and higher technical factor rating (good as compared to the awardee’s acceptable rating)--and in particular recognized the protester’s “qualitative advantage with the management plan.” Nevertheless, the contracting officer decided that SBH’s “significant advantage” over Ma-Chis under the most important past performance factor outweighed the protester’s higher technical rating and lower price. AR, Tab 17, SSD, at 5.

Award was made to SBH, and this protest followed a debriefing.

DISCUSSION

Ma-Chis challenges the evaluation of its past performance, complaining that the Corps unreasonably did not consider the projects performed by Absher Construction (the parent company of one of the Ma-Chis joint venturers).⁴ Ma-Chis contends that

⁴ Ma-Chis does not challenge the evaluation of its proposal under the technical factor, or the agency’s consideration of the merits of its proposal under this factor.

the RFP's restriction to the consideration of past performance projects performed by only the identified prime contractor does not apply to projects submitted by parent companies. Ma-Chis also argues that the RFP is ambiguous with respect to consideration of affiliated parent companies.⁵ We disagree.

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. See, e.g., Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4.⁶ 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. See, e.g., Hot Shot Express, Inc., B-290482, Aug. 2, 2002, 2002 CPD ¶ 139 at 3; Physician Corp. of Am., B-270698 et al., Apr. 10, 1996, 96-1 CPD ¶ 198 at 13; Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc. and O & G Indus. Inc., A Joint Venture, B-255756, Mar. 29, 1994, 94-1 CPD ¶ 223 at 5; Fluor Daniel, Inc., B-262051, B-262051.2, Nov. 21, 1995, 95-2 CPD ¶ 241 at 12.

Here, the solicitation specifically informed offerors that "[p]rojects performed by other contractors than the offeror, such as teaming partners or subcontractors, will not be evaluated as prime contractor experience or prime contractor past performance, unless those other contractors are part of a joint venture offeror as demonstrated by a signed joint venture agreement." RFP amend. 1, at 11. We do not agree with Ma-Chis that the solicitation only prohibited consideration of the past performance of "teaming partners or subcontractors." Teaming partners and subcontractors were only identified as examples of "other companies," whose past performance could not be considered in lieu of the prime contractor's. There is nothing in the solicitation indicating that the RFP's reference to "other contractors" would not include parent companies. Rather, the RFP unambiguously informed offerors that the agency would consider the past performance and experience of the identified prime contractor and, where the prime contractor was a joint venture, the past performance and experience of the joint venturers where a signed joint venture agreement was provided.

⁵ The protester also generally complains that the contracting officer in her selection decision failed to compare the parties' proposals or consider the protester's low price. See Protester's Comments at 9. There is no merit to this contention as the contracting officer's selection decision specifically recognized the protester's lower price and compared the relative merit of the two firms' proposals. See AR, Tab 17, SSD, at 3-5.

⁶ One prerequisite for such consideration is a demonstration in the proposal that the resources of the parent or affiliate will affect contract performance.

The protester's proposal identified the Ma-Chis joint venture as the prime contractor, see AR, Tab 18, Ma-Chis Standard Form 1442, at 2, and the protester does not contend that Absher Construction was a member of the joint venture. Because Absher Construction is not an offeror, or a member of the joint venture that submitted the offer, the agency properly did not consider the past performance and experience attributable to that firm.⁷ See Doyon-American Mech., JV; NAJV, LLC, B-310003, B-310003.2, Nov. 15, 2007, 2008 CPD ¶ 50 (an agency may not rely upon the past performance of the awardee's parent and affiliated companies, where the solicitation limited consideration of past performance to that of the prime contractor and primary teaming partners).

The protester also complains that SBH's contract was awarded at a price higher than the target ceiling amount, where Ma-Chis was directed to "submit a price lower than the ceiling amount" and informed that award could not be made to an offer that exceeds available funding. Protester's Comments at 8. Ma-Chis contends that the agency improperly "relax[ed] the requirements" for the awardee. Id. The agency responds that the RFP's target ceiling was based upon the anticipated available funds and that in discussions the agency merely warned the protester that "an award cannot be made to an offer that exceeds funding limitations." See AR, Tab 10, Discussions Letter, at 2. The Corps points out that the target ceiling may increase as additional funds are made available. See AR at 6.

Here, the record shows that both the protester's and awardee's final total price (i.e., base and option prices) exceeded the RFP's identified target ceiling. This indicates that Ma-Chis understood, contrary to its contention now, that the target ceiling price was not a solicitation requirement, but a warning that funds at the time of award may not be available beyond the ceiling. See The Austin Co., B-291482, Jan. 7, 2003, 2003 CPD ¶ 41 at 7 n.11. The record also shows that, in any event, Ma-Chis was not prejudiced by the agency's discussions, given that the protester actually improved its competitive standing by lowering its price during discussions. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Joint Mgmt. & Tech. Servs., B-294229,

⁷ The protester asserts that, even if the solicitation did not explicitly allow the consideration of a parent corporation's past performance and experience, this provision was latently ambiguous. We do not agree that the RFP is ambiguous.

B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

The protest is denied.

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General Counsel