



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Glen/Mar Construction, Inc.

File: B-410023

Date: October 10, 2014

Andy Brown for the protester.

Cecily Chambliss, Esq., Department of Veterans Affairs, for the agency.

Lois Hanshaw, Esq., Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of protester's past performance and technical approach is denied where the agency's evaluation was reasonable and in accordance with the solicitation's evaluation criteria.

DECISION

Glen/Mar Construction, Inc. (Glen/Mar) of Clackamas, Oregon, protests the exclusion of its proposal from the competitive range by the Department of Veterans Affairs (VA) under request for proposals (RFP) VA-101-14-R-0074 for the construction of columbarium expansion and cemetery improvements at the National Memorial Cemetery of the Pacific (NMCP) in Honolulu, Hawaii. Glen/Mar argues that it was not required to provide past performance information for subcontractors and that the agency should have assigned higher ratings to its proposal.¹

We deny the protest.

¹ Our Office did not issue a protective order in connection with this protest because Glen/Mar elected not to retain counsel who could receive access to nonpublic information pursuant to the terms of a protective order. Accordingly, our discussion is necessarily general in nature to avoid reference to nonpublic information. Our conclusions, however, are based on our review of the entire record, including nonpublic information provided by the agency to our Office.

BACKGROUND

The RFP provided for the award of a fixed-price contract for the construction of approximately 6,800 columbarium niches, a new administration building and public information center, repairs to existing roadways, replacement of existing signage and site furnishing, landscaping, irrigation, and site utilities at NMCP. RFP at 1, 10, 11. The estimated value of this contract is between \$10 million and \$20 million. Id. at 1. The RFP contemplated that award would be made on a best-value basis, considering the following evaluation factors, in descending order of importance: past performance, construction management/technical approach (technical approach), subcontracting plan, and price. Id. at 19, 25. When combined, the non-price factors were deemed significantly more important than price. Id. at 25.

The past performance evaluation would assess the offeror's probability of meeting the solicitation requirements by assigning a performance confidence rating based on an examination the offeror's quality of performance on 10-15 representative projects referenced in the offeror's proposal. Id. at 19, 25. To be considered relevant, projects were required to be of the same or similar size, scope, complexity, and cost to this requirement, and to be well underway² or completed within the past ten years. Id. at 19, 25; RFP Amend. 00001 at 2. Additional relevancy considerations would include, but were not limited to, contract amount, performance period, and whether the project was completed on time and within budget. RFP at 19. The RFP also stated that the government would evaluate the past performance of both the offeror and its major subcontractors. Id. at 26.

The RFP advised that the technical approach factor would be evaluated and scored based on the offeror's technical solution and the solution's associated technical risk. Id. at 21. The agency would examine the technical solution for, *inter alia*, the offeror's ability to deliver the project on time and within budget; the personnel and subcontractors proposed to manage and deliver the project; the experience and qualifications of key personnel; and the offeror's proposed schedule. Id. Regarding the schedule, as relevant here, the offeror was required to provide a proposed project schedule, including "sufficient detail to demonstrate the [o]fferor's understanding of the project requirements, critical path, and major milestones." Id. at 38. Offerors were also required to provide a project organizational chart and brief description of past performance and experience capabilities for all major subcontractors. Id. at 31.

On April 10, the VA received four timely proposals. Agency Report (AR), Legal Memo, at 1. A technical evaluation board (TEB) reviewed proposals and provided a consensus rating for the non-price factors, and the contracting officer, serving as

² The RFP defines "well underway" as meaning at least 50% construction progress completed. RFP at 25.

the source selection authority, separately evaluated price. AR, Tab 8, TEB Scoresheet, at 2; Tab 10, Technical Evaluation Report (TER), at 6.

Glen/Mar's proposal was assigned a limited confidence rating under past performance, and was evaluated as marginal with a moderate level of risk for its technical approach.³ AR, Tab 10, TER, at 20. In accordance with the RFP's evaluation scheme, it was rated outstanding for the small business plan factor, given its status as a small business. Id.

With respect to past performance, the TEB found that one of Glen/Mar's 13 representative projects was very relevant, but that the majority were not similar in value because they were valued at less than \$10 million; five of the projects were valued at less than \$5 million. AR, Tab 7, Past Performance Volume, at 1-15; Tab 10, TER, at 8. As a result, these projects were viewed as relevant only in part, either because they were not as complex, or not comparable in magnitude, scope, materials, or period of performance, to the requirement here. AR, Tabs 9A-9E, Evaluators' Rating Forms; Tab 10, TER, at 8. In determining performance confidence, the agency found that Glen/Mar's weaknesses outweighed its strengths. AR, Tab 10, TER, at 8. Some weaknesses, such as a Glen/Mar's failure to effectively maintain the schedule on four of its representative projects, raised significant concerns about whether Glen/Mar could deliver the project on time here. Id. at 8-9. The agency also noted that the proposal did not include past performance or relevancy of experience for the protester's proposed teaming subcontractor, as required by the RFP. AR, Tab 10, TER, at 8. The TEB's consensus was that it had limited confidence that Glen Mar could successfully deliver a completed project of this complexity and magnitude on time and within budget. Id. at 9.

With respect to the technical approach factor, the TEB assigned Glen/Mar's technical solution a marginal rating with moderate level of risk. Id. at 10. The TEB identified as strengths Glen/Mar's comprehensive narrative addressing project constraints, its good safety plan, and the reputation of its proposed teaming subcontractor based in Hawaii. Id. at 9. The TEB assigned seven weaknesses, and identified several areas of concern that were deemed to present moderate to high levels of risk for the government, such as the general lack of information in

³ As relevant here, limited confidence meant that the government had a low expectation of successful performance based on an offeror's recent/relevant experience and past performance record. RFP at 21. A marginal rating meant that the proposal did not clearly meet requirements and did not demonstrate an adequate approach and understanding of the requirements. Id. Moderate risk meant that with close government monitoring the offeror would likely overcome difficulties that could potentially disrupt the schedule, increase costs, or degrade performance. Id. at 22.

Glen/Mar's proposal about its teaming subcontractor (who would provide three of the key personnel proposed for the project); the company's reliance on new, inexperienced hires to staff the project; and a lack of information in its project schedule, such as the percentage of work to be completed at the end of each month of the contract period, as required by the solicitation. Id. at 9-10. The agency also assigned a weakness based on the experience of Glen/Mar's key personnel and subcontractors. Id.

After reviewing the proposals and other past performance information, the TEB recommended that the source selection authority establish a competitive range, limited to the most highly-rated offerors, which did not include Glen/Mar. Id. at 21. On June 9, the contracting officer notified Glen/Mar of its exclusion from the competitive range and offered a preaward debriefing. AR, Tab 11, Notice of Exclusion, at 1. After receiving the debriefing, Glen/Mar timely filed this protest with our Office.

DISCUSSION

Glen/Mar challenges the agency's evaluation of its proposal, arguing that the RFP did not require offerors to demonstrate past performance for subcontractors and that the agency's adjectival ratings for its past performance and technical approach should have been higher.⁴ We have examined all of Glen/Mar's arguments and find that none provides a reason to sustain the protest.

⁴ Glen/Mar also alleges that the responses on its past performance questionnaires should have warranted a higher past performance rating and, that as a small business, it was not required to offer a small business plan. Protest at 4, 6. The agency responded to these arguments in the agency report; however, the protester failed to rebut or otherwise address the agency's arguments in its comments. AR, Legal Memorandum at 14-15; see generally Protester's Comments. We conclude that Glen/Mar abandoned these protest grounds and we will not consider them further. IntegriGuard, LLC d/b/a HMS Fed.--Protest and Reconsideration, B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 4.

Additionally, to the extent the protester attempts to allege in its comments that the TEB's score sheets did not adhere to the independent documentation process outlined in the RFP, this protest is untimely. The protester received the agency report on August 6, 2014 and was informed that comments would be due on August 18. The protester requested and received a 4-day extension of time to file its comments; however, an extension of time to file comments does not toll our timeliness requirements for the filing of new protest grounds. Panacea Biotec, Inc., B-400776, Jan. 21, 2009, 2010 CPD ¶ 4 at 8. As a result, to the extent that

(continued...)

Glen/Mar's allegation that the RFP did not require offerors to provide past performance information for subcontractors is factually incorrect. With respect to past performance, the RFP stated that "the government would evaluate the past performance of both the offeror and major subcontractors." RFP at 26. Additionally, with respect to technical approach, the RFP required offerors to provide a description of past performance and experience capabilities for all major subcontractors. Id. at 31. Accordingly, this aspect of Glen/Mar's protest fails to state a valid basis and is dismissed. 4 C.F.R. § 21.5(f).

Glen/Mar also asserts that it should have received higher relevancy ratings and a higher performance confidence rating, based on its representative projects. The protester argues that the cited projects were, to varying degree, similar in scope, magnitude of effort, and complexity to the requirement here. Protest at 3. Glen/Mar also complains that it provided explanations in its protest for delays that occurred in its past performance and that, rather than downgrading Glen/Mar's proposal on this basis, the agency should have viewed the schedule delays as a demonstration of Glen/Mar's strength in dealing with difficult or unique challenges. Protest at 4.

An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. Cajun Constructors, Inc., B-409685, July 15, 2014, 2014 CPD ¶ 212 at 4. The evaluation of past performance, by its very nature, is subjective and we will not substitute our judgment for reasonably based evaluation ratings; an offeror's disagreement with an agency's evaluation judgments does not, by itself, demonstrate that those judgments are unreasonable. See Unispec Enterprises, Inc., B-407937, B-407937.2, Apr. 16, 2013, 2013 CPD ¶ 104 at 7.

On this record, the protester has not shown that the agency's evaluation was inconsistent with the terms of the RFP. As noted above, the RFP required Glen/Mar to provide past performance information for major subcontractors and Glen/Mar failed to do so in its proposal. Regarding relevancy, the TEB's determination that 9 of Glen/Mar's 13 representative projects had a dollar value that was below the range of this requirement, and lacked the complexity and magnitude of effort required here, was consistent with the RFP's standard for measuring relevance.

(...continued)

Glen/Mar raised new grounds of protest in its comments, those new protest grounds are untimely. 4 C.F.R. § 21.2(a)(2).

Similarly, we conclude that the TEB reasonably identified as a weakness Glen/Mar's failure to maintain the project schedule on four representative projects, three of which were less complex than the current acquisition, consistent with the terms of the solicitation. Under the performance confidence assessment, evaluators were to evaluate relevancy, as discussed above, and quality of past performance, which the agency found to be inconsistent and marked by problems managing subcontractors and their work. Accordingly, considering Glen/Mar's past performance on its representative projects, as measured by the RFP's evaluation factors, the protester has not shown why it was unreasonable for the agency to have a low expectation that Glen/Mar would successfully complete a project of the magnitude contemplated by the RFP on time and within budget. Although Glen/Mar maintains that it should have received higher ratings and should not have been assessed a weakness for schedule delays on prior projects, we are not persuaded that the agency's ratings or assessment were unreasonable or inconsistent with the solicitation. We view Glen/Mar's objections to the evaluation as disagreement with the agency's judgment, and find they provide no basis to deem the agency's actions unreasonable here.

Glen/Mar also argues that it should have received a higher rating for its technical solution. The protester contends that a marginal rating is not justified, since it received no deficiencies and "that rating can only be assigned when the proposal ' . . . does not clearly meet the requirements and has not demonstrated an adequate approach and understanding of the requirements.'" Protest at 5-6.

In reviewing protests challenging the evaluation of proposals, we do not conduct a new evaluation or substitute our judgment for that of the agency but examine the record to determine whether the agency's judgment was reasonable and in accord with the RFP evaluation criteria. Applied Tech. Sys., Inc., B-404267, B-404267.2, Jan. 25, 2011, 2011 CPD ¶ 36 at 9. A protester's disagreement with an agency's judgment is not sufficient to establish that an agency acted unreasonably. Watts-Obayashi, Joint Venture; Black Constr. Corp., B-409391 et al., Apr. 4, 2014, 2014 CPD ¶ 122 at 5. There is no legal requirement that an agency must award the highest possible rating, or the maximum point score, under an evaluation factor simply because the proposal contains strengths and/or is not evaluated as having any weaknesses. DynCorp Int'l LLC; Fluor SOSi Diplomatic Support Servs., LLC; Kellogg Brown & Root Servs., Inc., B-408554.5 et al., Dec. 9, 2013, 2014 CPD ¶ 6 at 8.

First, Glen/Mar's suggestion that a marginal rating may be assigned only in instances where a deficiency has been identified is inaccurate. The RFP provides that a proposal that "contains one or more deficiencies and is unawardable" should receive an unsatisfactory rating; the RFP's description of a marginal rating makes no mention of deficiencies. RFP at 21. In any event, Glen/Mar has not shown that the agency's evaluation conclusions were unreasonable. Rather, the record shows that, while the TEB's evaluation recognized Glen/Mar's strengths, it found several

areas of concern based on Glen/Mar's assigned weaknesses, related to experience, performance, and management of key personnel and subcontractors--all areas of evaluation contemplated by the RFP. The record also shows that Glen/Mar failed to offer past experience for its major, teaming subcontractor⁵ and did not detail its projected monthly progress, as required by the RFP. Glen/Mar's belief that its proposal warranted a higher rating reflects disagreement with the agency's judgment but does not show that judgment to be unreasonable.

The protest is denied.

Susan A. Poling
General Counsel

⁵ To the extent Glen/Mar may assert that its teaming partner was not a subcontractor, the RFP also required joint ventures to provide information to demonstrate each firm's experience relevant to their role on the acquisition. RFP at 25.