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Decision

Matter of: Bethel-Webcor JV

File: B-410772

Date: February 12, 2015

Jonathan A. DeMella, Esq., Davis Wright Tremaine LLP, for the protester.
Katie Slayton, Esq., Paul Clay, Esq., Naval Facilities Engineering Command, for the agency.
Gary R. Allen, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that an agency unreasonably failed to consider the experience and past performance of a protester's affiliate is denied where the protester's proposal did not establish that the affiliate would have any meaningful involvement in contract performance.
 2. Protest that an agency did not evaluate the protester's proposal in accordance with the solicitation's terms, and applied unstated evaluation criteria, is denied where the record reflects that the agency's evaluation was consistent with terms of solicitation.
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DECISION

Bethel-Webcor JV,¹ of Anchorage, Alaska, protests its exclusion from the second phase of competition under request for proposals (RFP) No. N62473-14-R-0001, issued by the Department of the Navy for the award of three or more indefinite-delivery, indefinite-quantity (ID/IQ) multiple-award contracts for construction and repair work at various locations within the Southwest United States. The protester challenges the agency's evaluation of Bethel-Webcor's proposal.

¹ Bethel-Webcor is a joint venture comprised of a small Alaska Native business (Bethel Contracting LLC) and a large business (Webcor Construction LP d/b/a Webcor Builders). Agency Report (AR), Tab 3, Bethel-Webcor Proposal, at 3.

We deny the protest.

BACKGROUND

The RFP, issued as a competitive small business set-aside, provided for multiple-award ID/IQ contracts for new construction, renovation and repair of general buildings at various locations, but anticipated that the majority of work would be performed in San Diego, California. RFP at 1. The solicitation anticipated the award of contracts with a base year and 4 option years, under which fixed-price task orders would be issued.² Id. at 3. The contract's estimated maximum dollar value, including the base year and all option years, is \$99 million; the task order range is \$8 million to \$15 million. Id. at 1.

Offerors were informed that award would be made on a best-value basis, using the two-phase design-build procedures of Federal Acquisition Regulation (FAR) subpart 36.3. RFP at 8. The RFP stated that the phase 1 evaluation would result in selecting five of the most qualified offerors, which would be invited to submit a phase 2 proposal.³ The RFP advised that the agency intended to make award without discussions or any other contact with offerors concerning proposals. Id. Further, the RFP cautioned offerors not to assume that they would be contacted or afforded any opportunity to qualify, discuss, or revise their proposals. Id.

For phase 1, offerors were informed that proposals would be evaluated for technical approach, experience, and past performance. RFP at 10-13. Under the technical approach factor, the RFP stated that proposals would be rated either acceptable or unacceptable, and that a proposal rated as unacceptable would not advance to phase 2. Id. at 11. The RFP provided a form, "Offeror Team Composition and Management," on which offerors were to provide narrative information regarding the primary members, composition, and management of the proposed design-build team. The form stated, "[i]f Offeror is a Joint Venture, Mentor-Protégé, or other legal partnership, list each partner as a separate team member," and provided spaces for inserting each team member's name, role, contractual relationship to the team, and role and responsibilities in performance of the contract. RFP, exh. A. The form also instructed offerors to "discuss the rationale for proposing this team

² The RFP reserved the right to also issue an initial task order with the award of the ID/IQ contract, or to issue only the task order as a "single-action contract." RFP at 8.

³ The government reserved the right to select more than five if it was determined to be in the best interests of the government. RFP at 8.

arrangement.” Id. As relevant here, the RFP’s instructions for completing this form stated,

If the experience of an entity is being claimed in Factor 2 [experience], that entity must be named in the above narrative and organizational chart.

Id. at 11. In addition to completing the form, offerors were required to submit a signed copy of a joint venture agreement, partnership agreement, teaming agreement, approved mentor-protégé agreement, or letter of commitment for each member of the offeror’s team. Id.

For the experience factor, offerors were to submit a maximum of five relevant construction projects that were similar in size, scope, and complexity to projects that might be ordered under the contract. RFP at 11. For joint ventures, such projects included those performed by the joint venture entity, or, if the joint venture did not have shared experience, projects could be submitted for each joint venture member. Id. at 12. The RFP warned that offerors that failed to submit experience for all joint venture members might be rated lower. Id. The RFP also expressly required that if an offeror was utilizing the experience information of an affiliate or member company--any company with a name “not exactly as stated on the SF 1442 [the standard form for the proposal]”--its proposal had to “clearly demonstrate that the affiliate/subsidiary/parent firm will have meaningful involvement in the performance of the contract.” Id.⁴

With regard to past performance, the RFP provided that proposals would be evaluated based on the relevant projects that were submitted under the experience factor. RFP at 14. The RFP informed offerors that those lacking relevant past performance history would not be evaluated favorably or unfavorably in past performance, but would receive an unknown confidence rating. Id.

The agency received phase 1 proposals from 42 offerors, including Bethel-Webcor, which were evaluated by a technical evaluation team (TET) that was a part of the source selection evaluation board (SSEB). AR, Tab 6, TET Report, at 2.

⁴ For the experience factor, proposals could receive one of four ratings: outstanding, good, acceptable, marginal or unacceptable. AR, Tab 2, Source Selection Plan, at 18-19.

As relevant here, the cover letter to the protester's proposal stated as follows:

Bethel Contracting and Webcor Builders have worked jointly on past projects and recently formalized that long standing relationship through participation in the SBA Mentor-Protégé program. We have founded a new Joint Venture (JV) entity for this project, Bethel-Webcor.

AR, Tab 3, Bethel-Webcor Proposal, Cover Letter.

With regard to the technical approach factor, Bethel-Webcor included a copy of a joint venture agreement between Bethel Contracting and Webcor Building in its proposal, and a teaming agreement between Bethel-Webcor and RIM Architects, but did not provide any mentor-protégé agreement. On its team composition and management form, which instructed joint-venture, mentor-protégé, or other legal partnership offerors to list each partner as a separate team member, the protester listed "Bethel-Webcor" as the offeror, and listed only RIM Architects as a team member. It did not mention any mentor-protégé agreement or identify any other firm as a team member. Id., Exh. A, Offeror Team Composition and Management.

With regard to experience and past performance, since Bethel-Webcor had no shared experience as a joint venture entity, the RFP required the protester to submit experience and past performance information for each joint venture member. RFP at 12, 14. For construction experience, the proposal referenced five projects, three of which were performed by Webcor Builders, the large business joint venture member.⁵ AR, Tab 3, Bethel-Webcor Proposal, Exh. B, at 33-54. The remaining two referenced contracts, however, were not performed by the other joint venture member, Bethel Contracting. These two projects were performed by Bethel Services, Inc. (BSI), an entity that the protester's proposal alternatively refers to as Bethel Contracting's "sister company" and its "predecessor." Id., at 19-32. There are no other references to BSI in the proposal.

The TET found the three contracts listed as Webcor Builders' experience to be relevant, but found no contracts demonstrating relevant experience attributable to Bethel Contracting. AR, Tab 6, TET Report, at 55. With respect to the contracts performed by BSI, the TET report stated that the proposal nowhere described what role, if any, BSI would play in the work to be performed under the contract, and concluded that BSI's experience could not be considered. Id. Because it found the proposal did not demonstrate relevant experience for either the joint venture entity or Bethel Contracting, the TET rated Bethel-Webcor's proposal unacceptable for the experience factor, and assigned an unknown confidence rating for the past performance factor. Id. at 54, 57.

⁵ [Deleted]

The TET reported its findings to the non-TET SSEB members, who ranked the offers and recommended that the seven offerors identified as the most-highly qualified advance to the second phase. AR, Tab 7, SSEB Report, at 22. After reviewing these reports, the source selection authority (SSA) selected the seven most-highly qualified firms, which did not include Bethel-Webcor, to proceed to phase 2. AR, Tab 8, SSA Decision. The agency notified Bethel-Webcor that it was not selected, and provided a debriefing. AR, Tab 9, Notification of Non-Selection. This protest followed.

DISCUSSION

Bethel-Webcor argues that the agency was required to recognize the experience of BSI as relevant and attributable to the protester, based on BSI's affiliation with Bethel Contracting and language in the proposal that, according to the protester, was sufficient to show that BSI would have meaningful involvement in the performance of the contract. In addition, the protester insists that its corporate structure should have been recognized in the evaluation as that of a mentor-protégé joint venture, and that the agency's failure to do so caused the agency to evaluate the protester's experience in a manner inconsistent with the terms of the RFP.

We disagree. We have considered all of the protester's arguments, although we address only the most significant ones, and find none provides a basis to object to the agency's evaluation of Bethel-Webcor's proposal.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor will we substitute our judgment for that of the agency; the evaluation of proposals is a matter within the agency's discretion. Halfaker & Assocs., LLC, B-407919, B-407919.2, Apr. 10, 2013, 2013 CPD ¶ 98 at 6. The relevant question for our Office, in reviewing this subjective judgment, is whether the evaluation was reasonable and consistent with the solicitation. ASRC Research & Tech. Solutions, LLC, B-406164, B-406164.3, Feb. 14, 2012, 2012 CPD ¶ 72 at 8. An agency properly may consider the experience or past performance of an offeror's affiliated companies where the firm's proposal demonstrates that the resources of the affiliated company will affect the performance of the offeror. See FAR § 15.305(a)(2)(iii); Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4. While it is appropriate to consider an affiliate's performance record where the affiliate will be involved in the contract effort or where it shares management with the offeror, it is inappropriate to consider an affiliate's record where that record does not bear on the likelihood of successful performance by the offeror. Id.

Here, the RFP specifically advised that for joint ventures that did not have shared experience, the agency would consider projects submitted for each joint venture member. RFP at 12. The RFP warned that offers that failed to include experience

for all joint venture members might be rated lower. Id. Again, as stated above, the RFP expressly required that if an offeror planned to use the experience of an affiliate, the affiliate must be named in the submitted organizational chart, and the proposal must “clearly demonstrate that the affiliate . . . will have meaningful involvement in the performance of the contract.” Id. at 11, 12. As explained in further detail below, the protester’s proposal did not comply with any of these requirements.

The record supports the agency’s determination that BSI’s experience and past performance was not attributable to Bethel Contracting. Bethel-Webcor’s proposal identified no meaningful role for BSI in actually performing the requirements here; in this regard, the protester’s proposal stated only that Bethel Contracting and BSI are both subsidiaries of Bethel Native Corporation (BNC). AR, Tab 3, Bethel-Webcor Proposal, Exh. B, at 19. Apart from general statements that BNC operating companies have proven experience in construction projects, and that Bethel Contracting would draw from its own pool of experienced management professionals who had played key roles in past projects for BSI, there is nothing in the record to show that BSI would be meaningfully involved in performing the contract. In short, the record does not show that the resources of BSI—that is, their workforce, management, facilities or other resources—will be provided or relied upon for contract performance here. Accordingly, we find the agency reasonably determined that BSI’s experience and past performance was not relevant and could not be credited to Bethel Contracting.

The protester also argues that the agency did not properly consider Bethel-Webcor’s participation in the SBA mentor-protégé program in not selecting Bethel-Webcor for the second phase. Protest at 2.

This argument is without merit. The evaluation record shows that the agency recognized that the cover letter to Bethel-Webcor’s proposal mentioned “participation” in the SBA Mentor-Protégé program. AR, Tab 6, TET Report, at 51; Tab 7, SSEB Report, at 5. However, the agency also noted that, other than this single reference to the mentor-protégé program—which did not actually state that the joint venture was approved by the SBA under the mentor-protégé program—the proposal did not address Bethel-Webcor’s corporate structure, and did not include a copy of an SBA-approved mentor-protégé agreement.⁶ AR, Tab 7, SSEB Report, at 5. Nonetheless, the SSEB decided it would treat Bethel-Webcor as a mentor-

⁶ Absent this agreement, Bethel Contracting’s affiliation with Webcor, a large business, would call into question Bethel-Webcor’s eligibility for award under this small-business set aside. SBA regulations require a mentor-protégé joint venture to have an SBA-approved mentor-protégé agreement before the firm can submit an offer as a joint venture under a small business set aside and receive the mentor-protégé exclusion from affiliation. See 13 C.F.R. § 124.520(d)(1)(i).

protégé joint venture for evaluation under phase 1, and then, if the firm was selected to advance to phase 2, the agency would request a size status determination from the SBA at that time. AR, Tab 14, E-mail of April 9, 2014. Further, the agency gave Bethel-Webcor an acceptable rating for the technical approach factor, the same rating given to all of the firms selected to move on to the second phase. On this record, we find no merit to the protester's contention that the agency ignored the protester's stated status as a mentor-protégé firm, and that this was inconsistent with the RFP's terms.

Nonetheless, Bethel-Webcor further argues that the evaluation was improper because a mentor-protégé joint venture's experience would be evaluated differently than that of a regular joint venture. The protester provides no legal support for this contention, but asserts that this reflects the view expressed by the agency during Bethel-Webcor's debriefing.⁷ Protest at 2-3; Comments at 2-4. The agency disputes this account, stating that it did not hold the protester's proposal to a higher standard or otherwise evaluate it differently, based on its failure to provide the mentor-protégé agreement; rather, the unacceptable rating was based on Bethel-Webcor's failure to demonstrate that both joint venture members had the requisite experience.⁸ AR, Memo. of Law at 14.

We need not resolve this dispute. The solicitation here required a mentor-protégé joint venture offeror to provide a copy of its SBA-approved mentor-protégé agreement, and to satisfy other informational requirements regarding the contractual relationships and roles of the entities involved, which, as described above, Bethel-Webcor did not do.⁹

⁷ In determining the reasonableness of the evaluation of proposals, we do not consider the agency's debriefing statements controlling; rather, we review the evaluation record to assure that the agency's evaluation was reasonable and consistent with the stated evaluation factors. In this regard, a debriefing is only an explanation of the agency's evaluation and source selection decision, not the evaluation or decision itself. Earth Resources Tech., Inc., B-406659, B-406659.2, July 30, 2012, 2012 CPD ¶ 226 at 3.

⁸ The agency states that, because the proposal failed to provide any information whatsoever regarding the roles of the joint venture members, the mentor-protégé agreement could have clarified the nature and level of support the mentor had pledged to the protégé, and might have provided a basis for mitigating Bethel Contracting's lack of stated experience. Memo. of Law at 15.

⁹ The protester also contends that the "mentor-protégé agreement was not requested by the solicitation." Comments at 4. This argument ignores the plain language of the solicitation, which, as described above, required offerors to submit a signed copy of a joint venture agreement, partnership agreement, teaming agreement, approved mentor-protégé agreement, or letter of commitment of the offeror's team. RFP at 11. Notwithstanding this express requirement, the protester
(continued...)

The responsibility for submitting a well-written proposal--with adequately detailed information which clearly demonstrates compliance with the solicitation and allows a meaningful review by the procuring agency--lies first and foremost with the offeror. Mike Kesler Enters., B-401633, Oct. 23, 2009, 2009 CPD ¶ 205 at 2-3. An offeror that does not affirmatively demonstrate the merits of its proposal risks rejection of its proposal. HDL Research Lab, Inc., B-294959, Dec. 21, 2004, 2005 CPD ¶ 8 at 5. Proposals with significant informational deficiencies properly may be excluded from further consideration, whether the deficiencies are attributable to either omitted or merely inadequate information addressing fundamental factors.¹⁰ American Gov't Servs., Inc., B-292242, Aug. 1, 2003, 2003 CPD ¶ 163 at 4.

Given Bethel-Webcor's failure to provide any information or documentation concerning its mentor-protégé relationship, we find the agency's evaluation of the protester's proposal consistent with the standards set forth in the RFP. Accordingly, we find no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel

(...continued)

argues that because the list used "or" instead of "and" as its connector, offerors were free to submit any one of the agreements listed. We disagree; we think it is beyond dispute that this language means an offeror intending to compete as a mentor-protégé joint venture is required provide the agreement applicable to that particular entity.

¹⁰ The protester also asserts that if the agency had any questions concerning its joint venture status, it should have sought clarification. Comments at 5-6. We also find no merit to this argument. FAR § 15.306(a) permits, but does not require, an agency to seek clarifications when contract award without discussions is contemplated, as is the case here. The fact that the agency did not do so does not provide a basis for us to sustain the protest.