



Decision

Matter of: DPBC HZ Joint Venture

File: B-415612

Date: January 31, 2018

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DIGEST

Protest challenging the agency's determination that the protester's proposal was not responsive and therefore unacceptable is denied where the agency reasonably determined that the protester's proposal did not satisfy the solicitation's requirements.

DECISION

DPBC HZ Joint Venture (DPBC), a Historically Underutilized Business Zone (HUBZone) joint venture of Sanford, Florida, protests the award of a contract to Herve Cody Contractor, of Robbinsville, North Carolina, by the Department of the Army, Corps of Engineers (Corps) under request for proposals (RFP) No. W912EP-17-R-0018 for the Kissimmee River Restoration Project S-69 Weir and Canal Backfill in Okeechobee and Highland Counties, Florida. The protester challenges the evaluation of its proposal and the selection decision.

We deny the protest.

BACKGROUND

The RFP, issued on June 21, 2017, was set aside for HUBZone small businesses, and contemplated award of a contract on a lowest-priced, technically-acceptable basis. Agency Report (AR), Tab 3, RFP at 48.¹ The RFP stated that to be considered

¹ The citations to the solicitation are to the Bates-stamped page numbers on the comprehensive copy of the solicitation provided by the agency.

technically acceptable, an offeror's proposal must be rated as acceptable under the following non-price factors: demonstrated technical experience and past performance. Id. at 48-49.

The demonstrated technical experience factor consisted of three subfactors: (A) construction of earthen levee embankment; (B) heavy civil construction involving movement of at least 200,000 cubic yards of soil, subgrade preparation, placement of reinforced concrete slabs, and driving of steel sheet pile;² and (C) construction in a wet site with fluctuating groundwater levels ranging between zero feet (ground surface) and two feet below ground surface.³ RFP at 53. The RFP required offerors to submit at least one and no more than three examples of recent and relevant experience on the same or similar completed civil construction projects or close to completed projects for each subfactor.⁴ Id. at 53. The RFP included a worksheet that solicited 17 data items and required that offerors utilize the worksheet to provide project information for each of the demonstrated technical experience subfactors. Id. at 54, 60-61.

As relevant to the protest, the RFP required that an offeror must have been the prime contractor on one of the projects submitted under each demonstrated technical experience subfactor. RFP at 54. The RFP also instructed that if any portion of the work submitted as demonstrated technical experience was subcontracted, the offerors should clearly identify the subcontracted work and provide the required experience for the subcontractor as it relates to the work the subcontractor would be performing under the current requirement. Id. The RFP further advised that a joint venture entity should submit at least one and no more than three projects for the combined joint venture, and

² For subfactor B, heavy civil construction, the RFP required specific experience as follows:

- Experience must include excavation, separation, stockpiling, hauling, subgrade preparation including underwatering/dewatering, and placing soil in final location.
- Experience must include preparation, form work, reinforcing, and concrete placement in final location.
- Experience must include placement of sheet pile structures in final location.

RFP at 53.

³ For subfactor C, construction in a wet site, the RFP required that the “[e]xperience must demonstrate construction that required underwatering/dewatering in order to facilitate placement of construction materials (i.e. soil backfill, concrete, geotextile, riprap, and bedding stone).” RFP at 53-54.

⁴ The RFP defined a complete project as a project that was physically completed within the last 10 years preceding the date of the solicitation and accepted by the customer. RFP at 53. A close to complete project was defined as a project that is over 75 percent physically complete. Id.

specifically stated: “If submitting a proposal as a joint venture, the experience of each of the joint venture partners can be submitted for the joint venture entity. These projects will be evaluated separately; however, the overall evaluation for the demonstrated [technical] experience [factor] will be combined to form one overall evaluation rating for the joint venture.” Id. at 1027. In addition, the RFP required that any projects the offeror provided under the demonstrated technical experience factor, including projects performed by subcontractors, have a corresponding submission for the past performance factor. Id. Any projects submitted for the demonstrated technical experience factor that did not have a corresponding past performance submission would not be evaluated. Id. The RFP further explained that if the agency concluded the demonstrated technical experience was acceptable, it would also conclude that the past performance was relevant. Id. at 56.

The RFP stated that failure to submit the requested information or meet the solicitation requirements may result in an offer being ineligible for award. RFP at 49. In addition, proposals without specified content could be deemed unacceptable and removed from competition, and “[f]ailing to submit or completely fill out attachments properly may result in rejection of the offer without further consideration.” Id. at 50. The agency stated it would not make assumptions concerning intent, capabilities or experiences. Id.

DPBC, which is a joint venture between Dorado Services, Inc., BCPeabody Construction Services, Inc. (BCPeabody), and Perk Company, Inc., submitted a proposal in response to the solicitation. AR, Tab 13, DPBC Proposal, at 45. As relevant to the protest, for the demonstrated technical experience factor, the DPBC proposal included two projects performed by BCPeabody for consideration under subfactor A (construction of earthen levee embankment) and subfactor B (heavy civil construction), and one project, identified as the SELA-16 Gardere/Murphy Canal North project, performed by Conquistador/Dorado JV, for consideration under subfactors B and C (construction in a wet site). Id. at 55-75. The proposal stated that Conquistador/Dorado JV, the prime contractor for the SELA-16 Gardere/Murphy Canal North project, had self-performed the following functions on that project: project management, site superintendent, and site safety health officer (SSHO). Id. at 69, 74.

Following the initial evaluation of proposals, the source selection evaluation board (SSEB) assigned the following ratings to the DPBC proposal:

Demonstrated Technical Experience	Unacceptable
Subfactor A (construction of earthen levee embankment)	Acceptable
Subfactor B (heavy civil construction)	Unacceptable
Subfactor C (construction in a wet site)	Unacceptable
Past Performance	Not Relevant
Subfactor A (construction of earthen levee embankment)	Relevant
Subfactor B (heavy civil construction)	Not Relevant
Subfactor C (construction in a wet site)	Not Relevant
Overall Rating	Unacceptable

AR, Tab 10, SSEB Report, Aug. 8, 2017, at 6, 10. After reviewing the evaluation, the contracting officer, who was also the source selection authority determined that the Corps should conduct discussions. AR, Tab 11, Competitive Range Determination, at 1; Contracting Officer Statement (COS) at 5. The DPBC proposal was included in the competitive range. AR, Tab 11, Competitive Range Determination, at 6.

The agency conducted two rounds of discussions. COS at 8. Among other things, in its first written discussions communication, the agency advised DPBC that its proposal had been rated as unacceptable under subfactor B (heavy civil construction) and subfactor C (construction in a wet site) of the demonstrated technical experience factor, stating in pertinent part:

[The] SELA-16 Gardere/Murphy Canal North [project] submitted by Dorado as the Prime, was performed by Conquistador as part of a separate joint venture with Dorado (known as Conquistador/Dorado JV, CDJV). Conquistador is not part of the current joint venture, DPBC HZ Joint Venture. This is in violation of Note 5 in Section 00100A of the solicitation. Dorado clearly stated that they self-performed only the roles of project management, site superintendent, and [SSHO] for the submitted project. Dorado (as part of the current joint venture) has not demonstrated that it has the technical experience to meet the requirements of Sub-Factor B. Therefore, the submitted project was deemed not relevant and Sub-Factor B was rated "Unacceptable."

* * * * *

The project submitted by DPBC JV, SELA-16 Gardere/Murphy Canal North, was considered unacceptable for the same reasons discussed above under Sub-Factor B. Therefore, Sub-Factor C was rated "Unacceptable."

AR, Tab 12, Evaluation Notice, Aug. 15, 2017, at 3. The letter further stated that for the same reasons identified under the demonstrated technical experience factor, the SELA-16 Gardere/Murphy Canal North project was considered not relevant, and therefore DPBC was rated unacceptable under the past performance factor. Id. at 4. The agency directed DPBC to submit a final proposal revision by August 22. Id.

DPBC timely submitted a revised proposal that included the same projects provided for evaluation under the demonstrated technical experience factor in its initial proposal. AR, Tab 14, DPBC First Revised Proposal, Aug. 21, 2017, at 19. In addition, DPBC provided the following response to the above discussion item regarding the SELA-16 Gardere/Murphy Canal North project:

CDJV was a fully integrated (i.e., fully populated) joint venture prime between Conquistador Services, LLC and Dorado Services, Inc. As a

member of the populated JV, Dorado participated in the Project Management, Site Superintendent, SSHO Officer functions, and all other work. Other work performed by Dorado as a member of the populated JV includes, but is not limited to, the placing of concrete slabs and sheet pile. Because the JV was fully populated all aspects of the work were performed by employees of the JV itself and Conquistador and Dorado gained equal technical experience through the JV. Therefore, it is our opinion that Dorado as well as Conquistador should each receive credit for all work performed by CDJV on this project.

Id. at 5. Thereafter, in a second written discussions communication, the agency advised DPBC:

Your responses to the Government's rating of "Unacceptable" for Demonstrated Technical Experience, Sub-Factors B and C refer to a fully integrated (i.e., fully populated) joint venture between Conquistador Services, LLC and Dorado Services, Inc. Please provide a copy of the CDJV agreement. Also, in accordance with Note 3, under Factor 2, Demonstrated Technical Experience in the solicitation, if any portion of the work provided as demonstrated technical experience was subcontracted, clearly identify that work as such.

AR, Tab 15, Evaluation Notice, Aug. 30, 2017, at 3. The agency again directed DPBC to submit a final proposal revision. Id.

DPBC timely submitted additional information to the agency for consideration, but did not include any revisions to its proposal regarding the projects provided for evaluation under the demonstrated technical experience factor in its initial proposal. See AR, Tab 16, DPBC Second Revised Proposal, Sept. 5, 2017. Instead, DPBC stated that the CDJV maintained three employees on the job site, the site superintendent ran the overall job site, the quality control manager maintained quality control, and the supervisors managed all the earthwork, with assistance from a subcontractor. Id. at 12-13. DPBC also provided the joint venture agreement between Conquistador Services, LLC and Dorado Services, Inc. Id. at 17-51. In addition, DPBC provided an explanation about how the work for the current requirement would be divided amongst its joint venture partners, identified two new major subcontractors, and provided teaming agreements between DPBC and the subcontractors along with some information about projects previously performed by the subcontractors.⁵ Id. at 1-2, 52-88.

⁵ When providing information regarding its proposed subcontractors, DPBC did not utilize the worksheet that the RFP required for the provision of project information, and did not otherwise indicate under which of the demonstrated technical experience subfactors the subcontractors' project information should be considered. In addition, DPBC did not provide any past performance information for its subcontractors.

After receiving DPBC's final proposal revision, the SSEB concluded:

The team was not able to evaluate the submitted information from DPBC HZ JV, with regard to the solicitation subfactors, as the offeror did not submit a revised technical proposal. Instead, the offeror submitted a letter of Evaluation Notice Response. The response letter did not directly address how the provided demonstrated experience related to the subfactors. Furthermore, the offeror did not provide the required documentation of 1) past performance rating, or 2) period of performance for one of the submitted projects as demonstrated experience. The information provided was lacking sufficient detail to perform the evaluation; therefore, the subfactors were not rated.

AR, Tab 17, SSEB Evaluation of DPBC Proposal, Sept. 26, 2017, at 1. In her selection decision, the contracting officer further explained:

DPBC JV's initial proposal was determined Unacceptable. DPBC JV was provided two opportunities to rectify proposal deficiencies through discussions and to bring it into compliance with the solicitation requirements. DPBC JV failed to submit a proposal that clearly demonstrated compliance with the solicitation that would allow meaningful review by the SSEB. The significant informational deficiencies, omissions, and conflictive submissions prevented such meaningful proposal evaluation. Therefore, DPBC JV's proposal [is] not eligible for award. The solicitation clearly stated that offerors shall submit all information requested in the RFP and failure to do so or meet an RFP requirement may result in an offer being ineligible for award. DPBC JV's proposal was therefore deemed not responsive to the solicitation.

AR, Tab 21, Source Selection Decision, at 10.

On September 27, the protester was notified that a contract was awarded to Herve Cody Contractor. DPBC-HZ received a debriefing on October 17, and this protest followed.

DISCUSSION

The protester raises numerous challenges to the Corps' evaluation of its proposal, and argues that a proper evaluation of its proposal would result in award to its lower-priced proposal. The protester also alleges that the agency was required to refer its proposal to the Small Business Administration (SBA) for a Certificate of Competency determination pursuant to 13 C.F.R. § 125.5(a)(2). Although we do not address in detail all of the protest allegations, we have considered them all and found that none provide a basis to sustain the protest.

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. JSR, Inc., B-405463, Nov. 8, 2011, 2011 CPD ¶ 265 at 4. A protester's disagreement with an agency's judgment, without more, is not sufficient to establish that an agency acted unreasonably. Trofholz Tech., Inc., B-404101, Jan. 5, 2011, 2011 CPD ¶ 144 at 3-4. Moreover, it is an offeror's responsibility to submit an adequately written proposal that demonstrates the merits of its approach; an offeror runs the risk of having its proposal downgraded or rejected if the proposal is inadequately written. Id. at 4-5.

DPBC first argues that the Corps unreasonably treated its submitted projects disparately, and improperly failed to credit DPBC under the demonstrated technical experience factor for the SELA-16 Gardere/Murphy Canal North project despite properly crediting the DPBC proposal for the submitted projects that were performed by BCPeabody. Protest at 4-5. The agency responds that it properly evaluated the DPBC proposal and concluded that DPBC did not provide the required demonstrated technical experience because the SELA-16 Gardere/Murphy Canal North project was performed by Conquistador/Dorado JV, a joint venture that is not the offeror, and the information submitted shows that the Conquistador/Dorado JV performed only quality control, safety, and project management. COS at 11; Memorandum of Law (MOL) at 9-14.

As noted, the RFP required that the offeror be the prime contractor on one of the submitted projects under each demonstrated technical experience subfactor, and further provided that if the offeror was a joint venture, the experience of each of the joint venture partners could be submitted for the joint venture entity. RFP at 54. Our review of the record reveals that in its initial proposal, DPBC utilized the RFP-mandated worksheet to present its demonstrated technical experience, and both worksheets submitted for BCPeabody indicated that the projects were performed by "BCPeabody Construction Services, Inc.," a joint venture partner. AR, Tab 13, DPBC Proposal, at 57, 63.

However, the worksheets for the SELA-16 Gardere/Murphy Canal North project indicated that the project was performed by "Conquistador/Dorado JV." AR, Tab 13, DPBC Proposal, at 67, 72. As identified in the DPBC proposal, Dorado Services, Inc. is a joint venture partner but Conquistador and Conquistador/Dorado JV are not. Id. at 31. Further, the Conquistador/Dorado JV joint venture agreement states that Conquistador was the managing venture partner and would perform a minimum of 51 percent of the total dollar amount of the labor portion of the project, and that Dorado would perform a maximum of 49 percent of the total dollar amount of the labor portion of the project. AR, Tab 16, DPBC Second Revised Proposal, Sept. 5, 2017, at 19.

Thus, the only project included in the proposal to demonstrate the experience of Dorado Services, Inc. was the SELA-16 Gardere/Murphy Canal North project which indicated that the Conquistador/Dorado JV, as the prime contractor, had only self-performed project management, site superintendent, and SSHO functions. AR, Tab 13, DPBC

Proposal, at 67, 69, 72, and 74. Further, in response to the second set of discussion questions, DPBC stated that “CDJV maintained 3 fulltime employees on site throughout the construction of this project,” and identified areas of project work that were subcontracted to other companies. AR, Tab 16, DPBC Second Revised Proposal, Sept. 5, 2017, at 12-13. When the agency contacted the administrative contracting officer (ACO) for the SELA-16 Gardere/Murphy Canal North project, the ACO confirmed that Conquistador/Dorado JV was the prime contractor and performed 20 percent of the work consisting of quality control, safety, and project management. AR, Tab 19, Email from Corps New Orleans District to Contracting Officer, Aug. 28, 2017. After two rounds of discussions, the agency concluded that DPBC failed to submit a proposal that clearly demonstrated compliance with the solicitation (i.e., demonstrated actual experience in either heavy civil construction or construction in a wet site) that would allow meaningful review by the SSEB due to the significant informational deficiencies, omissions, and conflicting submissions, and as a result, DPBC’s proposal was deemed not responsive to the solicitation. AR, Tab 21, Source Selection Decision, at 10. On this record, we agree and find reasonable the agency’s evaluation of DPBC’s proposal as unacceptable under subfactors B and C of the demonstrated technical experience factor.

The protester also argues that it was unreasonable for the agency to determine that it could not evaluate the DPBC proposal because it lacked sufficient detail regarding the newly identified major subcontractors in its second proposal revision. Protest at 5-6. DPBC repeatedly states that it did not provide the project information for its proposed major subcontractors for the purpose of agency evaluation under the demonstrated technical experience and past performance factors. Id.; Comments at 6, 13. The agency responds that it was not clear whether DPBC had submitted the additional information regarding the two new major subcontractors for consideration under the demonstrated technical experience factor. MOL at 14-17. The agency argues that DPBC’s responses to the agency in discussions failed to remedy the deficiencies in the proposal and due to conflicting and inadequate information, the DPBC proposal could not be meaningfully evaluated. Id.

As noted, the RFP provided and required offerors to utilize a worksheet to provide project information for each of the demonstrated technical experience subfactors. RFP at 54, 60-61. The RFP also required that projects provided for consideration under the demonstrated technical experience factor, to include subcontractors, have a corresponding submission for the past performance factor, and advised that any demonstrated experience that did not have a corresponding past performance submission would not be evaluated. Id.

After initially rating the DPBC proposal unacceptable, the agency provided the protester two opportunities through discussions to revise its proposal to improve its rating under subfactors B and C of the demonstrated technical experience factor. In its first response, the protester stated its disagreement with the agency’s conclusions, but did not revise its proposal to add or substitute projects to demonstrate the requisite experience. In its second response, DPBC introduced two new major subcontractors, and included some information relating to these subcontractors’ experience, but failed to

provide all of the required information in conformance with the solicitation instructions regarding their experience and past performance. To the extent the protester argues that it did not intend for the agency to consider its major subcontractors under the demonstrated technical experience factor, it is unclear for what purpose the information was included in its revised proposal or in what way the protester intended for the agency to evaluate it. As previously stated, an offeror is responsible for demonstrating affirmatively the merits of its proposal and risks rejection of its proposal if it fails to do so. Trofholz Tech., Inc., supra. Accordingly, we find the agency's determination that it could not evaluate DPBC's proposal here reasonable.

As for the protester's contention that the agency was required to refer DPBC's proposal to the SBA, we disagree. See Protest at 1, 7; Comments at 14. Where an agency finds the proposal of a small business to be unacceptable under a responsibility-related factor, that is, a factor pertaining to its ability to perform, such as whether it has adequate corporate experience or production equipment and facilities, the determination is essentially one of nonresponsibility, meaning that referral to the SBA, which has the ultimate authority to determine the responsibility of small business concerns, is required. Tyonek Worldwide Servs., Inc.; DigiFlight, Inc., B-409326 et al., Mar. 11, 2014, 2014 CPD ¶ 97 at 12; see also 13 C.F.R. § 125.5(a). Where an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility, however, referral to the SBA is not required. Tyonek Worldwide Servs., Inc.; DigiFlight, Inc., supra. Likewise, where an agency rejects a proposal as technically unacceptable on the basis of a factor that is arguably responsibility related, but the finding of unacceptability is based on the offeror's failure to submit specific documentation required by the solicitation, referral to the SBA is not required. AttainX, Inc.; FreeAlliance.com, LLC., B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 5.

Here, as discussed, DPBC's proposal failed to conform to the solicitation's proposal preparation instructions. Specifically, DPBC failed to submit information meeting the solicitation's requirements regarding technical experience in either heavy civil construction or construction in a wet site. See RFP at 54; AR, Tab 13, DPBC Proposal at 72. In addition, DPBC failed to utilize or otherwise provide all of the information solicited in the RFP-mandated worksheets for the project information submitted regarding the newly proposed major subcontractors included in its second proposal revision and also did not provide the required corresponding past performance information. See RFP at 54, 60-61; AR, Tab 16, DPBC Second Revised Proposal dated Sept. 5, 2017. The protester's failure to comply with the solicitation's proposal preparation instructions resulted in an initial evaluation rating of unacceptable, and the protester did not remedy the identified deficiencies when it was twice provided the opportunity to do so. Because the protester failed to provide a proposal responsive to the solicitation, referral to the SBA was not required.

The protest is denied.

Thomas H. Armstrong
General Counsel