



Decision

Matter of: Alexandra Construction, Inc.

File: B-417212

Date: April 2, 2019

Gregory T. Clark, Alexandra Construction, Inc., for the protester.
Timothy T. Corey, Esq., Hinckley Allen, for Stone & Lime Imports, Inc., the intervenor.
Meaghan LeClerc, Esq., and Nancy O'Connell, Esq., General Services Administration, for the agency.
Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is denied where the record shows that the agency's experience and past performance evaluations were consistent with the solicitation and applicable statutes and regulations.
2. Protest is denied where the protester did not suffer competitive prejudice from the agency's unequal treatment of offerors' status on examples of referenced experience or from the agency's waiver of a material term of the solicitation with respect to its evaluation of the awardee's proposal.

DECISION

Alexandra Construction, Inc., of Newton, Massachusetts, protests the award of a contract to Stone & Lime Imports, Inc. (S&L), of Brookfield, Massachusetts, under request for proposals (RFP) No. 47PB0018R0010, issued by the General Services Administration for building maintenance and repair services. The protester alleges that the agency unreasonably evaluated the proposals.

We deny the protest.

BACKGROUND

The RFP, issued on July 6, 2018, contemplated the award of a fixed-price contract for masonry repair and repointing services at the J.W. McCormack Federal Office Building in Boston, Massachusetts. RFP at 5, 17; RFP, Project Manual, § 01100. The J.W.

McCormack Federal Office Building is an historic Art Deco style building with ziggurat fashioned towers and granite-belt friezes. John W. McCormack U.S. Post Office and Courthouse, Boston, MA, <https://www.gsa.gov/historic-buildings/john-w-mccormack-us-post-office-and-courthouse-boston-ma#history> (last visited Apr. 1, 2019). Proposals were to be evaluated on a best-value tradeoff basis, considering total evaluated price and the following non-price factors, listed in descending order of importance: experience on similar projects, qualifications and experiences of key personnel, past performance, and project management plan and approach. RFP at 28-29. When combined, the non-price factors were equal in importance to the total evaluated price. Id. at 29.

For the experience factor, offerors were instructed to submit between four and six examples of completed projects. RFP at 8. Offerors were advised that their examples would be evaluated based on their relevance (i.e., projects of similar scope and complexity, and completed within the last ten years, would be rated more favorably). Id. at 30. Offerors were also advised that the referenced experience must satisfy five minimum characteristics, including (1) each completed project must include extensive exterior restoration or replacement of deteriorated stone on a masonry façade; (2) at least two of the referenced examples must have had a minimum construction cost of \$2 million; (3) at least one of the referenced examples must have involved a building listed in or eligible to be listed in the National Register of Historic Places; (4) at least one of the referenced examples must have involved a building that remained continuously occupied during the construction phase; and (5) at least one of the referenced examples must have been located in an urban high traffic location. Id. at 31. For each referenced example, offerors were also required to submit general information, including the location of the project, the level of authority (e.g., prime contractor, major subcontractor), and a point of contact. Id. at 30-31. In addition, the solicitation specified that at least two of the projects “must have been located in Northern New England.” Id. at 30.

For the past performance factor, offerors were instructed to submit past performance questionnaires (PPQ) for each example provided under the experience factor. RFP at 10. The agency would first assess the relevancy of the referenced examples compared to the scope of the contract. Id. at 33. Referenced examples involving similar scope, complexities, and magnitude of effort to the instant solicitation’s requirements would be assessed more favorably. Id. The agency would then consider the quality of performance for each referenced example; higher quality performance on more relevant projects would result in a higher past performance confidence rating. Id. The solicitation also advised that the agency may conduct telephone interviews with points of contact listed in the proposal. Id. at 33.

Three offerors, including Alexandra and S&L, submitted proposals prior to the August 21 closing date. Memorandum of Law (MOL) at 2. After receiving initial proposals, the agency established a competitive range consisting of Alexandra and S&L. Contracting Officer’s Statement of Facts (COS) at ¶ 12. The agency conducted

discussions with both offerors and received final revised proposals on November 15. Id. at ¶¶ 13, 14. The agency’s evaluation produced the following results:

	Alexandra	S&L
Experience	Acceptable	Excellent
Key Personnel	Marginal	Excellent
Past Performance	Acceptable	Excellent
Project Management	Acceptable	Excellent
Price	\$7,525,000	\$8,343,191

Agency Report (AR), Tab 9, Award Price Competition Memorandum (APCM) at 7. When conducting its evaluation, the agency expressed concern with several aspects of Alexandra’s technical proposal. Id. Indeed, the agency was concerned because Alexandra’s proposal lacked information confirming that Alexandra and its proposed masonry subcontractor had collaborated on more than one project. Id. at 7. The agency further was concerned with Alexandra’s minimal subcontracting plan and lack of any details regarding staging strategies, and the fact that Alexandra had completed only one major historic project within the last five years. Finally, the agency was concerned because Alexandra served as a construction manager for its only referenced high-rise project and because the project required Alexandra to construct a modern-style building as opposed to an art deco style building. Id.

Based on the agency’s evaluation, the source selection authority determined that S&L’s proposal represented the better value because, despite Alexandra’s lower evaluated price, S&L’s technical proposal was much higher rated. AR, Tab 9, APCM at 8. Central to the source selection authority’s (SSA) tradeoff analysis was Alexandra’s lack of demonstrated work history with its proposed subcontractor. Id. In contrast, the SSA explained that S&L would self-perform the masonry repairs and that S&L possessed excellent past experience providing masonry services to buildings of similar size and historical nature. Id. After the agency notified Alexandra that its proposal was unsuccessful, it filed the instant protest with our Office.

DISCUSSION

Alexandra raises multiple allegations regarding the agency’s evaluation of its and the awardee’s proposals. We have reviewed all of Alexandra’s allegations, and find no basis to sustain the protest. We discuss the principal allegations below, but note, at the outset that, in reviewing protests challenging an agency’s evaluation of proposals, including technical and past performance evaluations, our Office does not reevaluate proposals or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency’s evaluation was reasonable and consistent with the solicitation’s evaluation criteria, as well as applicable statutes and regulations. SaxmanOne, LLC, B-414748, B-414748.3, Aug. 22, 2017, 2017 CPD ¶ 264 at 3.

Alexandra's Proposal

Alexandra primarily argues that the agency conducted its past performance evaluation unreasonably because it did not verify Alexandra's performance with all of the listed points of contact and improperly contacted a third-party architectural firm for information. Protest at 1. In response, the agency argues that its actions were reasonable under the terms of the solicitation. Agency's Second Supp. MOL at 2-3.

The record shows that Alexandra identified four points of contact for its six referenced examples (i.e., three contracts all had the same point of contact). AR, Alexandra Proposal--Factor 1. The agency elected not to verify Alexandra's performance with the point of contact for these three contracts because it concluded that those projects were either less relevant to the agency's requirement or were completed more than 10 years earlier. AR, Tab 11, First Dec. of Project Manager, at ¶ 9. For the remaining three projects (i.e., the IRS Service Center contract, the Huntington YMCA contract, and the Parkway YMCA contract), the agency verified Alexandra's performance with only the point of contact for the IRS Service Center contract. Id. at ¶ 11. The agency repeatedly attempted to verify Alexandra's performance with the point of contact for the Huntington YMCA project but the point of contact did not return telephone calls or e-mails. Id. Although Alexandra provided an updated point of contact following discussions, the agency elected to verify Alexandra's performance with the architectural firm rather than contact the updated point of contact for the Huntington YMCA contract or the listed point of contact for the Parkway YMCA contract. Id. at ¶¶ 11-12. The architectural firm was able to verify Alexandra's performance for the Parkway YMCA project, and commented that Alexandra was "reasonable to work with, had conducted productive subcontractor coordination meetings, and [that the architectural firm] would have no problem working with [Alexandra] again." COS at ¶ 27.

In our view, the agency's decision not to verify Alexandra's performance with some of the points of contact listed in the proposal was reasonable because, as noted above, the solicitation provided that the agency may conduct telephone interviews with points of contact. See RFP at 33. In this regard, our decisions explain that absent specific solicitation language (which is not present here) there is no minimum number of past performance survey responses that an agency must receive relative to the number of references identified by the offeror, nor is there any requirement that offerors' have the same number of references to receive equal ratings. See, e.g., Sunrise Med. HHG, Inc., B-310230, Dec. 12, 2007, 2008 CPD ¶ 7 at 5. Thus, the agency's decision not to contact some of Alexandra's points of contact was reasonable because the solicitation did not contain a requirement to do so.

We also find the agency's decision to contact the architectural firm was reasonable. An agency is generally not precluded from considering any relevant information when conducting its past performance evaluation. See Federal Acquisition Regulation (FAR) § 15.305(a)(2)(ii); accord Paragon Sys., Inc., B-299548.2, Sept. 10, 2007, 2007 CPD ¶ 178 at 8. Indeed, the relevant inquiry as to who may furnish a past performance reference is whether the individual has a sufficient basis of knowledge to render an

informed opinion regarding the prior work effort. Paragon Sys., Inc., supra. Here, we think that the architectural firm had a sufficient basis of knowledge to provide an informed opinion because it had worked with Alexandra on the Parkway YMCA contract. COS at ¶ 27. Furthermore, we note that the solicitation did not contain any restriction precluding the agency from contacting additional sources of information and specified that the agency may rely on personal knowledge when evaluating past performance. See RFP at 33. Accordingly, we deny this protest allegation because the architectural firm had a reasonable basis to furnish a past performance reference and the agency's contact with the architectural firm was consistent with the solicitation.

Alexandra also argues that the agency unreasonably evaluated its past performance as acceptable because it received mostly positive ratings for its referenced examples. Protester's Comments at 7. Notwithstanding the fact that Alexandra received mostly positive ratings, the solicitation provided that the past performance confidence assessment would be assigned based on relevancy and quality. RFP at 33. Thus, an offeror would receive a higher rating when it had both highly relevant examples and high quality performance. Id.

Here, the record shows that the agency concluded that Alexandra had high quality ratings but not highly relevant performance examples. AR, Tab 8, Source Selection Evaluation Board Report at 16-17. In our view, that conclusion was reasonable. The solicitation called for the selected contractor to cut back and repoint mortar joints in terra cotta, remove existing coating from terra cotta, replace damaged terra cotta, install loose granite, and cut out and replace spalls in the granite. RFP, Project Manual at § 011000. In contrast, Alexandra's examples involve mostly general construction and some modern exterior and masonry restoration; only one highly relevant example included replacing terra cotta and repointing terra cotta joints. AR, Alexandra Proposal--Factor One. Given that the majority of Alexandra's referenced examples did not involve similar masonry restoration, we do not find the agency's evaluation to be unreasonable. Accordingly, we deny this protest allegation.

Finally, Alexandra argues that the agency unequally evaluated its and the awardee's proposals when examining the relevancy of the offerors' referenced examples. Specifically, it argues that it was assigned weaknesses for not serving as the prime contractor on some of its referenced examples, while the agency did not assign identical weaknesses to the awardee when it also did not serve as the prime contractor for some of its referenced examples. Protester's Second Supp. Comments at ¶ 3. In response, the agency asserts that meaningful differences between the proposals support the assignment of the weakness to the Alexandra but not to the S&L proposal. Second Supp. MOL at 5.

In this regard, agencies may not generally engage in conduct that amounts to unfair or disparate treatment of competing offerors. LCPtracker, Inc.; eMars, Inc., B-410752.3 et al., Sept. 3, 2015, 2015 CPD ¶ 279 at 6. On this record, we find that the agency unreasonably evaluated the quotations. In this context, both proposals include referenced examples where the offerors served in roles other than as prime contractors.

Alexandra's proposal shows that it served as a construction manager, but not the prime contractor, for one of its referenced examples, while S&L's proposal shows that it served as a masonry subcontractor for two of its referenced examples. AR, Alexandra Proposal--Factor 1, at 8; S&L Proposal--Factors 1 and 2, at 5, 7. Yet, the agency assigned only a weakness to Alexandra's proposal for not serving as the prime contractor on some of its referenced performance examples. See AR, Tab 9, APCM at 7. Thus, we find that the agency unequally evaluated the proposals. See ManTech Advanced Sys. Int'l, Inc., B-416374, Nov. 27, 2018, 2018 CPD ¶ 408 at 7 (agency unequally evaluated proposals when the agency assigned a weakness to the protester for not including key information in its proposal but did not assign a weakness to the awardee on that basis).

Although we find that the agency unequally evaluated the proposals in this regard, we do not find that the agency's error resulted in competitive prejudice and therefore we do not sustain this protest allegation. Competitive prejudice is an essential element of every protest, and requires that the protester prove that, but for the agency's actions, it would have received the award. Straughan Env'tl., Inc., B-411650 et al., Sept 18, 2015, 2015 CPD ¶ 287 at 12. We do not find that the protester suffered competitive prejudice because removal of this weakness would not necessarily improve the firm's competitive position. Cf. HydroGeoLogic, Inc., B-311263, B-311263.2, May 27, 2008, 2008 CPD ¶ 218 at 8 (protester did not suffer competitive prejudice because removal of a notable weakness would not improve the firm's competitive position); EMTA Insaat Taahhut Ve Ticaret, A.S., B-416391, B-416391.4, Aug. 13, 2018, 2018 CPD ¶ 280 at 7 n.4 (protester did not suffer prejudice because sustaining the allegation would not improve the firm's competitive position).

Significantly, the record shows that Alexandra was assigned numerous other weaknesses. These included the agency's primary concerns that Alexandra would subcontract the masonry restoration work, that Alexandra's proposal had a minimal subcontractor management plan, and that the proposal contained limited details evidencing prior instances where Alexandra and the subcontractor had collaborated.¹

¹ To the extent the protester asserts that the GSA unreasonably evaluated its proposal with respect to its experience with its proposed subcontractor or to its subcontractor management plan, that challenge is untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), require that protest allegations, other than those based upon improprieties in the solicitation, must be filed within 10 days of when the allegation was known or should have been known. Here, the protester knew as of January 30, the date that the agency produced its redacted report, that the agency had concerns with Alexandra's proposed use of a subcontractor, and with the apparent lack of documentation showing that the subcontractor would actually perform the work. Thus, the protester should have raised this allegation no later than February 11 in order to be considered timely. See 4 C.F.R. § 21.0(d) (when GAO is closed, the time for filing extends to the next day that GAO is open). Here, however, the protester did not raise this allegation until it filed its comments on the agency's first supplemental report on February 27.

AR, Tab 9, APCM at 7. Further, the record shows that the agency was largely concerned with Alexandra's lack of highly relevant experience in regard to all of its referenced examples. Id. Thus, when the agency conducted its tradeoff analysis, the agency considered Alexandra's use of a subcontractor and its lack of multiple examples of highly relevant prior work experience, to constitute the primary distinguishers between the proposals. Id. at 8. Therefore, we do not find that Alexandra suffered competitive prejudice because the removal of the weakness associated with its level of authority for one project would not have any effect on the agency's tradeoff analysis. Accordingly, we deny this protest allegation.

S&L's Proposal

With respect to S&L's proposal, Alexandra primarily argues that the proposal was unacceptable because it failed to comply with a material term in the solicitation. Specifically, Alexandra points out that S&L's proposal does not contain two examples of projects completed within Northern New England as required by the solicitation. Protester's Comments at 3. In response, the agency argues that the requirement was not material and, alternatively, that the protester did not suffer competitive prejudice. First Supp. MOL at 2-3.

In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis of award. ARBEIT, LLC, B-411049, Apr. 27, 2015, 2015 CPD ¶ 146 at 4. We will not disturb an agency's determination of the acceptability of a proposal absent a showing that the determination was unreasonable, inconsistent with the terms of the solicitation, or in violation of procurement statutes or regulations. Northern Light Prods., B-401182, June 1, 2009, 2009 CPD ¶ 117 at 3.

On this record, we find material the requirement that offerors submit two examples of experience performed in Northern New England because the solicitation specifically included this requirement as part of the evaluation criteria. RFP at 30. Indeed, the evaluation criteria specifically stated that "at least 2 projects must have been located in Northern New England." In view of that unequivocal language, we think that offerors were reasonably led to believe that they must submit at least two Northern New England projects in order to comply with the solicitation's evaluation criteria. Cf. Serka Taahhut Insaat, A.S., B-416391.2, B-416391.3, Aug. 13, 2018, 2018 CPD ¶ 284 at 3 (lines of communication on firm's organizational chart constituted a material term of the solicitation because the solicitation advised that the evaluation would be based on that information). Thus, because S&L did not submit at least two projects completed in Northern New England, we find that the agency improperly waived a material term of the solicitation. See AR, S&L Proposal--Factors 1 and 2, at 1-10

Nevertheless, even where an agency may have relaxed a material solicitation requirement, the protester still must show that it was prejudiced by the agency's action. As noted above, there is no basis for finding competitive prejudice and sustaining a protest where the protester fails to demonstrate that, but for the agency's actions, it

would have received the award. See Straughan Env'tl., Inc., supra. In the context of relaxation of material terms, the protester must show that it would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. Platinum Business Corp., B-415584, Jan. 18, 2018, 2018 CPD ¶ 34 at 4.

Here, we have no basis to conclude that Alexandra was prejudiced by S&L's omission of at least two examples Northern New England projects. Alexandra has not alleged that it would have included alternate examples of performance had it known that the agency would not have enforced this requirement. Cf. Platinum Business Corp., supra (protester was not prejudiced when it did not allege that it would have reformatted an information spreadsheet had it known that the agency would not enforce that requirement); Penn Parking, Inc., B-412280.2, Feb. 17, 2016, 2016 CPD ¶ 60 at 4 (protester was not prejudiced because the protester did not specify how it would have altered its proposal in light of relaxed solicitation requirements). Accordingly, we deny this protest allegation because the protester has failed to demonstrate that it suffered any competitive prejudice.

Alexandra finally argues that the agency unreasonably evaluated S&L's past performance. The protester asserts that S&L received satisfactory ratings for its prior contracts and therefore should not have been rated excellent for this factor. Protester's Comments at 8. In response, the agency asserts that S&L's past performance rating was reasonable because it received positive ratings and had highly relevant work. First Supp. MOL at 4.

On this record, we have no basis to object to the agency's evaluation. Although S&L received some satisfactory ratings on its CPARS, S&L also received exceptional and very good ratings. AR, S&L CPARS, Vols. 1, 2. Further, S&L received mostly exceptional or very good ratings on its PPQs. AR, S&L Proposal--Past Performance, at 1-22. Finally, as the agency points out, S&L's references are highly relevant to the agency's requirement because they involved repointing stone or brick, repairing masonry walls, working on multiple buildings listed in the National Register of Historical Places, and repairing at least some buildings that were either continuously occupied or located in urban, high-traffic areas. AR, S&L Proposal--Factors 1 and 2, at 1-10. Thus, in view of the fact that each of S&L's references met most of the minimum characteristics, involved highly similar functions as the instant requirement, and were rated favorably, we find the agency's assignment of an excellent rating to be reasonable. See RFP at 33 (higher quality performance on more relevant projects would result in a higher past performance confidence rating). Accordingly, this protest allegation is denied.

The protest is denied.

Thomas H. Armstrong
General Counsel