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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: KIC Development, LLC

File: B-297425.2

Date: January 26, 2006

Anthony Acri for the protester.
Rebecca L. Taylor, Esq., Leftwich & Ludaway, for Legin Group, Inc., an intervenor.
Jud E. McNatt, Esq., Department of Housing and Urban Development, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's determination that protester's proposal was technically unacceptable is sustained where the agency's determination that the proposal was unacceptable because it did not show that the protester itself met the solicitation's experience requirement--while its subcontractor clearly did--was inconsistent with the solicitation's evaluation scheme, which allowed offerors to meet experience requirements using the experience of properly-committed key employees or subcontractors.

DECISION

KIC Development, LLC protests the award of a contract to Legin Group, Inc. by the Department of Housing and Urban Development (HUD) pursuant to request for proposals (RFP) No. R-ATL-01810, issued to procure lead evaluation services for single-family properties owned by HUD and located within specified geographic regions; the award at issue here is for lead evaluation services within HUD's Atlanta region. KIC argues that HUD unreasonably concluded that KIC's proposal was technically unacceptable.

We sustain the protest.¹

¹ A related protest, brought by a different offeror and challenging HUD's award in the Denver region, was denied by our Office on January 5, 2006. See Prudent Techs., Inc., B-297425, Jan. 5, 2006, 2006 CPD ¶ ____.

BACKGROUND

The RFP was issued on July 27, 2005, and anticipated the award of up to four contracts for lead evaluation services, one for each of the four areas comprising the jurisdictions of HUD's Homeownership Centers in Atlanta, Denver, Philadelphia, and Santa Ana. The competition was limited to firms participating in the Small Business Administration's (SBA) 8(a) program.

The RFP anticipated that awards would be made to the offerors submitting the lowest-priced, technically acceptable proposals for each area. RFP at M-2.² Offerors could propose to perform in one, or any combination, of the four areas. The RFP identified three evaluation factors: (1) certification; (2) experience and past performance; and (3) management plan. RFP at M-2; RFP amend. 2, at M-4. The evaluation scheme advised potential offerors that proposals must be rated acceptable under all three evaluation factors to be eligible for award. RFP at M-2. In addition, under each of the three evaluation factors, the solicitation also identified a question, or questions, which had "to be answered in the affirmative, during proposal evaluation phase, in order for the offeror to be deemed acceptable for this factor." See RFP at M-2 (for the question under the certification factor); RFP at M-3 (for the three questions under the experience and past performance factor); and RFP amend. 2, at M-4 (for the question under the management plan factor).

Under the certification evaluation factor, the RFP required submission of all required certifications and licenses to perform these services. RFP at M-2. There is no issue in this protest regarding KIC's evaluation as acceptable under this factor.

Instead, this protest turns on KIC's evaluation under the experience and past performance factor. Under this factor, the RFP required that "[t]he Offeror and/or its proposed key personnel and/or its proposed subcontractors must have performed the same or similar services as required by the solicitation over approximately the last three years." RFP at M-2. If an offeror wanted to meet this experience requirement with individuals not currently employed, or with other corporate entities with which it would subcontract, the RFP required the submission of commitment letters with the proposal. The RFP also required that offerors "identify all contracts, either ongoing or completed within the last three years, which demonstrate performance relevant to the solicitation requirements." *Id.* Offerors with more than five relevant contracts were required to identify only the five most recent contracts where they performed these services.

² The RFP here numbers pages serially within each section, and starts each section with page 1 (e.g., L-1, L-2...M-1, M-2); it also numbers paragraphs within each section (M.1, M.2...). The RFP citations in this decision are to the page numbers.

As indicated above, the RFP set forth three questions that had to be answered in the affirmative for offerors to be deemed acceptable under the experience and past performance evaluation factor. These were:

Has the offeror and/or its proposed key personnel and/or its proposed subcontractors (if applicable) provided the same or similar services required by the solicitation over approximately the last three years?

If the experience requirement is met by the experience of individuals or corporate entities not currently employed by or a part of the offeror, has the offeror submitted commitment letters for these individuals and/or corporate entities?

Did the reference checks clearly indicate that the offeror and/or its proposed key personnel and/or its proposed subcontractors (if applicable) have a successful record of providing quality customer service and timely performance?

RFP at M-3.

Under the third evaluation factor, management plan, the RFP's guidance in section M was brief. In its entirety, the provision stated:

Contractor will submit a management plan, including timeline, that demonstrates the contractor understands and can meet the 6-day turnaround required in paragraph 4.2.1 of section C.

RFP amend. 2, at M-4. The only question identified in section M for this factor was:

Does the offeror's management plan and timeline demonstrate that the offeror understands the 6-day turnaround time required in paragraph 4.2.1 of Section C and can meet this requirement?

Id.

By the August 26 closing date, HUD received 29 proposals, including 1 from KIC. KIC's proposal indicated it is an SBA-certified 8(a) and Historically Underutilized Business Zone (HUBZone) contractor; KIC is also an Alaskan Native Corporation. Agency Report (AR), Tab 7B, at 1. Although it does not appear that KIC itself has performed lead evaluation services, its proposal indicates that it has "hired an experienced lead evaluation company that has the qualifications that the Government requires in order to win this contract opportunity." Id.

A technical evaluation panel (TEP) reviewed and rated each of the proposals, and determined that 17 of the proposals, including the proposal submitted by KIC, were

technically unacceptable. The TEP's consensus view of KIC's proposal was as follows:

[KIC] provided copies of current certifications/accreditation/licenses for all staff proposed as lead inspectors, risk assessors, and clearance technicians for region 1 and region 3 for which they proposed. KIC relies completely on a sub for the work. Offeror has not detailed any role for themselves. They failed to provide any information on its own key personnel or performance history, consequently the panel was unable to make a reasonable assessment of KIC's ability to manage the contract. All experience is with subcontractor, ALC. Its proposed subcontractor, ALC, has performed single-family lead base inspections throughout the United States. The Offeror's proposal shows a day-by-day timeline.

AR, Tab 11, at 6.

The remaining 12 acceptable proposals were ranked by price in the area, or areas, for which the firm that submitted the proposal was seeking award. After the offerors submitting the lowest-priced acceptable proposal within each area were determined to be responsible, awards were made without clarifications or discussions. The firm receiving the award for the area covered by the Atlanta Homeownership Center was Legin Group, with a total evaluated price of \$19,308,651.39. KIC's price for these services was \$19,296,475.

On October 5, HUD notified KIC that its proposal had been found technically unacceptable, and that the agency intended to make award to Legin Group. On October 13, the agency provided a debriefing. This protest followed, on October 18.

DISCUSSION

KIC argues that the agency unreasonably concluded that its proposal was technically unacceptable because KIC elected to meet the solicitation's experience requirement with the experience of a properly-committed subcontractor. KIC contends that the solicitation allowed offerors to meet the experience requirement with committed key employees or subcontractors, and that its proposal did so in a manner consistent with the solicitation's instructions.

HUD does not argue--nor does the record suggest--that KIC's proposed subcontractor fails to meet the experience requirement, or that KIC failed to provide a valid letter of commitment from the subcontractor. Rather, HUD explains that the evaluation panel found the proposal unacceptable under the experience portion of the experience and past performance factor because KIC "relied completely on a subcontractor for the work performance and work experience," AR, Memorandum of Law, at 2, and "because the proposal did not indicate in any fashion that the offeror or any of its own staff had any experience whatsoever in the area of lead evaluation

services.” AR, Contracting Officer’s (CO) Statement, at 5. HUD also argues that KIC’s proposal should have been rated unacceptable under the management plan factor, although the contemporaneous evaluation concluded the proposal was acceptable in this area. Id. Specifically, the CO states that he now thinks that KIC’s “proposal (1) indicated no management role for itself in this effort, (2) identified no key personnel staff from [KIC], and (3) did not demonstrate how it would manage subcontractors” Id. at 9.

Our Office examines an agency’s evaluation of experience and past performance to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations; however, the necessary determinations regarding the relative merits of offerors’ past performance records are primarily matters within the contracting agency’s discretion. Kay & Assocs., Inc., B-291269, Dec. 11, 2002, 2003 CPD ¶ 12 at 4. In this regard, our Office will not question an agency’s determinations absent evidence that those determinations are unreasonable or contrary to the stated evaluation criteria. Id.

In our view, HUD’s evaluation strayed from the RFP’s stated evaluation scheme. As indicated above, the RFP expressly provided that “[t]he Offeror and/or its proposed key personnel and/or proposed subcontractors must have performed the same or similar services as required by the solicitation over approximately the last three years.” RFP at M-2. Despite HUD’s attempt to argue that the term “and/or” immediately following the term “Offeror” permits other entities (key personnel or proposed subcontractors) to contribute to an offeror’s showing of experience, but not substitute for it entirely, that is not the commonly understood meaning of the term “and/or.” Rather, the term “and/or” as used in this context indicates that the experience requirement can be met jointly (X and Y together meet the requirement) or by one of the named entities (either X meets the requirement, or Y meets the requirement). Accordingly, KIC’s proposed approach of meeting the experience requirement with its properly-committed subcontractor was consistent with evaluation scheme; HUD’s finding that the proposal was technically unacceptable in this regard was not.

As noted above, in the agency report, HUD also argues that the CO now views KIC’s proposal as unacceptable under the third evaluation factor, management plan. (During the contemporaneous evaluation, KIC’s proposal was rated acceptable under the management plan factor.) Generally, we accord little weight to agency efforts to defend, in the face of a bid protest, a prior source selection through the submission of new analyses, because such reevaluations and redeterminations prepared in the heat of the adversarial process may not represent the fair and considered judgment of the agency. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. In addition, we note that the management plan factor in section M of the RFP was focused entirely on whether an offeror’s proposal indicated sufficient awareness of the 6-day turnaround for inspections required by the solicitation. As mentioned above, the contemporaneous evaluation materials

indicate that HUD's evaluators thought the proposal met this requirement, and based on our review of the record here, we see no basis to question that conclusion.³

RECOMMENDATION

Because we conclude that the evaluation of KIC's proposal was not consistent with the solicitation's stated evaluation scheme, we sustain the protest. We recommend that HUD reevaluate KIC's proposal in accordance with the solicitation's scheme, and make a new determination about whether the proposal is acceptable. If the proposal is found acceptable, we recommend that HUD determine whether KIC is a responsible offeror, subject to the SBA's certificate of competency procedures. See 13 C.F.R. § 125.6(f) (2005). In the event HUD decides that KIC's proposal is acceptable, and that KIC is a responsible offeror, we recommend that the agency terminate the award to Legin Group and make award to KIC as offeror with the lowest-priced, technically acceptable proposal for the area covered by HUD's Atlanta Homeownership Center. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest, including attorneys' fees, if any. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2005). As required by section 21.8(f)

³ The record indicates that HUD, in essence, is concerned about KIC's intent to comply with the RFP's limitations on subcontracting. See AR, CO's Statement, at 8. Our discussion above should not be read to suggest that HUD reasonably can have no concerns about KIC's proposed approach in this area. In fact, we think the very issues the evaluators identified in their assessment of the experience and past performance factor could give rise to reasonable agency concerns related to either the technical acceptability of KIC's proposal or KIC's responsibility. Specifically, the RFP at I-6 incorporated the requirement that at least 50 percent of the cost of contract performance incurred for personnel be expended for employees of the prime contractor. See Federal Acquisition Regulation § 52.219-14. Since KIC's proposal anticipates extensive subcontracting, the agency may want to review this matter. Where a proposal leads an agency to the conclusion that the offeror could not and would not comply with the subcontracting limitation, we have considered this to be a matter of the proposal's technical acceptability; a proposal that fails to conform to a material term or condition of the solicitation such as the subcontracting limitation is unacceptable and may not form the basis for an award. KIRA, Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3. Otherwise, the agency's judgment as to whether KIC will comply with the subcontracting limitation is a matter properly considered as part of the agency's responsibility determination. Id.

of our Regulations, KIC's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel