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Decision

Matter of: Gonzales Consulting Services, Inc.

File: B-291642.2

Date: July 16, 2003

John S. Stewart, Esq., Stewart Sokol & Gray, for the protester.
Pamela J. Mazza, Esq., Philip M. Dearborn, Esq., and Jacquelyn S. Stewart, Esq., Piliero, Mazza & Pargament, for NSR Information, Inc., an intervenor.
Gena E. Cadieux, Esq., Beth A. Kelly, Esq., Department of Energy, and
Ernest E. Estes, Esq., Department of Energy, Bonneville Power Administration, for the agency.
Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation advised offerors that agency would make a "best buy" determination based on consideration of, among other things, total cost to the agency and offerors' prior experience and past performance, agency reasonably concluded that protester's cost advantage of approximately 2 percent was outweighed by awardee's experience and highly regarded past performance of the precise requirements being competed under this solicitation.

DECISION

Gonzales Consulting Services, Inc. (GCS) protests the Bonneville Power Administration's (BPA) award of a contract to NSR Information, Inc. (NSRI) pursuant to request for offers (RFO) No. 03127 to provide various support services for BPA.[1] GCS protests that the agency's source selection decision was unreasonable and that the agency was biased against GCS.

We deny the protest.

BACKGROUND

BPA issued RFO No. 03127 on August 23, 2002, seeking proposals to provide administrative, technical and professional support services at various locations throughout the BPA servicing area.[2] The services to be performed under this solicitation combine the requirements currently being performed under three separate BPA contracts; NSRI is the incumbent contractor under two of those contracts.

The solicitation contemplated award of a cost-plus-fixed-fee contract for a 3-year base period and two 3-year option periods, and required that offerors submit separate cost and technical proposals. With regard to cost proposals, the solicitation provided offerors with the "estimated gross wages" that had historically been paid for the various types of labor required to perform the services sought, and required offerors to propose direct labor costs and indirect/burden rates for each contract period.[3] Agency Report, Tab 1, RFO, at 100002, 100009. More specifically, the RFP provided:

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[1] BPA is a federal entity within the Department of Energy, and was created by the Bonneville Project Act of 1937 to market hydroelectric power generated by a series of dams along the Columbia River in Oregon and Washington. 16 U.S.C. §§ 832-832m (2000). Unlike most executive branch agencies, BPA's contracting activities are not governed by the competition requirements of the Federal Property and Administrative Services Act of 1949, as amended by the Competition in Contracting Act of 1984; rather, the Bonneville Project Act provides that BPA's contracting authority is subject only to the provisions of that statute. 16 U.S.C. § 832a(f) (2000); see also International Line Builders, B-227811, Oct. 8, 1987, 87-2 CPD ¶ 345. BPA is, similarly, not subject to the Federal Acquisition Regulation (FAR) but, rather, is governed by BPA's own acquisition regulations, the Bonneville Purchasing Instructions (BPI), that implement the procurement authority granted in its organic statute. Id.

[2] The BPA servicing area includes the states of Oregon, Washington, Idaho, the portion of Montana west of the Continental Divide, and small portions of California, Nevada, Utah, and Wyoming. Agency Report, Tab 1, at 100066.

[3] The RFO referred to the combined indirect/burden rates as the "Composite Indirect Cost Rate Multiplier" or CICRM. Agency Report, Tab 1, RFO, at 100005a.

> [An offeror's] Cost Proposal must include a breakdown of the rates to be used in the performance of the contract (i.e. Fringe Benefits, Overheads, G&A [General & Administrative], etc.). This breakdown must include the individual rates to be used and must show how these rates are applied in the calculation of the proposed costs.

Agency Report, Tab 1, RFO, at 100005a.

With regard to contract award, offerors were advised that the agency would make a "best buy" determination based on both cost and non-cost factors. Specifically, the solicitation stated:

> Best buy will be determined by comparing such attributes of interests as total cost to BPA, technical and management features, relative quality and adaptability of services, the offeror's financial responsibility, skill, experience, record of integrity in dealing, the time of performance offered, past performance (including safety record), and whether the offeror has complied with the specifications or demonstrated capability to perform the statement of work.

Agency Report, Tab 1, RFO, at 100010.

Prior to submitting its initial proposal on September 20, 2002, GCS sought the agency's responses to certain questions, including an inquiry as to whether site managers' salaries were included in the "estimated gross wages" disclosed in the RFO.[4] The contracting officer mistakenly understood GCS's question to refer to only the overall project manager, and, based on this misunderstanding, incorrectly advised GCS that the costs associated with site managers were not part of the "estimated gross wages" as shown in the RFO.[5]

Nine offerors, including GCS and NSRI, submitted proposals which the agency subsequently reviewed and evaluated. On October 18, NSRI's proposal was selected for award and GCS was subsequently advised of that source selection decision. Thereafter, GCS filed an agency-level protest based, primarily, on GCS's reliance on the incorrect information it had been given regarding non-inclusion of site managers' salaries in the RFO's "estimated gross wages."

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[4] GCS states that it "was aware" there were at least seven site managers performing under the existing contract. Protest at 3.

[5] The BPI does not require that agency responses to individual offerors' questions be provided to all offerors; accordingly, only GCS received the incorrect information.

By decision dated January 2, 2003, the head of the contracting activity (HCA) sustained GCS's protest. Agency Report, Tab 3, at 100090-100106. In that decision the HCA directed that the agency re-open discussions with the three highest rated offerors, including NSRI and GCS, correct the misinformation GCS had previously received, request proposal revisions, reevaluate proposals, and make a new source selection decision. Id.

Consistent with the HCA's direction, by letters dated January 22, 2003, the agency reopened discussions with NSRI, GCS and a third offeror. Agency Report, Tab 4. The letter to GCS specifically advised that the "estimated gross wages" published in the RFO did include the salaries of seven site managers, but not the salary of the project manager, and requested that GCS submit proposal revisions by January 31. Agency Report, Tab 4, at 100119-20. GCS responded by letter dated January 31, making various changes to both its cost and technical proposal. Agency Report, Tab 6, at 100201-13. Among other things, GCS revised various portions of its aggregate indirect rate, that is, its CICRM, including a reduction in its fringe benefit rate. Agency Report, Tab 6, at 100211, 100226.

The agency, thereafter, conducted face-to-face discussions with each offeror. The contracting officer states that during the meeting with GCS, the agency sought explanations from GCS regarding the various changes to its proposed costs, and that GCS did not provide satisfactory responses. Specifically, the contracting officer states, "When questioned about these [cost] changes, [GCS] stated that they *believed* they could recover costs with the lower rates, but . . . did not offer any additional support for their conclusions." Agency Report, Tab 2, Decision Award Document, at 100088 (italics in original).

During the face-to-face meetings with the offerors, the agency also advised each offeror that there was a "significant likelihood" that the staffing level of employees used under the contract would be reduced from the existing level of 165,[6] and asked at what point each offeror would seek to amend its CICRM. Agency Report, Tab 2, at 100085. By letter dated February 27, GCS responded to this question, stating:

> You have asked us to address the impact of potential staff reductions on our proposed Composite Indirect Cost Rate Multiplier (CICRM).
>
> In our Revised Pricing Proposal dated January 31, 2003, we proposed a CICRM (exclusive of Fixed Fee) of [deleted]. We are prepared to accept this provided staff levels are not reduced below [deleted] from

[6] The record indicates that BPA has been undergoing financial difficulties since 2001, and is under significant, ongoing pressure to reduce costs. Agency Report, Tab 15, at 100368-73.

> the current level of 165 . . . . As staffing is reduced below [deleted], we would ask for incremental increases in the CICRM as follows:
>
> | Staffing level | CICRM |
> |---|---|
> | [deleted] | [deleted] |
> | [deleted] | [deleted] |
> | [deleted] | [deleted] |
> | [deleted] | [deleted] |
> | [deleted] | [deleted] |
> | [deleted] | [deleted] |

Agency Report, Tab 11, at 100343.

In contrast, NSRI responded to the agency's question regarding reduced staffing by stating that in no event would it seek changes to its CICRM prior to [deleted] (that is, for approximately [deleted]), and that it would do so then only if the employee base had decreased by at least [deleted] percent. Agency Report, Tab 11, at 10034. In short, GCS stated that it would seek an increase in its CICRM if the number of employees decreased from 165 to [deleted]--a decrease of [deleted]; NSRI stated it would not seek any increase for [deleted] and, then, only if the number of total employees had decreased by [deleted] percent.

Following the face-to-face discussions, the agency requested that the Defense Contract Audit Agency (DCAA) audit each offeror's proposed billing rates. Agency Report, Tabs 12, 13. The DCAA audit report regarding NSRI's proposed rates stated: "We found no basis to question NSRI's proposed provisional billing rates." Agency Report, Tab 12, at 100347. In contrast, the DCAA either took exception to or questioned several of the rates proposed by GCS. For example, the DCAA report concluded that GCS's method of calculating its fringe benefit rate differed from fiscal year (FY) 2002 to FY 2003, and that "[t]his practice is noncompliant with FAR 31.202." Agency Report, Tab 13, at 100358. With regard to GCS's proposed overhead rate, the DCAA report stated: "[GCS] understated the recorded or estimated overhead rates," further stating, "We determined [GCS] proposed overhead costs are a significant reduction from FY 2002 amounts." Agency Report, Tab 13, at 100359. Finally, with regard to GCS's proposed G&A rate, the DCAA report stated, "[GCS] significantly estimated rates lower than recorded for FY 2002," elaborating that although GCS's "cost and pricing data calculated a G&A rate for FY 2003 at [deleted] percent," GCS had proposed a [deleted] percent G&A rate for all contract periods. Agency Report, Tab 13, at 10060.

Following completion of discussions and receipt of all proposal revisions, the agency again evaluated the proposals, considering the various cost and non-cost issues identified in the RFO. The total costs proposed by GCS and NSRI were very close. Specifically, NSRI's proposed cost was $78,982,345, Agency Report, Tab 5, at 100198;

GCS's proposed cost was [deleted]. Agency Report, Tab 6, at 100211-13.
In evaluating the proposals, the agency considered the relative proximity of GCS's and NSRI's proposed costs, noting that GCS's cost proposal was approximately [deleted] percent lower than NSRI's, but also identifying certain risks that GCS's proposal presented. Specifically, the agency considered the inconsistency in GCS's indirect rates as identified by DCAA, and the fact that GCS had expressly qualified its initial commitment to hold its CICRM constant, stating: "We are prepared to accept [our initially proposed CICRM rate] <u>provided</u> staff levels are not reduced below [deleted]." Agency Report, Tab 11, at 100343 (emphasis added). In contrast, the agency considered NSRI's "proven track record," its ability to "control costs and work with BPA collaborately," its success in "provid[ing] a very high level of service," and its more advantageous commitment to maintain its CICRM. Agency Report, Tab 2, at 100087, 100089.

On March 17, the contracting officer, acting as the source selection authority, concluded that NSRI's experience in successfully performing the requirements being competed and the high quality of its past performance, along with the risks associated with GCS's proposal, outweighed the benefit offered from GCS's slightly lower proposed costs, and selected NSRI's proposal for award, stating:

> It is my opinion that the selection of NSRI poses the least amount of risk to BPA and the difference in price between GCS and NSRI is not especially significant, and if staff reductions are necessary, NSRI's costs will be lower than GCS'[s].
>
> In our best judgment, NSRI's proposal offers BPA the best overall value in that it provides a stabilization of costs with minimal disruption to current operations and will require the least amount of government oversight. There is no question of their overhead and fringe benefits rates, because they have been audited and accepted by DCAA, based on actual costs. The DCAA audit found that there were discrepancies between GCS'[s] proposed and actual costs. This discrepancy is understandable in that the audit is based on historic costs and many new costs would arise if GCS were to perform this work. However, as a major cost-reimbursable contract, the miscalculation of these costs could have significant negative implications for BPA and/or GCS. BPA is not i[n] the position to accept these risks at this time.
>
> It is my opinion that the selection of NSRI to continue our support services contract presents the least risk to BPA at this time and is the "best buy" for BPA based upon the criteria set for this competition. NSRI has performed very satisfactorily over the years and has demonstrated, not only a willingness, but also an ability to understand BPA's business and work with us collaboratively to provide a very high level of service. NSRI has repeatedly demonstrated their willingness to partner with BPA, as shown by their recent decision to freeze salaries

> at their current level indefinitely, while BPA attempts to recover its financial health. They have also [deleted] rates even though the number of employees has [deleted].

Agency Report, Tab 2, Decision Award Document, at 100089.

Thereafter, the agency advised GCS of its source selection decision. This protest followed.

DISCUSSION

GCS protests that the agency's source selection decision was unreasonable and that the agency was improperly biased against GCS in favor of the incumbent, NSRI. As discussed below, based on our review of the record, we find no basis to question the reasonableness of the agency's source selection decision, nor does the agency's reliance on NSRI's successful experience and highly regarded past performance constitute improper bias.

In reviewing a protest challenging an agency's evaluation of competing proposals, our Office will not reevaluate the proposals but, rather, will examine the record to ensure that the agency's evaluation was reasonable and consistent with the stated evaluation criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 3-4. A protester's mere disagreement with the agency's evaluation determination does not provide a basis for sustaining the protest. Brunswick Def., B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225 at 9.

Further, it is well settled that a particular offeror may possess unique advantages and capabilities due to its prior experience under a government contract, and the government is not generally required to equalize competition to compensate for such an advantage. Crux Computer Corp., B-234143, May 3, 1989, 89-1 CPD ¶ 422 at 5. More specifically, our decisions have long held that such an advantage neither constitutes preferential treatment nor is otherwise unfair. See, e.g., B.B Saxon Co., Inc., B-190505, June 1, 1978, 78-1 CPD ¶ 410 at 20.

Where, as here, the solicitation expressly advised offerors that the agency would consider the offerors' experience and past performance, it was clearly reasonable for the agency to rely on NSRI's experience in successfully performing the activities being competed, along with its highly regarded past performance of those activities with regard to controlling costs, and conclude that the advantages offered by NSRI's proposal outweighed any potential advantage reflected in GCS's slightly lower proposed costs. This is particularly true when GCS's cost advantage was based on billing rates that DCAA had questioned,[7] and that GCS had specifically conditioned on retention of an employee base that did not decrease by more than [deleted] percent.[8] The agency's preference for the incumbent's performance in these circumstances does not constitute an improper bias. To the contrary, we find the agency's source selection decision to be reasonable and supported by the record.

The protest is denied.

Anthony H. Gamboa
General Counsel

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[7] GCS maintains that the agency "neither had the right nor the obligation" to perform a "subjective and uninformed evaluation" of its proposed billing rates. GCS Comments on Agency Report, May 22, 2003, at 12. Nonetheless, other than arguing generally that all forward billing rates are projections, and asserting in conclusory form that GCS's explanation to the agency regarding its proposed rates should have been considered adequate, GCS offers nothing in the way of a detailed explanation responding to the specific concerns identified in the DCAA audit report.

[8] GCS also asserts that it was improper for the agency's evaluation to include consideration of GCS's February 27, 2003 statement that it would retain its initially proposed CICRM "provided staffing levels are not reduced below [deleted]"; GCS argues that it was only responding to a "hypothetical question." GCS Comments on Agency Report, May 22, 2003, at 13. GCS's assertion in this regard is without merit. The GCS statement was submitted in response to a specific agency question regarding the impact of staff reductions. GCS's response was unequivocal in not only expressly conditioning its initially proposed CICRM on retention of a staffing level of [deleted] employees, but further stating, "[a]s staffing is reduced below [deleted], we would ask for incremental increases" and calculated the increases it "would ask for" to the ten thousandth of a percentage point. Agency Report, Tab 11, at 100343.