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Decision

Matter of: Lloyd H. Kessler, Inc.

File: B-284693

Date: May 24, 2000

Jan D. Sokol, Esq., Stewart Sokol & Gray, for the protester.
James L. Weiner, Esq., and Alton E. Woods, Esq., Department of the Interior, for the agency.
Henry J. Gorczycki, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency is required to disclose in the solicitation a subfactor to evaluate a particular type of experience under the experience factor where the subfactor constitutes 40 percent of the technical evaluation.

DECISION

Lloyd H. Kessler, Inc. protests the award of a contract to John L. Jersey & Son, Inc. under request for proposals (RFP) No. FWS1-00-P004(KH), issued by the Department of the Interior, United States Fish and Wildlife Service (USFWS), for river dike renovation/rehabilitation at the Ridgefield National Wildlife Refuge, Washington. Kessler protests that the agency did not adhere to the stated RFP evaluation factors and improperly used unstated significant subfactors in the evaluation, and improperly evaluated Kessler's past performance.

We sustain the protest.

The RFP, issued October 29, 1999, contemplated the award of a fixed-price construction contract. Contract performance cannot begin "until the eagle leaves its nest" in August 2000. RFP amend. 0002, at 1, 3. The RFP stated a best value evaluation plan under which "price and capability score are of equal importance." RFP at 53. The capability score was said to be based on 100 possible points divided between (1) experience of firm (30 points) and (2) past performance of firm (70 points). RFP at 45.

The RFP's instructions for the preparation of responses to the past performance and experience factors stated that "OFFERORS SHOULD PROVIDE ONLY THE INFORMATION" requested by the RFP, that is, specified information about current contracts or contracts completed in the previous 2 years, including a brief description of the work performed and a point of contact. RFP at 46. The RFP stated that the agency would request performance information from the contract references to evaluate quality of performance, and may contact, and evaluate information received from, references other than those identified by offerors. RFP at 47. The RFP specified five criteria that would be considered in evaluating past performance. RFP at 45-46. The RFP stated no criteria that would be considered in evaluating experience, but noted that this evaluation would be based on existing and prior contracts. RFP at 45-47.

The agency received 17 proposals by the December 14 closing date. Kessler's proposal offered the lowest price of \$425,880 while Jersey's proposed price was \$487,221. Under the agency's evaluation, Kessler's proposal received a score of 70 points while Jersey's proposal was one of the highest-rated proposals with a score of 90 points. Agency Report at 1; Tab 8, Evaluation Results.

The agency's actual evaluation differed from that stated in the RFP in that the relative weights for experience and past performance were reversed and experience was assigned 70 points and past performance was assigned 30 points. Under this evaluation, the experience scores for Kessler and Jersey were 55 and 65 points, respectively, and the past performance scores were 15 and 25 points, respectively.¹ Agency Report at 1, Tab 8, Evaluation Results.

The scores for experience were based on the following three criteria and relative weights not stated in the RFP: (1) bioengineered slope protection, 40 of the possible 70 points; (2) wetland excavation, 15 points; and (3) rip-rap construction, 15 points. Agency Report, Tab 7, Evaluation and Award Determination Summary, at 1. Kessler's proposal received 25 of the possible 40 points for the bioengineered slope protection criterion, and received all of the combined 30 points available under the wetlands and rip-rap criteria. Supplemental Contracting Officer's Statement (Apr. 10, 2000) at 5. The agency evaluation stated that Kessler "apparently has average experience in bioengineering (2.5 projects as the engineers can find in the experience information given) slope protection but has good wetland excavation and rip-rap placement experience." Agency Report, Tab 7, Evaluation and Award Determination, at 2.

¹ The agency also assigned risk ratings based on the offerors' present and past performance. Kessler's rating was high risk and Jersey's rating was low risk. Agency Report, Tab 7, Evaluation and Award Determination, at 2-3.

Under past performance, Kessler's proposal provided the requested information on 16 contracts completed in the past 2 years. Agency Report, Tab 3, Kessler's Proposal, at 16-18. The agency based its past performance evaluation of Kessler on one of these contracts--a previous contract for dike repair with this agency--and two other contracts not identified in Kessler's proposal. Agency Report, Tab 5, Performance Evaluations. The agency evaluation identified adverse comments concerning Kessler's performance that resulted in a below-average score; however, the score was increased to an average score of 15 out of 30 points because the agency did not give Kessler the opportunity to respond to the reports of adverse past performance. Agency Report, Tab 7, Evaluation and Award Determination, at 3.

The agency's cost/technical tradeoff analysis concluded that the concerns arising from reports of adverse past performance for Kessler were not worth the cost savings of Kessler's lower price. Id. The agency determined that Jersey's proposal, as the lowest priced of the most highly rated proposals, represented the best value. Id. at 4, 6.

On February 4, 2000, the agency awarded the contract to Jersey. This protest followed. The agency suspended performance of Jersey's contract pending resolution of the protest.

Kessler protests the agency's failure to adhere to the RFP's stated evaluation weights and the use of unstated experience subfactors in the evaluation.

It is fundamental that offerors must be advised of the bases upon which their proposals will be evaluated. H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203 at 4. In particular, contracting agencies are required by statute and regulation to clearly set forth in the solicitation all evaluation factors and significant subfactors that will affect contract award and their relative importance. 41 U.S.C. § 253a(b)(1) (1994); Federal Acquisition Regulation § 15.304(d). An agency may not give importance to specific factors, subfactors, or criteria beyond that which would reasonably be expected by offerors. Kumasi Ltd./Kukawa Ltd. et al., B-247975.7 et al., May 3, 1993, 93-1 CPD ¶ 352 at 6; Republic Realty Servs., Inc., B-242629, May 7, 1991, 91-1 CPD ¶ 446 at 5. Contracting officials do not have the discretion to announce in the solicitation that they will use one evaluation plan and then follow another without informing offerors of the changed plan and providing them an opportunity to submit proposals on that basis. Kumasi Ltd./Kukawa Ltd., et al., supra at 7. A solicitation that does not set forth a common basis for evaluating offers, which ensures that all firms are on notice of the factors for award and can compete on an equal basis, is materially deficient. The Faxon Co., B-227835.3, B-227835.5, Nov. 2, 1987, 87-2 CPD ¶ 425 at 4.

Here, contrary to the terms of the RFP, the agency considered experience to be the most important technical factor comprising over two-thirds of the capability score. The agency also states that the single subfactor, bioengineered slope protection, is

the key consideration in the overall evaluation of experience, “as it will make or break this project,” Agency Report, Tab 7, Evaluation and Award Determination Summary, at 1 (*italics in original*). Consistent with this statement, bioengineered slope protection, though the term does not appear anywhere in the RFP, is the single-most important technical criterion, carrying more weight in the unstated evaluation plan--40 out of 100 overall capability points--than past performance, which was stated to be the most important evaluation factor, or the weight assigned in the solicitation to the entire experience factor. This is a significant evaluation subfactor that, by statute and regulation, must be clearly stated in the RFP along with its relative importance, even assuming it was considered reasonably related to the general experience factor stated in the RFP. See Kumasi Ltd./Kukawa Ltd., et al., supra, at 6 (subfactor four times more important than reasonably apparent from the RFP must be disclosed in RFP); Devres, Inc., B-224017, Dec. 8, 1986, 86-2 CPD ¶ 652 at 3 (subfactor worth more than any other technical factor is “significant”); cf. Bulova Techs., LLC, B-281384, B-281384.2, Feb. 3, 1999, 99-1 CPD ¶ 99, at 7-8 (agencies can properly take into consideration specific, albeit not expressly identified, experience in making qualitative distinctions between competing proposals, so long as the specific experience is logically encompassed by or related to the RFP’s requirements and stated basis for evaluation).

The RFP did not otherwise indicate that “bioengineered slope protection” had the overwhelming significance given in the evaluation. As noted, this term is not mentioned anywhere in the RFP. The term appears in the Evaluation and Award Determination, which identifies this requirement as contract line item number (CLIN) 11 in the RFP, which is “Furnishing and Placing Fabric Slope Protection.”² Agency Report, Tab 7, Evaluation and Award Evaluation, at 1; see RFP Bid Schedule at 1. Neither the estimated quantity for this CLIN and its associated price (as judged from the protester’s and awardee’s proposals), nor the description of this requirement in the statement of work indicates a level of significance approaching the weight accorded to bioengineered slope protection in the agency’s evaluation. RFP at C-108-16; Agency Report, Tabs 3 and 4, Proposals, Bid Schedule at 1.

The agency concedes that the actual relative weights of the evaluation factors were not consistent with that stated in the RFP, but asserts that Kessler was not prejudiced by this evaluation because Kessler’s relative ranking would not improve if the weights announced in the RFP had been used. The agency’s arguments do not consider the fact the proposals were prepared without offerors knowing either the overwhelming significance of experience generally, or bioengineered slope

² In its Supplemental Report, the agency references other RFP work items not included in CLIN 11 that constitute “bioengineering.” Supplemental Report at 2. However, the award document states that CLIN 11 was the “more weighted item” in the evaluation because it encompasses “bioengineered slope protection.” Agency Report, Tab 7, Evaluation and Award Determination, at 1.

protection specifically, in the evaluation, such that it cannot be said that offerors had a reasonable opportunity to compete on this basis.

In this regard, Kessler prepared its proposal under the stated RFP evaluation plan whereby experience was the least important technical factor. As instructed by the RFP, Kessler provided only a brief description of the work performed under its prior contracts, and did not specifically identify any work involving bioengineered slope protection. Agency Report, Tab 3, Kessler's Proposal, at 16-18. Even so, the agency was able to determine that Kessler "apparently has average experience" under this subfactor. Agency Report, Tab 7, Evaluation and Award Determination, at 2. Kessler states that, had it known when preparing its proposal that experience would be worth 70 percent of the capability score, and that bioengineered slope protection was of prime importance in the evaluation, it would have placed greater emphasis on experience in the contents of its proposal, and specifically would have emphasized its experience providing bioengineered slope protection. Protester's Comments at 9-10. Although the agency evaluation determined that Kessler performed bioengineered slope protection on "2.5 projects as the engineers can find in the experience information given",³ Agency Report, Tab 7, Evaluation and Award Determination Summary, at 2, Kessler states that all of its projects involved this type of work and it would have provided this and other experience information, had the agency stated that experience and this subfactor were as significant as they were evaluated. Protester's Supplemental Comments at 11.

Given that Kessler has relevant experience, it is reasonable to conclude that Kessler's score could increase considerably if the firm is permitted to submit a proposal with the knowledge of the actual importance of experience generally, and of bioengineered slope protection specifically.⁴ Because the agency used an evaluation plan not apparent from the RFP, the offerors, including Kessler, did not have the opportunity to compete on a common basis, so there is at least a reasonable possibility that Kessler's lowest-priced proposal will be selected for award if the

³ As stated, Kessler's proposal did not identify bioengineered slope protection work. Neither the evaluation record nor the agency's responses to this protest demonstrates how the agency made its determination in this regard as to Kessler's proposal or any other proposal. We also question what .5 of a project means for purposes of this evaluation and how that could be determined. No other offeror was noted to have experience on fractions of a project.

⁴ It is possible that, under such circumstances, Kessler's capability score could increase from 70 to 85 points from the evaluation of bioengineered slope protection alone, which would place its lowest-priced proposal extremely close to the highest-rated proposals, including Jersey's, thus changing the underlying basis upon which the agency's cost/technical tradeoff determination and source selection decision was made.

actual evaluation factors and subfactors are disclosed.⁵ We therefore find that Kessler was prejudiced.

We recommend that the agency amend the solicitation to state the agency's proposal requirements and evaluation plan, request and evaluate revised proposals, and make a new source selection decision.⁶ If a proposal other than Jersey's is selected for award, the agency should terminate the contract previously awarded to that firm. We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2000). The

⁵ We note that, even beyond the agency's failure to disclose the actual evaluation plan in the RFP, the documentation supporting the evaluation is minimal, such that it would be difficult to determine the reasonableness of the evaluation, even if the RFP were not defective. The little documentation that does exist indicates that the agency unequally evaluated offerors under the bioengineered slope protection subfactor, in that, although the experience under the other subfactors for Kessler and another offeror were evaluated as good, that offeror had "minimal" bioengineered slope protection experience compared to Kessler's "average" experience, but nevertheless received a considerably higher experience score than Kessler. Agency Report, Tab 7, Evaluation and Award Determination Summary, at 2, 5.

⁶ Kessler also contests its past performance evaluation. While we do not decide whether the past performance evaluation was improper, the record reflects some problems that should be appropriately addressed when the agency reopens discussions. Specifically, the record reflects that the agency contacted only 1 of the 16 references listed in Kessler's proposal (a USFWS contract), and while the agency alleges that the other references declined to comment on Kessler's performance, there is no documentation supporting this statement, and Kessler has submitted evidence that no such contacts were made. The other two references considered by the agency were for contracts apparently completed more than 3 years before the evaluation, although the RFP requested information only on contracts performed in the last 2 years. In addition, Kessler has vigorously disputed the accuracy of the negative comments regarding its past performance, and the agency states that Kessler was not given the opportunity to respond to these negative comments. Since such matters should be raised, where, as here, discussions are to be conducted, the agency can now afford Kessler an opportunity to respond to any negative comments regarding its past performance.

protester should submit its claim for costs, detailing and certifying the time expended and cost incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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