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Decision

Matter of: Perini/Jones, Joint Venture

File: B-285906

Date: November 1, 2000

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Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated technical proposals is sustained where record shows that agency improperly gave awardee evaluation credit for corporate experience of an affiliated company that was not proposed to perform the contract.

DECISION

Perini/Jones, Joint Venture (P/J) protests the award of a contract to Brown & Root Services (BRS) under request for proposals (RFP) No. N62470-00-R-0005, issued by the Department of the Navy to acquire worldwide emergency construction services. P/J asserts that the awardee's proposed project manager has an impermissible conflict of interest, and that the agency misevaluated both technical and cost proposals.

We sustain the protest.

BACKGROUND

The RFP contemplated the award of a cost-reimbursement contract to perform, on an as-needed basis, immediate-response construction services worldwide.

Essentially, the requirement is for the contractor to provide immediate comprehensive construction and construction-related services anywhere in the

world where needed because of a natural or man-made disaster, or in connection with military-led or -supported humanitarian assistance.

Offerors were required to submit detailed cost and technical proposals and were advised that the agency would award a contract based on its assessment of which proposal offered the best overall value to the government, considering cost and several non-cost evaluation factors. RFP at 59. The RFP advised that technical proposals would be evaluated using three broad factors listed in descending order of importance: corporate experience, past performance, and management/technical approach. Id. Under the management/technical approach factor, four subfactors were listed, also in descending order of importance: emergency response; organization, home office support and key personnel; financial management systems and procedures; and support for the small business program. Id. at 59-60.¹ For cost evaluation purposes, the agency would assess the reasonableness of their proposed indirect rates, and the realism of proposed costs, and adjust costs where appropriate. RFP, amend. 2, at 5. For proposal purposes, firms were required only to provide indirect rates; for direct costs, the RFP included cost figures provided by the agency. Id. at 2.

The agency received several initial offers and, after evaluating them, affording firms an opportunity to engage in discussions, make oral presentations and submit written final proposal revisions, assigned the following adjectival ratings to the proposals submitted by P/J and Brown & Root (the only proposals relevant here):

	Corp. Exp.	Past Perf.	Mgmt. & Tech.	Emerg. Resp.	Org., H/O Supp./ Key Pers.	Fin. Mgmt. Sys. & Proc.	Small Bus. supp.	OVER ALL TECH.	Evaluated Annual Cost (thousands)
BRS	Superior (plus)	Accep- table (plus)	Superior	Superior	Superior	Accep- table	Superior	Superior	\$48,879
P/J	Superior	Accep- table (plus)	Accep- table (plus)	Accep- table (plus)	Superior	Margin- ally accep- table	Superior	Superior (minus)	\$49,446

Based on these evaluation results, the Navy made award to BRS as the firm submitting the proposal deemed to offer the government the best overall value. P/J filed this protest following a debriefing provided by the agency.

¹ Each subfactor also had several express areas of consideration listed which we do not detail because they are not relevant here.

P/J challenges the agency's evaluation of proposals on several grounds, and also alleges an improper conflict of interest. We have considered all of these arguments and sustain the protest on the ground that the agency improperly evaluated BRS's corporate experience. We find that P/J's remaining assertions are without merit. We discuss the conflict of interest and corporate experience evaluation arguments below.

UNFAIR COMPETITIVE ADVANTAGE

In its initial protest, P/J asserted that BRS had an unfair competitive advantage because BRS's proposed program manager was an active duty Navy officer working in the same command that was conducting the acquisition at the time proposals were submitted and evaluated; P/J contended that this amounted to an improper conflict of interest. According to P/J, this individual, in his position as officer in charge of construction at a Naval facility in Naples, Italy, could have had access to P/J's proprietary data, as well as to the source selection authority (SSA) and agency evaluators for this requirement. With respect to its proprietary data, P/J asserted that the individual had reviewed cost data it submitted in connection with task orders issued under the predecessor contract for this requirement (P/J is the incumbent), and improperly used that information in assisting BRS in preparing its proposal. P/J asserted that the individual had access to the SSA and evaluators by virtue of his position as an active duty Navy officer, and that such access provided an opportunity for him to improperly influence the agency's evaluation and source selection decision.

Our Office provided the protester an opportunity to discover all relevant documents, and to obtain relevant testimony at a hearing conducted by our Office. In its post-hearing submission, P/J essentially concedes that the record does not establish any impropriety. Specifically, the protester states that it "recognizes that neither the Agency Report . . . nor the subsequent hearing . . . produced 'smoking gun' evidence of an actual conflict of interest as defined under current GAO caselaw." P/J Post-Hearing Brief, Sept. 29, 2000, at 1. P/J goes on to state that it "recognizes that the facts . . . do not demonstrate that [the individual in question] had specific contacts with the evaluators or the SSA that directly impacted their evaluations or the award decision." *Id.* at 8-9. P/J makes no mention of its original assertion that the individual in question had access to its proprietary data, and that he provided it to BRS.

P/J nonetheless urges our Office to find that the record reflects a significant apparent conflict of interest that the agency took no measures to mitigate. Where organizational affiliation creates the appearance of a conflict of interest, we have recognized the importance of addressing even apparent conflicts. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 12-19. Where, however, it is an individual's alleged actions (rather than an organizational affiliation) that creates the asserted impropriety, we

focus our review on the record's support for the alleged actions. Specifically, here, we reviewed whether the record showed that the awardee may have obtained an unfair competitive advantage in the procurement by virtue of its employment of a former government employee; that is, whether the actions of the former government employee may have resulted in prejudice in favor of the awardee. Proteccion Total/Magnum Sec., S.A., B-278129.4, May 12, 1998, 98-1 CPD ¶ 137 at 3-4.

There is no basis in the record for finding an unfair competitive advantage; as P/J itself concedes, despite significant development of the record for this issue, there simply is no evidence that any impropriety or unfair competitive advantage resulted from the awardee's employment of the individual in question, and there is no basis for finding the agency's actions otherwise objectionable. Accordingly, we deny this aspect of P/J's protest.

CORPORATE EXPERIENCE

As noted, corporate experience was the most important evaluation factor. The RFP provided that offerors should furnish the following information in this area:

Provide experience in construction, renovations, repairs, embarkation/transportation in the \$1 million to \$50 million range. Demonstrate world wide experience and emergency/contingency experience where rapid response and accelerated performance were essential.

RFP at 53. P/J asserts that the agency improperly assigned BRS's proposal a superior (plus) rating in this area, since the record shows that this rating was based on the experience of Kellogg Brown & Root, Inc. (KBR), an affiliated concern that was not offered to perform this requirement. P/J maintains that BRS, the offeror for this requirement, is primarily a logistics support contractor with extremely limited construction experience. P/J alleges that the agency erroneously relied on information relating to KBR, obtained from an Internet search, in reaching its evaluation conclusions.

The Navy takes the position that it was entirely proper to consider KBR's experience because BRS's offer included KBR resources. In this connection, the agency maintains that the resources of the entire Halliburton Company (the parent company of KBR and BRS) are offered in the BRS proposal. Agency Supplemental Report, Sept. 18, 2000, at 1-2. BRS asserts that KBR and BRS are the same legal entity for purposes of the evaluation. BRS's Supplemental Comments, Sept. 29, 2000, at 18-19.

An agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliated company will affect the performance of the offeror. Universal Bldg. Maintenance, Inc., B-282456, July 15, 1999, 99-2 CPD ¶ 32 at

6. The relevant consideration is whether the resources of the parent or affiliated company--its workforce, management, facilities or other resources--will be provided or relied upon for contract performance, such that the parent or affiliate will have meaningful involvement in contract performance. NAHB Research Ctr., Inc., B-278876.2, May 4, 1998, 98-1 CPD ¶ 150 at 4-5.

The SSA, when presented with the evaluators' findings, expressed reservations about the relevance of BRS's corporate experience. In this regard, the record includes a memorandum for the SSA that states:

The SSA, while accepting that (BRS) had more extensive emergency/contingency experience questioned whether that emergency experience was relevant to the type of work envisioned in this contract. That is whether it was for construction and related engineering and services as opposed to just logistics (laundry services, galley services, etc.).

Memorandum for the SSA, June 16, 2000, at 1. In response to the SSA's concern, the agency's contracting personnel conducted an Internet search to find the rankings of the offerors in terms of overall construction revenue, relying on data from the Engineering News Record. See <www.enr.com/dbase/99tic.asp>. The record shows that, as P/J alleges, the agency relied on the ranking of KBR--as opposed to BRS--in concluding from this search that BRS had significant construction experience. Memorandum for the SSA, June 16, 2000, at 1-3. This was unreasonable.

The record shows that BRS is a discrete legal entity, and that it was the offeror for this contract. In this regard, the offeror identified on the Standard Form (SF) 33 tendered by BRS with its offer is "Brown and Root Services." Further, the proposal includes a page accompanying the SF 33 that provides information on BRS, KBR and Halliburton Company. That document shows that KBR and BRS (as well as Halliburton) have different contractor and government entity (CAGE) codes (0BY16 for BRS, 0CXA7 for KBR), as well as different data universal numbering system (DUNS) numbers (177582855 for BRS, 010810893 for KBR). CAGE codes are assigned by the Defense Logistics Agency and are assigned to discrete business entities for purposes of executing payments under government contracts and to track the ownership of technical data; CAGE codes are used to dispositively establish the identity of a legal entity for contractual purposes. National Found. Co., B-253369, Sept. 1, 1993, 93-2 CPD ¶ 143 at 2 n.1. Similarly, the DUNS numbering system is one established by Dunn & Bradstreet Information Services, and discrete, nine-digit numbers are assigned for purposes of establishing the precise identification of an offeror or contractor. See Federal Acquisition Regulation (FAR) §§ 4.602, 52-204-6. On the SF 33, the CAGE code and DUNS number of BRS--and not that of KBR--are used to identify the offeror. This evidence indicates that BRS and KBR, while affiliated, nevertheless are discrete legal entities, and that KBR is not an

offeror legally responsible for performing the contract here. Neither the Navy nor BRS has provided any information demonstrating otherwise.²

Particularly telling in this regard is the content of BRS's proposal and the way the proposal addresses KBR's role. Since KBR was not an offeror, it would be appropriate for the agency to impute KBR's corporate experience to BRS only if BRS's proposal committed KBR's resources to performance of the contract. The proposal did not commit KBR resources—we find nothing in BRS's proposal that purports to offer the workforce, management, facilities or other resources of KBR for purposes of performing the contract. In this connection, every description of the firm's proposed technical approach references only BRS resources. For example, in describing its organization, authorities and chains of command, the proposal states that [deleted] will be established, and that the [deleted] will be overseen by [deleted]. The proposal states that this [deleted]. BRS Technical Proposal at 159 (emphasis added). Virtually every aspect of the proposal describes the firm's proposed approach in these terms, and virtually no mention is made of the workforce, management, facilities or other resources of KBR.³

In contrast, where BRS intended to demonstrate a specific commitment of resources, it did so unequivocally. For example, the proposal represents that it has established relationships with other companies which it can use to augment its [deleted] capabilities. The proposal specifically states:

[deleted]

BRS Technical Proposal at 141. KBR is not included on this list.

Not only did the BRS proposal not offer KBR resources, but it also did not purport to rely on KBR's prior contracts to demonstrate its corporate experience; [deleted]. Notwithstanding this fact, the agency, on its own initiative, obtained and relied on information relating to KBR that it found on the Internet. Given the absence of reference in the BRS proposal to KBR experience or resources in performance of the contract, the agency erred in seeking out and relying on information relating to KBR

² In contrast, P/J's joint venture agreement unequivocally provides that each joint venturer individually, as well as the joint venture itself, will be liable for performance of the contract. P/J Joint Venture Agreement at 1-2.

³ The only exception is in the firm's discussion of its [deleted] capabilities, where it states that it can [deleted]. BRS Technical Proposal at 138. Included in this section is a list of [deleted] entities worldwide, as well as a list of the status of [deleted]. This reference to [deleted], does not evidence meaningful involvement by those affiliated companies in the performance of the contract.

in evaluating BRS's corporate experience. See Universal Bldg. Maintenance, Inc., supra.⁴

Prior to obtaining the KBR information, the evaluators had assigned the BRS proposal a corporate experience rating of superior, whereas, after reviewing the information, they raised the adjectival rating to superior (plus). Memorandum for the SSA, June 16, 2000, at 3. The evaluator writing the narrative support for this change in the rating also stated that, "[i]n conclusion, I find that BRS has more construction experience, at least equal emergency response construction experience, and substantially more emergency response experience than does P/J." Id. Since this conclusion was based on the information relating to KBR, it is clear that this error by the agency affected the evaluation.⁵

We find that this error was prejudicial to P/J. Our Office will sustain a protest where the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

⁴ Both the Navy and BRS maintain that, even if the agency erroneously credited BRS with KBR's corporate experience, this was unobjectionable because P/J was also erroneously credited with the corporate experience of each of the joint venturers comprising P/J; the parties reason that both offerors were treated similarly, and that P/J therefore was not competitively prejudiced. We disagree. Agencies properly may consider the individual experience of joint venturers where each concern will contribute materially to performance of the contract. See NAHB Research Ctr., Inc., supra, at 4 (agency properly considered past performance of team members comprising offerors where record showed that team members would make meaningful contribution of resources during performance). As noted above, the P/J joint venture agreement provides that each joint venturer is individually as well as jointly liable for contract performance. Moreover, the P/J proposal expressly states: [deleted]. P/J Technical Proposal, Vol. II, at 161. Accordingly, there was a reasonable basis to consider the corporate experience of each joint venturer in evaluating P/J's proposal.

⁵ P/J also asserts that the contracts referenced in the BRS proposal to demonstrate its corporate experience are too old to be a reliable indicator, and that they also are fixed-price contracts that fail to demonstrate the firm's experience with cost-reimbursement contracting. This argument is without merit. The RFP did not establish a limitation regarding the age of the prior contracts and, in any case, while several of the contracts referenced by BRS were completed in the early 1990's, several others are recent or ongoing. P/J's assertion that the referenced contracts are fixed-price is simply incorrect; each of the reference forms submitted by BRS states that it involved cost-reimbursable projects. BRS Technical Proposal at 36-44.

The record shows that the award decision was based on three technical discriminators--corporate experience, financial systems and emergency response capability--and BRS's slightly lower cost. Final Business Clearance Memorandum at 5. Given our conclusion that BRS's rating under the most important corporate experience factor was unwarranted, there is a reasonable possibility that the award decision could change. In this regard, the agency sought out additional information on the Internet because the SSA expressly questioned the superior rating assigned BRS's proposal under corporate experience, citing BRS's apparent lack of relevant (i.e., construction) experience. Memorandum for the SSA, June 16, 2000, at 1. Had the SSA not considered the erroneous information, he may well have determined that the BRS's original superior rating under the corporate experience factor was not merited, and that a lower rating was more appropriate; since this would have left BRS's proposal rated below P/J's under the most important factor--even though BRS also has a technical advantage under emergency response and financial systems, as well as a slightly lower evaluated cost--it could have led the agency to determine that P/J's proposal was technically superior to BRS's. (In this regard, the source selection plan states that overall proposal ratings were to be assigned with "strong consideration given to the most heavily weighted factors." Source Selection Plan at 16.) Thus, this error in the evaluation was prejudicial to P/J. Accordingly, we sustain the protest on this basis.

FINANCIAL SYSTEMS FACTOR EVALUATION

In addition to the flaw in the corporate experience factor evaluation, there is some question regarding the evaluation of P/J's proposal under the financial management systems and procedures subfactor (the second of the three discriminators for award purposes). The record shows that the agency rated P/J's proposal marginally acceptable under this subfactor because, at the time it evaluated proposals, it had a report from the Defense Contract Audit Agency (DCAA) that there were inadequacies in [deleted] and that, upon last review, approval of its [deleted] had been withheld by the Defense Logistics Agency (DLA). Technical Evaluation Board Executive Summary of Oral Presentations (TEB Summary), Agency Report (AR), exh. 20, attach. P/J argues that the agency improperly ignored the fact that P/J had adequately addressed these matters. The agency takes the position that it was unaware of this information prior to award. We need not decide this issue. The record now includes a revised DCAA report showing that P/J's [deleted] is acceptable. AR, exh. 28. Further, while there is no direct evidence showing that DLA has reinspected P/J's [deleted], the record does include a comment from DCAA acknowledging that P/J made all of the recommended changes to its [deleted]. TEB Summary, AR, exh. 20, attach. In reevaluating the proposals, as we recommend below, the Navy should give consideration to the revised information concerning P/J's financial management systems, since it appears that any concerns relating to them have been resolved.

COST EVALUATION

As a final matter, although the method for evaluating costs provided in the RFP was not an issue in the protest,⁶ we believe it bears comment. As noted above, the RFP provided that only the offerors' indirect rates would be evaluated; direct costs (estimated by the agency as amounting to \$42.5 million per year) were to be neither proposed nor evaluated. Instead, the RFP simply required offerors to calculate and propose their indirect costs based on dollar figures for various types of direct costs provided in the solicitation. Because this issue was not raised by the parties, we do not have a record setting forth their detailed positions. Nonetheless, while the agency may have a legitimate reason for this cost evaluation method, it draws our concern because it appears to leave the largest portion of the costs under the contract unevaluated for purposes of the award decision. Of the offerors' evaluated annual costs, only \$6,379,000 was evaluated for BRS and \$6,946,000 was evaluated for P/J (compared to the agency's anticipated annual cost of \$48,879,000 for BRS and \$49,446,000 for P/J). In this regard, agencies are required to evaluate cost to the government in connection with the award of a contract. 10 U.S.C. § 2305(a)(3)(A)(ii) (1994); see Lockheed, IMS, B-248686, Sept. 15, 1992, 92-2 CPD ¶ 180 at 6-7; Systems

⁶ Any such contention would have been untimely in the context of a protest filed after the deadline for submitting proposals. 4 C.F.R. § 21.2(a)(1).

Integration & Research, Inc.; Presearch, Inc., B-279759.2, B-279759.3, Feb. 16, 1999, 99-1 CPD ¶ 54 at 7-8. Within the context of this acquisition, there is certainly reason to believe that the offerors' direct costs could differ dramatically based on their different technical capabilities and approaches, and the agency's current cost evaluation method does not account for such differences.

RECOMMENDATION

We recommend that the agency reevaluate the offerors' technical proposals in a manner consistent with our conclusions above. In addition, we recommend that the agency review the cost evaluation method outlined in the RFP; should the agency conclude that the evaluation method should be changed, we further recommend that the agency revise the solicitation and provide offerors an opportunity to submit revised proposals. Finally, we recommend that the agency reimburse P/J the reasonable costs associated with filing and pursuing its protest, including reasonable attorneys' fees, to the extent that those costs are attributable to its challenge of the agency's evaluation of technical proposals. 4 C.F.R. § 21.8(d)(1) (2000). P/J's certified claim for costs, detailing the time spent and the costs incurred must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
Acting General Counsel