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Decision

Matter of: S. C. Myers & Associates, Inc.

File: B-286297

Date: December 20, 2000

Stephen M. Seeger, Esq., Quagliano & Seeger, for the protester.
Stephen R. Jones, Esq., Department of Labor, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an offeror proposes a particular individual for a key position with the intention of removing that individual from the position after an unspecified transition period under the contract, and the agency relies on the offeror's representation that the individual will be performing the work in evaluating its proposal, the agency reasonably rejected the proposal once the agency learned of the offeror's actual intent.

DECISION

S. C. Myers & Associates, Inc. (SCMA) protests the rejection of its proposal and the award of a contract to McKissack & McKissack under request for proposals (RFP) No. RFP-DCS-00-08, issued by the Department of Labor for program management services in support of the Job Corps design and construction program. The protester contends that the agency erred in finding its proposal technically unacceptable.

We deny the protest.

The RFP, which was issued on December 28, 1999 as a total small business 8(a) set-aside, contemplated the award of a cost-plus-fixed-fee contract for a base and 4 option years. Services to be performed included project management and contract administration of design and construction contracts issued by the Department of Labor in support of the Job Corps program; on-site construction management and inspection; assistance in the procurement of furnishings and equipment for new Job Corps facilities; assistance in negotiations for site acquisition and continuing management and disposal of real property used by the Job Corps program; and ADP/LAN support.

The RFP provided for a two-step evaluation of proposals. Under the first step, proposals were to be evaluated under three technical evaluation factors—individual staff experience and qualifications (worth 35 percent of the technical evaluation points), past performance (worth 20 percent of the technical evaluation points), and corporate experience with related work (worth 15 percent of the technical evaluation points)—and cost/price. RFP amend. 2, attach. II, §§ M.2, M.3. Under the second step, offerors were to make an oral presentation, to be followed by a question and answer session, which would be used to evaluate their proposals under the fourth technical evaluation factor, technical approach (worth 30 percent of the technical evaluation points). *Id.* § M.3. The RFP advised offerors that the oral presentation and the question and answer session were not part of the offer and that they would not constitute discussions or obligate the agency to solicit revised offers. RFP § L.8. The solicitation provided for award to the offeror whose offer represented the best value to the government, with technical factors of significantly greater importance than cost/price. RFP § M.2. Although the RFP, as initially issued, stated that the agency intended to award without discussions, RFP § L.9, offerors were advised at the preproposal conference, a transcript of which was included in amendment No. 1 to the RFP, that on the same day that an offeror came in to make its oral presentation, the agency would conduct discussions with it regarding its business (*i.e.*, cost) proposal, and that the offeror would then have 1 week to submit a revised business proposal. RFP amend. 1, at 29.

To permit evaluation of their proposals under the staff experience and qualifications criterion, offerors were instructed to furnish resumes for their proposed project director and other professional personnel. In addition, offerors were instructed to furnish information regarding the time commitment of all professional personnel assigned to the project. The RFP required, in the latter regard, that all professional staff devote 100 percent of their time to the project. RFP amend. 2, attach. II, § M.3.

SCMA and McKissack, among others, submitted proposals prior to the March 15, 2000 closing date. In its proposal, SCMA identified the president of its proposed subcontractor, Contract Management Solutions, Inc. (CMSI), for the position of project director and another CMSI employee for the position of Director of Contract Operations; we refer to the two individuals in this decision as Ms. A and Ms. B, respectively. SCMA's proposal represented that each of the women would be devoting 100 percent of her time to the project. In late June, the agency notified SCMA that its oral presentation and the meeting to discuss its business proposal would be held on July 7.

On July 7, SCMA and CMSI representatives, including Ms. A and Ms. B, made the protester's oral presentation. During the question and answer period that followed, Ms. A was asked: "As president of CMSI and the proposed project director committing 100 percent of your time, how would your role be impacted in the event

that CMSI was awarded another contract?” Transcript of SCMA’s Oral Presentation and Q&A Session, at 63. Ms. A responded:

I really care about this program and I really want to be involved in it. . . . But, at the same time, since starting CMSI, I have gotten really excited, too, about owning a business and the opportunities that are involved in running a business and going after more work. Our present plan right now is that I am going to stay onboard 100 percent of my time through the transition, through all the initial partnering stuff¹ until everything is running really smoothly on the project. At that time I would leave the project full time and [Ms. B] would take over as project director. And what I would do is I would serve in like a partnering facilitator [role]. My plan would be to come into the office once a week

Id.

At the conclusion of the oral presentation and question and answer period, the protester’s representatives met with agency personnel to discuss SCMA’s business proposal. Again, one of the questions raised concerned Ms. A’s ability to commit herself full-time to the Job Corps project while running her company.² On July 14, SCMA submitted a revised business proposal, which included a response to this question. The response noted, in relevant part, that:

CMSI’s plans are as clarified during the question and answer session for the Oral Presentation. [Ms. A] plans to serve full-time as Project Director on the Program Management Support Contract (PMC) for the Department of Labor (DOL) through the transition period, and for as many months as it takes thereafter to ensure that everything is running smoothly on the PMC, as well as between the PMC and Engineering Support Contractor (ESC). During that time, in addition to managing

¹ Concurrent with issuance of this solicitation, the agency issued an unrestricted solicitation for architect and engineering services for the Job Corps program. The RFP at issue here indicated that a partnership between the two successful offerors was expected and would be essential. RFP §§ C.2, C.4.

² Specifically, Ms. A. was asked:

Please explain role as Project Director/owner with 100% of your time allocated to the project. How do you propose to manage the business aspects of your company?

Memorandum of Negotiations summarizing cost discussions between SCMA and DOL, at 4.

the PMC, [Ms. A] plans to train her replacement, [Ms. B] (who will be currently serving in the capacity of Director of Contracts Operations). [Ms. A] will not leave the project on a full-time basis, until both the status of the relationships between the contractors and [Ms. B's] training, are complete.

SCMA's Final Revised Cost Proposal, CMSI Package tab, at 1.

By letter dated August 30, the contracting officer notified SCMA that its proposal had been determined technically unacceptable based on Ms. A's representations during the question and answer period and in SCMA's revised cost proposal that she planned to serve full-time as project director only through the transition period and for as many months thereafter as necessary to ensure that the contract was running smoothly. Letter from Contracting Officer to SCMA (Aug. 30, 2000) at 1. The letter further noted that SCMA had failed to include estimated costs for materials and supplies and for communications in its revised cost proposal, which constituted a material deficiency further rendering the proposal technically unacceptable. Id. at 2.

On August 31, SCMA requested a debriefing, which the agency furnished on September 7. Following the debriefing, SCMA filed its protest with our Office. On October 11, the head of the contracting activity determined, in accordance with Federal Acquisition Regulation (FAR) § 33.104(b), that urgent and compelling circumstances necessitated that the agency proceed with award notwithstanding the protest, and on October 18, DOL awarded a contract to McKissack.

SCMA takes issue with the agency's determination that its proposal was technically unacceptable. As explained below, we find that the agency reasonably found SCMA's proposal unacceptable once the agency learned from the protester about Ms. A's limited availability; accordingly, we need not determine whether deficiencies in the protester's cost proposal furnished a separate basis for determining the proposal unacceptable.

In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable. For Your Information, Inc., B-278352, Dec. 15, 1997, 97-2 CPD ¶164 at 3, recon. den. RGII Technologies, Inc.—Recon. and Protest, B-278352.2, B-278352.3, Apr. 14, 1998, 98-1 CPD ¶130. Here, one of the solicitation's material requirements was that the offeror identify a qualified individual for the position of project director. In its proposal, SCMA named Ms. A for the position. SCMA revealed during the question and answer portion of its oral presentation that Ms. A did not intend to serve as project director for the duration of the project, however; she in fact intended to serve through the initial few months of performance only. We think that the agency reasonably viewed SCMA as having engaged in a kind of "bait and switch," offering Ms. A as project director, but actually intending to replace her relatively early in performance, without identifying in the proposal who the replacement project director would be.

From the agency's point of view, SCMA's proposal thus failed to propose a project director for most of the period of performance. We therefore find that the agency reasonably concluded that SCMA's proposal failed to conform to a material term of the solicitation and that it was thus technically unacceptable.

The protester argues that the limitation on Ms. A's commitment to the contract did not give rise to a deficiency in its proposal because the RFP did not require key personnel to commit themselves for the full life of the contract, as evidenced by RFP § H.9, allowing post-award substitution of personnel with the agency's permission. SCMA's argument is without merit. The RFP provided that one of the factors that would be considered in evaluating proposals under the staff experience and qualifications criterion was "[t]he time commitment of all personnel assigned to the project (the number of hours per month that each individual will devote to the project over its life).” RFP amend. 2, attach. II, § M.3.A. (emphasis added). We think that it is clear from the foregoing language that the agency anticipated that offerors would propose only personnel who intended to remain for the life of the project. Inclusion of the substitution of personnel clause does not suggest otherwise; that clause is intended to deal with unforeseen circumstances requiring replacement of personnel. See CBIS Fed. Inc., B-245844.2, Mar. 27, 1992, 92-1 CPD ¶ 308 at 5. We view it as implicit in solicitation language seeking names of personnel for particular positions that (unless the solicitation indicates otherwise) offerors are expected to propose personnel for the life of the contract, absent unforeseen circumstances that may justify their replacement.

SCMA asserts that the agency should not have relied on the statements SCMA made during the oral presentation regarding Ms. A to contravene its written proposal. On the contrary, we think that the agency properly considered SCMA's clear expression of intent regarding the limited length of the project director's commitment to the contract. See Department of the Navy-Recon., B-244918.3, July 6, 1992, 92-2 CPD ¶ 199 at 4. To the extent that the protester argues alternatively that the agency should have considered the information furnished in SCMA's oral presentation and revised cost proposal regarding replacement of Ms. A with Ms. B as a revision to its technical proposal, the RFP advised that the oral presentation would not be considered part of the offer and did not provide for the submission of revised technical proposals. While SCMA disclosed in its oral presentation and its revised cost proposal that it intended to replace Ms. A with Ms. B, an employee of CMSI whose qualifications were documented in the proposal, the agency by that time had completed its evaluation of personnel and, because SCMA had not proposed Ms. B for the position of project director in its technical proposal, the agency had not evaluated her qualifications. While the procedures used by the Department of Labor in this procurement may be problematic (and our decision should not be read as an endorsement of them), SCMA did not timely object to the RFP, which clearly indicated that the evaluation of the experience and qualifications of proposed staff would be completed prior to the oral presentations. Particularly in light of SCMA's failure to disclose its actual intent for the project director position in its proposal, we

do not believe that the agency was required, once it learned of that intent, to deviate from the solicitation's source selection process in order to reopen the technical evaluation.

The protester raised several additional arguments in its initial protest. For example, the protester complained that the agency had failed to notify it promptly that its proposal had been eliminated from consideration; in addition, it complained that the agency had failed to permit it to modify its "otherwise successful proposal," as permitted by FAR § 15.208(b)(2). The agency responded to these arguments in its report, contending that it had not delayed unduly in notifying the protester of the elimination of its proposal from further consideration and that, in any event, the protester had not demonstrated any prejudice arising from the delay. With regard to the protester's second argument, the agency noted that SCMA's proposal was not "otherwise successful," and thus FAR § 15.208(b)(2) was inapplicable. The protester has not attempted to rebut the agency position in its comments on the agency report; accordingly, we consider it to have abandoned these arguments. AdvanChip Corp., B-282571, July 29, 1999, 99-2 CPD ¶ 35 at 2 n.1.

The protester also complains that the agency failed to allow it to submit a revised technical proposal in response to amendment No. 4, dated July 5, 2000, which revised the solicitation provision regarding level of effort.³ We will not consider this complaint because it was not raised in a timely manner. In arguing that the agency should have permitted the submission of revised technical proposals, the protester is in essence arguing that the RFP improperly provided for the submission of revised business proposals only. The complaint is thus based upon an alleged solicitation impropriety, which to be timely would have needed to be raised prior to the time set on the closing date for receipt of revised proposals, i.e., July 14. See Bid Protest Regulations, 4 C.F.R. § 21.2(a) (2000); Oregon Iron Works, Inc., B-284088.2, June 15, 2000, 2000 CPD ¶ 119 at 6. Because the protester instead waited until September 18 to raise the issue, this ground of protest is untimely. For the same reason, to the

³ The original RFP provided at § F.3:

The level of effort for this solicitation is between 21 and 23 professional person years. The level of effort for each option period is equal to the base year plus inflation. The inflation rate will be determined by the Bureau of Labor Statistics.

Amendment No. 4, which was furnished to offerors on July 7, replaced the above provision with the following language:

The level of effort for the base year of this project is between 3 and 3.5 million dollars. The level of effort for each option period is equal to the base year plus a 3.5% increase for inflation.

extent the protester objects elsewhere in its protest to the agency's failure to conduct discussions with it regarding its technical proposal and to solicit a revised technical proposal from it, these complaints are untimely.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel