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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Myers Investigative and Security Services, Inc.

File: B-286971.2; B-286971.3

Date: April 2, 2001

William Myers for the protester.
Charles Keathley for Paragon Systems, Inc., an intervenor.
Terrence J. Tychan, Esq., Department of Health & Human Services; and John W. Klein, Esq. and Kenneth Dodds, Esq., Small Business Administration, for the agencies.
Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegations that agency improperly downgraded protester's proposal and failed to conduct meaningful discussions do not provide a basis for sustaining protest where awardee's proposal received a near-perfect evaluation score and was lower-priced than protester's; since awardee would remain in line for award based on its lower price even if protester's evaluation score were increased to level of the awardee's, protester was not prejudiced by the alleged improprieties.

2. Agency's consideration of awardee's proposed subcontractor's past performance in evaluating awardee's proposal was proper where solicitation did not prohibit the use of subcontractors and specifically advised offerors of agency's intent to evaluate subcontractors' past performance.

DECISION

Myers Investigative and Security Services, Inc. protests the award of a contract to Paragon Systems, Inc. under request for proposals (RFP) No. 263-00-P(BN)-0039, issued by the Department of Health and Human Services (HHS) for security guard services at the National Institutes of Health (NIH), Bethesda, Maryland. Myers argues that the evaluation of its offer was unreasonable, that discussions were inadequate, and that the agency improperly accepted the awardee's unauthorized joint venture/teaming arrangement with Coastal International Security, Inc. and improperly considered Coastal's past performance in evaluating Paragon's offer.

We deny the protest.

The RFP, issued August 24, 2000 as a competitive section 8(a) set-aside, contemplated the award of a fixed-price requirements contract for security guard services at the NIH main campus and satellite offices for a base year, with 4 option years. Section M of the RFP provided for award to the offeror whose proposal was determined to represent the best value to the government, price and other factors considered, and stated that the government would not make an award at a significantly higher overall cost to achieve only slightly superior performance, and that overall cost to the government could become the determining factor for award as the proposals become more equal based on the other factors. The RFP identified technical evaluation factors (and available points out of 100) for each factor as follows: understanding of and technical approach to performance requirements (25); corporate and human resources and key personnel (20); quality control program (20); ability to provide resources (20); and past performance/experience (15).

Under the past performance/experience factor, offerors were to be evaluated based on their performance under contracts of similar size for similar services, and were to have at least five references submit a three-page past performance questionnaire provided by the agency. Regarding subcontracting, the RFP incorporated by reference the clause at Federal Acquisition Regulation (FAR) § 52.219-14, Limitation on Subcontracting, which provides that, in a contract for services, at least 50 percent of contract costs for personnel shall be incurred by the prime contractor. RFP § I, at I-2. The RFP also advised offerors proposing subcontractors to include a statement with the proposal outlining, among other things, the subcontractor's willingness to perform and the time and facilities available for the project. RFP § L, at L-14.

Seven proposals were received by the October 13 closing date. In its proposal, Paragon listed Coastal as its subcontractor, and submitted its subcontracting agreement with Coastal. HHS Agency Report, Tab VI, § 5, at 1-2. Paragon provided three past performance references for itself and two for Coastal. The proposals were evaluated by a four-member technical evaluation panel (TEP). Contracting Officer's Statement at 1. In its evaluation of Paragon's past performance, the TEP evaluated all five contracts listed by Paragon and its subcontractor. Id. at 5. Following the initial technical and price evaluations, three proposals, including Myers's and Paragon's (the only proposals relevant here) were rated acceptable and included in the competitive range. Id. at 2. Written discussions were conducted and final revised proposals were received by November 15 and evaluated by the TEP. The final technical scores and prices for the protester and the awardee were as follows:

Offeror	Score	Price
Paragon	98	$25,442,436.67
Myers	72	$25,944,719.27

Since Paragon's proposal had the highest technical score and the lowest price, the agency determined that it offered the best value to the government; it awarded a contract to Paragon on December 7, 2000. That same day, the agency notified Myers that it had not been selected for award. Following a debriefing, Myers filed this protest with our Office.

EVALUATION AND DISCUSSIONS

Myers challenges the evaluation of its proposal under each of the five evaluation factors and alleges that discussions were inadequate. Myers complains, for example, that its proposal received only 15 out of a possible 20 points under the quality control factor, yet the agency asked no discussion questions regarding this aspect of its proposal. The protester argues that discussions were not meaningful because, although the evaluation indicates that the agency found weaknesses in its proposal, questions regarding these weaknesses were not raised during discussions.

These arguments do not provide a basis for sustaining the protest. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Trauma Serv. Group, B-254674, B-254674.2, Mar. 14, 1994, 94-1 CPD ¶ 199 at 6; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). Here, even if Myers's technical score were increased to the near-perfect level of Paragon's, Myers would not be in line for award because its price is approximately $1.5 million higher than Paragon's. Further, even if Myers's proposal attained a perfect score (i.e., 2 points higher than Paragon's), there is no likelihood that Myers would be awarded the contract in light of the explicit RFP statement that the agency would not award a contract at a significantly higher cost to achieve only slightly superior performance. Myers does not assert that it would have reduced its price had it been provided more thorough technical discussions, and the agency notes that correction of certain of the weaknesses in Myers's proposal--such as the shortage of proposed personnel during the transition phase--actually would have been expected to increase its proposed price. HHS Agency Report at 2.

JOINT VENTURE/SUBCONTRACTING ISSUES

Myers alleges that NIH improperly accepted an unauthorized joint venture/teaming arrangement between Paragon and Coastal. Protester's Comments at 1. The protester contends that, under Small Business Administration (SBA) regulations, an offeror must obtain SBA approval prior to award to engage in a teaming arrangement or joint venture to compete for section 8(a) contracts; it concludes that, since the SBA did not approve a joint venture arrangement between Paragon and Coastal before award, Paragon's proposal could not be accepted. Protester's Supplemental Comments, Feb. 8, 2001, at 1.

This argument is based on the flawed premise that Paragon and Coastal entered into a joint venture or teaming arrangement different from a conventional prime contractor/subcontractor relationship. This is not the case--there is no evidence in the record that Paragon and Coastal formed an unauthorized joint venture or teaming arrangement. Rather, as indicated above, Paragon's proposal included a subcontracting agreement with Coastal. Under that agreement, which is dated September 12, 2000, and lists the addresses of the prime contractor and the subcontractor, Paragon will perform 51 percent of the contract, including management, and Coastal 49 percent. HHS Agency Report, Tab VI, § 5, at 1-2. SBA reports--and our reading of SBA's regulations confirms--that, while SBA must approve a joint venture agreement before the joint venture may receive award of an 8(a) contract, 13 C.F.R. § 124.513(e), there is no regulatory requirement that it approve the subcontracts of 8(a) prime contractors. SBA Report at 3.

Myers argues that the RFP did not permit subcontracting and that, since this is a section 8(a) contract, SBA is the prime contractor and Paragon the only authorized subcontractor. Protester's Supplemental Comments, Feb., 19, 2001, at 1. This argument is without merit. The RFP clearly permitted subcontracting as an acceptable teaming arrangement. As noted above, the RFP referred to subcontracting repeatedly, including, for example, a provision entitled "Subcontractors," listing information to be furnished "[i]f subcontractors are proposed. . . ," and (by reference) the Limitation on Subcontracting clause at FAR § 59.219-14. There is nothing in the applicable regulations that prohibits section 8(a) firms from entering into subcontracting arrangements for purposes of competing for an 8(a) award. Indeed, SBA notes that its regulations actually contemplate that 8(a) participants will subcontract, and specifically provide that an 8(a) firm must comply with the Limitation on Subcontracting clause referenced in the solicitation. See 13 C.F.R. §§ 125.6 and 124.510(a).

PAST PERFORMANCE

Myers argues that Coastal's past performance should not have been evaluated as part of the evaluation of Paragon's proposal. Protester's Comments at 2. However, agencies properly may consider an offeror's subcontractor's experience under relevant evaluation factors where, as here, the RFP allows for the use of subcontractors to perform the contract, and does not prohibit consideration of subcontractor experience in the evaluation of proposals. Premier Cleaning Sys., Inc., B-249179.2, Nov. 2, 1992, 92-2 CPD ¶ 298 at 4; Commercial Bldg. Serv., Inc., B-237865.3, May 16, 1990, 90-1 CPD ¶ 473 at 6.

The protest is denied.

Anthony H. Gamboa
General Counsel