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Decision

Matter of: Native American Industrial Distributors, Inc.

File: B-310737.3; B-310737.4; B-310737.5

Date: April 15, 2008

Lee P. Curtis, Esq., Anthony L. Steadman, Esq., and Troy E. Hughes, Esq., Perkins Coie LLP, for the protester.

James L. Weiner, Esq., Department of the Interior, for the agency.

William K. Walker, Esq., Walker Reausaw, for Chenega Federal Systems, LLC, an intervenor.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably made award of a contract under a Buy Indian Act set-aside because there are no American Indians holding management positions in the company is denied where the solicitation did not impose a specific test for eligibility for award, and the agency reasonably interpreted the Buy Indian Act as allowing the company to qualify for award, since the company is a wholly-owned subsidiary of an Alaska Native Corporation pursuant to the Alaska Native Claims Settlement Act.

2. Protest that agency improperly selected for award proposal that failed to provide letters of commitment for key personnel is sustained where solicitation specifically required offerors to submit letters of commitment for all key personnel.

DECISION

Native American Industrial Distributors, Inc. (NAID), a small business, protests the award of a contract to Chenega Federal Systems, LLC, by the Department of the Interior, Bureau of Indian Affairs (BIA), under request for proposals (RFP) No. RBK00070010 for information technology infrastructure services. NAID objects that the contract award was improperly made to a firm that does not meet the requirements of the Buy Indian Act, 25 U.S.C. § 47, and that the agency overlooked the omission of required letters of commitment from the Chenega proposal that should have rendered the proposal unacceptable.

We sustain the protest.

BACKGROUND

The BIA issued the RFP on July 3, 2007, seeking fixed-price proposals to provide information technology support services in twelve functional areas, ranging from applications and database support to private branch exchange (telephone), video teleconferencing, and network support services. Performance Work Statement at 5-33. The RFP provided for a base period of 12 months, followed by four optional 12-month extensions.

The RFP provided that award of the contract¹ would be based on evaluation of five factors, which were listed in descending order of importance: technical approach, past performance, personnel resources, corporate experience, and “price/cost.” RFP attach. 3, Evaluation Factors, at 1.² With respect to the personnel resources factor, the RFP specified that the evaluation would consider

The degree to which the staffing approach satisfies the requirements defined in this document. Include the following: 1. a staffing plan which addresses capabilities and experience relating to the attached Statement of Work; 2. resumes for key personnel with letters of commitment.

Id. at 2.

The RFP also indicated that all contractor personnel (whether key or not) would be required to submit a signed nondisclosure agreement, and provided a nondisclosure agreement form. RFP attach. 1, Performance Based Statement of Work, at 49 (“The Government will provide a Non-Disclosure Statement to be signed by each

¹ Numerous conflicting statements in the RFP caused offerors to ask the BIA what type of contract would be issued. The BIA responded that the “contract will be FFP [firm fixed price] Completion IDIQ using FFP task orders” (with no explanation of the meaning of “Completion” here). See RFP attach. 8, Responses to Offeror Questions, at 16, 26. Although portions of the RFP, including the evaluation factors document, refer to the award of “this task order,” there now appears to be no dispute that the BIA intended to award a single contract.

² The RFP also incorporated contradictory provisions with respect to the evaluation of options under the price/cost factor: Federal Acquisition Regulation (FAR) §§ 52.217-3, 52.217-4 and 52.217-5. RFP at 107. It appears from the record that the BIA may have intended to incorporate only FAR § 52.217-5, because it evaluated prices by including the option years, although it did make certain price adjustments, based on the potential of deleting some services from the contract scope. While we note these issues, they are not raised in the protest, and we do not address them further.

Contractor personnel”). The employee nondisclosure agreement form provided, in relevant part, as follows:

I, _____, am an employee of or a subcontractor to __[Contractor Name]__, a contractor acting under contract to the _____ under Prime Contract No. _____, through Task Order _____. I understand that in the performance of this task, I may have access to sensitive or proprietary business, technical, financial, and/or source selection information belonging to the Government or other contractors. . . . I agree not to discuss, divulge, or disclose any such information or data to any person or entity except those persons directly concerned with the performance of this task order. . . .

In the event that I seek other employment, I will reveal to any prospective employer the continuing obligation in this agreement prior to accepting any employment offer.

RFP attach. 2, Non Disclosure Agreement Form, at 1.

As issued, the RFP notified offerors that it was set aside for service-disabled veteran-owned small business concerns (SDVOSBC), RFP at 95, while also advising that “[t]his acquisition will be a 100% Buy Indian set-aside under the Buy Indian Act.” RFP attach. 4, Instructions to Offerors, at 1. In response to questions from prospective offerors, the BIA attempted to clarify its instructions as follows:

No, the [SDVOSBC set-aside] clause was not in error. Buy Indian Act is the #1 set-aside and preference. Anyone not qualifying under the Buy Indian Act will be disqualified. Any subcontracting preference is to be given first to Buy Indian qualified firms and then to Service Disabled Veteran Owned businesses.

RFP attach. 8, Responses to Offeror Questions, at 14; see also id. at 11, 16, 17, 29 (similar questions and responses).

Five firms submitted proposals, including NAID and Chenega. While we understand that Chenega’s initial proposal included signed nondisclosure agreements, it did not include letters of commitment for any of the key personnel identified in the proposal.³ The BIA evaluators rated Chenega’s proposal as acceptable, and the

³ Since our review was focused on the sufficiency of the later source selection decision, the record of the evaluation of initial proposals was not fully developed. However, it appears that the BIA evaluators did not notice the absence of letters of commitment from the Chenega proposal in this initial evaluation. In contrast, the record reflects that the absence of letters of commitment in a third offeror’s proposal was cited as a “deficiency” under the personnel resources factor (along with other
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contracting officer (CO) ultimately determined that it provided the best value overall. By letter dated October 25, 2007, the BIA notified NAID that the agency had selected Chenega's proposal for award. NAID filed a protest of that award decision with our Office on October 30, and the BIA then took voluntary corrective action before the due date for an agency report. As a result, we dismissed as academic the earlier challenge to this procurement. Native Am. Indus. Distrib., Inc., B-310737, Nov. 20, 2007.

The agency's corrective action primarily involved amending the RFP to delete the SDVOSBC set-aside, and stating the numerical weighting for the evaluation factors. RFP amend. Nov. 14, 2007, at 1.⁴ After requesting revised proposals, the BIA received and evaluated final proposal revisions.

Once again, Chenega's revised proposal did not include letters of commitment. However, under the heading "Key Personnel," it did include 23 resumes and 22 nondisclosure agreements (that is, the proposal included a nondisclosure agreement for all but one of the employees identified). In the certifications section of the proposal, included as required by FAR § 52.212-3, Chenega marked the block to certify that it was a Native American firm. Supplemental CO Statement at 3. The revised proposal also stated that Chenega Federal Systems was a wholly-owned subsidiary of Chenega Corporation, an Alaska Native Corporation. Chenega Revised Proposal at 3 (Cover Letter). The proposal also included a copy of the Certificate of Eligibility issued by the BIA on November 18, 1974, recognizing the Native Village of Chenega, Alaska as an eligible beneficiary under the Alaska Native Claims Settlement Act. Chenega Revised Proposal at A-33.

In evaluating Chenega's revised proposal, the evaluators again did not identify the absence of letters of commitment for Chenega's key personnel. As relevant here, the final ratings for the NAID and Chenega proposals were as follows:

	Technical Approach	Past Performance	Personnel Resources	Corporate Experience	Price
NAID	42.0	28.0	7.6	3.8	\$46,718,554
Chenega	47.2	33.4	7.8	5.0	\$51,649,723

Agency Report, Tab 9, Source Selection Decision, at 6, 18.

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concerns), which then resulted in a rating of "unacceptable" under that factor. Agency Report, Tab 8, Evaluation Panel Consensus Report, at 9.

⁴ Although there was more than one amendment to the RFP, the individual amendments were not numbered; however, they were dated. Accordingly, we have used the date to identify the specific amendment.

After first concluding that Chenega was eligible for award, the CO concluded that Chenega's higher-rated proposal was worth its higher price. *Id.* at 21-22. On December 28, the BIA once again awarded the contract to Chenega. After NAID received a letter dated December 31 that was labeled as a combined notice of award and written debriefing, NAID filed this protest with our Office.

During the development of the record for this protest, NAID inquired about the absence of Chenega's letters of commitment from the agency report. In response, the BIA informed counsel for NAID by telephone on March 6 that Chenega had not provided letters of commitment with its revised proposal. NAID raised this issue as a supplemental basis of protest on March 7. Supplemental Protest at 1 n.1. Shortly thereafter, Chenega provided copies of letters of commitment for its key personnel to our Office and to counsel for the other parties.

In the BIA report addressing this supplemental protest, the CO provided an explanation of his views about the acceptability of Chenega's proposal with respect to key personnel, despite the omission. Specifically, the CO stated that Chenega's revised proposal was acceptable because "The Government viewed [Chenega's] proposed key personnel as unchanged from the original proposal since the Government received the letters of commitment in the first proposal." Supp. CO Statement at 4. A day later, however, counsel for the BIA discovered that the CO's representation was incorrect. Counsel promptly acted to correct the record by acknowledging that the BIA had never received the letters of commitment from Chenega during the procurement process. Instead, the BIA acknowledged that it first received these letters when they were produced by counsel for Chenega during the course of this protest.

DISCUSSION

NAID argues that the evaluation of revised proposals was unreasonable in several respects, and that discussions were inadequate. NAID also argues that Chenega is ineligible for award under the Buy Indian Act set-aside, and that Chenega engaged in a bait-and-switch of key personnel. During the protest, NAID withdrew the bait-and-switch allegations, and instead supplemented its protest to argue that the BIA had overlooked the omission of required letters of commitment from Chenega's revised proposal. We conclude that the BIA reasonably found Chenega to be eligible for award of a Buy Indian Act set-aside contract, but unreasonably failed to consider Chenega's omission of the required key personnel letters of commitment, and we sustain the protest on this basis.⁵

⁵ As a threshold matter, BIA argued throughout this protest that NAID is not an interested party to challenge this award because even if Chenega were found unacceptable, another offeror's technical score was superior to NAID's technical score. BIA's contention overlooks the fact that this was a best value procurement and NAID proposed a lower total price than either Chenega or the other competitive (continued...)

First, we consider the argument that Chenega is ineligible for award under a procurement conducted as a Buy Indian Act set-aside. Citing a court case and decisions by our Office under Buy Indian Act set-asides, NAID maintains that, in order to be eligible for award under a Buy Indian Act set-aside, a firm must have: (1) at least 51 percent American Indian ownership; (2) American Indians involved in the daily management of the firm; and (3) an American Indian recipient of the majority of the firm's accrued earnings. Protester's Comments at 8 (citing Colorado Constr. Corp., B-290960, Sept. 6, 2002, 2002 CPD ¶ 162 at 1, and other cases). NAID argues that neither the individual who serves as president and chief executive officer of Chenega, nor the individual who serves as the manager of day-to-day operations, is an American Indian. Id. Therefore, NAID contends that Chenega is not eligible for award.

The BIA and Chenega argue that the 3-part test cited by NAID is not required by either the Buy Indian Act or the terms of the RFP. Rather, the BIA emphasizes first that, regardless of whether American Indians are involved in the firm's management, Chenega is a wholly-owned subsidiary of an Alaska Native Corporation (ANC). See Chenega Revised Proposal at 3 (Cover Letter). As a result, the BIA contends that it reasonably concluded Chenega is an eligible offeror pursuant to the Buy Indian Act.

In considering the application of the Buy Indian Act, we have recognized that the BIA is entitled to considerable deference in determining the standards to apply, and the evaluation of whether a particular firm meets those standards. Cheyenne, Inc., B-260328, June 2, 1995, 95-2 CPD ¶ 117 at 4. Unlike the solicitations in the decisions cited by NAID, the RFP here provided no specific criteria by which eligibility for the set-aside would be determined. Nor does the statute itself require the BIA to use particular criteria. Rather, the operative language simply provides that "[s]o far as may be practicable Indian labor shall be employed, and purchases of the products . . . of Indian industry may be made in open market in the discretion of the Secretary of the Interior." 25 U.S.C. § 47 (2000 & Supp. V 2005).

While the protester correctly points out that the BIA has used the 3-part test in solicitations for services and supplies in the past, we believe the general statutory scheme provides sufficient discretion for the BIA to consider Chenega to be an eligible offeror under the Buy Indian Act, simply because it is the wholly-owned

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range offeror. Therefore, the BIA could have selected NAID under the award criteria by concluding that its lower price made it the best value, or that the higher-rated proposals of the other two offerors were not worth their higher prices. For this reason, we conclude that NAID is an interested party here.

subsidiary of an Alaska Native Corporation.⁶ Accordingly, we deny this ground of protest.

Next, NAID objects that Chenega failed to submit letters of commitment for its key personnel, and argues that the BIA failed to consider this fact in its evaluation of Chenega's revised proposal, while the same problem was labeled as a deficiency for another firm, and contributed to that firm's proposal being found unacceptable.

The BIA argues that the lack of letters of commitment was actually an insignificant matter, while Chenega argues that it viewed the nondisclosure agreements as the "functional equivalent of letters of commitment," particularly since the RFP did not further describe the requirement for letters of commitment. E-mail from Counsel for Intervenor (Mar. 12, 2008) at 1; Intervenor's Second Supplemental Comments at 2. Moreover, the BIA argues that NAID was not competitively prejudiced by the agency's relaxation of this requirement in favor of Chenega. According to the BIA, even if the omission had been identified as a deficiency for Chenega under the personnel resources factor, Chenega would nevertheless have been rated superior to NAID overall under the other non-price factors, and still would have received the contract award.

We disagree on each of these points, which we will address in turn. First, we note that the purpose of a requirement for an offeror to provide letters of commitment for key personnel is to preclude an offeror from proposing an impressive array of employees, being evaluated on that basis, and receiving award, even where the persons proposed had never committed themselves to the offeror, and may have had no intention of doing so. Xeta Int'l Corp., B-255182, Feb. 15, 1994, 94-1 CPD ¶ 109 at 9; cf. Science Applications Int'l Corp., B-290971 *et al.*, Oct. 16, 2002, 2002 CPD ¶ 184 at 6-7.⁷ We also find no basis in the record for the BIA's claim that omission of

⁶ In its comments on this ground of protest, Chenega points out that several federal government regulatory schemes would all consider a firm in Chenega's position to be an eligible Indian entity for their respective programs. Chenega argues that these include: (1) the Small Business Administration regulations, 13 C.F.R. § 124.109(a)(4); (2) the implementation of the Department of Interior Indian preference in the agency FAR supplement, 48 C.F.R. §§ 1452.226-70 and 1452.226-71; and (3) the FAR implementation of the Indian Incentive Program, FAR § 26.101.

⁷ The BIA cites for support of its position our decision in Science Applications Int'l Corp., in which the solicitation required each offeror to submit key personnel resumes and a "written agreement . . . to work for the offeror effective at contract award." In that decision, our Office concluded that the key personnel resumes met this requirement where each resume was signed by the employee, each employee involved was already employed by the offeror, and each employee included a statement of personal commitment to the contract effort on the face of the resume. By contrast, neither the resumes (which are not signed) nor the nondisclosure

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the letters of commitment could properly be considered an insignificant matter. The record here shows that the BIA overlooked the issue entirely in evaluating both Chenega's initial and revised proposals. We also note that the BIA's arguments that the omission of the letters of commitment is insignificant⁸—and that Chenega would have received the award, even if the agency had noticed the omission of the letters of commitment—are contrary to how the agency evaluated another offeror. They are, in essence, new assessments made in the heat of litigation, and are therefore entitled to little weight in our deliberations. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

Second, we think the form nondisclosure agreements here cannot reasonably be seen as substitutes for letters of commitment. The nondisclosure agreement was limited to just that—a promise not to disclose information. An employee with little or no intention of working on the contract could sign the nondisclosure agreement without contradicting that intention. More generally, neither the BIA nor Chenega has shown anything in Chenega's revised proposal that could be construed as a substitute for a letter of commitment from each of the key personnel listed.

Third, even though the RFP did not specify the form or exact content of letters of commitment, and did not further explain the requirement in the instructions to offerors, we do not think these facts excuse the omission of some form of a letter of commitment; that is, a signed statement by each key employee (or prospective key employee) whose resume is submitted, which generally confirms that he or she has made a commitment to work for the offeror on the pending contract if its proposal is successful.

Finally, with respect to the BIA's assertion that NAID has not been competitively prejudiced here, we again disagree. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald

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agreements here contain any similar statement; furthermore, the resumes indicate that significantly less than half of the key personnel are current employees of Chenega or its team members.

⁸ We also think that the BIA's claim—i.e., that Chenega's failure to provide the required letters of commitment is immaterial—is significantly undercut by the argument the agency made earlier in the development of this protest. When NAID first objected that Chenega's revised proposal did not contain the required letters of commitment, the BIA argued that the omission was inconsequential because the required letters had been provided in Chenega's initial proposal. It was only after conceding that the letters were never submitted during the competition that the BIA argued that the omission could be properly waived.

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). We conclude that the misevaluation was prejudicial to the protester based on our review of the evaluation record, which shows that the evaluators considered the omission of letters of commitment by another offeror to be a significant deficiency. Accordingly, if the BIA had noticed the omission of these letters from Chenega's proposal, Chenega too could have been assessed a deficiency in this area--and like that offeror might have been found unacceptable for the omission--while NAID, with its lower overall price, could have received the award. Thus, we sustain the protest on this basis.

CONCLUSION AND RECOMMENDATIONS

During the development of the protest, the BIA reported that it had learned from Chenega that "most of" its proposed key personnel remained available (implying that some were not), and that the BIA was prepared to proceed under the contract awarded to Chenega because the person proposed as the program manager was still available. Supplemental CO Statement at 4. The BIA's position suggests that the agency may have overstated its requirements with respect to key personnel by requiring offerors to provide letters of commitment for all key personnel.

Accordingly, the BIA should first determine whether the requirement for letters of commitment for all key personnel represents the agency's actual needs. If the BIA concludes that the RFP requirement for letters of commitment for all key personnel reflects its needs, we recommend that the agency reevaluate the existing proposals according to the evaluation criteria in the RFP, and make a new source selection decision. If, however, the agency concludes that it does not need letters of commitment--or does not need them for all key personnel--we recommend that the BIA amend the RFP to accurately state its requirements, state the basis on which offerors will be evaluated, and request revised proposals.

With respect to reopening this competition, we note that both the protester and the intervenor have raised questions about whether the information provided to each of them before the submission of the final proposal revisions adequately communicated to them the areas of their respective proposals requiring correction or amplification. Although we do not reach any conclusion on the merits about whether these exchanges constituted discussions--and if so, whether the discussions were adequate--the BIA should consider conducting discussions with all competitive range offerors before requesting final proposal revisions.⁹

⁹ In this regard, we anticipate that the BIA may want to consider the letters of commitment that were submitted by Chenega during this protest. To do so, it appears the BIA will need to reopen discussions with all offerors remaining in the competitive range to avoid allowing only one of them (Chenega) to provide information that has a significant bearing on the evaluation (that is, the letters of commitment). See Corporate Am. Research Assocs., Inc., B-228579, Feb. 17, 1988, (continued...)

We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2007). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel

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88-1 CPD ¶ 160 at 3 (agency receipt of letters of commitment after closing date for submission of proposals necessitated holding discussions with all offerors).