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Decision

Matter of: Ahntech-Korea Company, Ltd.

File: B-400145.2

Date: August 18, 2008

Leigh T. Hansson, Esq., Gregory S. Jacobs, Esq., and Steven D. Tibbets, Esq., Reed Smith LLP, for the protester.

Megan E. Stephens, Esq., Department of the Army, for the agency.

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DIGEST

Protest that agency improperly evaluated protester's experience is denied where record shows agency properly determined that protester did not have 3 years of relevant experience, as required by solicitation, and experience of protester's parent company could not properly be considered because proposal did not establish that parent company's resources were committed to contract performance.

DECISION

Ahntech-Korea Company, Ltd. protests the award of a contract to Kyungil Industrial Development Co., Ltd. under request for proposals (RFP) No. W91QVN-08-R-0010, issued by the Department of the Army, U.S. Army Contracting Command Korea (CCK), for civil engineering services at several U.S. Army bases that serve the United States Forces Korea. Ahntech-Korea principally asserts that its proposal was improperly determined to be technically unacceptable based on a failure to demonstrate adequate experience.

We deny the protest.

The solicitation, issued December 21, 2007, contemplated the award of a fixed-price requirements contract for civil engineering services, including customer support, infrastructure and facility maintenance, physical plant operations, civil engineering support, environmental protection, engineering support, and property management, at six U.S. Army locations in Korea, for a 1-month phase-in/transition period, a base year, and four 1-year option periods. RFP at 3-68. Award was to be made to the offeror submitting the lowest-priced, technically acceptable proposal based on consideration of three evaluation factors: technical (comprised of three subfactors--

prior experience, technical excellence, and personnel qualifications); past performance; and price. All factors were of equal importance and proposals were to be rated as acceptable or unacceptable under each factor and subfactor; a rating of unacceptable under any factor or subfactor would result in an overall unacceptable rating. RFP at 100. Offerors were required to have 3 years of experience in facility maintenance for the same or similar services, RFP at 86, and were to include in their proposals a list of all contracts or subcontracts during the past 3 years that were relevant to the efforts required by this solicitation. RFP at 113. Offerors also were to identify subcontractors and/or affiliated offerors. *Id.* at 111. On January 28, 2008, CCK issued amendment 0007, which advised offerors that “Only Korean companies will be eligible for award.” RFP amend. 7, at 3-4.

Twelve proposals, including Kyungil’s and Ahntech-Korea’s, were received by the closing time. In its proposal, Ahntech-Korea indicated that it was a Korean company and a wholly owned subsidiary of Ahntech, Inc., a small disadvantaged business headquartered in San Diego, California (Ahntech-San Diego). To demonstrate its prior experience, Ahntech-Korea identified in its proposal two prior contracts: a contract for the operation and maintenance of the Korean Training Range Complex (KTRAC), to be performed by the protester from October 2006 until September 2011, and a contract performed by Ahntech-San Diego from January 2000 until July 2007, for the operation and maintenance of various primary training ranges (PTR) within the U.S.

Proposals were initially evaluated by a technical evaluation board (TEB), which determined that Ahntech-Korea’s proposal was acceptable under all three evaluation factors. Agency Report (AR), Tab 17, TEB Report, at 1. However, the contracting officer, upon review of the TEB’s evaluation, determined that Ahntech-Korea’s proposal was technically unacceptable under the experience subfactor. Specifically, the contracting officer found that the scope of the KTRAC contract was not comparable to the work under the RFP, since it did not involve maintaining a large number of bases. AR, Tab 20, Contracting Officer’s Memorandum for the Record, at 4. The contracting officer further noted that the information regarding Ahntech-San Diego’s PTR contract was “general in nature,” and insufficient to allow the contracting officer to conclude that Ahntech-Korea met the 3-year experience requirement. The contracting officer therefore rejected the TEB’s recommendation that Ahntech-Korea be found technically acceptable, and stated that he had “determined [Ahntech-Korea] to be technically unacceptable based upon [a] lack of similar 3 years of experience.” *Id.* at 5. On April 29, the agency notified Ahntech-Korea that award had been made to Kyungil. After a debriefing, Ahntech-Korea filed this protest in our Office.

Ahntech-Korea protests on a number of grounds, including, for example, that the solicitation did not define “Korean company,” that the solicitation did not provide that the awardee had to be a Korean company, and that the agency improperly failed to take Ahntech-San Diego’s experience into account in evaluating Ahntech-Korea’s

experience.¹ Protester's Comments at 11; Protester's Supplemental Comments at 3. Ahntech-Korea also argues that the contracting officer's post-protest statement that he determined not to consider Ahntech-San Diego's experience because it is not a Korean company and was not listed as an affiliate of Ahntech-Korea, is inconsistent with the contemporaneous record. Protester's Comments at 14. Ahntech-Korea asserts that the experience of Ahntech-San Diego should be evaluated because, even though Ahntech-San Diego was not listed as an affiliate, Ahntech-Korea's proposal clearly demonstrated that Ahntech-San Diego would "guide and support" Ahntech-Korea under the contract. Protester's Comments at 16.

The evaluation of technical proposals is a matter largely within the agency's discretion. C. Lawrence Const. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4. In reviewing an agency's technical evaluation, we will not reevaluate the proposals; rather, our review is limited to determining whether the evaluation was reasonable and consistent with the solicitation's evaluation criteria and with all applicable procurement statutes and regulations. See, e.g., Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 ¶ 169 at 4.

We agree with the protester that the contracting officer's explanation of his evaluation, in response to the protest, does not entirely track the contemporaneous record. For example, the protester is correct that there is nothing in the contemporaneous record supporting the contracting officer's claim that he did not consider Ahntech-San Diego's PTR contract in evaluating Ahntech-Korea's experience because Ahntech-San Diego is not a Korean company. In fact, as discussed above, the record shows that the contracting officer did consider Ahntech-San Diego's PTR contract; he concluded that the proposal information concerning this contract was too "general in nature" to allow the contracting officer to find that Ahntech-Korea met the 3-year experience requirement. However, notwithstanding the agency's unsupported statements in response to the protest, it is

¹ The Army asserts, as a preliminary matter, that GAO lacks jurisdiction to hear the protest because the protest is being funded by the Republic of Korea and not with appropriated funds, citing our Bid Protest Regulations. Agency's Dismissal Request at 3-4. The Army also claims that the procurement is not within our jurisdiction because the Republic of Korea selected the awardee. Id. Our authority to decide bid protests extends to alleged violations of the procurement statutes and regulations by federal agencies, 31 U.S.C. § 3552 (2000); 4 C.F.R. § 21.1(a) (2008), and is based on whether the procurement was conducted by a federal agency; our jurisdiction is not dependent upon whether appropriated funds were involved in a procurement. Yoosung T&S, Ltd., B-291407, Nov. 15, 2002, 2002 CPD ¶ 204 at 3 n.2. The record shows that, although the Republic of Korea made the award decision, the Army conducted the procurement—it issued the solicitation, evaluated the proposals, and made the award recommendation. This being the case, we consider the procurement to be by a federal agency. Consequently, the protest falls within our jurisdiction.

clear from the contemporaneous record that it reasonably found that Ahntech-Korea did not meet the 3-year experience requirement.

As discussed, Ahntech-Korea's proposal identified two contracts to show that it met the 3-year similar experience requirement—the firm's own KTRAC contract and Ahntech-San Diego's PTR contract. Regarding the KTRAC contract, as noted, the agency determined that it was not sufficiently similar to the effort under the RFP because it did not involve managing multiple bases. Moreover, as the agency notes in its report, Ahntech-Korea had been performing under the KTRAC contract for fewer than the 3 years required under the solicitation. AR, Tab 1, Legal Memorandum, at 13. The protester does not question the agency's findings, or its resultant conclusion that the KTRAC contract did not demonstrate the required 3 years of experience, and we thus have no basis to question the evaluation in this regard.

Regarding Ahntech-San Diego's PTR contract, an agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror only where the firm's proposal demonstrates that the resources of the parent or affiliated company will affect the performance of the offeror. Perini/Jones Joint Venture, B-285906, Nov. 1, 2000, 2000 CPD ¶ 68 at 4. 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, such that the parent or affiliate will have meaningful involvement in contract performance. Id. at 5.

Although the record shows that the agency did consider the PTR contract in the evaluation (finding that the proposal information concerning this contract was too "general in nature"), since Ahntech-San Diego was not an offeror, it would be appropriate for the agency to impute that entity's experience to Ahntech-Korea only if Ahntech-Korea's proposal committed Ahntech-San Diego's resources to performance of the contract. We find that the proposal did not commit Ahntech-San Diego's resources. There is nothing in Ahntech-Korea's proposal that purports to offer the workforce, management, facilities or other resources of Ahntech-San Diego for performance of the contract. The protester points to proposal language that it believes was sufficient to commit Ahntech-San Diego's resources. However, the cited language consists of only general statements regarding guidance, instruction, and support. For example, the proposal states that "[s]ince Ahntech-Korea's inception, the parent company has provided support mentoring, and training to develop the subsidiary's management structure to one that focuses heavily on the needs of the customer and how the company can satisfy them," Ahntech-Korea Proposal, at 1, and that "[c]orporate experience comes from the dual experiences of Ahntech-Korea, combined with those of the parent company, Ahntech-San Diego. In the parent role, Ahntech-San Diego provides guidance, instruction, and support to each contract performed by Ahntech-Korea and as such Ahntech-Korea benefits heavily from the experiences gained by the parent company over years of performance on Government contracts." Id. at 3. While these

statements perhaps are sufficient to indicate that there is a business relationship between the two entities, there is nothing in the language--or elsewhere in the proposal--that actually commits any of Ahntech-San Diego's resources to performance of the contract. This being the case, the contracting officer could not properly consider Ahntech-San Diego's experience in its evaluation of Ahntech-Korea.

Since the agency reasonably determined that the KTRAC contract did not satisfy the 3-year experience requirement, and since the agency could not properly consider Ahntech-San Diego's experience in the evaluation, it is clear that the protester did not meet the 3-year experience requirement. It follows that the contracting officer's conclusion that Ahntech-Korea's proposal was technically unacceptable was unobjectionable. The protester's other arguments--regarding, for example, the absence of any RFP requirement that warranted rejecting the protester's proposal on the basis that the protester is not a Korean company--are irrelevant, since they have no bearing on the propriety of the agency's rejection of the proposal as unacceptable under the experience requirement.

The contracting officer also found Ahntech-Korea to be nonresponsible based on its determination that it did not have an office in Korea, had insufficient financial resources, and had no facilities or existing organization. The protester challenges this determination. However, since the protester's proposal was properly rejected as technically unacceptable, the firm could not receive the award even if we found its challenge meritorious. This aspect of the protest therefore is academic. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

The protest is denied.

Gary L. Kepplinger
General Counsel