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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Burns and Roe Services Corporation

File: B-291530

Date: January 23, 2003

Kenneth B. Weckstein, Esq., and Shlomo D. Katz, Esq., Epstein Becker & Green, for the protester.

William A. Roberts, III, Esq., David M. Southall, Esq., and Jonathan L. Kang, Esq., Wiley Rein & Fielding, for J.A. Jones Management Services, Inc., the intervenor.

Robert Roylance, Esq., and Richard G. Welsh, Esq., Department of the Navy, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly considered the particular benefit associated with an offeror's experience as the incumbent contractor in making its source selection where the solicitation advised offerors that corporate experience was an evaluation factor.

2. Agency's evaluation of the protester's proposal under a small business program support evaluation criterion was unreasonable where the protester submitted its proposal as a teaming agreement/joint venture between a large business and a small business, and the agency considered only the protester's reliance on small business subcontractors, but not whether the protester's performance entailed the participation of a small business.

DECISION

Burns and Roe Services Corporation (B&R) protests the award of a contract to J.A. Jones Management Services, Inc. under request for proposals (RFP) No. N62470-01-R-5541, issued by the Department of the Navy, for regional base operations support services at the Naval Station Roosevelt Road, Puerto Rico, and other federal

facilities in the Caribbean.¹ The protester argues that the agency's evaluation of proposals and selection of Jones's proposal for award were unreasonable.

We sustain the protest.

The RFP provided for the award of a fixed-price, indefinite-quantity contract for a base period of 1 year with four 1-year options. The successful contractor will provide all labor (including supervision and management), tools, materials, equipment, and transportation for base operations support, real property operations, and maintenance and repair services.

The RFP stated that the award would be made to the offeror submitting the proposal representing the best value to the government, considering the equally weighted evaluation factors of price and technical. The solicitation added that the technical evaluation factor was comprised of the following five equally weighted technical criteria: (1) past performance; (2) corporate experience; (3) staffing plan; (4) work accomplishment; and (5) support for the small business, small disadvantaged business, and woman-owned business program.

The RFP included detailed instructions for the preparation of proposals. Offerors were to submit separate price and technical proposals. With regard to price, offerors were instructed to complete the price schedule set forth in the RFP. The price schedule included, for the base year of the contract and each option period, a number of contract line items (CLIN) under the headings of "firm fixed price work" and "indefinite quantity work." With regard to the "firm fixed price work," the RFP provided CLINs setting forth a general description of the work required, a contract requirement reference number, an estimated annual quantity, and a unit measure.² Each offeror was required to complete the schedule by providing its unit and total price for each of the "firm fixed price work" CLINs. Similarly, for the CLINs under

¹ The proposal included a "teaming agreement" between B&R and Ferguson-Williams, Inc., and explained that B&R and Ferguson-Williams "intend to form a joint venture specifically to perform the Project." Agency Report (AR), Tab 13, Burns and Roe/Ferguson-Williams Proposal, at 154. Accordingly, it appears that the "team" of B&R and Ferguson-Williams—not B&R itself—is the interested party with standing to protest the agency's actions. Although Jones argues that we should dismiss the protest, it is apparent that B&R is acting as an authorized agent of the team and is thus eligible to file this protest. *H.J. Group Ventures, Inc.*, B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203 at 1 n.1. Except where otherwise clear from the context, the references to B&R in this decision are references to the B&R/Ferguson-Williams team.

² For example, CLIN 0113AA was described as family housing "Change of Occupancy Maintenance," with an estimated quantity of 12 and a unit measure of "month."

the heading “indefinite quantity work,” the RFP provided a general description of the work required, a contract requirement reference number, an estimated annual quantity, and a unit measure.³ Each offeror was required to complete the schedule by providing its unit and total price for each of the indefinite-quantity CLINs. The RFP’s price schedule also provided a “recap sheet base year – option 4,” that offerors were to complete by entering, for the base period and each of the option periods of the contract, their total price for the “firm fixed price work” and “indefinite quantity work,” as well as the sum of these items. RFP at B-73. Offerors were required to submit offers for all items and quantities listed. RFP at M-2.

The agency received proposals from six offerors by the RFP’s closing date. The proposals were evaluated, and four proposals, including those submitted by Jones (the incumbent contractor) and B&R, were included in the competitive range. Discussions were held, and final revised proposals were requested and received.

Jones’s proposal was evaluated as “good” under the technical factor at an evaluated price of \$95,287,642. With regard to the evaluation criteria comprising the technical factor, Jones’s proposal was evaluated as “good” under the past performance, corporate experience, and support for small business criteria, and “satisfactory” under the staffing and work accomplishment criteria.⁴ B&R’s proposal was evaluated as “good (minus)” under the technical evaluation factor at an evaluated price of \$92,441,617. B&R’s proposal was evaluated as “good” under the past performance and corporate experience criteria, “good (minus)” under the support for small business criterion, and “satisfactory” under the staffing and work accomplishment criteria. AR, Tab 17, Source Selection Board (SSB) Report, Sept. 24, 2002, at 6.

In determining which proposal represented the best value to the agency, the agency noted that although B&R’s total proposed price was “2.8% lower” than Jones’s, all of that price advantage was due to B&R’s lower price for the “indefinite quantity work” (\$15,733,880 for B&R in comparison to \$19,497,006 for Jones). As to the “firm fixed price work,” the agency found that Jones’s proposal was slightly lower priced than B&R’s (\$71,790,636 for Jones in comparison to \$72,707,736 for B&R). The agency noted here that over the past 5 years it had ordered only 37 percent of the “indefinite quantity work” set forth in the solicitation, and calculated that if it were to order the same percentage of “indefinite quantity work” under the contract to be awarded

³ For example, CLIN 0213A was described as family housing “floor tile replacement,” with an estimated quantity of 3,000, and a unit measure of square feet.

⁴ Proposals were evaluated under the technical factor and evaluation criteria as either excellent, good, satisfactory, marginal, or poor. The source selection plan (SSP) also provided that proposals could be evaluated under the past performance criterion as “no rating.” AR, Tab 3, SSP, at 11.

here, the “difference in actual cost to the government would be just over one-half of one percent.” AR, Tab 17, SSB Report, Sept. 24, 2002, at 9; Tab 18, Post-Negotiation Business Clearance Memorandum (BCM), at 14.

The SSB next noted that the proposals of Jones and B&R were evaluated respectively as “good” and “good (minus)” under the technical factor, and that the “difference in the overall rating is in the small business subcontracting plan.” AR, Tab 17, SSB Report, Sept. 24, 2002, at 9; Tab 18, Post-Negotiation BCM, at 6.

Finally, the SSB noted that Jones “is the incumbent contractor currently performing most of the services for the same customers in the same remote location as called for in this solicitation,” and that “[t]hey propose to roll their existing management team over from the current contract to the new one.” The SSB found that Jones’s “incumbency provides the government a high degree of confidence and low risk in the successful performance of [Jones] on a follow on contract.” AR, Tab 17, SSB Report, Sept. 24, 2002, at 9-10; Tab 18, Post-Negotiation BCM, at 6-7.

The SSB concluded that because, in its view, the evaluated 2.8 percent price advantage associated with B&R’s proposal “is actually expected to be considerably less,” it did not offset the advantages associated with Jones’s “slightly better technical proposal” and status as the incumbent contractor that provided the SSB with more confidence as to the successful performance of the contract. AR, Tab 17, SSB Report, Sept. 24, 2002, at 9; Tab 18, Post-Negotiation BCM, at 7. In addition to the detailed analysis in the source selection documentation regarding the agency’s view that the price advantage associated with B&R’s proposal was expected to be closer to .58 percent, rather than 2.8 percent, the Post-Negotiation BCM (approved by the source selection authority (SSA)) also stated, apparently in the alternative, that Jones’s “slightly better technical proposal” and greater experience due to its status as the incumbent contractor “is worth more than the small price differential of 3%.” AR, Tab 18, Post-Negotiation BCM, at 7.

Award was made to Jones, and, after requesting and receiving a debriefing, B&R filed this protest, challenging the evaluation and source selection decision on the basis that the agency inappropriately considered incumbency in the source selection decision, unreasonably evaluated the proposals under the support for small business criterion, and did not consider the actual total offered prices in the source selection decision.⁵

⁵ B&R also argued in its protest that the agency “arbitrarily wrapped-up” B&R’s “Past Performance subscores” in arriving at an overall rating of “good” under the past performance criterion, and “failed to award [B&R] strengths for its significant air operations experience.” Protest at 2, 14. Although the agency addressed these arguments in its report, the protester did not respond to the agency’s position in either its comments or its supplemental comments. Accordingly, we consider B&R

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With regard to the source selection decision's reference to Jones's status as the incumbent contractor, B&R argues that "since incumbency was not among the stated evaluation criteria, this action by the SSA was clearly improper." Protest at 11.

Where a solicitation advises offerors that experience is to be evaluated, an agency may properly consider an offeror's specific experience in the area that is the subject of the procurement. In this regard, experience as an incumbent may offer genuine benefits to an agency and may reasonably distinguish the incumbent's proposal. IBP, Inc., B-289296, Feb. 7, 2002, 2002 CPD ¶ 39 at 5.

As mentioned previously, the solicitation specifically listed corporate experience as an evaluation criterion under the technical evaluation factor. In this regard, the RFP stated that "[t]he offeror shall demonstrate experience in performing similar type work, size, volume and complexity for the last five years with a value of \$8,000,000 or more per project annually." The RFP added here that, among other things, it was "the Offeror[']s responsibility to clearly explain and demonstrate to the Government how their work experience in each referenced contract is relevant to the contract requirements in this solicitation." RFP amend. 1, at L-9.

In considering the impact of incumbency, the SSB noted that Jones's status as "the incumbent contractor currently performing most of the services for the same customers in the same remote location," and the firm's intent to "roll their existing management team over from the current contract to the new one . . . provides the government a high degree of confidence and low risk in the successful performance . . . on a follow on contract." AR, Tab 17, SSB Report, Sept. 24, 2002, at 9-10. Although, as noted by the protester, both Jones's and B&R's proposals received ratings of "good" under the corporate experience criterion, the agency could consider Jones's incumbency as a discriminator in the source selection decision because this criterion was part of the evaluation scheme.⁶ IBP, Inc., supra, at 7.

The protester next argues that the agency acted unreasonably in evaluating its proposal as "good (minus)" under the "Support for the Small Business, Small Disadvantaged Business, and Woman-Owned Business Program" evaluation criterion, given that Ferguson-Williams (B&R's teaming partner) is a small business,

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to have abandoned these aspects of its protest. Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 5-6 n.3.

⁶ The protester also complains that because approximately 17 percent of the work reflected in the RFP represents "new contract work," the agency erred in considering Jones the incumbent contractor. However, the source selection decision reflects the clear awareness that this RFP included "new work" in crediting Jones's incumbent experience.

and according to the proposal, would perform approximately 40 percent of the work if B&R were awarded the contract, see AR, Tab 5, B&R Technical Proposal, at 157, which the agency did not credit in the evaluation.

This criterion was listed as one of the five equally weighted technical criteria in section M of the RFP. This section, however, provided no explanation as to what information the agency would consider in a positive manner while evaluating proposals under this criterion. Instead, the detail as to what the agency would look for under this criterion was provided in the RFP under section L, “Instructions and Conditions, and Notices to Bidders.”

As initially issued, section L of the RFP referred to the “Support for the Small Business, Small Disadvantaged Business, and Woman-Owned Business Program” evaluation criterion and explained that it was comprised of two subfactors: (A) Small Business Past Performance and (B) Subcontracting Plan Effort. As to subfactor (A), the solicitation explained that if the offeror were a large business, it was required to submit with its proposal two standard forms, both of which report information regarding the offeror’s past small business subcontracting efforts. With regard to subfactor B, the solicitation provided the Navy’s “goals in terms of percentage of all subcontracted work in dollars,” and requested that offerors submit subcontracting plans demonstrating, among other things, “[t]he extent of participation of such firms in terms of the value of the total acquisition and the percentage of subcontracted effort.” The solicitation added that “[f]or Small Businesses, contractors are not required to submit a subcontracting plan nor [the standard forms], but must self certify as a Small Business.” The solicitation concluded in this regard that “Small Business offerors . . . will be rated Superior for this factor.” RFP at L-11.

The agency issued a total of eight amendments to the solicitation, none of which modified the evaluation factors or criteria set forth in section M of the RFP. However, amendment No. 4 modified the two subfactors identified in section L that comprise the “Support for the Small Business, Small Disadvantaged Business, and Woman-Owned Business Program” evaluation criterion to read: (a) Past Performance in Utilizing [Historically Underutilized Business Zone Small Businesses, Small Businesses, Small Disadvantaged Businesses (SDB), Women-Owned Small Businesses, Veteran-Owned Small Businesses, and Historically Black College and University or Minority Institutions] in Previous Contracts; and (b) Participation of Small Businesses in the Performance of this Project. These subfactors were said to be of equal importance. The RFP specified with regard to subfactor (b) that the “[e]valuation will include the extent of participation of small businesses in terms of the total value of the acquisition,” and required large business offerors to “[i]dentify the extent of participation of small businesses in terms of the value of the total acquisition.” The amendment also deleted the statement that small businesses would receive a rating of “superior” under this evaluation criterion, and informed small business offerors that they were to “[i]dentify, in terms of dollar value and

percentage of total proposed price, the extent of the work you will perform as the prime contractor,” and the extent that they planned to subcontract work to, among others, large businesses, other small businesses, or SDBs. RFP amend. 4, at L-11.

In response to the protest, the agency asserts that because B&R “is a large business, the proposal must be considered as being submitted by a large business.” The agency explains that it thus considered, during its evaluation of B&R’s proposal, the “level of subcontracting (in terms of dollars) the prime proposed with various types of small businesses.” The agency concludes that because “[B&R’s] goal matched the RFP requirements, but did not exceed them . . . they received a rating of Satisfactory for the current project subcontracting plan subfactor.” Thus, the agency did not credit B&R with Ferguson & Williams’s participation in its evaluation of this criterion. AR at 6.

In our view, the agency’s evaluation was clearly inconsistent with the terms of the solicitation. As indicated above, the RFP, while initially referring only to the evaluation of proposals to determine the extent of each offeror’s proposed subcontracting plan, was amended to provide that the “[e]valuation will include the extent of participation of small businesses in terms of the total value of the acquisition.” RFP, amend. 4, at L-11. B&R’s proposal plainly states that Ferguson-Williams, a small business, would perform approximately 40 percent of the work if B&R were awarded the contract.⁷ AR, Tab 5, B&R Technical Proposal, at 157. In light of this, we find that the agency’s evaluation of B&R’s proposal under the “Support for the Small Business, Small Disadvantaged Business, and Woman-Owned Business Program” evaluation criterion was unreasonable. See Summit Research Corp., B-287523; B-287523.3, July 12, 2001, 2001 CPD ¶ 176 at 7 (in evaluating proposals under small business participation factor, agency was required by the terms of the solicitation to consider whether the offeror itself was a small business in addition to whether the offeror proposed to rely on small business subcontractors).

The impact of the agency’s actions here on the overall source selection must now be considered. In this regard, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency’s actions, it would have had a reasonable possibility 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).

Here, as mentioned previously, the “Support for the Small Business, Small Disadvantaged Business, and Woman-Owned Business Program” criterion was one

⁷ This of course is in addition to the subcontracts proposed by B&R in its proposal that resulted in the agency determining that B&R’s proposal met, but did not exceed, the subcontracting goals set forth in the RFP.

of five equally weighted technical evaluation criteria used by the agency to assess the merits of the competing proposals, and was the only criterion under which the proposals of Jones and B&R received different ratings--Jones was rated as "good" and B&R was rated as "good (minus)." Although the agency also discussed Jones's incumbency in the source selection decision, the record does not indicate that this evaluated advantage was the basis for the source selection (and certainly not the sole basis), given the decision's reliance on Jones's higher rating under the "Support for the Small Business, Small Disadvantaged Business, and Woman-Owned Business Program" criterion. Accordingly, because the competition was relatively close with regard to both technical merit and price (with the price difference in B&R's favor), the record reflects a reasonable possibility that B&R would have been selected, but for the agency's failure to evaluate its proposal in a manner consistent with the solicitation's "Support for the Small Business, Small Disadvantaged Business, and Woman-Owned Business Program" criterion. We therefore conclude that the agency's action prejudiced B&R and therefore sustain the protest.

Accordingly, and in light of our recommendation that the agency perform a new evaluation, we need not address the protester's argument that the agency failed to follow the solicitation's stated price evaluation scheme with regard to the SSA's determination, discussed above, that the 2.8 percent price advantage associated with B&R's proposal was actually expected to be considerably less, that is, .58 percent, except to observe that the RFP contemplated that the total evaluated price--including both "firm fixed price" and "indefinite quantity" work--would be the basis for the award evaluation. See RFP at M-2.⁸

The protest is sustained.

We recommend that the agency evaluate proposals under the "Support for the Small Business, Small Disadvantaged Business, and Woman-Owned Business Program" evaluation criterion in a manner consistent with the solicitation, that is, in a manner

⁸ We find it troubling, however, that the agency has repeatedly indicated its belief during the course of this protest that it will, in fact, require only about 37 percent of the "indefinite quantity" estimates set forth in the solicitation, which appears to establish that the agency has little or no confidence in those estimates. Estimated quantities in a solicitation for an indefinite-quantity contract should be realistic, based upon the best information available, and represent the agency's anticipated needs. Federal Acquisition Regulation § 16.504(a)(1); Carr's Wild Horse Center, B-285833, Oct. 3, 2000, 2000 CPD ¶ 210 at 3 n.3; Howard Johnson, B-260080, B-260080.2, May 24, 1995, 95-1 CPD ¶ 259 at 3. We believe that the agency would be well advised to review the solicitation's quantity estimates, so that, if it concludes that they do not reflect the agency's current judgment about its anticipated needs, the solicitation can be amended to correct the estimates and request revised proposals before the agency proceeds to implement our recommendation.

that considers the extent of participation of small businesses as a fraction of the total value of the acquisition, rather than solely the percentage of effort subcontracted to small businesses, and then make a new source selection decision. If a proposal other than Jones's is selected for award, the Navy should terminate the contract previously awarded to that firm. We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel