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Decision

Matter of: Ashe Facility Services, Inc.

File: B-292218.3; B-292218.4

Date: March 31, 2004

Michael A. Gordon, Esq., Holmes, Schwartz & Gordon, for the protester.
Ira E. Hoffman, Esq., and James A. McMillan, Esq., Grayson, Kubli & Hoffman, for Kira, Inc., an intervenor.
Richard G. Welsh, Esq., Naval Facilities Engineering Command, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where solicitation contained an ambiguity regarding whether the agency intended to include indefinite-quantity prices in its evaluation of total price or whether the agency intended to evaluate indefinite-quantity prices solely for reasonableness. Because the ambiguity was latent, the issue was timely when raised after award.
2. Protest that agency improperly failed to consider the protester's key personnel under the corporate experience factor is sustained where the record reveals that the agency considered the awardee's key personnel when it evaluated the awardee's corporate experience.
3. Protest that awardee's proposal contained material misrepresentations regarding its status as a qualified Historically Underutilized Business Zone (HUBZone) small business concern is dismissed; protest ultimately involves issue of whether awardee was a qualified HUBZone concern, a matter within the exclusive statutory authority of the Small Business Administration.

DECISION

Ashe Facility Services, Inc. protests the award of a contract to Kira, Inc. for base operating support services at two Navy installations in Florida under request for proposals (RFP) No. N69272-03-R-1010, issued by the Naval Facilities Engineering Command (NAVFAC). Ashe principally alleges that the RFP's price evaluation provision contained a latent ambiguity and that the agency improperly evaluated its proposal, as well as the proposal submitted by Kira.

We sustain the protest.

BACKGROUND

NAVFAC issued the RFP as a Historically Underutilized Business Zone (HUBZone) set-aside to acquire base support services at the Naval Air Station Jacksonville, Florida and the Naval Station Mayport, Florida, as well as certain outlying areas, for a base year with four 1-year options and three 1-year award option periods, referred to as the Regional Base Operating Support 2 (“RBOS 2”) contract.¹ The RFP divided the base support services into four main functional work areas (janitorial, pest control, refuse collection/recycling, and grounds maintenance) and within each functional area identified both fixed-price and indefinite-quantity work items.

Offerors were required to separately price the fixed-price work items and the indefinite-quantity work items. Specifically, contract line item number (CLIN) 0001 required a lump sum price for all of the fixed-price work under the contract for the base period. CLINs 0003, 0005, 0007, and 0009 required lump sum prices for the fixed-price work for each of the four 1-year options, and CLINs 0011, 0013, and 0015 required lump sum prices for the fixed-price work for each of the three 1-year award option periods. These lump sum prices were drawn from exhibits A-D in section J of the RFP, which required detailed unit pricing for the fixed-price work, as well as supplemental pricing sheets.²

The RFP also provided for a variable pricing element, which was specific to the fixed-price work under the solicitation. The agency anticipated that buildings and/or areas within buildings would be added, deleted, or changed by contract modification during the course of the contract, thus changing the contract’s value. See RFP, annex 2, at 18. Apparently in an effort to pre-establish the price of such modifications (rather than having to negotiate their price at the time the

¹ The award option periods were included to provide the selected contractor with an incentive to perform well by providing for the award of additional option periods if the contractor achieves positive performance ratings during the course of contract performance. See RFP, Award Option Plan.

² The RFP instructed offerors to submit, in attachment JB-1, supplemental pricing information by functional area (i.e., janitorial, pest control, refuse/recycling, and grounds maintenance) for the fixed-price portion of the contract for the base period, each option year, and each award-option period. See RFP § L. This supplemental information required detailed information concerning the offerors’ direct costs (labor, material, equipment, subcontract, and “other”) and indirect costs (labor, material and equipment, home office overhead, general and administrative, and profit) within each of the four functional areas.

modifications arose), the RFP required offerors to submit a “cost factor” for adding work and a separate “cost factor” for deleting quantities of work for the fixed-price services under each of the four service categories.³ RFP § B, attach. JB-2. The RFP expressly instructed that the add/delete pricing was for the fixed-price work; there was no add/delete pricing for the indefinite-quantity work. These add and delete factors were then applied to “hypothetical” contract modifications.⁴ Offerors were required to calculate their add/delete prices for the base, option, and award option periods and to include a lump sum add/delete price under CLIN 9008 for the base, option, and award option periods.⁵

Lump sum pricing was also required for the indefinite-quantity work. CLIN 0002 required a lump sum price for all of the indefinite-quantity work for the base period. CLINs 0004, 0006, 0008, and 0010 required lump sum prices for the indefinite-quantity work for each of the four 1-year options, and CLINs 0012, 0014, and 0016 required lump sum prices for the indefinite-quantity work for each of the three 1-year award option periods. These lump sum prices were drawn from exhibits E-J in section J of the RFP, which required detailed unit pricing for the indefinite-quantity work.

Section M of the RFP advised that award would be made to the offeror whose proposal represented the “best value” and further advised that price (Factor E) was equal to the combined weight of four technical factors: (1) past performance information (Factor A); (2) corporate experience (Factor B); (3) management (Factor C); and (4) technical approach/methods (Factor D) (consisting of four subfactors: (a) janitorial; (b) pest control; (c) refuse/recycling; and (d) grounds maintenance). RFP § M. The four technical factors were of equal weight, as were the four subfactors within Factor D.

³ Offerors were instructed that the add/delete pricing would be used to price contract modifications “throughout the life of the contract.” RFP § B, attach. JB-2 (emphasis in original).

⁴ For example, under the janitorial services function, attachment JL-2 of the RFP provided a hypothetical modification adding 6,044 square feet of a specific sub-category of work described as “Service Class A.” This quantity was multiplied by the contractor’s per square foot unit price for Service Class A work as well as the contractor’s cost factor (which the offeror was required to submit as a percentage). This calculation resulted in the contractor’s price for adding the hypothetical quantity of Service Class A work.

⁵ The RFP also included CLINs 9000 through 9007. Offerors were specifically instructed not to submit a dollar figure under these CLINs. Rather, these CLINs appeared to be for administrative purposes and used as place holders for the offerors’ proposed add/delete cost factors under attachment JB-2 of the RFP.

Specifically, with respect to the evaluation of price, the RFP provided:

The price proposal will be evaluated to determine reasonableness and realism of price as well as whether proposed pricing demonstrates an understanding of the work and an ability to perform the contract. Price will be evaluated by adding the base, each option period quantities, each award-option period quantities, and add/delete/change services period totals for the firm fixed-price items (Indefinite-quantity items will be reviewed for reasonableness).

RFP § M.

With regard to the technical factors, the RFP provided that an offeror's "technical proposal will be evaluated to determine whether the offeror possesses the capability to successfully perform the stated requirements of the RFP." RFP § M. Specifically, as it relates to this protest, section M stated that corporate experience would be evaluated based on "any" information submitted by the offeror and references submitted by the offeror. RFP § M.

Section L required submission of specific information in order to evaluate an offeror's past performance and corporate experience. Specifically, section L instructed:

[Factor A – Past Performance Information] The offeror shall provide references of past performance on contracts performed within the past (5) years that demonstrate a history of performance on relevant contracts of similar scope, size and complexity in performing work suitable for this requirement . . . (PLEASE NOTE: specific experience on contracts of similar complexity should be addressed via separate EVALUATION FACTOR B [Corporate Experience]. . . Key personnel and subcontractor's past performance may also be evaluated. . . .

[Factor B – Corporate Experience] The offeror shall provide a single data sheet for each relevant contract during the past five (5) years which is similar in complexity (i.e. type of work, size (\$) and volume) as required by this solicitation. . . . The offeror shall provide this information for any subcontractors proposed for use on this contract. The offeror shall describe experience (including subcontractors) in performing contracts of similar complexity for the last five (5) years.

RFP § L (emphasis in original).

The agency received several proposals in response to the solicitation, including proposals from Kira and Ashe. In accordance with the agency's source selection plan (SSP), the agency assembled a technical evaluation board (TEB) to evaluate the

strengths and weaknesses of the offerors' technical proposals and a separate price evaluation board (PEB) to evaluate their price proposals. The SSP further provided that the TEB and PEB evaluations would be reviewed by a source selection board (SSB). In its evaluation of technical proposals, the agency employed the following adjectival rating scheme: exceptional, acceptable, marginal, and unacceptable. If an offeror lacked pertinent past performance information, the offeror would receive a "neutral" rating. Agency Report (AR), exh. 2, SSP, at 12.

In its initial evaluation of proposals, the TEB scored Kira as "acceptable" for both past performance information and corporate experience. Under the past performance factor, the TEB noted that the past performance survey results were very favorable for Kira and its subcontractors. Under corporate experience, the TEB stated that Kira had "demonstrated corporate experience in contracts that were similar in scope, complexity, context and relevancy." AR, exh. 6, TEB Report, Aug. 18, 2003 (revised Aug. 22, 2003).

Ashe's initial evaluation ratings were less favorable. The TEB rated Ashe "neutral" for past performance and "marginal" for experience. In its evaluation of Ashe's past performance information, the TEB noted several weaknesses, specifically, that Ashe failed to submit evidence of past performance in [deleted] and that Ashe lacked "multifunction service" past performance. With regard to Ashe's corporate experience, the TEB concluded that Ashe's experience did not involve contracts similar in complexity to the work required under the solicitation. The TEB focused on the fact that Ashe's experience was in grounds maintenance only and noted that managing one functional area is less complicated than managing the four functional areas required under the solicitation. The TEB also indicated that Ashe failed to establish corporate experience for [deleted].

Upon its review of the TEB report, however, the SSB disagreed with several of the TEB's conclusions. While the SSB agreed with Kira's acceptable past performance rating (adding that Kira had moderate performance risk because Kira's team had not worked together before), it expressed concerns with Kira's acceptable rating for corporate experience, and instead rated Kira "marginal" for that factor. In its narrative statement addressing Kira's experience the SSB stated:

All five contracts submitted for consideration were Housing Maintenance Contracts that included some janitorial, pest, refuse, and grounds functions. For example, Kira maintained [deleted] acres of grounds versus the 2700 plus acres under RBOS 2. Also this same contract is not similar in complexity; for example the TEB commented that mowing grounds around housing is less complex than mowing airfield and weapons areas. With grounds maintenance being approximately 40% of the total cost, and 60% of the total effort, there is risk associated with Kira's proposal in this area. Also, as identified in the TEB Report, Kira's proposed key personnel had limited experience

in other areas as well. . . . Proposed personnel have limited experience in some of the areas specified in the request for proposal.

AR, exh. 6, SSB Report, Sept. 16, 2003, at 2-3.

With regard to Ashe, the SSB expressed concerns with the TEB's neutral rating under the past performance information factor. While noting that Ashe did not have multifunction past performance, the SSB found that Ashe's team, which consisted of the [deleted] and the management of the [deleted], had "successful" past performance, and that Ashe's past performance history of grounds maintenance services was successful. AR, exh. 6, supra, at 4. Because of "moderate performance risk" stemming from the fact that Ashe and the subcontractors had not worked together under one contract, the SSB rated Ashe "acceptable" under the past performance information factor. AR, exh. 6, supra, at 4.

Under corporate experience, the SSB concurred with the TEB's "marginal" rating for Ashe. The SSB noted that despite Ashe's strength in the single grounds maintenance function, Ashe had little experience with similar multifunction contracts. AR, exh. 6, supra, at 4.

Based on its overall evaluation of the proposals submitted, the agency set a competitive range, which included Kira and Ashe, and held an initial round of discussions with these firms. In its discussions with Ashe, the agency raised issues concerning Ashe's past performance and corporate experience. Specifically, the agency asked Ashe to provide past performance information of [deleted] related to the solicitation, or to explain how it intended to mitigate its lack of past performance for this function. With regard to the corporate experience factor, the agency informed Ashe that its proposal lacked "multifunction team experience of similar size, scope and complexity" and asked how Ashe intended to mitigate the lack of multifunction team experience related to the solicitation requirements. AR, exh. 8, Discussion Questions for Ashe, Sept. 22, 2003. The agency also asked Ashe to provide information that showed corporate experience in the [deleted] because, according to the agency, Ashe's proposal did not reflect such experience.

In its discussions with Kira, the agency raised concerns with Kira's corporate experience and stated: "Your proposal lacks multifunction team experience of similar size, scope and complexity. Of specific concern is the lack of corporate experience in [deleted]." AR, exh. 7, Discussion Questions for Kira, Sept. 22, 2003. The agency asked Kira to explain how it intended to mitigate its lack of multifunction team experience as related to the solicitation requirements.⁶

⁶ During the course of the discussions, Kira asked the agency to define what it meant by "multifunction" and the agency "explained that multifunction meant all four work (continued...)"

Upon evaluation of the offerors' revised proposals, the TEB again rated Kira's corporate experience as "acceptable." While the TEB report indicated that Kira's lack of corporate experience in [deleted] was a weakness, it concluded that this lack of experience was offset by the experience of its key personnel. AR, exh. 11, TEB Report, Kira Synopsis, Oct. 15, 2003, at 1.⁷ In answering the agency's concerns about its lack of [deleted] experience Kira stated that "one must consider our proposed key personnel and their extensive experience in [deleted]" AR, exh. 9, Kira's First Revised Technical Proposal, Oct. 6, 2003, Answer to Discussion Question 1. Kira's past performance rating of "acceptable" did not change.

In evaluating Ashe's revised proposal, the TEB revised its initial "neutral" rating for Ashe's past performance to "acceptable" based on "additional consideration given to sub-contractors and key personnel." AR, exh. 11, TEB Report, Oct. 15, 2003, Ashe Synopsis, at 1. The TEB noted that Ashe's past performance had a weakness due to its lack of past performance with contracts that were similar in complexity (its "lack of multifunction experience"). AR, exh. 11, supra. Under corporate experience, the TEB again rated Ashe "marginal" because Ashe demonstrated "limited experience" on multifunction contracts and "[deleted]." AR, exh. 11, supra.

The TEB's report on the revised proposals was submitted to the SSB and again, the SSB disagreed with the TEB's conclusions as to Kira's corporate experience. The SSB maintained that Kira's proposal warranted a "marginal" not an "acceptable" rating under this factor because of Kira's lack of corporate experience in [deleted]; because Kira "demonstrated little evidence of having experience performing contracts of similar scope, size, and complexity to the RFP requirements"; and because Kira failed to demonstrate "average" experience in managing multifunction contracts. AR, exh. 11, SSB Report, Oct. 20, 2003, at 2-3. The SSB, however, agreed with the TEB's adjectival ratings for Ashe's revised proposal under the past performance information and corporate experience factors. Based on its evaluation of the revised proposals, the SSB recommended a second round of discussions with the offerors in the competitive range.

During discussions with Kira, the agency stated:

(...continued)
areas." AR, Memorandum Re: Competitive Range Discussions with Kira, Sept. 25, 2003, at 2.

⁷ The agency's report included two different TEB report synopses for Kira, one of which had a line through it noting it was replaced by the November 18, 2003 TEB Report. We considered both synopses as part of the October 15, 2003 TEB report.

Your proposal fails to demonstrate that your firm has multifunction corporate experience managing contracts of similar complexity (i.e. type of work, size (\$) and volume) commensurate with the requirements of this solicitation. Specifically, the Government has concern with your firm's apparent lack of corporate experience in the area of [deleted].

AR, exh. 12, Discussion Questions for Kira, Nov. 10, 2003.

Based on this concern, the agency asked Kira to explain how it intended to mitigate its "lack of corporate experience in managing multifunction facilities support services contracts related to the requirements of this solicitation." AR, exh. 12, supra.

In its discussions with Ashe, the agency stated that Ashe failed to demonstrate "multifunction (i.e. grounds maintenance, janitorial, refuse/recycling and pest control) corporate experience" and asked Ashe to explain how it intended to mitigate this lack of experience. AR, exh. 13, Discussion Questions for Ashe, Nov. 10, 2003.

In response to the discussion questions both Kira and Ashe revised their proposals. Kira sought to address the agency's concerns regarding its corporate experience primarily by comparing its work experience under its Naval Air Station contract at Lemoore, CA (NAS Lemoore), which had a \$5.5 million annual value. Kira explained that this contract required work in each of the functional areas under the RBOS 2 contract and that the grounds maintenance work under the NAS Lemoore contract had an annual value of approximately \$4.3 million while the RBOS 2 grounds maintenance value was approximately \$4.1 million. In addition, Kira described the NAS Lemoore contract with reference to specific work requirements, including the fact that it required [deleted] acres of grounds maintenance.⁸ AR, exh. 14A, Kira's Answers to Second Round of Discussion Questions.

Ashe responded to the agency's concerns regarding its corporate experience by emphasizing its experience in grounds maintenance, the experience of its proposed subcontractors and proposed [deleted] management staff, as well as the experience of its key personnel, which reflected management experience in the areas of [deleted].⁹ AR, exh. 15, Ashe's Answers to Second Round of Discussion Questions.

⁸ The RBOS 2 contract requires grounds maintenance encompassing approximately 2,700 acres. AR, exh. 6, supra, at 2.

⁹ To meet the janitorial service function, Ashe had proposed the management staff of the [deleted] and identified them as key personnel.

After reviewing the second round of proposal revisions both the TEB and the SSB agreed that Kira warranted an “acceptable” rating for corporate experience. Specifically, the SSB concluded that Kira’s NAS Lemoore contract was similar in scope, size, and complexity to the RFP requirements and stated that Kira’s acceptable rating under this factor was based in part on its “key personnel.” AR, exh. 16, SSB Report, Nov. 19, 2003, at 3.

Similarly, with regard to Ashe, both the TEB and the SSB scored Ashe as “marginal” under the corporate experience factor. The TEB emphasized that Ashe demonstrated only “limited experience on multifunction contracts” and that Ashe had “[deleted].” While noting two strengths, including Ashe’s proposed subcontractors, the SSB nevertheless concluded that Ashe’s two weaknesses justified a marginal rating.¹⁰

Because Kira had the highest rated and the lowest priced proposal, the SSB recommended award to Kira.¹¹ The SSA approved this recommendation and the contract was awarded to Kira. AR, exh. 16, SSB Report. After receiving a debriefing, Ashe filed this protest.

DISCUSSION

Ashe challenges the agency’s price and technical evaluations. Principally, Ashe argues that the agency’s evaluation of the offerors’ prices was materially flawed due to a latent solicitation ambiguity regarding the evaluation of prices; the agency failed to properly consider Ashe’s key personnel when evaluating its corporate experience; and the agency’s evaluation of the offerors’ past performance and corporate experience was compromised by the agency’s reliance on an unstated minimum requirement, specifically, experience in managing all four of the RFP’s functional areas in a single contract.

Solicitation Ambiguity

Ashe maintains that the price evaluation provision in section M was ambiguous and that the agency’s interpretation and application of the provision differed from its understanding of how the agency intended to evaluate price. Specifically, when the

¹⁰ The SSB concluded that both Kira’s and Ashe’s corporate experience presented a risk due to the fact that their proposed teams had never worked together as a single corporate entity.

¹¹ In the final evaluation Kira was ranked first and Ashe was ranked second. In evaluating price, the agency added the prices for the fixed-price items and the prices for the indefinite-quantity items. Kira’s total combined price was \$80,688,670, and Ashe’s total price was [deleted].

agency evaluated price it added all the fixed-price items and the indefinite-quantity items together and compared the total price of the proposals. Ashe, however, interpreted section M to provide that only the fixed-price items would be added together for a total evaluated price and that the prices for the indefinite-quantity items would be considered solely for reasonableness.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. A party's particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provisions is reasonable and susceptible of the understanding that it reached. DynCorp Int'l LLC, B-289863, B-289863.2, May 13, 2002, 2002 CPD ¶ 83 at 8; Aerospace Design & Fabrication, Inc., B-278896.2 et al., May 4, 1998, 98-1 CPD ¶ 139 at 13.

We think that Ashe's interpretation is reasonable. As noted above, with regard to price evaluation, section M states that price will be evaluated "by adding the base, each option period quantities, each award-option period quantities and add/delete/change services period totals for the firm fixed-price items (Indefinite-quantity items will be reviewed for reasonableness)." RFP § M (emphasis added). Because the base, option periods, and award option periods had separate fixed-price and indefinite-quantity CLINs, we think that Ashe reasonably understood the phrase "for the firm fixed-price items" to indicate that only those prices for the fixed-price elements of the base, option periods, and award option periods would be added together. Moreover, the parenthetical at the end of the sentence specifying in very general terms that indefinite-quantity items would be reviewed for reasonableness, suggests that the indefinite-quantity prices for the base, option periods, and award option periods were to be evaluated separately from the fixed-price items.

The agency argues that Ashe's interpretation is unreasonable because there is no comma after the word "totals," thus limiting the qualifying phrase "for the firm fixed-price items" to the last antecedent. According to the agency, the phrase "for the firm fixed-price items" can only be read in conjunction with the phrase "add/delete/change services period totals," which merely describes the amount offerors were to place in CLIN 9008. While the government's interpretation is not unreasonable, the sentence's punctuation alone does not mandate the agency's interpretation or render Ashe's unreasonable. See U.S. v. Bass, 404 U.S. 336, 340 n.6 (1971) (concluding omitted comma not determinative of statutory language); Porto Rico Railway, Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920) (stating "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all") (citing United States v. Standard Brewery, 251 U.S. 210, 218 (1920)).

In arguing the unreasonableness of Ashe's interpretation, the agency also contends that the parenthetical regarding the indefinite-quantity items was intended to inform

offerors that the indefinite-quantity unit pricing captured in Exhibits E-J of the RFP would be evaluated for reasonableness. While such a reading may have been intended, the general language of the parenthetical does not clearly state this intention, nor does the solicitation when read as a whole appear to require such an interpretation.

Assuming then that both the agency's and the protester's interpretations of the provision are reasonable, this indicates an ambiguity in the RFP with respect to the price evaluation of the indefinite-quantity items. Accordingly, we must determine whether the ambiguity is latent or patent since, if patent, it would have had to be protested prior to proposal submission date. The Arora Group, Inc., B-288127, Sept. 14, 2001, 2001 CPD ¶ 154 at 7 n.5. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, (e.g., where the solicitation provisions appear inconsistent on their face), while a latent ambiguity is more subtle. See Brickwood Contractors, Inc., B-292171, June 3, 2003, 2003 CPD ¶ 120 at 6 (explaining a patent ambiguity as one which is obvious on its face); Bank of Am, B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137 at 10 (finding patent ambiguity where solicitation terms were in direct conflict). Since Ashe's interpretation of the solicitation provision did not directly conflict with any of the other solicitation provisions and the ambiguity only came to light in the context of the agency's price evaluation, we conclude that the ambiguity was latent rather than patent and Ashe's protest of this issue thus is timely.

The agency argues that, even assuming a latent ambiguity, Ashe cannot show prejudice as a result. In support of its argument the agency relies on the fact that under Ashe's interpretation of the RFP's price evaluation provision, its price would have been higher than Kira's.¹²

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. Enola-Caddell JV, B-292387.2, B-292387.4, Sept. 12, 2003, 2003 CPD ¶ 168 at 6. The agency's position here, however, is flawed because it is premised on evaluating the possible prejudice to the protester based on an interpretation of the solicitation that the agency clearly did not intend. Where a solicitation contains a latent ambiguity, prejudice is measured with respect to the agency's intended meaning of the ambiguous provision, not the unintended meaning. Thus, we examine whether the offeror would have altered its proposal to its competitive advantage if it had had the opportunity to respond to the intended

¹² If the totals for the fixed-price items had been evaluated without the indefinite-quantity items, Ashe's evaluated price would have been [deleted], while Kira's evaluated price would have been [deleted], a difference of [deleted].

meaning. CW Constr. Servs. & Materials, Inc., B-279724, July 15, 1998, 98-2 CPD ¶ 20 at 8-9.

The record clearly reflects that the agency intended to, and did in fact, evaluate price by adding the fixed-price and indefinite-quantity prices. Moreover, the protester has reasonably asserted that it would have changed its pricing strategy [deleted] had it known that the indefinite-quantity items were to be part of the total cost evaluation, rather than evaluated solely as to reasonableness.¹³ See Decl. by Vice-President of Ashe, Dec. 22, 2003, at 1. We believe that Ashe has demonstrated that it would have a substantial chance of receiving the award in a competition if the solicitation were not ambiguous as to the agency's intended price evaluation, and we therefore conclude that Ashe has reasonably demonstrated that it was prejudiced by the agency's inclusion of a latently ambiguous price evaluation provision.

Under these circumstances, the appropriate course of action is to clarify the RFP and afford offerors an opportunity to submit proposals based on the clarified solicitation. Allied Signal, Inc; Elec. Sys., B-275032, B-275032.2, Jan. 17, 1997, 97-1 CPD ¶ 136 at 11.

Evaluation of Key Personnel

With regard to the evaluation of corporate experience, the protester raises several challenges, including the alleged failure to properly consider the experience of its proposed management staff (Ashe's key personnel). The agency notes that Ashe received a "marginal" rating for corporate experience, in part, because it failed to demonstrate that it had experience in performing [deleted] of the complexity contemplated by the RFP. According to the agency, while Ashe submitted information concerning its [deleted] management personnel, under the terms of the solicitation, the agency was not required to attribute the experience of those personnel to Ashe as an entity in evaluating Ashe's corporate experience.

In considering a protest such as Ashe's objecting to an agency's evaluation of proposals, we will not reevaluate the proposals, but will instead review the record to determine whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations. Atlantic Research Mktg. Sys., Inc., B-292743, Dec. 1, 2003, 2003 CPD ¶ 218 at 4-5. As explained below, the agency's evaluation of Ashe's corporate experience was fundamentally flawed.

The agency does not dispute the protester's assertion that the agency failed to consider its key personnel under the corporate experience factor. Rather, the

¹³ Kira's total price for the indefinite-quantity items was [deleted], while Ashe's total price was [deleted], a difference of [deleted].

agency maintains that it was not required to consider Ashe's management personnel when evaluating Ashe's corporate experience as an entity.¹⁴ The record reflects, however, that the agency considered Kira's "key personnel" when it evaluated Kira's corporate experience. For example, in the final SSB report, which was approved by the SSA, the SSB changed the "marginal" rating it had assigned to Kira's corporate experience in prior evaluations to an "acceptable" rating, stating that Kira's "key personnel" warranted the rating and offset performance risks. See AR, exh. 16, supra, at 2-3. Moreover, the TEB report, which was prepared after the first round of discussions, explains that Kira's lack of similar experience for the [deleted] work required under the RFP was "offset by the experience of Key Personnel." AR, exh. 11, TEB Report, Kira Synopsis, at 1. Finally, the chairman of the SSB stated in a declaration prepared in response to Ashe's protest that Kira's final acceptable rating for corporate experience was warranted based, in part, on Kira's "key personnel." AR, exh. 18, Decl. of SSB Chairman, at 3.

Given the clear indication in the record that the agency considered Kira's key personnel under the corporate experience factor, it was unfair for the agency not to consider Ashe's key management personnel under the same factor. This disparate treatment rendered the agency's evaluation of corporate experience unreasonable. Lockheed Martin Info. Sys., B-292836 et al., Dec. 18, 2003, 2003 CPD ¶ 230 at 11-12.

Undisclosed Requirement

Ashe also argues that in evaluating past performance and corporate experience the agency gave undue weight to whether an offeror had multifunction contracting experience, which Ashe alleges the agency understood as experience in managing all four of the RFP's functional areas (janitorial, pest control, refuse/recycling, and grounds maintenance), and that such experience became a de facto requirement, which was not disclosed in the solicitation. According to Ashe, the agency improperly downgraded its ratings for past performance and corporate experience while overstating Kira's ratings for these factors based on the multifunction contracting requirement.

We find nothing objectionable in the agency's consideration of multifunction contracting past performance and corporate experience. Where detailed technical proposals are sought and technical evaluation criteria are used to enable the agency

¹⁴ While the agency contends that it was not required to consider key personnel under this factor, the solicitation is not clear on this point. The solicitation instructions regarding the corporate experience factor required offerors to submit information about the experience of their subcontractors and was silent as to key personnel. RFP § L. Section M, however, indicated that in evaluating corporate experience, the agency would consider "any" information supplied by the offeror. RFP § M.

to make comparative judgments about the relative merits of competing proposals, vendors are on notice that qualitative distinctions among competing proposals will be made under the various evaluation factors. See Leach Mgmt. Consulting Corp., B-292493.2, Oct. 3, 2003, 2003 CPD ¶ 175 at 4-5. In making such distinctions, an agency may properly take into account specific, albeit not expressly identified, matters that are logically encompassed by or related to the stated evaluation criteria. Si-Nor, Inc., B-292748.2 et al., Jan. 7, 2004, 2004 CPD ¶ 10 at ____.

Here, the RFP required management of four different functional areas and required offerors to demonstrate their past performance and corporate experience with contracts of similar “complexity.” Clearly, an offeror’s past performance history and experience with managing the four functional areas to be performed is relevant to the offeror’s history and experience with regard to contracts that were similar in “complexity” to the RFP requirements. See Leach Mgmt. Consulting Corp., supra. Accordingly, it was reasonable for the agency to consider the extent of the offerors’ multifunction contracting history and experience when evaluating the past performance and corporate experience factors.

In addition, despite the protester’s contentions otherwise, the record does not suggest that the agency treated multifunction contracting experience as a minimum requirement. Rather, in considering Ashe’s past performance and corporate experience, the agency rated Ashe “acceptable” and “marginal,” respectively, even though the agency had concluded that Ashe had no past performance or corporate experience with contracts that combined the functional areas under the RFP. Had multifunction contracting been a minimum requirement as argued by the protester, Ashe would have received an “unacceptable” rating under these factors.

The protester also asserts that the agency’s evaluation of Kira’s past performance and corporate experience was flawed because Kira failed to demonstrate any past performance or corporate experience in performing grounds maintenance work similar in complexity to that required by the RFP. According to Ashe, the past performance and experience emphasized by Kira and relied upon by the agency in rating Kira “acceptable” (the NAS Lemoore contract) was not similar in complexity to the grounds maintenance work required by the solicitation.

We find the agency’s evaluation in this regard unobjectionable. During the first two evaluations, the SSB clearly expressed its concern with what it believed to be Kira’s lack of comparable grounds maintenance experience, rating Kira “marginal” for the corporate experience factor. After evaluating Kira’s answers to the second round of discussion questions, however, the SSB rated Kira “acceptable.” In answering the SSB’s concerns, Kira more fully explained its [deleted] experience under its NAS Lemoore contract noting that it had a higher dollar value than the RBOS 2 grounds maintenance work and specifically compared the work under the NAS Lemoore contract to the work required under the RBOS 2 contract. While the protester concludes that the [deleted] work under Kira’s NAS Lemoore contract was less

complex than the RBOS 2 work because the NAS Lemoore contract required only [deleted] acres of grounds maintenance and the RBOS 2 contract required 2,700 acres, given the closeness of the dollar values for the work as well as the similar work items, we see nothing unreasonable in the agency's conclusion that the NAS Lemoore grounds work was similar in complexity to the grounds work required by the RFP.¹⁵ See American Artisan Prods., Inc., B-292559, B-292559.2, Oct. 7, 2003, 2003 CPD ¶ 176 at 6-7 (recognizing that dollar value is an objective measure of the size (or scale) and complexity of referenced contracts); Knightsbridge Constr. Corp., B-291475.2, Jan. 10, 2003, 2003 CPD ¶ 5 at 3.

Ashe also asserts that Kira did not actually perform the NAS Lemoore grounds maintenance work; rather, Kira merely managed a subcontractor, which performed the work. The distinction between performing grounds maintenance work versus managing such work is relevant in this case, according to Ashe, because Kira had proposed to perform all of the grounds maintenance work in-house rather than subcontract the work [deleted].¹⁶ Ashe's assertion in this regard is based entirely on a chart in the intervenor's comments on the agency report, which attempts to establish the similarity between the NAS Lemoore contract and the RBOS 2 contract. Under the NAS Lemoore contract heading, the chart states "proven successful subcontract management for grounds maintenance." Intervenor's Comments on AR, at 8. Because the cited chart and statement were not part of the contemporaneous record evaluated by the agency, nor do they conclusively establish Ashe's assertions regarding the scope of Kira's grounds maintenance work under the NAS Lemoore contract, we have no basis to find the agency's conclusions regarding Kira's grounds maintenance past performance or corporate experience to be unreasonable.

Other Protest Issues

Ashe further alleges in its protest that information disclosed by the agency during its discussions with Kira with regard to the grounds maintenance factor constituted improper technical transfusion and that Kira's proposal contained material misrepresentations regarding its HUBZone status.¹⁷

¹⁵ The protester also asserts that Kira overstated the dollar value of the grounds maintenance work under the NAS Lemoore contract by including work such as construction, design and installation of an irrigation system, which are not grounds maintenance work items under the RBOS 2 contract. Ashe, however, presents no evidence and does not cite any information in the record in support of this assertion.

¹⁶ HUBZone contractors must actually perform 50 percent of the contract work with their own personnel, RFP, Section I, FAR § 52.219-3, and of the four functional areas under the RFP, grounds maintenance represented 60 percent of the total labor hours.

¹⁷ Ashe also argues that the agency unreasonably evaluated Kira's price for reasonableness and realism. Because we are sustaining the protest as a result of a
(continued...)

Technical transfusion connotes the disclosure of a “unique or ingenious” technical solution from a competitor’s proposal. Gentex Corp. – Western Operations, B-291793 et al., Mar. 25, 2003, 2003 CPD ¶ 66 at 25; see FAR § 15.306(e)(2) (prohibiting disclosure of an offeror’s “technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror’s intellectual property to another offeror”). In support of its technical transfusion claim, Ashe points to the fact that during discussions the agency asked Kira to address how it planned to perform particular grounds maintenance work without certain “typical” [deleted] equipment and questioned whether Kira’s number of [deleted] was sufficient given the required work. We do not find any evidence in the record to suggest that the agency imparted to Kira any of Ashe’s proposal information, let alone any “unique” or “innovative” grounds maintenance ideas during the course of discussions. To the extent that Ashe is arguing that the agency coached Kira through the specificity of the discussion questions, we find nothing improper with the detailed nature of the questions. See The Communities Group, B-283147, Oct. 12, 1999, 99-2 CPD ¶ 101 at 4.

Ashe also filed a supplemental protest arguing that Kira is ineligible for award because it is not a qualified HUBZone contractor and because Kira’s initial proposal submissions contained material misrepresentations to the extent that Kira indicated that “no material change in . . . HUBZone employee percentage has occurred since it was certified by the Small Business Administration in accordance with 13 CFR part 126” AR, exh. 3, § K.

After Ashe had filed its protest with this office, Ashe filed a protest with the Small Business Administration (SBA) challenging Kira’s HUBZone status on the ground that less than 35 percent of Kira’s employee’s resided in a HUBZone.¹⁸ Ashe initially prevailed at the SBA. Essentially, the SBA held that while Kira met the 35 percent HUBZone residency requirement at the time it submitted its initial proposal, it did not meet this requirement at the time of award. Interpreting its regulations as requiring a HUBZone small business concern to meet the residency requirement both at the time of its initial proposal submission and the time of award, the SBA granted Ashe’s protest and decertified Kira.

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latent ambiguity as to the price evaluation scheme, and we are recommending that the agency clarify the RFP and allow for the submission of revised proposals, we need not address this issue.

¹⁸ In general, in order to be a qualified HUBZone small business concern, at least 35 percent of the firm’s employees must reside in a HUBZone. 15 U.S.C. § 632(p)(5)(A)(i)(I)(aa) (2000); 13 C.F.R. § 126.200(b).

Kira appealed this decision, arguing that there is no requirement that a HUBZone small business concern meet the 35 percent residency requirement both at the time of initial offer and at the time of award. The SBA agreed, reversing its prior decision and reinstating Kira into the competition. Ashe requested reconsideration of this decision, which was denied.

Under 15 U.S.C. § 637(b)(6) (2000), the SBA has conclusive authority to determine matters of size status for federal procurement purposes and our Office will neither make nor review size status determinations. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1) (2003). Similarly, the SBA is the designated authority for determining whether a firm is an eligible HUBZone small business concern, and it has established procedures for interested parties, including procuring agencies, for challenging a firm's status as a qualified HUBZone small business concern. 15 U.S.C. §§ 632 (p)(5)(A), 657a (c)(1) (2000); 13 C.F.R. §§ 126.503, 126.801 (2004); Federal Acquisition Regulation (FAR) §§ 19.306, 19.1303. As a consequence, our Office will neither make nor review HUBZone status determinations.

While Ashe concedes that the SBA has conclusively certified Kira as a qualified HUBZone concern, Ashe maintains that our Office can address the question of whether Kira's proposal contained a misrepresentation regarding the change in its HUBZone employee percentage since that issue relates to Kira's proposal submission and not Kira's HUBZone status per se. Ashe's argument, however, misses the mark.

According to Ashe, Kira's proposal submissions contained material misrepresentations since Kira had dipped below the 35 percent residency requirement and yet Kira certified that there was no material change in its HUBZone employee percentage. In order for Kira to have falsely certified that no material change had occurred regarding its HUBZone employee percentage, however, Kira's temporary dip below the 35 percent residency requirement would have to be considered a "material" change. The SBA, however, conclusively ruled that this change did not compromise Kira's status as a qualified HUBZone small business concern and thus effectively decided that the dip in Kira's employee percentage was not a "material" change. Because Ashe's allegation in this regard is inextricably linked to the SBA's decision regarding Kira's HUBZone status, our Office will not revisit this issue.

RECOMMENDATION

We recommend that the agency clarify the solicitation with regard to how it intends to evaluate price. In addition, the agency should clarify the solicitation regarding the evaluation of key personnel under the corporate experience factor. The agency then should obtain revised proposals, evaluate them, hold further discussions if necessary, and make a properly documented award determination. If Kira is not the successful offeror, the agency should terminate Kira's contract for the convenience of the government. We also recommend that Ashe be reimbursed the costs

associated with filing and pursuing its bid protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). Ashe's certified claim for costs, detailing the time spent and the costs incurred must be submitted to the agency within 60 days of receiving our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel