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Decision

Matter of: Chapman Law Firm, LPA

File: B-293105.6, B-293105.10, B-293105.12

Date: November 15, 2004

James S. DelSordo, Esq., Halloran & Sage, for the protester.
Alfred C. Moran, Esq., for Harrington Moran Barksdale, Inc., an intervenor.
Carolyn Fiume, Esq., Department of Housing & Urban Development, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency misled protester during discussions into believing that its responses had adequately addressed identified weaknesses and deficiencies is denied where record shows that agency neither indicated to protester that its responses to discussion questions resolved agency's concerns, nor otherwise indicated that protester could not further address those concerns in its final proposal revision.
 2. Protest that agency's evaluation improperly failed to credit protester for proposed subcontractor's experience is denied where subcontractor was removed from management position in protester's final proposal revision.
 3. Protest that agency incorrectly averaged adjectival ratings for individual evaluation factors in determining overall adjectival rating for protester's technical proposal is denied, since record shows that award decision was based, not on adjectival ratings, but on relative advantages and disadvantages of protester's and awardee's proposals.
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DECISION

Chapman Law Firm, LPA protests the award of a contract to Harrington Moran Barksdale, Inc. (HMBI) under request for proposals (RFP) No. R-OPC-22505, issued by the Department of Housing and Urban Development (HUD) for marketing and management services (M&M) for HUD-owned single-family properties in the Illinois/Indiana area.

We deny the protest.

The solicitation provided for a “best value” evaluation based on price and the following technical factors (in descending order of importance): management capability/quality of proposed management plan; past performance; experience; proposed key personnel; subcontract management; and small business subcontracting participation. Price was significantly less important than the technical factors, which were rated using an adjectival scale of excellent, good, fair, marginal and unacceptable.

Several proposals were received, and Chapman’s and HMBI’s were among those included in the competitive range. After multiple rounds of discussions and the submission of final proposal revisions (FPR), Chapman’s proposal was rated fair overall (fair for management capability/management plan, good for past performance, fair for experience, fair for proposed key personnel, good for subcontract management plan, and excellent for small business subcontracting plan). Chapman’s proposed price was \$147,776,750. Agency Report (AR) at 15, 16. HMBI’s proposal was rated good overall, with a good rating for each factor. Id. Although HMBI’s price was \$177,697.00, the technical evaluation panel recommended HMBI for award as the firm submitting the best value proposal. The contracting officer concurred and made award to HMBI.

Chapman challenges the award decision on a number of grounds. We have reviewed the record and find Chapman’s arguments to be without merit. We discuss several of Chapman’s principal arguments below.

DISCUSSIONS

Chapman’s proposal was rated fair under management capability/quality of proposed management plan. Chapman asserted in its initial protest that, at the debriefing, HUD identified two proposal weaknesses under this factor that it improperly failed to identify during discussions—the preliminary quality control plan included few key management controls or corrective actions, and the preliminary marketing plan contained many errors and omissions, as well as poorly detailed proposed strategies. In its report, HUD demonstrated that it did in fact raise these issues with Chapman during discussions. In its September 27 comments responding to the report, Chapman abandoned its argument regarding the adequacy of discussions under this factor.

Chapman also argues that HUD misled it into believing that its responses to the discussion questions had satisfied HUD’s concerns. Specifically, Chapman asserts that, during each round of discussions, HUD required Chapman to address only those issues currently raised and informed it that all prior issues had been resolved.

Chapman's assertions are belied by the record. While HUD's discussion letters included the statement "Your written responses to the written negotiations/discussions should address **only** the areas set forth above. . . ." (emphasis in original), the letters nowhere stated that prior issues had been resolved, and (other than the initial letter, which did not request FPRs) specifically advised that offerors may address any area in their FPR. Discussion Letters dated Apr. 27, 2004, May 21, 2004, and June 8, 2004.¹

TECHNICAL EVALUATION

Experience

Chapman's proposal was rated fair under the experience factor. According to Chapman, this rating is unreasonable because it reflects a failure by the agency to consider the experience of Chapman's proposed subcontractor, George Tustin.

The solicitation provided that "[t]he proposal should provide evidence of the firm's experience or the experience of its major subcontract partners." RFP at 277. Chapman submitted its initial proposal as a joint venturer with a number of partners, including George Tustin, who was represented as having mortgagee compliance and property management experience. Chapman Initial Proposal at 11. In its FPR, however, Chapman changed its business organization to that of a sole proprietorship, with many of the joint venture partners becoming employees. Response to Discussion Question No. 2 (Apr. 8, 2004); FPR at 2 (May 2, 2004). HUD found that Chapman's FPR removed George Tustin as a major subcontract partner, and that this left Chapman with no identified property management experience and only limited mortgagee compliance experience. FPR at 11, 124. Chapman maintains that the agency unreasonably concluded that Chapman removed George Tustin from its proposal, and that his experience thus was no longer relevant for evaluation purposes.

In reviewing a protest against an agency's proposal evaluation, our role is limited to ensuring that the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. Philips Med. Sys. of North Am. Co., B-293945.2, June 17, 2004, 2004 CPD ¶ 129 at 2.

The agency's evaluation conclusions were reasonable. Chapman's initial proposal listed George Tustin, owner of Tustin and Company, as a joint venture partner, and listed George Tustin on the organizational chart as an assistant vice president for

¹To the extent Chapman did not resolve HUD's concerns in responding to discussion questions, the agency was under no obligation to hold repeated rounds of discussions regarding the same issue. Professional Performance Dev. Group, Inc., B-279561.2 et al., July 6, 1998, 99-2 CPD ¶ 29 at 5 n.3.

management. Initial Proposal at 11. In Chapman's FPR, however, while George Tustin was still identified, along with his experience, in the firm overview section of the proposal, there no longer was any indication that he would have any role in performing the contract--or, if so, what his role would be--and he was no longer listed on the organizational chart. Based on the lack of any information explaining George Tustin's proposed role in performance and the change in the organizational chart, the agency reasonably could conclude that George Tustin no longer was being proposed to perform a property management and mortgagee compliance function. We note that Tustin Field Services (presumably an affiliate of Tustin and Company) is still included in the protester's FPR as one of many subcontractors that will assist with inspections and/or repairs, FPR at 132, but, again, the FPR does not indicate that this company was to be involved in the property management and mortgagee compliance areas. We conclude that the agency reasonably did not credit Chapman with experience in those areas.

Key Personnel

Chapman's proposal was rated fair under the key personnel factor. During the debriefing, Chapman was told of two significant weaknesses in this area--the failure to identify qualified management staff at the contract area office, and the failure to provide a clear, detailed and feasible staffing plan. Chapman disagrees with this evaluation.

With respect to management staff, HUD was concerned that the person proposed as the contract area manager did not have the necessary qualifications or experience, since his background was in criminal law and he had no prior real estate or office management experience. AR at 26. The agency was further concerned because Chapman did not provide a resume for the only other named manager, its Indiana State director of operations.² Id. Chapman does not dispute that the proposed manager of the contract area office does not have any real estate or office management experience, or that it failed to provide a resume for the Indiana State director of operations. There thus is no basis to question the agency's conclusions in this regard.

With respect to the staffing plan, HUD was concerned that Chapman proposed only two file clerks to manage 7,000 files, failed to identify any staff to support the quality control (QC) manager, and did not otherwise state how many employees would staff

² The agency also was concerned because it believed this individual had been named as the state director of operations in another proposal, but the agency now concedes, as the protester asserts, that she actually was removed from that other proposal. Given the other deficiencies in this area (and elsewhere in the proposal), there is no reason to believe that this error by the agency had any effect on Chapman's rating in this area or on the award decision.

the office. AR at 25-26. Chapman argues that HUD's focus on proposed clerks is unreasonable, since the clerk position is the most minor entry-level position and, in any case, its proposal made clear that additional clerks could be added if necessary. Similarly, Chapman notes that its proposal stated that it is committed to ensuring that the level of staffing and on-site management is ideally suited to optimum contract performance, and to increasing staffing if necessary. Chapman further asserts that the QC manager is listed above 78 other persons on the organizational chart, making it clear that he would have all necessary personnel support.

We find nothing unreasonable in the agency's concerns. Chapman's blanket statement that it would hire more clerks if necessary and otherwise would provide sufficient staff was not a substitute for proposing adequate staffing in the first place or, alternatively, providing details regarding its staffing plan. Further, the agency reasonably could conclude that the mere listing of the QC manager above 78 people on the organizational chart--with no explanation as to which personnel would be available for QC support--was not sufficient to establish the amount of staff support that would be provided to the QC manager. A proposal must include sufficient information to demonstrate that the offeror is proposing to meet the agency's needs. Ervin & Assocs., Inc., B-280993, Dec. 17, 1998, 98-2 CPD ¶ 151 at 6. We conclude that the evaluation of Chapman's proposal in this area was reasonable.

OVERALL RATING

Chapman asserts that, based on its ratings (in order of importance) of fair, good, fair, fair, good and excellent for the technical factors, its proposal should have been rated good, rather than fair, overall.

This argument is without merit. First, we see nothing objectionable in a final adjectival rating of fair, given that three of the four most important factor ratings were fair, and that the fourth rating was good. In any case, Chapman attaches unwarranted weight to the adjectival ratings. Such ratings are not binding on the source selection official but, rather, serve only as a guide to intelligent decision making. See Wesley Med. Resources, Inc.; Human Resource Sys., Inc., B-261938.5, B-261938.6, Nov. 20, 1995, 95-2 CPD ¶ 230 at 9 n.2. Here, the record demonstrates that HUD's comparison of the proposals and award decision were based, not on a mechanical application of the overall ratings, but on the underlying qualitative merits of the proposals. This being the case, arriving at a different "average" adjectival rating--good, instead of fair, as Chapman claims its proposal should have been rated--for the proposal's overall rating would have had no effect on the award decision.

BAD FAITH

Chapman maintains that HUD engaged in unfair practices in conducting the procurement, as evidenced by its failure to credit Chapman for certain proposal revisions, and its allowing an offeror in another region to substitute a subcontractor

after award, while failing to credit Chapman for its proposed subcontractor's experience. Chapman further asserts that a HUD employee accepted employment with an M&M contractor who submitted an offer.

Government officials are presumed to act in good faith, and a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6.

Chapman has not provided any evidence that agency officials acted in bad faith or otherwise improperly. First, our review of the record shows that HUD did consider all of Chapman's proposal revisions; Chapman's disagreement with the agency's conclusion that the revisions did not in every case alleviate HUD's concerns or warrant changes in Chapman's evaluation rating does not demonstrate bad faith. Further, as discussed above, we find that HUD was justified in concluding that Chapman had removed George Tustin from the firm's proposal, at least with respect to any management position, and therefore properly did not credit Chapman with his experience. Finally, while the HUD employee identified by Chapman reportedly did receive an offer of employment from an M&M contractor, the employee has submitted a declaration stating that he did not participate in the M&M procurement and that the ethics office at HUD approved the employment. Employee Declaration, Sept. 14, 2004. The protester has presented no evidence showing otherwise.

LIMITATION ON SUBCONTRACTING

The solicitation incorporated Federal Acquisition Regulation (FAR) § 52-219-14, which requires the contractor to perform more than 50 percent of the cost of contract performance with its own staff. Chapman asserts that the award to HMBI was improper because it was not clear from the firm's proposal that it would comply with this requirement.

An agency's judgment as to whether a small business offeror will comply with the subcontracting limitation generally is a matter of responsibility, and the contractor's actual compliance with the provision is a matter of contract administration. Symtech Corp., B-285358, Aug. 21, 2000, 2000 CPD ¶ 143 at 12. However, where, as here, a protester alleges that an offer indicates that the offeror will not comply with the subcontracting limitation, we will consider the matter. Id.

In evaluating HMBI's proposal, HUD concluded that the division of responsibility between HMBI and its subcontractor, Best Assets, together with vague descriptions of such things as time commitments and position descriptions, made it unclear whether HMBI would perform more than 50 percent of the value of the contract. HUD notified HMBI of its concerns and, in response, HMBI clarified in its FPR what its responsibilities would be in performing the contract. HUD concluded that HMBI's

FPR demonstrated that the firm would perform 51 percent of the value of the contract with its own work force. Given that there was nothing on the face of HMBI's proposal indicating that it could not or would not comply with the requirement, and the fact that Chapman has not disputed HUD's conclusion, there is no basis for us to question HMBI's compliance with the subcontracting limitation.

BONDING REQUIREMENT

The solicitation required the contractor to submit a performance or payment bond equal to 2 percent of the original cost of the contract within 60 days of contract award. Chapman asserts that HUD improperly has failed to enforce this requirement, instead permitting HMBI to provide 1/12 of the bond requirement in cash, instead of providing the actual bond. We will not consider this argument; whether HMBI furnishes the required bond is a matter of contract administration within the discretion of the contracting agency, and not for our review. 4 C.F.R. § 21.5(a); Prime Mortgage Corp., B-238680.2, July 18, 1990, 90-2 CPD ¶ 48 at 6 n.5.

The protest is denied.

Anthony H. Gamboa
General Counsel