



Decision

Matter of: Advant-EDGE Solutions, Inc.

File: B-400367.2

Date: November 12, 2008

Donald J. Holland for the protester.

Rebecca L. Tranthem, Esq., Department of Veterans Affairs, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation did not require offeror itself to possess specific licenses and permits, agency properly evaluated licenses and permits issued in name of awardee's subcontractor.
 2. Evaluation of protester's proposal was unobjectionable where, due to weakness associated with "sharps" exchange program, agency reasonably evaluated proposal as satisfactory and, although it experienced difficulty in contacting protester's past performance references, reasonably evaluated past performance as low risk.
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DECISION

Advant-EDGE Solutions, Inc. (AES) of North East, Maryland protests the award of a contract to NEIE Medical Waste Services, LLC (NEIE) of Portsmouth, Virginia under request for proposals (RFP) No. VA-248-07-RP-0094, issued by the Department of Veterans Affairs (VA) for biomedical waste services. AES challenges the agency's evaluation of the proposals.

We deny the protest.

The RFP, set aside for small disadvantaged veteran-owned small businesses (SDVOSB), sought proposals for all labor, equipment, containers, transportation and supervision required to pick-up, transport, incinerate and/or acceptably dispose of biomedical infectious waste, pharmaceutical and veterinary waste, chemotherapy waste, biological/pathological waste, contaminated waste, and VA "sharps"

containers, from three VA medical facilities in Florida.¹ Proposals were to include per-pound pricing based on estimated quantities of waste at each of the medical facilities. The RFP contemplated the award of a fixed-price requirements contract for a base period, with 4 option years.

Proposals were to be evaluated for “best value” on the basis of three factors-- technical capability, past performance, and price. The two non-price factors were equally important and, combined, were equal in importance to price. With regard to past performance, the RFP required submission of at least three references for the offerors’ most recent and relevant contracts performed for biomedical waste service.

Eight offerors, including AES and NEIE, submitted proposals, which were evaluated by a technical evaluation panel (TEP). The other six proposals were eliminated based on lack of SDVOSB status, unreasonably high prices, or unsatisfactory technical ratings. The TEP reached the following consensus technical ratings for AES’s and NEIE’s proposals:

	AES	NEIE
Technical	Satisfactory	Excellent
Past Performance	Low Risk	Very Low Risk
Price	\$1,584,835	\$1,866,523

In reviewing the evaluation record, the contracting officer, as source selection authority (SSA), noted that NEIE’s proposal had multiple strengths and exceeded the minimum requirements. With regard to AES, he noted a weakness in its proposal--the sharps container exchange program--that was not easily correctable. As to past performance, he noted two excellent references for NEIE and the TEP’s difficulty in establishing contact with AES’s references. While NEIE’s price was 20% higher than AES’s, the SSA determined that NEIE’s proposal’s technical advantages justified the price premium, and that NEIE’s proposal therefore represented the best value. Accordingly, VA made award to NEIE. After an unsuccessful agency-level protest, AES filed this protest with our Office.

NEIE EVALUATION

Licenses and permits

The RFP’s performance work statement (PWS) required the successful contractor to pick-up, transport, and treat and/or dispose of medical waste in accordance with all applicable county, Florida state, and federal (Environmental Protection Agency and Department of Transportation) laws, policies and guidelines, as well as VA infectious

¹ The term “sharps” refers to items, such as needles, that must be disposed of in a safe, secure manner. Agency Report (AR) at 5.

medical waste requirements. PWS § D.1.2. The contractor was also required to “maintain all necessary medical waste permits and licenses for the disposal and treatment of such waste.” Id.

AES asserts that NEIE is not technically capable of performing the contract because it does not meet the RFP’s license requirements. Specifically, it maintains that NEIE is not a Florida corporation and lacks a Florida Department of Health permit to provide biomedical waste transportation and disposal services. In AES’s view, NEIE cannot “maintain” the necessary licenses and permits because it must rely on its subcontractor, Healthcare Waste Solutions of Florida, LLC (HWS), to handle the waste.

This argument is without merit. The RFP did not require any specific license or permit as a precondition to receiving award but, rather, only required that the contractor maintain all necessary permits and licenses and that it perform the work in accordance with applicable laws. Whether an offeror, prospectively, was capable of meeting this performance requirement was a matter of the firm’s responsibility. See SourceLink Ohio, LLC, B-299258, Mar. 12, 2007, 2007 CPD ¶ 50 at 4. The RFP provided for offerors to submit copies of their permits and licenses with their proposals, presumably for purposes of enabling the agency to determine offerors’ responsibility in this area. NEIE responded to the requirement by submitting copies of HWS’s Florida biomedical waste licenses and permits. There was nothing improper or unreasonable in the agency’s accepting and considering this information, since there is nothing improper in an offeror’s meeting licensing requirements through a subcontractor.² See The Ensign-Bickford Co., B-274904.4, Feb. 12, 1997, 97-1 CPD ¶ 69 at 4 (agency’s allowing offeror to rely on licensed subcontractor and its plan for waste management tasks was reasonable). We conclude that the agency reasonably relied on HWS’s information in finding that NEIE was a responsible offeror.

Experience

AES asserts that NEIE began business in August 2007, just 2 months before the closing date. In the protester’s view, NEIE lacks relevant experience and it was

² We reach the same conclusion with regard to AES’s assertion that NEIE—a non-Florida-licensed contractor—violated a Florida regulation prohibiting a generator of biomedical waste from negotiating for waste transport with a person who is not registered with the Florida Department of Health (FDOH). FLA. ADMIN. CODE ANN. r. 64E-16.606. Again, there is nothing improper in NEIE’s reliance on its subcontractor. As explained by an FDOH official, the intent of the law is to ensure that biomedical waste is not transported in Florida by an unregistered transporter; a prime contractor using a licensed Florida transporter is considered “fine.” AR, Tab 3.

unreasonable for the agency to rely on the experience of NEIE's "sister" company, NEIE, Inc. Protest at 2.

AES's assertions are without merit. The RFP required offerors to provide a description of their applicable experience in the area of biomedical waste services, but did not specify any amount of experience or restrict the source of the experience. RFP ¶ 5.1.2. An agency properly may consider the experience of a predecessor firm or of the corporation's principal officers that was obtained prior to its incorporation date. Trailboss Enters., Inc., B-297742, Mar. 20, 2006, 2006 CPD ¶ 64 at 4; R.J. Crowley, Inc., B-229559, Mar. 2, 1988, 88-1 CPD ¶ 220 at 6. NEIE Medical Waste Services, LLC was formed when its predecessor ("sister") company, NEIE, Inc., divided its business lines and transferred all of its medical waste contracts to the new company. AR at 4. As relevant to the RFP here, the newly formed company shares the same contract management staff, processes, experience, and support as its predecessor. Id. In evaluating NEIE's technical capability (including experience) as excellent, the agency reviewed information about NEIE, Inc., including its successful performance of three current, similarly scoped VA contracts for removal and disposal of medical waste. NEIE Proposal at 5; AR, Tab 13. Since the agency could properly consider the experience of NEIE's predecessor, there was nothing unreasonable in the agency's evaluation.

SDVOSB Requirements

In its comments on the agency report, AES argues that NEIE fails to meet the RFP's requirement that at least 50% of the cost of personnel for contract performance be spent for employees of an SDVOSB concern. RFP § 5.6(c). While AES raised this issue in its agency-level protest, and the agency denied the issue, AES's initial protest to our Office did not specifically challenge the agency's decision or otherwise raise this issue. Where a protest first has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 calendar days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (2008). VA's denial of AES's protest on this ground constituted initial adverse agency action. Since AES raised this issue with our Office for the first time in its comments--well more than 10 days after the agency denied its protest--it is untimely and will not be considered.³

³ In any event, an agency's judgment as to whether a small business offeror will comply with a limitation on subcontracting provision is a matter of responsibility, and the contractor's actual compliance with the provision is a matter of contract administration. Coffman Specialties, Inc., B-284546, B-284546.2, May 10, 2000, 2000 CPD ¶ 77 at 5. Only where a proposal, on its face, should lead an agency to the conclusion that an offeror could not and would not comply with the subcontracting limitation, will the proposal be considered unacceptable for award. See KIRA, Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3. Here, the agency notes
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AES EVALUATION

Sharps Exchange System

AES maintains that the agency's evaluation of its technical proposal was flawed and thus does not support the agency's award to NEIE at a higher price. Specifically, AES asserts that the agency improperly found that it had proposed a sharps exchange system, and downgraded its proposal on this basis. AES claims that, in fact, "nowhere in its submission" did it propose such a system; the "only" reference was in its company overview as one of six services offered by the firm. Comments at 3. AES notes in particular that its proposal did not mention a sharps exchange program with reference to RFP paragraph D.4, which addressed disposal and sanitation requirements. Id.

In reviewing an agency's technical evaluation, we will not reevaluate proposals, but will examine the record to ensure that it was reasonable and in accordance with the stated evaluation criteria and applicable procurement statutes and regulations. Harris Corp., B-299864 et al., Sept. 14, 2007, 2007 CPD ¶ 180 at 5.

The evaluation here was reasonable. The RFP provided for the collection of various types of biomedical waste at each facility's pick-up area using contractor-furnished containers. RFP ¶¶ D.1.1, D.4. VA personnel were responsible for distributing these containers throughout the facilities and for returning them to the waste pick-up area. RFP ¶ D.5.1. Contractors were not responsible for providing sharps containers, which were to be purchased and stocked by VA. RFP ¶ D.1.1. However, AES's proposal cover letter described, among other procedures that would or could be provided, an expansion of VA's medical waste program through a "reusable sharps program" that entailed AES's entry into the facility to swap full sharps containers with clean containers, and provided the benefits of lowered expenses and elimination of needle-stick exposure to staff. AR, Tab 23. As part of its experience description, AES's proposal noted the firm's specialization in providing comprehensive waste management, including "sharps exchange services," again described the services, and identified AES's partner firm that would perform the services. Id. In evaluating AES's proposal, the TEP noted that the proposed program would not work at facilities as complex as VA's installations. AR, Tab 18. In this regard, the infection control section at one of the medical facilities covered by the contract had reviewed the program and did not recommend using it, apparently

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that NEIE did not take exception to this requirement and that it provided a labor hour plan supporting its intent to comply with the requirement. Agency Protest Denial, Aug. 18, 2008, at 1.

due to access issues. Id.; AR at 5. In the TEP's view, this proposal weakness could not be corrected easily. AR, Tab 13.

Contrary to AES's assertions, its proposal clearly described a proposed sharps exchange system or program. While AES did not repeat information about its sharps system in its proposal section concerning disposal and sanitation requirements (¶ D.4), its absence there was not inconsistent with its proposal elsewhere. In this regard, its cover letter identified these and other services as "key differences" from other proposals and its later description of the services did not clearly identify the services as optional. AR, Tab 23. Since the RFP provided for the VA to furnish sharps containers and for its personnel to convey waste to the waste pick-up point, AES's proposal to enter and replace sharps containers throughout the facility was reasonably considered part of its proposal and evaluated as a weakness when compared with the VA's stated requirements.

Past Performance

AES asserts that the evaluation of its past performance was flawed because the agency did not make a sufficient attempt to contact one of its references—a firm performing a contract at the VA Medical Center (VAMC) in Washington, D.C.

The evaluation was reasonable. The RFP requested at least three past performance references for offerors' most recent and relevant contracts for biomedical waste services. RFP ¶ 5.1.5. AES's proposal listed four references, with telephone numbers and brief descriptions of its work, including contracts for medical waste packaging services, supply of medical waste containers, removal and destruction of regulated medical waste and recycling of other waste, and destruction of U.S. currency waste. Proposal ¶ 5. It also identified three contracts with other VAMCs, but provided no contact information. Id.

The agency states that it had difficulty contacting any of AES's references, including the Washington, D.C. VAMC reference. The agency was able to correctly deduce the contractor's name, but it found that the person listed as a reference "did not exist at the contact number provided." AR at 5. While AES states that the number provided was, and remains, the reference's cell phone number, an agency is only required to use reasonable efforts to contact an offeror's past performance references; it is not required to make multiple attempts to contact such references. See OSI Collection Servs., Inc.; C.B. Accounts, Inc., B-286597.3 et al., June 12, 2001 CPD ¶ 103 at 9. AES has not shown that the agency's efforts to contact the Washington, D.C. reference were unreasonable. Rather, it appears that it was AES's providing a single cell phone number, and no other contact information (e.g., a phone number for the headquarters of the contractor) that led to the agency's unsuccessful efforts. We

conclude that there was no impropriety on the part of the agency, and therefore find no basis for questioning the past performance evaluation.⁴

Since we find no error in the agency's evaluation of the proposals, and price and technical factors were weighted equally, there is no basis to question the SSA's determination that the technical advantages of NEIE's proposal justified its price premium.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁴ In any event, AES does not appear to have been prejudiced by the agency's actions. Even though its "low risk" rating was not the highest possible, AES provides nothing to support a finding that contact with the Washington, D.C. VAMC reference would have significantly improved its overall past performance rating. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. 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).