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**Comptroller General
of the United States**

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

Decision

Matter of: Dix Corporation

File: B-293964

Date: July 13, 2004

Patrick J. Kirby, Esq., Ryan D. Yahne, Esq., and Richard D. Campbell, Esq., Dunn & Black, for the protester.

John Breiling, Esq., and Misty Latcu, Esq., Department of the Army, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

1. Where a solicitation states that award will be made on the basis of lowest price among quotations found satisfactory under the past performance/experience criteria, but also includes language suggesting that the agency would make a “best value” selection, including a cost/technical tradeoff if necessary, the solicitation is ambiguous on its face, and a protest of an award made on a lowest price, technically acceptable basis is untimely.
 2. Where request for quotations did not include separate evaluation criteria for evaluating the experience of individual key personnel and did not otherwise expressly restrict the consideration of key personnel experience under the corporate experience subfactor, agency properly could consider the individual experience of vendor’s key personnel in determining whether the vendor’s experience satisfied the requirement for a minimum of 3 years of corporate experience rehabilitating cranes of similar size and scope.
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DECISION

Dix Corporation protests the U.S. Army Corps of Engineers’ issuance of a purchase order to Service Crane, LLC, under request for quotations (RFQ) No. W9127N-04-Q-0020, for bridge crane rehabilitation at the powerhouses at Detroit Dam and Big Cliff Dam, Oregon. Dix protests the agency’s evaluation and resulting source selection decision.

We deny the protest.

The RFQ, issued as a simplified commercial item acquisition under Federal Acquisition Regulation (FAR) Parts 12 and 13, contemplated the award of a fixed-price purchase order. The RFQ, at section 3-7, included language from the clause at FAR § 52.212-2, "Evaluation--Commercial Items (Jan 1999)," including subsection (a):

The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government price and other factors considered. The following factors shall be used to evaluate offers: . . ."

RFQ § 3-7. Other than price, section 3-7 set forth only one evaluation factor, "Past Performance and Experience." Past performance/experience included four subfactors: (1) timeliness of services, (2) quality of services, (3) responsiveness of contractor to changes or problems, and (4) a minimum of 3 years experience rehabilitating cranes of similar size and scope. The RFQ stated that the subfactors would be evaluated as follows:

All sub-factors are of equal weight, and except for sub-factor 4 that will be rated just Satisfactory or Unsatisfactory, they will be rated as Excellent, Good, Satisfactory, Marginal, or Unsatisfactory.

RFQ § 3-7(a)(1). Following these provisions, however, section 3-7 also provided as follows:

Technical and past performance are of equal importance, and, when combined, are somewhat more important than price. A rating of Unsatisfactory for any factor or sub-factor shall cause the quote to be rejected. It is the Government's intent to award to the offeror who receives a Satisfactory or better rating in sub-factors 1, 2, 3, and 4, and who has the lowest price.

Id.

The Corps received five quotations by the closing time. Service Crane submitted the quotation with the lowest price. Dix quoted the next lowest price.

Service Crane as a company did not have the required 3 years of experience. Its quotation instead cited the experience of its two key personnel--its president (16 years of relevant experience) and lead technician (22 years of relevant experience)--who previously were employed as key personnel in the crane rehabilitation department of a major supplier of crane maintenance and rehabilitation services. In addition, Service Crane stated in its quotation that its subcontractor for electrical work had 30 years experience in the crane business. Service Crane stated that these three individuals would do all the "hands on" work under the contract. Service Crane Quotation at 6. Moreover, Service Crane's

president and its subcontractor had inspected and prepared a report on the condition of the cranes to be rehabilitated, and the agency considered these individuals to be most knowledgeable about the condition of the cranes. Evaluation Documents at 2-1 to 2-2. Based on this experience of the firm's key personnel and subcontractor, the agency determined that Service Crane satisfied the minimum experience requirement and accordingly rated the firm "satisfactory" under past performance/experience subfactor 4.

The Corps also rated Service Crane satisfactory or higher under the remaining three past performance/experience subfactors. The agency thereupon issued a purchase order to Service Crane on the basis that its quotation was satisfactory under all of the evaluation criteria and quoted the lowest price. This protest followed.

Dix asserts that the agency improperly made award based on the lowest price without performing a cost/technical tradeoff considering the difference in experience of other vendors. Dix also asserts that the agency unreasonably evaluated Service Crane as satisfactory under the 3-year minimum experience requirement under past performance/experience subfactor 4.

Dix's arguments furnish no basis upon which to question award of the purchase order to Service Crane. As an initial matter, the protester's allegation that the agency improperly failed to make a cost/technical tradeoff, including crediting Dix with superior experience, is an untimely protest of an ambiguity apparent on the face of the RFQ. Although RFQ, at section 3-7, included language consistent with making a "best value" selection, such as the relative weights of evaluation factors, suggesting that the agency would conduct a cost/technical tradeoff if necessary, that section of the RFQ also stated that "[i]t is the Government's intent to award to the offeror who receives a Satisfactory or better rating in sub-factors 1, 2, 3, and 4, and who has the lowest price." RFQ § 3-7(a)(1). As the protester itself acknowledges, these provisions are in "inherent conflict." Dix Comments, May 19, 2004, at 5. Where a solicitation contains such a patent ambiguity, an offeror has an affirmative obligation to seek clarification prior to the first due date for responding to the solicitation following introduction of the ambiguity into the solicitation. 4 C.F.R. § 21.2(a)(1) (2004); see American Connecting Source d/b/a/ Connections, B-276889, July 1, 1997, 97-2 CPD ¶ 1 at 3. The purpose of our timeliness rule in this regard is to afford the parties an opportunity to resolve ambiguities prior to the submission of solicitation responses, so that such provisions can be remedied before firms formulate their responses. Gordon R. A. Fishman, B-257634, Oct. 11, 1994, 94-2 CPD ¶ 133 at 3. Where a patent ambiguity is not challenged prior to submission of solicitation responses, we will dismiss as untimely any subsequent protest assertion that is based on one of the alternative interpretations as the only permissible interpretation. U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10.

Dix asserts that Service Crane did not have the required minimum of 3 years of experience rehabilitating cranes of similar size and scope to be rated satisfactory under subfactor 4; according to the protester, it was improper for the agency to

consider the experience of the Service Crane's key personnel in determining the relevant experience of Service Crane. We disagree. Although an agency may not substitute the experience of a firm's key personnel for corporate experience where the terms of the solicitation reasonably preclude such substitution, such as where the solicitation includes separate evaluation criteria for corporate and key personnel experience, Advanced Resources Int'l, Inc., B-249679, Nov. 18, 1992, 92-2 CPD ¶ 357 at 6; Washington State Comm'n for Vocational Educ.—Recon., B-218249.2, July 19, 1985, 85-2 CPD ¶ 59 at 8-9, absent such a preclusion, an agency generally may consider the experience of key personnel in evaluating the corporate experience of a new business. Technical Resources, Inc., B-253506, Sept. 16, 1993, 93-2 CPD ¶ 176 at 5; General Offshore Corp., B-246824, Apr. 1, 1992, 92-1 CPD ¶ 335 at 4.

Here, since the RFQ did not include separate evaluation criteria for evaluating the experience of individual key personnel, or otherwise expressly restrict the consideration of key personnel experience under the corporate experience subfactor, the agency properly could consider the individual experience of a vendor's key personnel in determining whether the vendor's experience satisfied the 3-year minimum experience requirement. Since Service Crane's key personnel had substantially more than 3 years of relevant experience in crane rehabilitation, the agency's satisfactory rating for Service Crane under the experience subfactor was reasonable. Further, inasmuch as the record does not support the protester's allegation that Service Crane's quotation should have been rejected as unsatisfactory, there is no basis to object to the agency award to Service Crane based on lowest price.

The protest is denied.

Anthony H. Gamboa
General Counsel