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Decision

Matter of: Bilfinger Berger Government Services GmbH

File: B-402944

Date: August 19, 2010

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Frank J. Borgia for SKE International, Inc., an intervenor.
Katherine D. Denzel, Esq., and Jay Aldridge, Esq., U.S. Army Corps of Engineers, for the agency.
Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's determination not to attribute affiliated entities' experience and past performance to protester for evaluation purposes was unobjectionable where it reasonably concluded that protester's proposals neither adequately established that incorporation of affiliated entities into protester was complete or substantially complete--as represented by protester--nor otherwise demonstrated that affiliated entities would be meaningfully involved in contract performance.

DECISION

Bilfinger Berger Government Services GmbH (BBGS), of Mainz, Germany, protests the award of contracts to SKE International, Inc., of Warwick, New York, under U.S. Army Corps of Engineers requests for proposals (RFP) Nos. W912GB-10-R-0005 (Hohenfels) and W912GB-10-R-0024 (Schweinfurt). BBGS asserts that the Corps unreasonably failed to consider experience and past performance information included in its proposals.

We deny the protests.

BACKGROUND

The RFPs, issued in January 2010, provided for award of indefinite-delivery, indefinite-quantity contracts for services including construction, building renovation, repair/replacement of major building systems, maintenance and repair of facilities, landscaping, and environmental work. Agency Report (AR) at 2; AR, Tab 7b, Hohenfels RFP; AR, Tab 8c, Schweinfurt RFP. The primary areas of work are the Army Garrisons in Hohenfels and Schweinfurt, Germany. Proposals were to be evaluated for “best value” based on four factors: experience, past performance, management approach, and price. AR at 11; Hohenfels RFP at 000139-144; Schweinfurt RFP at 000236-240. Experience was more important than past performance, which was more important than management approach, and the technical factors combined were significantly more important than price. Id. With regard to experience and past performance, offerors were to identify in their proposals no more than 10 prior projects that best represented their experience performing the work required under the RFP. Hohenfels RFP at 000134; Schweinfurt RFP at 0000231. Offerors also were to provide a past performance reference questionnaire to a point of contact for each project listed. Hohenfels RFP at 000135-136; Schweinfurt RFP at 000231-000232.

Five proposals were received in response to the Hohenfels RFP and four in response to the Schweinfurt RFP. AR, Tab 1, Contracting Officer’s (CO) Statement, Hohenfels, at 9; AR, Tab 2, CO’s Statement, Schweinfurt, at 9. BBGS and SKE submitted proposals under both RFPs. AR at 6.

BBGS is a new entity established by Bilfinger Berger AG (Bilfinger), a global holding company with numerous subsidiaries and affiliates that provide construction and services worldwide. AR at 2; Protests at 5-6, 8. As a newly-formed entity, BBGS itself has never performed a U.S. government contract. Three of Bilfinger’s affiliates, Bilfinger Berger Hochbau GmbH (BBH), HSG-Zander GmbH (HSG), and Bilfinger Berger AG Sede Secondaria Italiana (BBSSI) have previously performed contracts for U.S. agencies in Europe. Id. BBGS’s proposals included experience and past performance information consisting wholly of contracts performed by BBH and HSG. Id.; AR, exh. 9, BBGS Hohenfels Proposal, at 000302-365; AR exh. 10, BBGS Schweinfurt Proposal, at 000418-483. The proposals also included the following statement:

BBGS will absorb (take over) all existing U.S. Government contracts of [BBH, HSG, and BBSSI] and any other Bilfinger Berger AG U.S. Government work in Europe. Therefore, BBGS has absorbed the experience and past performances of these companies, which will be referred to as BBGS experience throughout this proposal. This absorption of the contracts, experience and past performance is part of

a written agreement with the U.S. Government. BBGS will execute all future U.S. Government work with a focus on quality, safety, customer service and ethics based business practices. The resources, personnel and equipment used to execute our ten (10) past performance projects are presently or will shortly become resources of BBGS. These experience[d] and capable personnel will be used to execute the ... contract.

BBGS Hohenfels Proposal at 000304; BBGS Schweinfurt Proposal at 000420.

The “written agreement” referenced in the above excerpt from BBGS’s proposals is an administrative agreement that was negotiated among the Departments of the Army and Air Force and certain Bilfinger entities, but the record shows that the agreement was never executed by the Bilfinger entities and the agencies. Protests at 8-9; AR at 2-9; AR, Tab 6b, Administrative Agreement. In general, the draft agreement details debarment proceedings brought against certain Bilfinger entities, and Bilfinger’s efforts to remediate the issues that led to those proceedings. *Id.* As part of that remediation, Bilfinger represented that it would form BBGS as the entity that would be responsible for performing Bilfinger’s future U.S. government contracts for work in Europe. Administrative Agreement at 000038. The draft agreement further provided that all U.S. government contract work currently being performed by BBH, HSG, and BBSSI would be transferred to BBGS. *Id.* at 000052. Several Army personnel, including the contracting officer, were involved in or aware of the negotiations leading to the draft agreement. Protests at 8-9; AR at 2-8.

Proposals were evaluated by a technical evaluation board (TEB). CO’s Statement, Hohenfels, at 9-11; CO’s Statement, Schweinfurt, at 9-11. The Hohenfels and Schweinfurt evaluations were substantially similar. Both TEBs rated BBGS acceptable (on a scale of excellent, good, acceptable, marginal, or unsatisfactory) for experience, good (on a scale of excellent, good, acceptable, marginal, poor, or neutral) for past performance, and good for management approach. AR, Tab 11, Hohenfels TEB Report, at 543; AR Tab 12, Schweinfurt TEB Report, at 561. With regard to experience, the Hohenfels TEB expressed concern that “BBGS states in the proposal that it will absorb all existing Government work of the other B&B entities (page 73) but not when.” Hohenfels TEB Report at 544 (emphasis in original). The TEB also noted that BBGS was a “new ‘entity’ with an unproven experience record,” and that it was “unclear” whether BBGS could take credit for experience of other Bilfinger contractors. *Id.* The TEB expressed similar concerns with regard to BBGS’s past performance. *Id.* at 000545-546. The Schweinfurt TEB made similar comments regarding the uncertainty of BBGS’s relationship with the other Bilfinger entities. Schweinfurt TEB Report at 562-563.

The contracting officer (CO) was the source selection authority for both acquisitions. CO's Statement, Hohenfels, at 11; CO's Statement, Schweinfurt, at 11. In both acquisitions, the CO rejected the acceptable rating for experience assigned BBGS by the TEB and instead rated the proposal unsatisfactory. AR, Tab 13, Hohenfels Source Selection Decision Document (SSDD), at 000575; AR, Tab 14, Schweinfurt SSDD, at 000589. The CO noted, in this regard, that BBGS "did not provide a signed agreement nor have they initiated actions to absorb (novate) the contracts of the [other Bilfinger affiliated] firms as they state." Id. The CO concluded that, "Since there were no signed agreements provided with the proposal, none of the experience should have been evaluated for this offeror resulting in deficiencies for this factor, and an overall high level of risk commensurate with an unsatisfactory rating." Id. The CO also rejected the good rating the TEBs assigned BBGS for past performance, and instead rated the proposals neutral. Id. The CO found that the "fact that each of these firms were able to successfully execute the contracts independently is not necessarily indicative of the new firm's (BBGS) ability to manage the new pieces and successfully execute the work required under this contract," and that "BBGS has not performed any contracts." Id.

BBGS's was the lowest-priced proposal but, based largely on its unacceptable experience rating and neutral past performance rating, the CO found that BBGS's proposal did not represent the best value. Hohenfels SSDD at 000585-586; Schweinfurt SSDD at 596-598. In comparing BBGS's and SKE's proposals, the CO stated as follows:

Thus the primary question is whether BBGS's price proposal merits the risk associated with their non-price proposal. As the SSA, I find that it does not. The high to very high risk associated with BBGS's experience combined with the unknown performance risk identified with a company with no performance record is not justified relative to the superior ratings of SKE with non-cost factors being significantly more important than price.

Hohenfels SSDD at 000585; Schweinfurt SSDD at 000597.

DISCUSSION

BBGS asserts that the agency unreasonably disregarded the experience and past performance of the other Bilfinger entities. Protests at 10-11. BBGS asserts that, based on the agency's course of dealing with BBGS and the other Bilfinger entities, especially the negotiations with regard to the administrative agreement, agency personnel had "substantial and personal knowledge" of BBGS's plan to "effectively take over as the Bilfinger government contracting entity," and that it was "wholly unreasonable to act as if it was unaware of BBGS's status and role." Id. at 11. The

protester asserts that this failure on the part of the agency resulted in a flawed experience/past performance evaluation and best value determination. Id. at 11-12.

An agency properly may consider the experience or past performance of an offeror's parent or affiliated companies where the firm's proposal demonstrates that the resources of the parent or affiliated company will affect the performance of the offeror. See Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4; see also Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iii).¹ Under this standard, the relevant consideration is whether the resources of the parent or affiliated company--its workforce, management, facilities or other resources--will be relied upon for contract performance, such that the parent or affiliate will have meaningful involvement in contract performance. Bering Straits Tech. Servs., LLC, B-401560.3, B-401560.4, Oct. 7, 2009, 2009 CPD ¶ 201 at 3 (agency reasonably found that proposal did not demonstrate meaningful involvement); Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 (record did not establish meaningful involvement).

The evaluation was reasonable. As discussed, the basis for BBGS's reliance on the experience/past performance of BBH and HSG was the administrative agreement referenced in the firm's proposal, under which those other entities would be incorporated into BBGS and BBGS would become responsible for performance of their contracts, as well as future Bilfinger contracts with the U.S. government. As noted, however, that agreement had not been signed at the time of the evaluation, and the agency reports that it "had not received any information to indicate that BBH, HSG, and BBSSI had been consumed or absorbed by BBGS at the time BBGS submitted their proposal" and that it "had no reason to believe that BBH, HSG, and BBSSI were not still separate legal corporate entities that continued to engage in U.S. Government contracting." AR at 8. Indeed, the agency points out that BBSSI recently had submitted proposals in its own name on certain Europe District solicitations, and had been awarded a contract. Id. at 8-9.² The agency further asserts that, even as of the time of award, it had received neither any agreements

¹ Since the RFPs did not specifically provide for consideration of experience/past performance of entities such as those relied upon by BBGS, the Corps was permitted, but not required, to consider BBGS's proposal information in the evaluation. However, it is apparent that the Corps intended to consider such experience/past performance to the extent that a proposal established that the related entity would have meaningful involvement in performance of the contract.

² In addition, in the Schweinfurt SSDD, the contracting officer indicated that he had information that BBH and HSG had recently competed separately and against each other. Schweinfurt SSDD at 000589.

assigning current government contracts from BBH, HSG, and BBSSI to BBGS, nor any documentation that BBGS had acquired BBH, HSG, or BBSSI's assets or personnel. *Id.* As discussed, absent evidence that the other Bilfinger entities had been or soon would be incorporated into BBGS, or that those entities' resources otherwise would be available for performance of the contract, the CO determined that there was an insufficient basis to attribute the entities' experience/past performance to BBGS. We find nothing unreasonable in this determination.

The protester claims that it "explicitly referenced in its proposal that the resources and personnel who performed its proposed projects would be performing on any resultant contract," Protests at 11, and asserts that the Army unreasonably ignored these affirmative statements in declining to attribute the other entities' experience/past performance to BBGS. Comments at 9-10. BBGS's proposals, however, are tentative, provisional, and indefinite with regard to "absorption" of the Bilfinger entities into BBGS, and the agency maintains that "BBGS did not submit *anything* as part of their proposals to indicate why it should be credited with the experience and past performance of two legally separate entities." AR at 14 (emphasis in original). We have reviewed the proposals and agree with the agency that, aside from BBGS's representations regarding the incorporation of the entities into BBGS, the proposals nowhere demonstrated that the resources of the other entities would be available to BBGS in performing the contract. Absent such information, the contracting officer reasonably concluded that the other entities' experience/past performance information was not attributable to BBGS.³

The protester cites prior decisions in which we have recognized that, in certain limited circumstances, an agency evaluating an offeror's proposal has an obligation to consider past performance information outside the proposal when it is "too close at hand" to require offerors to shoulder the inequities that would spring from failure to consider the information. *See, e.g., Keystone Sealift Servs, Inc.*, B-401526.3, Apr. 13, 2010, 2010 CPD ¶ 95; Protests at 10-11; Comments at 10-11. However, the question here is not whether the agency was required to consider information

³ The protester has provided a declaration by the Chief Executive Officer of BBGS regarding BBGS's absorption of the resources of BBH and HSG. Comments, attach. A, at 3-4. However, such explanatory or supplemental information provided in protest submissions cannot cure an inadequately written proposal. *See, e.g., HealthStar VA, PLLC*, B-299737, June 22, 2007, 2007 CPD ¶ 114.

outside of the proposal, but whether the CO's judgment based on that information was reasonable; again, we have found that the CO's judgment was reasonable.⁴

The protests are denied.

Lynn H. Gibson
Acting General Counsel

⁴ In its original protests, BBGS asserted that the contracting officer's evaluation of its experience and past performance constituted a de facto debarment. Protests at 12-13. The agency addressed this issue in its report, AR at 20-23, and the protester did not rebut the agency's arguments in its comments. Consequently, we consider this protest ground to be abandoned. CM Mfg., Inc., B-293370, Mar. 2, 2004, 2004 CPD ¶ 69 at 3. Further, in its comments, BBGS asserts that the contracting officer should have sought clarification regarding the issue of BBGS's experience and past performance information. Comments at 13, n.5. This allegation is plainly untimely, since it was not raised within 10 days after the protester knew or should have known the information on which the argument is based. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2010).