

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

Redacted

PROTEST OF:

TOMPKINS BUILDERS, INC.)	
)	CAB No. P-0801
Under RFP No. DCAM-2008-R-0088)	

For the Protester: Douglas L. Patin, Esq., Robert J. Symon, Esq., Bradley Arant Boult Cummings LLP. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General. For the Intervener: Claude M. Bailey, Esq., Terry L. Elling, Esq., Venable LLP.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 25312712

Tompkins Builders, Inc., has protested the contracting officer's decision to eliminate it from a competition for construction of the Consolidated Forensics Laboratory ("CFL") on the ground that Tompkins did not meet two special standards of responsibility. Tompkins relied on projects performed by its parent company, Turner Construction Company, and Turner's involvement in the CFL to satisfy the special standards of responsibility. Having reviewed the record, we find that the contracting officer's determination to exclude Tompkins from the competition because it did not satisfy the special standards of responsibility was unreasonable and irrational. Tompkins' proposal and BAFO clearly demonstrate the commitment of the personnel, management, and financial resources of its parent, Turner Construction, such that Turner will have meaningful involvement in contract performance. Accordingly, we sustain the protest and direct the contracting officer to perform a new and proper evaluation of Tompkins, including conducting discussions and requesting additional BAFOs if necessary, and make a proper selection decision.

BACKGROUND

On September 25, 2008, the District of Columbia, through the Office of Contracting and Procurement ("OCP"), issued RFP DCAM-2008-R-0088 for the construction of the new Consolidated Forensics Laboratory ("CFL"). (Agency Report ("AR"), Ex. 1). The new building will enable the District to co-locate the District's Metropolitan Police Department Forensic Laboratory, the Department of Public Health, and the Chief Medical Examiner for improved and efficient coordination of the functions of crime scene investigation, protection, and management of public health issues, and forensic law enforcement.

Included in the RFP were special standards of responsibility. (AR Exs. 1, 1a). These special standards of responsibility were included in two separate sections of the RFP, section B.2

and section L.5.1.1. (AR Exs. 1, 1a). Amendment No.2 of the RFP amended the language used in section B.2 and section L.5.1.1. (AR Ex. 2).

Amendment No.2 deleted the language from section B.2 in the RFP in its entirety and replaced it with the following language:

B.2 Special Standard of Responsibility: In order to be eligible for award, the offeror, as General Contractor, must have completed in the past five years a LEED certified construction project value of at least \$75,000,000; and must have completed or is currently in the process of completing (at least 50% percent completion at the time of submitting proposals) a scientific research laboratory with the a construction value of at least \$75,000,000 (See paragraph L.5.1.1).

Failure to meet any of the above requirements shall constitute a technically unacceptable offer. (emphasis in the original).

The language in Amendment No.2 also deleted the language from section L.5.1.1 in the RFP in its entirety and replaced it with the following language:

L.5.1.1 Special Standards of Responsibility - In order to be eligible for award, the offeror, as General Contractor, must have completed in past five years a LEED certified construction project with a construction value of at least \$75,000,000; and must have completed or is currently in the process of completing (at least 50% completion at the time of submitting proposals) a scientific research laboratory with a construction value of at least \$75,000,000. Offeror shall describe in detail all current projects detailing the above. In addition, the District will not find responsible any offeror that does not provide with its proposal information adequate to determine its compliance with the Stated Special Standards of Responsibility. At a minimum, an offeror should provide the following:

- a) Time Period of the Construction;
- b) Name and location of scientific research laboratory;
- c) Name of contact person;
- d) Phone number of contact person;
- e) Total contract amount;
- f) Year completed

Failure to meet any of the above requirements shall constitute a technically unacceptable offer. (emphasis in the original).

On December 15, 2008, two offerors, Tompkins and Whiting Turner Contracting Company, Inc., timely submitted sealed proposals. In its proposal, to meet the special standards of responsibility, Tompkins submitted several project references in which its parent, Turner Construction, served as the general contractor. (AR Ex. 5). There is no dispute that the project references meet the special standards of responsibility if Tompkins can rely on them. Tompkins

is a wholly-owned subsidiary of Turner. (AR Ex. 5). Tompkins' president is a Turner vice-president. Additionally, the Tompkins proposal states that:

[REDACTED]

Under the Project Approach Introduction, the proposal provides:

[REDACTED]

The contracting officer appointed [REDACTED] technical evaluators. The technical evaluation panel was given the technical proposals, and conducted an evaluation of the proposals. One panel member, [REDACTED], in an apparent reference to the projects listed by Tompkins for the special standards of responsibility, included the following evaluation comments: [REDACTED]

[REDACTED]

By letter dated January 16, 2009, the original contracting officer for the procurement advised Tompkins that it was within the competitive range and requested that Tompkins submit a written best and final offer ("BAFO") including any revisions to the original technical and price proposals. Apparently, no oral discussions were conducted with the two offerors. In the January 16 letter, the contracting officer also required that Tompkins provide a detailed response to each

of the questions listed in an attached “BAFO - Questions to Offeror” document. (Tompkins Comments on Agency Report, Ex. A). BAFO Question 1 states:

[REDACTED]

[REDACTED]

[REDACTED]

In a BAFO response under cover letter dated January 29, 2009, Tompkins submitted responses to the BAFO questions. Tompkins’ response to BAFO Question 1 states as follows:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Tompkins further responded to BAFO Question 1 by attaching to its submittal a [REDACTED]

[REDACTED] (AR Ex. 6).

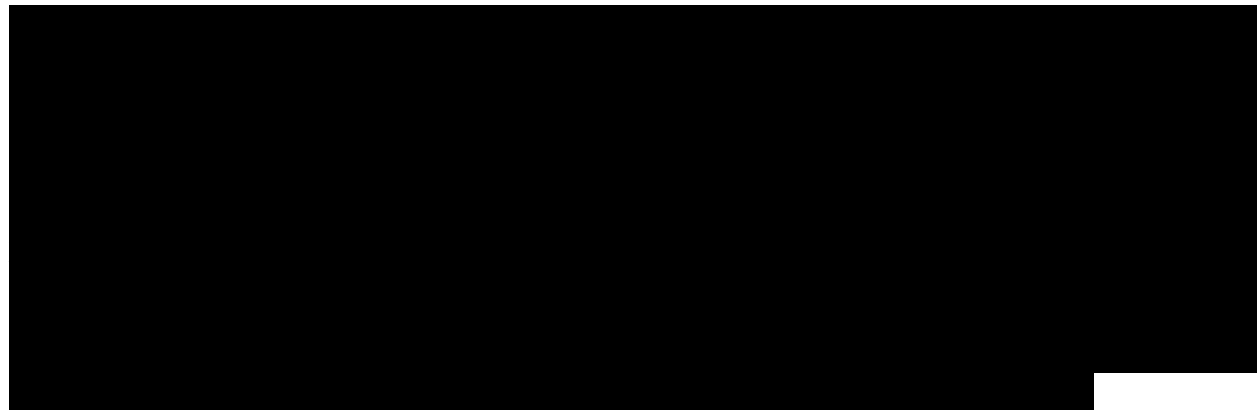
Tompkins BAFO included a [REDACTED]

[REDACTED]:

[REDACTED]

(AR Ex. 6). In response to BAFO question 3, Tompkins states that [REDACTED]

[REDACTED]



The chair of the evaluation panel made the following comment in an evaluation on February 5, 2009:



(District's May 21, 2009 Response, at 2).

By letter dated February 17, 2009, the contracting officer notified Tompkins that its proposal would not be recommended for award. (AR Ex. 3). By email dated February 18, 2009, Tompkins requested a debriefing. (AR Ex. 3). The contracting officer refused to provide a debriefing stating that the request for a debriefing was premature because an award had yet to be made. (AR Ex. 3). Tompkins filed a protest (CAB No. P-0797) on February 27, 2009, requesting the Board to direct the contracting officer to provide Tompkins with a debriefing. A telephone status conference regarding the protest was conducted by the Board on March 4, 2009. At the conclusion of the status conference, the Board issued an order directing the contracting officer to provide the debriefing requested by Tompkins. (CAB No. P-0797 Order dated March 4, 2009). The debriefing was held on March 11, 2009, and conducted by a second contracting officer. (Protest, dated March 20, 2009; AR Ex. 3). During the debriefing, the new contracting officer became aware of irregularities in the technical evaluation of Tompkins. (AR Ex. 4). The contracting officer stated that OCP was advised by legal counsel that Turner's experience could not be considered for their evaluation of Tompkins' proposal and that Tompkins' failure to possess the requisite experience played a significant role in the results of the technical evaluation. Tompkins then questioned why Tompkins' proposal had not been considered technically unacceptable and eliminated from award consideration. The contracting officer admitted that OCP did not properly follow RFP Section L.5.1.1. (CAB No. P-0801 Protest dated March 20, 2009). Due to these irregularities, the contracting officer and District counsel

terminated the debriefing and instructed Tompkins that the contracting officer would review the technical evaluation to determine whether it was conducted in compliance with the requirements stated in the RFP. (AR Ex 4).

On March 20, 2009, Tompkins filed a protest docketed as CAB No. P-0801. The issues raised by this protest were: (1) whether the contracting officer conducted an analysis of the offer “most advantageous” to the District, (2) whether the District properly evaluated Tompkins’ technical proposal; and (3) whether the District conducted a proper cost-technical trade-off analysis. On March 31, 2009, the District filed a motion to dismiss Tompkins’ protest arguing that all three of Tompkins’ allegations were premature since the contracting officer was currently reviewing the technical evaluation and would not provide an award recommendation until that review was completed. (AR Ex. 3). Tompkins submitted its opposition to the District’s motion on April 3, 2009. (AR Ex. 3).

On March 31, 2009, a new (third) contracting officer was appointed for this procurement. (AR Ex. 3). Based upon the irregularities in the technical evaluation that were discovered during the debriefing, the contracting officer determined that it would be proper to re-evaluate each proposal in accordance with the evaluation criteria in the RFP. (AR Ex. 4). While conducting this re-evaluation of Tompkins’ proposal and BAFO, the contracting officer determined that Tompkins did not meet the special standards of responsibility stated in the RFP. (AR Ex. 4). In a determination dated April 17, 2009, the contracting officer determined that Tompkins did not meet the special standards of responsibility because Tompkins could not rely on Turner’s projects to meet the special standards, and thus Tompkins was eliminated from further consideration for award. (AR Ex. 4). Upon receiving notification of its elimination from the procurement, Tompkins filed an amended protest on April 22, 2009. Between April 28 and May 21, 2009, the parties (including the intervener) filed briefs and exhibits to supplement the record.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03(a)(1).

The parties agree that the primary issue for us to decide is whether the contracting officer properly determined to exclude Tompkins from the competition on the basis that Tompkins could not rely on the performance experience of its parent company, Turner Construction, in satisfying the solicitation’s special standards of responsibility. Definitive or special standards of responsibility are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor’s ability to perform the contract.” *M.C. Dean, Inc.*, CAB No. P-0505, Dec. 3, 1997, 45 D.C. Reg. 8664, 8669. The criteria limit the class of contractors to those meeting the specified qualitative and quantitative qualifications necessary for adequate contract performance. *Id.* Unless the contracting officer’s determination was unreasonable, the determination should not be disturbed. *M.C. Dean*, 45 D.C. Reg. at 8672 (sustaining protest where contracting officer could not reasonably have found that the proposed awardee complied with the special standards of responsibility); *Universal Bldg. Maint., Inc.*, B-282456, July 15, 1999, 99-2 CPD ¶ 32. We conclude that the contracting officer’s determination – that Tompkins could not rely on its parent company’s past performance in assessing compliance with the special standards of responsibility – was unreasonable and irrational.

Here, the contracting officer concluded that Tompkins could not rely on Turner's performance in meeting the special standards of responsibility and thereby eliminated Tompkins from the competition, leaving only one offeror in the competition, Whiting Turner Contracting Company. We begin by noting that the contracting officer misapprehended the law in his determination by implying in his April 17 determination that Turner had to furnish a written commitment of resources in Tompkins' proposal. The contracting officer states in his determination:

[REDACTED]

GAO precedent, followed by the United States Court of Federal Claims, sets out the standard guiding our resolution of the issue before us. The GAO has repeatedly held that an agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliated company will affect the performance of the offeror. *Perini/Jones, Joint Venture*, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68; *Hot Shot Express, Inc.*, B-290482, Aug. 2, 2002, 2002 CPD ¶ 139; *Universal Bldg. Maint., Inc.*, B-282456, July 15, 1999, 99-2 CPD ¶ 32. The relevant consideration is whether the resources of the parent or affiliated company – its workforce, management, facilities, or other resources – will be provided or relied upon, such that the parent or affiliate will have meaningful involvement in contract performance. *Perini/Jones, Joint Venture*, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68; *NAHB Research Ctr., Inc.*, B-278876.2, May 4, 1998, 98-1 CPD ¶ 150. Where no provision in the solicitation precludes offerors from relying on the resources of their corporate parent or affiliated companies in performing the contract, and an offeror represents in its proposal that resources of a related company will be committed to the contract, the agency properly may consider those resources in evaluating the proposal. See *Physician Corp. of America*, B-270698 et al., Apr. 10, 1996, 96-1 CPD ¶ 198; *T&S Products, Inc. v. United States*, 48 Fed. Cl. 100, 111 (2000). Absent a direction from the contracting officer requesting an offeror to provide a written commitment from the parent or affiliated firm, the offeror itself may commit the resources of its parent or affiliate.

In *Ecompex, Inc.*, B-292865.4, June 18, 2004, 2004 CPD ¶ 149, cited by the District, the offeror's (AEC) proposal included a letter from Ahtna, Inc., its parent company, stating that it fully backed AEC's efforts to obtain the contract, and also specifically stated that the financial resources of Ahtna including lines of credit, operating capital, and performance bonding, would be used to complete the contract. The GAO held that in view of Ahtna's commitment of financial resources, the agency had a reasonable basis for attributing the experience of Ahtna to AEC in evaluating AEC's experience. Here, there is no question that there was a similar commitment of Turner's financial resources to the CFL contract. The only difference here is that the commitment was stated by Tompkins in its proposal on behalf of Turner.

Tompkins' BAFO and proposal show the commitment of key Turner personnel, management, and financial resources to the CFL project.

[REDACTED]



These pledges of Turner personnel, management, and financial resources clearly demonstrate that the resources of Turner will affect Tompkins' performance of the CFL project, such that Turner will have meaningful involvement in contract performance. Accordingly, the contracting officer's determination to exclude Tompkins from the competition was unreasonable and irrational. To the extent that the evaluators in prior technical evaluations downgraded Tompkins under the mistaken belief that Turner's experience could not be considered for their evaluation of Tompkins' proposal and that Tompkins' failure to possess the requisite experience

played a significant role in the results of the prior technical evaluations, those evaluations were flawed. A new evaluation of Tompkins is required.

CONCLUSION

In sum, we have carefully considered the record presented in this protest and conclude that the contracting officer unreasonably excluded Tompkins from the CFL competition based on the special standards of responsibility. Accordingly, we sustain the protest and direct the contracting officer to complete a proper new evaluation of Tompkins' offer. If the contracting officer deems it necessary to conduct discussions with the offerors, he shall do so and request further BAFOs. After completing a new evaluation, the contracting officer shall make a proper, documented selection decision based on the terms and conditions of the solicitation and the law.

SO ORDERED.

DATED: May 21, 2009

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge