

PROTEST OF:

The volume and complexity of the work: The project is a large, unique scientific research facility which is the first of its kind in this country; no other laboratory exists where these three functional elements are co-located. Facilities of this type are by nature technically complex. They include varied and non-conventional finishes and extremely complex mechanical and electrical systems, which result in very “dense” construction. This dense construction is further complicated by

the high number of skilled trades working in relatively small spaces; hence the need for extremely effective coordination and scheduling.

The RFP provided that the procurement would be awarded to the offeror whose offer is most advantageous to the District, based upon the evaluation criteria. The RFP further noted that “[W]hile the points in the evaluation criteria indicate their relative importance, the total scores will not necessarily be determinative of the award. Rather, the total scores will guide the District in making an intelligent award decision[] based upon the evaluation criteria.” Section M of the solicitation provided a maximum of 70 points for the technical proposal, consisting of a maximum of 30 points for relevant experience and past performance of the general contractor, 20 points for the relevant experience and past performance of key subcontractors, and 20 points for the offeror’s project management plan. The price evaluation was worth a maximum of 30 points, where the lowest price proposal would receive the maximum 30 points and other proposals would receive a score based on the maximum 30 points times the ratio of the lowest price to the price of the proposal being evaluated. (AR Ex. 1). The evaluation factor for relevant experience and past performance of the general contractor was to be evaluated based on four subfactors: the special standards of responsibility included in the RFP, similarity of projects, timeliness of performance, and key personnel. (RFP Section L.5.1). The factor for relevant experience and past performance of key subcontractors was to be evaluated on two subfactors: similarity of projects and subcontractor key personnel. (RFP Section L.5.2). The factor for the project management plan was to be evaluated on six subfactors: organization chart, quality control plan, CPM schedule, risk mitigation plan, building information modeling, and safety. (RFP Section L.5.3). Amendment No. 2 of the RFP (AR Ex. 2) provided the following regarding the special standards of responsibility:

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 a construction value of at least \$75,000,000 (See paragraph L.5.1.1). . . .

* * *

L.5.1.1 Special Standards 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 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 omitted).

RFP Section L.5.1.2, regarding the “Similarity of Projects” subfactor for the general contractor’s relevant experience and past performance factor, requests the offerors to provide information about prior similar projects including the name and location of the “scientific research laboratory or similar project” and a “[d]escription of the work performed by the Offeror; including comparisons to the work of this solicitation and constraints on performance of the work”

On December 15, 2008, two offerors, Tompkins and Whiting-Turner timely submitted sealed proposals. Tompkins is a wholly-owned subsidiary of Turner Construction Company which is not related to Whiting-Turner.

By letter dated February 17, 2009, the contracting officer notified Tompkins that its proposal would not be recommended for award. (AR at 4). After the Board directed the contracting officer to conduct a debriefing as requested by Tompkins (CAB No. P-0797 Order dated March 4, 2009), the contracting officer became aware of irregularities in the technical evaluation of Tompkins and terminated the debriefing. On March 20, 2009, Tompkins filed a protective protest docketed as CAB No. P-0801, challenging the District’s technical evaluation of Tompkins based on what it learned during the truncated debriefing. On March 31, 2009, a newly appointed contracting officer commenced a reevaluation of the proposals. In a determination dated April 17, 2009, the contracting officer eliminated Tompkins from the competition, concluding that Tompkins could not rely on the experience of its parent company, Turner Construction, and thus could not meet the special standards of responsibility. Tompkins filed an amended protest on April 22, 2009, contesting its elimination from the competition. On May 21, 2009, the Board sustained Tompkins’ amended protest. On remand, the contracting officer directed the technical evaluation panel (“TEP”) to reconvene on May 27 to re-evaluate the initial proposal and BAFO submitted by Tompkins. (AR at 5, AR Ex. 28). On May 28, the TEP chairman compiled the panel’s scores, prepared a consensus report, and submitted them to the contracting officer. After reviewing the materials, the contracting officer decided to conduct additional discussions with the offerors. (AR at 5; AR Ex. 28).

On June 4, 2009, the contracting officer held discussions with Tompkins and Whiting-Turner, and requested second BAFOs from them on June 5. The offerors submitted second BAFOs on June 10 and the TEP reconvened to review the proposals on June 11. The panel members individually reviewed and scored the proposals, and the TEP prepared a consensus evaluation report which was transmitted to the contracting officer on June 15 with supplementation on June 18 pursuant to a request for clarification from the contracting officer.

(AR at 6; AR Exs. 23, 24, 25, and 28). The contracting officer reviewed the proposals, the TEP consensus report, and the supplemental clarifications, and made an independent evaluation of the proposals. On June 26, 2009, the contracting officer executed a business clearance memorandum (AR Ex. 28) in which he discussed the technical and price evaluation of the offerors and selected Whiting-Turner for award of the CFL contract. Although the final scores for Tompkins and Whiting-Turner were within 5 points of each other based on a maximum possible score of 112 points (including up to 12 preference points), the contracting officer concluded that Whiting-Turner had the superior proposal. Whiting-Turner received a rating of “excellent” in every technical subfactor but one for the three evaluation factors while Tompkins received a rating of “good” for the subfactors under the first two factors and “excellent” in four of the six subfactors for the third factor. Tompkins received the maximum score for the price evaluation with its total project price being \$4.8 million less than Whiting-Turner’s price. Tompkins also received 4 preference points as a certified business enterprise. The contracting officer concluded that it was more advantageous for the District to award to Whiting-Turner based on its better technical proposal notwithstanding its higher price.

On June 30, 2009, the District submitted the proposed contract award to the District of Columbia Council for approval. On July 14, 2009, Tompkins received a debriefing regarding the proposed award. On July 17, 2009, Tompkins filed its protest.

DISCUSSION

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

Tompkins argues that the contracting officer failed to justify awarding the contract to the higher priced offeror, Whiting-Turner. Tompkins faults the contracting officer for not conducting a proper cost technical tradeoff analysis. Tompkins insists that the technical proposals were essentially equivalent and that awarding to the offeror with a \$4.8 million higher price is irrational and unreasonable. Reviewing the record, we find no basis for sustaining Tompkins’ challenge. In the business clearance memorandum which summarizes his evaluation of the proposals and selection decision, the contracting officer determined that Whiting-Turner’s proposal was superior to Tompkins’ proposal, with superior experience in the construction of laboratory facilities, a better commitment of key general contractor personnel and subcontractors with experience working with each other on other similar projects, and a fully developed project management plan that showed a solid grasp of a sound project approach. The contracting officer agreed with the evaluation conducted by his technical evaluation panel, and his decision for additional discussions and second BAFOs plus his request for TEP clarifications of the June 15 consensus report demonstrate that he conducted a reasonably thorough independent assessment of the technical evaluation. Even with the total evaluation points for technical, cost, and preferences indicating Whiting-Turner as the top-ranked offeror, the contracting officer nevertheless considered in his selection decision whether the technical advantages he and the TEP found with the Whiting-Turner proposal justified the higher price. The contracting officer concluded that the technical proposal commitment by Whiting-Turner was worth the \$4.8 million higher price. We see no basis in the record for concluding that the contracting officer acted unreasonably or irrationally in deciding that the awardee’s proposal was most advantageous to the District.

Tompkins further argues that the contracting officer effectively changed the evaluation criteria by narrowing the range of “relevant” past performance from “scientific research laboratory or similar projects” as stated in the solicitation to “forensics or medical examiner facilities.” Tompkins points to what it calls disparate treatment in the evaluation of past projects of the offerors based on similarity of those projects to the CFL project. Tompkins states that in connection with the second BAFO request, the contracting officer had more questions about Tompkins’ past performance projects and concentrated on whether its prior projects involved forensic/police laboratories or medical examiner/morgue facilities and whether the square footage of those projects were similar to the CFL project. Tompkins contends that Whiting-Turner’s proposal contained no medical examiner/morgue project experience and at most two or three forensic labs but with smaller square footage than CFL.

We cannot sustain Tompkins protest allegation that the evaluation subfactor for similarity of projects was narrowed or that the contracting officer unfairly downgraded Tompkins for a weakness in forensics or medical examiner project experience. The evaluators and contracting officer found Tompkins past performance projects, which clearly included scientific research laboratories, to be deserving of a “good” rating and Whiting-Turner’s past performance projects to be deserving of an “excellent” rating. The contracting officer committed no error by requesting Tompkins to identify any forensic or medical examiner facilities in its second BAFO response. Such project experience is logically encompassed by the evaluation criteria and the request was meant to provide Tompkins an opportunity to strengthen its proposal. Tompkins supplied additional project references, some of which included forensic laboratories. Some of the references were discounted by the contracting officer and evaluators because the work was performed as the owner’s construction manager rather than as general contractor. The failure of the contracting officer to make a similar BAFO request of Whiting-Turner is best explained in the record as reflecting the contracting officer’s and TEP’s belief that Whiting-Turner had provided already in its initial proposal significant references to scientific and medical research (including forensics) laboratory project experience, meriting the maximum “excellent” rating for the subfactor. We have carefully considered the information provided by each offeror in its proposals, including the BAFOs, and from the record we cannot conclude that the evaluation violated the terms of the solicitation or the law. The question of the aptness of prior performance project references is committed primarily to the business judgment of the evaluators and contracting officer and it would be improper for us to attempt to conduct our own evaluation of the technical features of the proposals. We discern no evidence of disparate treatment favoring Whiting-Turner over Tompkins.

Finally, Tompkins argues that it was improper for the contracting officer and TEP to rely in the second BAFO evaluation on Whiting-Turner’s submission of an augmented CPM schedule, updated site utilization plans, preliminary LEED action plan, and project specific safety plan. Tompkins notes that Whiting-Turner prepared these documents during an approximate 3-month period from the time that it received initial notice in February 2009 of a proposed award. Tompkins contends that the RFP did not require such detailed schedules and plans, the submissions were unnecessary in the proposal phase, and the contracting officer improperly cited the documents as a proposal advantage for Whiting-Turner. Tompkins also points to a cost and pricing certification dated June 22, 2009, submitted by Whiting-Turner to the

contracting officer (4 days before the contracting officer signed the business clearance memorandum) as additional evidence of a predisposition to award to Whiting-Turner. The contracting officer states in a declaration that he requested a revised certification because in reviewing Whiting-Turner's second BAFO price proposal, he noticed a discrepancy in the price and thus he wanted the correct price clarified.

We cannot sustain Tompkins' protest ground. Whiting-Turner worked on the schedules and plans in anticipation of receiving an award and recognized that its work was at its own risk as there was no contract in place. Tompkins cites no legal authority, and we are aware of none, which prohibits a contracting officer from considering such additional documentation provided in a BAFO. Whiting-Turner may have believed that its prospects for receiving an award justified beginning work on these schedules and plans before award. Tompkins has not shown that it was prejudiced in the technical evaluation. Whiting-Turner had received even before the second BAFO the maximum points under the relevant evaluation criteria as determined by the TEP and contracting officer. The contracting officer's reference to a "fully developed Project Management Plan" in his independent assessment may in part refer to the augmented schedules and plans but the record does not support a conclusion that these schedules and plans were the decisive factor in making award to Whiting-Turner.

To the extent that Tompkins alleges bias or bad faith on the part of the District's contracting officials, the record does not support such a finding. The contracting officer and evaluators performed their duties consistent with the law and the terms of the solicitation and their evaluation and selection documentation adequately explains the bases for their determinations. Tompkins' motion challenging the District's determination to proceed with performance is moot in light of our decision denying the protest.

CONCLUSION

We have considered each of the allegations raised by Tompkins in its protest and supplemental pleadings and conclude that Tompkins has not shown that the contracting officer violated the law or the terms and conditions of the solicitation. Accordingly, we deny its protest.

SO ORDERED.

DATED: October 21, 2009

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

CONCURRING:

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