



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Kevcon, Inc.

File: B-406024.3

Date: June 18, 2012

Lawrence M. Prosen, Esq., Andrew N. Cook, Esq., and John P. Estep, Esq., K&L Gates, LLP, for the protester.

Laurence P. Lubka, Esq., Hunt Ortmann Palffy Nieves Lubka Darling & Mah, Inc., for R.E.M. Construction Co., an intervenor.

Shaquana L. Cooper, Esq., Charlma Quarles, Esq., and Phillipa L. Anderson, Esq., Department of Veterans Affairs, for the agency.

Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly evaluated proposals is denied where the record shows the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations.

DECISION

Kevcon, Inc., of Escondido, California, protests the award of a contract to R.E.M. Construction Co., of Pasadena, California, under request for proposals (RFP) No. VA-101-11-RP-0021, issued by the Department of Veterans Affairs (VA) for the construction of a 3.3 megawatt (MW) photovoltaic system at the VA Southern Nevada Healthcare System Medical Center in North Las Vegas, Nevada. Kevcon argues that the agency improperly evaluated both firms' proposals.

We deny the protest.

BACKGROUND

The RFP, issued on June 7, 2011, contemplated the award of a fixed-price contract for the provision of all labor, materials, supplies, transportation, equipment, and supervision necessary to provide a photovoltaic system. The system will be comprised of one 1.5 MW solar farm on approximately 10 acres with ground mounted single or dual axis tracking solar panels. The system will also include four

steel truss canopy structures with fixed solar panels to provide 1.8 MW of power and shaded parking spaces below. The work is to consist of earthwork and grading, excavation and concrete for footings and trenching for underground electrical, structural concrete, steel, and masonry, hollow metal doors, frames, and louvers, moisture protection for inverter enclosures, ornamental fencing, and all electrical work, materials and equipment for a complete photovoltaic system installation. RFP, Part 1, at ¶ A.1; RFP Amendment No. 0004, at 4.

Award was to be made, without conducting discussions, on the basis of price and technical considerations deemed most advantageous to the government.¹ If technical proposals were essentially equal, award would be made on the basis of lowest price. Id. at ¶¶ A4.A, A4.B. The solicitation set forth three technical factors, in descending order of importance: construction management, past performance, and schedule. All of the technical factors, when combined, were significantly more important than price. Id. at ¶ A4.B.

Under the construction management factor, proposals were to be evaluated on the basis of three equally important areas, corporate project experience, project personnel experience, and technical/management approach. Id. at ¶ A4.B. Under the schedule factor, proposals were to be evaluated on the realism and reasonableness of their proposed schedules. RFP at ¶ A4.B. The past performance and price factors are not at issue here. As discussed further below, the RFP included detailed instructions for the content of proposals.

The contracting officer (CO) received proposals from 24 firms by the August 12 closing date, including those from Kevcon and R.E.M. Award was made to R.E.M. on September 28. Kevcon filed a timely protest in this Office after its debriefing. On November 15, VA advised our Office of its intention to take corrective action by reevaluating proposals. We dismissed the protests of Kevcon and another unsuccessful offeror as academic.

The technical evaluation board (TEB) reconvened to reevaluate the proposals and forwarded the results to the CO. The TEB prepared two documents for each proposal. One document was a score sheet. Under the agency's methodology, a maximum of 100 points was available for each proposal--45 points for the construction management factor, 30 points for the past performance factor, and 25 points for the schedule factor. Agency Report (AR), Exhibit (Exh.) 10, TEB Consensus Score Sheets. The other document was a narrative report summarizing the proposal's strengths and weaknesses. AR, Exh. 11, TEB Evaluation Reports.

¹ Although the solicitation uses the term "cost," we assume that the VA meant to use the term "price" since the RFP anticipated the award of a fixed-price contract.

The CO, acting as the source selection authority (SSA), ranked the proposals from highest point-score to lowest. R.E.M.'s proposal, with a point score of [DELETED] and a price of \$23,347,412, was ranked third. The two proposals ranked higher than R.E.M.'s proposal were also higher-priced. Kevcon's proposal, with a point score of [DELETED] and a price of \$[DELETED], was ranked tenth. Of the six intervening proposals between R.E.M. and Kevcon, one was priced nearly \$[DELETED] lower than Kevcon.

The CO noted the RFP's instruction that all technical factors, when combined, were significantly more important than price, and decided to analyze only the top three most highly technically rated offerors for award. AR, Exh. 14, CO's Rationale for Award, at 7. He eliminated one proposal based on its price, which was much higher than the prices of the other two highly rated proposals. The CO deemed the proposals of R.E.M. and the other firm essentially equal based on their point scores and on their respective strengths and weaknesses. Id. at 7-9. As a result, he reaffirmed his award to R.E.M. on the basis of price. Id. at 9.

On March 16, 2012, VA notified the offerors that the initial award to R.E.M. was unchanged. Kevcon filed this protest after its debriefing. Kevcon argues that the VA improperly evaluated both proposals under the project personnel experience area of the construction management factor. Kevcon also argues that the VA improperly evaluated its proposal under the technical/management approach area of the construction management factor, as well as under the schedule factor.

DISCUSSION

The evaluation of an offeror's proposal is a matter within the agency's discretion. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4; IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest of an agency's evaluation of proposals, our Office will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. On the record here, we have no basis to find the agency's evaluation unreasonable.

Construction Management Factor – Project Personnel Experience

Kevcon argues that the agency improperly ignored the relevant experience of its proposed key personnel, and unfairly assigned R.E.M.'s proposal a higher rating, under the project personnel experience area of the construction management factor. Under this area, offerors were required to demonstrate the relevant experience of their key project personnel by providing biographical data for at least five specified positions: Overall Project Executive, Overall Construction Project Manager, Overall Project Superintendent, Overall Lead Project Engineer, and

Project Scheduler. For their key personnel, offerors were to describe “work experience with projects [that] were medical facilities (similar in size and scope) and the company (by name) they worked for when involved in the project.” RFP, Part II, ¶ C3.A.1.b.1(e).

For scoring proposals under this area, the TEB established a maximum score of 15 points. Within that 15 points, proposals could receive one point each (a maximum of five points) for providing five types of biographical data (name, company and position title, experience, job-related education experience, position to be held with company), and two points each (a maximum of 10 points) for the degree to which each offeror’s five key personnel demonstrated their relevant experience.² AR, Exh. 10, TEB Consensus Score Sheets.

Kevcon’s proposal included five resumes: a Project Executive & Scheduler, two Project Managers, a Project Superintendent, an Electrical Project Superintendent, and a Solar Project Engineer. AR, Exh. 7, Kevcon Proposal at 22-27. Each person’s resume listed several projects as their work experience. The VA awarded Kevcon’s proposal 10 points out of the 15 points available. While the proposal included all required elements of biographical data (for which it received five points), the VA found that only one of the firm’s key personnel merited the maximum score of two points for his experience. The VA found that the remaining key personnel had relevant experience but awarded them only one point each because they did not demonstrate experience on projects similar in size and scope. AR, Exh. 10, TEB Consensus Score Sheet for Kevcon, at 1; Exh. 11, TEB Evaluation Report for Kevcon, at 2-3.

R.E.M.’s proposal included resumes for five persons with titles matching those in the RFP. AR, Exh. 8, R.E.M. Proposal, at 23-32. The VA awarded R.E.M.’s proposal 13 points out of the 15 points available. While it included all required elements of biographical data (for which it received five points), only three of the firm’s key personnel merited the maximum score of two points for their experience. The VA found that the remaining key personnel had relevant experience but awarded them only one point each because they also did not demonstrate experience on projects similar in size and scope. AR, Exh. 10, TEB Consensus Score Sheet for R.E.M., at 1; Exh. 11, TEB Evaluation Report for R.E.M., at 2-3.

² Kevcon argues this methodology was irrational because it assessed points for both providing biographical data elements and for demonstrating the requisite experience for each key personnel. To the extent this methodology “double-counted” any aspects of the proposals, we can find no prejudice to Kevcon. Both firms received the full five points for submitting the biographical data elements; as discussed below, the VA found R.E.M.’s proposal superior when considering the substance of its personnel experience.

In its comments on the agency report, Kevcon argues that the VA ignored the “substantial, identified medical facility experience in its proposal,” citing in particular three of its key personnel. Kevcon Comments at 8.

There is no contemporaneous narrative explanation of the VA’s conclusions that key personnel did, or did not, have relevant experience. However, the VA provided a supplemental statement from the CO in which he explains the bases for the agency’s point score ratings.

According to the CO, the VA concluded that the projects listed for Kevcon’s key personnel work experiences were much smaller in size and scope as compared to the scope of the project contemplated here, with its need for a photovoltaic system for a medical facility campus. The CO explains that Kevcon’s proposal listed only small-scale projects for its key personnel experiences, and projects for non-medical facilities that were neither similar in size nor scope to the project at issue here. He states that, although Kevcon did not submit key personnel project experiences similar in size and scope, the agency did evaluate its key personnel project experiences and provided the firm some credit for those projects. CO’s Supplemental Statement, at 1.

The CO goes on to rebut, in detail, Kevcon’s argument that three of its key personnel demonstrated substantial relevant experience. For example, Kevcon argued that its proposed Project Executive & Scheduler had direct experience with various medical facilities of a similar size and scope, citing five projects. The CO addressed each project and explained why the VA considered most of them to be smaller projects, in terms of dollar value or complexity, as compared to the requirements under the solicitation, and why the VA found that they were not similar in size and scope. Among other things, the CO explained that the projects did not involve photovoltaic systems. The CO also indicated that Kevcon’s proposal lacked sufficient information on another project to determine its size and scope. *Id.*, at 3-5.

Kevcon’s response to the CO’s supplemental statement does not specifically address his detailed explanation. Instead, Kevcon argues that the CO’s supplemental statement is an insufficient post-hoc argument made in response to a protest and, therefore, entitled to little weight. We do not agree.

In reviewing an agency’s evaluation, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties’ arguments and explanations. ASRC Research & Technology Solutions, LLC, B-406164, B-406164.3, Feb. 14, 2012, 2012 CPD ¶ 72 at 4. While we generally give little or no weight to reevaluations and judgments prepared in the heat of the adversarial process, Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, post-protest explanations that provide a detailed rationale for contemporaneous conclusions,

and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions so long as those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

Kevcon argues that the CO's supplemental statement is not the type of post-protest explanation that we will consider because the contemporaneous record is too limited for us to judge whether there is consistency between the two. While the contemporaneous record here is unquestionably sparse, it does show that the VA found certain key personnel had "no experience on project[s] similar in size and scope," and, by inference, found other key personnel had experience on projects similar in size and scope. We conclude that the CO's post-protest explanation of the bases for these contemporaneous conclusions is the type of post-protest explanation we will consider.³

In its comments, Kevcon raises a substantive challenge to the agency's evaluation of the experience of its project personnel. Kevcon argues that the agency's evaluation is based on a misunderstanding of the solicitation's experience requirements. According to Kevcon, the phrase "similar in size and scope" only modifies the term "medical facility," and not "project." Thus, according to Kevcon, it did not need to demonstrate experience with projects of a similar size and scope as compared to the photovoltaic project here; rather, all it had to demonstrate was that its key personnel had experience with projects located at medical facilities that are similar in size and scope to the VA Southern Nevada Healthcare System Medical Center.⁴

³ Kevcon also appears to argue that the agency's evaluation of its proposal under the project personnel experience area was inconsistent with the evaluation of its proposal under the corporate experience area. However, the two areas concern different requirements. Under the latter, offerors were to demonstrate their corporate experience with projects previously completed similar to this project both in size and scope completed within the last five years; such experience could be based on work performed by key subcontractors. RFP ¶ C3.A.1.a., as amended by Amendment No. 0003, at 2. Both Kevcon and R.E.M. received the maximum 15 points for this area. Under the former, offerors were to demonstrate the relevant experience of key project personnel. RFP ¶ C3.A.1.b.

⁴ On the other hand, in its supplemental comments, Kevcon asserts that the agency's "heightened reliance" on medical center experience is irrelevant, because this is essentially a construction project. Kevcon Supplemental Comments, at 5. If Kevcon thought the emphasis on experience at a medical facility was irrelevant, it was incumbent on the firm to raise the issue prior to submitting its proposal. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2012) (to be timely, a protest based

(continued...)

To be reasonable, an interpretation of solicitation language must be consistent when read as a whole and in a reasonable manner. AHNTECH Inc., B-291998, Apr. 29, 2003, 2003 CPD ¶ 90 at 2. Again, individuals were to “describe work experience with projects [that] were medical facilities (similar in size and scope.)” RFP ¶ C3.A.1.b.1)e). The solicitation is poorly drafted, but Kevcon’s interpretation could lead to the absurd result that a project as simple as changing a light bulb could satisfy the experience requirement for this \$20 million photovoltaic construction project, so long as the light bulb was changed in a medical facility that is “similar in size and scope” to the facility here. That is not a reasonable interpretation.

Kevcon next argues that the VA scored R.E.M.’s proposal too high because its resumes did not, as required, provide the “company (by name)” for which the individuals worked when they performed the projects listed as their work experience. Kevcon asserts that R.E.M.’s proposal should have received zero points in this area for the omission of this information.

VA’s response--that the employer names of R.E.M.’s key personnel appear on their biographical data resumes--does not fully address Kevcon’s assertion. However, a review of the record shows that, while this information does not explicitly appear on the resumes, it is largely evident from R.E.M.’s proposal as a whole. For example, two projects listed by R.E.M.’s Overall Construction Project Manager are described elsewhere in the proposal as having been performed since 2010. Since this individual’s resume states he has worked for R.E.M.’s key subcontractor for 10 years, the identity of the company is evident. In any event, there is no basis to conclude that these omissions required the VA to give R.E.M.’s proposal zero points given the detailed information in R.E.M.’s proposal with respect to work experience. There is also no reason to think that the mere reduction of a point or two would have prejudiced Kevcon. In this regard, point scores are but guides to, and not substitutes for, intelligent decision-making; the relevant considerations are the agency’s qualitative assessments of proposals. See Archer Western Contractors, Ltd., B-403227, B-403227.2, Oct. 1, 2010, 2010 CPD ¶ 262 at 5; Gap Solutions, Inc., B-310564, Jan. 4, 2008, 2008 CPD ¶ 26 at 3-4. The VA found the substance of R.E.M.’s project personnel experience superior to that of Kevcon. There is no reason to think that a reduction in the firm’s point score for the reason identified by Kevcon would affect that qualitative judgment.

Kevcon finally argues that the agency’s evaluation reflected disparate treatment. According to Kevcon the VA did not downscore R.E.M.’s proposed Overall Project

(...continued)

upon alleged solicitation improprieties which are apparent prior to the time set for receipt of initial proposals shall be filed prior to that time).

Superintendent for his lack of medical facility experience, however, it did downscore Kevcon's personnel for their lack of medical facility experience. This allegation is without merit.

As the CO's explanation makes clear, Kevcon's key personnel were not downscored for their lack of medical facility experience. Instead, the VA could not give their experience the maximum available points because it was on smaller and less complex projects, most of which did not involve photovoltaic systems. CO's Supplemental Statement, at 3-6. The CO explains that R.E.M.'s proposed Overall Project Superintendent had some minor construction experiences with nonmedical and one medical office project, but identified experience with two photovoltaic system projects. The TEB considered this overall construction background with an emphasis on his photovoltaic system experiences and gave him the maximum 2 points because the scope of work here involves a photovoltaic system. Id. at 6-7. Kevcon has given us no reason to find this portion of the evaluation to be unreasonable.

Construction Management Factor - Technical/Management Approach

For the technical/management approach area, offerors were required to provide, among other things, a project organizational chart and narrative that included the key personnel described elsewhere in the proposal. RFP ¶ C3.A.1.c.3).

The VA evaluated Kevcon's proposal as having a weakness for failing to clearly define the roles of its key personnel. AR, Exh. 11, TEB Evaluation Report for Kevcon, at 3. As the CO explains, Kevcon's proposal contained conflicting information as between its organizational chart and the resumes for its key personnel, and within the resumes themselves. For example, one resume lists a title of "Project Executive and Scheduler," but the organizational chart lists the same individual as only the "Project Executive." The resume for another person listed his title as "Project Superintendent," but his duties include scheduling. The resume for another person lists his title as "Project Manager," but the organizational chart identifies him as both "Project Manager" and "Scheduler." CO's Statement at 5-7; AR, Exh. 7, Kevcon Proposal, at 22-25, 34.

Kevcon does not address these inconsistencies. Instead, citing the CO's statement with respect to a different allegation, Kevcon argues that the VA understood that its "Solar Project Engineer" is the same individual listed on the organizational chart as the "Electrical Engineer." This argument has no bearing on the weakness identified by the agency, and does not show that the evaluation was unreasonable.

Schedule Factor

Kevcon argues that VA improperly evaluated Kevcon's proposal under the schedule factor. Under this factor, offerors were required to provide two categories of

information. First, offerors were to provide a detailed progress schedule indicating specific tasks with dates for each step of the process. RFP ¶¶ C3.A.3.a. In evaluating this information, the TEB grouped the tasks into three areas. AR, Exh. 10, TEB Consensus Score Sheets, at 2. Second, offerors were required to specify allowances for bad weather, days of the week and hours of construction operations during each phase of the work, and the percentage of contract completion that will be achieved at the end of each month of the contract. RFP ¶¶ C3.A.3.b..

Under the first category--detailed progress schedule--Kevcon's proposal received the maximum score, 5 points, for two areas, and 4 points for the third area. The VA evaluated the proposal as having strengths in each area and no weaknesses.

Kevcon argues it should have received the maximum score of 5 points instead of 4 points because it was evaluated as having a strength and no weakness. However, there is no legal requirement that an agency must award the highest possible rating, or the maximum point score, under an evaluation factor simply because the proposal contains strengths and/or is not evaluated as having any weaknesses. See, e.g., Applied Technology Systems, Inc., B-404267, B-404267.2, Jan. 25, 2011, 2011 CPD ¶ 36 at 6; Archer Western Contractors Ltd., *supra*.

Under the second category--allowance for bad weather, days and hours of construction during each phase, and contract completion--the agency evaluated Kevcon's proposal as having two weaknesses and assessed 5 of the 10 points available. The TEB stated that Kevcon's proposal was vague on phasing and did not identify the hours of operation as required by the solicitation. AR, Exh. 10, TEB Consensus Score Sheet for Kevcon, at 2; Exh. 11, TEB Evaluation Report for Kevcon, at 4-5.

Kevcon conflates these weaknesses and argues that its schedule narrative was not vague because it identified when certain portions of the work would be performed in off hours. Kevcon Comments, at 21-22. The VA found the proposal vague with respect to phasing, however, not with respect to work performed in off hours. The agency also found that the proposal did not, as required, identify the hours of operation.⁵ Kevcon's arguments do not show the agency's evaluation was unreasonable.

The protest is denied.

Lynn H. Gibson
General Counsel

⁵ Kevcon's protest erroneously argued that "[n]owhere does the RFP mention or require identification of hours of operation in the narrative." Kevcon Protest, at 14.