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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Singleton Enterprises

File: B-298576

Date: October 30, 2006

Arthur Wayne Singleton for the protester.
Stanley M. Wyre, Esq., Stanley M. Wyre Associates, L.L.C., for Chezcore, Inc., the intervenor.
Ruth Kowarski, Esq., General Services Administration, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitation provision stating that under the solicitation's past performance evaluation factor the agency would evaluate the "offeror's actions under previously awarded contracts" created a latent ambiguity where in addition to the agency's intended meaning that only the offeror's corporate past performance would be considered, the solicitation was reasonably read by the protester as providing for the evaluation of the past performance of the proposed subcontractors that will perform major or critical aspects of the work required.

DECISION

Singleton Enterprises protests the award of a contract to Chezcore, Inc. under request for proposals (RFP) No. GS-05P-06-SVC-3022, issued by the General Services Administration (GSA) for exterior masonry repair to a federal building in Battle Creek, Michigan. The protester argues that the agency's evaluation of proposals under the solicitation's past performance factor was unreasonable.

We sustain the protest.

The RFP provided for the award of a fixed-price contract to the offeror whose proposal represented the best value to the government based upon the evaluation factors of past performance and price. The solicitation specified that in determining which proposal represented the best value, the agency would consider past performance to be significantly more important than price.

As relevant here, the solicitation required that proposals include certain past performance information. Specifically, the RFP included "Past Performance Reference Sheet[s]" to be completed by the offerors for each of their references. The RFP stated that "offerors cannot use the same reference/contact person more than once," and that each offeror "must provide a minimum of three customer references for past performance evaluations," although each offeror could submit as many as six references. RFP, Supp. Instructions to Offerors, at 3. The solicitation listed the type of information that the agency would consider in evaluating past performance, such as "[t]he offeror's overall quality of performance," and specified that the past performance would be considered relevant if it met the following three listed criteria:

1) The contract was to perform brick and/or limestone repairs (replacing, patching, dismantling, repairing, tuckpointing, sealing, etc.)
2) Past contracts were completed no more than five years from the closing date of this solicitation.
3) Current contracts are [at] least 80% complete.

RFP, Supp. Instructions to Offerors, at 3. The solicitation concluded here by admonishing offerors that the "failure of the offeror to provide a minimum of three relevant references that [met] the [three] criteria [for relevance], and/or the inability of the Government to complete a minimum of three reference checks, after making a reasonable effort to do so, [would] result in the offeror being rated as 'neutral' on past performance." Id. at 3-4.

The agency received nine proposals by the solicitation's closing date. Chezcore's proposal received a "very good" rating under the past performance factor at a total evaluated price of $1,278,592 and Singleton's lower-priced proposal received a "neutral" rating under the past performance factor.[1]

Singleton's proposal included completed past performance reference sheets regarding two contracts that had been performed by Singleton and three contracts that had been performed by Singleton's proposed "major subcontractor." The record reflects that the past performance information pertaining to Singleton's proposed subcontractor was not considered by the agency in evaluating Singleton's proposal under the past performance factor "because [it was] for a subcontractor . . . and not the named offeror." Singleton's proposal thus "received a 'neutral' rating in terms of

[1] The protester proceeded with its protest pro se and, therefore, did not have an attorney who could obtain access to non-public information pursuant to the terms of a protective order. Accordingly, our discussion of the evaluation and source selection is necessarily general in nature to avoid reference to non-public information. Our conclusions, however, are based on our review of the entire record, including non-public information.

past performance, since [Singleton] did not provide a minimum of three relevant references."[2] Agency Report (AR), Tab 9, Source Selection Decision, at 4. The agency selected Chezcore's proposal, rather than Singleton's lower-priced proposal, for award, and this protest followed.

Singleton argues that the agency "did not properly evaluate Singleton's past performance by failing to take into account past performance information regarding Singleton's subcontractor who would perform major or critical aspects of the solicitation's requirements." Protest at 4. In this regard, the protester points out that Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iii) states that a past performance "evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition." The protester also points out that the RFP did not state that the agency would not consider the past performance of proposed subcontractors in evaluating past performance, and that our Office has previously found that the past performance of a proposed subcontractor may be considered in determining whether an offeror meets experience or past performance requirements in a solicitation where the solicitation does not expressly prohibit its consideration. Protester's Comments at 1, 3; see The Paintworks, Inc., B-292982; B-292982.2, Dec. 23, 2003, 2003 CPD ¶ 234 at 3.

The agency responds by pointing out that it "never stated in the RFP that the past performance of other than the offeror would be considered," and that the RFP did not specifically "request that the offerors submit past performance information for proposed major subcontractors." Contracting Officer's Statement at 7; see AR at 4. The agency notes that our Office has recognized that FAR § 15.305(a)(2)(iii), cited by the protester, does not mandate that agencies consider the past performance of subcontractors, but only states that agencies "should" consider such information. AR at 6, citing MW-All Star Joint Venture, B-291170.4, Aug. 4, 2003, 2004 CPD ¶ 98 at 4 and TyeCom, Inc., B-287321.3, B-287321.4, Apr. 29, 2002, 2002 CPD ¶ 101 at 6. The agency thus concludes that "the only reasonable construction of the [RFP's] past performance evaluation clause is that only prime contractor past performance information would be considered by GSA in evaluating offers," and that Singleton's

[2] The agency also considered only one of the references provided by Singleton pertaining to contracts it had completed because the two references submitted by Singleton, while for different contracts with work performed on different buildings in different states, listed the same "customer" and "contact person." AR, Tab 9, Source Selection Statement, at 4; see AR, Tab 5a, Singleton's Proposal; RFP, Supp. Instructions to Offerors, at 3 ("offerors cannot use the same reference/contact person more than once"). Singleton does not contest the propriety of this agency action. Protest at 2.

protest is an untimely challenge of an alleged impropriety apparent from the solicitation. AR at 5; see Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2006).

We agree with the protester that FAR § 15.305(a)(2)(iii) suggests, as evidenced by the word "should," that agencies consider in their evaluations the past performance of proposed "subcontractors that will perform major or critical aspects of the requirement." In addition, as correctly noted by the protester, our Office has found an agency's consideration of a proposed subcontractor's past performance when evaluating an offeror's proposal under a past performance factor permissible in the same circumstances as here, that is, where the solicitation neither prohibited nor mentioned the evaluation of such information. AC Techs., Inc., B-293013, B-293013.2, Jan. 14, 2004, 2004 CPD ¶ 26 at 3; The Paintworks, Inc., supra. To put it another way, our Office, based upon applicable caselaw, statute, and regulation, would have found it unobjectionable had the agency chosen to consider the past performance of Singleton's subcontractor when evaluating Singleton's proposal.

The fact remains, however, that the solicitation referred to the agency's evaluation of the "offeror's" past performance and did not specifically request information on the past performance of subcontractors. Additionally, the agency is correct in pointing out that the consideration of subcontractor past performance, as set forth in FAR § 15.305(a)(2)(iii), is not mandatory. MW-All Star Joint Venture, supra; TyeCom, Inc., supra; see Olympus Bldg. Servs., Inc., B-282887, Aug. 31, 1999, 99-2 CPD ¶ 49 at 3-4 (RFP's past performance evaluation factor providing that key personnel past performance would not be considered was found to be reasonably based and not prohibited by regulation).

Although in the agency's view the solicitation provided that the agency would consider only the corporate past performance information of the "offeror," and the agency report makes it clear that the agency intended such a reading, we also, for the reasons stated above, find the protester's interpretation of the solicitation that it would also permit the evaluation of subcontractor past performance to be reasonable.[3] Because we believe that both the agency's and protester's

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[3] This situation is distinguishable from decisions such as Blue Rock Structures, Inc., B-287960.2, B-287960.3, Oct. 10, 2001, 2001 CPD ¶ 184. In Blue Rock, we found the agency's assignment of a "neutral" rating to the protester's proposal under the past performance factor reasonable, given the fact that Blue Rock was a newly-formed entity, and the experiences of its key personnel were reasonably found by the agency to be inadequate to demonstrate that the newly formed firm would successfully function as a corporate entity or successfully perform the contract. Blue Rock Structures, Inc., supra, at 3-4. In Blue Rock, the agency actually considered the past performance information regarding the firm's key personnel, and made an individualized determination that the information was inadequate, whereas, here, the agency categorically refused to consider information regarding the offerors'

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interpretations of the RFP are reasonable, this indicates an ambiguity in the RFP with respect to information that the agency would consider in performing its past performance evaluation. An ambiguity exists where two or more reasonable interpretations of the terms or specifications are possible. A party's particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provisions is reasonable and susceptible of the understanding it reached. DynCorp Int'l LLC, B-289863; B-289863.2, May 13, 2002, 2002 CPD ¶ 83 at 8; Aerospace Design & Fabrication, Inc., B-278896.2 et al., May 4, 1998, 98-1 CPD ¶ 139 at 13.

With that in mind, we must determine whether the ambiguity is latent or patent since, if patent, it would have had to be protested prior to the closing date for the submission of proposals in order to be considered timely. Ashe Facility Servs., Inc., B-292218.3; B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 11; see 4 C.F.R. § 21.2(a)(1). A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error (e.g., where the solicitation provisions appear inconsistent on their face), while a latent ambiguity is more subtle. Ashe Facility Servs., Inc., supra. Since Singleton's interpretation of the RFP did not directly conflict with any of the other solicitation provisions, and the ambiguity came to light in the context of the agency's past performance evaluation, we conclude that the ambiguity here was latent rather than patent. Singleton's protest is thus timely. Id.

As indicated, the agency intended the solicitation to provide that only the offeror's past performance, and not that of proposed subcontractors, would be considered by the agency in evaluating proposals and in making its source selection. The protester states that, had it been aware prior to the closing date for the receipt of proposals of the agency's intended meaning, it would have protested the propriety of that aspect of the RFP. Protester's Comments at 1. Given the protester's position here, and the indicated intent of FAR § 15.305(a)(2)(iii)--which by using the term "should" advises agencies that they should consider in their evaluations the past performance of proposed "subcontractors that will perform major or critical aspects of the requirement" unless they have a reasonable basis for not doing so--the propriety of the agency's decision not to follow the approach advised in the FAR cannot be assumed. In our view, there is thus a reasonable possibility that a timely protest would have ultimately led to the agency's adopting the FAR's recommended approach. Even if it did not, so that the procurement was conducted under the agency's current approach (but unambiguously stated), the protester would have had an opportunity to submit a proposal consistent with that approach. In view of the potentially different outcome associated with this necessarily speculative analysis,

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proposed subcontractors' past performance without having specifically stated in the solicitation that it would not consider a proposed subcontractor's past performance.

we find a reasonable possibility that the protester was prejudiced by the agency's actions.

We recommend that the agency review its position that it will consider only the offerors' corporate past performance and not the past performance of major subcontractors or subcontractors that will perform critical aspects of the requirement, amend the solicitation so that it clearly advises offerors of what information the agency will consider in performing its evaluation under the past performance factor, and reopen the competition. The agency should evaluate proposals submitted in response to the solicitation as amended, and make a new source selection determination. If the agency determines that the proposal of an offeror other than Chezcore represents the best value to the government, we recommend that the agency terminate the contract awarded to Chezcore and award a contract to the offeror whose proposal is selected. We also recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). In accordance with section 21.8(f) of our Regulations, Singleton's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Gary L. Kepplinger
General Counsel