



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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: DBI Waste Systems, Inc.

File: B-408304; B-408304.2

Date: August 5, 2013

John Curran, Esq., and David M. Biele, Esq., Corwin & Corwin LLP, for the protester.

Joseph M. Goldstein, Esq., and Andrew Schwartz, Esq., Shutts & Bowen LLP, for Conquistador Services, LLC, an intervenor.

Jeanne S. Morris, Esq., Department of Veterans Affairs, for the agency.

Pedro E. Briones, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that awardee's quotation violates applicable limitation on subcontracting is denied where the quotation does not show, on its face, that the awardee will not comply with the limitation.

2. In evaluating vendor without relevant past performance, an agency may consider proposed subcontractor's past performance unless prohibited by solicitation.

DECISION

DBI Waste Systems, Inc., of Everett, Massachusetts, protests the issuance of a blanket purchase agreement (BPA) to Conquistador Services, LLC, of Phillipsburg, New Jersey, under request for quotations (RFQ) No. VA241-13-Q-0498, issued by the Department of Veterans Affairs (VA) for recycling and trash removal services at the VA Medical Center (VAMC) in Bedford, Massachusetts. DBI maintains that the awardee's quotation was unacceptable because it exceeded the RFQ's limitation on subcontracting and failed to provide relevant past performance information.

We deny the protest.

BACKGROUND

The RFQ was set aside for service-disabled, veteran-owned small business (SDVOSB) concerns and included the VA Acquisition Regulation's (VAAR) limitation

on subcontracting clause, which provides that, for service contracts, an SDVOSB concern must perform at least 50 percent of the personnel costs. RFQ at 15-17 (incorporating text of VAAR § 852.219-10(c)(1)). The solicitation provided for the issuance of a fixed-price BPA (for a base year and 4 option years) on a best value basis, considering three evaluation factors--past performance, technical (certification of destruction as it applies to Massachusetts State recycling and solid waste requirements), and price. Id. at 1, 32-33. The RFQ stated that the technical and past performance factors combined were more important than price.¹ Id. at 33.

The RFQ included a detailed statement of work (SOW) for non-hazardous waste removal² and full-service recycling management, and specified numerous tasks in that regard, including data collection, reporting, compliance, and professional services such as training and consulting. Id. at 4-7. With regard to data collection and reporting, the SOW requires the contractor to track solid waste and recycling data and compile this information in monthly reports; provide material safety data sheets; maintain bills of lading for all shipments; and submit other reports required by law. Id. at 6-7. With regard to compliance, the SOW requires the contractor to comply with applicable federal, state, city, and county laws and regulations governing waste removal. Id. at 4. The SOW also requires the contractor to certify, on a monthly basis, that medical and government records are appropriately disposed of, and take necessary precautions to prevent the disclosure of personal and sensitive information. Id. at 7. With regard to training and consulting, the SOW requires the contractor to provide a training video on recycling, a quarterly newsletter for VA employees, and a monthly web posting of recycling progress, as well as in-house training and “walk-through” recycling sessions as needed. Id.

The VA received quotations from four vendors, including DBI and Conquistador, which were evaluated by the hospital’s contracting specialist and the chief of environmental management services. Contracting Specialist’s Statement at 1. As relevant here, Conquistador proposed to subcontract waste and recyclables collection to a non-SDVOSB concern, and Conquistador’s quotation included an agreement identifying Conquistador as the prime contractor and the subcontractor as a key subcontractor.³ AR, Tab B, Conquistador’s Quotation, at 8, 18.

¹ The RFQ advised that the agency would consider all past performance of recycling and waste management of a similar scope and conducted under Massachusetts standards. RFQ amend. 1, at 2.

² The SOW required waste removal from two VAMC buildings on a weekly basis, and from six other buildings and a picnic area on a biweekly basis. RFQ at 5-6.

³ Conquistador also proposed a second, non-SDVOSB subcontractor to provide and haul a recycling trailer. Agency Report (AR), Tab B, Conquistador’s Quotation, at 23). However, the protester does not argue, and the record does not suggest, that this subcontractor will perform a significant portion of the work.

Conquistador also provided past performance information on contracts for collection and disposal of refuse and recyclables performed by its key subcontractor, but did not provide past performance information for itself. Id. at 19-21.

The agency rated DBI's and Conquistador's quotations acceptable under the non-price evaluation factors, and determined that Conquistador's price, which was approximately \$60,000 less than DBI's price, provided the best value to the agency.⁴ Contracting Specialist's Statement at 1. After receiving a notice that its quotation was not selected, DBI contacted the agency to express concerns over Conquistador's compliance with the limitation on subcontracting. Id. In response, the contracting specialist asked Conquistador to verify that it would comply with the subcontracting limitation; Conquistador responded affirmatively. Id.; AR, Tab F, Awardee's May 3, 2013, Email to VA. The BPA was issued to Conquistador, and DBI filed this protest.

DISCUSSION

DBI protests the awardee's compliance with the solicitation's limitation on subcontracting, and the awardee's past performance evaluation. We have considered all of DBI's arguments and find that they provide no bases to sustain the protest.

Limitation on Subcontracting

DBI contends that the agency should have found Conquistador's quotation unacceptable for failing to comply with the RFQ's limitation on subcontracting. Protest at 1. The protester argues that Conquistador does not intend to provide more than 50 percent of the labor costs because, in the protester's view, Conquistador proposes to subcontract virtually the entire project to a non-SDVOSB. Id. at 2; Protester's Comments at 2-4.

The VA argues that, on its face, Conquistador's quotation generally indicates its intent to comply with the subcontracting limitation. AR at 3. The agency also points out that the RFQ did not require vendors to provide in their quotations specific proof of compliance, such as a breakdown of labor hours. Id.

As discussed above, the solicitation included a limitation on subcontracting clause, VAAR § 852.219-10(c)(1), which provides that, for service contracts, an SDVOSB concern must perform at least 50 percent of the personnel costs. As a general matter, an agency's judgment as to whether a small business vendor will be able to comply with a subcontracting limitation presents a question of responsibility not

⁴ The remaining quotations were found unacceptable.

subject to our review. Chant Engineering Co., Inc., B-402054, Dec. 29, 2009, 2010 CPD ¶ 16 at 2. However, where a quotation, on its face, should lead an agency to the conclusion that a vendor has not agreed to comply with the subcontracting limitation, the matter is one of the quotation's acceptability. Id.

In our view, nothing on the face of Conquistador's quotation, including the terms of its proposed subcontracting agreement, takes exception to the RFQ's limitation on subcontracting, or suggests that the awardee will not comply with that limitation in performing the contract. As relevant here, Conquistador's quotation states that it will be responsible for overall contract performance; that it will market recyclables; that it will prepare and submit monthly reports and disposal records; and that it will perform all billing and administrative functions. AR, Tab B, Conquistador's Quotation, at 18. The quotation states that the key subcontractor will perform all aspects of refuse and recyclables collection. Id. Moreover, the subcontracting agreement explicitly states that in no event will Conquistador perform less than the percentage required by the subcontracting limitation and that Conquistador does not intend to be "unusually reliant" upon the subcontractor in the performing the contract. Id. at 10, 13.

DBI disputes that Conquistador's quotation is facially compliant with the subcontracting limitation, because Conquistador's subcontracting agreement provides that the key subcontractor would perform the waste removal, hauling, and container cleaning tasks, which the protester insists comprise almost the entirety of the requirement. Protester's Comments at 2-4; Protester's 2nd Supp. Comments at 3-7. DBI contends that, under the terms of the subcontracting agreement, Conquistador would only perform limited administrative or professional functions that, according to the protester, are insignificant, discretionary, or performed by VAMC staff. Id.

The VA explains that the procurement is primarily for management of the hospital's waste removal and recycling program and requires a significant amount of professional and administrative work. 2nd Supp. AR, Tab J, Declaration of Chief of Environmental Management Services, at 1. In contrast, the agency argues, the waste and recycling removal tasks that the key subcontractor will perform are limited to picking up and transporting waste, which are a relatively small portion of the contract. Id. at 2.

We agree with the agency that the solicitation here calls for significantly more work than transporting waste. As discussed above, the solicitation calls for full-service recycling management, and it requires the contractor to perform (in addition to picking up and transporting waste) numerous data collection, reporting, compliance, training, and consulting tasks. Specifically, the contractor must: (1) track solid waste and recycling data, and provide monthly reports of this information; (2) maintain bills of lading and provide monthly and yearly summaries of this information; (3) document credits received for materials and reimburse the agency for such credits; (4) provide monthly forecasts, supported by at least two trade

publications, of material pricing; (5) comply with waste regulations at various governmental levels, and submit mandatory reports in that regard; (6) appropriately handle and destroy medical records, and submit monthly certifications of destruction; (7) provide recyclability analysis, including laboratory and economic analysis; (8) provide a quarterly newsletter; (9) provide a monthly web posting; and (10) provide a training video, in-house training sessions, and walk-through trainings. RFQ at 4-7.

Contrary to the protester's suggestion, these tasks are not limited, insignificant, or reserved for VAMC staff, and we are persuaded by the agency that these tasks require a significant amount of professional and administrative work. Although DBI disputes and minimizes the amount of labor required to perform some of the tasks enumerated above, the RFQ does not support DBI's conclusion that the professional and administrative work is only a small part of the contract. Furthermore, the intervenor has provided a detailed breakdown of its expected labor hours, convincingly showing that the professional and administrative work performed by Conquistador is more than three times that of the waste removal work performed by the key subcontractor, consistent with our interpretation of the RFQ above. AR, Tab G, Declaration of Conquistador President. Accordingly, based on our review of the record, we find no basis to question the VA's determination that the awardee would comply with the RFQ's subcontracting limitation, and DBI's arguments to the contrary simply reflect its disagreement with the agency.⁵

Past Performance

DBI also protests Conquistador's past performance evaluation and argues that the awardee failed to show relevant past performance as required by the solicitation. Protester's Comments at 4. The protester complains that Conquistador relied exclusively on its key subcontractor's past performance (which, in the protester's view, also suggests that Conquistador does not intend to comply with the subcontracting limitation because it lacks relevant experience). Id.; Protester's Supp. Comments at 3-4.

⁵ DBI also argues that Conquistador cannot comply with the limitation on subcontracting clause because the awardee is allegedly not registered to do business in Massachusetts. Protest at 2; see Protester's Comments at 5 n.1. The RFQ contained only a general provision that the contractor obtain all necessary licenses and required permits; it did not require compliance at the time vendors submitted quotations. See RFQ at 19. Furthermore, Conquistador's subcontract agreement states that both parties will comply with all federal, state, and local laws, and regulations, as well as all licenses and permits required for performance. AR, Tab B, Conquistador's Quotation, at 14.

An agency may consider a proposed subcontractor's past performance when evaluating a vendor's quotation under a past performance factor, where the solicitation neither prohibited nor mentioned the evaluation of such information. See Singleton Enters., B-298576, Oct. 30, 2006, 2006 ¶ 157 at 4.

Contrary to DBI's suggestion, the RFQ did not state that only past performance for the prime contractor would be considered. Rather, the solicitation advised that the agency would consider all past performance of recycling and waste management of a similar scope conducted under Massachusetts standards. See RFQ amend. 1, at 2. Thus, we find that the agency properly considered the past performance of the key subcontractor.

The protest is denied.

Susan A. Poling
General Counsel