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Decision

Matter of: McDonald Construction Services, Inc.

File: B-285980; B-285980.2

Date: October 25, 2000

Thomas E. Abernathy IV, Esq., Smith, Currie & Hancock, for the protester.
Robert A. Emmanuel, Esq., Emmanuel, Sheppard & Condon, for Greenhut Construction Services, Inc., the intervenor.
Thomas W. Burt, Esq., and Larry E. Beall, Esq., U.S. Army Corps of Engineers, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that the agency unreasonably evaluated its proposal because it was downgraded under three separate evaluation areas for the same deficiency is denied, where the record shows that the agency evaluated the protester's proposal in accordance with the criteria announced in the solicitation, the criteria assessed separate aspects of the proposals, and the deficiencies noted reasonably related to all three evaluation areas at issue.

DECISION

McDonald Construction Services, Inc. protests the award of a contract to Greenhut Construction Services, Inc. under request for proposals (RFP) No. DACA01-00-R-0009, issued by the U.S. Army Corps of Engineers for the construction of a hospital central energy plant at Eglin Air Force Base, Florida. McDonald challenges the evaluation of its proposal and contends that the agency improperly conducted discussions with the awardee, while it failed to conduct similar discussions with McDonald.

We deny the protest.

BACKGROUND

The RFP, issued on March 1, 2000, contemplated the award of a fixed-price contract for the construction of the required plant, which generally consists of a steel frame building with slab on grade floor and concrete foundation. The building is to be a free-standing central energy facility housing the existing chiller and boiler assets which will be relocated from the main hospital to the new plant. Offerors were required to submit fixed prices for the basic requirement, for each of four option items, and a total price. Offerors were instructed to submit proposals in two separate volumes--performance capability (volume I), and "pro forma" requirements (volume II). The RFP contained detailed instructions on the type of information required to be included in each volume.

Section 00120 of the RFP explained that a source selection evaluation board (SSEB) would evaluate volume I of the proposals in the areas listed below. Volume II, which was to include such items as contractor representations and certifications, bonds, standard form 1442, the schedule, and subcontracting plan, was to be evaluated separately on a "go or no-go" basis; the financial statement, which was also to be included in volume II, was not to be evaluated. Price was not to be numerically scored but was to be evaluated for fairness and reasonableness. The RFP stated that the technical area (i.e., performance capability) and price were equal in importance. In addition, the RFP stated that the government may make award without discussions, and cautioned offerors to provide their best terms in the initial proposals. Award was to be made to the offeror whose proposal was deemed most advantageous to the government.

The RFP listed the following subfactors for evaluating volume I and their relative importance (maximum point values for each subfactor shown were not provided in the RFP but were set out in the instructions provided to the SSEB).

Factor/Subfactor	Value
Vol. I-Perf. Capability	
Organization	200
Specific Personnel	125
Specialized Experience on Similar Type of Work	200
Preliminary Quality Control Plans	100
Preliminary Project Schedules	60
Past Perf. on Utilization of Small Bus. Concerns	40
Safety Program	75
Total Points	800

Nine firms submitted proposals by the time set on June 8 for receipt of initial proposals, ranging in total price from McDonald's low price of \$5,565,007 to \$7,602,895; Greenhut submitted the second lowest total price. As for technical scores, the protester's proposal was ranked seventh while Greenhut's proposal was ranked first. The following table shows the results of the evaluation of initial proposals and the SSEB's consensus scores for the protester, the awardee, and the three highest-rated firms:

Offeror	Score	Price
Greenhut	513	\$6,029,000
Offeror B	413	6,051,000
Offeror C	383	6,068,300
Offeror D	372	6,252,777
McDonald	349	5,565,007

The SSEB identified no material deficiencies or significant weaknesses in Greenhut's proposal that would render the firm ineligible for award. By contrast, the SSEB found that all other eight proposals, including McDonald's proposal, contained either material deficiencies or significant weaknesses, which, according to the SSEB, could have been cured if discussions were held. The SSEB determined, however, that discussions were not necessary because those eight proposals did not offer any significant advantages over Greenhut's acceptable offer. In particular, the SSEB noted that Greenhut's proposal earned the highest technical score, exceeding the second highest-rated proposal (offeror B) by 100 points, and the protester's proposal by 164 points. Based on the results of the initial evaluation, the SSEB recommended to the source selection authority (SSA) that Greenhut be awarded the contract. The SSA agreed with the SSEB's recommendation and awarded the contract to Greenhut. This protest followed a debriefing by the agency.

PROTEST ISSUES

McDonald primarily argues that the agency improperly evaluated its proposal. Specifically, the protester contends that the agency improperly downgraded its proposal under three separate evaluation subfactors (organization, specific personnel, and preliminary quality control plans) for the same deficiency the SSEB identified, relating to McDonald's proposed "contractor quality control" (CQC) system manager. The protester also argues that the agency failed to obtain adequate competition. In a supplemental protest, McDonald alleges that the agency improperly conducted discussions with the awardee, thus allowing that firm to cure deficiencies in its proposal related to Greenhut's CQC system manager, but failed to

conduct similar discussions with McDonald.¹ McDonald also challenges the agency's price/technical tradeoff decision.

Untimely Protest Issue

In its comments, McDonald asserts for the first time that the evaluation of its proposal under the "specialized experience on similar type of work" subfactor was unreasonable. This new argument is untimely raised.

Under our Bid Protest Regulations, protests not based upon alleged solicitation improprieties must be filed not later than 10 days after the basis for protest is known. 4 C.F.R. § 21.2(a)(2). Where a protester initially files a timely protest and supplements it with new and independent grounds of protest, the new allegations must independently satisfy these timeliness requirements; our Regulations do not contemplate the unwarranted piecemeal presentation of protest issues. Litton Sys., Inc., Amecom Div., B-275807.2, Apr. 16, 1997, 97-1 CPD ¶ 170 at 4 n.1. Here, while McDonald's initial protest was filed in a timely manner, McDonald did not challenge the evaluation of its proposal under the "specialized experience on similar type of work" subfactor. McDonald was aware of this basis of protest, at the latest, upon its receipt of the agency report on August 31, but did not raise this new issue within 10 days after McDonald received the report. McDonald's comments, filed on September 18, were not filed within the 10-day period prescribed by our Regulations

¹ The agency argues that McDonald is not an interested party to maintain the protest. See 4 C.F.R. § 21.0(a) (2000). According to the agency, and the intervenor agrees, even if the three allegedly improper deficiencies related to the CQC system manager were removed from McDonald's proposal, its score would increase by 9 "percentage" points, improving its overall score by only 12 points (from 349 to 361 points), which would not be sufficient to have a material impact on the award decision. These parties' analysis is flawed. In this regard, we note that the evaluators deducted a total of 243 points from McDonald's technical score under the three subfactors at issue (worth a maximum of 425 points). If we found that McDonald's arguments regarding the evaluation of its proposal had merit and sustained its protest, it is possible that upon reevaluation its total score could improve significantly and that, given McDonald's low price, the agency could determine that McDonald's proposal is most advantageous to the government. See International Data Prods., Corp.; I-Net, Inc.; and Dunn Computer Corp., B-274654 et al., Dec. 26, 1996, 97-1 CPD ¶ 34 at 5 (protesters rated eighth and ninth in overall technical merit are interested parties to challenge evaluation of their proposals where both offered lower prices and solicitation called for award to the offeror found most advantageous to the government); Rome Research Corp., B-245797.4, Sept. 22, 1992, 92-2 CPD ¶ 194 at 6 (fourth-ranked firm which offered lowest proposed costs is an interested party to challenge the evaluation of its proposal). We therefore consider McDonald an interested party to challenge the evaluation of its proposal.

because we granted SDS's request for an extension of time within which to file them. See 4 C.F.R. § 21.3(i). An extension for purposes of filing comments, however, does not waive the timeliness rules with regard to new grounds of protest. SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 4 n.3. Accordingly, this new protest issue is untimely, and will not be considered.²

ANALYSIS

Proposal Evaluation

McDonald contends that the agency unreasonably downgraded its proposal under the organization, specific personnel, and preliminary quality control plans subfactors for the same deficiency related to its proposed CQC system manager. The protester does not challenge the reasonableness of the deficiency finding itself. Instead, McDonald contends that the agency improperly "triple-counted" that deficiency, which, according to McDonald, should have affected its technical score only under the specific personnel evaluation subfactor. As explained in greater detail below, we disagree with the protester's position.

The evaluation of technical proposals is a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Federal Env'tl. Servs., Inc., B-260289, B-260490, May 24, 1995, 95-1 CPD ¶ 261 at 3. In reviewing an agency's technical evaluation, we will not reevaluate the proposals, but will examine the record of the evaluation to ensure that it was reasonable and in accordance with the stated evaluation criteria. Id. As explained in detail below, based on our review of the record, we conclude that the three evaluation subfactors on which the protester relies were aimed at assessing different, discrete aspects of the proposals, and that the deficiency the SSEB noted in McDonald's proposal concerning the CQC system manager's educational qualifications and minimum experience was reasonably related to both the specific personnel and preliminary quality control plans evaluation areas, and was distinct from the deficiency in McDonald's proposal that the SSEB identified under the organization subfactor.

² Further, McDonald's argument in its September 18 comments that the evaluation of its proposal under this RFP was inconsistent with the evaluation of a proposal it submitted under a different RFP to the same agency involving a different construction project, is similarly untimely. In any event, each acquisition stands on its own, and the evaluation and relative ranking of McDonald's proposal under another procurement are irrelevant to determining the reasonableness of the evaluation here. See Renic Corp., Gov't Sys. Div., B-248100, July 29, 1992, 92-2 CPD ¶ 60 at 5.

Specific Personnel

The RFP contained specific personnel requirements under the quality control organization section. See RFP § 01451, CQC, ¶ 3.4 Quality Control Organization, at 3. Under this section, the RFP required offerors to identify a CQC system manager, an individual within the onsite work organization who is to be responsible for overall management of CQC and has the authority to act in all CQC matters for the contractor. *Id.* ¶ 3.4.2, CQC System Manager, at 3. In addition, the RFP required that the proposed CQC system manager be a graduate engineer, graduate architect, or a graduate of construction management, with a minimum of 5 years construction experience on construction similar to the contemplated contract. *Id.* This information, pertaining to proposed key personnel, was to be evaluated under the specific personnel subfactor, which stated as follows:

Specific Personnel. The offeror must provide the requested information to identify and demonstrate that its key personnel meet minimum qualifications necessary, including satisfactory experience in similar type work, to manage, . . . subcontract acquisition and management functions.

RFP ¶ 3.2.2, at 2.

The SSEB found that under this subfactor, McDonald's proposed onsite CQC system manager, a high school graduate, did not meet the RFP's minimum formal educational requirements. Agency Report exh. J, SSEB Consensus Scoresheets, McDonald. The protester does not take issue with this specific deficiency, arguing instead that the SSEB improperly downgraded its proposal for this deficiency under the organization and preliminary quality control plans subfactors, thus "triple-counting" the deficiency. McDonald maintains that this deficiency properly should have affected its score only under the specific personnel subfactor. As discussed in detail below, we disagree.

Preliminary Quality Control Plans

As relevant here, the RFP advised that the successful offeror is required to "implement a formal quality control program which will ensure high quality construction." RFP § 00110, ¶ 2.5.1. The RFP specifically stated that the successful offeror "shall expand the preliminary plans to comply with section 01451," related to CQC. *Id.* Offerors were further required to address, at a minimum, several items in each preliminary plan, including authorities, tasks, functions, and minimum qualifications required for each proposed position in their quality control organization. *Id.* ¶¶ 2.5.1.1, 2.5.1.2. Offerors were required to describe in their proposals the authority, assigned tasks, and functions of the CQC manager and each

key QC position. Id. § 00110, ¶ 2.5.1.1. This information was to be evaluated as follows:

Plans for Quality Control. The offeror must submit the required information to demonstrate understanding of the contract’s “Inspection of Construction” and “[CQC]” requirements and to demonstrate that the offeror has an effective quality control system for construction, [and] meeting the contract requirements.

RFP ¶ 3.2.4, at 4.

The SSEB noted that McDonald’s proposal failed to describe the authorities, tasks, and functions of the mechanical and electrical quality control personnel as required by § 00110, ¶ 2.5.1.1 of the RFP, and failed to describe their minimum educational qualifications, as required by RFP ¶¶ 2.5.1.1 and 2.5.1.2. The SSEB also found that McDonald’s proposal “deviated” from the RFP’s minimum educational qualifications for the onsite CQC system manager. Agency Report ex. J, SSEB Consensus Scoresheets, McDonald, at 4. The SSEB designated these as three separate deficiencies in the proposal. Id.

The protester argues that it was improper for the evaluators to note the same deficiency regarding the educational qualifications and experience of its proposed CQC system manager under both the specific personnel and the preliminary quality control plans subfactors. We disagree. There was nothing inherently improper in the SSEB’s considering the same deficiency under different evaluation criteria. An agency may properly downgrade a firm under more than one criterion based on the same information or deficiency where the deficiency affects the acceptability of the firm’s proposal in more than one area. Greenbrier Indus., Inc., B-252943, Aug. 11, 1993, 93-2 CPD ¶ 91 at 3. The specific personnel criterion, which included an assessment of the proposed CQC system manager’s qualifications, was intended to assess whether the proposed individual met the RFP’s minimum educational qualifications and had relevant experience in similar type work. Thus, the SSEB properly considered McDonald’s proposed CQC system manager’s qualifications under this subfactor. The preliminary quality control plans subfactor, on the other hand, was aimed at determining whether offerors satisfactorily demonstrated their understanding of the contract’s quality control system for construction. Based on our review of the record, we conclude that these criteria were aimed at assessing different, discrete aspects of the proposals, and that the deficiency the SSEB noted in McDonald’s proposal concerning the CQC system manager’s educational qualifications and minimum experience was reasonably related and relevant to both the specific personnel and preliminary quality control plans evaluation areas. Accordingly, we have no basis to question the evaluation of McDonald’s proposal in these areas.

Organization

Regarding the information to be evaluated under the organization subfactor, the RFP stated as follows:

Organization. The offeror must provide the requested information concerning its organization. The offeror must demonstrate that it has the necessary structure and resources within its organization to manage, control, and administer the construction operations, quality control program and subcontracts. This must be achievable with other projected on-going work. The offeror must agree and demonstrate that it will self-perform at least 20 [percent] of the on-site contract work. This work is defined in Section 00110: Proposal Submission Requirements.

Id. § 00120, Evaluation of Proposals, ¶ 3.2.1.

Under this subfactor, the SSEB found that McDonald had failed to describe in its proposal the onsite mechanical and electrical CQC personnel under the Quality Control Team Organization, as required under § 00110, ¶ 2.2.2.4 and § 01451, ¶ 3.4.2, and noted this as a deficiency in its proposal. Agency Report exh. J, SSEB Consensus Scoresheet, McDonald, at 1.

Our review of the record shows that McDonald failed to provide in its proposal information demonstrating that it has the necessary structure and resources within its organization to manage, control, and administer the construction operations, quality control program and subcontracts. Given that the organization subfactor was directed at assessing the offerors' CQC organizational structure and available resources to effectively manage the contract, the protester's failure to describe in its proposal the onsite mechanical and electrical CQC personnel in its organization as required by the RFP was appropriately considered under this evaluation subfactor. Further, this deficiency--related to McDonald's mechanical and electrical CQC personnel--is distinct from, and unrelated to, the other deficiencies described above concerning its proposed CQC system manager. Accordingly, McDonald's contention that the agency improperly considered the deficiency regarding its proposed CQC manager under this subfactor clearly is not supported by the record.

McDonald also contends that in awarding the contract to Greenhut based on initial proposals, the agency failed to obtain adequate competition. In this connection, the protester argues that the agency should have conducted discussions rather than making award on initial proposals because the SSEB's concerns regarding its CQC system manager could have been easily cured.

The protester's contention that the agency should have held discussions with McDonald to cure deficiencies in its proposal is without merit. The RFP clearly stated that the agency may make award on the basis of initial offers, without discussions. RFP § 00120, ¶ 7.1, at 7. In this regard, offerors were specifically cautioned to provide their best terms for both price and technical in their initial submissions, and to not assume that they would be included in the competitive range for discussions, if discussions were required. *Id.* In such cases, the burden is on the offeror to submit an initial proposal that adequately demonstrates its merits. Norden Sys. Inc., B-255343.3, Apr. 14, 1994, 94-1 CPD ¶ 257 at 7-8.

Here, the record shows that the evaluators identified several deficiencies in McDonald's proposal under the organization, specific personnel, specialized experience on similar type work, and preliminary quality control plans evaluation subfactors. In addition to the specific deficiencies discussed here, the SSEB identified several other weaknesses and disadvantages in McDonald's proposal which, together with the deficiencies, reasonably caused the SSEB to downgrade the proposal in those areas. In addition, as already stated, the SSEB identified no material deficiencies or significant weaknesses in Greenhut's proposal, and, in fact, noted numerous advantages in that firm's offer. Agency Report ex. K, SSEB Final Report, at 1. By contrast, the SSEB found that all other eight proposals, including McDonald's, contained either material deficiencies or significant weaknesses, and that, even if those deficiencies or weaknesses were corrected through discussions, those proposals did not offer any significant advantages over Greenhut's acceptable offer. *Id.* ¶ 6, at 3. Given that nine firms responded to the RFP, and that the agency properly accepted Greenhut's proposal without discussions, the protester's contention that the agency did not obtain adequate competition is without merit.

Supplemental Protest

In a supplemental protest, McDonald argues that after receipt of initial proposals and before award, the agency improperly conducted discussions with Greenhut, thus allowing that firm to cure deficiencies in its proposal related to its proposed CQC system manager, while failing to hold similar discussions with McDonald regarding its CQC system manager.

The agency explains that following the initial evaluation, the SSEB determined that Greenhut had apparently intended to propose one of three individuals [DELETED], listed in various areas of its proposal, as its CQC system manager. It is undisputed that on June 16, 2000, the agency telephoned Greenhut in an effort to clear up this apparent ambiguity. The record shows that by fax of that same date, in response to the agency's inquiry, Greenhut submitted a new "Key Personnel--Construction" form designating a fourth individual, [DELETED], as its CQC manager. In addition, Greenhut submitted a revised narrative of its preliminary quality control plans describing [DELETED] authority, tasks, and functions, as well as her formal educational background and relevant experience with similar projects. Greenhut

also included with this submission a revised organizational chart which replaced [DELETED] as the CQC system manager. (We note that [DELETED] was not proposed in Greenhut's initial proposal.) The SSEB reviewed Greenhut's June 16 submission, considered it acceptable, but did not change Greenhut's relatively high technical score. The agency takes the position that the communication it had with Greenhut was merely a clarification, not discussions, and thus maintains that it was not required to hold discussions with McDonald or with any other firm.

We need not address this contention since it is clear from the record that McDonald did not suffer competitive prejudice as a result of the agency's action. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, even assuming that McDonald is correct that the agency's communication with Greenhut constituted discussions, thus requiring the agency to conduct discussions with other offerors whose proposals were in the competitive range, in view of McDonald's overall low technical score and relative standing, and given that the SSEB identified no significant technical advantages in the protester's proposal, it is clear that McDonald's proposal would not have been included within the competitive range.

Federal Acquisition Regulation § 15.306(c) provides that:

- (1) Agencies shall evaluate all proposals . . . and, if discussions are to be conducted, establish the competitive range. Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency

We do not read this language to require agencies to retain in the competitive range a proposal that is not among the most highly rated ones or that the agency otherwise reasonably concludes has no realistic prospect of award. SDS Petroleum Prods., Inc., supra, at 5. An agency may properly determine whether to include a proposal within the competitive range by comparing the proposal evaluation scores and the proposal's relative standing. A proposal that is technically acceptable need not be included in the competitive range when, relative to other acceptable offers, it is determined to have no realistic prospect of being selected for award. Matrix Gen., Inc., B-282192, June 10, 1999, 99-1 CPD ¶ 108 at 3-4. Here, as a result of the several deficiencies the SSEB identified in McDonald's proposal, it was downgraded to an extent that it did not have a realistic prospect of being selected for award because there were at least two other competitively priced, acceptable proposals that earned

significantly higher technical ratings.³ Accordingly, we view it as so unlikely that McDonald's proposal would have been included within the competitive range that we conclude that McDonald did not suffer any competitive prejudice as a result of the allegedly improper action. See, e.g., Matrix Gen., Inc., *supra* (firm which submitted fifth ranked technical proposal out of ten offers and third lowest price was properly excluded from the competitive range).⁴

Finally, McDonald is not an interested party to challenge the agency's tradeoff decision which resulted in the award to Greenhut. Under our Bid Protest Regulations, a party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. 4 C.F.R. § 21.0(a). Here, since as a result of the agency's evaluation, which we find reasonable, McDonald's technical proposal was ranked seventh, and since in addition to Greenhut's, several other higher-rated, reasonably priced proposals remained eligible for award, McDonald is not an interested party to challenge the agency's tradeoff decision because, even if its protest were sustained, those intervening offerors, not McDonald, would be in line for award. See, e.g., U.S. Constructors, Inc., B-282776, July 21, 1999, 99-2 CPD ¶ 14 at 5; Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 at 3-4; Dick Young Prods. Ltd., B-246837, Apr. 1, 1992, 92-1 CPD ¶ 336 at 8.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel

³ The record shows that based on the initial evaluation, the two most highly rated proposals--Greenhut's and offerors B's--earned 513 and 413 points, respectively, while the SSEB assigned McDonald's proposal only 349 points, which resulted in the protester's proposal being ranked seventh out of nine. The record further shows that Greenhut's and offeror B's total prices were within a relatively narrow range of \$22,000 from each other, and both were approximately 94 percent of the government's independent estimate of \$6.4 million for the project. The evaluation record further shows that the SSEB identified no significant technical advantages in McDonald's proposal, while it identified 14 advantages in Greenhut's proposal and 4 advantages in offeror B's proposal.

⁴ In reaching our conclusion, we recognize that agencies may not eliminate a technically acceptable proposal from the competitive range without considering the relative cost or price of that proposal to the government. Kathpal Techs., Inc.; Computer & Hi-Tech Management, Inc., B-283137.3 *et al.*, Dec. 30, 1999, 2000 CPD ¶ 6 at 9. This does not mean, however, that the mere fact that McDonald's price was less than the ultimate awardee's would have required the agency to include it within the competitive range. See L&M Tech., Inc., B-278044.5, May 8, 1998, 98-1 CPD ¶ 131 at 4, *citing* Intown Properties, Inc., B-250232, Jan. 14, 1993, 93-1 CPD ¶ 43 at 6.