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Decision

Matter of: Archer Western Contractors, Ltd.

File: B-403227; B-403227.2

Date: October 1, 2010

Larry W. Caudle Jr., Esq., and Brad C. Friend, Esq., Kraftson Caudle, for the protester.

Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., and Richard H. Snyder, Esq., Smith Pachter McWhorter, PLC, for Sundt Construction, Inc., the intervenor.

Charles L. Webster III, Esq., Department of the Army, Corps of Engineers, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Selection of a higher-rated, higher-priced task order proposal is reasonable where the selection official found that the awardee's higher technical merit outweighed the protester's lower proposed price.

DECISION

Archer Western Contractors, Ltd., of Chicago, Illinois, protests the award of a task order to Sundt Construction, Inc., of Tucson, Arizona, under request for task order proposals (RFP) No. W9126G-08-D-0066, RFP 0006, issued by the Department of the Army, Corps of Engineers, for the design and construction of a warriors in transition complex at Fort Sill, Oklahoma.¹ Archer challenges the agency's evaluation of technical proposals.

We deny the protest.

¹ Warriors in transition complexes provide facilities to allow injured or temporarily disabled soldiers to live, eat, train, and work together. RFP amend. 3, Statement of Work (SOW), § 011000, ¶ 3.1.

BACKGROUND

The RFP provided for the issuance of a fixed-price task order under a previously awarded multiple-award, task order contract for the design and construction of a warriors in transition complex, consisting of a barracks for wounded soldiers and related items including landscaping, paving, walks, curbs, drainage, and access roads. The SOW identified functional, technical, and design requirements and objectives for the complex. In this regard, the SOW informed offerors that the agency sought innovative, creative, and life-cycle-cost-effective solutions that exceeded the minimum requirements. RFP, SOW, § 011000, ¶ 1.0.

Offerors were also informed that proposals would be evaluated on a best value basis, considering the following evaluation factors: design/technical; proposed contractor duration/summary schedule; past performance; and price. The design/technical and proposed contractor duration/summary schedule factors were stated to be equal in weight and more important than the past performance factor, which was more important than price. RFP § 002230, ¶ 4.0. Four subfactors were identified under the design/technical factor: building functional, aesthetics and space; quality of building systems and materials; sustainability requirements; and proposed sitework and building construction coordination plan. With respect to the design/technical factor, the RFP sought conceptual-level presentation drawings, technical approach narratives, and material and system quality information. Offerors were instructed to provide enough detail to allow the agency to evaluate whether a proposal met or exceeded the solicitation's requirements.

The RFP identified a number of desired features as “preferable,” and others as “desirable.” For example, under the quality of systems and materials subfactor, the RFP identified five preferences. Id. at ¶ 5.3.1. In addition, offerors were informed that they could offer other voluntary features, termed “betterments.”² Offerors were informed that desirable features, installation preferences, and voluntary betterments would be given additional consideration during the evaluation process. See id. at ¶ 5.3.3.2. In this regard, the RFP requested that offerors identify what they considered to be betterments in their proposals under the design/technical subfactors. Id. ¶ 5.1.

The agency received proposals from Archer and Sundt. Discussions were

² The underlying task order contract defines a betterment as “any component or system which exceeds the minimum requirements stated in the Request for Proposal. This includes all betterments identified in the proposal and/or all government identified betterments.” Agency Report (AR), Tab 25, Multiple-Award, Task Order Contract, § 007300, ¶ 1.3.

conducted, and revised proposals were evaluated by the agency’s evaluation board, as follows:³

	Sundt	Archer
Design/Technical	Excellent	Good
Proposed Contract Duration and Summary Schedule	Good	Good
Past Performance	Low	Low
Price	\$13,987,412	\$13,350,000

AR, Tab 11, Source Selection Evaluation Report, at 4.

The evaluators’ adjectival ratings were supported by narrative discussions that identified each offerors’ respective strengths under each factor. With regard to the evaluation of Archer’s proposal under the design/technical evaluation factor, the evaluators noted as a “significant strength” the firm’s offer of all five installation preferences, and its offer of several betterments, including a Leadership In Energy and Environmental Design (LEED) Gold rating, extended warranties on several systems, all copper conductors, improved finishes in the building, excellent sitework and contractor coordination, and superior insulation. Id. The agency found no weaknesses. Archer’s good rating under the proposed contract duration/summary schedule factor reflected the evaluators’ judgment that Archer proposed a detailed schedule and offered to complete the project in 60 fewer days than the contract’s maximum performance period. Id.

The awardee’s excellent rating under the design/technical evaluation factor reflected the evaluators’ judgment that Sundt’s proposal contained a number of strengths and no weaknesses. As with Archer’s proposal, the agency found Sundt’s offer of all five installation preferences to be a “significant strength.” The evaluators also noted a number of strengths and betterments that the evaluators found enhanced the facility, the most notable of which was the firm’s offer of a [DELETED] foundation for the barracks. The agency found that this was a “very desirable foundation design at [Fort] Sill due to [the] highly expansive soils,” and this “pushes the proposal into the ‘excellent’ rating.” AR, Tab 23, Sundt Consensus Evaluation Rating Sheets, at 1. The evaluators also noted as strengths Sundt’s offer of additional enhancements, such as [DELETED]. With regard to the firm’s proposed schedule, the evaluators rated

³ The RFP defined “excellent” to be a proposal that reflected an excellent approach including numerous advantages and essentially no disadvantages such that the risk of unsuccessful performance was very low, and “good” to be a proposal that reflected a sound approach that included advantages and relatively minor disadvantages such that the risk of unsuccessful performance was low. RFP § 002230, ¶¶ 9.4.3.1, 9.4.3.2.

Sundt proposal as good, finding that the firm had proposed a detailed schedule and offered to complete the project in [DELETED] days than the maximum performance period. AR, Tab 11, Source Selection Evaluation Report, at 5.

The evaluation results were provided to the contracting officer, who was the selection official for this procurement. The contracting officer noted that both firms' proposals were evaluated as having significant strengths and betterments, but found that Sundt's proposal warranted a higher technical rating, largely because Sundt offered a [DELETED] foundation. The contracting officer found that this type of foundation (which Archer did not offer) was a highly significant strength because it reduces movement and prevents cracking, which "exponentially increases the durability of the facility while [it] reduces maintenance costs due to the environment in which the facility is being built." AR, Tab 12, Source Selection Decision, at 4; Contracting Officer's Statement at 12. The contracting officer concluded that the technical merit in Sundt's proposal, associated with the firm's offered [DELETED] foundation and numerous betterments, provided benefits that "the government will realize in durability, longevity, decreased maintenance costs and increased aesthetic appeal" that outweighed Archer's price advantage. AR, Tab 12, Source Selection Decision, at 6.

The agency issued the task order to Sundt, and this protest followed.

DISCUSSION

Archer complains that its proposal should have received a higher rating under the design/technical factor.⁴ Specifically, Archer argues that the RFP defined a good rating to be a proposal that had a sound approach with "few relatively minor disadvantages," and an excellent rating to be a proposal that had "essentially no disadvantages." Archer contends that because the agency found that the firm's proposal contained no disadvantages under this factor, its proposal should have been rated as excellent. In this regard, Archer argues that the agency evaluated the firms' proposals disparately, because, in the protester's view, Archer's evaluated significant strength and six betterments should have received a higher rating under the design/technical factor than Sundt's evaluated two significant strengths (one of

⁴ Archer also challenges its good rating here on the grounds that it was improper for the contracting officer to conclude that Archer's proposal constituted a "sound approach," which posed a "low risk" of unsuccessful performance under this evaluation factor. Archer argues that, although "sound approach" and "low risk" are aspects of a "good" rating under the RFP, this analysis is only in the contracting officer's selection decision, and argues that the contracting officer under the RFP was not permitted to perform his own evaluation. We disagree. Selection officials have inherent authority to independently evaluate proposals. See SAMS El Segundo, LLC, B-291620, B-291620.2, Feb. 3, 2003, 2003 CPD ¶ 44 at 18.

which was Sundt's proposed foundation) and four betterments. Supplemental Protest at 4.

In reviewing protests of alleged improper evaluations and source selection decisions, it is not our role to reevaluate submissions; rather, we will examine the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Panacea Consulting, Inc., B-299307.4, B-299308.4, July 27, 2007, 2007 CPD ¶ 141 at 3. In this regard, agencies' use of evaluation ratings for offerors' proposals, whether numeric, color or adjectival, are but guides to, and not substitutes for, intelligent decisionmaking; they do not mandate automatic selection of a particular proposal. See Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 31. A protester's mere disagreement with an agency's judgment is not sufficient to establish that an agency acted unreasonably. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

Here, Archer's arguments provide no basis to object to the agency's evaluation of proposals under the design/technical factor. As noted above, the agency considered both firms' evaluated strengths and betterments in qualitatively assessing the merits of the firms' respective proposals. The agency found that Sundt's proposal was superior to Archer's under this factor, largely due to Sundt's offer of a [DELETED] foundation. Although Archer disagrees with this judgment, it does not show it to be unreasonable. Moreover, Archer's mathematical counting of strengths and betterments is misplaced, as it is an agency's qualitative findings in connection with its evaluation of proposals that govern the reasonableness of an agency's assessment of offerors' proposals.⁵ Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 187 at 7.

Archer also contends that the agency could not credit Sundt for its offer of a [DELETED] foundation, because, in Archer's view, the RFP advised offerors that any of three identified foundations (including the [DELETED] foundation) were equally acceptable, and Archer had offered another of the identified foundations.

We find no merit to this argument. In pertinent part, the RFP stated:

The foundation is site specific and must be designed upon known geotechnical considerations by an engineer knowledgeable of the location conditions, e.g. highly expansive soils, ground water levels. . . . Due to soil conditions at Ft. Sill, the use of pier and supported grade beam foundation with structurally supported slab,

⁵ In addition, we are aware of no requirement that an offeror be given the highest available ratings simply because its proposal is not evaluated as having weaknesses. Pannesma Co. Ltd., B-251688, Apr. 19, 1993, 93-1 CPD ¶ 333 at 4.

conventional rib mat slabs or thickened structural slabs is required for this project.

RFP § 011000, ¶ 6.6.4. This provision does not state that each type of foundation was of equal merit. Rather, offerors were informed that they must propose one of the three identified foundations, but that the foundation chosen must be based upon “known geotechnical considerations” of the site. In the context of this best value procurement, offerors were allowed to choose which type of foundation to offer, and the agency would judge the merits of that choice. Apart from its argument that the RFP provided that all three foundations were of equal merit, Archer does not contend that all three foundations were in fact the same or that the [DELETED] foundation offered by Sundt was not superior to the type of foundations offered by Archer.⁶

To the extent that Archer argues that the solicitation was ambiguous, or that it was misled during discussions, with respect to how the agency would evaluate the type of foundations offered,⁷ the protester does not argue or show that it was prejudiced. Competitive prejudice is a necessary element to every protest; we will not sustain a protest unless the protester shows that but for the agency’s error, it has a substantial chance for award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 103 F.3d 1577, 1581 (Fed. Cir. 1996). Archer does not state that, had it known the agency would consider the merits of the type of foundation offered, it would have offered a different foundation or would otherwise have modified its proposal in any way.

⁶ The protester objected to the agency’s description of Sundt’s offer of [DELETED] foundation to be a betterment. The contemporaneous record shows that the agency variously discussed the merits of Sundt’s offered foundation as both a betterment and as a proposal strength, and the agency concedes that Sundt’s proposed foundation should not have been described as a betterment, but as a significant proposal strength. See Supplemental Legal Memorandum at 9. We find that the agency’s description of Sundt’s proposed foundation in some parts of the record as a betterment (rather, than as a proposal strength) does not provide any basis for objecting to the agency’s judgment that Sundt’s proposed foundation was superior to Archer’s.

⁷ In its supplemental protest, Archer argued that it was treated disparately in discussions, stating that it was informed during discussions that “there should be no betterments for any . . . structural systems,” and yet the agency credited Sundt’s proposal for its foundation, which was part of the structural system. Supplement Protest at 4. The Corps responded to this argument in its supplemental agency report, and Archer did not rebut the agency’s response in the protester’s supplemental comments.

The protester also protests the good rating assigned to Archer's proposal under the proposed contract duration/summary schedule evaluation factor, arguing that this rating was inconsistent with the excellent rating the firm's proposal received under a different Corps procurement for barracks at Fort Leonard Wood, Missouri. This argument is without merit. Each procurement action is a separate transaction, and an agency's actions under one procurement are not relevant to the propriety of its actions under another for purposes of a bid protest. Franz Rubenbauer Raumausstatter; Malerbetrieb Anastassios Georgiadis, B-290317.3 et al., July 16, 2002, 2002 CPD ¶ 124 at 4. Moreover, Archer does not explain why its proposal merits a higher rating than Sundt's under this factor, given that both firms were found to have proposed detailed plans but Sundt actually offered [DELETED].

We deny the protest.

Lynn H. Gibson
Acting General Counsel