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Decision

Matter of: Desbuild Inc.

File: B-409009.2, B-409009.3

Date: April 9, 2014

Douglas L. Patin, Esq., Bradley Arant Boult Cummings LLP, for the protester.
Federal Bureau of Investigation, for the agency.

Robert D. English, Esq., Federal Bureau of Investigation, for the agency.

Gary R. Allen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Request for reconsideration of GAO decision denying protest is denied where the request does not show that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of our decision, and where the request repeats arguments previously made and simply disagrees with the prior decision.

2. Timely protest of agency's best value decision based on pricing information previously withheld from the protester is denied where agency considered prices to be reasonable, and properly considered price and non-price factors in making its award decision.

DECISION

Desbuild Inc., of Hyattsville, Maryland, requests that we reconsider our January 6, 2014 decision denying its protest of the award of contracts to Biscayne Contractors, Inc.; Meltech Corporation, Inc.; Montage Inc.; and TMG Construction Corporation, under request for proposals (RFP) No. 2151136564, issued by the Federal Bureau of Investigation (FBI) for repair, renovation, new construction, and alterations to facilities and utilities at various FBI facilities, including the FBI Headquarters in Washington, D.C., the FBI Academy in Quantico, Virginia, and the Criminal Justice Information Services Complex in Clarksburg, West Virginia.

In addition, Desbuild raises a new basis of protest to the awards to Montage Inc. and TMG Construction Corporation, contending that the agency's best value

decision was flawed because of a “substantial discrepancy” between the protester’s and these awardees’ pricing.

We deny the request for reconsideration and the newly-raised protest.

BACKGROUND

The RFP, issued as a small business set-aside, provided for award of up to five fixed-price, indefinite-delivery, indefinite-quantity contracts for construction services for a base year and four option years. RFP at 1. The solicitation contemplated a two-phased evaluation, during which Desbuild and several other offerors from phase one were invited to compete in phase two. RFP at 18. The phase two evaluation scheme provided for an evaluation of technical approach (which consisted of technical¹ and past performance subfactors) and price, with technical approach and price being of equal weight. RFP at 21. The RFP stated that prices would be evaluated for reasonableness and for realism. RFP at 22.

Four offerors were selected for award after the phase two evaluation. Their proposal ratings, along with Desbuild’s, were as follows:

	Technical	Past Performance	Overall	Price
Montage	Blue	Green	Green	\$518,000
Biscayne	Green	Blue	Green	\$398,000
TMG	Green	Green	Green	\$556,187
Meltech	Green	Yellow	Green	\$376,082
Desbuild	Yellow	Yellow	Yellow	\$404,279

Agency Report (AR), Tab 14, Technical Evaluation Consensus Report, at 7-11, Tab 15, Contract Award Memo., at 4. All of the above offerors’ prices were determined to be reasonable based on a comparison to all of the offers received and a comparison to the independent government estimate (IGE);² no prices were found to be unrealistically low. AR, Tab 15, Contract Award Memo., at 4-5.

With respect to the technical evaluations, Desbuild’s proposal received yellow/marginal ratings for the technical approach factor (including yellow/marginal ratings for each of the subfactors--technical and past performance). The awardees

¹ The technical subfactor further included consideration of construction schedule, safety plan, waste plan, and work breakdown. RFP at 21.

² Nine offers were evaluated. AR, Tab 15, Contract Award Memo., at 4. The IGE was \$399,645. Contracting Officer’s Statement at 6.

received green/acceptable ratings for the technical approach factor. AR, Tab 14, Technical Evaluation Consensus Report, at 7-11. For past performance, one awardee received a blue/outstanding rating, two awardees received green/acceptable ratings, and one awardee received a yellow/marginal rating. Desbuild's price was lower than two of the awardees. Id. Desbuild's protest concerned the agency's phase-two evaluations.

As reflected above, two of the firms identified in the table (Montage and TMG) offered higher prices than Desbuild. However, the agency determined that both firms offered proposal advantages that justified paying the higher prices for those proposals. AR, Tab 15, Contract Award Memo., at 4-7.

In its initial protest, filed with our Office on September 30, 2013, Desbuild claimed that the agency treated offerors disparately in evaluating past performance by granting higher ratings to three of the awardees, who allegedly lacked the same type of experience that the protester admittedly lacked. Protest at 9-10. The protester also contended that the agency misevaluated Desbuild's construction schedule in two areas, which contributed to the firm's yellow/marginal rating under the technical approach factor. Id. at 10-13. Additionally, the protester claimed that the agency's errors led to a flawed best value determination. Id. at 13-14. In a supplemental protest (first supplemental protest) filed with its comments, Desbuild challenged additional proposal weaknesses that the agency identified in a written debriefing document.³ Comments and First Supp. Protest at 6-12.

We denied the initial protest, finding that the agency reasonably evaluated proposals. We also dismissed as untimely the first supplemental protest challenges to additional technical weakness, because Desbuild knew of these grounds from its debriefing, yet did not timely raise them in its initial protest. Desbuild Inc., B-409009, Jan. 6, 2014, 2014 CPD ¶ 23 at 5-7.

In the initial and first supplemental protest, Desbuild was represented by counsel who was admitted to the protective order. Despite the protective order, the agency provided Desbuild's counsel with redacted documents but provided unredacted documents to GAO. Second Supp. Protest at 1-2. Our Office was not aware that the agency had withheld information from the protester, and we included some of the information in the protected decision. As a result, counsel for the protester first learned certain information about this procurement, including Montage's and TMG's higher prices, from the protected version of our prior decision.

Within 10 days of receipt of our prior decision, Desbuild filed a second supplemental protest. In this filing Desbuild again protests the awards to Montage and TMG, arguing that the best value decision was flawed because the agency did not take

³ Our Office did not assign a separate file number for the first supplemental protest.

into account the “substantial discrepancy” between Desbuild’s and the awardees’ proposed prices. Second Supp. Protest at 7. Because Desbuild was previously unaware of this information, we find the second supplemental protest to be timely and we address the issues in this decision. 4 C.F.R. § 21.2 (a)(2) (2014).

RECONSIDERATION ISSUES

Desbuild requests that we reconsider our prior decision. The protester argues that GAO erred in finding the first supplemental protest grounds untimely, erred in its analysis of the past performance evaluation, and erred in concluding that the protester did not address two issues in its comments.

To prevail on a request for reconsideration, the requesting party must either show that our decision contains an error of fact or law, or present information not previously considered that warrants the decision’s reversal or modification. 4 C.F.R. § 21.14(a). A request for reconsideration that reiterates arguments made previously and merely expresses disagreement with the prior decision does not meet the standard for granting reconsideration. Gordon R.A. Fishman--Recon., B-257634.4, Sept. 9, 1996, 96-2 CPD ¶ 110 at 2-3. Here, we conclude that the standard for reconsideration has not been satisfied.

Timeliness of the First Supplemental Protest

The protester contends that GAO erred in rejecting as untimely its first supplemental protest challenging several weaknesses assigned to its proposal, which were identified in a written debriefing. Request at 2-3.

As noted above, Desbuild’s initial protest, with respect to its technical evaluation, challenged only two weaknesses concerning the agency’s evaluation of its construction schedule. See Protest at 11-13. In response to the protest, the agency stated that it informed Desbuild in an oral debriefing that the firm’s proposal had numerous other weaknesses, as reflected in the written debriefing document. Contracting Officer’s Statement at 9; Agency Dismissal Request, Oct. 29, 2013, at 3. The debriefing document contained in the record identified the following weaknesses:

1. Schedule indicates fieldwork can be completed in [deleted].
2. Shortened Government review of submittals.
3. [Deleted] project duration.
4. Uncertainty regarding soundness of approach in phasing after-hours work, commissioning, and testing.
5. No training mentioned in the technical approach.
6. No personnel are specifically assigned to this task order (superintendent?).
7. Project safety plan is not detailed nor site specific.

8. No demo routes id'ed.
9. Specific recycling goals mentioned.
10. Unclear if the Past Performance projects are relevant in quantities and scope.

Contracting Officer's Statement at 9; AR, Tab 16, Desbuild Debriefing Document, at 4.

In its request for reconsideration, Desbuild claims that it did not receive the debriefing document until October 29, 2013, and that it filed its first supplemental protest challenging all of the listed weaknesses within 10 days of receipt of that document. Request at 3. However, after receiving and reviewing the debriefing document, Desbuild's president submitted a declaration indicating that only two of the listed weaknesses were not revealed during the oral debriefing that was held earlier on September 26, 2013.⁴ See Decl. of Desbuild President, Oct. 31, 2013, at 1. Based on the president's declaration, we found timely the protest challenges to the two weaknesses not identified earlier.

Contrary to Desbuild's contentions, our prior decision considered all of Desbuild's arguments concerning the two timely issues, but only discussed the primary one in resolving the protest. This is consistent with the statutory mandate that our bid protest forum provide for "the inexpensive and expeditious resolution of protests." See Competition in Contracting Act of 1984, 31 U.S.C. § 3554(a)(1) (2006). Ahtna Facility Services, Inc.--Recon., B-404913.3, Oct. 6, 2011, 2012 CPD ¶ 270 at 3. For example, we addressed Desbuild's challenge to the agency's finding of a weakness due to the protester's proposed five-month construction schedule. Desbuild Inc., supra, at 6-7. Based on the record before us, we do not find that our Office erred in its conclusion that the remaining supplemental protest issues were untimely.

Past Performance

The protester next contends that we erred in stating that "Desbuild did not protest the evaluation of its past performance as yellow/marginal." Desbuild Inc., supra, at 7 n.12. Desbuild contends that it "necessarily" challenged its own evaluation rating when it alleged disparate treatment in the evaluation of past performance. Request at 4. Our decision fully considered the protester's arguments of disparate treatment with regard to the past performance ratings assigned to both Desbuild's and the awardees' proposals. The comment in the footnote was not material to our analysis and does not require a change in the outcome of the case.

⁴ The president's declaration stated that the oral debriefing did not address either (1) Desbuild's [deleted] project duration, or (2) its failure to specifically assign personnel to the task order. Decl. of Desbuild President, Oct. 31, 2013, at 1.

Desbuild further complains that GAO made an error of law by rejecting the protester's claims of unequal treatment in the evaluation of past performance. Request at 5. Desbuild presents no facts or arguments to indicate error in our previous decision. The request merely restates arguments made by Desbuild and previously considered by our Office, and does not provide a basis for reconsideration. Meridian Mgmt. Corp., Inc.--Recon., B-254797, June 28, 1994, 94-1 CPD ¶ 389 at 2.

Unaddressed Protest Grounds

Desbuild argues that GAO made an error of fact in its decision by stating that Desbuild did not address in its comments two issues raised in its initial filing. Request at 5-6. We disagree.

In its initial protest, Desbuild challenged the evaluation of its construction schedule, arguing that the agency erroneously concluded that (1) the firm did not provide for the replacement of a sufficient number of variable frequency drives (VFDs) after-hours, and (2) the firm's commissioning plan lacked detail. Protest at 11-13. In its agency report, the agency denied faulting Desbuild for the number of VFDs or the lack of a commissioning plan; instead, it explained that it had criticized the firm's proposal for "uncertainty regarding soundness of approach" for phasing in after-hours work and commissioning. AR at 3; Contracting Officer's Statement of 9; Tab 16, Desbuild Debriefing Document, at 4. After receipt of the agency report, the protester repeated its initially-raised protest grounds, but it did not substantively discuss them. Comments and first Supp. Protest at 6. Elsewhere in its comments and first supplemental protest, the protester summarily stated that the firm adequately addressed construction schedule milestones, after-hours work, commissioning, and testing. Id. at 10-11. In a second submission of comments, the protester again did not discuss the initially raised protest issues concerning the VFDs and commissioning plan. Supp. Comments at 1-5. In our decision, we mentioned that the protester's comments "did not further address" the two initially raised issues and instead focused on untimely supplemental protest grounds. Desbuild Inc., supra, at 5.

In sum, we have seen nothing in the protester's summary and peripheral statements about these issues that leads us to conclude that our prior decision should be reversed. The request for reconsideration is denied.

SECOND SUPPLEMENTAL PROTEST

In its second supplemental protest, Desbuild asserts that the agency failed to meaningfully consider the significantly higher prices of two awardees (Montage and TMG) in the best value decision. Second Supp. Protest at 7. The protester further asserts that the "wide gap" between offerors' pricing and the difference between the awardees' pricing and the IGE call into question both the agency's determination

that the prices were reasonable and its best value decision.⁵ Comments on Second Supp. Protest at 3.

Where, as here, the RFP provides for a best value decision, the source selection official retains discretion to select a higher-priced but technically higher-rated submission, if doing so is in the government's best interest and is consistent with the solicitation's stated evaluation and source selection scheme. 4-D Neuroimaging, B-286155.2, B-286155.3, Oct. 10, 2001, 2001 CPD ¶ 183 at 10. The source selection official has broad discretion in determining the manner and extent to which he/she will make use of technical and cost evaluation results, and this judgment is governed only by the tests of rationality and consistency with the stated evaluation criteria. Id.

Here, the record shows that the agency reasonably determined that the awardees' prices were fair and reasonable, and that they were not unrealistically low, based on a comparison of the prices to those of the other offerors and the IGE. These methods of comparison are expressly identified as permissible methods of price analysis in Federal Acquisition Regulation (FAR) § 15.504-1(b)(2). In its best value tradeoff, the agency specifically noted that Montage's and TMG's prices were not the lowest, but that other offerors submitted even higher prices that were also determined to be fair and reasonable. AR, Tab 15, Contract Award Memo., at 4. The agency found that TMG's proposal offered numerous advantages, including: [deleted] to include training, punch list, and inspection; an approach to submittals and moving between phases of work that created confidence in TMG's approach; a strong description of software to coordinate project timelines, project progress, and delivery of materials; and strong site specific safety and waste plans. Id. at 6. Similarly, the agency found Montage's proposal to offer the following advantages: the firm performed previous work on projects of the same trade and comparable magnitude; the proposal demonstrated a solid understanding of the mechanical and electrical work; and the proposal included good safety practices for onsite installation. Contracting Officer's Statement, Feb. 4, 2014, at 1. In fact, based on these advantages, the Montage and TMG proposals were ranked first and second under the non-price factors. AR, Tab 15, Contract Award Memo., at 4.

The record shows that the agency reasonably considered the technical advantages of Montage's and TMG's proposals, as well as the reasonableness and realism of

⁵ We have considered all of Desbuild's arguments, although we only address the most significant. We find none of Desbuild's arguments provide a basis to sustain a protest.

their higher prices, in selecting the two firms for award. Although Desbuild disagrees with this assessment, it has not shown it to be unreasonable.

The request for reconsideration and second supplemental protest are denied.

Susan A. Poling
General Counsel