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United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: ABM Government Services, LLC

File: B-410991.2

Date: April 17, 2015

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DIGEST

Agency properly eliminated protester's proposal from the competitive range where the agency reasonably concluded that the proposal was not among the most highly rated.

DECISION

ABM Government Services, LLC, of Hopkinsville, Kentucky, protests the exclusion of its proposal from competition for the award of a contract by the Department of the Army, Corps of Engineers, under request for proposals (RFP) No. W912DY-12-R-0046, for energy conservation services.

We deny the protest.

BACKGROUND

The Army issued the RFP on April 4, 2014, anticipating the award of up to 20 indefinite-delivery, indefinite-quantity contracts for the Army's Energy Savings Performance Contracts (ESPC) III program.¹ The ESPC III program is for design,

¹ The agency explains that ESPC contracts are partnerships between federal agencies and energy service companies, in which the contractor is required to guarantee a specific level of cost savings that will be sufficient to pay for the improvements over the term of the contract. Savings must exceed payments in

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construction, and operation of energy savings projects to help meet mandated energy savings goals established in the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, and subsequent amendments and directives. The required services are to be performed at government installations or facilities throughout the Continental United States and outside the Continental United States.

The RFP provided that the awards would be made on a best-value basis considering five evaluation factors, listed in descending order of importance with factors 3 and 4 being equal in importance: (1) corporate technical experience and management approach for ESPC projects; (2) financial capability; (3) past performance; (4) small business participation; and (5) technology markups and financing markups.² As relevant, evaluation factor 1 consisted of five subfactors: (a) performance contracting based energy experience and expertise; (b) management approach to support contract performance; (c) understanding of the Army ESPC process; (d) energy baseline and savings calculation capability; and (e) ability to develop a measurement and verification plan. The RFP provided that factor 1 and its subfactors would be evaluated on the basis of “the size of the project(s), the number of projects, the variety of technologies, the offeror’s understanding of the requirements, and the breadth and depth of the offeror’s experience in execution of the identified projects and energy conservation measures.” RFP at 94.

Under factor 1, subfactor (a), offerors were required to list and describe at least three, and no more than ten, prior energy conservation projects, completed and accepted by the customer within the past 5 years. RFP at 93. Under subfactor (d), each offeror was to describe its energy baseline and savings calculation experience as follows:

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every year of the contract. Accordingly, the federal ESPC authority requires the contractor to undertake measurement and verification (M&V) activities and provide documentation to demonstrate that the guarantee has been met. Essentially, ESPCs reallocate money that the agency pays for utilities, and the energy savings realized provide the income to finance the project. After the contract term ends, any additional savings accrue to the agency. See, Agency Report (AR), Contracting Officer’s Statement, at 11-12, citing Department of Energy/Federal Energy Management Program (DOE/FEMP) M&V Guidelines: Measurement and Verification for Federal Energy Projects at 1.1.2.

² Essentially cost/price, in the ESPC context.

1. The Offeror shall provide one executive summary to describe the best example of its work for a detailed audit report completed for Government (preferably a Department of Defense activity) or a private sector client.
2. For the audit report identified above, the Offeror shall describe the methodology used for establishing the energy baseline and the method or methods used to adjust the baseline due to facility and other changes. If multiple baseline methods were used, the Offeror should identify applicable energy technologies for each. The Offeror should describe the method(s) used to calculate energy savings of the installed energy conservation projects. The Offeror should describe the method(s) used to measure energy savings performance of installed energy conservation projects. If multiple performance measurement methods were used, the Offeror shall identify the applicable energy technologies for each.

Id. at 93-94.³ Also under subfactor (d), offerors were to “identify no more than 10 additional audit reports and indicate whether the report was performed for a DoD activity or private sector client.” Id. at 94.

With regard to subfactor (e), the RFP instructed as follows:

The Offeror shall describe not more than five potential issues (including which specific energy savings technology the issue applies to) and related method(s) used in determining measurement and verification (M&V) plans based on the methodologies developed in the DOE/FEMP M&V Guidelines for Federal Energy Projects and International Performance Measurement and Verification Protocol (IPMVP).

³ As addressed further below, we note that both the relevant ESPC M&V guidelines, and the RFP, at attachment J-8, provide format and content requirements for executive summaries of M&V plans and savings calculations on ESPC projects. See AR, Tab H, DOE/FEMP M&V Guidelines: Measurement and Verification for Federal Energy Projects, M&V Plan and Reporting Outlines, at D-3; RFP, Section J, Attach. J-8, at 1. Although the RFP instructions did not specifically require the use of these formats for the executive summary required under subfactor (d), the M&V guidelines and RFP attachment provide insight into the information expected in an executive summary for an ESPC audit report.

Id. Additionally, each offeror was to “provide an overview of its proposed testing and inspection approach including the associated technical and operational issues involved in assuring optimal ECM performance.” Id.

Finally, the RFP’s instructions provided that “Volume I” of the proposals--responsive to evaluation factor 1 and its subfactors--was limited to 50 pages, exclusive of the proposal cover letter, table of contents, and list of tables and figures or acronyms. Id. at 92. Offerors were instructed to provide an “Attachment 3” to proposal volume I, consisting of project data sheets (one sheet per project), that would not be counted toward the page limit--although offerors were also cautioned that supporting information, in excess of the single page datasheet per project limitation, would be included in the page count. Id.

The Army received 22 responsive proposals by the RFP’s May 27, 2014, closing date. Subsequent to the receipt of initial proposals, the contracting officer established a competitive range consisting of the 13 proposals considered to have a reasonable chance of being selected for award. ABM’s proposal was not among the 13 selected for the competitive range, and ABM was informed of this fact on November 25. ABM then requested a pre-award debriefing, which it received on December 29. This protest followed.

DISCUSSION

ABM challenges the reasonableness of the agency’s decision to exclude its proposal from the competitive range, asserting that the agency imposed unstated evaluation criteria, and otherwise unreasonably evaluated its proposal.⁴ Our Office will review an agency’s evaluation and exclusion of a proposal from the competitive

⁴ ABM also asserts that the agency was obligated to include it in the competitive range because the deficiencies in its proposal were easily correctable, and other offerors with easily correctable deficiencies in their proposal were admitted to the competitive range. We have reviewed this allegation and conclude that it provides no basis on which to sustain the protest. In its supplemental agency report, the agency provided a reasonable explanation for why it considered other offerors’ deficiencies to be easily correctable, and ABM’s deficiencies to be more serious. In brief, the agency concluded that the deficiencies present in the proposals admitted to competitive range involved the omission of certain documents relating to financial capability the correction of which did not require revision of the substance of the proposals, while ABM’s deficiencies related to its substantive response under the most-important evaluation factor. The protester did not seek to rebut the agency’s explanation in its supplemental comments. Accordingly, because the record demonstrates a reasonable basis to distinguish between the two types of deficiencies, we find ABM’s allegation to be unsupported. See ECC Renewables, LLC; Pacific Power, LLC, B-408907.3 et al., Jan. 31, 2014, 2014 CPD ¶ 60 at 6 n.6.

range for reasonableness and consistency with the solicitation criteria and applicable statutes and regulations. Outreach Process Partners, LLC, B-405529, Nov. 21, 2011, 2011 CPD ¶ 255 at 3. In this regard, contracting agencies are not required to retain in the competitive range proposals that are not among the most highly rated or that the agency otherwise reasonably concludes have no realistic prospect of being selected for award. Federal Acquisition Regulation § 15.306(c); Wahkontah Servs., Inc., B-292768, Nov. 18, 2003, 2003 CPD ¶ 214 at 4. Proposals with significant informational deficiencies may be excluded, whether the deficiencies are attributable to omitted or merely inadequate information addressing fundamental factors. American Med. Depot, B-285060 *et al.*, July 12, 2000, 2002 CPD ¶ 7 at 6-7. Here, we find that the exclusion of ABM's proposal from the competitive range was reasonable and consistent with the evaluation factors set forth in the RFP.

In the December 29 debriefing, the agency explained that ABM's proposal was not selected for the competitive range due to an unacceptable rating resulting from two deficiencies under factor 1: one deficiency under subfactor (d), and one deficiency under subfactor (e). The subfactor (d) deficiency consisted of two weaknesses which the agency concluded, taken together, indicated a failure to "demonstrate energy baseline and savings calculation capability." AR, Tab D, Source Selection Evaluation Board (SSEB) Report, at 13. The two weaknesses were recorded as follows:

No description of Phase I is provided in the example Executive Summary as required in Section L of the RFP. No annual savings and simple payback were provided. No summary table of major energy conservation measures and associated savings is provided. This is the type of information typically provided in an Executive Summary to aid in high level understanding of the economics driving a performance contract and making informed decisions at an executive level. (page 43)

Paragraph D.2 provides very little discussion about how energy savings were measured, how energy savings were calculated, methods to adjust baseline due to facility changes, and where secondary International Performance Measurement and Verification Protocol (IPMVP) categories were used as required in Section L of the RFP. This section fails to show an understanding of how energy savings are measured, how energy savings are calculated, and what methods are used to adjust baseline due to facility changes. A clear understanding of these things is required to perform ESPC contracts. It also fails to show an understanding of the importance of developing

a sound M&V plan and increases risk of unsuccessful performance to an unacceptable level. (page 43)

Id.

Concerning the subfactor (d)(1) requirement to provide an executive summary, the record reflects that the “executive summary” set forth in the body of ABM’s proposal was limited to a two-paragraph description of a recently completed ABM project at Wright State University (WSU), a state government entity in Dayton, Ohio. ABM provided the actual executive summary of the WSU project in a proposal appendix--however, as discussed below, ABM does not dispute that this proposal appendix exceeded the RFP’s page limit, and the appendix was not considered in the evaluation. Thus, ABM effectively acknowledges that its response to subfactor (d) did not include the actual executive summary of its WSU audit, discussion of a phase I audit, annual savings and simple payback information, a summary table of major energy conservation measures and associated savings, or discussion of baseline adjustments or facility changes. As a general matter, offerors must prepare their proposals within the format limitations set out in an agency’s solicitation, including any applicable page limits. ManTech Advanced Sys. Int’l, Inc., B-409596, B-409596.2, June 13, 2014, 2014 CPD ¶ 178 at 3. Offerors that exceed a solicitation’s established page limitations assume the risk that the agency will not consider the excess pages. Id.

Nonetheless, ABM asserts that the agency’s assessment was unreasonable and premised on unstated evaluation criteria, because the proposal instructions did not specifically require an offeror to discuss the above considerations. We disagree, and see no error in the agency’s assessment. As described above, the offerors’ proposals were to be evaluated for “the offeror’s understanding of the requirements, and the breadth and depth of the offeror’s experience in execution of the identified projects and energy conservation measures.” RFP at 94. In this case, ABM’s decision to include only minimal detail concerning the WSU audit in the body of the proposal, and include the actual executive summary in an appendix exceeding the RFP page limitations, caused ABM’s proposal to lack information to demonstrate ABM’s understanding of the agency’s requirements. It is an offeror’s responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation and allows a meaningful review by the procuring agency. Mike Kesler Enters., B-401633, Oct. 23, 2009, 2009 CPD ¶ 205 at 2-3.

More specifically, concerning the informational weaknesses highlighted by the agency under subfactor (d), two aspects of ABM’s response support the agency’s assessment. First, as described above, ABM does not dispute that the actual executive summary of its WSU project--also containing supporting information including the descriptions of the methodologies used to establish the energy baseline for the project, as well as documentation of actual savings--was not

included within the proposal page limitations set forth in the RFP. In this regard, the record shows that volume I of ABM's proposal--responsive to evaluation factor (1) and its subfactors--substantially exceeded the RFP's 50-page page limit for that volume. In particular, ABM failed to heed the RFP's instructions to provide an "Attachment 3" to proposal volume I consisting of project data sheets (one sheet per project), that would not be counted toward the page limit. Instead, ABM incorporated project data sheets into the body of its volume I response, and attempted to include an approximately 159-page appendix of detailed ESPC audit executive summaries. It is not disputed that the executive summary of the WSU project was contained within this appendix, and began on page 89 of volume I of ABM's proposal. Here, we see no error in the agency's exclusion of supporting information in ABM's proposal that was outside of the proposal page limit, or assessment of a weakness for a lack of supporting information provided within the page limitations for volume I of the proposal.

Second, the two-paragraph description of the WSU project that was provided within the page limits of ABM's proposal, although labeled as an "executive summary," lacked considerable information generally provided in the executive summary of an ESPC audit report.⁵ Given that the evaluated portion of ABM's response omitted this information, the agency reasonably assigned a weakness relating to ABM's apparent lack of understanding of the information typically presented in an ESPC executive summary. Our Office has repeatedly acknowledged that, in evaluating proposals, an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by, or related to, the stated evaluation criteria. Independence Constr., Inc., B-292052, May 19, 2003, 2003 CPD ¶ 105 at 4. In this case the agency's assessment of a weakness is not unreasonable, nor does it represent the imposition of unstated evaluation criteria.⁶

⁵ For example, as reflected in the relevant M&V guidelines and on the form provided at RFP attachment J-8, requirements for an ESPC M&V executive summary include a "Proposed Annual Savings Overview" for each energy conservation measure used. See AR, Tab H, DOE/FEMP M&V Guidelines: Measurement and Verification for Federal Energy Projects, Appendix D, M&V Plan and Reporting Outlines, at D-3; RFP, Section J, Attach. J-8, at 1. ABM's inclusion of detailed executive summaries in its proposal appendix suggests that ABM was aware of the general requirements for an ESPC audit executive summary, but did not include a full executive summary in the body of its proposal in an attempt to circumvent the proposal page limits set forth in the RFP.

⁶ ABM also disputes the agency's criticism, set forth in the agency's legal memorandum, of ABM's use of whole building utility bill comparison in the WSU project. ABM asserts that in a footnote supporting that criticism, the agency cites to an outdated version of the DOE/FEMP M&V Guidelines, which provided that "[u]tility bill comparison is a very simple and typically, an unreliable method . . . not recommended for most federal ESPC projects." Agency Report, Legal

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ABM next challenges the agency's assessment of a deficiency under evaluation factor 1, subfactor (e), ability to develop a measurement and verification plan. This deficiency stated that:

Proposal does not address what related method(s) will be used in determining measurement and verification plans based on the methodologies developed in the DOE/FEMP M&V Guidelines for Federal Energy Projects and International Performance Measurement and Verification Protocol (IPMVP). Proposal identifies potential issues but does not discuss how these issues are addressed to measure and verify energy savings as required in the RFP using the methodologies listed above. Using the "highly unlikely scenarios of act of God or an act of war" as two of their potential issues shows a fundamental failure to address typical scenarios which are encountered in ESPC work. This lack of understanding increases risk of unsuccessful performance to an unacceptable level to the government.
(pages 47-48)

AR, Tab D, SSEB Report, at 13-14.

As set forth above, under this subfactor, offerors were required to describe not more than five potential issues related to "determining measurement and verification (M&V) plans based on the methodologies developed in the DOE/FEMP M&V Guidelines for Federal Energy Projects." RFP at 94. The agency explains that the referenced guidelines outline various constraints, risks, and uncertainties, which it

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Memorandum, at 21. ABM explains that the most current version of the guidelines elaborates that although simple utility bill comparison is not recommended, techniques using regression models can take into account independent variables such as weather. Comments at 5. ABM states that its WSU project utilized regression models in its utility bill comparisons, a fact which was clear from its proposal. On our review of the record we conclude that ABM's arguments are misplaced. While the footnote in the agency's legal memorandum did relate to utility bill comparison and quote an outdated version of the guidelines, the actual contemporaneous weakness assessed against ABM's proposal was for failure to provide sufficient information concerning the methods, calculations, and measurements used to create baselines and establish energy savings--such as the specific type of regression models or software utilized in determining energy savings on the WSU project. As discussed above, we conclude that the contemporaneous weaknesses assessed against ABM's proposal under subfactor (d), were reasonable and consistent with the RFP's evaluation criteria.

expected offerors to discuss in their responses. AR, Contracting Officer's Statement, at 24.

ABM did not address the issues described in the guidelines, but instead discussed two other potential issues related to building occupancy--concerning the use of occupancy sensors and the potential for unexpected changes in occupancy--and two additional issues that it now acknowledges were "throwaway" issues--acts of God and acts of war. Comments at 10. ABM asserts that it should not have been assigned a deficiency because two of its examples of potential issues were responsive to the RFP, and that the agency's expectation that offeror's would discuss the concerns already set forth in the M&V guidelines was unreasonable and constituted unstated evaluation criteria.

We disagree, and see no error in the agency's assessment of a deficiency. As addressed above, offerors were to be evaluated for their understanding of the requirements of the RFP. In this case, ABM not only failed to discuss aspects of the M&V guidelines cited in the subfactor's requirements, but also failed to explain the impact on M&V of energy savings relating to the building occupancy issues it discussed, and chose to discuss two potential issues that were not relevant to typical ESPC projects. The agency's conclusion that ABM's incomplete response and discussion of irrelevant issues indicated a lack of understanding of the agency's requirements and supported the assessment of a deficiency is not unreasonable. See Heritage Reporting Corp., B-409331.2 et al., Mar. 26, 2014, 2014 CPD ¶ 112 at 6.

The protest is denied.

Susan A. Poling
General Counsel