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Decision

Matter of: Phillips and Jordan, Inc.

File: B-411551

Date: August 25, 2015

Darwin A. Hindman, III, Esq., and Joshua A. Mullen, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., for the protester.
Susan E. Symanski, Esq., Department of the Army, for the agency.
Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation and rejection of the protester's proposal as technically unacceptable is denied where the record reflects that the agency reasonably found that the protester's proposal took exception to the solicitation's requirements, and failed to address this defect during discussions.

DECISION

Phillips and Jordan, Inc. (P&J), of Knoxville, Tennessee, protests the elimination of its proposal from the competition under request for proposals (RFP) No. W912EP-14-R-0016, which was issued by the Department of the Army, Army Corps of Engineers, Jacksonville District, for the construction of the C-44 Reservoir/Stormwater Treatment Area Project, in Martin County, Florida. P&J argues that its proposal was improperly eliminated from the competition because the agency unreasonably determined that its proposal was unacceptable under two evaluation factors.

We deny the protest.

BACKGROUND

The Army issued the RFP on December 29, 2014, seeking the construction of an above-ground reservoir, discharge canal, and associated structures to capture water from the C-44 Basin in Martin County, Florida. The solicitation anticipates the issuance of a fixed-price contract, with a period of performance of 1,552 calendar days, plus 90 days for grass establishment, after the notice to proceed. RFP at 79.

The solicitation provides for award on a best value basis, considering the following four factors: (1) technical merit, (2) past performance, (3) small business participation, and (4) price. RFP at 19. The technical merit factor consists of two subfactors: (1) demonstrated experience, and (2) implementation plan and construction. Id. Both technical merit subfactors are further divided into subelements. The RFP states that, “[t]o receive consideration for award, a rating of no less than ‘Acceptable’ must be achieved for the technical factor (to include all the subfactors) and Small Business Participation,” and that “[a] rating of Unacceptable for any individual subfactor/subelement will result in an overall rating of Unacceptable for the entire Factor.” Id.

The Army received proposals by the initial closing date of February 26, 2015. Contracting Officer (CO) Statement at 4. After an initial review of proposals, the contracting officer established a competitive range of all offerors, including P&J. The agency then conducted discussions with offerors, and provided evaluation notices (ENs) which described issues identified by the agency regarding the offerors’ proposals. P&J’s EN stated that P&J’s proposal was found unacceptable under both of the technical merit subfactors, based on deficiencies, weaknesses, and significant weaknesses assessed under the subelements under these subfactors. AR, Tab 11, Revised Evaluation Notice (EN) (Apr. 2, 2015), at 1-6. As relevant here, the agency assessed a deficiency to the protester’s proposal under the implementation plan subelement of the second technical subfactor, finding that P&J improperly qualified its proposal based on the following language: “P&J states that P&J management reserves [the] right to integrate other subcontractors into [the] project.” Id. at 4. Additionally, the Army assessed several significant weaknesses to P&J’s proposal under the demonstrated experience subelement under the first technical subfactor, stating that “P&J does not clarify if the gated structures are through a reservoir embankment with a design head equal to or greater than 8 feet,” and “[e]xamples were missing descriptions for placement of concrete and whether or not cold joints were utilized.” AR, Tab 11, Revised EN Notice, at 3.

The Army received timely final proposal revisions (FPRs) on April 10. After evaluating FPRs, the contracting officer established a second competitive range of the most highly rated proposals, which did not include P&J’s proposal. AR, Tab 13, 2nd Competitive Range Determination Memo (May 5, 2015), at 7. On May 6, the Army notified P&J that its proposal had been determined technically unacceptable and outside the competitive range, and therefore would receive no further consideration for award. AR, Tab 4, Agency Letter (May 6, 2015), at 1.

P&J requested a pre-award debriefing, which it received on May 13. AR, Tab 10, Debriefing Slides at 1. This protest followed.

DISCUSSION

P&J challenges the Army's evaluation of its proposal as unacceptable under both of the technical merit subfactors: (1) demonstrated experience, and (2) implementation plan/construction schedule.¹ For the reasons discussed below, we conclude that the agency reasonably evaluated the protester's proposal as unacceptable under the second subfactor because P&J included language in its implementation plan which the Army found improperly qualified P&J's proposal. Because offerors were required to receive an acceptable rating for each subelement to be considered for award, we need not address the agency's other arguments, concerning the evaluation of the protester's proposal under the first subfactor, demonstrated experience.

In reviewing protests challenging an agency's evaluation of proposals, our Office does not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. We have long held that the evaluation of proposals is a matter within the discretion of the procuring agency; we will question the agency's evaluation only where the record shows that the evaluation does not have a reasonable basis or is inconsistent with the RFP. Hardiman Remediation Servs., Inc., B-402838, Aug. 16, 2010, 2010 CPD ¶ 195 at 3. An offeror risks having its proposal evaluated unfavorably where it fails to submit an adequately written proposal. Recon Optical, Inc., B-310436, B-310436.2, Dec. 27, 2007, 2008 CPD ¶ 10 at 6.

As discussed above, to receive consideration for award, offerors were required to receive a rating of no less than acceptable for the technical factor, to include all subfactors, and subelements. RFP at 19. Under the implementation plan subelement of the second subfactor, the solicitation required that an offeror describe its proposed implementation plan, including a description of related activities and items of work, to include coordination with major subcontractors. Id. With regard to subcontractors, the solicitation includes a non-substitution clause, which places limitations on the substitution of subcontractors during contract performance. RFP at 222 (Section 00800, paragraph 999.215-4001, Limitations on

¹ The protester also challenges the agency's assessment of a marginal rating under a subelement of subfactor 1 regarding demonstrated experience of successfully completing the construction of a zoned reservoir embankment that is designed to hold a minimum pool depth of 8 feet or greater.

Substitutions for Certain Positions and/or Subcontractors).² The solicitation also warned: “Caution: Proposals that are qualified may be considered unacceptable. Be Careful!” RFP, Specifications, Vol. I, at 41.

P&J argues that the Army’s evaluation of P&J’s implementation plan in P&J’s FPR as unacceptable was unreasonable because P&J modified its proposal after discussions to address the agency’s concerns. P&J’s initial proposal stated: “Phillips & Jordan’s management reserves the right to determine when to integrate other subcontractors into the project in order to meet the work requirements, based on qualified subcontractor availability, and the actual schedule of work.” AR, Tab 19A, P&J Initial Proposal, Factor 1, Subfactor 2, at 4. The Army assessed a deficiency to P&J’s proposal based on its conclusion that this statement improperly qualified P&J’s proposal, in light of the solicitation’s substitution of subcontractors clause, quoted above. Accordingly, the agency raised this issue with P&J during discussions. AR, Tab 11, Revised EN (Apr. 2, 2015), at 4.

Despite its receipt of an EN on this issue, P&J’s FPR implementation plan included the same language, quoted above. AR, Tab 12C, P&J Revised Proposal, Factor 1, Subfactor 2, at 4. In evaluating P&J’s FPR, the Army noted that, the RFP requires that “[s]ubstitution shall be in accordance with the substitution clause per Contract Specification Section 00800 (999.215-4001), Limitations on Substitutions for Certain Positions and/or Subcontractors,” and that “[p]roposals are not allowed to be qualified.” AR, Tab 15, Revised SSEB Report (Apr. 21, 2015), at 23. In addition, the agency noted that although P&J was informed of the deficiency during discussions, “[t]he specific language remained unchanged.” AR, Tab 15, Revised SSEB Report (Apr. 21, 2015), at 23. Accordingly, the Army assessed a deficiency

² Specifically, this provision stated:

The award decision for this contract was based, in part, on an evaluation of the personnel and/or subcontractors the Contractor included in its proposal for the positions and/or items of subcontracted work identified at the end of this paragraph. The Contractor agrees these personnel and/or subcontractors will be employed as described in its proposal and no substitutes will be employed without prior written approval of the Contracting Officer or Administrative Contracting Officer. The Contractor further agrees that any proposed substitutes shall meet or exceed the qualifications of the original personnel and/or subcontractors. If the Contractor’s proposal did not name a subcontractor for an identified item of work, the Contractor will not be allowed to subcontract that item of work without prior approval of the Contracting Officer or Administrative Contracting Officer.

RFP at 222.

to P&J's implementation plan, and rated its proposal unacceptable under this subelement and subfactor. Id. at 22-23.

The protester contends that the Army's evaluation was unreasonable because the agency failed to consider other information in P&J's FPR that stated P&J's intent to delete the qualifying language. Specifically, the protester points to a crosswalk of the revisions incorporated into its proposal, which stated that the "[q]ualifying language has been deleted from the implementation plan." AR, Tab 12B, P&J Crosswalk, at 2. The protester, relying on common law contract interpretation principles, asserts that the more specific language included in the crosswalk should be interpreted to revise P&J's FPR despite the fact that P&J failed to delete the qualifying language from its implementation plan. We disagree.

As discussed above, the solicitation here includes a non-substitution of subcontractors clause, and warned that qualified proposals could be considered unacceptable. RFP, Specifications, Vol. I, at 41. Despite this warning, and despite being informed during discussions of the deficiency relating to the qualifying language in its proposal, the record reflects that P&J failed to remove the qualifying language from its FPR. See AR, Tab 12C, P&J Revised Proposal, Factor 1, Subfactor 2, at 4. In the revised SSEB Report, the evaluators stated that, "[t]he Offeror was informed of the deficiency related to providing qualifying language in [its] proposal," but "[t]he specific language remained unchanged." AR, Tab 15, Revised SSEB Report, at 23.

As the contracting officer notes in response to the protest, while "P&J claims that the crosswalk in the revised proposal states that the Qualifying language had been deleted from the Implementation Plan[,] when verified, the statement remained in the body of the proposal." CO Statement at 10. The contracting officer also states that "[t]his statement was noteworthy and discussed prior to submission of the revised proposal and it is not the Government's responsibility to interpret or assume the offeror's meaning or intent." Id. Although the protester argues that it was unreasonable for the agency to discount the statement in P&J's crosswalk that the "[q]ualifying language has been deleted from the implementation plan," we think the Army reasonably concluded that these two conflicting statements created, at best, an ambiguity regarding the protester's implementation plan. See Potomac Elec. Corp., B-311060, Apr. 2, 2008, 2008 CPD ¶ 63 at 3 (proposal containing conflicting provisions rendered proposal ambiguous and thus, unacceptable).

Finally, while the protester asserts that the agency had an obligation to inquire about the conflicting statements in its FPR, it is well established that an agency need not reopen discussions to address a protester's failure to resolve an issue raised during discussions, or to address deficiencies first introduced by the offeror after discussions have closed. UNICCO Gov't Servs., Inc., B-409111 et al., Jan. 23, 2014, 2014 CPD ¶ 55 at 8; Eagle Creek Marina, B-405220, Sept. 16, 2011, 2011 CPD ¶ 193 at 4. As referenced above, it is an offeror's responsibility to submit an

adequately written proposal, and an offeror risks having its proposal evaluated unfavorably where it fails to do so. See Recon Optical, Inc., supra. Here, the agency assessed a deficiency to the protester's proposal based on qualifying language regarding the protester's implementation plan. Based on this record, we find nothing unreasonable regarding the agency's evaluation.

The protest is denied.

Susan A. Poling
General Counsel