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Decision

Matter of: Cape Environmental Management, Inc.

File: B-412046.4; B-412046.5

Date: May 9, 2016

Kevin P. Mullen, Esq., and Rachel K. Plymale, Esq., Morrison & Foerster LLP; and Carrie F. Apfel, Esq., Jenner & Block LLP, for the protester. William E. Franczek, Esq., and Patrick Genzler, Esq., Vandeventer Black LLP, for MEB General Contractors, Inc., an intervenor. Connie L. Baran, Esq., Department of the Army, Corps of Engineers, for the agency. Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's post-corrective action reevaluation of past performance is denied where the agency did not depart from the solicitation's stated evaluation scheme and the relevancy ratings are supported by the record and consistent with the solicitation.

DECISION

Cape Environmental Management, Inc. (Cape), of Norcross, Georgia, protests the award of a contract to MEB General Contractors, Inc. (MEB), of Savannah, Georgia, under request for proposals (RFP) No. W912HN-15-R-0003, issued by the Department of the Army, Corps of Engineers (Corps), for construction for replacement of hydrant fuel systems at Robins Air Force Base, Georgia. Cape challenges the evaluation of its and MEB's past performance.

We deny the protest in part and dismiss it in part.

BACKGROUND

The RFP, issued on March 12, 2015, under Federal Acquisition Regulation (FAR) part 15, contemplated the award of a fixed-price contract on a best-value basis,

considering the following evaluation factors: past performance, relevant specialized experience, small business participation plan, and price. RFP¹ at 2, 15. Relevant specialized experience was more important than past performance and the small business participation plan was less important than the other two factors. Id. at 15. The solicitation stated that all non-cost factors, when combined, were approximately equally important to price. Id.

The solicitation advised that one performance confidence assessment rating would be assigned for each offeror after evaluating the offeror's recent past performance, focusing on performance that is relevant to the contract requirements. Id. at 8. In this regard, the solicitation stated that "[a]spects of relevant projects include similarity of scope, type of work, complexity, contract type, and the degree of subcontracting or teaming proposed by the [o]fferor." Id. The solicitation further advised that projects would be evaluated using a list of "project characteristics"² that was "not intended to be a comprehensive list," and similar types of experience areas that are considered "especially relevant."³ Id. As relevant here, the

¹ The RFP was amended five times. All citations to the RFP are to the final version, as amended on July 13, 2015.

² The solicitation provided the following project characteristics:

Project will include constructing a pressurized Type III hydrant fuel system with 16 hydrant outlets, pumphouse modification to provide roughly 151 liter-per-second (2,400 gallon per minute) pumping capacity, fuel filter separators, upgraded electrical system and automatic controls, and emergency generator. It will contain hydrant loop piping system with leak detection, cathodic protection, and pigging system. Work includes site preparation and improvements, airfield pavements, drainage control, supporting utilities, and physical security measures. Demolish or decommission the existing hydrant system outlets, lateral control pits, piping and supporting infrastructure. Project includes remediation of fuel contaminated soil funded by other appropriations.

RFP at 9.

³ The areas of experience included:

Replacing Hydrant Fuel System, Purge and Abandon existing fuel lines, Installation/Removal of concrete/asphalt for airfields, utilities, Hydrant Loop Piping, Installation of hydrant pits, electrical system and automatic controls, fuel filter separators, pumphouse construction/renovation, high point vent assembly, low point drain pit assembly, and site improvements includes removal/replace of pavements concrete and asphalt, provide all support facilities (utilities,

(continued...)

solicitation stated that the agency would assign relevancy ratings⁴ to the projects submitted by the offerors “[u]sing the criteria described in paragraph 4.2.2 above.” Id. at 9. In this regard, the project characteristics (4.2.2.1) and “especially relevant” experience (4.2.2.2) were listed in subsections of paragraph 4.2.2. Id. at 8-9. The solicitation also advised that “[i]f no recent/relevant performance record is available, or the [o]fferor’s performance record is so sparse that no meaningful confidence assessment rating can be reasonably assigned, this factor will be assigned a rating of “Unknown Confidence (Neutral)[”]. Id. at 11.

The solicitation instructed offerors to demonstrate experience similar to the work described in the listed project characteristics and to “clearly demonstrate relevant experience on projects that are similar in function, size, scope and complexity to the project under this solicitation.” Id. at 9. Offerors were advised that “[f]ailure to include all the requested information may hinder the evaluation board’s ability to determine the relevance of the project and, consequently, lead to a lower confidence rating in this factor.” Id.

For the relevant specialized experience factor, the solicitation provided that the government would evaluate the projects that were considered in the evaluation of the past performance factor and were determined to be at least somewhat relevant. Id. at 12. The solicitation warned offerors that if the offeror could not demonstrate relevant experience, or had no relevant experience, the offer might be rated unacceptable,⁵ and that this would render the proposal ineligible for award. Id. at 12, 13.

(...continued)

and grounding) for Type III Fuel Systems or facilities similar to those noted above.

Id.

⁴ A relevancy rating table included in the solicitation provided definitions for each rating based on the level of similarity between a project submitted by an offeror and the “scope and magnitude of effort and complexities this solicitation requires.” Id. at 9-10. As relevant here, a relevant rating was defined as “[p]resent/past performance effort involved similar scope and magnitude of effort and complexities this solicitation requires”; somewhat relevant was defined as “[p]resent/past performance effort involved some of the scope and magnitude of effort and complexities this solicitation requires”; and not relevant was defined as “[p]resent/past performance effort involved little or none of the scope and magnitude of effort and complexities this solicitation requires.” Id.

⁵ Unacceptable was defined as “[p]roposal does not meet requirements and contains one or more deficiencies. Proposal is ineligible for award.” Id. at 13.

The agency received three timely proposals, including those submitted by Cape and MEB. A source selection evaluation board (SSEB) was established to evaluate the proposals. The SSEB members individually evaluated the proposals and then submitted a consensus report to the contracting officer, who served as the source selection authority (SSA). See Agency Report (AR), Tab 6, Source Selection Evaluation Report (SSER) at 2; Tab 7, Source Selection Decision (SSD) (Pre-Corrective Action) at 1. The results of the SSEB's evaluation for Cape and MEB were as follows:

	Cape	MEB
Past Performance	Satisfactory Confidence	Substantial Confidence
Relevant Specialized Experience	Acceptable	Good
Small Business Participation Plan	Good	Good
Price	\$14,904,786	\$15,971,700

AR, Tab 7, SSD (Pre-Corrective Action) at 2.

Cape and MEB each submitted four reference projects. For the past performance and relevant specialized experience factors, the SSEB utilized 20 project characteristics⁶ to determine the relevancy of each project. See generally AR, Tab 12, SSEB Chairman Affidavit; Tab 11, Evaluation Worksheets. As relevant here, the SSEB found that three of Cape's projects were relevant to the solicitation's scope of work and one project was not relevant. See AR, Tab 6, SSER at 8-10.

Using the SSEB report, the SSA performed a tradeoff analysis between the offerors' proposals and found that as between Cape and MEB, "MEB's superior technical ratings outweigh the 7.16% premium over Cape's lowest priced offer," and selected MEB for award. AR, Tab 7, SSD (Pre-Corrective Action) at 2-4. After being notified that the SSA selected MEB for award, Cape filed a protest and supplemental protest with our Office. After the agency reports and protester's comments were filed, the agency decided to take corrective action by reevaluating the offerors'

⁶ The project characteristics utilized by the SSEB were Type III hydrant loop piping; hydrant pits; pumphouse modifications to the pumping capacity; fuel filter separators; upgraded electrical system; upgraded automatic controls; emergency generator; leak detection system; cathodic protection; pigging system; high point vent assembly; low point drain pit assembly; utilities; site improvements (including removal of concrete and asphalt pavements); replacement of airfield concrete pavements; purge and abandon existing fuel lines; demolish fuel lines; demolish fuel control pits; demolish hydrant pits; and remediation of fuel contaminated soil. See generally AR, Tab 11, Evaluation Worksheets.

proposals and making a new selection decision based on the reevaluation. Based on the agency's corrective action, our Office dismissed Cape's protest as academic.

The SSEB subsequently reconvened to reevaluate the offerors' proposals under the past performance and relevant specialized experience factors. AR, Tab 16, Source Selection Reevaluation Report (SSRR) at 1. Before reevaluating proposals, the SSEB reviewed the scope, type of work, and complexity of the work to be performed in order to determine whether there was a more effective way to consider the relevance of projects offered for past performance and relevant specialized experience. Id. at 2. See also AR, Memorandum of Law (MOL) at 2-5. In this regard, the SSEB considered whether there were key elements of the pressurized hydrant system that would more usefully reflect relevance than the 20 individual characteristics that it had been applying. AR, Tab 16, SSRR at 2; AR, MOL at 5. As a result, the SSEB identified the following four key elements of a pressurized Type III hydrant fueling system: (1) a hydrant loop with constant-pressure system that includes hydrant pits; (2) a pumphouse with pumps, motors, fuel filter separators, and automatic controls; (3) airfield pavement as a result of the work required on a Type III hydrant fuel system; and (4) demolition of existing facilities and decommissioning of existing hydrant system pits, lateral control pits, piping, and supporting infrastructure.⁷ AR, Tab 16, SSRR at 2.

The SSEB considered the extent to which the inclusion of these key elements would affect the relevance rating for similar projects that proposals referenced to show past performance and relevant specialized experience. Id. The SSEB concluded that a project would be evaluated as very relevant if it contained all four key elements; relevant if it contained three of the four key elements; somewhat relevant if it contained two of the four key elements; or not relevant if it contained only one, or none, of the four key elements. Id. In this regard, the SSEB explained that "[b]ecause the four key elements are all important, a project that contained only one of any of the elements did not include enough work that was similar in scope or complexity to the requirements of this solicitation." Id. For the relevant specialized experience factor, the SSEB stated that strengths and weaknesses were determined by comparing the features of the submitted projects with the four key elements used under the past performance factor evaluation and considering the description of specialized experience under the factor. Id.

As a result, the SSEB assigned new past performance and relevant specialized experience ratings. The evaluation results of Cape and MEB are below:

⁷ The SSEB determined that the four key elements included the characteristics identified in the project characteristics and the similar types of experience areas described as "especially relevant" under the solicitation's past performance factor. See AR, Tab 16, SSRR at 2; RFP at 9.

	Cape	MEB
Past Performance	Unknown Confidence	Satisfactory Confidence
Relevant Specialized Experience	Unacceptable	Good
Small Business Participation Plan	Good	Good
Price	\$14,904,786	\$15,971,700

Id. at 6.

As relevant here, all four of Cape's projects were determined to be not relevant because they each met only one of the four key elements under the past performance factor, and as a result, the SSEB assigned an unknown confidence rating.⁸ See id. at 8-13. Further, because none of Cape's projects were determined to be at least somewhat relevant, the SSEB determined that Cape "did not demonstrate any relevant experience that could be evaluated for [the relevant specialized experience] factor," and assigned an unacceptable rating under that factor. This rendered Cape's proposal ineligible for award in accordance with the solicitation, notwithstanding its lowest price. See id. at 13; AR, Tab 17, SSD (Post-Corrective Action) at 8.

On January 13, 2016, Cape was notified of the agency's decision to affirm its selection of MEB. Protest at 7-8; Id., exh. 1, Unsuccessful Offeror Notice at 1. This protest followed.

DISCUSSION

Cape argues that the agency's reevaluation using the four key elements, without amending the solicitation and allowing offerors to revise their proposals, was inconsistent with the solicitation and procurement law; and argues that the reevaluation was also flawed and unequal. Although we do not specifically address all of Cape's arguments, we have fully considered all of them and find that they afford no basis on which to sustain the protest.

Reevaluation Methodology

Cape argues that the agency's use of key elements in the reevaluation departed from the solicitation's designated criteria for project relevancy. See Protest at 10-12. Specifically, the protester contends that the agency changed the solicitation's holistic review of relevancy based on a specific list of broad criteria to

⁸ Unknown confidence was defined as "[n]o recent/relevant performance record is available or the [o]fferor's performance record is so sparse that no meaningful confidence assessment rating can be reasonably assigned." RFP at 11.

an overly simplified formula using four “much narrower, hand-picked” key elements. Id. at 12. The protester further contends that the agency never amended the solicitation to institute its new evaluation scheme, nor did the agency otherwise inform the offerors and give them an opportunity to structure their proposals with the new focus on these key elements in mind. Id.

The agency acknowledges that as part of its reevaluation, the agency not only reevaluated the proposals but also took a different approach to evaluating the proposals. AR, MOL at 2. In this regard, the agency states that instead of “[m]aking a list of the project characteristics and the areas of experience that are especially relevant and counting how many [of these] were contained in a proposal,” it “looked at the submitted projects holistically” to determine how closely a project performed in the past was similar to this one.” Id. at 4-5. Specifically, the agency explained that it took into consideration the RFP’s stated project characteristics and the similar types of experience areas that were considered especially relevant, and focused on “what type of work was similar in scope and complexity.” In this context, it determined that the “four key elements encompassed all of the [project characteristics and similar types of experience areas]” listed in the solicitation. Id. The agency explains that its approach was consistent with the solicitation--which advised offerors that the agency’s evaluation would include consideration of projects that involved a similar scope and magnitude of effort and complexities as the solicitation required--and notes, further, that notwithstanding the list of project characteristics and areas of experience included in the solicitation, the solicitation advised offerors that they “should clearly demonstrate relevant experience on projects that are similar in function, size, scope and complexity to the project under this solicitation.” Id. at 5.

The mere fact that a reevaluation of proposals after corrective action varies from the original evaluation does not constitute evidence that the reevaluation was unreasonable. Rather, it is implicit that a reevaluation can result in different findings and conclusions. IAP World Servs., Inc., B-406339.2, Oct. 9, 2012, 2012 CPD ¶ 287 at 3-4; QinetiQ North Am., Inc., B-405163.2 et al., Jan. 25, 2012, 2012 CPD ¶ 53 at 13. The overriding concern for our Office’s review is not whether the evaluation results are consistent with the earlier evaluation results, but whether they reasonably reflect the relative merit of the offers. See Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 11.

We do not find the agency’s use of the four key elements in its reevaluation represents a departure from the stated evaluation scheme or is otherwise objectionable. Underlying Cape’s arguments is its belief that the agency should have credited each individual project characteristic or area of experience listed, regardless of the referenced project’s similarity to the requirement here. See Comments at 5 n.1 (“the Agency completely misunderstands Cape’s argument. Cape is not arguing that experience in one of the ‘key elements’ does not demonstrate experience in other ‘especially relevant’ areas, but rather that

experience in other ‘especially relevant’ areas is in and of itself relevant and should be credited as such.”). However, the issue before us is not whether the evaluation methodology preferred by the protester would have provided a better approach, but whether the agency’s methodology was reasonable and consistent with the terms of the solicitation. As the agency explains, it considers its holistic approach to be a more effective means of determining what type of prior work was similar to this project by focusing on the type of work that was similar in scope and complexity. See AR, MOL at 2-5. In this regard, the agency asserts that the use of the four key elements was consistent with the RFP because they encompassed the project characteristics and areas of especially relevant experience. Id. at 4-7.

We find the agency’s use of the four key elements unobjectionable. While the solicitation stated that it would use the project characteristics and areas of especially relevant experience in its evaluation, the solicitation did not establish these characteristics or areas as sub-criteria or sub-factors. See RFP at 8-9. Accordingly, we deny this basis of protest.

Evaluation of Proposals

Cape challenges the agency’s evaluation judgments with respect to the protester’s own and MEB’s referenced projects under the past performance factor. See Protest at 13-15. Cape also argues that the agency reevaluated the two offerors in an unequal manner. See Supp. Protest at 14.

The agency explains that using a different process than it did in its first evaluation, it reached different conclusions about whether the submitted projects were relevant as a result of a closer review of the information submitted by each offeror and whether the information demonstrated that a submitted project was similar to this procurement. AR, MOL at 7; AR, Supp. MOL at 1, 4. The agency states, further, that it evaluated each proposal individually, based on its particular contents and merits. AR, Supp. MOL at 4. In this regard, the agency explains that the information that Cape claims the agency “disregarded” was not the result of disparate treatment but was due to inconsistencies within Cape’s proposal. See id. at 1-3.

Our Office will examine an agency’s evaluation of an offeror’s past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror’s past performance is primarily a matter within the agency’s discretion. American Env’tl Servs., Inc., B-406952.2, B-406952.3, Oct. 11, 2012, 2013 CPD ¶ 90 at 5; AT&T Gov’t Solutions, Inc., B-406926 et al., Oct. 2, 2012, 2013 CPD ¶ 88 at 15. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror’s disagreement with an agency’s evaluation judgments, by itself, does not demonstrate that those judgments are unreasonable. American Env’tl Servs., Inc.,

supra; Short & Assocs., B-406799, B-406799.4, Aug. 31, 2012, 2012 CPD ¶ 251 at 4. Agencies may not engage in disparate treatment of offerors in the evaluation of past performance. Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 at 17. However, it is an offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. See, e.g., Int'l Med. Corps, B-403688, Dec. 6, 2010, 2010 CPD ¶ 292 at 7. An offeror runs the risk that a procuring agency will evaluate its proposal unfavorably where it fails to do so. Id.

On this record, we find the agency's evaluation unobjectionable. The solicitation required offerors to provide "sufficient information for the government to determine the relevancy of the project." See RFP at 7. Here, while Cape's proposal provided in its project descriptions project characteristics that were listed in the solicitation, Cape's proposal was inconsistent or did not provide additional information for the agency to determine the relevance of such work to this procurement.

For example, Cape contends that the agency should have found a project the protester performed involving an expansion of the hydrant system at [DELETED] somewhat relevant because it satisfied an additional key element that the agency failed to consider. Protest at 13. Specifically, Cape claims that because its proposal stated that this project was a type III hydrant fuel system with hydrant pits, it satisfied the "hydrant loop with hydrant pits" key element. Id. In its evaluation, the agency found that the project description provided by Cape did not indicate a looped hydrant fueling system with a return line. AR, Tab 16, SSRR at 10. In this regard, the agency explains that while Cape's proposal stated that the project involved a type III hydrant fuel system, i.e., a system configured in a loop with no dead ends, it also stated that the system included "two parallel 14-inch jet fuel-supply lines." AR, MOL at 7; see also AR, Tab 3, Cape Proposal at 54, 82.⁹ The agency explains that a system that includes parallel fuel supply lines cannot also be constructed as a loop with no dead ends. AR, MOL at 7. Given the inconsistency in Cape's proposal with regard to the description of the piping configuration, we find the agency's conclusion to be reasonable.

Similarly, Cape argues that the agency should have credited it for having met the airfield paving key element on two additional projects because the proposals stated

⁹ In its comments, Cape submitted a declaration claiming that the "piping described in Cape's project description – the parallel piping – did not indicate that this was not a looped system. Rather, the parallel piping described referred to both the supply and return piping required to create the 'loop.'" Comments, Declaration of M. Cooper at ¶ 7. However, there is nothing in Cape's proposal that contains this explanation. See AR, Tab 3, Cape Proposal at 54, 82.

that Cape performed “airfield paving” on these projects.¹⁰ Protest at 13-14. For both projects, the agency states that it “could not determine whether there was airfield paving and the extent of it for the submitted project and whether it was similar to the requirements of the solicited project” based on the information in Cape’s proposal. AR, Tab 16, SSRR at 10, 11. In response to the protest, the agency acknowledges that Cape’s proposal referenced airfield paving, but there was no information in the proposal to indicate that the airfield paving that was included in the project was in a location where airplanes would travel across it, since both projects involved tank farms--a bulk storage facility not used for direct aircraft fueling and not typically located near a terminal--or that the airfield paving was similar to that required by this procurement, i.e., airfield pavement installed for aircraft to travel on in order to refuel. See AR, MOL at 8; AR, Supp. MOL at 2; Agency Response to GAO Request for Information at 3-4.

Here, the record shows that other than one reference to “airfield paving,” nothing in Cape’s proposal explained how the airfield paving on these projects was similar to the requirement here. See AR, Tab 3, Cape Proposal at 59, 66, 83, 84. For example, the protester refers to a project in its proposal identified as “the [DELETED] project” that Cape claims satisfied the airfield paving key element. As support for this contention, the protester argues that its proposal stated that this project included airfield paving work at an international airport; “requir[ed] very close coordination and scheduling with the airport authority for access;” required Cape to ensure that its activities did not impact airport operations; and “required special badging/access . . . and active [Foreign Object Debris] management controls to ensure that construction debris did not impact aircraft on active runways and taxiways.” See id. at 59, 83; Supp. Comments at 3-4; Protester’s Response to GAO’s Request for Information at 1-2. However, as explained by the agency, the referenced project involved a different type of hydrant fuel system at a bulk storage facility, which functions to receive fuel for storage for use at another time, and issues that fuel when needed--not for direct aircraft fueling, which is what this procurement requires. Agency Response to GAO Request for Information at 3-4. On this record, we find the agency’s evaluation unobjectionable.

With respect to Cape’s claim of disparate treatment, the protester has not shown that the agency treated the offerors unequally. In this regard, Cape contends that the agency took a skeptical view of the contents of its proposal while making every effort to credit MEB’s prior projects. Supp. Protest at 14. The record shows that the agency reached different conclusions about the offerors’ proposals based on the different information provided by the offerors.

¹⁰ These projects are the Tank Farm and Hydrant Fueling, [DELETED]; and the Tank Fuel Farm Facility, [DELETED] projects. Id. at 59, 66, 83, 84.

For example, Cape claims that the agency failed to give Cape credit for having experience with pumphouses even though its proposal described installation of components of a pumphouse--while giving credit to MEB for simply mentioning "pump stations" without any more detail. Id. In response, the agency states that the installation of the components of a pumphouse were not necessarily sufficient to encompass or be equal to the work contemplated under this procurement--i.e., constructing, renovating, or modifying a pumphouse. AR, MOL at 8. In contrast, not only did MEB state it constructed "pump stations" similar to those contemplated for this procurement, but its proposal specifically stated that it constructed a "Fuel Oil Reclaimed (FOR) pumphouse" and two "fuel pumphouses," which allowed the agency to confirm the nature of the work performed by MEB. AR, Supp. MOL at 2. See also AR, Tab 5, MEB Proposal at 19, 35.

Similarly, Cape contends that the agency treated the offerors unequally when it credited one of MEB's projects, which was described as a type IV hydrant fueling system, for being a type III hydrant fueling system, yet refused to find any similarities between Cape's project that included a type I hydrant system and the type III hydrant system requirement. See Supp. Protest at 14. See also AR, Tab 16, SSRR at 21; AR, Tab 5, MEB Proposal at 30; AR, MOL at 10. In response to the protest, the agency explains that a type IV hydrant system is a type III system that allows fueling of an airplane while the engine is running; whereas a type I system is a completely different system because it is not a looped fueling system. AR, Supp. MOL at 3. As a result, we do not find that the record shows that the agency treated the offerors disparately.

With respect to Cape's remaining challenges to the evaluation of MEB's proposal, we find the protester is not an interested party. Under our Bid Protest Regulations, only interested parties may protest procurement actions by Federal agencies such as the ones undertaken here by the Corps. 4 C.F.R. § 21.1(a). That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party where it could not be considered for an award if its protest were sustained. JSF Sys., LLC, B-410217, Oct. 30, 2014, 2014 CPD ¶ 328 at 4; Yoosung T&S, Ltd., B-291407, Nov. 15, 2002, 2002 CPD ¶ 204 at 3. Given our conclusions above, Cape remains ineligible for award, and therefore lacks the requisite legal interest to challenge the evaluation of MEB's proposal. Accordingly, this basis of Cape's protest is dismissed.

This protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel