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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: M.A. Mortenson Company

File: B-413714

Date: December 9, 2016

Peter J. Eyre, Esq., Robert J. Sneckenberg, Esq., and Charles Baek, Esq., Crowell & Moring LLP, for the protester.

Shelly L. Ewald, Esq., Brent N. Mackay, Esq., and Eric M. Liberman, Esq., Watt, Tieder, Hoffar & Fitzgerald, LLP, for GRAM JV, the intervenor.

Steven W. Feldman, Esq., Department of the Army, Corps of Engineers, for the agency.

Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the protester's technical proposal is denied where the record demonstrates that the evaluation was reasonable and consistent with the stated evaluation criteria.

2. Protest challenging agency's conduct of discussions is denied where the record provides no basis on which to conclude that discussions were not meaningful.

DECISION

M.A. Mortenson Company, of Minneapolis, Minnesota, protests the issuance of a task order to GRAM JV--a joint venture of John C. Grimberg, Co., of Rockville, Maryland, and AMATEA, LLC, of Leesburg, Virginia--under request for proposals (RFP) No. W912DY-15-D-00XX, issued by the Department of the Army, Corps of Engineers, for the repair and renovation of building 247 at Fort Belvoir, Virginia. The protester asserts that the agency unreasonably evaluated Mortenson's proposal and that discussions were not meaningful.

We deny the protest.

BACKGROUND

The RFP sought proposals for the issuance of a fixed-price task order for the renovation of an occupied building to the offeror whose proposal represents the best value to the government, considering the following four evaluation factors: technical/management approach (including the technical approach, soundness of approach, schedule (execution) management, and management area elements); past performance; price and price related factors; and small business utilization.¹ RFP at 3. As relevant to this protest, award would not be made to an offeror whose proposal contains a material deviation from the RFP requirements. Id. at 5.

Under the technical/management approach factor, offerors were to demonstrate an understanding of the requirements and goals of the Design Requirements Document (DRD), which was an attachment to the solicitation. AR, Encl. 3, Facilities Repair and Renovation (FRR) Section 863 Proposal Format, at 1. The requirements contained in the DRD were “minimums”; the agency advised offerors that “[i]nnovative, creative, and life-cycle cost-effective solutions which meet or exceed these requirements are encouraged.”² AR, Encl. 4, DRD, at 8. According to the DRD, the building would remain occupied while undergoing renovation, and the agency required that offerors’ work plans include “phasing” the work and rotating groups of personnel through an available “swing space.”³ Id. at 12 (“Phasing will be required to implement building-wide repairs in this project”). Specifically, the DRD stated:

The implementation of Building-Wide Repairs (Section 3.0) requires the project to be accomplished in phases. The facility must remain operational for the existing tenants during the repair/alteration phase.

¹ The RFP anticipated the issuance of a task order pursuant to a multiple-award task order contract (MATOC) to provide repair and renewal services for Corps facilities. Agency Report (AR), Encl. 2, Base Contract, at 3. The Corps refers to the MATOC as the U.S. Army Engineering Support Center, Facilities Repair and Renewal Program, Multiple-Award Task Order Contract. The base contract is a fixed-price design-build construction contract, with time and materials elements. The MATOC has a 24-month base period and three 12-month option periods. Id. Both the protester and the awardee were awarded the MATOC and were eligible to compete in this task order competition. RFP at 1.

² For example, with respect to Leadership in Energy and Environmental Design (LEED) registration, the contractor was required to obtain, at a minimum, LEED Silver Level. AR, Encl. 4, DRD, at 13.

³ Swing space allows for the transition of employees into vacant spaces while repairs and renovations are in progress. AR, Encl. 5, Final Version of Statement of Work (SOW), at 19.

Tenants shall be relocated within Building 247 as needed to accommodate the repair/alteration schedule. Level Three and a portion of the Level One are currently vacant and will be utilized during the swing space phase.

Id. at 42. One of several specific tasks identified in the scope of work was for the contractor to “[f]acilitate temporary relocations of [Army Inspector General School] and [Army Force Management School] staff and faculty, and classroom areas into swing space.” Id. at 93. In addition, the solicitation required that proposals include resumes detailing the background and experience of the following key personnel: project manager, contract administrator, quality control manager, design manager, and safety manager. AR, Encl. 3, FRR Section 863 Proposal Format, at 2. Offerors were advised that proposals would be evaluated on whether “the offeror’s plan demonstrate[s] that appropriate personnel and equipment will be positioned efficiently to carry out the requirements.” Id. at 1.

Both the protester and the awardee submitted proposals. As discussed in detail below, after discussions, the protester’s proposal was evaluated as containing two significant weaknesses under the technical/management approach factor; the proposed personnel lacked experience renovating occupied facilities, and the protester failed to mitigate issues arising from its decision to leave the workforce in place, rather than utilize the swing space to relocate personnel. AR, Encl. 11, Consensus Proposal Evaluation Worksheet, at 4-5. The agency concluded that these weaknesses raised Mortenson’s level of risk to an unacceptable level, and assigned Mortenson a deficiency. As a result, Mortenson’s proposal was rated unacceptable under the technical/management approach factor and was ineligible for award. AR, Encl. 12, Source Selection Decision Document (SSDD), at 8-9, citing RFP at 5 (noting that a proposal that contains a material deviation from the RFP requirements is ineligible for award). In contrast, GRAM JV’s proposal was evaluated as acceptable under the technical/management approach. Id. at 3. GRAM JV’s and Mortenson’s proposals both received a substantial confidence rating for past performance, were viewed as offering fair and reasonable prices, and were given a rating of pass for small business utilization. Id. GRAM JV’s total proposed price of \$26,205,000 was higher than Mortenson’s proposed price of \$21,074,000. Id. at 9. Award was made to GRAM JV and this protest followed.⁴

⁴ As explained above, this protest concerns a task order competition under a multiple-award contract awarded by the Army’s Corps of Engineers. As the estimated value of this proposed task order exceeds \$10 million, this protest is within our jurisdiction. 10 U.S.C. § 2304c(e)(1)(B).

DISCUSSION

Mortenson challenges the agency's technical evaluation and the conduct of discussions. The protester argues that the agency unreasonably assessed two significant weaknesses in Mortenson's proposal, which resulted in an evaluation rating of unacceptable under the technical/management approach factor. The protester also argues that the agency's discussions were inadequate or misleading because the Corps did not raise specific concerns relating to key personnel in occupied spaces.⁵ Protest at 14-18; Comments at 10-13. The agency argues that its evaluation was reasonable and that its discussions were meaningful. AR at 48. We address each of these allegations below, and find no basis upon which to sustain the protest.

Technical Evaluation

Mortenson challenges the assessment of two significant weaknesses in its proposal that, when combined, rendered the protester's proposal ineligible for award. The first significant weakness Mortenson challenges is the agency's conclusion that Mortenson's key personnel, especially its contract administrator, generally showed experience with constrained sites but showed little or no experience renovating occupied facilities. The protester argues that the solicitation did not impose specific requirements for most of the key personnel, let alone require experience with occupied facilities. Mortenson also argues that the agency narrowly defined work in occupied facilities, but that, regardless, its proposal did demonstrate that proposed personnel had such experience. Comments at 8; see also Protest at 13. The second significant weakness the protester challenges is the agency's concerns with the protester's proposed method of renovation. Mortenson contends that these concerns also result from the application of unstated evaluation criteria. Comments at 5-7. The agency asserts that its technical evaluation was reasonable and consistent with the stated evaluation criteria. AR at 47-66.

The task order competition here was conducted pursuant to Federal Acquisition Regulation (FAR) subpart 16.5. The evaluation of proposals in a task order competition, including the determination of the relative merits of proposals, is primarily a matter within the contracting agency's discretion, because the agency is responsible for defining its needs and the best method of accommodating them. URS Fed. Servs., Inc., B-413333, Oct. 11, 2016, 2016 CPD ¶ __ at 6. Our Office will review evaluation challenges to task order procurements to ensure that the competition was conducted in accordance with the solicitation and applicable procurement laws and regulations. Id. A protester's disagreement with the

⁵ The protester also argued that it was unreasonable for the agency to mechanically convert the two significant weaknesses into a deficiency, Protest at 19, but withdrew the allegation. Comments at 13 n.12.

agency's judgment, without more, is not sufficient to establish that an agency acted unreasonably. Id. Moreover, as a general matter, when evaluating proposals in a task order competition, an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by the stated evaluation criteria. Id. at 8.

Key Personnel

As noted above, Mortenson challenges the assessment of two significant weaknesses in its technical proposal that, when combined into a deficiency, rendered the protester's proposal ineligible for award. The first significant weakness was that the protester's proposal failed to demonstrate that its proposed personnel, including its contract administrator, had sufficient experience with the renovation of occupied facilities. The protester asserts that the agency failed to make known to offerors, when they prepared their proposals, that personnel would be evaluated on their experience renovating occupied facilities. Comments at 8.

We see no merit to the protester's claim that the agency did not sufficiently highlight the "specific criteria" that proposed personnel have experience with the renovation of occupied facilities. As a result, we disagree with the protester's contention that the agency employed an unstated evaluation criterion in its evaluation. One critical facet of the performance required here was that the building undergoing renovation would remain occupied. See AR, Encl. 4, DRD, at 8, 42. As noted above, the agency advised offerors that proposals should contain resumes of the offered personnel and that the proposals should also "demonstrate that appropriate personnel and equipment will be positioned efficiently to carry out the requirement." AR, Encl. 3, FRR Section 863 Proposal Format, at 1. In this case, the degree to which proposed personnel, including the contract administrator, demonstrated experience with the renovation of facilities that remained occupied was not a "specific" criterion. It was, however, logically encompassed by the solicitation because it broadly impacted an offerors' ability to perform the requirement. Therefore, the agency reasonably evaluated the degree to which the protester's proposed personnel demonstrated such experience.

The protester also asserts that the requirement was "narrowly defined" by the agency in its final evaluation, and that the agency did not provide a timely distinction between "occupied facilities" and "constrained sites." Comments at 8, 10-11. The agency explains that work in constrained sites, as described in the resumes provided in the protester's proposal, poses fewer logistical challenges than work in a facility that remains occupied during reconstruction. AR at 53; see also AR, Encl. 12, SSDD, at 8 (working in an occupied facility is more challenging "because in a constrained site no difficulties arise with agency personnel working inside the

building”).⁶ The agency’s failure to make that explicit in the solicitation provides no basis on which to sustain the protest.

Mortenson also argues that, nonetheless, its proposal did demonstrate that the proposed key personnel, including the contract administrator, had experience with occupied facilities. Protest at 14-15; Comments at 8, 12-13. The agency asserts that it considered the content of the resumes and reasonably concluded that several key personnel, including the proposed contract administrator, had little or no experience renovating occupied facilities. AR at 52-53; AR, Encl. 12, SSDD, at 8; see AR, Encl. 10, Mortenson Technical Proposal.

The agency’s evaluation of Mortenson’s technical proposal stated:

[T]he offeror’s contract manager is listed as a construction executive on all of his projects.⁷ There is little description of his duties in these projects and it is difficult to know if he has any contract administration experience. His experience appears to be more like a company executive than a day-to-day administrator.

AR, Tab 11, Consensus Proposal Evaluation Worksheet at 4. Thus, the agency concluded that the resume provided indicates extensive experience as a “construction executive,” not a contract administrator who performs day-to-day contract duties. Id.; Encl. 12, SSDD, at 8. Specifically, the job title for four out of the five projects on the resume is construction executive. See id.; AR, Encl. 10, Mortenson Technical Proposal, Revised Contract Administrator Resume. Further, none of those four projects showed that work performed was for renovation of occupied facilities. AR at 53. One project, for which the proposed contract administrator was the project manager, involved the renovation of approximately 40,000 square feet of surgical suites and laboratories in various locations in a hospital, which remained in operation throughout. AR, Encl. 10, Mortenson Technical Proposal, Revised Contract Administrator Resume. However, because

⁶ The agency explains that working in constrained sites is not the same as or even similar to working in an occupied facility. AR at 53. With a constrained site, “the contractor must ensure that access to and from the site is closely monitored for security and logistical efficiency while the contractor is doing renovations.” Id. The agency asserts that “relocating communication lines, power, water and so forth from one site to another. . . is not the same as working inside an occupied facility such as Building 247.” Id.

⁷ In fact, on one of four projects, added after discussions, the proposed contract administrator’s job title is project manager. AR, Encl. 10, Mortenson Technical Proposal. He is also “[c]urrently working as the construction executive” on two projects. Id.

there was little description of this person's duties in the projects, the agency could not conclude that the work was similar in complexity to that of the solicitation. AR, Encl. 11, Consensus Proposal Evaluation Worksheet, at 4. Based on the resume provided, the agency reasonably concluded that the proposed contract administrator had little or no actual contract administration experience, and no meaningful experience in the renovation of occupied facilities.

With respect to the other key personnel, the protester disagrees with the agency's evaluation, and argues generally that the proposal highlighted a variety of work in occupied facilities. Comments at 12. The protester provides examples of this experience, but the examples Mortenson cites are not comparable to the current project. Protest at 14; see also AR at 52-54 (protester's key personnel work on the following projects: a renovation where the staff was relocated offsite, not rotated through swing space in the building undergoing renovation; window restoration; new construction projects; and the renovation of surgical suites and laboratories, discussed above). On this record, we have no basis on which to object to the agency's evaluation of the protester's proposal as containing a significant weakness under the technical/management approach factor, where the proposal failed to demonstrate that the proposed personnel have experience renovating occupied structures or that the proposed contract administrator has experience in that capacity.

Workforce Disruption

The protester also challenges the agency's assessment of another significant weakness in Mortenson's proposal under the technical/management approach factor, the result of several concerns with the protester's proposed method of renovation. As discussed above, the DRD stated that offerors would need to relocate agency personnel, on a rotating basis, from space that was under reconstruction to swing space and that level three and a portion of level one of the building could be utilized for such purposes. AR, Encl. 4, DRD, at 42. Such phasing would permit the renovation of space that was temporarily unoccupied. See id.

Instead, Mortenson proposed renovating the facility without the use of the swing space, with agency personnel remaining in their existing locations. AR, Encl. 10, Mortenson Technical Proposal, at 3 (noting that the protester's proposed plan eliminates the use of the proposed swing space). The agency identified the following concerns with the protester's approach: the proposal failed to sufficiently mitigate the noise from air conditioning units to be placed outside the building or to manage air distribution and "environmental conditions"; the proposed remediation of asbestos while in the same room as the tenants would cause tenant stress; night work could cause security concerns without being any less disruptive to the workforce; the proposed work plan would introduce multiple and recurring inefficiencies and unwarranted inconveniences to the agency workforce; and

employee morale would be negatively impacted from working in a space undergoing major renovation over an extended period of time. AR, Encl. 11, Consensus Proposal Evaluation Worksheet, at 5; AR, Encl. 12, SSDD, at 8.

The protester disagrees, alleging that some of these concerns result from the application of unstated evaluation criteria. See Comments at 5-7. As noted above, when 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. Open Sys. Sci. of Virginia, Inc., supra. Here, the protester proposed an approach that was not envisioned by the RFP, namely, Mortenson's proposal eliminated the use of the swing space and kept the workforce in place. The DRD set forth the minimum performance requirements, one of which was that offerors' plans include "phasing" the work and rotating groups of personnel through an available "swing space," because the "[t]enants shall be relocated within Building 247 as needed to accommodate the repair/alteration schedule." AR, Encl. 4, DRD, at 8, 12, 42.

Moreover, the solicitation explained that the buildings would be occupied during all phases of the contract and the DRD contained several sections on locating units in the building to allow the facility to remain operational and therefore avoid disruption. AR, Encl. 5, Final Version of SOW, at 5; AR, Encl. 4, DRD, at 42-48. The concerns identified in the evaluation are directly related to the agency's desire to minimize the disruption to the workforce caused by the renovation; the noise and adequacy of the air conditioning, the proposed remediation of asbestos without relocating the workforce, the disruption caused by having one's workspace renovated at night, and the general stress of working in a space undergoing major renovation. For these reasons, we find reasonable the agency's determination that Mortenson's proposal contained two significant weaknesses, which combined to create a deficiency.

Discussions

The protester also challenges the agency's conduct of discussions, asserting that the agency's failure to define the term "occupied facility," as opposed to "constrained sites," rendered discussions not meaningful. Protest at 14; Comments at 10-11.

The regulations concerning discussions under FAR part 15, which pertain to negotiated procurements, do not, as a general rule, govern task and delivery order competitions conducted under FAR part 16, such as the procurement for the task order here. P3I, Inc.; Quantech Servs., Inc., B-405563.4 et al., Aug. 6, 2015, 2015 CPD ¶ 333 at 13. In this regard, FAR § 16.505 does not establish specific requirements for discussions in a task order competition; nonetheless, when exchanges with the agency occur in task order competitions, they must be fair and not misleading. Id. In our decisions discussing an agency's obligations in

conducting discussions under FAR part 15, we have held that an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns, or misinform the offeror concerning a problem with its proposal or about the government's requirements. Id. Further, in the context of both FAR part 15 and 16 procurements, we have held that agencies are not required to "spoon-feed" an offeror during discussions; agencies need only lead offerors into the areas of their proposals that require amplification or revision. Clark/Caddell Joint Venture, B-402055, Jan. 7, 2010, 2010 CPD ¶ 21 at 7. Indeed, doing so could deny the agency of the opportunity to assess whether the offeror has a clear understanding of the requirements. See, e.g., CEdge Software Consultants, LLC, B-409380, Apr. 1, 2014, 2014 CPD ¶ 107 at 6 (noting that this is particularly true where one aspect of the evaluation is to test the offeror's technical understanding).

Here, during discussions, the agency informed the protester that its key personnel showed little or no experience "with working in an occupied facilit[y]." AR, Encl. 9, Mortenson Discussion Letter, Aug. 3, 2016, at 2. An agency may reasonably assume that an experienced renovation contractor understands the difference between an occupied facility and a constrained site; any requirement that the agency define those terms during discussions would be "spoon feeding." Moreover, in response to the discussion questions, the protester replaced its originally proposed project manager and provided supplemental experience information for its key personnel, with an emphasis on "occupied facilities." AR, Encl. 9, Mortenson Technical Proposal, at 1. In addition, in response to a different discussion question, the protester discussed night work "in occupied spaces" and the plan for renovation while the occupants were still in the building, thereby showing its understanding of occupied facilities. Id. at 3.

Given the revisions that the protester made to its proposal, it seems clear that Mortenson understood the distinction between "occupied facilities" and "constrained sites," but the resumes provided did not demonstrate experience renovating occupied facilities. Further, the protester has not identified more relevant performance that would have been included on its key personnel resumes had the agency defined the term "occupied facility," and we thus have no basis on which to conclude that the protester was prejudiced by the agency's failure to define the term. Lockheed Martin Corp., B-411365.2, Aug. 26, 2015, 2015 CPD ¶ 294 at 14 (noting that competitive prejudice is an essential element of a viable protest; and where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest).

The protest is denied.

Susan A. Poling
General Counsel