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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Trade Eastern, Inc.

File: B-411857

Date: November 9, 2015

Douglas F. Trumbower, for the protester.

Richard L. Carr Jr., Esq., Dunlevey, Mahan & Furry, for Butt Construction Company, Inc., an intervenor.

Jennifer M. Payton, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the exclusion of the protester's proposal from phase I of a two-phase design-build competition is denied where the agency reasonably found that the protester was not among the most highly-qualified offerors, and therefore did not qualify to proceed to the phase II competition.

DECISION

Trade Eastern, Inc., of Wilkes-Barre, Pennsylvania, a small business, protests the exclusion of its proposal under phase I of a two-step competition under request for proposals (RFP) No. W912QR-15-R-0026, which was issued by the Department of the Army, Army Corps of Engineers, for the renovation and repair of the Ashley, Pennsylvania Army Reserve Center and organizational maintenance structure.

We deny the protest.¹

¹ Our Office did not issue a protective order in connection with this protest because Trade Eastern elected not to retain counsel eligible for admission under a protective order. A full version of the agency report was provided to our Office, while a redacted version of the report was furnished to the parties. Consequently, our discussion regarding the agency's evaluation of offerors' proposals is general in nature because information in those evaluations may be proprietary to the offerors. We have reviewed the entire unredacted record in camera.

BACKGROUND

The solicitation anticipates the award of a fixed-price design-build contract for the renovation and repair of the 42,000 square foot Luzerne County Army Reserve Center and 4,300 square foot organizational maintenance shop. RFP at 6. Proposals were to be evaluated in two phases, and only those offerors whose proposals were found acceptable under phase I would be eligible to compete in phase II. The solicitation further provided that up to a maximum of five of the most highly-qualified phase I offerors would be selected to participate in phase II. RFP at 6. Under phase I, proposals were to be evaluated in three areas: past performance, technical/management plan, and pro forma information. Id. Price was not to be submitted in the phase I proposals. Id. at 8. Under phase II, proposals were to be evaluated under the following areas: technical, management plan, small business participation plan, price, and pro forma information. Id. at 23. The RFP contemplates award on a “best overall value” basis. Id. at 21. The agency stated that the estimated construction cost was between \$10,000,000 and \$25,000,000. Contracting Officer Statement at 1.

Regarding past performance, the offerors were to provide descriptions of up to three design/build projects that are “similar to this project in size and scope,” and that were completed or substantially completed within the last 7 years. RFP at 11. The solicitation provided the following regarding the “similar . . . in size and scope” requirement:

Projects considered similar in size would be a minimum of 25,000 square feet. Projects considered similar in scope to this project include the new construction or renovation of National Guard Armories, Army Reserve Centers, Armed Forces Training Centers, office complexes, and educational facilities.

Id. at 11.

The solicitation provided that the agency would evaluate the relevancy and recency of each past performance project identified in an offeror’s proposal and assign it one of the following relevancy ratings: very relevant, relevant, somewhat relevant, or not relevant. Id. at 9, 12. The agency would then assign a performance confidence rating to each offeror based on the degree of successful performance for all of the recent and relevant projects identified in the offeror’s proposal. Offerors were to receive one of the following performance confidence assessment ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral). Id. at 9. Of relevance to this protest, unknown confidence (neutral) is defined as:

No recent/relevant performance record is available or the offeror's performance record is so sparse that no meaningful confidence assessment rating can be reasonably assigned.

Id.

The technical/management plan factor required, among other things, a description of the role and interaction of the design team with the contracting team during construction. Id. at 12. The solicitation provided that this description was to include, at a minimum, several items, including a contract closeout plan. Id. The solicitation stated that there was a 6-page limit for the management plan. Id. Offerors were reminded to include their best technical and capability information and not to assume that they would have an opportunity to engage in discussions or submit a revised offer. Id. at 8.

Seven offerors submitted proposals by the closing date. The agency assigned Trade Eastern an overall past performance rating of unknown confidence, and an acceptable rating under the technical/management plan evaluation factor. Agency Report (AR), Tab 4, Determination of Selection of Offerors to Participate in Phase II, at 2. The agency did not conduct discussions with offerors. The agency found five of the phase I proposals to be the most highly-rated, and selected those proposals to proceed to phase II. Id. at 1; Contracting Officer Statement at 4. Trade Eastern's proposal was one of the two not selected to proceed to phase II, based on its ratings under the past performance and technical/management plan factors. Id. After receiving notice of its removal from the remainder of the competition, Trade Eastern filed this protest.

DISCUSSION

Trade Eastern raises three primary arguments. First, the protester challenges the Corp's evaluation of its past performance as meriting a rating of unknown confidence. Second, the protester challenges the evaluation of its proposal under the technical/management plan evaluation factor. Third, the protester argues that the agency unreasonably eliminated its proposal from the phase I competition without considering price. For the reasons discussed below, we find no basis to sustain the protest.

In reviewing protests relating to an agency's evaluation of proposals, we will not independently reevaluate proposals; rather, we will review the record to ensure that the agency's evaluation was consistent with the terms of the solicitation and applicable statutes and regulations. Engineered Elec. Co. d/b/a/ DRS Vermont, B-295126.5, B-295126.6, Dec. 7, 2007, 2008 CPD ¶ 4 at 3-4. A protester's mere disagreement with an agency's evaluation, without more, does not establish that the agency acted unreasonably. Government Telecomms., Inc., B-299542.2, June 21, 2007, 2007 CPD ¶ 136 at 4.

Past Performance

Trade Eastern contends that the Corp's evaluation of its past performance was flawed. Specifically, Trade Eastern contests the "not relevant" rating that the agency assigned to each of its past performance projects, and the assignment of an overall past performance rating of unknown confidence. Comments at 2. We find no merit to this argument.

Trade Eastern submitted three past performance projects for review. The agency found one of the three projects to be not similar in size because Trade Eastern's proposal did not specify a square footage total for this project. AR, Tab 3, Summary Selection Evaluation Report, at 17. In addition, the agency found that none of three projects were similar in scope to the instant project because the agency concluded that most of the work in these projects did not include construction of training areas, offices, or administrative areas. Id. at 17-18.

In large part, the protester argues that the Corps should have concluded that the protester's general reputation in the construction business demonstrated the quality and relevance of its past performance; alternatively, the protester argues that the agency should have overlooked omissions in its proposal. Comments at 2 ("To deem our past performance as 'not relevant' and 'unknown confidence' because perhaps we didn't 'dot an i,' needs to be re-examined by the Corps."). We find that the agency reasonably evaluated the protester's past performance in accordance with the solicitation requirements. In this regard, an agency's evaluation is dependent on the information furnished in a proposal; thus, it is the offeror's responsibility to submit an adequately written proposal for the agency to evaluate. Outreach Process Partners, LLC, B-405529, Nov. 21, 2011, 2011 CPD ¶ 255 at 5; SC&A, Inc., B-270160.2, Apr. 10, 1996, 96-1 CPD ¶ 197 at 5. Accordingly, an offeror that does not submit an adequately written proposal runs the risk of having its proposal rejected. Henry Schein, Inc., B-405319, Oct. 18, 2011, 2011 CPD ¶ 264 at 7; L-3 Commc'ns EOTech, Inc., B-311453, B-311453.2, July 14, 2008, 2008 CPD ¶ 139 at 4.

With regard to Trade Eastern's first and third past performance projects, the protester contends that the agency failed to reasonably evaluate the relevance of those projects. Trade Eastern's first past performance project, the Jack Williams Tire & Automotive Centers Corporate Expansion, concerned a warehouse expansion and the construction of a tire and auto service center, with only a small portion of actual office space renovation. Id. at 17. The protester's third past performance project, the Baker Hughes Oil Field Operations Service Center Renovations, was the renovation of a warehouse, and only a small portion of the area involved office space renovation. Id. at 18. To the extent that the protester argues that these projects had additional square footage that the agency failed to consider, we note that the agency concluded that these two projects were similar in

size to the solicitation, but were not similar in scope. Comments at 2; AR, Tab 3, Summary Selection Evaluation Report, at 17. As stated above, it was the amount of office space renovation encompassed in these projects that the agency determined to be insufficient. Id. at 17-18.

With regard to the second of Trade Eastern's three past performance projects, Commons @ Utility Drive, the protester contends that the agency should have "reasonably assess[ed]" that a \$7.2 million design/build project on a college campus was more than 25,000 square feet. Comments at 2. The record shows, however, that the protester's proposal did not provide information concerning the square footage total of the project. AR, Tab 1, Trade Eastern's Phase I Proposal, Vol. 1, Past Performance at 20-30. To the extent that the protester contends that the agency should have assumed, based on the dollar value of the contract, that it met the solicitation's requirement that a "similar in size" project be at least 25,000 square feet, the protester's failure to provide this information does not render the agency's judgment unreasonable. Comments at 2.

The protester also argues that the agency's evaluation of its past performance was "biased and discriminatory," in that the solicitation language regarding which projects the agency would consider similar in scope overly favored firms that had completed construction or renovation of an Army Reserve Center. Comments at 1. To the extent that the protester argues that the evaluation criterion for past performance was biased in favor of firms that had completed construction or renovation of a U.S. Army Reserve Center, this alleged bias was apparent on the face of the solicitation. The protester could not participate in the competition, await the outcome, and then complain about the "ground rules" of the solicitation. Put simply, protests challenging alleged solicitation improprieties must be filed before proposals are due in order to be considered timely. 4 C.F.R. § 21.2(a)(1).

Technical/Management Plan

Next, Trade Eastern contests its rating of acceptable under the evaluation factor for technical/management plan. The protester argues that the agency unreasonably assigned its proposal a weakness under this factor for failing to address a close-out plan. AR, Tab 3, Summary Selection Evaluation Report, at 20. We disagree.

Trade Eastern primarily argues that the statement of work for this solicitation was lengthy and that offerors' proposals were limited to six pages for the technical/management plan factor. Comments at 2. For these reasons, the protester contends that the Corps should have "pointed out" any "common activities" in the design/build project plan that were more important than others, and that the agency wanted to have addressed in the offerors' proposals. Id.

The solicitation, however, specifically advised offerors that they were to address, "a[t] a minimum," several specific items, including a close-out plan. RFP at 12.

Because Trade Eastern's proposal did not address the close-out plan, we conclude that the agency reasonably assigned the protester a weakness under this factor. In this regard, a procuring agency has discretion in determining whether a particular approach or product meets a solicitation's technical requirements, and we will not disturb the agency's determination unless it is shown to be unreasonable. Great Journey West, LLC, B-407045, Sept., 21, 2012, 2012 CPD ¶ 262 at 4.

To the extent that Trade Eastern believes that the RFP did not afford offerors adequate space to address their management plans, Trade Eastern is again alleging a solicitation impropriety it was required to protest prior to the closing time for receipt of proposals. See 4 C.F.R. § 21.2(a)(1); SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 6 n.10.

Evaluation of Price

Finally, Trade Eastern contends that the Corps unreasonably failed to consider price to the government in selecting offerors for the phase II competition. We conclude that this argument fails to state a valid basis.

This competition was conducted as a two-step design-build procurement.² Under phase I, as stated above, proposals were to be evaluated under the factors of past performance, technical/management plan, and pro forma information. RFP at 6. Prices were not requested under phase I of the procurement; instead, they were to be submitted in offerors' phase II proposals. Id. at 8, 23. Because the RFP expressly provided that only the most highly-rated offerors would be selected to participate in the phase II competition, and also provided that the phase I competition would not consider price, the protester's complaint that the agency did not consider price in the phase I competition fails to state a valid basis of protest. 4 C.F.R. § 21.1(c)(4), (f). To the extent Trade Eastern believes that the phase I evaluation procedures should have considered price, the protester cannot now timely challenge the terms of the solicitation. Id. § 21.2(a)(1).

The protest is denied.

Susan A. Poling
General Counsel

² Although the solicitation did not specifically reference the two-step design-build procedures under Federal Acquisition Regulation (FAR) subpart 36.3, it is clear that the procedures set forth in the RFP followed those procedures. See also AR, Tab 4, Determination of Selection of Offerors to Participate in Phase II, at 2 (citing FAR 36.3 procedures). Under these procedures, price is only considered in phase II of a competition. FAR § 36.303-2. In any event, as discussed above, the RFP here did not request prices during phase I of the competition.