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Decision

Matter of: Defense Base Services, Inc.

File: B-414591

Date: July 12, 2017

Lisa A. Markman, Esq., Douglas L. Patin, Esq., and Emily A. Unnasch, Esq., Bradley Arant Boult Cummings LLP, for the protester.

John C. Masterson, Esq., and Robert F. Simpson, Department of the Navy, for the agency.

Peter D. Verchinski, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a procurement conducted under two-phase design-build selection procedures, protest of an agency's evaluation of protester's phase 1 proposal, and the agency's decision to exclude the protester from phase 2, is denied where the agency's evaluation was reasonable and in accordance with the solicitation's evaluation criteria.

DECISION

Defense Base Services, Inc. (DBSI), of Anchorage, Alaska, protests the Department of the Navy's exclusion of its proposal from phase 2 of a two-phase design-build competition under request for proposals (RFP) No. N40192-16-R-2800, for construction projects on Guam. DBSI argues that the agency improperly evaluated its phase 1 proposal and unreasonably eliminated it from the competition.

We deny the protest.

BACKGROUND

The RFP was issued on March 29, 2016, under the two-phase design-build provisions of Federal Acquisition Regulation (FAR) subpart 36.3 and contemplated the award of indefinite-delivery, indefinite-quantity multiple-award task order contracts for design-build and construction projects at various federal or military facilities and installations on Guam. The RFP, which was set aside for small businesses, stated that the agency intended to award five contracts for a base year and four 1-year option periods. RFP at 3-7. The maximum dollar value, including the base period and all

options, for all contracts combined was \$240,000,000. RFP at 6. The RFP also provided that the price range for task orders to be issued under the contract is \$1,000,000 to \$20,000,000. Id.

Relevant to this protest, under phase 1, the agency was to evaluate proposals using the following four factors: technical approach, experience, past performance, and safety. RFP at 24. The technical approach evaluation factor was to be evaluated on an acceptable/unacceptable basis, while the experience and safety evaluation factors would be evaluated using adjectival ratings (outstanding, good, acceptable, marginal, and unacceptable), and the past performance evaluation factor would be evaluated using confidence levels (substantial, satisfactory, limited, no, or unknown). Agency Report (AR), Tab 7, Phase One Source Selection Evaluation Board (SSEB) Report, at 3-4. The solicitation stated that, in phase 1, the government intends to select the most highly qualified offerors to submit proposals for phase 2 without conducting discussions, except for clarifications as described in Federal Acquisition Regulation (FAR) § 15.306(a). Id. at 15, 22. The RFP also provided that the Navy “may waive informalities and minor irregularities in proposals received.” Id. at 15.

Regarding technical approach, offerors were to provide a narrative describing the composition and management of the firms proposed as the design-build team.¹ Id. at 25. This narrative was to describe the primary construction firms and primary design firms for this contract and rationale for proposing this arrangement, and offerors were to **“[s]pecifically identify one (1) Lead Design Firm for this contract.”** RFP, amend. 1, at 2 (emphasis in original). In addition to the narrative, the RFP stated that Offerors were required to submit

a fully executed true and authentic copy of the legally binding agreement, such as a joint venture agreement, partnership agreement, teaming agreement, approved mentor protégé agreement (MPA), or letter of commitment for each member of the Offeror’s team identified above (e.g. joint venture member, partner, team member, subcontractor, parent company subsidiary, or other affiliated company, etc.).

RFP at 25. The RFP stated that an offeror that was rated unacceptable under this factor would not be considered for phase 2 of the procurement. Id.

The agency received numerous proposals from offerors, including DBSI, by the revised closing date of May 5, 2016. As relevant here, DBSI’s proposal did not include a legally binding teaming agreement between DBSI and DBSI’s lead design firm, [DELETED]. Rather, DBSI’s proposal included a confidentiality agreement, which was dated

¹ The RFP defined the offeror’s team as “the Offeror, the Offeror’s outside Lead Design Firm, and/or in-house Lead Designer(s) only; does not include other subcontractors or consultants.” RFP at 25.

February 12, 2014 and expired on February 28, 2017, between DBSI's parent corporation and [DELETED].² AR, Tab 5, Vol. I, Confidentiality Agreement, at 1-3.

The agency's SSEB assigned a deficiency to DBSI's proposal for failing to include a legally binding teaming agreement for the lead design firm, and consequently found the proposal unacceptable under the technical evaluation factor. AR, Tab 7, Phase One SSEB Report, at 88. The agency also assessed various weaknesses under the experience, past performance, and safety evaluation factors, and rated DBSI's proposal as marginal, limited confidence, and marginal under each factor, respectively. Id. at 87-96. Based on DBSI's unacceptable rating, DBSI's proposal was eliminated from the competition. This protest followed.

DISCUSSION

DBSI raises numerous challenges to the agency's evaluation of its proposal. DBSI primarily alleges that it was improper for the agency to eliminate its proposal for failing to submit a legally binding teaming agreement because the agency should have permitted DBSI to correct its clerical mistake by allowing the firm to submit its teaming agreement during clarifications. DBSI also alleges that the agency engaged in disparate treatment because it permitted other offerors to continue to phase 2 of the procurement, despite those offerors' failure to include legally binding agreements. While we do not specifically discuss each of the protester's arguments, and variations thereof, we have considered all of them and find that none provides a basis to sustain the protest.³

² DBSI "is a certified SBA Region X 8(a) Alaskan Tribal Minority Owned Small Disadvantaged Business subsidiary of parent corporation Chugach Government Solutions, LLC" AR, Tab 5, Tab 5, DBSI Proposal, Vol. I-18.

³ DBSI argues that the confidentiality agreement it submitted with its proposal satisfied the RFP's requirements. Protest at 10-12. The protester argues that the RFP only required a "legally binding agreement," which its confidentiality agreement satisfied, and the RFP's requirement that the agreement be "such as a joint venture agreement, partnership agreement, teaming agreement, approved mentor protégé agreement (MPA), or letter of commitment," only provided examples of types of agreements that could be submitted, but did not specifically require an offeror to submit such an agreement. We disagree. Here, we find that the RFP, read as a whole, clearly informed offerors that the agency intended for offerors to submit legally binding teaming agreements (or similar agreements) under the technical evaluation factor, and did not anticipate that offerors could submit agreements unrelated to their team relationship during contract performance. In this regard, the goal of the agency's technical evaluation was to evaluate the offeror's "teaming relationship" such that an offeror demonstrated "meaningful involvement in the performance of the contract." RFP at 25. Given this, we find nothing improper with the agency's determination that DBSI's confidentiality agreement failed to satisfy the RFP's requirements for the legally binding agreement.

Clarifications

DBSI complains that the agency acted unreasonably by not seeking clarifications from the firm with regard to its legally binding teaming agreement. In support of this, DBSI points to its proposal, which states “Please see the following pages for a fully executed true and authentic copy of our legally binding agreement with [DELETED].” Agency Report (AR), Tab 5, DBSI Proposal, Vol. I-19. Rather than include the proper agreement, however, DBSI states that its proposal mistakenly included the confidentiality agreement. According to DBSI, the agency should have known that DBSI erroneously included the wrong agreement, and should have permitted the firm to clarify its proposal by allowing the firm to substitute the proper agreement with the mistaken agreement.

FAR § 15.306 describes a spectrum of exchanges that may take place between a contracting agency and an offeror during negotiated procurements. Clarifications are limited exchanges between the agency and offerors that may occur when contract award without discussions is contemplated; an agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. FAR § 15.306(a); Satellite Servs., Inc., B-295866, B-295866.2, Apr. 20, 2005, 2005 CPD ¶ 84 at 2 n.2. Although agencies have broad discretion as to whether to seek clarifications from offerors, offerors have no automatic right to clarifications regarding proposals, and such communications cannot be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. Alltech Engineering Corp., B-414002.2, Feb. 6, 2017, 2017 CPD ¶ 49 at 6.

We find no merit to DBSI’s contention that the Navy was required to seek clarifications from the protester with respect to DBSI’s legally binding teaming agreement. As noted above, an agency is permitted, but not required, to obtain clarifications from offerors. Furthermore, the RFP permitted, but did not require, the agency to “waive informalities and minor irregularities.” RFP at 15. Moreover, to become acceptable, the protester would have to provide additional, substantive proposal information--specifically, the legally binding teaming agreement. Although the protester views its proposal omission to be minor or clerical, correction of this discrepancy would have required the agency to conduct discussions. Highmark Medicare Servs., Inc., et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 11 (discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect); see FAR § 15.306(d); see also Environmental Quality Mgmt., Inc., B-402247.2, Mar. 9, 2010, 2010 CPD ¶ 75 at 5.

Disparate Treatment

Next, DBSI alleges that the agency’s evaluation was improper because other offerors failed to submit legally binding agreements, and yet were not found to be technically

unacceptable.⁴ The protester points to the agency's evaluation of offeror B, where the agency found that the firm had failed to submit legally binding agreements for six design subconsultants, and yet had found no weakness or deficiency. AR, Tab 7, Phase One SSEB Report, at 152. The protester also points to the agency's evaluation of offeror C, where the agency found a weakness for failing to provide a legally binding agreement for one construction subcontractor and nine design subconsultants. Id. at 205. The protester contends that the agency's failure to find that offeror B and C's proposal were unacceptable under the technical evaluation factor constitutes unequal treatment. We find no merit to this argument.

It is a fundamental principle of government procurement that competitions must be conducted on an equal basis, that is, offerors must be treated equally and therefore must be evaluated evenhandedly against common requirements and evaluation criteria. Walsh Construction Co. II, LLC, B-410015 et al., Sept. 25, 2014, 2014 CPD ¶ 291 at 6. However, where a protest alleges unequal treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between the offeror's proposals. APlus Technologies, Inc., B-408551.3, Dec. 23, 2013, 2014 CPD ¶ 12 at 7.

Here, the agency explains that both offeror B and offeror C provided legally binding teaming arrangements with their lead design firms, while DBSI failed to provide this document. Supp. Memorandum of Law at 12-14. The agency further explains that it viewed the lead design firm as the most important member of the offeror's team, as evidenced by the RFP's definition of "offeror's team," which defined the team as the offeror and the lead design firm and/or in-house lead designer. Finally, the agency explains that, consistent with the relative importance of the different teaming members, the agency assigned a deficiency for DBSI's failure to provide a legally binding teaming agreement with its lead design firm, and assessed weaknesses for offerors' failure to provide teaming agreements with other members of its team.⁵ Given this, we find nothing improper with the agency's finding of a deficiency for DBSI's failure to provide a

⁴ DBSI further complains that the agency engaged in disparate treatment because it sought clarifications from other offerors, but not from DBSI. Specifically, DBSI points to the agency's request that another offeror (offeror A) clarify that certain of offeror A's Occupational Safety and Health Administration (OSHA) rates were, in fact, zero for some years, and explain why offeror A was not required to meet the minimum reporting requirements for other years. AR, Tab 7, Phase One SSEB Report, at 86. However, requesting clarification from one offeror does not trigger a requirement that the agency seek clarification from other offerors. See Serco Inc., B-406061.1, B-406061.2, Feb. 1, 2012, 2012 CPD ¶ 61 at 13; Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6. Consequently, we find this protest ground is without merit.

⁵ With regard to offeror B, where the agency assigned no weaknesses, the agency explains that the firm submitted a legally binding teaming agreement with its Lead Design firm, and that firm's subconsultants "were clearly shown to have a contractual relationship with the Lead Design Firm." Supp. Memorandum of Law at 12-13.

teaming agreement with DBSI' lead design firm, while not finding deficiencies for other firms that fail to provide teaming agreements for subcontractors.

Finally, the protester challenges the weaknesses identified in the protester's proposal under the technical, experience, past performance, and safety evaluation factors. For example, the protester challenges the assignment of weaknesses under the experience and past performance evaluation factors because the weaknesses--relating to DBSI's failure to submit a legal binding agreement with [DELETED]--are an improper "triple counting" of DBSI's failure to provide the legally binding agreement that was already identified as a deficiency under the technical evaluation factor. Protester's Comments at 6.

However, the solicitation, as described above, warned offerors that an evaluation rating of unacceptable for the technical evaluation factor would result in the offeror's proposal no longer being considered for award. Therefore, while DBSI challenges the agency's evaluation of its proposal under the other factors, we need not address those contentions as the agency reasonably found that DBSI was rated unacceptable under the technical evaluation factor, which rendered DBSI's proposal unawardable.

The protest is denied.

Susan A. Poling
General Counsel