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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Millar Elevator Service Company

File: B-284870.4

Date: December 27, 2000

Susan L. Schor, Esq., McManus, Schor, Asmar & Darden, for the protester.
Jeffrey S. Baird, Esq., Bewley, Lassleben & Miller, for Amtech Elevator Services, an intervenor.
Robert J. McCall, Esq., General Services Administration, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency was required to reject awardee's proposal for failing to acknowledge a solicitation amendment is denied where awardee's technical proposal, and the signed price proposal that the awardee submitted in response to the amendment, obligated the awardee to perform in accordance with the solicitation as amended.

2. Agency held meaningful discussions with protester where it pointed out significant weaknesses; other weaknesses were not required to be discussed because they were either insignificant or introduced into protester's proposal following discussions.

DECISION

Millar Elevator Service Company protests the award of a contract to Amtech Elevator Services under solicitation for offers (SFO) No. GS-03P-CDC-00-0006, issued by the General Services Administration (GSA) for elevator modernization and maintenance in the Moorhead Federal Building in Pittsburgh, Pennsylvania. Millar complains that GSA performed an unreasonable evaluation of its and Amtech's

technical proposals, failed to hold meaningful discussions with Millar, and performed an improper price/technical tradeoff.[1]

We deny the protest.

The SFO, issued on October 29, 1999, contemplated the award of a fixed-price contract, on a best-value basis. The evaluation was to be based on six technical evaluation criteria, listed in descending order of importance--design; maintenance and performance history; modernization experience and past performance; schedule, key personnel and staffing plan; women-owned business, and small disadvantaged business participation in subcontracting--and price, which was slightly less important than the technical criteria. SFO vol. 4, pt. 3, ¶¶ 1.3, 2.2.

Millar and Amtech were the only two offerors that responded to the solicitation. A source selection board (SSB) evaluated the technical proposals and the contracting officer evaluated the price proposals. After two rounds of discussions and the submission of first and second best and final offers (BAFO), GSA determined that Amtech's proposal represented the best value, and therefore selected that firm for award. Millar protested the award decision. Following an "outcome prediction" alternative dispute resolution conference conducted at the request of the parties, the General Accounting Office attorney handling the matter advised the parties that there appeared to be errors in GSA's evaluation. Following the conference, GSA proposed corrective action that led to our dismissing the protest. Thereafter, GSA issued amendment No. 4 to make changes to the solicitation, requested third BAFOs, evaluated those BAFOs, and performed a new best-value analysis. Contracting Officer's Statement (COS) at 3, 4. Amtech was again selected for award and Millar now protests the new award decision.

Millar challenges the evaluation on numerous grounds. We have reviewed the record and find all of Millar's arguments to be without merit. We discuss Millar's primary arguments below.

ACKNOWLEDGMENT OF AMENDMENT

Millar protests that Amtech's offer should have been rejected as unacceptable because Amtech did not acknowledge amendment No. 4.

Where an offeror fails to acknowledge an amendment, the agency is not required to reject the offer if the offeror is otherwise obligated to perform in accordance with the terms of the solicitation. MR&S/AME, An MSC Joint Venture, B-250313.2, Mar. 19, 1993, 93-1 CPD ¶ 245 at 5.

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[1] Millar has filed a supplemental protest (B-284870.5) that is pending and which we intend to address in a separate decision.

Amendment No. 4 deleted options 1, 2 and 8 and the asbestos abatement work from the SFO, deleted a requirement for offerors to submit past performance references from the Pittsburgh area, and required offerors to propose an alternate premium finish (specified by the solicitation as Corian) for the elevator cabs. The amendment also requested revised BAFOs, but provided that the agency would consider an offeror's original proposal if it chose not to submit a BAFO. Amtech did not submit a revised technical proposal, and since the amendment had the principal effect of deleting, rather than adding, work, Amtech remained obligated under its unrevised technical proposal to perform all of the work required under the SFO as amended. Further, Amtech did submit a revised price proposal that reflected the work to be performed. It deleted prices for options 1, 2 and 8, and reduced Amtech's total price to account for the elimination of the asbestos abatement work. Amtech's revised price proposal already included a price for the Corian alternate premium finish for the elevator cabs. (Amtech's original technical proposal also included Corian as an alternate premium finish.) We conclude that Amtech's failure to formally acknowledge the amendment did not render its proposal unacceptable.

EVALUATION

Elimination of Options

The solicitation as initially issued, and the contract originally awarded to Amtech, included the basic work plus option items. SFO app. C at 3-4. As discussed above, amendment No. 4 deleted the asbestos abatement work plus option items 1 and 2 from the SFO; this was because this work would be completed by Amtech by the time the new evaluation and award took place. COS at 3. Noting that the award document for the new award to Amtech (following the reevaluation) refers to option items 1 and 2, Millar asserts that the award improperly exceeds GSA's minimum needs, since it includes deleted work.

These assertions are without merit. GSA explains that, following the reevaluation, it did not award a new contract to Amtech; it merely reaffirmed the original award, leaving in place Amtech's contract, which included option items 1 and 2. COS at 4. The award document refers to option items 1 and 2, not because the work is to be performed again, but because Amtech already has performed the work under its original contract and will be entitled to payment for that work. Agency Report (AR) at 4-5. There is no basis for questioning the agency's explanation.

Cab Finish

The solicitation as initially issued required offerors to propose a deluxe and a premium finish for the elevator cabs. COS at 1. The premium finish was specified as marble, although offerors could also offer an alternate premium finish. See SFO vol. 3, § 40.1(c). Amendment No. 4 made it mandatory for offerors to propose Corian as an alternate premium finish. Amend. No. 4 at 3. Millar asserts that,

notwithstanding these provisions requiring that premium finishes be offered, GSA improperly considered only the deluxe finish in evaluating BAFOs under the technical design factor. This argument is without merit. GSA concedes that it evaluated only the deluxe finish, but explains that this is because the SFO prescribed the premium and alternate premium finishes, so there was no design effort on the part of the contractor for the agency to evaluate with regard to these finishes. COS at 7. Amtech has not rebutted the agency's position by explaining what it believes GSA was required to evaluate with regard to the premium finishes, and we find the agency's position reasonable.

References

Millar furnished new past performance references in its BAFO in response to amendment No. 4. Millar maintains that GSA improperly failed to contact three of these references, and that this was contrary to the terms of the SFO. This argument is without merit. The SFO did not provide that the agency would contact any specific number of references; rather, it required offerors to include past performance references and simply stated that the agency would evaluate past performance. The source selection evaluation plan did provide for contacting three references, but this plan is an internal agency document that provided guidance in the evaluation and award process; unlike the solicitation, this plan did not confer any rights on offerors, and therefore does not provide a basis for challenging the evaluation. General Sec. Servs., Corp., B-280388, B-280388.2, Sept. 25, 1998, 99-1 CPD ¶ 49 at 6.[2]

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[2] Millar asserts that the agency improperly downgraded its proposal under the design factor for failure to propose a graphical user interface (GUI) based on the Microsoft Windows™ operating system, since the SFO did not require the GUI to be Windows™-based. Under our Regulations, allegations such as this must be raised no later than 10 days after they were known. 4 C.F.R. § 21.2(a)(2) (2000). GSA reports, and Millar does not dispute, that it told Millar during its March debriefing that its [deleted] GUI was a weakness. Id. This being the case, since Millar did not raise this issue until more than 10 days after its debriefing, the argument is now untimely. In any case, GSA notes that, while the SFO did not require that the GUI be Windows™-based, it did specify a "preference" for a Windows™-based GUI. SFO vol. 3, ¶ 23.10, COS at 8. We have recognized that an evaluation properly may take into account whether an offeror has proposed to perform in accordance with preferences listed in the solicitation. See HG Properties A, L.P., B-284170 et al., Mar. 3, 2000, 2000 CPD ¶ 36 at 8.

DISCUSSIONS

Millar asserts that GSA improperly failed to address a number of evaluated proposal weaknesses during discussions. Although discussions must address at least deficiencies and significant weaknesses identified in proposals, the scope and extent of discussions are largely a matter of the contracting officer's judgment; they need not address every area of a proposal where the ratings could be improved. MCR Fed., Inc., B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8 at 11; Consolidated Eng'g Servs., Inc., B-279565.5, Mar. 19, 99-1 CPD ¶ 76 at 9. Nor is an agency required to reopen discussions to raise a weakness or deficiency that an offeror introduced into a BAFO. Joint Threat Servs., B-278168, B-278168.2, Jan. 5, 1998, 98-1 CPD ¶ 18 at 10.

GSA has responded to each allegation of alleged inadequate discussions by explaining that the weakness was pointed out during discussions, or that discussions were unnecessary because the weakness was insignificant or first introduced in Millar's BAFO. In most cases, Millar has not substantively responded to GSA's position, but instead has simply repeated the statements it made in its protest. Based on our review of the record, we find that the discussions were adequate. We discuss specific examples below.

Millar asserts that the agency did not discuss its concerns regarding whether Millar included everything in its proposed price, the rumored retirement of its [deleted] and the competence of its proposed [deleted]. However, the record shows that the agency did discuss with Millar its proposed pricing and the rumored retirement of its [deleted} and that, in fact, these issues were not considered weaknesses during the final evaluation. See AR at 4-8. GSA also raised (during January discussions and at the firm's oral presentation) its concern that Millar's [deleted] was unable to [deleted] specified by the solicitation. COS at 11. Millar does not dispute this, but asserts that its cab manufacturer did develop a design by the time Millar submitted its February BAFO, and that the agency should have discussed any concerns that remained following this BAFO. This argument is without merit. The fact that the [deleted] eventually came up with a [deleted] did not eliminate all of the agency's legitimate concerns; the agency reasonably could question the level of competence of the [deleted] given the time it took to develop [deleted]. Since GSA put Millar on notice of its concern, it was not required to raise this matter again. See OMV Med., Inc., B-281490, Feb. 16, 1999, 99-1 CPD ¶ 38 at 7 (agency is not required to conduct successive rounds of discussions until omissions are corrected).

Millar also argues that the agency did not discuss with Millar its concern over Millar's proposed use of the [deleted] device and an ambiguity in its proposal with respect to whether the [deleted] controller it proposed had predictive call assignment. Prior to submitting its May BAFO, Millar proposed to install the [deleted] device, and offered the [deleted] device as an optional item GSA could select. COS at 13. GSA had concerns with the [deleted] device, but did not discuss them with Millar because it did not intend to select the [deleted] device. In its May

BAFO, Millar eliminated the [deleted] device and proposed only the [deleted device. Millar maintains that the agency was required to discuss any concerns it had with the [deleted] device. We disagree. Since the [deleted] device originally was only offered as an option, and the agency did not intend to select it, the agency had no reason to evaluate it or to discuss its concerns about it with Millar. Only when Millar introduced the device as a nonoptional item in its final BAFO did the agency's concerns become relevant. However, GSA was not required to reopen discussions at that juncture to raise its concern. Joint Threat Servs., supra, at 10. Similarly, the agency was not required to discuss the ambiguity with respect to the predictive call assignment of the [deleted] controller, since this ambiguity also was first introduced in the firm's May BAFO.

Millar asserts that the agency failed to point out several additional items, including concern over its proposed [deleted] and [deleted]. However, these were minor matters that the agency was not required to discuss. For example, while the score sheets are not broken down specifically for each design feature, Millar lost only [deleted] points for the entire conceptual design area, COS at 9 and Scoresheets for BAFO 3, and the agency's concerns with the proposed [deleted] and [deleted] did not play any role in the agency's best-value determination. Again, an offeror is not entitled to discussions simply because it did not receive the maximum available points for a certain factor. See MCR Fed., Inc., supra.

Millar asserts that, because there was only a [deleted] point difference between its and Amtech's technical scores, any weakness could have affected the award decision; therefore, all of the evaluated weaknesses were significant and should have been raised in discussions. This argument is without merit. We will not find that an agency improperly failed to advise an offeror of a weakness reasonably viewed during the evaluation as minor merely because, as the competition played out, the weakness could have been a determinative factor in choosing between two closely ranked proposals. Brown & Root, Inc. and Perini Corp., a joint venture, B-270505.2, B-270505.3, Sept. 12, 1996, 96-2 CPD ¶ 143 at 6.

Best-Value Determination

Millar argues that it was unreasonable for GSA to pay a price premium of [deleted] for Amtech's proposal based on its [deleted] point technical scoring advantage.

Price/technical tradeoffs may be made in deciding between competing proposals; the propriety of such a tradeoff turns, not on the difference in technical scores or ratings per se, but on whether the agency's judgment concerning the significance of the difference was reasonable and adequately justified in light of the evaluation scheme. SEEMA, Inc., B-277988, Dec. 16, 1997, 98-1 CPD ¶ 12 at 6. In this regard, evaluation scores are merely guides for the selection official, who must use his or her judgment to determine what the technical difference between competing proposals might mean to contract performance. Id.

Here, the record shows that GSA's award decision was based, not on the point scores, but on the identified strengths and weaknesses of the technical proposals balanced against the difference in price. AR at 14-16. In the final analysis, the agency chose Amtech's proposal over Millar's because Amtech's technical proposal was viewed as superior to Millar's under both the design and modernization experience factors--the most important and third most important factors--and offered a significantly higher level of elevator maintenance. Id. Given that price was less important than technical factors in the award decision, GSA reasonably could determine that the superiority of Amtech's proposal was worth its higher price.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel