



Decision

Matter of: Diversified Maintenance Systems, Inc.

File: B-401329.4

Date: November 9, 2009

Timothy M. Willardson, Esq., for the protester.
Capt. Rinah R. Shah, Department of the Army, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement that provided for multiple awards, protest challenging agency's failure to award protester a contract is denied, where the agency reasonably downgraded protester's proposal for significant weaknesses in the protester's proposed safety plan.

DECISION

Diversified Maintenance Systems, Inc. of Salt Lake City, Utah, protests the failure of the Department of the Army to award the firm a contract under request for proposals (RFP) No. W9124A-08-R-0003, which provided for multiple awards of indefinite-delivery, indefinite-quantity (ID/IQ) contracts for construction services.

We deny the protest.¹

The RFP, issued as a small business set-aside, provided for the award of ID/IQ contracts for a base year with four 1-year options for minor construction and real property maintenance and repair at Fort Huachuca, Arizona, and other nearby sites. In this regard, the RFP stated that the "[g]overnment intends to award to the two small businesses that represent the best overall value to the government." RFP at 1. The solicitation identified a guaranteed minimum for each contract of \$50,000 per year for each base and option year. RFP at 3.

¹ Because the protester did not seek admission under the protective order issued in connection with this protest, our discussion of the agency's evaluation is somewhat general.

Offerors were informed that award would be made on a “best value” basis, considering the following evaluation factors (and subfactors): management (general management principles, key management personnel, organizational structure, financial ability); technical (specific experience/technical approach, quality assurance/quality control, safety and health program); past performance; and price. RFP at 116-17. The non-price evaluation factors were stated to be equal in weight and, when combined, significantly more important than price. RFP at 118. Offerors were also informed that the agency intended to make award without conducting discussions. Id.

The agency received 18 proposals, including those of Diversified and Marsh Development, Inc., Native American Services Corporation, and Sun Belt Builders, Inc. Proposals were adjectivally rated by the agency’s source selection evaluation board (SSEB).² Diversified’s proposal was found to be technically unacceptable but susceptible of being made acceptable under the quality assurance/quality control subfactor. Because the agency did not establish a competitive range or conduct discussions, Diversified’s proposal was rejected. Awards were made to Marsh (at an evaluated price of approximately \$21.2 million) and Native American (approximately \$21.0 million). Agency Report (AR), Tab 24, Source Selection Decision, at 3, 57. Following a debriefing, Diversified protested the failure of the agency to award a contract to Diversified. Sun Belt also protested to our Office.

Prior to submitting its report in response to the protests, the Army informed our Office that it would reevaluate the protesters’ proposals and make “a new award decision to determine whether a third award will be made.” AR, Tab 14, Army Letter to GAO, May 20, 2009, at 2. The agency also stated that it did not intend to “disturb the awards to the current awardees.”³ Id. We dismissed the protests as academic, based on the agency’s proposed corrective action. Diversified initially protested the Army’s corrective action, but withdrew this protest when the Army confirmed that it would continue to stay performance of Marsh’s and Native American’s contracts pending the completion of the agency’s proposed corrective action.

The SSEB reevaluated Diversified’s and Sun Belt’s proposals.⁴ With respect to Diversified’s proposal, the SSEB increased Diversified rating under the “quality assurance/quality control” subfactor from “unacceptable but susceptible of being made acceptable” to an “acceptable” rating.

² Proposals were evaluated as exceptional, good, acceptable, marginal, unacceptable/susceptible to being made acceptable, or unacceptable. RFP at 116.

³ Neither protester challenged the evaluation of the awardee’s proposals.

⁴ In reevaluating proposals the SSEB did not use the earlier SSEB evaluation report. Contracting Officer’s Statement at 1.

The SSEB also found, however, that Diversified's proposal was "marginal" under the safety and health program subfactor rating, where previously Diversified's proposal had received an acceptable rating under this factor.⁵ Diversified's marginal rating under safety and health program subfactor reflected the SSEB's revised judgment that Diversified's proposal contained a number of weaknesses, including two "significant" weaknesses. The SSEB found that Diversified's proposal that the "Safety Officer may assign some or all of his tasks to other individuals as well as individuals outside of the company, ie, Insurance Company, Broker Loss Control Representative," was a significant weakness, because "the Safety Officer's duties should [not] be allowed to be transferred to others within the organization when it not known what safety training and qualification they possess." See AR, Tab 20, Management/Technical Evaluation Report, at 18; see also Diversified's Technical Proposal, Appendix C, Safety and Health Plan, at C-2. The SSEB also found that Diversified's proposal to use superintendents as safety inspectors to be a significant weakness, because of the potential "conflict of interest" with regard to the safety inspectors' and superintendents' respective duties. Id.

Following the reevaluation of proposals, the contracting officer made and documented a new source selection decision. See AR, Tab 24, Source Selection Decision. The contracting officer concluded that, in addition to the awards made to Marsh and Native American, a third award should be made to Sun Belt, because the proposals of these three firms had "low prices along with technical solutions that provide the Government with the least amount of technical risk." Id. at 57. In this regard, the contracting officer noted that the awardee's and Diversified's total evaluated prices were all less than the independent government cost estimate. Id. at 41. In determining that Diversified would not be awarded a contract, the contracting officer recognized that Diversified's total evaluated price was less than Marsh's and Native American's. The contracting officer concluded, however, that Diversified's slight price difference, which was "less than 1% of the estimated Contract value," did not overcome the significant weaknesses in Diversified's safety and health program.⁶ Id. at 42.

⁵ The RFP defined a "marginal" rating to be "an approach which may not be capable of meeting all requirements and objectives," that the "risk of unsuccessful performance is high as the proposal contains solutions which may not be feasible or practical," and that "[t]hese solutions are further considered to reflect high risk in that they lack clarity and precision, are generally unsupported, and do not demonstrate a complete understanding of the requirements." RFP at 116.

⁶ Although the source selection decision cited Diversified's quality control proposal as the source of the significant weaknesses, the document, as a whole, shows that this was a typographical error inasmuch as the previous page of the decision noted that the protester had received an "acceptable" rating under the quality assurance/quality control subfactor, provided a detailed analysis of Diversified's

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Diversified protests the agency's evaluation of its proposal under the safety and health program subfactor, complaining that its proposal did not state that its "site" safety officer's could delegate their duties to others.⁷ In this regard, Diversified contends that only the "company's" safety officer could assign certain tasks to others. The protester argues that the "site" safety officers "have the responsibility for that task being done and being done correctly." Protester's Comments at 12. The protester further argues that its proposal only allowed the company safety officer to delegate duties, and not to "abdicate" them.

In reviewing protests of alleged improper evaluations and source selection decisions, it is not our role to reevaluate submissions; rather, we will examine the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Panacea Consulting, Inc., B-299307.4, B-299308.4, July 27, 2007, 2007 CPD ¶ 141 at 3. A protester's mere disagreement with the agency's judgment is not sufficient to establish that an agency acted unreasonably. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

Here, we find the Army's evaluation of Diversified's proposal to be reasonable. First, with respect to Diversified's objection to the agency's assessment of a significant weakness for Diversified's proposed use of superintendents as safety inspectors, although Diversified initially challenged this assessment, the protester abandoned this ground of protest in its comments.⁸ With respect to the Army's other assigned

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weaknesses under the safety and health program subfactor, and concluded that the protester's "Safety and Health Program had significant disadvantages that outweighed the advantages." Id. at 41.

⁷ The protester also challenged the Army's reevaluation, suggesting that, because the firm's rating under the quality assurance/quality control evaluation subfactor decreased from acceptable to marginal and that no evaluation strengths were noted, reevaluation was not independently performed but establishes an intent to remove the firm from the competition. Comments at 11. There is no evidence in the record, other than Diversified's inference and speculation, to support the protester's attribution of unfair or prejudicial motives to the Army's reevaluation. Because government officials are presumed to act in good faith, a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6.

⁸ The Army in its report addressed Diversified's objections to the agency's assessment of a significant proposal weakness for Diversified's proposed use of superintendents as safety inspectors, and Diversified did not respond to the Army's

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significant weakness (that is, that Diversified proposed that its safety officers could delegate their responsibilities to others), we also find the agency's evaluation to be reasonable. As found by the Army, Diversified stated in its proposal that its company safety officer could assign duties to other unidentified individuals.⁹ Although Diversified now argues that there is a distinction between a "company" safety officer and a "site" safety officer, its proposal does not explain this distinction. It is an offeror's obligation to submit an adequately written proposal for the agency to evaluate. See Independence Constr., Inc., B-292052, May 19, 2003, 2003 CPD ¶ 105 at 5. We find no basis to object to the Army's evaluation in this regard.¹⁰

The protester also asserts that the agency did not perform a proper price reasonableness analysis. Diversified fails to state a valid basis for protest, however, given that it does not allege that Marsh's and Native American's evaluated prices are too high. See Cherry Road Tech.; Elec. Data Sys. Corp., B-296915 et al., Oct. 24, 2005, 2005 CPD ¶ 197 at 18 ("since the protesters do not contend that [the awardee's] price is too high, no concern about reasonableness arises"). Moreover, as noted above, Marsh's and Native American's evaluated prices are less than the government's independent cost estimate.¹¹

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explanation in its comments, thus abandoning this aspect of its protest. See Symplicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 5 n.6.

⁹ Diversified's proposal identified safety officer duties that could be delegated to include "ensuring that employees are trained in accordance with the task order specific Safety and Accident Prevention Plan" and "visiting project sites to provide oversight and identify potential hazards." See Diversified's Technical Proposal, Appendix C, Safety and Health Plan, at C-2.

¹⁰ Diversified also objects to the Army's concern that the agency could not know the qualifications of the individuals to whom the safety officer would transfer duties, arguing that the agency had found that the protester's proposal had a significant strength for its employee's qualifications. Protest at 15. However, we do not find that the assessed strength mitigates the agency's concern that Diversified proposed that its safety officer could delegate his/her duties to unidentified individuals.

¹¹ Furthermore, the record shows that the Army calculated prices per contract line item numbers for each offeror and compared offerors' prices to each other and to the independent government cost estimate. Supplemental AR, Tab 3, Price Evaluation Report. A price reasonableness determination may be based on various price analysis techniques, including comparison of prices received among themselves and to an independent government estimate. Federal Acquisition Regulation § 15.404-1(b)(2).

The protester also complains that the RFP does not permit the Army to award a third contract. Given that Diversified did not challenge the awards made to Marsh and Native American, we see no possible prejudice to Diversified arising from the Army's decision to consider Diversified's proposal for the award of a third contract. Moreover, this protest ground was not timely filed within 10 days of when the protester learned the basis for its protest. Specifically, Diversified learned on May 21, 2009, from the Army's proposed corrective action in response to the firm's prior protest that the agency would consider making a third award under the RFP. Although Diversified initially challenged the corrective action on the basis that the RFP did not permit a third award, Diversified withdrew its protest.

The protest is denied.

Lynn H. Gibson
Acting General Counsel