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Decision

Matter of: East West, Inc.

File: B-400325.10

Date: July 6, 2011

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DIGEST

Protest objecting to exclusion of proposal from competitive range is denied where protester fails to demonstrate that it was misled by agency into reducing its proposed staffing to an unacceptable level, and where agency reasonably determined that due to protester's failure to propose an adequate approach to staffing and other significant weaknesses in the proposal, major revision of the proposal would be required to make it technically acceptable.

DECISION

East West, Inc., of Falls Church, Virginia, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. 263-2008-P(GG)-0238, issued by the National Institutes of Health (NIH) for custodial services at NIH buildings located in Bethesda, Rockville, and Poolesville, Maryland. The protester argues that the evaluation of its proposal was unreasonable.

We deny the protest.

BACKGROUND

This procurement has a lengthy history. The RFP, which contemplates the award of a 5-year (1 base plus 4 option years) indefinite-delivery/indefinite quantity contract, was originally issued on June 4, 2008. The solicitation provides for award to the offeror whose proposal represents the best value to the government, technical, cost/price, and past performance (in order of importance) considered. Factors to be

considered in the technical evaluation are technical approach and understanding of the requirement¹ (worth 50 points), personnel (20 points), and corporate experience and capability (30 points).

Upon receipt of initial proposals, the agency established a competitive range of three. After we sustained a protest by an offeror whose proposal had been excluded, see Arc-Tech, Inc., B-400325.3, Feb. 19, 2009, 2009 CPD ¶ 53, the contracting officer established a new competitive range of five proposals. The agency invited the five firms to submit revised price proposals, and, after reviewing the submissions, selected Integrity National Corporation for award. In her source selection decision, which contained no tradeoff analysis, the contracting officer noted that East West's proposal had received a technical score of 93 and Integrity's a score of 81, and that the two offerors' respective evaluated prices were approximately \$35.8 million and approximately \$34.5 million.

The agency notified the protester of the award to Integrity in late November 2009, and East West protested to our Office. The protester alleged that NIH personnel had violated the Procurement Integrity Act by meeting and exchanging information with Integrity staff members prior to award of the contract, and that the agency's price/technical tradeoff determination was unreasonable and inconsistent with the RFP. On January 20, 2010, the agency notified us that it would take corrective action by investigating the alleged Procurement Integrity Act violations and by conducting and documenting a best value tradeoff analysis. On January 27, 2010, we dismissed the protest as academic.

The contracting officer conducted an investigation and found no evidence that a Procurement Integrity Act violation had occurred. She also performed a best value tradeoff analysis and concluded that while East West had received higher scores than Integrity under all three technical evaluation factors, both offerors were capable of performing the work, and thus East West's higher technical rating did not merit the payment of a price premium of \$1.3 million. After being notified of the results of the investigation and the agency's source selection determination, East West again protested to our Office.

East West disputed the contracting officer's findings regarding the Procurement Integrity Act violation and objected to several aspects of the agency's source selection determination. The agency notified us that it would take corrective action in response to the latter complaint by amending the evaluation criteria; inviting the offerors in the competitive range to submit revised proposals; evaluating proposals

¹ Among the subfactors to be considered in evaluating proposals under the technical approach and understanding factor were the offeror's proposed staffing plan and the offeror's proposed methods of communicating with government contracting personnel and NIH customers regarding day-to-day operations.

and conducting discussions; obtaining and reevaluating past performance information (according to the agency, the past performance evaluation documents had been lost when the contracting officer's computer crashed); and making a new source selection decision. Because the agency had granted the protester appropriate relief with regard to these arguments, we dismissed them. By decision of August 6, 2010, we denied the protester's allegation of a Procurement Integrity Act violation. East West, Inc., B-400325.7, B-400325.8, Aug. 6, 2010, 2010 CPD ¶ 187.

In October 2010, four of the five competitive range offerors submitted revised proposals. An evaluation panel consisting of one of the original evaluators and two new evaluators convened and evaluated the proposals. Results of the evaluation and offerors' proposed prices were as follows:

OFFEROR	PRICE	TECH. SCORE
Integrity	\$33,803,560	93
East West	\$33,640,400	54
Offeror A	\$36,598,504	52
Offeror B	\$42,155,290	78

Competitive Range Determination, Mar. 4, 2011, at 2. The contracting officer determined that the proposals of East West and Offeror A were technically unacceptable, and, as a consequence, should not be included in the competitive range.

In her competitive range determination, the contracting officer explained that while the technical evaluation panel had identified several strengths in East West's proposal, the panel had also identified significant weaknesses in the proposal that caused it to be determined technically unacceptable. A significant weakness in the protester's proposal was its staffing plan. In this regard, the contracting officer found that East West's proposal of only [deleted] workers (cleaning staff plus other staff) was "unreasonably low for a project with this scope and magnitude." The contracting officer further noted that the protester had assigned only [deleted] to the Poolesville campus, which the panel considered "very risky" because it did not ensure the availability "at any given point" of a trained custodian familiar with the campus. In addition, the proposal was internally inconsistent with regard to the number of night hours to be worked by the project manager and the nighttime supervisors, and did not clearly delineate the supervisory lines of authority. The contracting officer further noted that East West had failed to identify the individual who would fill the key position of assistant manager, and that it had failed to furnish required letters of commitment for two other proposed key personnel. Id. at 2-3.

The contracting officer also identified as a significant weakness the protester's failure to address as part of its proposed communications plan the need for daily interaction between agency and contractor personnel. In addition, the contracting

officer expressed concern over a statement in a company customer relations training manual included by the protester as an exhibit to its proposal, which encouraged the practice of inviting customers to lunch and sporting events as a means of fostering communication; according to the contracting officer, the agency considered this method of communication to be unacceptable due to ethical concerns. Lastly, the contracting officer identified as significant weaknesses in the proposal East West's failure to provide sound levels for its proposed equipment; the protester's proposed use of chemicals and products for cleaning that were forbidden to be used at NIH; and its proposed focus on punitive measures for quality control violations by members of its staff rather than on training the staff. Id. at 3.

By letter of March 7, the contracting officer notified the protester that its proposal had been excluded from the competitive range. After requesting and receiving a debriefing, East West protested to our Office on March 30.

DISCUSSION

The protester takes issue with the agency's determination of technical unacceptability, arguing that (1) the principal basis for the agency's finding is that its proposed staffing level was too low, and the agency had misled it into decreasing its proposed staffing to this low level; (2) the findings of the current evaluation panel with regard to the weaknesses in its proposal are inconsistent with the findings of the initial evaluation panel and thus are suspect; and (3) even assuming that its proposal contains significant weaknesses, it should still have been included in the competitive range because the weaknesses could be addressed without major revision of the proposal. We address these arguments in turn.

East West contends that the agency misled it into lowering its staffing level to the level that the agency has now determined to be unacceptably low by asking, after submission of the 2009 revised price proposal, for the following clarification:

In a previous proposal, East-West, Inc. offered to reduce its housekeeping staff. However, in the current proposal, there are no reductions in housekeeping staff, but there have been administrative positions eliminated. Please explain.

Agency Letter to Protester, June 26, 2009, at 1. After the protester responded that it had never intended to reduce its housekeeping staff, Protester Letter to Agency, June 30, 2009, at 1, the agency proceeded with the source selection process. After selecting Integrity, the agency furnished the protester with a written debriefing, in which it identified several weaknesses that "were not considered significant to the selection process," including the following:

Eliminated only administrative positions.

Did not reduce the housekeeping staff as mentioned in their previous proposal.

NIH Debriefing Letter, Dec. 22, 2009, at 3. The protester contends that these communications furnished it with clear notice that the agency wanted it to reduce its housekeeping staff.

In response, the agency maintains that the message conveyed by the above communications was not that the agency wanted the protester to reduce its housekeeping staff, but rather, that the agency wanted an explanation as to why the protester had not reduced its housekeeping staff after indicating that it would and regarded the protester's failure to furnish such an explanation as a minor weakness. We agree with the agency that the message conveyed by the request for clarification was that the agency wanted an explanation for the protester's changed approach to reducing its staffing; moreover, we think that when the weakness identified at the debriefing is considered in light of the preceding communication, it was reasonably clear that what the agency regarded as a weakness was the protester's failure to furnish an explanation for the change and was not signaling to East West that it needed to lower its proposed staffing level. In any event, even assuming that the protester reasonably interpreted the agency's request for clarification and debriefing comment as encouraging it to reduce its housekeeping staff, the agency's communications in no way implied that the agency wanted East West to reduce its staffing by a margin of approximately [deleted] percent;² thus, we do not think that it may reasonably be argued that the agency misled the protester into reducing its staff to the level that it did.

As a final matter, it is not apparent to us, based on the record here, that the aforementioned communications were the primary impetus behind the protester's decision to eliminate staffing positions. The protester was on notice at the time it submitted its 2010 revised proposal that Integrity's previously submitted proposal had been approximately \$1.3 million lower in price than its own; East West was also on notice that the agency had selected Integrity's lower-rated, lower-priced proposal as representing the best value to the government. This information clearly provided the protester with ample incentive to reduce its proposed staffing level (and thereby its price).

Turning to the protester's complaint that the second evaluation panel assigned its proposal a significantly lower rating than the first panel, it should first be recognized that there was a significant difference between the two proposals--i.e., as previously

² In its 2010 revised proposal, the protester eliminated [deleted] general cleaning staff positions that it had originally proposed. Compare East West Technical Proposal, July 7, 2008 at 14 with East West Technical Proposal, Oct. 19, 2010, at 13.

noted, East West substantially reduced its proposed staffing in its 2010 proposal. In addition, the composition of the two evaluation panels was different (only one evaluator served on both), and different evaluation panels may reasonably arrive at differing conclusions regarding the technical merits of a proposal. In reviewing the second panel's conclusions, our primary concern is not whether the ratings are consistent with the earlier panel's ratings, but rather, whether they reasonably reflect the relative merits of the proposals. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 11.

Here, the record demonstrates a reasonable basis for the bulk of the evaluators' findings of weakness and significant weakness.³ Most significantly, we think that the evaluators reasonably determined that the protester's proposed level of staffing was inadequate, particularly given that the proposed level is not supported by the breakdown of staffing by building that the protester included in its proposal. In this connection, the breakdown of staffing by building reflected a need for [deleted] cleaners, Protester's Revised Technical Proposal at 15-19, yet the protester proposed a cleaning staff of only [deleted] in its staffing summary.⁴ Id. at 13. In addition, the record demonstrates a reasonable basis for the other findings of weakness pertaining to the protester's staffing plan identified by the contracting officer in her competitive range determination.

The record also demonstrates a reasonable basis for a number of the second panel's findings of weakness pertaining to features that were also present, but were not recognized as weaknesses, in the first proposal. For example, while only the second panel cited the protester's offering of a [deleted] for the Poolesville campus as a weakness despite the fact that this was a feature of both proposals, the second panel furnished a reasonable explanation for its finding--i.e., assignment of only [deleted] to the campus meant that during substantial blocks of time, no custodial staff would be available. Likewise, while only the second panel identified omission of the name of an assistant manager and of letters of commitment for two proposed key personnel as weaknesses, the record confirms that this information was in fact missing from the proposal.

³ While we are not persuaded that all of the findings of weakness were reasonable--for example, it is not clear to us that there was a reasonable basis for a finding of weakness based on the protester's failure to address the need for daily interaction between contractor and agency personnel--we are persuaded that there were enough reasonable findings of weakness and significant weakness to support the determination of unacceptability.

⁴ As a further inconsistency, the protester's organizational chart, id. at 14, shows a cleaning staff of [deleted].

Based on our review of the evaluation record, it appears to us that the reason that the second panel identified many more weaknesses in the protester's proposal than the first panel was that the second panel subjected the proposals to a more exacting review than the first panel, perhaps as a consequence of the multiple protests that occurred between the two evaluations. We see nothing objectionable in this, given that all proposals appear to have been subjected to the same level of heightened scrutiny during the second evaluation.

Finally, the protester argues that its proposal should not have been excluded from the competitive range as technically unacceptable because it could have addressed the weaknesses identified by the agency without major revision of the proposal. Where a proposal is technically unacceptable as submitted and would require major revisions to become acceptable, exclusion from the competitive range is generally permissible, AH Computer Consulting, Inc., B-401204, June 25, 2009, 2009 CPD ¶ 132 at 4, and the determination as to whether the weaknesses in a proposal are of such a magnitude that major revision of the proposal would be required to address them is essentially a matter of agency judgment, which we will not question absent a showing that the determination was unreasonable. See Software Assocs., Ltd., B-213878, Apr. 3, 1984, 84-1 CPD ¶ 378 at 3-4. Here, given the protester's failure to propose an adequate approach to staffing, as well as the proposal's numerous other weaknesses and significant weaknesses, we think that the agency reasonably determined that major revision of the proposal would be required to make it technically acceptable.

The protest is denied.

Lynn H. Gibson
General Counsel