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Decision

Matter of: Zodiac of North America

File: B-409084; B-409084.2; B-409084.3

Date: January 17, 2014

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DIGEST

1. Protest challenging technical acceptability of awardee's proposed inflatable craft is denied where record demonstrates that agency reasonably evaluated awardee's test reports demonstrating compliance with the solicitation's speed requirements.
2. Protest that agency conducted unequal discussions in a lowest-priced, technically-acceptable procurement is denied where the record shows that the agency provided offerors an equal opportunity to revise their proposals to make them acceptable.

DECISION

Zodiac of North America, of Stevensville, Maryland, protests the Department of the Army's award of a contract to Atlantic Diving Supply, Inc. (ADS), of Virginia Beach, Virginia, under request for proposals (RFP) No. W56HZV-13-R-0186, for inflatable combat raiding craft and inflatable combat assault craft. Zodiac contends that the agency made award on the basis of an unacceptable proposal and engaged in unequal discussions.

We deny the protest.

BACKGROUND

The RFP, issued on February 28, 2013, contemplated award of a fixed unit-price, indefinite-delivery/indefinite-quantity contract to provide 7-person inflatable combat raiding craft and 15-person inflatable combat assault craft. RFP at 4, 111. The 7-person inflatable combat raiding craft will be used to support missions such as airborne and air mobile infiltration, clandestine over-the-horizon insertion and extraction, submarine infiltration and exfiltration of special operations forces, surface swimming operations, SCUBA operations, river reconnaissance, searching, water gap crossing, and humanitarian missions. Id. at 4. The 15-person inflatable combat assault craft will be used to support missions such as hydrographic survey and side-scan sonar operations, bridging operations, water gap crossing for larger forces, and safety and diver recovery platform. Id.

The RFP provided that the procurement would be conducted as a commercial item procurement, with award to be made to the offeror who submitted the lowest-priced, technically acceptable proposal. RFP at 3, 111. The solicitation also stated that, in order to be considered for award, an offeror's proposal must be rated acceptable under every individual requirement specified in the technical information questionnaire for the 7-person inflatable combat raiding craft, 15-person inflatable combat assault craft, and associated outboard motors. RFP at 112.

The agency received three proposals by the April 22 closing date. Agency Report (AR) at 5. After identifying concerns regarding each of the three proposals, the agency issued evaluation notices (ENs) to Zodiac, ADS, and the third offeror. After receiving the offerors' responses to the first set of ENs, the agency determined that Zodiac's proposal was technically acceptable, and therefore, no further discussions were needed. Since the responses of ADS and the third offeror did not resolve all of the agency's concerns, the agency engaged in additional discussions with those two firms. On September 10, the agency requested final proposal revisions. The revised proposals submitted by ADS and Zodiac were both determined to be technically acceptable. AR, Tab 23, Source Selection Decision, at 1. Since ADS's price of \$47,521,660.61 was lower than Zodiac's price of \$[DELETED], ADS's proposal was selected for award. Id. at 2. This protest followed.

DISCUSSION

Zodiac contends that ADS's proposal was technically unacceptable, the agency conducted unequal discussions, and the agency improperly waived a material requirement in the solicitation. We find no merit in Zodiac's arguments.

Technical Acceptability

Zodiac asserts that ADS proposed boats whose engines are insufficient to meet the solicitation's speed requirements. In this regard, Zodiac contends that the agency never evaluated the speed test results submitted by ADS in response to discussion questions.

The evaluation of an offeror's proposal is a matter largely within the agency's discretion. Frontline Healthcare Workers Safety Found., Ltd., B-402380, Mar. 22, 2010, 2010 CPD ¶ 91 at 5. In reviewing a protest that challenges an agency's evaluation of proposals, our Office will not reevaluate proposals; rather, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Ocean Servs., LLC, B-406087, B-406087.2, Feb. 2, 2012, 2012 CPD ¶ 62 at 5.

The record here supports the agency determination that ADS's boats with the proposed engines will meet the solicitation's speed requirements. As relevant here, the technical information questionnaire indicated that the outboard motor(s) for the raiding craft were required to propel a fully-loaded (2,120 pound) craft at 16 knots during sea state 1 (calm water) within two minutes. AR, Tab 10, Outboard Motor Technical Information Questionnaire, at 2. The outboard motor(s) for the assault craft were required to propel a fully-loaded (4,000 pound) craft at 16 knots during sea state 1 within two minutes. Id. The record indicates that ADS proposed the same motors ([DELETED]) as Zodiac. See AR, Tab 19, Zodiac Proposal, at 40; AR, Tab 17, ADS Proposal, at 3.

With regard to the inflatable combat raiding craft, ADS submitted a test report prepared by [DELETED] that stated that the craft with a base weight of 2,124.5 pounds achieved speeds in excess of 16 knots in sea states 1-2 and 2 in under two minutes. AR, Tab 21, Inflatable Combat Raiding Craft Speed Test Report, at 3. With regard to the inflatable combat assault craft, ADS submitted a test report, also prepared by [DELETED], that stated that the craft with a weight of 4,434 pounds achieved speeds in excess of 16 knots in sea state 1 in under two minutes. AR, Tab 20, Inflatable Combat Assault Craft Speed Test Report, at 4-5, 8-9. Further, the record indicates that the agency evaluated the test reports submitted by ADS, determining that the submitted information demonstrated compliance with the speed requirements. AR, Tab 16, ADS Evaluation SSEB Report Excerpt, at 1. Zodiac has not shown that the test reports were questionable on their face or that the agency otherwise was unreasonable in determining that the information submitted by ADS was adequate to demonstrate compliance with the speed requirements.

Discussions

Zodiac asserts that discussions were unequal because the agency provided ADS with multiple rounds of discussion questions, repeatedly giving ADS an opportunity to address the agency's concerns, but did not provide Zodiac with similarly detailed discussions.¹

This argument is without merit. The scope and extent of discussions are a matter of contracting officer judgment. Federal Acquisition Regulation (FAR) § 15.306(d)(3); Tritech Field Eng'g, Inc., B-255336.2, Apr. 13, 1994, 94-1 CPD ¶ 261 at 5. There is nothing legally objectionable in an agency's conducting multiple rounds of discussions to resolve significant weaknesses or deficiencies found in a proposal. General Dynamics--Ordnance & Tactical Sys., B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 7; Dynacs Eng'g Co., Inc., B-284234 et al., Mar. 17, 2000, 2000 CPD ¶ 50 at 3-4. Further, if one offeror's proposal revisions have already addressed all of the agency's concerns, there is nothing legally objectionable in an agency's conducting more rounds of discussions with another offeror to resolve significant weaknesses or deficiencies found in that proposal. See General Dynamics--Ordnance & Tactical Sys., supra.

Here, the solicitation provided for a low-priced/technically acceptable competition, with a pass/fail evaluation of technical proposals. RFP at 111-12. Accordingly, "technically acceptable" was the highest available technical rating, and a proposal rated technically acceptable could not be further improved. Zodiac's proposal was rated technically acceptable after the first round of discussion questions. AR, Tab 17, Zodiac Technical Information Questionnaire Excerpt, at 1. Therefore, because it was not possible for Zodiac to improve its technical proposal after the first round of discussion questions, the agency's subsequent discussions with offerors whose proposals were not technically acceptable did not deprive Zodiac of any opportunity afforded to other offerors in the competition. Commercial Design Group, Inc., B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 at 3. Further, Zodiac was not deprived of the opportunity to make revisions to its proposal had it chosen to do so, as all offerors were provided an opportunity to submit final proposal revisions

¹ In this regard, Zodiac complains that the Agency was facilitating ADS's refinement of its proposal. Second Supp. Protest at 12. However, the fundamental purpose of discussions is to afford offerors the opportunity to improve their proposals to maximize the government's ability to obtain the best value, based on the requirement and the evaluation factors set forth in the solicitation. AT&T Gov't Solutions, Inc., B-406926 et al., Oct. 2, 2012, 2013 CPD ¶ 88 at 17. Further, the rewrite of FAR part 15 eliminated the prohibition on technical leveling (helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussions). Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 10.

after the discussions period had closed. AR, Tab 39, Letter to Zodiac Requesting Final Proposal Revisions; AR, Tab 40, Letter to ADS Requesting Final Proposal Revisions. Thus, there is no basis for finding the challenged discussions to be improper.²

Commerciality

Next, Zodiac argues that the agency did not conduct a commerciality assessment prior to awarding to ADS to determine whether its proposed boats were commercial items. Specifically, Zodiac complains that the agency did not formally evaluate or document whether ADS's proposed raiding craft and assault craft were commercial items at the time of the evaluation.

When using commercial item procedures, there is no requirement that an agency formally evaluate or document whether an offered item is a commercial item, absent a solicitation provision requiring a separate commerciality determination or some indication that the proposed items are not commercial. Firearms Training Sys., Inc., B-292819.2 et al., Apr. 26, 2004, 2004 CPD ¶ 107 at 12; see NABCO, Inc., B-293027, B-293027.2, Jan. 15, 2004, 2004 CPD ¶ 14 at 4 (there is no requirement in the FAR that agencies formally evaluate or document whether an offered item is a commercial item when using commercial item procedures). Here, while the commercial item solicitation contained references to commercial items, see RFP at 43, 75, it did not require a separate commerciality determination during the evaluation.

Further, the record reflects that the agency here concluded, prior to issuing the solicitation, that the requirement could be satisfied using commercial items. AR, Tab 28, Commerciality Determination, at 1. This determination was based on the

² Zodiac also contends that discussions were unequal because the agency raised a pricing issue with ADS, but it failed to notify Zodiac that its price was significantly higher than the price proposed by ADS. Second Supp. Protest at 12. However, the record reflects that the agency's communications regarding ADS's price proposal consisted of two questions regarding the completeness of the proposal. AR, Tab 48, ADS Pricing EN Response, at 1 (asking for clarification as to why ADS did not propose labor hours for the first ordering year and why no indirect costs were listed). In contrast, Zodiac's price was evaluated to be reasonable and acceptable. Source Selection Decision, at 2. Where an offeror's price (such as Zodiac's) is not so high as to be unreasonable and thus unacceptable for award, the agency is not required to advise the offeror during discussions that its prices are considered high. Karrar Sys. Corp., B-310661, B-310661.2, Jan. 3, 2008, 2008 CPD ¶ 51 at 3; MarLaw-Arco MFPD Mgmt., B-291875, Apr. 23, 2003, 2003 CPD ¶ 85 at 6. In these circumstances, we find no merit in the protester's claim of unequal discussions.

contracting officer's knowledge of the procurement history of these craft--specifically that they had previously been procured as commercial items. Contracting Officer's Statement at 20. The determination was also based on the agency's market research, which included a review of the commercial product literature for several firms that sell inflatable boats. AR, Tab 13, Market Research for Inflatable Combat Raiding Craft; AR, Tab 14, Market Research for Inflatable Combat Assault Craft. In addition, as noted by ADS, the firm provided in its proposal a specifications sheet available to commercial buyers and commercial product literature that showed that both of its boats were commercial items. Intervenor's Comments at 4. In these circumstances, we cannot find the agency's actions in this regard objectionable.

Price Buildup Information

Zodiac contends that the agency improperly waived a material solicitation requirement for ADS. Specifically, Zodiac notes that the solicitation required offerors to provide the build-up of unit prices by cost element, such as labor, material, other direct costs, and indirect costs. RFP at 109. Prior to the due date for submission of proposals, Zodiac contacted the agency and requested that, since this is a fixed-price procurement of commercial items, the requirement for price buildup information be removed from the solicitation. Zodiac Price Response at 3. The agency declined to remove this requirement. Id.

After reviewing offerors' proposals, the agency contacted ADS during discussions and asked it to clarify why the firm had not included the labor hours or indirect costs used in the buildup of its price proposal. AR, Tab 47, ADS Pricing Evaluation Notice, at 1. ADS responded that the majority of the manufacturing would be performed by the firm's two subcontractors, both of which had declined to provide a breakout of their proposed hours of direct labor and labor overhead. Id. at 2. Instead, the subcontractors had provided only the direct costs of the subsystems they would provide. Id. With regard to indirect costs, ADS responded that it does not have a cost accounting system, so it was unable to break out its indirect costs. Id. Despite the missing information, the agency considered ADS's price proposal to be acceptable. Zodiac contends that this constituted a waiver of a material solicitation term. Zodiac Dec. 20 Response at 3.

This argument does not provide a basis for sustaining the protest. Even where an agency clearly should have amended a solicitation or otherwise apprised offerors that it had effectively waived a requirement, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. Labatt Food Serv., Inc., B-310939.6, Aug. 18, 2008, 2008 CPD ¶ 162 at 3. Competitive prejudice from such a waiver exists only where the requirement was not similarly waived for the protester, or where the protester would be able to alter its proposal to its competitive advantage if given the opportunity to respond to the relaxed term. See Phoebe Putney Memorial Hospital, B-311385,

June 19, 2008, 2008 CPD ¶ 128 at 4; United Def. LP, B-286925 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 27.

Here, the record indicates that the agency relaxed its requirements for price buildup information for both offerors. Specifically, the agency notes that Zodiac's price proposal was also missing price buildup information, such as the direct labor price data for the inflatable combat raiding craft. AR, Tab 51, Zodiac Price Proposal Matrix, at 1. Despite the missing price buildup information in both ADS's and Zodiac's price proposals, the agency determined that both price proposals were acceptable. SSDD at 2. Further, Zodiac has made no convincing showing that it would have altered its proposal in any meaningful way had it known that the agency would waive the buildup requirement. Thus, we find no basis to sustain Zodiac's protest based on a waiver of the price buildup information requirement.

The protest is denied.

Susan A. Poling
General Counsel