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Decision

Matter of: Nirvana Enterprise, Inc.

File: B-414951.2; B-414951.3

Date: December 19, 2017

Robert K. Tompkins, Esq., and Rodney M. Perry, Esq., Holland & Knight, LLP, for the protester.

J. Dale Gipson, Esq., Tracy A. Marion, Esq., Maurice J. Fitzgerald, III, Esq., and Katherine E. McGuire, Esq., Lanier Ford Shaver & Payne PC, for the intervenor. Captain Jeremy D. Burkhart, Lieutenant Colonel Andrew J. Smith, and Scott N. Flesch, Esq., Department of the Army, for the agency.

Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's evaluation of proposals is denied where the record shows the evaluation was reasonable and consistent with the terms of the solicitation, as well as applicable statutes and regulations.

2. Protest that the source selection decision was unreasonable is denied where the record shows that the consensus evaluation was based on the actual merits of the proposal, and where the record shows that the source selection official exercised independent judgment and adequately documented his decision.

DECISION

Nirvana Enterprise, Inc., of Merritt Island, Florida, protests the award of a contract to Advanced Technology Logistics (ATL), of Newnan, Georgia, under request for proposals (RFP) No. W9124J-17-R-0012, issued by the Department of the Army for education support services. Nirvana challenges the agency's evaluation of proposals and source selection.

We deny the protest.

BACKGROUND

The Army issued the RFP on February 7, 2017, as a small business set-aside, for education support services at U.S. Army Reserve Education Centers located throughout the United States. The RFP contemplated the award of a fixed-price contract with an 11-month base period, two 1-year option periods, and a 30-day phase-out period to the offeror with the lowest-priced, technically-acceptable offer. RFP at 7. Proposals were to be evaluated based on technical, price, and past performance factors. Id. at 106. The technical factor had four subfactors: mission capability, transition approach, personnel management, and management control. Id.

The RFP's performance work statement (PWS) specified that the selected offeror would be expected to provide fully-trained personnel, including education service advisors and test examiner personnel. PWS § 1.9. The education service advisors would be expected to perform a total of 32 tasks, most involving assisting students with GoArmyEd accounts or informing students about education and tuition assistance programs. PWS §§ 5.3.1 - 5.3.32. The test examiner personnel would be expected to perform a total of 11 tasks, including test proctoring and maintaining control over test answer booklets until the booklets are submitted for scoring. PWS §§ 5.4.1 - 5.4.11. Test examiner personnel would also be required to perform all the duties of education service advisors. PWS § 5.11.

Education service advisors and test examiner personnel were also required to meet certain qualifications. Education service advisors were to possess an associate's or higher degree, or a combination of appropriate education and experience. PWS § 1.9.1.7. Test examiner personnel were to possess a bachelor's or higher degree, and at least three years of professional relevant work experience in testing. Id. at § 1.9.1.8. Proposed workers were covered by the Service Contract Act (SCA) and were to be paid in accordance with the Department of Labor (DOL) wage rate determinations applicable where the employees would be located. RFP at 113; PWS at Tech. Ex. 4. The RFP included a list of locations where employees would be located and referenced the SCA wage determinations that would apply for each of these locations. PWS at Tech. Ex. 4.

The agency received proposals from 10 offerors, including Nirvana and ATL. Tab 32, Price Negotiation Memorandum at 15-16. The agency determined that only Nirvana and ATL submitted technically acceptable offers, and awarded the contract to ATL based on its lower price. Id. at 15-16, 48. This protest followed.

DISCUSSION

Nirvana raises various challenges to the agency's evaluation of ATL's proposal and to the source selection decision. We considered all of the firm's allegations and find no basis to sustain the protest. We discuss the protester's principal contentions below. We note at the outset that, in reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency's

evaluation was reasonable and consistent with the solicitation's evaluation criteria, as well as applicable statutes and regulations. SaxmanOne, LLC, B-414748, B-414748.3, Aug. 22, 2017, 2017 CPD ¶ 264 at 3.

ATL's Proposed Labor Category

Nirvana argues that the agency should have evaluated ATL's proposal as technically unacceptable based on the labor category the firm proposed to use for its education service advisors and test examiner personnel. In this regard, the record shows that ATL proposed to use the SCA labor category of [DELETED]. According to Nirvana, [DELETED] employees are incapable of performing the tasks of education service advisors and test examiner personnel, and therefore Nirvana argues that ATL's proposal should have been rated technically unacceptable because ATL proposed unqualified staff.

Based on our review of the record we have no basis to sustain this protest allegation. The record shows that an offeror's selection of one or another SCA labor category did not have any bearing on the agency's conclusion about the technical acceptability of any proposal. The RFP did not require offerors to propose personnel under any particular labor category, and the RFP's evaluation criteria did not specify that proposals would be rated unacceptable should they use the [DELETED] labor category; rather, the RFP required only that offerors propose employees that meet the specified education or experience qualifications in order to fulfil the duties of education service advisors and test examiner personnel. Indeed, Nirvana's allegation is based on its own determination that the [DELETED] labor category is inapplicable to the duties of education service advisors and test examiner personnel, as opposed to being based on any provision within the solicitation. Accordingly, we do not find that ATL's proposal should have been rated technically unacceptable because the solicitation did not require offerors to convey any substantive information about personnel qualifications through the selection of a particular SCA labor category. See n-Link/LSG JV, B-411352, B-411352.2, July 1, 2015, 2015 CPD ¶ 194 at 6 (selection of a particular SCA labor category did not render proposal technically unacceptable when the selection was not intended to convey substantive information about personnel qualifications).¹

Alternatively, Nirvana alleges that ATL's selection of the [DELETED] labor category evidences its intent to violate the SCA and should have been rejected as nonresponsive.² Where a firm offers hourly rates below those specified in an SCA

¹ Because we find that the solicitation did not require offerors to propose particular labor categories, we need not address protester's derivative allegations (*i.e.*, ATL's proposed use of [DELETED] personnel rendered its proposal unacceptable under three technical subfactors).

² GAO held a conference call on October 18, 2017, where we stated our intent to dismiss Nirvana's protest grounds asserting that ATL intended to violate the SCA and
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wage determination, that firm is nonetheless eligible for a contract award provided the proposal does not evidence intent to violate the SCA and the firm is otherwise determined to be responsible. Allen-Norris-Vance Enters., Inc., B-243115, July 5, 1991, 91-2 CPD ¶ 23 at 3. On a fixed-price contract, as here, a proposal that does not take exception to the solicitation's SCA provisions yet offers labor rates that are less than the SCA-specified rates may simply constitute a below-cost offer, and an award to a responsible firm on the basis of such an offer is legally unobjectionable. Id. In contrast, where there is an indication that the offeror does not intend to be bound by the terms of the SCA, its offer must be rejected. Id. Here, ATL's proposal did not take any exception to the RFP requirement regarding compliance with the SCA; rather, ATL's proposal evidenced intent to be bound by the SCA as it included specific SCA labor categories for its personnel. See Solid Waste Servs., Inc., B-248200.4, Nov. 9, 1992, 92-2 CPD ¶ 327 at 3 (bid did not evidence intent to violate SCA when the bidder did not take exception to the SCA requirement and its bid confirmed that it intended to comply with the SCA). As a result, we have no basis to sustain this protest allegation.

Nirvana also asserts that ATL's proposed SCA labor category rendered it a nonresponsible offeror. As a general matter, our Office does not review affirmative determinations of responsibility, which are typically matters within the agency's broad discretion. 4 C.F.R. § 21.5(c). We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the agency may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Id.; Fidelis Logistic and Supply Servs., B-414445, B-414445.2, May 17, 2017, 2017 CPD ¶ 150 at 5. Here, Nirvana's allegation that ATL proposed incorrect SCA labor categories does not meet our threshold for review. Below-cost pricing is legally unobjectionable, see American Overseas Book Co., Inc., B-276675, July 10, 1997, 97-2 CPD ¶ 12 at 3, and an alleged defective technical approach does not demonstrate a lack of present responsibility. Furthermore, the record shows that these aspects of ATL's proposal were considered as part of the evaluation process. Tab 32, Price Negotiation Memorandum at 21-23, 46. Accordingly, we do not find that the contracting officer ignored information relevant to determining that ATL was a responsible offeror.

Technical Evaluation

Nirvana alleges that ATL's proposal should have been rated unacceptable under the mission capability subfactor. The firm asserts that ATL failed to demonstrate that it had sufficient financial resources to provide uninterrupted services for 45 days.

Under the mission capability subfactor, the RFP required offerors to provide a "certified letter from a financial institution that states the Offeror has enough financial resources

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that ATL was a nonresponsible offeror. E-mail from GAO to Parties, Oct. 11, 2017. GAO did not require the agency to address these allegations in its report. Id.

available to ensure uninterrupted delivery of required services for 45 days based on the Offeror's proposal value." RFP at 107. ATL's proposal included a letter from a financial institution stating ATL had deposit accounts with "positive banking activity and with deposits totaling in excess of six figures." Tab 28, ATL Revised Proposal, attach. 1. The letter also stated ATL "has established loan relationships with our institution. All accounts are in good standing and have been maintained as agreed." Id. The agency determined that the letter was sufficient to satisfy the evaluation criteria. It interpreted the letter as evidence that ATL had sufficient financial resources, and also that ATL was credit-worthy and capable of opening new lines of credit. Contracting Officer's Supplemental Statement of Facts at 2.

Based on the record, we find the agency's evaluation reasonable. The evaluation criteria required only that the offeror demonstrate that it has enough financial resources available to perform for 45 days. ATL's letter reasonably meets the criteria because it states that ATL possessed financial resources that it could draw upon in order to provide uninterrupted services and that ATL has a positive credit history. Although Nirvana asserts that ATL's letter should have included a more definite value, the evaluation criteria did not require such specificity but rather only required that offerors show that they possess "enough resources." Furthermore, Nirvana's allegation that the agency interpreted ATL's credit-worthiness or financial resources too favorably simply constitutes disagreement with the agency's judgment because it only challenges the agency's judgment of ATL's letter. Applied Tech. Sys., Inc., B-404267, B-404267.2, Jan. 25, 2011, 2011 CPD ¶ 36 at 9 (a protester's disagreement with the agency's judgment, without more, does not render an evaluation unreasonable).

Source Selection Decision

Nirvana contends that the source selection evaluation board (SSEB) unreasonably evaluated the incorrect version of ATL's proposal, and that the source selection decision does not reflect the independent judgment of the source selection authority (SSA) and was not adequately documented.

As to whether the SSEB unreasonably evaluated the incorrect version of ATL's proposal, we find no merit to this allegation. The agency received initial proposals by March 23, and final proposals by June 1. Contracting Officer's Supplemental Statement of Facts at 1. Although some of the individual members of the SSEB may have reviewed ATL's initial proposal when completing their individual score sheets, our overriding concern when reviewing the reasonableness of an SSEB's evaluation is whether the consensus scores reflect the relative merits of the proposal. See Resource Applications, Inc., B-274943.3, Mar. 5, 1997, 97-1 CPD ¶ 137 at 5 (stating "the overriding concern in the evaluation process is that the final score assigned accurately reflect the actual merits of the proposals, not that it be mechanically traceable back to the scores initially given by the individual evaluators."); see also SRA Int'l, Inc., B-407709.5, B-407709.6, Dec. 3, 2013, 2013 CPD ¶ 281 at 11. Here, the consensus evaluation report shows that the SSEB considered ATL's final proposal when developing their final judgment because the consensus evaluation sheet states that the

SSEB reviewed ATL's proposal dated June 1. Tab 47, Consensus Technical Evaluation of ATL. Accordingly, we find the SSEB reasonably evaluated ATL's proposal.

Finally, we find that the source selection decision reflects the independent judgment of the SSA and is adequately documented. Section 15.308 of the Federal Acquisition Regulation (FAR) provides that:

The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment.

FAR § 15.308. With regard to documentation, it need only be sufficient to establish that the agency was aware of the relative merits and costs of the competing proposals and that the source selection be reasonably based. See General Dynamics, American Overseas Marine, B-401874.14, B-401874.15, Nov. 1, 2011, 2012 CPD ¶ 85 at 16.

Here, the record shows that the SSA exercised his independent judgment because the source selection decision document states that the SSA determined that ATL's proposal represented the best value, the SSA's determination was made based upon the evaluation factors, and the SSA based his decision on an integrated assessment of the proposals. Tab 51, Source Selection Decision Document. The SSA's declaration states that he conducted an initial review of each proposal received, briefed and trained the SSEB, reviewed the SSEB's reports and evaluations, and consulted with the contract specialist. Contracting Officer's Supplemental Statement of Facts at 2. The SSA's declaration also states that while he relied on the SSEB's evaluations, he also evaluated ATL's proposal against all evaluation criteria prior to reaching his decision. Id. Additionally, the Price Negotiation Memorandum shows that the SSA found ATL's proposal acceptable under each specific evaluation criteria and identified ATL's proposal as lower-priced compared to Nirvana's proposal. Tab 32, Price Negotiation Memorandum at 21-23, 46. Given this record and the fact that this procurement was conducted on a lowest-priced, technically-acceptable basis, we find nothing objectionable about the content, or level of documentation, of the SSA's source selection decision.³

The protest is denied.

Thomas H. Armstrong
General Counsel

³ Nirvana also alleged that ATL submitted its initial proposal late and therefore ATL should have been ineligible for award. Nirvana Comments at 11. Nirvana withdrew this allegation in its supplemental comments. Nirvana Supplemental Comments at 2.