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Decision

Matter of: Bristol Environmental Remediation Services, LLC

File: B-416980; B-416980.2

Date: January 16, 2019

S. Lane Tucker, Esq., Stoel Rives LLP, for the protester.
Stacy K. Birkel, Esq., Department of the Army, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of protester's proposal is sustained where record shows agency's evaluation was unreasonable and inconsistent with the terms of the solicitation.

DECISION

Bristol Environmental Remediation Services, Inc., of Anchorage, Alaska, protests the rejection of its proposal under request for proposals (RFP) No. W9128F-16-R-0027, issued by the Department of the Army, U.S. Corps of Engineers for environmental remediation and munitions response services. Bristol argues that the agency unreasonably rejected its proposal.

We sustain the protest.

BACKGROUND

The RFP¹ was set aside for exclusive participation among eligible section 8(a) small businesses and contemplates the award of up to 10 fixed-price, multiple-award, indefinite-delivery, indefinite-quantity task-order contracts. Award was to be made on a best-value tradeoff basis, considering price and several non-price considerations. The non-price considerations, listed in descending order of importance, were: previous

¹ All citations to the RFP in this decision are to agency report (AR) exh. 15, identified by the agency as the solicitation as amended.

experience, resumes of key personnel, past performance, organizational structure, and sample project technical approach.² RFP at 79. The RFP further provided that the non-price considerations, in combination, were significantly more important than price. Id.

In response to the RFP, the agency received a number of proposals, including that of the protester. After performing an initial evaluation, the agency established a competitive range, engaged in discussions with the competitive range offerors, and solicited, obtained and evaluated revised proposals. After evaluating the revised proposals, the agency assigned identical--acceptable--ratings to all of the competitive range proposals under the previous experience, resumes of key personnel and organizational structure factors, and also assigned identical past performance ratings to all of the firms as well (relevant/satisfactory confidence). AR, exh. 5, Source Selection Decision Document (SSDD), at 31.³ Under the fifth and least important evaluation factor, sample project technical approach, the agency assigned the Bristol proposal a marginal rating, and identified five weaknesses as forming the basis for that rating. Id. at 68-69. In contrast, all of the proposals ultimately receiving award were assigned acceptable ratings under the fifth evaluation factor. Id. at 31. Based on these evaluation results, the agency made award to six offerors.⁴ After being advised of the agency's award decision and requesting and receiving a debriefing, Bristol filed the instant protest.

² The RFP advised that the agency would assign adjectival ratings to each non-price factor, other than past performance, of outstanding, good, acceptable, marginal or unacceptable. RFP at 79-80. For past performance, the RFP advised that the agency would evaluate the relevancy of each offeror's past performance examples, and assign confidence ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown (neutral) confidence to each offeror's past performance. RFP at 81. The RFP also included definitions for the following terms: "significant strength," "strength," "weakness," "significant weakness" and "deficiency." Id.

³ The SSDD pages are not numbered. All references to that document are to the corresponding page numbers as they appear in the pdf document provided by the agency in its report.

⁴ The record shows that Bristol submitted the lowest price among the competitive range offerors. In making the award decisions, the record shows that the agency performed a cost/technical tradeoff between Bristol and the next-higher-priced offeror and concluded that the price premium associated with that proposal--approximately 75 percent--was worth the cost associated with award to that firm compared to making award to the protester. The remaining five awardees all had prices that were even higher than the price used by the agency for its cost/technical tradeoff, with the highest-priced firm being awarded a contract based on a proposed price of more than three times the price offered by the protester. AR, exh. 5, SSDD, at 31.

PROTEST

Bristol argues that the agency unreasonably assigned all of the identified weaknesses to its proposal and maintains that it should have been given an acceptable rating under the sample project technical approach factor. Bristol argues that, if the agency's evaluation had been reasonable, it would have been awarded one of the possible 10 contracts contemplated under the RFP.

We sustain Bristol's protest for the reasons discussed below. In reviewing protests relating to an agency's evaluation of proposals, our Office does not independently evaluate 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 terms of the solicitation and applicable statutes and regulations. L3 Unidyne, Inc., B-414902 et al., Oct. 16, 2017, 2017 CPD ¶ 317 at 3. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the terms of the solicitation, inadequately documented, or not reasonably based. Id.

We note at the outset that the five weaknesses identified by the agency as forming the basis for its marginal rating of the Bristol proposal were not identified as significant weaknesses or deficiencies as those terms were defined in the RFP. Thus, each of the five weaknesses were comparatively minor concerns that did not render the Bristol proposal unacceptable or unawardable, and it was only the agency's consideration of the weaknesses in combination that apparently led it to assign a marginal rating to the proposal.

Against this backdrop, the agency, in its report to our Office concedes as a threshold matter that three of the five weaknesses were not, in fact, properly identified as weaknesses and should not have been assigned to the protester's proposal. Contracting Officer's Statement at 11-13. We discuss the remaining two weaknesses below.

As noted, the RFP is for environmental remediation and munitions response services, and offerors were required, as part of their proposals, to provide the agency with a response to a sample project outlined in the RFP. The sample project required the offeror to provide a comprehensive plan to respond to a trench that contained potentially unexploded ordnance (UXO); to excavate the trench and remove the UXO; and to remediate the trench and a surrounding 60-acre area. RFP at 60-63. As part of the remediation effort, offerors were required to describe how they would render the site acceptable for unlimited use and unrestricted exposure (UU/UE).

All parties agree that, in performing the remediation effort to render the site acceptable for UU/UE, one of the requirements was to perform soil sampling. In performing such sampling, the offeror was required to identify what is referred to in the record as a "unit of decision" (U/D). A U/D is a specific "lot" size (for example, one acre), and the offerors

were required to identify the U/D size, and then explain how sampling would be performed within each U/D.

The first of the two remaining weaknesses was assessed after the agency concluded that Bristol's proposed U/D size of from one to two acres was too large to accomplish sampling in a manner that would render the site acceptable for UU/UE under applicable law. AR, exh. 11, Source Selection Evaluation Board (SSEB) Report, at 47; exh. 7, SSEB Report Addendum, at 32. Bristol argues that the agency conclusion is both unreasonable, and more importantly, reflects disparate treatment of its proposal in comparison to how one of the awardees' proposals was evaluated.

We offer no opinion regarding what essentially amounts to a scientific conclusion on the part of the agency regarding the adequacy of the proposed solution. However, we agree with the protester that the record reflects apparent disparate treatment of the offerors by the agency in its evaluation of proposals for this aspect of the sample project. In this connection, the record shows that the agency also identified a weakness in the proposal of one of the awardees based on the adequacy of its response to the sampling requirement, and that this weakness (along with another weakness) resulted in the SSEB changing the proposal's rating from acceptable to marginal for the sample project evaluation factor. Specifically, the agency evaluators made the following finding:

Offeror states they will test for nitrate ammonium and sulfate, which are so prevalent in all media that it would be hard to determine if there are exceedances without associated background information. This response was not acceptable to the SSEB. The response did not include any information on the number of samples or where the samples would be taken since these compounds are ubiquitous in nature. The samples would be necessary to determine if detections were a result of the source material.

AR, exh. 7, SSEB Report Addendum, at 14. Notwithstanding this express finding, the agency's source selection authority (SSA) changed the firm's rating back to acceptable, finding as follows:

The rating for this factor was changed back to Green/Acceptable by the SSA because the Offeror had identified weaknesses that would not affect overall contract performance and no new weaknesses were identified. While the proposal did not fully explain the sampling protocol, the effort could be clarified during development of the sampling plan.

AR, exh. 5, SSDD, at 46. Again, we offer no opinion regarding the scientific conclusion of the agency in connection with the evaluation of this proposal. However, it appears from the record that both offerors were criticized for the adequacy of their sampling protocols. Notwithstanding this apparent fact, the agency ultimately made award to one firm while eliminating the other firm from award consideration. This amounts to disparate treatment of the offerors. It is axiomatic that agencies are required to evaluate proposals on a common basis and in accordance with the terms of the RFP;

agencies may not properly engage in disparate treatment of offerors in the evaluation of proposals. Alutiiq Pacific, LLC, B-409584, B-409584.2, June 18, 2014, 2014 CPD ¶196 at 10. We therefore sustain this aspect of Bristol's protest.

The second of the remaining weaknesses identified by the agency evaluators related to how Bristol proposed to excavate the munitions trench and remove possible UXO. A review of the protester's proposal shows that Bristol proposed to have UXO technicians enter the trench with an array of hand-held tools for munitions and metal detection and survey a discrete area of the trench to determine the existence of "anomalies" in order to detect the presence of possible munitions to a depth of 12 inches. AR, exh. 13, Bristol Tech. Proposal, at 39-40; exh. 8, Bristol Responses to Discussion Questions, at 3-4. Once it was determined that there were no anomalies present to a depth of 12 inches, the trench would be excavated using earth moving machinery (EMM) by performing a 6-inch "lift," that is, the soil would be removed to a depth of six inches.⁵ Id. During the 6-inch lift, all UXO technicians would exit the trench, and one remaining UXO technician would be present near the trench as a "spotter" to observe the 6-inch lift. Id.

Once the 6-inch lift was accomplished, the UXO technicians would return to the trench to again perform a survey of the work area to a depth of 12 inches to ensure it was clear of any anomalies. AR, exh. 13, Bristol Tech. Proposal, at 39-40; exh. 8, Bristol Responses to Discussion Questions, at 3-4. Another 6-inch lift would be performed, and so on, until all anomalies were detected and removed, or until the trench was excavated to the specified depth. Id. In the event an anomaly was detected, the trench would be excavated using hand tools rather than the EMM to ensure that no anomaly would be inadvertently struck. Id. Bristol proposed to excavate entirely by hand whenever an anomaly was discovered within 12 inches of the surface, and to remove any uncovered munitions by hand. Id.

The record shows that the agency was concerned about the safety of Bristol's proposed approach. During the initial evaluation, the evaluators noted that some of the possible buried munitions could include a particular type of bomb, the BLU-107, which is described in the record as a type of munitions with the greatest fragmentation distance (MGFD). Because of the MGFD of the BLU-107, the agency evaluators were concerned that, should such a bomb be struck during excavation, the armoring on the EMM would be inadequate to protect its operator, and personnel in or around the trench (more specifically, the UXO technician spotter) could be injured or killed. AR, exh. 11, SSEB Report, at 47. The agency evaluators therefore expressly concluded that robotic excavation equipment would be the appropriate solution. Id.

⁵ Bristol proposed to "up-armor" the EMM, and also proposed an additional measure of welding a "butter bar" or flat piece of steel to the "teeth" of the EMM bucket to ensure that the "teeth" of the bucket did not inadvertently strike an object. AR, exh. 13, Bristol Tech. Proposal, at 39-40; exh. 8, Bristol Responses to Discussion Questions, at 3-4.

During discussions, the agency asked Bristol the following question: “It is assumed that the BLU-107 will be the munitions with the greatest MGF, please explain how personnel will be protected from an accidental detonation.” AR, exh. 9, Bristol Discussion Questions, at 4. Bristol responded to the question by largely reiterating the methodology described above.

In evaluating Bristol’s revised proposal, the agency continued to assign a weakness to the proposal for the reasons described above, namely, that Bristol failed to propose to use robotic equipment, and instead intended to use UXO technicians on site and perform the excavation using an EMM. AR, exh. 7, SSEB Report Addendum, at 32. This concern is reiterated verbatim in the SSDD, AR, exh. 5, at 69, and specifically is identified as the reason the agency was willing to pay a price premium of approximately 75 percent over the protester’s proposed price in making its award decision. Id. at 79.

Bristol argues that its methodology was consistent with the engineering guidance included in the RFP. Bristol therefore argues that, either this is not, in fact, a weakness because its approach was consistent with the guidance provided in the RFP, or the agency failed to afford it meaningful discussions, since, apparently, only a robotic equipment solution would have been considered acceptable to the evaluators, and such an approach was at variance with the guidance included in the RFP.

We agree with the protester that its proposed approach appears consistent with the engineering guidance included in the RFP. The solicitation specifically incorporates, and requires compliance with, an agency-issued publication entitled “Explosives Safety and Health Requirements” designated as publication EM-385-1-97. RFP at 25-26. Among other things, that publication specifically describes a procedure for intentionally removing buried munitions using an armored EMM, and limiting the use of the EMM to circumstances where any identified anomaly is at least 12 inches below the area being excavated, after which excavation is to be performed by hand. AR, exh. 20, EM-385-1-97, at 70-72. That engineering manual makes no mention of using robotic equipment for excavation of buried munitions.

The record thus establishes that the protester’s proposal was compliant with the express terms of the RFP. The agency therefore either unreasonably assigned the weakness to the Bristol proposal, or failed adequately to inform the protester during discussions of its true concern, namely, that the explosive nature of the BLU-107 munitions would require use of robotic equipment. Under these circumstances, we sustain this aspect of Bristol’s protest.

In sum, the record shows that the Bristol proposal was eliminated from consideration for award because the agency identified some five weaknesses associated with its response to the sample project. Of those five weaknesses, the agency concedes that three were erroneously assigned. Of the remaining two weaknesses, one--Bristol’s proposed soil sampling methodology--appears largely to be identical to a weakness assigned to one of the awardees’ proposals. However, the SSA concluded for that offeror that such a weakness was not a legitimate concern or a material impediment to

award. It follows that a largely identical weakness in the Bristol proposal also should not be a legitimate concern or an impediment to making award to the protester. The final remaining weakness identified by the agency is one that either unreasonably was assigned in light of the technical materials included in the RFP, or was a concern the protester could not reasonably have known about that the agency failed to bring to its attention during discussions. Finally, as noted earlier, the record shows that the agency made award to firms that all had submitted prices significantly higher than the price offered by the protester, and in at least one instance, made award to a firm proposing a price more than three times higher than the price offered by the protester. In light of these considerations, we sustain Bristol's protest.

RECOMMENDATION

We recommend that the agency reevaluate the protester's proposal in light of the discussion above, and reconsider Bristol's eligibility for contract award. We also recommend that the protester be reimbursed its reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d). The protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel