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Decision

Matter of: U.S. Facilities, Inc.

File: B-418229; B-418229.2

Date: January 30, 2020

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DIGEST

1. Protest challenging the agency's evaluation of awardee's price and technical approach proposals is dismissed as factually and legally insufficient.
 2. Protest challenging the agency's evaluation of protester's business management approach is denied where the evaluation was reasonable and consistent with the stated evaluation criterion.
 3. Protest challenging the rating assigned to the evaluation of protester's technical approach is denied where the protester does not dispute the underlying evaluation and fails to establish that it was prejudiced by the rating assigned.
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DECISION

U.S. Facilities, Inc. (USF), of Philadelphia, Pennsylvania, protests the award of a contract to EMCOR Government Services, Inc. (EGS), of Arlington, Virginia, under request for proposals (RFP) No. DE-SOL-0011435, issued by the Department of Energy (DOE) for facilities maintenance and management services at DOE's headquarters locations in Washington, District of Columbia, and Germantown, Maryland. USF argues the agency's evaluation of offerors' proposals and resulting award decision were improper.

We dismiss the protest in part and deny the protest in part.

BACKGROUND

The RFP was issued on December 13, 2017, pursuant to the procedures of Federal Acquisition Regulation (FAR) part 15.¹ Agency Report (AR), Tab A.1, RFP § A; Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 1. The solicitation contemplated the award of a single indefinite-delivery, indefinite-quantity contract under which fixed-price and time-and-materials task orders would be issued for a base year with four 1-year options. RFP § B.1. In general terms, the contractor was to provide all personnel, supervision, equipment, tools, and materials necessary to perform the specified services. AR, Tab A.1, RFP, J.1., Performance Work Statement at 1. The RFP established that contract award would be made on a best-value tradeoff basis, based on five evaluation factors: technical approach; corporate experience; business management approach; past performance; and price. RFP amend. 2 § M at 14, § M.2. The non-price factors were listed in descending order of importance and, when combined, were significantly more important than price. RFP amend. 2 § M.2.

Eight offerors, including EGS and USF, submitted proposals by the March 2, 2018, closing date. An agency source evaluation board (SEB) evaluated offerors' non-price proposals using the following adjectival ratings: outstanding, good, satisfactory, marginal, and unsatisfactory for the technical approach, corporate experience, and business management approach factors. Past performance was to be rated as either favorable, neutral, or unfavorable. AR, Tab B.1, SEB Report at 9-10. Offerors' prices were not rated, but evaluated for reasonableness. COS/MOL at 5; RFP amend. 2 § M.2.

On August 7, 2019, the SEB completed its evaluation of offerors' proposals, with the final assigned ratings and prices of the EGS and USF proposals as follows:

	EGS	USF
Technical Approach	Outstanding	Good
Corporate Experience	Outstanding	Outstanding
Business Management Approach	Good	Good
Past Performance	Favorable	Favorable
Price	\$45,221,966	\$58,173,774

AR, Tab B.1, SEB Report at 2-3; Tab B.2, Source Selection Decision Document (SSDD) at 5-6.

¹ The solicitation was subsequently amended two times. Among other things, RFP amendment 2 replaced, in whole, the solicitation's proposal preparation instructions (section L) and evaluation factors for award (section M). Unless specified otherwise, all citations are to the final version of the solicitation.

The agency evaluators also identified strengths and weaknesses in the offerors' proposals, and made other narrative findings, in support of the ratings assigned. AR, Tab B.1, SEB Report, at 21-23, 60-61, 83-86.

On October 16, the agency source selection authority (SSA) concluded that EGS's proposal, which was both higher technically rated and lower-priced than that of USF, represented the overall best value to the government. AR, Tab B.2, SSDD at 12-13.

On October 18, DOE provided USF with notice of contract award to EGS. USF received a debriefing from the agency on October 23, and filed this protest with our Office on October 28.

DISCUSSION

USF, the incumbent, raises various challenges regarding DOE's evaluation of the offerors' proposals and resulting award decision. The protester alleges that the evaluation of EGS's proposal under the price and technical approach factors was improper. USF also contends the evaluation of its proposal under the business management approach and technical approach factors was flawed.² In filing and pursuing this protest, USF has made arguments in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester's arguments and conclude that none furnishes a basis on which to sustain the protest.

Evaluation of EGS's Proposal

USF protests the evaluation of EGS's proposal under the price and technical approach factors. As detailed below, we find these challenges to be factually and legally insufficient.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

² USF also filed a supplemental protest raising additional challenges to the agency's evaluation and award decision, which it subsequently elected to withdraw. Comments and Supp. Protest at 2-6; USF Withdrawal of Supp. Protest Grounds, Dec. 5, 2019, at 1.

Price Evaluation of EGS

USF contends the agency failed to adhere to the requirements of the solicitation by not conducting the required price realism analysis and assessing the performance risk associated with EGS's low price. Protest at 11-13. The agency asserts that no price realism evaluation was required by the solicitation here. Agency Dismissal Request, Nov. 5, 2019, at 4-6. We agree.

Where a solicitation contemplates the award of a fixed-price or time-and-materials contract, price realism is not ordinarily considered, because a fixed-priced type contract places the risk and responsibility for costs and resulting profit or loss on the contractor. HP Enter. Servs., LLC, B-413888.2 *et al.*, June 21, 2017, 2017 CPD ¶ 239 at 5; *see* FAR § 15.402(a). While an agency may conduct a price realism analysis in awarding a fixed-price contract, it is for the limited purpose of measuring an offeror's understanding of the requirements or to assess the risk inherent in the offeror's proposal. FAR § 15.404-1(d)(3); Hewlett Packard Enter. Co.--Costs, B-413444.3, Mar. 3, 2017, 2017 CPD ¶ 85 at 5; Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. In the absence of an express price realism provision, we will conclude that a solicitation contemplates a price realism evaluation only where the solicitation expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and the solicitation states that a proposal can be rejected for offering low prices. DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. Absent a solicitation provision providing for a price realism evaluation, agencies are neither required nor permitted to conduct one in awarding a fixed-price or labor-hour contract. Delta Risk, LLC, B-416420, Aug. 24, 2018, 2018 CPD ¶ 305 at 18-19.

Here, the RFP contained neither an express price realism provision nor any statement that the agency would review prices to determine whether they are so low as to reflect a lack of technical understanding. By contrast, with regard to the price evaluation factor, the RFP stated only that "[p]rice proposals will not be assigned an adjectival rating but shall be evaluated for completeness and price reasonableness."³ RFP amend. 2 § M.2. For these reasons, we conclude that USF has failed to make the threshold showing required to prevail on this allegation, namely that the solicitation required a price realism

³ USF, in support of its assertion that a price realism evaluation was required, points to language in the amended RFP stating that "[i]f a cost realism analysis is performed, cost realism may be considered by the source selection authority in evaluating performance or schedule risk," as well as language in the initial RFP--which was subsequently replaced by RFP amendment 2--stating that prices were to be "reasonable to the offeror." RFP amend. 2, FAR clause 52.215-1, Instructions to Offerors--Competitive Acquisition, at 5; RFP § M at 77. Neither of these provisions, however, constitutes an express price realism requirement or the requisite price realism-equivalency statement, and thus fail to establish that a price realism evaluation was required. DynCorp Int'l LLC, *supra*.

analysis. Accordingly, we dismiss this ground for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f); Delta Risk, LLC, *supra*, at 19.

Technical Approach Evaluation of EGS

USF also protests the technical approach evaluation of EGS. The protester contends that EGS's low price "necessarily implies" that EGS either proposed lower labor rates and benefits than did USF, or proposed significantly reduced manpower, and thus should not have received an "outstanding" technical approach rating. Protest at 9. The agency argues that the protest is speculative, and factually and legally insufficient. Agency Dismissal Request, Nov. 5, 2019, at 2-4. We agree.

As a preliminary matter, we disagree with USF's speculative assumption that a low price necessarily implies low labor rates and benefits, or reduced manpower. In regards to a fixed-price contract, an offeror, in its business judgment, properly may decide to submit a price that is extremely low or even below-cost, and the ability of an offeror to perform at the price offered is a matter of contractor responsibility. Ultimate Concrete, L.L.C., B-412255, B-412255.2, Jan. 13, 2016, 2016 CPD ¶ 20 at 15; Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶ 124 at 4. In any event, USF also fails to establish that an offeror's labor rates and/or manpower levels were to be considered under the technical approach factor.

The RFP established that, under the technical approach factor, the agency would assess an offeror's overall method of operations, understanding of DOE's requirements and needs, proposed "lessons learned," and small business subcontracting goals. RFP amend. 2 § M.2. There was simply no requirement that DOE assess an offeror's labor rates or manpower levels under the technical approach factor as USF argues. In fact, USF's own proposal contained no reference to either labor rates or manpower levels as part of its technical approach submission. *See* AR, Tab C.1, USF Proposal, Vol. I, Technical Proposal, at 7-27. USF has thus failed to make the threshold showing that the agency failed to conduct an evaluation required by the RFP, namely assessing labor rates and/or manpower levels as part of the technical approach factor. Accordingly, we dismiss this challenge as both speculative and for failure to state a valid basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f); HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 4 n.9.

Business Management Approach Evaluation of USF

USF challenges the evaluation of its proposal under the business management approach factor. The protester maintains that the one assigned weakness was unreasonable and inadequately documented.

In reviewing a protest challenging an agency's evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency regarding a proposal's relative merits, as the evaluation of proposals is a matter within the agency's discretion. Peraton, Inc., B-417088, B-417088.2, Feb. 6, 2019, 2019 CPD ¶ 190 at 5;

Del-Jen Educ. & Training Group/Fluor Fed. Solutions LLC, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 8. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations, and adequately documented. Management Sys. Int'l, Inc., B-409415, B-409415.2, Apr. 2, 2014, 2014 CPD ¶ 117 at 5. A protester's disagreement with the agency's evaluation judgments, without more, is insufficient to establish that an evaluation was improper or lacked a reasonable basis. Lanmark Tech., Inc., B-408892, Dec. 19, 2013, 2013 CPD ¶ 295 at 5.

As part of the business management approach evaluation, the SEB assessed USF's staffing plan for both DOE facilities in Washington and Germantown. AR, Tab B.1, SEB Report at 52; see RFP amend. 2 § M.2. The agency evaluators found that while USF proposed two shift supervisors for the Washington location, "there [were] no shift supervisors provided for Germantown . . ." Id. at 60. The SEB concluded that USF's lack of shift supervisors for the Germantown facility would increase the risk of unsuccessful performance. Id. at 60-61.

USF contends the agency failed to adequately explain why the lack of shift supervisors for the Germantown facility, which was substantially smaller than the Washington facility, would increase the risk of successful performance. Protest at 13. USF also maintains that it, in fact, included a shift supervisor as part of its Germantown facility staffing--but had designated the position as "Boiler Plant Supervisor." Id. at 13-14.

We find the evaluation here to be reasonable. It is an offeror's responsibility to submit an adequately written proposal which clearly demonstrates the merits of its approach; an offeror runs the risk of having its proposal downgraded, or rejected, if the proposal is inadequately written. Dewberry Crawford Group; Partner 4 Recovery, B-415940.10 et al., July 2, 2018, 2018 CPD ¶ 297 at 13-14. USF's staffing plan for the Washington facility expressly designated its shift supervisors as "Shift Supervisor[s]." AR, Tab C.1, USF Proposal, Vol. I, Technical Proposal, at 53. By contrast, none of the positions in USF's staffing plan for the Germantown facility were described as "Shift Supervisors." Id. at 54-55. Moreover, USF's staffing for the Germantown facility included many positions not associated with boiler plant operations (e.g., electricians, engineers, plumbers, carpenters, custodial inspectors), and no indication existed in USF's proposal that a "boiler plant supervisor" would perform supervisory functions outside of the boiler plant operation. We therefore find it was reasonable for the agency to conclude, as it did, that USF's proposal did not include shift supervisors for the Germantown facility.

We also find the SEB documented, in textbook fashion, its conclusion that USF's lack of shift supervisors for the Germantown location increased performance risk. Specifically, the agency evaluators stated that "[w]ithout adequate shift supervisory support, there would be no point of contact between DOE personnel and [USF]'s staff/personnel. This could potentially lead to a high risk of miscommunication between DOE and the offeror. This attribute will decrease the probability of success of the contract." AR, Tab B.1, SEB Report, at 60-61. In sum, the evaluation here was reasonable and consistent with

the stated evaluation criteria and fully documented. Therefore, we deny this protest allegation.

Technical Approach Evaluation of USF

USF challenges the agency's evaluation of its technical approach. USF does not dispute any of the underlying evaluation findings, but rather, the adjectival rating assigned to its proposal. Protest at 8-9.

As set forth above, the agency established an adjectival rating scheme (e.g., outstanding, good, satisfactory) that would be used to assess offerors' technical approach proposals. AR, Tab D, Source Selection Plan at 10, 16. Relevant to the protest here, the definition for the "good" rating indicates that "[t]he proposal demonstrates a good understanding of the contract requirements, and an effective approach to perform the work that results in a high probability of successful contract performance with a likelihood that performance expectations will be exceeded." Id. at 16; AR, Tab B.1, SEB Report, at 10.

The SEB, when evaluating USF's technical approach, identified one significant strength and two strengths and assigned it a "good" rating for that evaluation factor. AR, Tab B.1, SEB Report at 12, 21-22. Also, in the accompanying narrative summary, the agency evaluators in one instance described USF's technical approach as demonstrating a "good understanding" of the contract requirements and in another instance as demonstrating a "clear understanding" of the contract requirements. Id. USF points to the varying terminology (i.e., "clear" and "good") used within the evaluation summary and, "[b]ased on this alone," argues the evaluation was improper and inconsistent with the stated evaluation criteria. Protest at 8. We find USF's protest here reflects a fundamental misunderstanding of the proposal evaluation process.

In a negotiated procurement, an agency is required to identify the bases upon which offerors' proposals will be evaluated and to evaluate offers in accordance with the stated evaluation criteria. Competition in Contracting Act of 1984, 41 U.S.C. § 3306(b)(1)(A); FAR §§ 15.304(d), 15.305(a); A-P-T Research, Inc., B-414825, B-414825.2, Sept. 27, 2017, 2017 CPD ¶ 337 at 4; Northrop Grumman Info. Tech., Inc., B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167 at 5. An agency's chosen evaluation rating scheme, however, is not the stated evaluation criteria, nor need it be disclosed in the solicitation. FAR § 15.304(d); see URS Fed. Tech. Servs., Inc., B-405922.2, B-405922.3, May 9, 2012, 2012 CPD ¶ 155 at 10 n.17 (finding no requirement that the agency disclose its adjectival rating scheme as part of the solicitation). Moreover, we are unaware of (and the protester has provided no reference to) any requirement for the agency to employ only the words used in an adjectival definition when providing the narrative explanation for the agency's assignment of the rating. The mere fact that the SEB did not parrot, verbatim, the "good" rating definition does not make the agency's

evaluation or the assigned rating unreasonable.⁴ In fact, USF does not dispute any of the underlying findings that resulted in the assignment of its “good” rating. As such, we can find no merit to this allegation.

In any event, we find that USF has failed to demonstrate how it was prejudiced here. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Engility Corp., B-413120.3 et al., Feb. 14, 2017, 2017 CPD ¶ 70 at 17; Lockheed Martin Integrated Sys., Inc., B-408134.3, B-408134.5, July 3, 2013, 2013 CPD ¶ 169 at 8; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

We have consistently recognized that ratings, be they adjectival, numerical, or color, are but a guide to, and not a substitute for, intelligent decision-making. See, e.g., NCI Info. Sys., Inc., B-412680, B-412680.2, May 5, 2016, 2016 CPD ¶125 at 9; Science Apps. Int’l Corp., B-407105, B-407105.2, Nov. 1, 2012, 2012 CPD ¶ 310 at 9. The germane consideration is instead whether the agency fully considered the actual qualitative differences in the offerors’ proposals. InfoZen, Inc., B-408234 et al., July 23, 2013, 2013 CPD ¶ 211 at 8. Here the record reflects that the SSA, when conducting his comparative assessment of the offerors’ proposals, properly found that it was the underlying features in EGS’s technical approach proposal--and not the awardee’s adjectival rating--that made EGS technically superior to the other offerors, including USF. AR, Tab B.2, SSDD at 12-13. In sum, we find USF’s challenge to its assigned technical approach rating to be both without merit and without prejudice.

Best-Value Tradeoff Analysis

Finally, USF argues the agency’s best-value determination is flawed because of the underlying errors in the evaluation. Protest at 15. Because we have dismissed or denied the protester’s challenges to the agency’s evaluation, we conclude that there is also no basis to challenge the agency’s resulting best-value determination. Procentrix, Inc., B-414629, B-414629.2, Aug. 4, 2017, 2017 CPD ¶ 255 at 15. Where, as here, the highest-rated, lowest-priced offer is selected for award, a tradeoff is not required. Dell

⁴ Nor is it even clear to us that a “clear understanding” is inapposite to a “good understanding,” especially in light of the fact that the term “clear understanding” is not used in the definition of any other adjectival rating. See AR, Tab D.1., Source Selection Plan at 16. Here, DOE’s adjectival rating scheme, including the definitions for the ratings, was established in the agency’s source selection plan. Even if we were to find any merit in this argument--which we do not--at most, USF has shown only that the SEB failed to comply with an internal agency guide, which does not provide a basis on which to sustain a protest. Cognitive Med. Sys., Inc., B-414017, B-414017.2, Jan. 6, 2017, 2017 CPD ¶ 18 at 3; All Points Logistics, Inc., B-407273.53, June 10, 2014, 2014 CPD ¶ 174 at 10 n.10.

Servs. Fed. Gov't., Inc., B-412340 et al., Jan. 20, 2016, 2016 CPD ¶ 43 at 7 n.6;
Alliance Tech. Servs., Inc., B-311329, B-311329.2, May 30, 2008, 2008 CPD ¶ 108 at 3.

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel