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Decision

Matter of: J&J Worldwide Services

File: B-418148.3

Date: June 30, 2020

Kate H. Kennedy, Esq., and Jonathan A. Demella, Esq., Davis Wright Tremaine LLP, for the protester.

Douglas P. Hibshman, Esq., Fox Rothschild LLP, for Valiant Government Services, LLC, the intervenor.

Tamar Gerhart, Esq., Michael Graves, Esq., and Matthew R. Keiser, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency improperly evaluated the protester’s technical proposal as unacceptable is denied where the evaluation was reasonable and consistent with the solicitation.

DECISION

J&J Worldwide Services, of Austin, Texas, protests the issuance of a task order to Valiant Government Services, LLC, of Hopkinsville, Kentucky, under request for proposals (RFP) No. MRR-2019-008108, by the Department of the Army, Army Corps of Engineers (Corps), for the repair and renewal of the radiology department at the Madigan Army Medical Center, Joint Base Lewis McChord (JBLM), Washington. J&J contests each of the multiple weaknesses, significant weaknesses, and deficiencies the agency assigned to its proposal. The protester also challenges the agency’s source selection decision.

We deny the protest.

BACKGROUND

On March 18, 2019, the Corps issued the solicitation, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5, to contractors holding a Corps multiple-award task order contract (MATOC), for repair and renewal services for Corps

facilities.¹ Agency Report (AR), Tab 1, RFP at 1. The solicitation sought proposals to repair and renew the radiology department at the Madigan Army Medical Center, JBLM. *Id.* This project includes the accommodation of two new magnetic resonance imaging (MRIs) machines, along with accessory spaces in direct support of the new equipment. *Id.* at 4. The RFP also specified that the radiology department shall remain operational during this repair and renewal project. *Id.*

The RFP's scope of work (SOW) contained certain performance requirements. AR, Tab 5, RFP amend. 3, Amended SOW. As relevant here, the amended SOW required that the contractor remove the existing HVAC system and replace it with "new, complete HVAC systems including the air moving equipment" and that no existing ductwork would be used, and further provided that "[e]lectrical systems shall be in compliance with the latest required codes/UFC [Unified Facility Code] and standards." *Id.* at 9-10.

The solicitation anticipated the issuance of a fixed-price task order to the offeror whose proposal was determined to represent the best value to the agency, price and other factors considered. RFP at 1. The RFP included the following evaluation factors: technical approach, past performance, and price. *Id.* at 26. The RFP provided that the technical approach and past performance factors were significantly more important than price. *Id.* at 1. The technical approach factor was comprised of the following three subfactors: technical approach summary, key personnel resumes and management approach. *Id.* at 26.

The RFP stated that the technical approach factor and subfactors would be evaluated for weaknesses, significant weaknesses, deficiencies, risk and strengths and assigned one of the following combined technical/risk ratings: outstanding, good, acceptable, marginal, and unacceptable. *Id.* at 26-27. As relevant to this protest, the solicitation warned offerors that no award would be made to a contractor whose proposal received a final technical rating of marginal or unacceptable. *Id.* at 26. The solicitation defined the rating of unacceptable technical/risk as follows:

Proposal does not meet requirements of the solicitation, and thus, contains one or more deficiencies, and/or risk of unsuccessful performance is unacceptable. Proposal is unawardable.

Id. at 27. Further, the solicitation defined a deficiency as a "material failure of a proposal to meet a [g]overnment requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level."² *Id.* at 28.

¹ Both the protester and Valiant were awarded the MATOC and were eligible to compete in this task order competition. RFP at 1.

² The solicitation stated that the agency intended to award without discussions, and cautioned offerors to include their best terms from a price and technical standpoint. *Id.* In this regard, the solicitation stated that "[p]roposals that fail to include or describe key features of work or equipment shall be [considered] deficient." *Id.* at 27.

Prior to the July 1, 2019 deadline for submission of proposals, the agency received four proposals in response to the RFP, including those of J&J and Valiant. Contracting Officer Statement and Memorandum of Law (COS/MOL) at 1. Based upon the agency's evaluation of proposals, the contracting officer, acting as the source selection authority (SSA), selected Valiant for award.

On November 1, J&J filed a protest with our Office challenging the agency's award decision. In response to the protest, the agency advised that it would take corrective action by reevaluating proposals and issuing a new award decision. Req. for Dismissal, B-418148.2, Nov. 13, 2019. Accordingly, our Office dismissed the protest as academic. *J&J Worldwide Servs.*, B-418148.2, Nov. 19, 2019 (unpublished decision).

As a part of its corrective action, the agency reevaluated J&J's proposal and determined that it was technically unacceptable, after assigning J&J's proposal five deficiencies and two significant weaknesses. COS/MOL at 2, 9, (citing AR, Tab 8, Board Consensus Evaluation at 7-12). Under the technical approach subfactor, the agency assigned J&J's proposal three deficiencies. Relevant to this protest, the agency assigned a deficiency under the technical approach factor because J&J's proposal offered to provide a "new or renovated" HVAC system, when the solicitation required the removal of the existing HVAC system and replacing it with a new, complete HVAC system.³ AR,

³ The agency assigned the second deficiency under the technical approach factor because J&J proposed to install specification grade heavy-duty receptacles and not hospital grade receptacles, while under UFC 4-510-01 11-5.10.2.3 hospital grade receptacles in anesthetizing locations in MRI scanning rooms are required. AR, Tab 8, Board Consensus Evaluation at 8-9; Tab 6, J&J's Proposal Vol. I, Technical Approach at 20; AR, Tab 5, RFP amend. 3, Amended SOW at 9.

The Corps assigned a third deficiency under the technical approach factor because the agency determined that J&J's proposal provided scant information concerning the architectural features of the work. In this regard, the solicitation required that offerors provide a narrative description of the contractor's technical solution to achieve a final product, including at least a minimum description in sufficient detail of the contractor's plan to construct major features of the work and provide the deliverables in the scope of work. AR, Tab 8, Board Consensus Evaluation at 9; Tab 6, J&J's Proposal Vol. I, Technical Approach at 15; RFP at 26.

Under the key personnel subfactor J&J's proposal received one deficiency because its proposal failed to provide a resume for the site superintendent as required by the RFP. AR, Tab 8, Board Consensus Evaluation at 11; Tab 6, J&J's Proposal Vol. I, Technical Approach at 3-8; RFP at 26. J&J's proposal received one deficiency under the management approach subfactor because the agency found that J&J's proposal failed to provide its management approach as required by the RFP. AR, Tab 8, Board Consensus Evaluation at 12; RFP at 26.

Tab 8, Board Consensus Evaluation at 9; AR, Tab 6, J&J Proposal Vol. I, Technical Approach at 15; AR, Tab 5, RFP amend. 3, Amended SOW at 10.

As a result of these deficiencies and significant weaknesses, the agency assigned J&J's proposal an overall technical risk rating of unacceptable. AR, Tab 8, Board Consensus Evaluation at 7. Based upon this rating of unacceptable, J&J's proposal was therefore deemed unawardable and not considered for award. AR, Tab 10, Unsuccessful Offeror Letter (Feb. 27, 2020) at 1. On February 27, 2020, at the conclusion of its corrective action, the agency again selected Valiant for award, finding that its proposed price of \$51,372,530 represented the best value to the government. *Id.* After receiving a debriefing, J&J filed this protest with our Office.⁴

DISCUSSION

J&J challenges multiple aspects of the agency's evaluation and the source selection decision. Specifically, the protester contests each weakness, significant weakness, and deficiency assigned to its proposal. Protest at 16-33; Comments at 12-30. The protester also argues that the record is insufficient to show the contracting officer, acting as the SSA, exercised his independent discretion with respect to the award decision. Comments at 4-9.

Although we do not specifically address all of J&J's arguments, we have fully considered all of them and find that they afford no basis on which to sustain the protest. As discussed below, we find reasonable the agency's assessment of a deficiency in the protester's proposal under the technical approach summary subfactor. We also find that the record demonstrates that the SSA conducted an independent assessment when making his award decision and that J&J is not an interested party to pursue its challenge to the adequacy of the best-value determination itself.⁵

⁴ The awarded value of the task order at issue exceeds \$25 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts. 10 U.S.C. § 2304c(e).

⁵ After development of the record, the GAO attorney conducted an outcome prediction alternative dispute resolution (ADR) conference (for a description of GAO's outcome prediction ADR process, see *Alaska Structures, Inc.--Costs*, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 4 n.4). She advised the parties that J&J's protest appeared to be without merit because the record showed that the agency's evaluation of its proposal as technically unacceptable was reasonable and adequately documented. The protester subsequently informed our Office that it did not intend to withdraw its protest based on this ADR session, but would rather have a written decision on the merits of its case.

Technical Evaluation

As stated above, the task order competition here was conducted pursuant to FAR subpart 16.5. In reviewing protests of an award in a task order competition, we do not reevaluate proposals, but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 7.

Here, the SOW required that the contractor remove the existing HVAC system and replace it with "new, complete HVAC systems including the air moving equipment" and that no existing ductwork be used. AR, Tab 5, RFP amend. 3, Amended SOW at 10. In its technical proposal, J&J proposed "new or renovated air handling units, duct distribution and terminal control units." AR, Tab 6, J&J's Proposal Vol. I, Technical Approach at 15. The agency determined that J&J's proposal clearly contemplated the use of renovated air handling units, duct distribution and terminal control units and failed to comply with the RFP's requirements, and that such a deviation constituted a deficiency. AR, Tab 8, Board Consensus Evaluation at 9.

J&J asserts that the only element of the HVAC systems that it proposed to reuse was the existing exhaust fan duct risers from Level 2 to the roof of the second story. Comments at 14. As justification, J&J states that its proposed reuse of the HVAC duct work in this limited area is consistent with the RFP directive that "[l]ess disruption to the customer during performance is valued higher," because it would lessen the disruption to the customer on the second floor. *Id.* at 14-15 (citing RFP at 27). In the alternative, J&J argues that even if this proposed reuse was determined to be inconsistent with the solicitation requirements, the agency unreasonably determined that this "limited reuse" constituted a deficiency, which is defined as "a material failure of a proposal to meet a [g]overnment requirement." Comments at 15 (citing RFP at 28).

We find that the agency reasonably determined that by proposing a limited reuse of some HVAC components, J&J's proposal failed to meet the solicitation's requirement that the contractor replace the existing HVAC system with a new HVAC system. First, the protester's argument that its deviation from the RFP requirements was justified by the fact that such limited reuse would lessen the disruption to the customer amounts to an untimely challenge to the terms of the solicitation. That is, the protester's contention that it could deviate from the requirements expressly stated in the amended SOW in order to satisfy the solicitation's instruction to lesson disruption, at best, alleges a patent ambiguity in the RFP. To be timely, such a protest based on alleged improprieties in a solicitation that are apparent prior to closing time for receipt of proposals must be filed by that time. 4 C.F.R. § 21.2(a)(1).

In addition, we reject J&J's alternative argument that its reuse of some HVAC components should be characterized as a minor deviation, rather than a deficiency. As stated above, this project involves the repair and renewal of a healthcare facility that shall remain operational during the project. RFP at 4. Our Office has consistently found

that an agency's judgment in matters related to human safety carries considerable weight. See *PEMCO World Air Servs.*, B-284240.3 *et al.*, Mar. 27, 2000, 2000 CPD ¶ 71 at 7. Here, because J&J concedes that it proposed to reuse some HVAC components, contrary to a material solicitation requirement, we find no basis to conclude that this violation constitutes a minor deviation. Furthermore, J&J has not shown the agency's conclusion that installation of an entirely new HVAC system was an important aspect of the project to be unreasonable. On this record, we find no basis to question the agency's decision to assess this deficiency to J&J's proposal.

As stated above, the solicitation warned offerors that no award would be made to a contractor whose proposal received a final technical rating of marginal or unacceptable. *Id.* at 26. Because any one deficiency would result in J&J's technical proposal being rated as unacceptable and thus unawardable, we need not address the reasonableness of the agency's assessment of the remaining four deficiencies and two significant weaknesses assigned to J&J's proposal. *Olgoonik Logistics, LLC*, B-415569, Jan. 23, 2018, 2018 CPD ¶ 36 at 5 n.3. Accordingly, the protester's challenge to the agency's technical evaluation is denied.⁶

Source Selection Decision

J&J also challenges the agency's source selection decision on the basis that the record is devoid of any independent assessment of proposals by the SSA. Comments at 4-9. As support, J&J points out that the agency's letter notifying J&J that it was an unsuccessful offeror was dated before the contracting officer's memorandum which contained the basis of his source selection decision. Comments at 4; AR, Tab 10, Unsuccessful Offeror Letter (Feb. 27, 2020); AR, Tab 9, Contracting Officer's Memorandum (Mar. 5, 2020). In essence, J&J contends that the record, as it existed at the time of award, is simply insufficient to support the agency's source selection decision.

In response, the agency states that the contracting officer initially documented his basis for award in a memorandum dated February 27, 2020. Agency Response to GAO

⁶ In its comments, the protester also contends that the record contains inadequate documentation to show that the agency actually conducted a reevaluation of proposals during its corrective action. Comments at 3-4. Based upon our review of the record, we reject the protester's contention. As noted above, the agency notified our Office on November 14, 2019, that it would take corrective action by reevaluating proposals and issuing a new source selection decision. Req. for Dismissal, B-418148.2, Nov. 14, 2019. In response to this protest, the agency provided a document, dated February 14, 2020, which the agency explains is the document containing its reevaluation of proposals. COS/MOL at 2 (citing AR, Tab 8, Board Consensus Evaluation). Additionally, the contracting officer explains that he relied upon this reevaluation of proposals when making his award decision. COS/MOL at 2. Consequently, we find no merit to this protest allegation.

Request for Clarification (June 22, 2020) at 1-2. The agency explains that because this February 27 memorandum contained errors, the contracting officer subsequently issued a revised memorandum, dated March 5. *Id.* (citing AR, Tab 9, Contracting Officer's Memorandum (Mar. 5, 2020)). Further, the agency clarifies that none of the errors in the initial award memorandum had an effect on the award decision. *Id.* at 2.

We find the record demonstrates that the contracting officer, acting as the SSA, made an independent assessment with respect to the award decision. In this regard, we accept the agency's assertion that the March 5 memorandum represents the basis of the contracting officer's source selection decision. First, the record shows that the revised memorandum was finalized and signed prior to J&J filing its protest, and therefore was not created "in the heat of the adversarial process." See *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

Second, we note that even though J&J has access to both the February 27 and March 5 memoranda, it has not identified any specific reason to question the veracity of the agency's assertions. Indeed, as relevant here, both the February 27 and March 5 memoranda contain a contemporaneous finding by the contracting officer that J&J's proposal was rated as unacceptable under the technical approach factor. Agency Response to GAO Request for Clarification (June 22, 2020), attach. A, Contracting Officer's Memorandum (Feb. 27, 2020); AR, Tab 9, Contracting Officer's Memorandum (Mar. 5, 2020). Because the protester's argument is premised on the contention that at the time of award there was no contemporaneous record of the contracting officer's independent assessment, we deny this protest ground.

To the extent the protester challenges the adequacy of the agency's best-value decision, we need not resolve the protester's arguments because J&J is not an interested party to raise these allegations. As discussed above, we conclude that the agency reasonably found J&J's proposal to be technically unacceptable, and thus ineligible for award. Therefore, J&J cannot establish that it is an actual or prospective bidder or offeror whose direct economic interest would be affected by the agency's best-value decision because its proposal is ineligible for award. *All Native, Inc.*, B-411693 *et al.*, Oct. 5, 2015, 2015 CPD ¶ 337 at 4.

The protest is denied.

Thomas H. Armstrong
General Counsel