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Decision

Matter of: ACC Construction Company, Inc.

File: B-420801

Date: September 2, 2022

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DIGEST

Protest challenging the agency's evaluation of the protester's proposal under multiple evaluation factors is denied where the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

ACC Construction Company, Inc. (ACC Construction), of Augusta, Georgia, protests its exclusion from phase two of the competition conducted under request for proposals (RFP) No. W912HN-20-R-4001, issued by the Department of the Army, Army Corps of Engineers for construction services. The protester contends that the agency unreasonably evaluated its proposal and improperly eliminated the proposal from the next phase of the competition.

We deny the protest.

BACKGROUND

On September 2, 2020, the Army issued the RFP under the two-phase design-build provisions of Federal Acquisition Regulation (FAR) subpart 36.3, seeking proposals for general construction services within the three-state region of North Carolina, South Carolina, and Georgia. Agency Report (AR), Tab 3, Conformed Solicitation (RFP) at 1, 8. The RFP contemplated the award of up to five multiple-award task order contracts with a base period of 2-years and three 1-year options. *Id.* at 1.

The RFP established a two-phase procurement and informed offerors that the Army would use a best-value tradeoff in making an award decision. *Id.* The RFP further advised that the agency would consider two non-price evaluation factors in phase one of the procurement: (1) past performance and (2) design experience. *Id.* at 15. The past performance factor was to be evaluated using adjectival relevancy and confidence ratings,¹ and the design experience factor would be evaluated using combined technical/risk adjectival ratings.² *Id.* at 19-22. The RFP further stated that the past performance factor was more important than the design experience factor. *Id.* at 22. After selecting no more than eight of the mostly qualified offerors, the agency was to evaluate technical capability and price in phase two of the procurement. *Id.* at 9.

As relevant to this protest, under the past performance factor the RFP instructed offerors to demonstrate a record of construction performance and experience in recent and relevant projects. *Id.* at 17. To that end, the RFP required offerors to submit Past Performance Questionnaires (PPQs) or Contractor Performance Assessment Reports (CPARs) for each relevant project submitted.³ *Id.* The RFP informed offerors that relevant projects were those similar in size, scope, and complexity to the anticipated project being solicited, and went on to provide several examples of different varieties of relevant projects. *Id.* at 18-19.

The RFP advised that the Army's evaluation under the past performance factor would result in an assessment of the agency's confidence in the ability of offerors to meet the solicitation's requirements. *Id.* at 19. Further, the RFP provided that an offeror "may" increase the agency's level of confidence if it could demonstrate that it had successfully performed a wide-variety of work, as described in the RFP's instructions. An offeror could also potentially increase the agency's level of confidence by demonstrating that it had prior experience working with its proposed design firm. *Id.*

The Army received 29 proposals by the phase one closing date of October 14. AR, Tab 1, Contracting Officer's Statement (COS) at 1. In addition to finding all of ACC Construction's submitted past performance projects to be very relevant, the agency's source selection evaluation board (SSEB) evaluated the protester's phase one proposal as follows:

¹ The relevancy ratings ranged from not relevant to very relevant, and the confidence ratings ranged from no confidence to substantial confidence. RFP at 19-20.

² The combined technical/risk ratings ranged from unacceptable to outstanding. RFP at 21-22.

³ The solicitation also stated that the agency could review any other sources other than those provided by the offeror, and may retrieve on its own an offeror's CPAR for a submitted project. RFP at 18.

Past Performance	Satisfactory Confidence
Design Experience	Good

AR, Tab 5a, SSEB Report at 12. The agency identified two strengths, one weakness, and no deficiencies with the protester's demonstrated past performance. *Id.* at 15-16. The lone weakness concerned a CPAR associated with one of the protester's submitted past performance projects, project 4, which the agency had documented as containing evaluation ratings of "3 – Satisfactory, 2 – Marginal, and 1 – Unsatisfactory." *Id.* at 16. Overall, the agency concluded that the protester's proposal warranted a past performance confidence rating of "satisfactory confidence," meaning that the government had "a reasonable expectation that the offeror will successfully perform the required effort." *Id.* at 12; RFP at 20.

On May 3, 2022, the Army notified ACC Construction that the firm was not selected to participate in phase two of the competition. AR, Tab 7a, Notice of Unsuccessful Offeror at 1. The notice included relevant excerpts from the SSEB report that documented the agency's assessment of the protester's proposal, and listed the strengths and weaknesses identified above. *Id.* at 1, 8. In addition to requesting a debriefing, the protester immediately informed the agency that the CPAR evaluation ratings identified by the agency in the SSEB report for past performance project 4 were inaccurate. The protester provided the agency with a copy of the CPAR for project 4, which indicated that ACC Construction had actually received ratings of "2 - Exceptional, 3 - Very Good, and 1 - Satisfactory." Protest at 2; see Protest, exh. B.

After internally investigating the discrepancy identified by ACC Construction, the Army concluded that the SSEB had, in fact, used the correct CPAR evaluation ratings for project 4 in its initial evaluation of the protester's past performance; the inaccurate ratings contained within the initial SSEB report were, according to the agency, the result of an internal clerical error. COS at 2. The agency nevertheless re-convened the SSEB on May 9 to re-evaluate the protester's proposal. *Id.*; see also AR, Tab 5b, Addendum for SSEB Report at 5. The SSEB's re-evaluation of the protester's proposal identified the same two strengths as the initial evaluation, removed the previously assessed weakness, and again found no deficiencies. *Id.* at 5-6, 10. The re-convened SSEB concluded that the protester's submitted past performance still warranted a rating of "satisfactory confidence." *Id.* at 6; AR, Tab 2, Memorandum of Law (MOL) at 2.

On May 31, ACC Construction received a written debriefing from the Army. AR, Tab 7h, Debriefing Letter at 1. The agency's debriefing letter informed the protester that the SSEB had re-convened and re-evaluated the protester's proposal, and that the SSEB had assigned the proposal the same past performance rating of satisfactory confidence. *Id.* On June 3, the protester filed this protest with our Office.

DISCUSSION

ACC Construction raises various challenges to the Army's evaluation of its proposal under the past performance and design experience evaluation factors. The agency

responds that its evaluation of the protester's proposal under these factors was reasonable and consistent with the terms of the solicitation. Based on our review of the record and as explained below, we conclude that none of the protester's challenges afford a basis on which to sustain the protest.

Evaluation of Past Performance

ACC Construction argues that the Army's evaluation of its proposal under the past performance factor was unreasonable for three primary reasons: (1) the agency relied on erroneous CPAR evaluation ratings and but for that error, the protester would have received a higher confidence rating; (2) the agency failed to acknowledge the wide-variety of work the protester demonstrated in its proposal, which similarly prevented it from receiving a higher rating; and (3) the agency failed to acknowledge that the protester demonstrated successful previous performance with its proposed designer. Protest at 3-4.

The Army responds that its evaluation was reasonable and consistent with the terms of the RFP. Specifically, with respect to ACC Construction's first argument, the agency contends that upon review of internal documentation, the agency confirmed that it used the correct CPAR evaluation ratings in its initial evaluation of the protester's proposal. MOL at 4. Additionally, the agency contends that, in any event, it performed a reasonable re-evaluation of the protester's proposal using the CPAR ratings provided by the protester. *Id.* Further, with respect to the protester's second and third arguments, the agency maintains that the record shows that the agency considered both the wide-variety of work demonstrated by the protester's proposal and the previous work experience the protester demonstrated with its proposed designer of record, and the agency's confidence assessment under the past performance factor reflected that consideration. MOL at 6.

In reviewing a protest challenging an agency's evaluation of proposals, our Office will not re-evaluate proposals or substitute our judgment for that of the agency. *Kiewit Infrastructure West Co.*, B-415421, B-415421.2, Dec. 28, 2017, 2018 CPD ¶ 55 at 5. The evaluation of proposals is generally a matter within the agency's discretion. *Id.* Our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the evaluation factors set forth in the RFP. *Id.* A protester's disagreement with the agency's evaluation, without more, does not establish that the agency acted unreasonably. *REEL COH Inc.*, B-418095, B-418095.2, Jan. 10, 2020, 2020 CPD ¶ 55 at 8.

As explained above, the RFP instructed offerors to submit either PPQs or CPARs containing prior evaluation ratings for each submitted project. RFP at 16. The agency's evaluation of past performance would consist of a consideration of these projects and the previous evaluation ratings received, and result in an assessment of the agency's confidence in the ability of offerors to meet the current solicitation's requirements. *Id.* at 19.

Based on our review of the record, we find that the Army's actions and evaluation of ACC Construction's proposal were reasonable, and the protester has not pointed to any evidence in the record to the contrary or otherwise given our Office any basis on which to sustain the protest. Upon learning of an alleged discrepancy between the prior CPAR evaluation ratings as documented in the SSEB report and the prior CPAR evaluation ratings provided by the protester, the agency immediately investigated the matter to ensure its evaluation was performed properly and in a manner consistent with the terms of the solicitation. AR, Tab 5b, Addendum for SSEB Report at 5; *see also* COS at 2. The agency asserts that its initial evaluation was proper but to be sure, it re-convened the SSEB in order to be certain that the protester received a fair and reasonable evaluation that considered all of the correct past performance information.⁴ MOL at 4.

The re-convened SSEB documented its findings in an addendum to the initial SSEB report and ultimately arrived at the same confidence rating with respect to the protester's past performance. AR, Tab 5b, Addendum for SSEB Report at 6-10. While the weakness previously assigned to the protester's proposal in the initial SSEB report was no longer associated with the protester's proposal, nothing in the solicitation required a proposal evaluated as containing zero weaknesses to receive a "substantial confidence" rating. Rather, the RFP afforded the agency discretion to weigh all of the past performance information that the RFP required and assign a rating based on the confidence the agency had in the protester's ability to meet the solicitation requirements. See RFP at 18-19. We find no basis to disturb the agency's ultimate conclusion that it had satisfactory confidence in the protester based on its past performance.⁵

⁴ The agency contends that its initial evaluation was in fact based on the correct CPAR evaluation ratings and that any discrepancy between the ratings in the SSEB report and the actual CPAR ratings was the result of a clerical error made after it had completed the initial evaluation. The agency's contention, however, does not explain how or why the initial evaluation, if based on the correct CPAR ratings, included a documented weakness derived from the incorrect CPAR ratings. We need not resolve this apparent inconsistency, however, because the record shows that the agency did re-evaluate ACC Construction's proposal using the correct CPAR evaluation ratings and explained that the re-evaluation resulted in the same confidence rating, which we find was a reasonable conclusion.

⁵ ACC Construction's allegations that the Army's actions in investigating the discrepancy were insincere or that its re-evaluation was insufficient--or in the protester's words, that the re-evaluation was "garbage in and garbage out"--are not supported by the record. Protest at 4. Government officials are presumed to act in good faith, and allegations of bias or bad faith must be supported by convincing proof, beyond mere inference and innuendo. *Peraton Inc.*, B-416916.5; B-416916.7, Apr. 13, 2020, 2020 CPD ¶ 144 at 9. We presume that the agency has acted in good faith, and the protester has not provided or pointed to any evidence beyond mere inference indicating otherwise. Accordingly, this protest ground is denied.

Next, ACC Construction alleges that it should have received a higher rating under the past performance factor because its proposal demonstrated previous experience performing a wide variety of work that the agency failed to acknowledge. Protest at 3. We find that the Army's evaluation in this regard was also reasonable. The agency's SSEB report included documentation of the variety of work performed by the protester for each submitted project under the heading "relevant scope elements." See AR, Tab 5a, SSEB Report at 12-15. For example, in evaluating one of the protester's past performance projects the agency recognized that the protester's proposal demonstrated work in the following areas: design-build of an operational facility, sensitive compartmented information facility, administrative and office building, educational facility, and recreational and storage facility. *Id.* at 14.

Thus, the protester's assertion that the agency failed to acknowledge the variety of work the firm performed is contradicted by the record. Though the protester argues that it should have received a higher rating or a strength for the variety of work it submitted, the RFP states that demonstrating a "wide-variety" of work "may" increase the SSEB's confidence. RFP at 19. In sum, the protester's allegation amounts to disagreement with the agency's evaluation and does not provide a basis to sustain the protest.

Similarly, ACC Construction's argument that it should have received a higher rating under the past performance factor for demonstrating previous experience working with its designer of record is without merit. Protest at 4. The SSEB report stated that the Army actually assigned a strength to the protester's proposal in this regard, noting that the protester submitted three projects with its designer of record, "demonstrating the ability for the offeror and the designer of record to work together and complete a successful project." AR, Tab 5a, SSEB Report at 16. As above, the protester's assertion that the agency failed to acknowledge its experience working with its proposed designer is contradicted by the record. The agency identified this aspect of the protester's proposal a strength, and the protester's position that it should have received a higher confidence rating again amounts to disagreement with the agency's evaluation and exercise of its discretion which does not provide a basis to sustain the protest.

As these latter two arguments are contradicted by the record and amount to disagreement with the Army's evaluation rating, they do not, on their own, demonstrate that the agency's evaluation was unreasonable. *REEL COH Inc.*, *supra* at 8. As such, these protest grounds are also denied.

Evaluation of Design Experience

ACC Construction raises two primary arguments in support of its challenge that it should have received higher than a "good" rating under the design experience factor: (1) the agency based its evaluation on an erroneous design completion date for one of the protester's submitted projects, which was mistakenly stated in the protester's proposal and negatively affected its rating; and (2) the agency failed to note or mention anything

favorable regarding the protester's submission of at least two design-build projects, contrary to the terms of the solicitation. Protest at 4.

The Army responds that its evaluation was based on information provided by ACC Construction and consistent with the terms of the solicitation. MOL at 8-9. Regarding the protester's first argument, the agency contends that because the solicitation required offerors to provide design completion dates in the project narrative of their proposals, it was reasonable for the agency to rely on the accuracy of the information provided by the protester in that narrative. In response to the second argument, the agency disputes the protester's allegation that it did not "note" or "mention anything favorable" with respect to the protester's submission of multiple design-build projects. MOL at 9. According to the agency, the record shows that the SSEB not only considered the protester's multiple design-build projects, but the SSEB report actually indicated this was a strength in the protester's proposal. *Id.* Based on our review of the record, we find the protester's arguments to be without merit.

With respect to ACC Construction's first argument, the RFP advised that, under the design experience factor, the Army would evaluate recent and relevant submitted projects that "must be fully designed within six (6) years preceding the date of this solicitation." RFP at 21. To that end, the RFP instructed offerors to state, in the narrative of their proposals, the date of design completion for each of their submitted projects. *Id.* In the narrative of its proposal, the protester provided a design completion date of June 8, 2014, for design experience project 4. AR, Tab 4b, Protester's Proposal Volume II at 46; AR, Tab 5a, SSEB Report at 18. The agency therefore found design experience project 4 not to be relevant, because its design completion date was outside of the six-year time frame required by the RFP. As previously mentioned, the agency still rated the proposal as "good" under the design experience factor. AR, Tab 5a, SSEB Report at 16, 20.

ACC Construction does not dispute the completion date included in the narrative of its proposal, but argues that the CPAR for design experience project 4 indicates that the project was actually completed in March 2017, which would be within the 6-year timeframe established by the RFP. Protest at 4-5. The protester maintains that given this information, the agency unreasonably relied on the date in the narrative in concluding that project 4 was not relevant. *Id.* at 4.

We find the Army's evaluation in this regard to be reasonable and consistent with the terms of the solicitation. The RFP clearly stated that offerors were to provide the design completion date for all submitted projects specifically in their proposal narrative; it was thus reasonable for the agency to rely on the date provided in ACC Construction's narrative, notwithstanding the protester's assertions after the fact that the date on the CPAR was the correct date.⁶ As we have said, it is an offeror's responsibility to submit

⁶ The Army also notes that the CPAR project completion date may not accurately reflect the design completion date, because the CPAR date reflects the completion of the

a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation requirements and allows for meaningful review. *Raytheon Co.*, B-416578, B-416578.2, Oct. 22, 2018, 2018 CPD ¶ 376 at 12. An offeror that does not affirmatively demonstrate the merits of its proposal risks rejection of its proposal or that its proposal will be evaluated unfavorably where it fails to do so. *Jacobs Tech., Inc.*, B-411784, B-411784.2, Oct. 21, 2015, 2015 CPD ¶ 342 at 8.

We also find ACC Construction's second argument relating to design experience to be without merit. The protester alleges that it did not receive credit for submitting two design-build design experience projects. However, the evaluation record indicates that the protester received a strength for submitting not only two, but three design-build projects. AR, Tab 5a, SSEB Report at 16, 19. In its comments to the agency report, the protester merely repeats its argument from the initial protest, alleging that the agency failed to note or mention anything favorable in the evaluation about the protester's submission of multiple design-build projects. Comments at 2. Because the protester has failed to meaningfully respond to the agency in its comments, we conclude that the protester's argument amounts to disagreement with the agency's evaluation under the design experience factor, and, without more, does not demonstrate that the agency's evaluation was unreasonable. We therefore deny this protest ground. *REEL COH Inc.*, *supra* at 8.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

contract and is "simply not the same" as the design completion date that was required by the solicitation. MOL at 8.