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Decision

Matter of: Aptim-Amentum Alaska Decommissioning, LLC

File: B-420993.3

Date: April 26, 2023

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Scott H. Riback, 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 awardee's proposal is sustained, in part, where record shows that the proposal failed to meet a material requirement of the solicitation.
 2. Protest challenging the adequacy and fairness of discussions conducted with the protester is denied where the record shows the agency met its obligation to conduct adequate and equal discussions.
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DECISION

Aptim-Amentum Alaska Decommissioning, LLC (A3D), of Baton Rouge, Louisiana, protests the award of a contract to Westinghouse Government Services (WGS), of Hopkins, South Carolina, under request for proposals (RFP) No. W912DR-22-R-0027, issued by the Department of the Army, U.S. Army Corps of Engineers, for the decommissioning and dismantlement of the SM-1A nuclear reactor facility located in Ft. Greeley, Alaska. A3D argues that the agency miscalculated the WGS proposal and also failed to engage in adequate, equal discussions with the firm.

We sustain the protest in part, and deny it in part.

BACKGROUND

This is our second occasion to consider the propriety of the agency's actions in connection with the award of the subject contract. In August 2022, the agency awarded a contract to WGS, and A3D filed a protest and a supplemental protest with our Office challenging the agency's award decision. Based on allegations advanced in A3D's supplemental protest, the agency elected to take corrective action, representing that it would reevaluate the WGS proposal and "re-document" its source selection decision (the agency also stated that it reserved the right to expand its corrective action to include reopening discussions). Based on the agency's proposed corrective action, we dismissed A3D's earlier protest as academic. *Aptim Amentum Alaska Decommissioning, LLC*, B-420993, B-420993.2, Oct. 11, 2022 (unpublished decision). A3D's current protest is a challenge to the agency's decision to affirm its earlier source selection decision.

The RFP contemplates the award, on a best-value tradeoff basis, of a hybrid cost-plus-incentive-fee/cost-reimbursement/fixed-price contract to perform the requirement. Broadly speaking, the contract contemplates a 72-month period of performance and divides the work between base and option work elements. RFP, amend. No. 0008, at 2-3, 30.¹

Firms were advised that the agency would evaluate proposals considering cost/price and four non-cost/price factors: overall project approach (deemed more important than the next two factors); management approach/key personnel; past performance (each deemed approximately equal and more important than the final factor); and small business participation.² RFP amend. No. 0008, at 42-43. All of the non-cost/price factors in combination were deemed approximately equal to cost/price. *Id.*

¹ The agency issued a series of eight amendments to the original solicitation. These amendments made various changes to the solicitation's performance work statement; provided answers to offeror questions; made repeated revisions to the instructions to offerors and the basis for proposal evaluation; made changes to the allocation of work between the base and option line items; and provided additional documentation necessary for offerors to prepare their proposals (for example, a wage determination). All citations to the solicitation in this decision identify the applicable amendment that includes the version of the RFP provision being cited.

² The RFP provided that the agency would assign adjectival ratings of outstanding, good, acceptable, marginal, or unacceptable to the overall project approach, management approach, and small business participation factors. RFP, amend. No. 0008, at 44-45. The RFP also provided that the agency would first assess past performance examples for relevancy and quality. Thereafter, based on an integrated assessment of all of an offeror's past performance examples, the agency would assign adjectival ratings of substantial confidence, satisfactory confidence, neutral confidence, limited confidence, or no confidence under the past performance factor.

In response to the solicitation, the agency received three proposals. After evaluating the proposals, engaging in three rounds of discussions, and soliciting and evaluating final proposal revisions, the agency made award to WGS, concluding that its proposal represented the best overall value to the government.

As noted, A3D filed a protest and supplemental protest challenging that award decision. Based on allegations advanced in A3D’s supplemental protest, the agency elected to take corrective action to reevaluate the WGS proposal and make a new source selection decision. After reevaluating the WGS proposal, the agency assigned the following ratings to the proposals of A3D and WGS:

	Overall Project Approach	Management Approach	Past Performance	Small Business	Cost/Price³
A3D	Outstanding	Outstanding	Substantial Confidence	Outstanding	\$133,504,090
WGS	Good	Good	Substantial Confidence	Outstanding	\$103,544,690

AR, Exh. 36, SSDD, at 9; Exh. 43, SSDD Addendum, at 2-3.⁴ On the basis of these evaluation results, the agency reaffirmed its selection of WGS, concluding that its proposal offered the best overall value to the government. After being advised of the agency’s source selection decision, A3D filed the instant protest.

DISCUSSION

A3D argues that the agency misevaluated the WGS proposal under the management approach and past performance factors. A3D also argues that the agency failed to engage in adequate and equal discussions with the firm. We have reviewed all of A3D’s allegations and sustain its protest relating to the evaluation of WGS’s

³ The agency made minor cost realism adjustments to both firms’ proposals. The record shows that the agency adjusted A3D’s cost/price downward by \$2,995,406, for an evaluated cost/price of \$130,508,684. Agency Report (AR), Exh. 36, Original Source Selection Decision Document (SSDD), at 41; Exh. 43, SSDD Addendum, at 7. The agency adjusted WGS’s cost/price upward by \$7,445,793, for an evaluated cost/price of \$110,990,484. *Id.* The agency did not reevaluate cost/price proposals as part of its corrective action, so these same adjustments appear in both the SSDD and the SSDD addendum. The agency’s cost realism evaluation is not at issue in this protest.

⁴ The evaluation results for A3D are derived from the agency’s original SSDD because the agency did not reevaluate its proposal. The evaluation results for WGS are derived from the agency’s SSDD addendum.

management approach proposal; we have no basis to object to the agency's actions relating to A2D's remaining allegations.⁵ We discuss our conclusions in detail below.

Evaluation of the WGS Proposal

A3D argues that the agency miscalculated the WGS proposal under the management approach and past performance factors. In reviewing challenges to an agency's evaluation of proposals, our Office does not 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 scheme and applicable statutes and regulations. *LMI Consulting, LLC*, B-421233, B-421233.2, Jan. 24, 2023, 2023 CPD ¶ 36 at 4.

With respect to the management approach factor, A3D maintains that the WGS proposal failed to meet a requirement of the solicitation and should have been excluded from award consideration. A3D draws our attention to two provisions of the RFP in support of its allegation which, A3D argues, required rejection of WGS's proposal for its alleged failure to include a key personnel retention plan.⁶ The first provision is in the instructions to offerors detailing preparation of proposals in response to the management approach factor and provides:

Procedures/processes to ensure services that result in submission of high quality technical documents and deliverables. At a minimum, the contractor shall include procedures/processes that address the following:

Prime and subcontractor staffing management. Identify the retention plan to ensure key personnel are available for the duration of the project.

RFP, amend. No. 0007, Section L. II, Instructions to Offerors, at 35-36. The second provision relied on by A3D is from the management approach evaluation factor, and provides as follows: "The [management approach] factor is met when the firm

⁵ In its initial protest, A3D also challenged the agency's evaluation of what it characterized as various risks associated with the WGS proposal; A3D also alleged that the agency performed a faulty best-value selection decision. A3D Protest at sections III.D and III.E. A3D withdrew these allegation after reviewing the agency report. A3D Corrected Comments at 2.

⁶ A3D also supports its argument with reference to a section of the performance work statement that includes a requirement for the successful contractor to provide management support services, and makes reference to producing various management plan documents: RFP amend. No. 0008 at 11. Inasmuch as this is a performance requirement to be met by the contractor after contract award, this provision did not impose a requirement that had to be satisfied during proposal submission. *Xerox Corporation*, B-417498.2, B-417498.3, Aug. 16, 2021, 2021 CPD ¶ 304 at 8.

demonstrates all of the requirements in Section L, Factor II.” RFP, amend. No. 0008, Management Approach Evaluation Factor, at 47.

According to A3D, these provisions, when read together, required rejection of the WGS proposal because, according to A3D, the WGS proposal did not include a retention plan. In contrast, the agency takes the position that these RFP provisions did not require it to reject the WGS proposal, but only required it to consider the relative merit of WGS’s proposed retention approach, which the agency maintains it did.

We sustain this aspect of A3D’s protest. Where the record shows that a firm’s proposal fails to meet a material requirement of the solicitation, the proposal is technically unacceptable and cannot serve as the basis for the award of a contract. *Low & Associates, Inc.*, B-297444.2, Apr. 131, 2006, 2006 CPD ¶ 76 at 6.

As noted, the RFP management approach evaluation factor stated that it was “met” when all of the requirements outlined in the instructions to offerors were met. The instructions to offerors, in turn, required proposals to, among other things, identify a retention plan to ensure key personnel are available for the duration of the project. RFP amend. No. 0007, Section L. II, Instructions to Offerors, at 35-36.

A review of the WGS proposal shows that it did not include a stand-alone key personnel retention plan, nor did it otherwise specifically address retention of key personnel. The agency used the fact that the WGS proposal included letters of commitment for all key employees in which the key employees committed to work on the contract throughout the period of performance as a basis for concluding that WGS had included a key personnel retention plan. AR, Exh. 43, SSDD Addendum, at 4-5. The agency also found the fact that WGS proposed a phased approach to employing its staff created [deleted] and that this also provided a basis for concluding that it had included a key personnel retention plan. *Id.*

The simple fact of the matter, however, is that the WGS proposal does not include a plan for how it will retain key personnel during performance of the contract, as required by the RFP. This is in contrast, for example, to the protester’s proposal, which included a stand-alone discussion detailing its key personnel retention plan. AR, Exh. 26, Protester’s Proposal, Vol. II Management Approach at 19. Under this section, the protester identified a variety of retention incentives for key personnel, such as [deleted]. *Id.* A3D’s proposal also [deleted]. *Id.* at 17.

Regarding WGS’s letters of commitment, while the solicitation separately stated that offerors could receive “additional consideration” for providing letters of commitment for key personnel, *see*, RFP, amend. No. 0008, Management Approach Evaluation Factor, at 48, the inclusion of such letters did not amount to a substitute for a key personnel retention plan, which was separately required. While WGS’s key employee letters represent commitments from the individuals to perform their duties for the required period of performance, these up-front commitments cannot reasonably be viewed as a

plan for how WGS would continue to retain these key personnel throughout performance of the contract.

As noted, and again by way of comparison, A3D proposed [deleted]. A3D also took the additional step of [deleted]. Regardless of the comparative merits of these features, the simple fact of the matter is that, together, these proposal features constituted a key employee retention plan.

Finally, we fail to see how an approach that promises [deleted] can reasonably be considered a substitute for a separate retention plan for key personnel. Simply stated, [deleted] has nothing to do with proposing a package of specific, identified incentives for retaining key personnel.

In light of the foregoing discussion we find that, because inclusion of a key personnel retention plan was a material requirement of the solicitation, and because the WGS proposal did not include such a plan, it could not properly serve as the basis for award of the contract. *Low & Associates, Inc., supra*. We therefore sustain this aspect of A3D's protest.

A3D also argues that the agency misevaluated WGS's past performance. In this connection, A3D focuses on two of WGS's past performance examples, and maintains that the agency assigned unreasonably high relevancy ratings to these two examples. A3D's allegations focus on a list of seven enumerated characteristics included in the instructions to offerors. RFP, amend. No. 0007, Instructions to Offerors, at 37-38. The past performance evaluation factor provided that: "The level of relevancy will be determined by the evaluated extent to which individual projects demonstrate multiple requirements, or characteristics, identified in Section L, Factor III." RFP, amend. No. 0008, Evaluation Factors, at 48.

A3D essentially argues, based on the relevancy ratings assigned to other past performance examples evaluated for it and WGS, that the agency's assignment of relevancy ratings to the two challenged examples was unreasonable. In effect, A3D's challenge is based on what amounts to A3D's counting of the enumerated characteristics used to support the relevancy ratings for the challenged examples, and comparing that to a count of the enumerated characteristics used to support the relevancy ratings assigned to other past performance examples. A3D argues, based on this "counting" exercise, that the assignment of the relevancy ratings for the two challenged past performance examples was irrational, and internally inconsistent with the remainder of the agency's relevancy ratings.

We find no merit to this aspect of A3D's protest because it relies on a faulty premise, namely, that by some unstated calculus used by A3D in its "counting" exercise, the agency erred in the assignment of the relevancy ratings for these two past performance examples. As we have consistently stated, evaluation scores, whether they be numeric or adjectival--or as in this case, where they involve the assignment of relevancy ratings based on an analysis of the particular attributes of past performance examples--are only

guides to intelligent decision making. *ISHPI Information Technologies, Inc.*, B-420718.2, B-4207618.3, July 29, 2022, 2022 CPD ¶ 195 at 11; *see also*, *L-3 Communications, L-3 Link Simulations and Training*, B-410644.2, Jan. 20, 2016, 2016 CPD ¶ 44 at 5. The scores assigned are not dispositive metrics for an agency to express a proposal's merit. What is important is the underlying substantive merits of the proposal (or past performance example) as embodied in, or reflected by, the scores, along with the underlying narrative description that supports the assignment of those scores. *Id.*

Here, A3D does not challenge the agency's substantive underlying findings with respect to these two examples (either in terms of the relevancy ratings assigned or the qualitative assessment of the two examples), but only challenges the agency's relevancy ratings based on its "counting" exercise described above.

For example, one of WGS's past performance examples challenged by A3D is referred to as the Zion Nuclear Power Plant Decommissioning Project, a project to which the agency assigned a rating of "very relevant." A3D's protest essentially ignores the agency's underlying, substantive findings with respect to this example. The agency found:

Zion Nuclear Power Plant Decommissioning Project demonstrates multiple project characteristics identified in Section L, Factor III of the solicitation to include nuclear reactor decommissioning; experience with radioactive waste remediation; experience with complex logistics, to include waste transportation; experience executing a project in accordance with ARO [Army Reactor Office], DOE [Department of Energy], or NRC [Nuclear Regulatory Commission] requirement[s,] and was a cost type contract. The project also received additional consideration for being over \$40M in magnitude, [for involving] work within constrained physical environment[,] and [because] multiple proposed key personnel (PM [program manager], SM [site manager] and QSCM [quality control system manager]) were engaged in the project. . . . This project is the decommissioning and demolition of two commercial nuclear power plants whose scope is near identical to the work required for SM-1A [the solicited requirement]. The project demonstrates multiple requirements, or characteristics, as identified in Section L, Factor III and Section M, Factor III of the solicitation. Additionally, the project is very similar to SM-1A in scope as the project was the decommissioning and demolition of two commercial nuclear power plants.

AR, Exh. 42, Source Selection Advisory Council Report Addendum, at 25.

A3D has not challenged any of the agency's underlying substantive findings, quoted above, and instead--as discussed--bases its argument entirely on its own "counting" of the enumerated characteristics that it believes properly are attributable to the project's

scope.⁷ This amounts to no more than A3D's disagreement with the agency's evaluation findings; such disagreement, without more, does not provide a basis for our Office to question the agency's evaluation of WGS's past performance. *Async-Nu Microsystems, Inc.*, B-419614.5, B-419614.6, Sept. 30, 2022, 2022 CPD ¶ 251 at 9-10. Accordingly, we deny this aspect of A3D's protest.

Adequacy of the Agency's Discussions with A3D

A3D argues that the agency engaged in inadequate and unequal discussions with the firm. As noted, the agency conducted three rounds of discussions, and the record shows that, during the third round of discussions, the agency advised A3D for the first time that its cost/price was not competitive. AR, Exh. 22, Discussions Letter with A3D, at 4. A3D argues that the agency engaged in inadequate and unequal discussions with it because the agency waited until the third round of discussions to raise the matter of its relatively high cost/price. According to A3D, the agency should have afforded it successive cost/price discussions during each of the three rounds of discussions; A3D argues that WGS was afforded three rounds of discussions during which, according to A3D, the agency "coached" it to help resolve weaknesses and deficiencies in its proposal.

We find no merit to this aspect of A3D's protest. Unless an offeror's proposed price is so high as to be unreasonable or unacceptable, an agency is not required to inform the offeror during discussions that its proposed price is high in comparison to a competitor's proposed price, even where price is the determinative factor for award. *DynCorp International, LLC*, B-417506, B-417506.10, July 31, 2019, 2019 CPD ¶ 338 at 13. (While agencies are not required to advise a firm that its proposed price is high where it has not been determined to be unreasonably high, an agency may permissively elect to advise a firm that its price is not competitive. *Id.* at 14.) In addition, agencies are not required to engage in successive rounds of discussions until all proposal defects have been corrected, nor are agencies required to reiterate concerns that were not alleviated by a firm's proposal revisions. *Argon ST, Inc.*, B-401387, Aug. 6, 2009, 2009 CPD ¶ 163 at 4.

The record shows that, during the agency's initial evaluation of cost/price, it made no determination as to the reasonableness of any firm's cost/price, AR, Exh. 14, Initial Cost/Price Evaluation Report, at 3. The record also shows that after receipt of the first and second revised proposals, it found all firms' cost/price reasonable. AR, Exh. 17, Second Cost/Price Evaluation Report, at 3; Exh. 21, Third Cost/Price Evaluation Report, at 3.

⁷ A3D also has not shown that there were any problems or concerns associated with performance of the Zion contract. In this connection, the record shows that the agency reviewed past performance questionnaire ratings for this project which included 22 "exceptional" and one "very good" rating for the project. AR, Exh. 42, Source Selection Advisory Council Report Addendum, at 25.

Nonetheless, after receiving the second revised proposals, although the agency still concluded that all prices submitted were reasonable overall, AR, Exh. 21, Third Cost/Price Evaluation Report, at 3, the agency determined that A3D's proposed price for the base work elements (as opposed to optional elements) was higher than available funding for the base work.⁸ AR, Exh. 20, Available Funding E-Mail, at 2. In light of these considerations, the agency issued a discussion question to A3D, permissively advising it that its price was not competitive. AR, Exh. 22, A3D Third Discussions Letter, at 4. The agency also issued an amendment to the RFP that changed the division of the work elements between the base and options in an apparent effort to ensure that all offerors cost/price for the base work elements would be within the available funding. RFP, Amend. No. 0008, at 2-3.

In response to this third round of discussions, A3D significantly [deleted] its overall cost/price from \$[deleted] to \$[deleted]. AR, Exh. 28, A3D's Final Cost/Price Worksheet, at 2. A3D also dramatically [deleted] its cost/price for the base elements to \$[deleted], which was well below the available funding of approximately \$[deleted]. *Id.*

We have no basis to object to the agency's actions during discussions, as described above. First and foremost, because the record shows that A3D's cost/price was at all times considered reasonable, the agency was under no legal obligation to engage in cost/price discussions with A3D at all. Second, the record reflects that the agency not only permissively engaged in cost/price discussions with A3D after receipt of the second revised proposals, but also amended the solicitation in an apparent effort to ensure that A3D--and all offerors--would propose a cost/price for the base work that was within the limits of available funding. Third, inasmuch as the agency was under no obligation to engage in price discussions with A3D at any point during the acquisition, it necessarily follows that the agency was under no obligation to engage in successive rounds of cost/price discussions. In a word, the agency more than met its legal obligation to discuss cost/price with A3D.

We point out as well that A3D has not demonstrated that the discussions the agency held with WGS involved repeated, successive rounds of discussions concerning the same weaknesses or deficiencies, so there also is no basis for our Office to conclude that the discussions were somehow unequal or unfair as among the competitors. Accordingly, we deny this aspect of A3D's protest.

⁸ The record shows that, in A3D's initial and first revised proposals, A3D's proposed price for the base work was within the available funding. A3D's initial proposed cost/price for the base work was \$[deleted]. AR, Exh. 13, A3D's Initial Cost/Price Worksheet, at 2. A3D's first revised cost/price for the base work was \$[deleted]. AR, Exh. 16, A3D's First Revised Cost/Price Worksheet, at 2. A3D dramatically [deleted] its price for the base work elements to approximately \$[deleted] for the first time in its second revised proposal. AR, Exh. 19, A3D Second Revised Pricing Worksheet, at 2. The available funding for the base work was [deleted]. AR, Exh. 20, Available Funding E-Mail, at 2.

RECOMMENDATION

As noted above, we conclude that the WGS proposal could not properly form the basis for the award of a contract because it failed to meet a material requirement of the solicitation, namely, the requirement for a key employee retention plan. We recommend that the agency eliminate WGS from further consideration for award and make award to one of the remaining firms in the competition, if otherwise proper. In the alternative, we recommend that the agency reopen discussions among the competitors; solicit, obtain and evaluate revised proposals; and make a new source selection decision. We also recommend that the agency reimburse the protester the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained in part, and denied in part.

Edda Emmanuelli Perez
General Counsel