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Decision

Matter of: Building Restoration Corporation

File: B-402000

Date: December 29, 2009

Timothy A. Sullivan, Esq., and Jason C. Tarasek, Esq., Best & Flanagan LLP, for the protester.

Capt. Bridget E. Keenan, Department of the Army, for the agency.

Cherie J. Owen, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly evaluated protester's proposal as marginal, and thus ineligible for award under the terms of the solicitation, is denied where the record shows that the agency reasonably concluded the proposal's deficiencies and weaknesses warranted a technical rating of marginal, and thus properly made award to the lowest-priced, technically-acceptable offeror without conducting discussions.

DECISION

Building Restoration Corporation (BRC) of Roseville, Minnesota, protests the award of a contract to Hydro-Tech, Inc., of Lehi, Utah, under request for proposals (RFP) No. W91QF4-09-R-0020, issued by the Department of the Army for repair of a tower at Fort Leavenworth, Kansas. BRC contends that the Army's evaluation of its proposal was unreasonable.

We deny the protest.

BACKGROUND

The RFP was issued on July 14, 2009, and called for the award of a fixed-price contract. The RFP provided that award would be made, without discussions, to the lowest-priced, technically-acceptable offeror. RFP at 10. Under the technical evaluation factor, the RFP identified four subfactors: (1) prior experience with historic preservation construction projects; (2) technical excellence; (3) management capability; and (4) personnel qualifications. Id.

To receive consideration for award, a rating of no less than adequate was required for the first subfactor; ratings of no less than acceptable were required for the remaining three subfactors. Id. at 10, 11, 17-18. As relevant here, the RFP stated that, with regard to all of the subfactors except the first one, a rating of acceptable would be assigned to proposals that contained some strengths, but no deficiencies or significant weaknesses, provided any identified minor weaknesses did not impact the probability of meeting minimum requirements. A marginal rating would be assigned to proposals that contained numerous weaknesses (including significant weaknesses) and/or some deficiencies, provided the proposal's overall approach was sufficiently sound that the weaknesses or deficiencies could be corrected without a major rewrite of the proposal. RFP at 18.

With regard to the second subfactor, technical excellence, offerors were required to describe the approaches they would use to ensure that the results of the construction project met the specified requirements. Offerors were to prepare a summary plan for elements necessary to complete the required work, including, but not limited to, technical approaches and methods and means. RFP at 15-16. As relevant here, the RFP's specifications make numerous references to different types of "Dutchman" repairs¹ to be performed under the contract. See AR, Tab 6, RFP Attach. 1, at 14, 18, 173-74, 177, 179, 181, 183, 185, 186-90. Further, the Dutchman work comprised two separate lines on the schedule contained in the RFP. AR, Tab 6, RFP Attach. 1, at 14. The RFP also stated that the agency's evaluation under the technical excellence subfactor would include an evaluation of the offeror's construction schedule. RFP at 11.

The specifications also required offerors to provide a site safety and health officer at the work site at all times to perform safety and occupational health management, surveillance, inspections, and safety enforcement for the contractor. AR, Tab 6, RFP, Attach. 1, at 66. The specifications stated that the contractor quality control person on this project could not also serve as the safety officer. Id.

In evaluating the protester's proposal, the technical evaluation board (TEB) assigned a deficiency for the protester's construction schedule. AR, Tab 27, TEB Report, at 5. The TEB found that the schedule did not appear to be thoroughly developed to demonstrate the sequence and overlap of work required by solicitation specification sections 02 41 19, covering selective demolition, and 04 01 20, covering the maintenance of masonry; the evaluators also concluded that BRC's construction schedule was internally inconsistent. AR, Tab 27, TEB Report, at 4; AR, Tab 29,

¹ A Dutchman repair is defined in the specifications as the process of removing damaged stone to a specified depth and inserting a new piece of stone to fit in the opening created to form a seamless patch. AR, Tab 6, RFP Attach. 1, at 173. The specifications also reference and define a full-face Dutchman, a multi-face Dutchman, a Dutchman joint, and a Dutchman collar joint. Id. at 173-74.

Contracting Officer's (CO) Memorandum, at 15 (noting that BRC's schedule contained an almost three-week delay between demolition of some masonry and the replacement of that masonry).

The TEB also noted that BRC's proposal did not identify a separate individual to serve as the quality control person. Instead, the proposal stated, "Our Safety Director also provides Quality Control functions on his visits to job sites on a rotating basis. The Safety Director submits his reports directly to management." AR, Tab 20, BRC Proposal at 149. In its consensus report, the TEB concluded that BRC's quality control program was insufficient because, under the terms of the solicitation, the site safety officer could not also serve as the quality control officer. AR, Tab 27, TEB Report, at 5. The TEB listed this as a deficiency under the technical excellence subfactor. Id.

The board also noted that BRC's proposal failed to address the firm's experience making Dutchman repairs. The board assigned a weakness for this failure, concluding that the omission could mean that BRC lacked such experience. AR, Tab 27, TEB Consensus Report, at 4.

The CO adopted these findings in her source selection decision. AR, Tab 29, CO Memorandum, at 14-15. The agency determined that BRC's technical proposal was marginal, and therefore not eligible for award. Thus, the agency awarded the contract to Hydro-Tech, Inc., at a price of \$1,696,100.

On August 25, the agency provided BRC with a debriefing. In the debriefing, the agency discussed the issues identified above, as well as the other strengths and weaknesses assigned to BRC's proposal. AR, Tab 28, Debriefing Memorandum, at 5. The protester filed an agency-level protest on September 4. The agency denied the protest on September 29, and this protest followed.

DISCUSSION

BRC contends that the agency's evaluation of its proposal was unreasonable, and that its proposal should have been evaluated as technically acceptable under all subfactors. Among other issues, BRC argues that the agency should not have assigned a deficiency to its proposal for its schedule. BRC also challenges the agency's assignment of a weakness for its failure to discuss Dutchman work in its proposal, arguing that this constitutes an evaluation criterion not set forth in the solicitation. As set forth below, we disagree with the specific contentions identified here, and with BRC's other challenges.²

² BRC also challenges the agency's evaluation under the prior experience technical subfactor on the basis that its rating of neutral was unreasonable. Protest at 3-4. However, because a rating of neutral does not render a proposal ineligible for award under the evaluation scheme here, BRC was not prejudiced by the rating. Moreover, (continued...)

Since, under the evaluation scheme here, a proposal had to have an acceptable rating to be considered for award, and since a proposal with deficiencies could not be rated acceptable, see RFP at 10-11, 17-18, we consider first BRC's challenge to the agency's assessment of a deficiency with regard to the firm's construction schedule. Protest at 5. In this regard, BRC disputes the agency's finding that the firm's construction schedule did not reflect a full understanding of the potential problems of the project, was not sufficiently developed, and contained inconsistencies. BRC also argues that the Army's conclusions were unreasonable because the schedule committed to completing all required work within the allotted time, and budgeted for an overlap of work to allow for unforeseen conditions. Protest at 5, Comments at 11.

The evaluation of technical proposals is a matter within the discretion of the contracting agency. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16 at 5. In reviewing an agency's evaluation, we will not reevaluate technical proposals; instead, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria. MAR Inc., B-246889, Apr. 14, 1992, 92-1 CPD ¶ 367 at 4. An offeror's mere disagreement with the agency's evaluation does not render the evaluation unreasonable. McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 18.

We have reviewed BRC's proposal and the agency's evaluation materials, and we see nothing unreasonable about the agency's conclusions. Specifically, we agree that, in evaluating an offeror's schedule, the agency was permitted to do more than merely ascertain whether the schedule committed to complete the project by the date specified in the solicitation. Instead, the agency reasonably reviewed the schedule and expressed concerns about its adequacy for ensuring that the project would be completed on time. In contrast, BRC has not—even in the course of its protest—explained how the agency's conclusions about weaknesses in BRC's schedule were

(...continued)

to the extent BRC claims the agency committed fraud and acted in bad faith, see Protest at 6, we dismiss the protest. There is no evidence in the record, other than BRC's speculation, to support the protester's attribution of unfair or prejudicial motives to the agency's evaluation. Because government officials are presumed to act in good faith, a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Diversified Maint. Sys., Inc., B-401329.4, Nov. 9, 2009, 2009 CPD ¶ 226 at 4 n.7; Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. Moreover, as discussed in this decision, we conclude the agency's evaluation of BRC's proposal was reasonable.

erroneous, or unreasonable. Based on our review, we think the agency's assessment of a deficiency in this area was reasonable.

The protester also challenges several weaknesses assigned to its proposal. For example, BRC argues that the agency imposed an unannounced evaluation criterion with regard to its failure to address Dutchman repairs, since the RFP did not list Dutchman work as an evaluation factor. We disagree.

A solicitation must inform offerors of the basis for proposal evaluation, and the evaluation must be based on the factors and significant subfactors set forth in the solicitation. Federal Acquisition Regulation (FAR) § 15.304(d); Akal Sec., Inc., B-271385, B-271385.3, July 10, 1996, 96-2 CPD ¶ 77 at 3. Agencies are required to identify evaluation factors and significant subfactors, but they are not required to identify all areas of each which might be taken into account, provided that any unidentified areas are reasonably related to or encompassed by the stated criteria. Smart Innovative Solutions, B-400323.3, Nov. 19, 2008, 2008 CPD ¶ 220 at 4.

Here, we agree with the agency that an offeror's experience with Dutchman repairs was reasonably encompassed under the technical excellence subfactor. This subfactor required that offerors describe the technical approaches and methodology necessary to complete the required work. In addition, as set forth above, Dutchman repairs were referenced numerous times throughout the specifications, and were specifically mentioned on the schedule contained in the RFP.

Moreover, we note for the record that there was an additional deficiency identified in BRC's proposal that the protester did not challenge in its protest filing at GAO; thus, even if the protester prevailed on the challenges it raised—which it does not—it would remain ineligible for award. Specifically, the TEB assigned a deficiency for the firm's failure to follow the solicitation's express requirement that the safety officer could not also serve as the quality control officer. AR, Tab 27, TEB Consensus Report, at 5. Not only did the CO adopt this finding in her selection decision, AR, Tab 29, CO Memorandum, at 15, but this deficiency was also noted in the debriefing memorandum. AR, Tab 28, Debriefing Memorandum, at 5. Although BRC challenged this finding in its agency-level protest, AR, Tab 31, Agency-Level Protest, at 2, and although the agency addressed it, AR, Tab 31, Decision on Agency-Level Protest, at 6, this issue was not raised in BRC's protest to our office. Hence, on the basis of its nonconforming proposal, BRC is ineligible for award under the terms of this solicitation.

We deny the protest.

Lynn H. Gibson
Acting General Counsel