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Decision

Matter of: Del-Jen, Inc.

File: B-402575.2; B-402575.3

Date: November 5, 2012

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Christian M. Butler, Esq., and John M. Sabatino, Esq., Department of Homeland Security, for the agency.

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DIGEST

Protest challenging the award of a contract for maintenance and repair services is sustained, where the awardee took exception in its final revised proposal to a material solicitation requirement by limiting its performance of repairs to those under \$750,000.

DECISION

Del-Jen, Inc., of Clarksville, Tennessee, protests the award of a contract to Kellogg, Brown & Root Services, Inc. (KBR), of Arlington, Virginia, by the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), under request for proposals (RFP) No. HSBP1209R2483 for comprehensive tactical infrastructure maintenance and repairs. Del-Jen challenges the agency’s evaluation and source selection decision.

We sustain the protest.

BACKGROUND

The Secure Fence Act of 2006, as amended, requires DHS to construct not less than 700 miles of reinforced fencing along the U.S. southwest border with Mexico where practical and effective, and to provide for the installation of additional

physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border and deter smugglers and others attempting illegal entry into the United States. See 8 U.S.C. § 1103 note. To fulfill this requirement, CBP has constructed tactical infrastructure along sections of the California, Arizona, New Mexico, and Texas borders with Mexico, and has the responsibility for maintaining all tactical infrastructure along the border.¹ Agency Report (AR), Tab B, Acquisition Plan, at 6. For internal contract management purposes, CBP has grouped the border region into four areas.

Solicitation

The RFP provided for the award of two cost-plus-fixed-fee contracts for maintenance and repair support along the southwest border for Areas 2 and 3 for a base year and two option years.² RFP at 11, 32. Offerors were informed that the agency expected to award one contract for each area, and offerors were permitted to submit proposals for one or both areas.³ Id. at 11. Area 2, which is relevant to this protest, contains 388 miles of border under the responsibility of the Tucson, Arizona, and Yuma, Arizona, sector offices. Id. at 13. The RFP advised offerors that, in addition to maintenance and repair work, the government could, at its discretion, require the contractor to carry out improvements incidental to the maintenance and repair of existing tactical infrastructure.⁴ RFP, Statement of Work (SOW) at 12. The RFP stated that the improvements, which were not to be priced by the offerors, would not exceed \$750,000 per activity. Id. at 12-13.

Offerors were informed that award would be made on a best value basis, considering cost and the following non-cost factors (in descending order of importance): management approach, technical capabilities, past performance, and small business utilization. RFP at 109. All non-cost factors, when combined, were

¹ Tactical infrastructure consists of fences/gates, roads/bridges, drainage systems/grate systems, lighting systems/electrical systems, and vegetation control/debris removal. Agency Report (AR), Tab B, Acquisition Plan, at 6.

² Maintenance is defined as work activities that preserve or sustain the ability of an asset to continue to carry out its function or preserve its established level of performance. Repairs are defined as work to restore an existing asset to pre-damage condition and level of performance so that it may be effectively utilized for its designated purpose. SOW at 12.

³ This protest concerns only the procurement for Area 2.

⁴ The SOW defined improvements to include work that enhances the mission and functional capabilities of an asset through an addition, expansion, or adaptation--such as replacing fence sections with a more permanent fence structure. SOW at 12.

stated to be significantly more important than cost. Subfactors under each factor were of equal importance. Id. Offerors were informed that the agency would evaluate cost proposals for reasonableness and realism. Id. at 108.

Instructions were provided for proposal preparation under each evaluation factor. See id. at 97-104. Offerors were instructed to provide a notional work plan as part of their technical proposals and were informed that this plan was for evaluation purposes only. Id. at 101-02. The RFP provided notional work requirements in specific areas for which offerors were to describe how they would approach and support the maintenance and repair requirements within that area. RFP, attach. 2, Guidance for Notional Work Plan, at 113.

With respect to cost, the RFP identified representative maintenance and repair work for which offerors were to provide their estimated costs of performance. RFP, attach. 3, Guidance for Contractor Cost Proposal, at 130. For example, offerors were required to estimate costs for urgent and routine work repairing cut fences, maintaining roads and electrical systems, and debris removal in urban and rural areas. See id. at 130-38.

Evaluation of Proposals

CBP received proposals for Area 2 from seven offerors, including Del-Jen and KBR.⁵ Contracting Officer's (CO) Statement at 1. Offers were evaluated by the agency's technical evaluation team (TET), and technical and cost questions were sent to all offerors. As relevant here, the TET was concerned that a flow chart in KBR's proposal with respect to responding to major unforeseen emergencies could be construed as meaning that KBR could refuse to perform repairs with an estimated cost over \$750,000. Supp. AR at 2. Accordingly, CBP informed KBR that its proposed flow chart

appears to represent a misinterpretation of the RFP requirement that [tactical infrastructure maintenance and repair] activities cannot exceed \$750,000 per activity. Please describe Offeror's understanding of the RFP stated \$750,000 limitation.

Supp. AR, Tab 3, KBR Discussion Letter, Mar. 21, 2012, at 3.

KBR responded that it understood that the limitation of \$750,000 applied to improvements. Id. Despite this response, CBP asked KBR: "Want to clarify your understanding that M&R [maintenance and repair] activities can not exceed \$750,000 is per the contract or per incident?" Id., Tab 2, Notes from KBR

⁵ Two offerors withdrew their proposals prior to the submission of final proposal revisions. CO's Statement at 2.

Discussion, Apr. 4, 2012, at 2. KBR responded that it “visualized it as per incident. We understand the limit is under \$750,000 and ours is per incident.” Id.

Final proposal revisions (FPR) were obtained from five offerors. Despite its initial answer during discussions, KBR’s FPR stated that “KBR acknowledges that there is a cap for any [tactical infrastructure] repair greater than \$750,000 on a per incident basis.” In addition, KBR did not modify the flow chart that raised the TET’s initial concerns. KBR FPR at 28.

KBR’s and Del-Jen’s FPRs were evaluated as follows:⁶

		Del-Jen	KBR
Factor 1 – Management approach		Superior	Superior
	Organization structure	Superior	Superior
	Work plan development	Superior	Superior
	Work plan management & execution	Superior	Superior
	Regulatory compliance	Good	Superior
Factor 2: Technical capabilities		Good	Superior
	Key personnel qualifications	Good	Superior
	Resource capability	Good	Good
	Information management & control	Good	Superior
Factor 3 – Past performance & related experience		Superior	Superior
Factor 4 – Small business utilization		Good	Good

AR, Tab F1, TET Chair Summary Report, at 2, 4.

The TET’s adjectival ratings were supported by narrative discussion that identified strengths and weaknesses in respective proposals. As relevant here, the TET evaluated KBR’s FPR as superior under the work plan management and execution subfactor, but noted as a weakness that KBR had inaccurately interpreted the RFP

⁶ The management approach and technical capability factors and associated subfactors were evaluated as superior, good, satisfactory, marginal, or unsatisfactory. As relevant here, a superior proposal demonstrates excellent understanding of requirements and approach that significantly exceeds performance or capability standards, and has exceptional strengths that will significantly benefit the government. A good proposal demonstrates good understanding of requirements and approach that exceeds performance or capability standards, and has one or more strengths that will benefit the government. The past performance factor was evaluated as neutral, superior, satisfactory, or unsatisfactory. The small business utilization factor was evaluated as superior, good, satisfactory, extra consideration, neutral, marginal, or unsatisfactory. AR, Tab C2, Amended Source Selection Plan, at 31-33.

language as limiting repairs greater than \$750,000, rather than limiting improvements. AR, Tab F2, TET Final Technical Consensus Report for KBR, at 9. The TET acknowledged that, although KBR's written response in discussions recognized that the limitation applied to improvements, KBR's FPR continued to erroneously apply this limitation to repair work. The TET concluded, however, that the impact of KBR's error would be minimal because the limiting statement occurred in the section relating to unforeseen emergencies, where the offeror would be expected to identify and report estimated costs, regardless of whether it was a repair or improvement cost. Additionally, the TET noted that the agency could clarify this limitation after award. Id.

Source Selection Decision

The source selection authority (SSA) reviewed the TET and cost evaluation team final reports, received a source selection briefing, and independently reviewed proposals. The SSA adopted the findings of the TET and cost evaluation team, including the adjectival ratings. AR, Tab G, Source Selection Decision, at 1. The SSA considered KBR's proposal to be technically superior to Del-Jen's and the other offerors' proposals, stating:

This is due primarily to KBR's management and technical approach that are based on their comprehensive understanding of the Work Area 2 requirements and conditions along the Yuma and Tucson border combined with their substantial, directly relevant past performance experience performing work similar in size, scope, and complexity to the [comprehensive tactical infrastructure maintenance and repair] Work Area 2 requirements.

Id. at 1-2. The SSA also recognized that KBR's evaluated most probable costs were much higher than Del-Jen's, as follows:

	Del-Jen	KBR
Base Year	\$4.80 million	\$8.08 million
Base and Option Years	\$15.12 million	\$25.44 million

Id. at 10. The SSA performed a cost/technical tradeoff analysis of Del-Jen's and KBR's proposals.⁷ The SSA concluded that KBR's proposal presented significant

⁷ The proposal of the offeror with the second highest technical ranking was evaluated as having a higher most probable cost than either Del-Jen or KBR. The SSA did not include this proposal in his detailed trade-off analysis. See AR, Tab G, Source Selection Decision, at 4.

benefits and advantages that outweighed Del-Jen's lower most probable costs, and selected that firm to receive award. Id. at 12.

This protest followed a debriefing.

DISCUSSION

Del-Jen complains that CBP misevaluated KBR's proposal and improperly allowed the awardee to take exception to a material solicitation requirement. Del-Jen also challenges the SSA's cost/technical tradeoff decision, complaining that the SSA did not reasonably consider the technical differences between the two firms' proposals and did not sufficiently consider Del-Jen's evaluated cost advantage.

The evaluation of an offeror's proposal is a matter largely within the agency's discretion. Frontline Healthcare Workers Safety Found., Ltd., B-402380, Mar. 22, 2010, 2010 CPD ¶ 91 at 5. In reviewing an agency's evaluation of proposals and source selection decision, our Office will not reevaluate the proposals, but, rather, will examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. One Largo Metro LLC; Metroview Dev. Holdings, LLC; King Farm Assocs., LLC, B-404896 et al., June 20, 2011, 2011 CPD ¶ 128 at 14; Johnson Controls World Servs., Inc., B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88 at 6.

As explained below, we agree with Del-Jen that KBR took exception to a material solicitation requirement, and we therefore find that CBP's selection of KBR's proposal for award was unreasonable. We sustain Del-Jen's protest on this basis. We also find from our review of the record that, but for this issue, the SSA reasonably considered the technical and cost differences between the two firms' proposals in performing a reasonable cost/technical tradeoff. We therefore deny the remainder of Del-Jen's protest grounds.

Material Solicitation Requirement

Del-Jen contends that KBR's proposal was unacceptable because it limited KBR's obligation to perform repairs to those below \$750,000. More specifically, Del-Jen states that this limitation constitutes an exception to the material requirement that the contractor would perform all necessary repairs, including those over \$750,000. See Supp. Protest at 7. Del-Jen contends that the SSA unreasonably concluded that KBR clarified its understanding of the limitation in response to discussion questions because this response occurred prior to the submission of its FPR, which continued to repeat the error, and therefore superseded the commitment made during discussions. Id. at 8-9. Del-Jen also argues that CBP erred in concluding that the agency could simply clarify the matter with KBR after award. Id. at 10.

It is a fundamental principle in a negotiated procurement that a proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award. See The Boeing Company, B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 54; TYBRIN Corp., B-298364.6; B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

CBP argues that KBR's FPR did not take exception to a material requirement, but rather, at most created an ambiguity in one section of the FPR.⁸ CBP further argues that it reasonably interpreted KBR's FPR statement in the context of the section in which it appears--i.e., responding to major unforeseen emergencies--to mean that KBR would flag unusually high estimated repair costs to obtain guidance from the agency. Supp. AR at 2-3. CBP also contends that the context and placement of the limiting statement in the FPR supports its position because the section addresses responding to unforeseen emergencies and not routine or typical urgent repairs. Id. at 3.

We find CBP's interpretation of KBR's proposal language to be unreasonable and not supported by the record. The purpose of the solicitation was to obtain all necessary maintenance and repair services. The only limitation on the dollar value of services to be performed in the RFP referred to a government commitment to limit tactical infrastructure improvements to \$750,000 per activity. See SOW at 12-13. The TET itself recognized this distinction when it expressed concern that the flow chart in KBR's proposal created uncertainty with respect to whether KBR was placing a \$750,000 cap on the amount of repairs it would perform under the contract. While KBR initially appeared to acknowledge during discussions that the limitation applied to improvements, it later responded to CBP's oral discussions confirming a similar limitation on repairs. Moreover, KBR explicitly stated in its FPR the \$750,000 limitation applied to "any [tactical infrastructure] repair." See KBR FPR at 28.

The record does not support CBP's belief that KBR's explicit limitation of repairs in its FPR was merely an ambiguity that could be resolved by reading the proposal in conjunction with the firm's discussion responses.⁹ The plain language in KBR's

⁸ CBP does not contest that the requirement to perform all necessary repairs is a material solicitation requirement.

⁹ CBP cites several of our decisions in urging us to accept KBR's discussion responses as the basis for resolving what it considers an apparent ambiguity. These decisions are inapposite to the situation here where KBR unambiguously placed a limitation upon its obligation to perform all necessary repairs. For example, in CH2M Hill Antarctic Support, Inc., B-406325 et al., Apr. 18, 2012, 2012 CPD ¶ 142, the error concerned an inconsistency in the proposal because of a math error that was apparent on the face of the proposal. Here, the error is not a math

(continued...)

FPR is simply not ambiguous. Moreover, the placement of the limitation in the section of the FPR that refers to unforeseen repairs is not consistent with the agency's explanation that KBR had intended the limitation to apply only to improvements.¹⁰ In addition, contrary to the agency's arguments, KBR's response in oral discussions actually supports the firm's explicit application of the \$750,000 limitation to repairs.¹¹

Accordingly, we find that KBR took exception to a material solicitation requirement. In this regard, we also do not agree with the agency that KBR's exception to this material requirement could simply be resolved after award. The fact that an awardee may, after award, agree to be bound to a solicitation's material requirements does not render the proposal acceptable or the award proper. See Marshall-Putnam Soil & Water Conservation District, B-289949, B-289949.2, May 29, 2002, 2002 CPD ¶ 90 at 7 (question as to whether proposal satisfied material solicitation requirement could not be treated as a minor informational deficiency that could be corrected after award).

Source Selection Decision

Del-Jen also challenges the SSA's tradeoff decision, arguing that the SSA did not reasonably consider the technical differences between the two proposals and did not reasonably consider Del-Jen's price advantage in selecting KBR's more expensive proposal. In this regard, Del-Jen disputes that the discriminating strengths identified by the SSA for KBR under the work plan development, regulatory compliance, key personnel qualifications, and information management and control subfactors merit KBR's \$10 million premium.

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error apparent on the face of the proposal, but rather a statement placing a limitation on repairs.

¹⁰ We recognize that the limitation appears in the section of KBR's FPR concerning emergency repairs. The limitation on its face, however, applies to all repairs in general.

¹¹ We note that CBP appears to have misled KBR during discussions by not clearly identifying that there was a problem in that the proposal appeared to limit the firm's obligation to perform all repairs. Instead, CBP asked KBR in oral discussions whether the cap on repairs applied to each activity or the contract as a whole. It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. See 10 U.S.C. § 2305(b)(4)(A)(i); The Boeing Company, *supra*, at 49; AT & T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 6.

Where, as here, a solicitation provides for award on a best value basis, the decision as to the relative technical merit of the offers must be based upon a comparative consideration of the technical differences of the proposals. See Systems Research & Applications Corp.; Booz Allen Hamilton, Inc., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28 at 24. Ratings, whether numerical, color, or adjectival, are merely guides to assist agencies in evaluating proposals. Technology Concepts & Design, Inc., B-403949.2, B-403949.3, Mar. 25, 2011, 2011 CPD ¶ 78 at 7. Proposals with the same adjectival ratings are not necessarily of equal quality, and an agency may properly consider specific advantages that make one proposal higher quality than another. Id. at 7-8. A protester's mere disagreement with the agency's determinations as to the relative merit of competing proposals and its judgment as to which proposal offers the best value to the agency, does not establish that the evaluation or source selection was unreasonable. Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 4.

Here, the record shows that the SSA reasonably considered the technical differences between Del-Jen's and KBR's proposals in determining that KBR's technically superior proposal outweighed Del-Jen's cost advantage. For example, Del-Jen argues that, with respect to the work plan development subfactor, the SSA unreasonably concluded that KBR's proposal presented potential cost savings from value engineering, because such savings would be too speculative to be considered a benefit. See Del-Jen Comments at 4. CBP explains, however, that the strength identified in KBR's proposal under this subfactor for KBR's value engineering approach presented not only potential cost savings but would provide data that will enable CBP to compete the requirement in the future on a fixed-price basis, rather than a cost-reimbursable basis. AR, Tab G, Source Selection Decision, at 5; Supp. AR at 5. Moreover, KBR's approach would provide data and analysis that will enable CBP to reduce the degree of uncertainty in contract performance over time and, among other things, better prioritize work requirements and help minimize the total amount of time that tactical infrastructure assets are degraded or in a state of disrepair. Supp. AR at 5-6.

As another example, Del-Jen disputes that KBR's proposal presents discriminating strengths under the key personnel qualifications subfactor, where the SSA noted that KBR proposed more qualified key personnel than Del-Jen. See AR, Tab G, Source Selection Decision, at 7. Del-Jen argues that its proposed sector supervisors have the same amount of experience as KBR's supervisors, and that it proposed the same number of program analysts as KBR. Del-Jen Comments at 8-9. The SSA explains that he recognized, as he stated in his decision, that Del-Jen had gone beyond the RFP requirements by proposing additional key personnel, but also noted that the TET had not identified any strengths based on the qualifications and experience of Del-Jen's proposed staff. See Supp. AR, SSA Statement, at 2; see also AR, Tab G, Source Selection Decision, at 7. The SSA states that the firms' resumes highlight discernable differences in the experience of personnel proposed by the two offerors. For example, the SSA agrees with Del-Jen

that the resume of Del-Jen's proposed sector supervisor indicated 18 years of field experience as a carpenter and carpenter foreman, but states that the remainder of this individual's resume did not otherwise detail that individual's experience and qualifications. In contrast, the SSA states that KBR's resumes clearly indicated how the experience of each of its proposed key personnel was relevant to meet requirements, which the SSA found demonstrated that KBR had proposed higher quality personnel. Supp. AR, SSA Statement, at 3.

In sum, we have considered all of Del-Jen's arguments but find that they do not provide any basis for objecting to the SSA's selection decision. Although the protester disagrees with the SSA's conclusion that the technical superiority of KBR's proposal outweighs Del-Jen's evaluated \$10 million cost advantage, this disagreement does not show that the SSA's tradeoff decision was unreasonable.

RECOMMENDATION

We recommend that CBP reopen discussions with offerors, provide offerors an opportunity to submit revised proposals, reevaluate proposals, and make a new selection decision consistent with our decision.¹² We also recommend that the protester be reimbursed its reasonable costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2012). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1)

The protest is sustained.

Lynn H. Gibson
General Counsel

¹² We do not agree with Del-Jen that the facts of this case warrant a recommendation that the agency make award to the protester as the offeror next in line for award, given that the record shows that the CBP misled KBR in discussions concerning the \$750,000 limitation.