



**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

## Decision

**Matter of:** Linc Government Services, LLC

**File:** B-404783.2; B-404783.4

**Date:** May 23, 2011

---

Sean D. Forbes, Esq., and Bryant S. Banes, Esq., Neel Hooper & Banes, PC, for the protester.

Steven W. Feldman, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

1. Agency reasonably rejected the protester's submission on Phase I of a design/build construction procurement conducted in accordance with Federal Acquisition Regulation (FAR) subpart 36.3, where major weaknesses were found in the submission, such that the protester was reasonably determined to be not one of the most highly qualified offerors to be invited to participate in Phase II.
2. In a design/build construction procurement that was conducted in accordance with FAR subpart 36.3, agency's decision to hold discussions with only the higher rated phase I offerors as part of the process of determining the most highly qualified Phase I offerors to be invited to participate in Phase II was unobjectionable.
3. In a design/build construction procurement that was conducted in accordance with FAR subpart 36.3, where an agency issues an amendment to the solicitation changing the evaluation criteria applicable to Phase I of the acquisition after the Phase I submissions were received, and the amendment allows for revisions to the Phase I submissions, but does not provide a closing date, an agency is not required to consider revisions to a submission that are provided more than 2 months after the amendment was issued; after the agency completed what was, in essence, a competitive range exclusion; and after the agency advised the offeror in a debriefing of the problems found in its submission.

---

## DECISION

Linc Government Services, LLC, of Hopkinsville, Kentucky, protests the Department of the Army, U.S. Army Corps of Engineers' decision to exclude that firm for further consideration for one of the multiple awards anticipated or under consideration for the design-build of medical facilities in the continental United States and overseas locations under request for proposals (RFP) No. W921DY-10-R-0005. Linc contends that the agency misevaluated its proposal and failed to provide it with discussions.

We deny the protest.

## BACKGROUND

The agency issued the RFP on September 22, 2010, seeking proposals for a target of four awards of multiple award, task order contracts. Under the contracts, task orders will be issued to the selected contractors for the design/build and construction of projects for the medical repair and renewal (MRR) program throughout the continental United States and overseas locations.

The procurement was conducted pursuant to Federal Acquisition Regulation (FAR) subpart 36.3, "Two-Phase Design-Build Selection Procedures."<sup>1</sup> Under phase I, which is the phase that this protest concerns, the agency sought submissions from interested firms to determine the "most highly qualified offerors" to be invited to provide competitive proposals under phase II. FAR § 36.303-1(b).

The RFP identified three evaluation factors (in descending order of importance) to evaluate the phase I submissions: corporate medical experience, past performance, and organizational and management/technical approach. In addition, the RFP stated that the submittals would be assigned a "go/no-go" rating under the bondability factor. RFP at 46. Price was not to be evaluated under phase I. FAR § 36.303-1(a)(2)(iii). The RFP stated that the agency intended to select a "target" of six offerors to submit competitive proposals for Phase II. RFP at 3; see 10 U.S.C. § 2305a(d); FAR § 36.303(a)(4).

As to Phase II, the RFP anticipated the submission of "competitive proposals" to be evaluated under the evaluation criteria listed in the solicitation. Phase II was to be conducted in accordance with FAR Part 15. FAR § 36.303-2. The RFP stated that a

---

<sup>1</sup> The design-build selection procedures are authorized by 10 U.S.C. § 2305a (2006).

target of four contracts would be awarded among the Phase II offerors. FAR § 36.303-2; RFP at 21.

The agency received 27 phase I submissions by the October 25 due date.<sup>2</sup> The agency evaluated the submissions and assigned ratings of outstanding, good, acceptable, susceptible to being made acceptable<sup>3</sup>, marginal<sup>4</sup>, and unacceptable under the corporate medical experience factor and the organizational and management/technical approach factor. RFP at 47. For the past performance factor, submissions received ratings of low risk, moderate risk, high risk, or unknown risk. RFP at 49.

After the submissions were evaluated, the contracting officer decided to exclude from further consideration 18 of the offerors, including Linc. The offerors excluded from the competition were those that had received a marginal rating or lower under the corporate medical experience factor and/or the organizational and

---

<sup>2</sup> As discussed below, after the phase I submissions were received, on November 22, amendment No. 3 to the RFP was issued making certain revisions to the evaluation scheme.

<sup>3</sup> The RFP defined susceptible to being made acceptable as follows:

The proposal demonstrates an approach/experience which, as initially proposed, cannot be rated Acceptable or above because one or more deficiencies which are readily resolvable, and if resolved would necessarily result in a higher rating than Marginal.

**Note: A susceptible rating cannot be a final rating. The final rating will either decrease to a rating of Marginal or Unacceptable, or if deficiencies are corrected, increase to a rating of acceptable or better.**

RFP at 48.

<sup>4</sup> The RFP defined marginal as follows:

The proposal demonstrates an approach/experience which does not meet all requirements and objectives. The approach/experience contains weaknesses, significant weaknesses, and/or deficiencies. Any strengths or significant strengths that may exist are outweighed by the weaknesses, significant weaknesses, and/or deficiencies. Collectively, the strengths, significant strengths, weaknesses, significant weaknesses, and/or deficiencies are likely to result in less than acceptable performance.

RFP at 48.

management/technical approach factor, or a “no go” rating for the bondability factor. The contracting officer found that a “major rewrite” would be necessary to make these submissions acceptable. Agency Report (AR), Tab 2, Contracting Officer’s Memorandum. Linc’s submission received ratings of “marginal” for corporate medical experience, “low risk” for past performance, “marginal” for organizational and management/technical approach, and “no go” for bondability; Linc was therefore eliminated from the competition. AR, Tab 1, Agency Evaluation of Linc’s Submission, at 9.

Discussions were conducted with the nine remaining firms--all of which received ratings of susceptible of being made acceptable, acceptable, or higher, and “go” ratings for bondability--and revised submissions were requested from these firms. AR, Tab 4, Down Select Decision, at 3. After evaluating these revised submissions, the agency determined that six firms should be selected for phase II. Id. at 7.

On February 1, 2011. Linc received notification that its phase I submission was rejected and that Linc would not be considered for the second phase of the competition. The agency provided Linc with a written debriefing at that time. This protest followed.

## DISCUSSION

Linc protests its exclusion from the second phase of the competition. Linc complains that its submission was unreasonably rated as “no go” under the bondability factor, and “marginal” under the corporate medical experience and organizational and management/technical approach factors.

In reviewing a protest of an agency’s selection of contractors for design/build services, our Office will not substitute its judgment for that of the agency evaluators. Rather, the evaluation of offerors’ phase I submissions is within the discretion of the agency, and our review examines whether the agency’s selection was reasonable and in accordance with the published criteria. See Sletten Cos./Sletten Constr. Co., B-402422, Apr. 21, 2010, 2010 CPD ¶ 97 at 6. A protester’s mere disagreement with the agency’s evaluation does not show that it is unreasonable. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

As noted above, the protester received a “no go” rating for bondability. The RFP stated:

Offerors are required to submit proof of [their] ability to obtain performance and payment bonds attesting to the offeror’s ability to provide assurance for not less than \$25,000,000 per task order and \$80,000,000.00 aggregate. . . . A letter of commitment from the surety will provide acceptable proof of the offeror’s ability to obtain adequate assurance.

RFP amend. 1, at 29; amend. 3, at 12. Linc provided a letter from its surety, which stated that it “has supported single projects for Linc Government Services LLC in excess of \$10,000,000.” Linc’s Proposal, Tab E. Because Linc’s proposal did not establish its ability to meet the requirement that the surety will provide bonding for projects in excess of \$25 million, the agency decided Linc’s submission was “no go” under this factor.

In response, Linc argues that any problem with its surety’s commitment could have been corrected during discussions (or by a simple request for clarification) or by considering Linc’s successful past experience obtaining bonding on its prior MRR contract. We disagree. There is no doubt that Linc’s submission, on its face, failed to establish its ability to meet the bonding requirements of this solicitation. In addition, under the circumstances here, the responsibility for Linc’s failure to establish its ability to meet this clearly stated requirement can, in no way, be shifted from Linc to the agency. In this regard, an offeror bears the burden of submitting an adequately written proposal and it runs the risk that its proposal will be evaluated unfavorably where it fails to do so. Tetra Tech Tesoro, Inc., B-403797, Dec. 14, 2010, 2011 CPD ¶ 7 at 5.

Linc received a marginal rating under the corporate medical experience factor. In evaluating this factor, the agency determined that Linc had limited experience in occupied or operational medical facilities. The agency found that the bulk of the Linc projects identified in its submission, which were performed at Department of Defense medical facilities, involved general facility repair and renewal, such as repair of a roofing system, a parking lot upgrade for security purposes, and work in the training and administrative area. In the agency’s view, Linc identified only one highly relevant project inside an occupied medical facility--a surgical services renovation project. AR at 9-10; see Tab 1, Linc Evaluation Worksheet, at 1. Based on these conclusions, the agency evaluated Linc’s submission as marginal under this factor.

Linc contends that the agency’s evaluation was unreasonable because experience at occupied/operational medical facilities was not specifically identified as being required, or of higher value, than other specialized experience under the corporate medical experience factor. Protester’s Comments at 19. However, as the agency points out, the experience required to be demonstrated here is “specialized medical facility repair renewal experience,” such as “infection control” and “interim life safety measures.” AR at 10; see RFP amend. 1, at 22; amend. 3, at 5. While the protester asserts that it demonstrated other “specialized” experience in its submission, we agree with the agency that, since the basic purpose of the MRR contracts was for the “repair” and “renewal” of medical facilities, experience in working at

occupied/operational medical facilities was important,<sup>5</sup> such that a lack of such experience could reasonably be regarded as a significant weakness.<sup>6</sup> In evaluating proposals, an agency properly may take into account specific matters that are logically encompassed by, or related to, the stated evaluation criteria, even when they are not expressly identified as evaluation criteria.<sup>7</sup> MINACT, Inc., B-400951, Mar. 27, 2009, 2009 CPD ¶ 76 at 3.

Linc also received a marginal rating under the organizational and management/technical approach factor. The agency assigned Linc a significant weakness under this factor because Linc failed to show that its proposed [DELETED] had the required experience in medical repair and renewal type projects. The agency deemed such experience to be critical due to the challenges of design/construction regarding medical systems, such as medical gas and infection control. AR at 14; see RFP at 43. Under this factor, the agency also determined that Linc had failed to provide a required letter of commitment from one of its subcontractors. AR, Tab 1, Linc Evaluation Worksheet, at 7.

Here too, Linc claims that it should have been rated, at worst, susceptible of being made acceptable under this factor because the agency should have been aware that Linc's proposed [DELETED] was a [DELETED], and therefore should have been aware of the [DELETED] qualifications. Linc asserts that any further questions regarding the [DELETED] qualifications not included in its submission could easily have been clarified. However, we find the agency reasonably based its evaluation on the contents of Linc's submission,<sup>8</sup> and reasonably assigned the submission a

---

<sup>5</sup> As pointed by the agency, the statement of work included in the RFP made numerous references to work being done in occupied/operational medical facilities.

<sup>6</sup> Linc contends that many of the projects identified in its submission were performed under its previous MRR contract and should therefore be considered acceptable experience here whether or not they were done in occupied/operational medical facilities. This provides no basis, however, to find unreasonable the agency's judgment that a lack of such experience was likely to result in less than acceptable performance.

<sup>7</sup> To the extent that Linc argues that its submission should have, at worst, been evaluated as susceptible of being made acceptable under this factor instead of marginal, the agency reasonably regarded this as a major weakness that would likely result in less than acceptable performance and could not be fixed during discussions, such that Linc warranted a marginal rating under this factor.

<sup>8</sup> Linc's reliance on its status as an incumbent and belief that the agency would consider such information to supplement the proposal is misplaced, given that a procuring agency's technical evaluation is dependent upon the information furnished in the offeror's proposal. Pedus Bldg. Servs., Inc., B-257271.3 et al., Mar. 8, 1995, 95-1 CPD ¶ 135 at 3. Linc's arguments, that extraneous information regarding the

(continued...)

marginal rating under this factor. As noted above, an offeror bears the burden of submitting an adequately written proposal and runs the risk that its proposal will be evaluated unfavorably where it fails to do so. Tetra Tech Tesoro, Inc., supra.

Linc also argues that the agency improperly held discussions with only certain Phase I offerors. According to Linc, if the agency was going to hold discussions with, and request revised submissions from, some Phase I offerors, then it was required to do so with all of the Phase I offerors.

As discussed above, the agency culled out the offerors that received a rating of marginal or lower on the corporate medical experience factor and the organizational and management/technical approach factor, or a “no go” bondability rating, and held discussions with the remaining nine offerors to determine which should be included in the second phase of the competition. There is nothing in the regulations concerning Phase I of the Design-Build Selection Procedures, FAR § 36.303-1, or the authorizing statute for these procedures, 10 U.S.C. § 2305a, that makes the discussions requirements of FAR part 15 applicable to the first phase of a FAR subpart 36.3 procurement, and we will not import these requirements--absent a provision in the solicitation that does so.<sup>9</sup> In addition, there is no provision in 10 U.S.C. § 2305a or FAR subpart 36.3 that limits an agency’s ability, during Phase I, to talk with, and obtain revised submissions from, some portion of the offerors to determine which should be included in the second phase of the competition. Moreover, we also note that FAR § 1.102-4(e) provides that a procurement procedure is permissible where not specifically prohibited. See MTB Group, Inc., B-295463, Feb. 23, 2005, 2005 CPD ¶ 40 at 2. In short, we find no basis to object to the agency’s actions here.

Finally, the protester complains that it was not permitted to submit a revised submission after the agency issued amendment No. 3 to the RFP, which was issued after the Phase I submissions had been provided the agency and which modified the evaluation criteria. We again disagree.

---

(...continued)

proposed [DELETED] and other matters (e.g., bondability) not contained in its submission, but otherwise known to the agency, was “simply too close at hand” to ignore in evaluating Linc’s submission, are not pertinent here, inasmuch as we have only applied that concept to the evaluation of past performance. See Career Training Concepts, Inc.--Advisory Opinion, B-311429, B-311429.2, June 27, 2008, 2009 CPD ¶ 97 at 5.

<sup>9</sup> In contrast, FAR § 36.303-2 expressly requires Phase II to be conducted in accordance with FAR part 15.

The record shows (and the agency concedes) that changes were made to the evaluation criteria by amendment No. 3--issued after receipt of the Phase I submissions--and that the submissions were evaluated under the revised evaluation criteria stated in amendment No. 3. The record also shows that the amendment did not specifically request revisions by a certain date, or state when the amendment was required to be acknowledged.<sup>10</sup> Instead, amendment No. 3 included the following statement in block 11:

If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

Thus, contrary to Linc's allegations, we think this amendment clearly allowed Linc to revise its Phase I submission. However, Linc failed to do so (or complain) until after it was notified of its rejection and received a debriefing--more than 2 months after acknowledging the amendment.

Linc also argues that because amendment No. 3 provided no closing date for submission revisions, the agency should have considered information that Linc submitted, even though this was done after it was excluded from the competition and after it received a debriefing.<sup>11</sup>

While neither Linc, the agency, nor our Office has located precedential guidance applicable to a situation where an amendment allows for revised proposals, but does not establish a closing date for such revisions, we think Linc's actions provide no support for concluding that the agency acted improperly here. In our view, even where an agency provides an open opportunity to submit proposal revisions in response to an amendment by not including a closing date, this opportunity to provide revisions cannot be reasonably regarded as unlimited. Specifically as to this case, we think that an agency is not required to consider revisions to a submission that are provided more than 2 months after the amendment was issued; after the agency completed what was, in essence, a competitive range exclusion; and after the agency advised the offeror in a debriefing of the problems found in its submission. See generally KPMG Consulting LLP, B-290716; B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 at 11 (In a request for quotations in which there was no

---

<sup>10</sup> On November 23, Linc acknowledged the amendment.

<sup>11</sup> We note for the record that Linc attempted to submit a revised letter from its surety and the commitment letter from the subcontractor after its debriefing. Protest attaches. 8 & 9. Linc asserts that if this information were considered, it would have been included among the offerors for Phase II.



provision for rejecting quotations submitted after the designated closing date, an agency may consider "late" quotations or quotation modifications, so long as the award process has not begun and other offerors would not be prejudiced); Spacesaver, B-228098, Nov. 6, 1987, 87-2 CPD ¶ 457 at 3 (same).

The protest is denied.

Lynn H. Gibson  
General Counsel