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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: KAES Enterprises, LLC

File: B-407964.4

Date: August 21, 2013

Christopher Kaes, for the protester.
KalMarie Rawald, Esq., Federal Emergency Management Agency, for the agency.
Noah B. Bleicher, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of protester's proposal under the technical approach and understanding factor is denied where the record shows that the evaluation was reasonable and consistent with the terms of the solicitation.
 2. Protest alleging bias and bad faith on the part of the agency is denied where the protester has not supported the allegations with convincing proof and the record does not evidence bias or bad faith.
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DECISION

KAES Enterprises, LLC, of Puyallup, Washington, protests its exclusion from the competitive range, under request for proposals (RFP) No. HSFE70-13-R-0005, issued by the Department of Homeland Security, Federal Emergency Management Agency (FEMA) for generator maintenance services. KAES contends that FEMA unreasonably excluded its proposal from the competitive range and that the agency's evaluation evidenced bias against KAES and bad faith on the part of the agency.

We deny the protest.

BACKGROUND

The RFP, set aside for service-disabled veteran-owned small businesses (SDVOSB), provided for the award of a fixed-price contract for generator

maintenance services at FEMA distribution centers in Frederick, Maryland; Atlanta, Georgia; Fort Worth, Texas; and Moffett, California.¹ RFP at Cover Sheet, E-7. The contract was to be awarded for a 1-year base period and two 1-year option periods. Id. at B-3. The RFP included a performance work statement (PWS) that described the scope of work required under the contract. RFP, attach. 2, PWS. Specifically, the PWS identified various maintenance tasks the contractor would perform once a quarter over an 8-business day period at each distribution center. RFP, attach. 2, PWS § 5.1. The PWS also required the contractor to maintain the generator fleet at a “minimum level of 90% ‘fully mission capable’. . . with 100% being the targeted goal.”² Id.

Offerors were informed that the award would be made on a best value basis, considering price and the following three non-price factors (listed in descending order of importance): technical approach and understanding, management approach and capabilities, and past performance.³ RFP at E-11. With regard to the technical approach and understanding factor, as relevant here, the RFP instructed offerors to “provide a detailed description” of how they would meet the PWS requirements. Id. at E-3. The RFP listed five elements that firms were to discuss in this part of their technical proposals, including, for example, a discussion of the project work plan and schedule, a discussion of proposed methods and techniques for completing each task (including the equipment to be used), and a discussion of anticipated major difficulties and problem areas. Id.

Pursuant to the RFP, the agency would assess proposals under this factor by evaluating “the degree to which the offeror effectively demonstrate[d] a knowledge, understanding, and technical ability to successfully perform the requirements of the PWS. . . .” Id. at E-12. The RFP further instructed that an offeror’s statements that it could meet all requirements “without detailed supporting information” would be

¹ On January 24, 2013, KAES filed a protest with our Office objecting to various terms of the solicitation. In response, the agency took corrective action and amended the solicitation with regard to some of KAES’s complaints. GAO denied the remainder of KAES’s solicitation challenges in our decision of KAES Enterprises, LLC, B-407964, Apr. 23, 2013, 2013 CPD ¶ _____. GAO subsequently dismissed KAES’s request for reconsideration in our decision of KAES Enterprises, LLC, B-407964.3, July 31, 2013.

² For a generator to be considered fully mission capable, the PWS identified seven requirements, including, for example, being able to “reliably produce stable current,” having fully operational gauges and control panel indicator lights, and being ready for transport by ground, sea, or air. RFP, attach. 2, PWS § 4.5.

³ The past performance factor included three subfactors: quality of the offeror’s work, customer satisfaction, and timeliness of performance and final completion of the contract. RFP at E-11.

considered a deficiency. Id. The RFP provided that, as part of the evaluation, proposals would be assigned a rating of superior, satisfactory, marginal, or unsatisfactory. Id. at E-11. The RFP emphasized that “All proposals rated unsatisfactory for either Technical Approach and Understanding or Management Approach and Capabilities WILL BE ELIMINATED FROM THE COMPETITIVE RANGE.” Id. at E-12 (emphasis in original).

The agency received offers from nine firms, including KAES (an SDVOSB), prior to the RFP’s deadline for the submission of proposals. Contracting Officer’s Statement at 1. A FEMA technical evaluation team (TET) evaluated the technical proposals and documented its consensus findings in a report to the contracting officer. In the report, the TET identified six deficiencies in KAES’s proposal under the technical approach and understanding factor. AR, exh. 8, TET Technical Evaluation Report, at 19-22. For example, the TET noted that KAES’s proposal failed to comply with the PWS’s requirement that the maintenance services be completed over an 8-day period each quarter. Id. at 19. Similarly, the TET assigned the proposal another deficiency because it failed to “elaborate” on actions necessary to return generators to service upon mission completion from disaster response. Id. at 21. Yet another deficiency was assigned because the proposal did not “clearly lay out” what KAES’s equipment would be at each site. Id. at 20. Because of the deficiencies, the TET rated KAES’s proposal unsatisfactory under the technical approach and understanding factor. Id. at 22. Consistent with the RFP requirement that any proposal rated unsatisfactory under the factor would be eliminated from the competitive range, KAES’s proposal was not evaluated any further. Id.; see RFP at E-12. Following a debriefing, KAES filed this protest.⁴

DISCUSSION

In its protest, KAES challenges the agency’s evaluation of its technical proposal. Specifically, KAES argues that the firm offered a “superior performance plan” and that it was unreasonable for the agency to rate the proposal as technically unacceptable. Protest at 1. KAES also complains that FEMA did not fully evaluate its proposal and improperly excluded it from the competitive range without considering its proposed price. Id. at 2. Additionally, KAES alleges that the agency was biased against the firm and awarded the contract in bad faith. Id. at 2-3.

⁴ Subsequent to the filing of this protest, on June 19, 2013, FEMA awarded the contract to Megawattage Generator Inc. Contracting Officer’s Statement at 2. The agency overrode the automatic stay of contract performance during this protest, finding that contract performance was in the “best interests” of the United States due to an “urgent and compelling” need for the generator maintenance and repair services. AR, exh. 13, Determination and Findings, at 1; see 31 U.S.C. § 3553(d)(3)(C)(i) (2013).

The evaluation of technical proposals is a matter within the discretion of the contracting agency, since the agency is responsible for defining its needs and the best method of accommodating them. The Keniya Group, Inc.; Academy Solutions Group, LLC, B-406314, B-406314.2, Apr. 11, 2012, 2012 CPD ¶ 141 at 4. In reviewing an agency's evaluation, we will not reevaluate technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. Id. A protester's mere disagreement with the agency's conclusions does not render the evaluation unreasonable. James Constr., B-402429, Apr. 21, 2010, 2010 CPD ¶ 98 at 3.

Here, FEMA's evaluation of KAES's proposal was unobjectionable and consistent with the terms of the solicitation. In this regard, the record shows that the agency's assignment of an unsatisfactory rating under the technical approach and understanding factor was reasonable. Specifically, the PWS required the contractor to perform the generator maintenance services on a "rotating basis," i.e., the contractor was to complete the maintenance services at each distribution center every 90 days during an 8-business day period. RFP, attach. 2, PWS § 5.1. In its offer, KAES proposed to "establish[] in-house or teaming partner assets at each distribution center location in-lieu of a 'rotational' service plan. . . ." AR, exh. 5, KAES Proposal, at 2. Because KAES proposed to provide services throughout the 90-day quarter at each location, instead of within an 8-day window as required by the PWS, it was reasonable for the TET to assign the proposal a deficiency. See AR, exh. 8, TET Technical Evaluation Report, at 19. Although KAES argues that the "local 365 day coverage" it offered was a "superior performance plan," this argument is unavailing. Protest at 1-2. It is the agency's role, not the protester's, to define both the agency's underlying needs and the best method of accommodating those needs. Dwight Tellier Church Organs, Inc., B-292825, Dec. 9, 2003, 2003 CPD ¶ 226 at 3; see Vertol Sys. Co., Inc., B-293644.6 et al., July 29, 2004, 2004 CPD ¶ 173 at 3.

Another example of the reasonableness of the agency's evaluation was the assignment of a deficiency because KAES's proposal did not include "critical required data" about the equipment the firm would use to perform the generator maintenance. See AR, exh. 8, TET Technical Evaluation Report, at 20. As discussed above, the RFP instructed offerors to discuss the "proposed methods and techniques for completing each task, to include . . . equipment to be utilized." RFP at E-3. The RFP also cautioned offerors that omitting "detailed supporting information" would result in the assignment of a deficiency. Id. at E-12. In its proposal, KAES indicated that "all required materials and additional equipment shall be procured" and that "personal [sic], tools, and almost all equipment are already in place." AR, exh. 5, KAES Proposal, at 2. Elsewhere in its proposal, KAES states that it "owns several spare load banks." Id. at 6.

Based on the information presented in the proposal, the TET reasonably determined that KAES did “not clearly lay out what their equipment will be at each site; they do not list the quantity and size of load bank machines they have available.” AR, exh. 8, TET Technical Evaluation Report, at 20 (emphasis in original). The TET similarly found that KAES’s suggestion that it would “supplement” government furnished property indicated a “lack of understanding” of the requirements, because the PWS emphasized that the contractor would be “solely responsible for providing all equipment necessary to perform the requirement of the PWS.” Id.; see RFP, attach. 2, PWS § 6.3. Due to the lack of detailed information regarding equipment, the TET reasonably concluded that it was “unable to assess the offeror’s capability to perform the work,” and the TET assigned the proposal a deficiency. AR, exh. 8, TET Technical Evaluation Report, at 20. On this record, we find no basis to question the agency’s evaluation conclusions.

There is also no merit to KAES’s complaint that FEMA did not fully evaluate KAES’s proposal and excluded it from the competitive range without considering price. See Protest at 2; Comments at 5-6. Here, as discussed above, the solicitation expressly advised that proposals rated unsatisfactory under the technical approach and understanding factor (or the management approach and capabilities factor) would be eliminated from the competitive range. RFP at E-12. Given our conclusion that the agency reasonably rated KAES’s proposal unsatisfactory under the factor, which rendered the proposal as a whole technically unacceptable, FEMA was not required to continue its evaluation of the proposal. In this regard, the ratings under the remaining factors were irrelevant because a technically unacceptable proposal cannot be considered for award. See LifeCare, Inc., B-291672, B-291672.2, Feb. 20, 2003, 2003 CPD ¶ 95 at 4 n.13, 7. Similarly, while an agency may not exclude a technically acceptable proposal from the competitive range without meaningful consideration of that proposal’s cost or price to the government, see Kathpal Tech., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6 at 9, where, as here, the agency concludes that a proposal is technically unacceptable, it is proper to exclude the proposal from the competitive range without considering price. TMC Design Corp., B-296194.3, Aug. 10, 2005, 2005 CPD ¶ 158 at 5.

Finally, KAES argues that FEMA conducted the procurement in bad faith. In its protest, KAES describes what it contends is a “habitual pattern[]” of “long-term favoritism” by FEMA toward a particular contractor and its affiliated companies. Comments at 6. KAES alleges that in conducting the procurement at issue, the agency’s “only intent is to perpetuate further performance by their most favored contractor. . . .” Protest at 3. Similarly, KAES alleges that the agency was biased against the protester. Id. at 2.

Government officials are presumed to act in good faith, and a protester’s contention that contracting officials are motivated by bias or bad faith thus must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement

officials on the basis of inference or supposition. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. Here, the record does not support KAES's claims of bad faith or bias. In this respect, the premise of KAES's argument is that FEMA was improperly attempting to award the contract to a certain company. However, the record shows that FEMA did not award the contract to the company KAES's complaint focuses on or one of the affiliated companies identified by KAES.⁵ In fact, the agency reports that the company KAES focuses on did not even submit a proposal for the current procurement, and none of the affiliated companies KAES identifies was included in the competitive range. AR at 9. Similarly, there is no evidence in the record that the agency was biased against KAES; as noted above, the record demonstrates that the agency reasonably eliminated KAES's proposal from the competitive range. In sum, KAES has not provided the convincing proof necessary to support its claims of bias or bad faith, and the protester's post-award suggestion that the contract award is a "political dodge" does not provide a basis to sustain the protest. See Comments at 7.

The protest is denied.

Susan A. Poling
General Counsel

⁵ As discussed above, FEMA awarded the contract subsequent to the filing of this protest. Contracting Officer's Statement at 2.