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Decision

Matter of: Priority One Services, Inc.

File: B-410695.3; B-410695.4

Date: April 6, 2016

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DIGEST

Protest challenging an agency's conduct of discussions, technical evaluation, cost realism analysis, and best-value tradeoff determination is denied where the record demonstrates that the agency's actions were reasonable and consistent with the terms of the solicitation.

DECISION

Priority One Services, Inc. (Priority One), of Alexandria, Virginia, protests the award of a contract to Charles River Laboratories, Inc. (CRL), of Wilmington, Massachusetts, by the Department of Health and Human Services, National Library of Medicine under request for proposals (RFP) No. NIH-LM2014115 for operation and maintenance of the Alamogordo Primate Facility (APF) in Alamogordo, New Mexico.

We deny the protest.

BACKGROUND

The APF houses 160 chimpanzees that were previously used as medical research subjects and infected with viruses, such as Hepatitis C and Human Immunodeficiency Virus in experiments funded by the Public Health Service. Supp. Agency Report (SAR), Tab 3D, Statement of Work (SOW), at 1; Tab 3H, Memorandum of Understanding, at 2.

On May 30, 2014, the RFP was issued on an unrestricted basis. RFP at 46. The solicitation contemplated award on a best-value basis for a multiple-year cost-reimbursement, level of effort contract with a base year and four 1-year option periods. Id. at 44, 46.

Offerors would be evaluated based on four factors, listed in order of importance: (1) technical; (2) cost; (3) past performance; and (4) small disadvantaged business (SDB) participation. Id. at 79. The RFP advised that non-price factors, when combined, were significantly more important than cost. Id.

The technical factor consisted of three subfactors with detailed technical criteria.¹ Id. at 80-81. As relevant here, criterion 1 would evaluate competence in the operation and maintenance of a large chimpanzee facility, conforming to applicable laws and policies. Id. at 80. This criterion also included four considerations, including, as relevant here, the adequacy of proposed procedures for veterinary care and animal husbandry of more than 100 chimpanzees, and an offeror's experience in and technical approach for fulfilling requirements in 15 areas, such as routine animal care, animal handling for animals affected with human pathogens, and appropriate management oversight.² Id. at 80-81.

The RFP stated that cost/price proposals would be evaluated for reasonableness and cost realism, which would be considered in the best-value tradeoff. Id. at 45, 79. As relevant here, the cost-realism analysis would evaluate whether an offeror's proposed costs were realistic for the work to be performed; reflected a clear understanding of the requirements; and were consistent with the proposal's unique methods of performance and materials. Id. at 79.

The RFP also stated that the government reserved the right to conduct discussions, if necessary. Id. at 44.

¹ Although the RFP listed these criteria as "factors" under the technical factor, it also refers to them as "detailed criteria." RFP at 80.

² Criterion 2 would evaluate expertise and experience of proposed personnel in nonhuman primate medicine and infectious diseases. RFP at 81. Criterion 3 would evaluate organizational commitment. Id. at 81-82. The RFP also included a "Personnel" section that includes sections entitled "Single Principal Investigator/Project Director" and "Additional Personnel." RFP at 62-63. As relevant here, the Project Director was responsible for overall implementation of the contract. Id. at 63. The latter section stated that "[f]or all proposed personnel who are not currently members of the offeror's staff, a letter of commitment or other evidence of availability is required." Id. at 63.

Initial Evaluation and Protest

Two offerors--the protester and the awardee--timely submitted proposals. On September 26, after the technical evaluation group (TEG) completed its evaluation of proposals, the contracting officer (CO), acting as the source selection authority (SSA), determined that CRL's proposal was technically superior and represented the best value to the government. AR, Tab 15, Source Selection Decision (SSD), at 1.

On October 1, Priority One was notified of award and requested a debriefing. Id. After receiving a debriefing, the protester timely filed a protest with our Office, challenging the agency's evaluation of proposals and its award to CRL. On October 24, the agency informed our Office, and the protester, that it would take corrective action by reevaluating technical and cost proposals, conducting discussions, and making a new source selection decision. On October 30, based on the agency's proposed corrective action, our Office dismissed that protest as academic. Priority One Services, Inc., B-410695, Oct. 30, 2014 (unpublished decision).

Implementation of Corrective Action

As part of the implementation of its corrective action, the agency reevaluated the original proposals and assessed Priority One two technical weaknesses for its response to criterion 1. The TEG found that the protester failed to document "adequacy of proposed procedures for veterinary care and animal husbandry of more than a hundred chimpanzees" and failed to demonstrate proper experience handling and maintenance of over 100 infected chimpanzees.³ AR, Tab 7, TEG, at 4.

The agency engaged in discussions with both offerors. AR, Tab 15, SSD, at 2. Regarding the cost proposal, the discussion letter--to both the protester and awardee--states, "[y]our organization's cost proposal exceeds NIH's [National Institute of Health] budget for this project. NIH would like to offer you an opportunity

³ The agency also found other technical weaknesses. For example, the agency was concerned that the proposed facility director, who would perform the responsibilities of the Principal Investigator/Project Director, might not possess experience working with infected chimpanzees, which could put the safety of the colony at risk. AR, Tab 7, TEG Reevaluation, at 6. Additionally, based on the protester's representation that incumbent staff may be prohibited from talking to the protester, the agency was concerned that the protester might not be able to secure incumbent staff as proposed. Id. at 7. These issues were raised to the protester during discussions.

to adjust your cost proposal downward.”⁴ AR, Tab 10B, Priority One Discussion Questions, at 1. Additionally, the agency requested that Priority One address the inclusion of the New Mexico Gross Receipts (NMGR) tax, pointing out that it was not accounted for in Priority One’s proposal.⁵ Id. at 5. Regarding the technical evaluation, the agency asked whether the protester possessed experience providing animal and husbandry care for infected/biohazardous chimpanzees in populations larger than 100. Id. at 2.

The protester revised its technical proposal to respond to the discussion questions and decreased its price by \$[deleted]. AR, Tab 15, SSD, at 2. Regarding the NMGR tax, the protester’s response to discussion questions stated that the tax would be [deleted].⁶ AR, Tab 12A, Priority One Response to Discussion Questions, at 20. With respect to its experience operating a facility like APF, Priority One’s response outlined the [deleted] of experience that various staff possessed in working with infected chimpanzees.⁷ AR, Tab 12B, Priority One Revised Technical

⁴ The discussion letters also requested “best and final offer[s].” AR, Tab 10B, Priority One Discussion Questions, at 1; Tab 10A, CRL Discussion Questions, at 1. Additionally, the independent government estimate (IGE) was \$12,414,939. CO Statement at 5.

⁵ The agency explains that New Mexico imposes a gross receipts tax--for the privilege of doing business in the state--on the seller, who customarily recovers the cost from the buyer. As this tax applies to the seller’s receipts, it is applicable to transactions with government buyers, who would normally be tax exempt. Unless an exemption or deduction applies, the seller’s receipts are taxable regardless of the buyer’s tax status. Supp. Legal Memorandum at 3. Additionally, Federal Acquisition Regulation (FAR) clause 52.229-10, State of New Mexico Gross Receipts and Compensating Tax, was not included in the RFP. The CO states that the IGE did not include the tax because the government was not aware that it applied to the government. In September 2014, the government became aware that the NMGR tax would be an allowable direct cost and raised the inclusion of the tax to the protester during the discussions that were conducted as part of the corrective action. Supp. CO Statement at 1; AR, Tab 10B, Priority One Discussion Questions, at 5. CRL’s initial cost proposal included the tax. AR, Tab 5B, CRL Initial Business Proposal, at 1.

⁶ The revised cost proposal does not include this statement or any information related to the tax. See AR, Tab 12C, Priority One Revised Cost Proposal.

⁷ Regarding its proposed facility director, the protester proposed a new person for this position, but failed to demonstrate that he worked for the company by providing the offer and acceptance letter referenced in the revised response. AR, Tab 12A, Priority One Response to Discussion Questions, at 7. Regarding its ability to retain
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Proposal, at A-6
to A-7.

The TEG reevaluated the protester's revised proposal and found that it adequately addressed some, but not all, of the issues that were raised. The TEG still had concerns regarding Priority One's ability to manage the large number of chimpanzees in the facility and concluded that the weakness remained as originally identified. AR, Tab 13, Addendum to TEG Report, at 2. In this regard, the agency concluded that the protester's response did not address the organization's experience providing animal husbandry care for infected chimpanzees in populations larger than 100.⁸ Id.

The SSA concurred with the TEG's findings on the protester's strengths and weaknesses, and also conducted her own independent technical analysis. AR, Tab 15, SSD, at 4. Regarding technical experience, the SSA concluded that although Priority One stated that the firm and staff possessed the experience required by the RFP, it did not propose "any experience nor demonstrated ability" to operate and maintain a facility like APF. Id. at 5. Specifically, the SSA stated, "the proposal lacks the finer details which are also of great importance." For example, the SSA observed that Priority One's proposal lacked a detailed discussion about geriatric care, despite the facility's aging and ailing population of animals, and included no discussion of fluctuating climate concerns.⁹ Id. The SSA concluded

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incumbent staff, the protester stated it "re-confirmed the willingness of the incumbent APF staff to work for [Priority One] should we be awarded the contract." Id. at 9.

⁸ Additionally, the TEG and SSA had "great concerns" regarding the protester's response with respect to the proposed facility director and the protester's ability to retain incumbent staff. For example, the TEG and SSA recognized the new director as a "significant improvement," but could not confirm his commitment to the project without a commitment letter. AR, Tab 15, SSD, at 7. Similarly, the TEG and SSA were unsure whether Priority One could actually recruit and retain their proposed personnel since the protester failed to offer a plan for how this would be accomplished. AR, Tab 15, SSD, at 7.

⁹ The SSA also mentioned the failure to provide an adequate plan to prevent breeding. As relevant here, the RFP would also evaluate an offeror's proposed procedures for preventing APF chimpanzees from breeding. RFP at 80. The agency found lacking the protester's proposed breeding prevention plan, which generally discussed the use of physical barriers to prevent copulation; and concluded that a discussion of other contraception methods would have been beneficial, given NIH's mandate to prevent breeding. AR, Tab 15, SSD, at 5.

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that “[t]he lack of such details highlights the substantial distinction between an organization’s ability to provide limited support to a facility and operating a facility such as APF as a prime contractor.” Id.

Regarding the NMGR tax, the SSA determined that the protester’s cost proposal did not include the 7.875% tax in their costs and, accordingly, increased Priority One’s proposed cost by \$1,171,131.¹⁰ Supp. Legal Memorandum at 5; AR, Tab 15, SSD, at 10-11.

Following the reevaluation of proposals, the final ratings were as follows:

	Priority One	CRL
Technical Score ¹¹	78 out of 100	96.6 out of 100
Past Performance	N/A	Acceptable
SDP Participation	Acceptable	Acceptable
Initial Cost	[\$deleted]	[\$deleted]
Revised Cost	[\$deleted]	[\$deleted]
Adjusted Cost	\$14,269,949	\$15,000,105

Tab 13, Addendum to TEG Report, at 7.

On December 15, 2015, the agency completed the corrective action contemplated by the prior protest and made award to CRL.¹² AR, Tab 15, SSD, at 13. In this

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¹⁰ The agency also adjusted CRL’s price to include the correct percentage of the tax. Id. at 11.

¹¹ As relevant here, the RFP stated that acceptability of technical proposals would be evaluated by a technical review committee utilizing point scores and written critique. RFP at 50. The highest score for criterion 1 was 40 points, while the highest scores for criterion 2 and 3 were 30 points. The protester’s scores for the three technical criteria were 29.2 for criterion 1; 23.2 for criterion 2; and 25.6 for criterion 3. AR, Tab 13, Addendum to TEG Report, at 7. CRL’s ratings were 39.6 for criterion 1; 27.8 for criterion 2; and 29.2 for criterion 3. Id.

¹² On November 20, prior to the completion of the proposed corrective action, Priority One again protested, alleging that the agency failed to implement the corrective action it had proposed in response to Priority One’s prior protest. After making award, the agency requested dismissal of the protest as academic, since it completed the corrective action as planned and made a new award decision. On December 17, we dismissed this protest as academic. See Priority One Services, Inc., B-410695.2, Dec. 17, 2015 (unpublished decision).

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regard, the SSA recognized that CRL's cost proposal was higher than Priority One's, but concluded that CRL's technical superiority and minimal performance risk justified the associated cost premium. Id. at 13.

On December 28, the protester timely filed the instant protest with our Office.¹³

DISCUSSION

The protester alleges that the agency did not engage in meaningful discussions, improperly evaluated Priority One's technical approach, and conducted flawed cost-realism and best-value analyses. We have reviewed all of the protester's arguments, although we only address the more significant ones, and, for the reasons stated below, find that none provides a basis to sustain the protest.

Discussions

The protester argues that the agency failed to engage in meaningful discussions because it misrepresented the protester's initial cost as being above the agency's budget and then made award to CRL at a higher cost. Protest at 4. The agency asserts that no misrepresentation occurred because both offerors' costs exceeded the IGE, and both were invited to decrease their costs. Legal Memorandum at 7-8. In this regard, the agency explains that it asked offerors to lower their costs because their final proposed and probable costs did, in fact, exceed the IGE and available budget, but that when final costs were submitted, still exceeding the budget, the agency was forced to identify additional funds for the procurement. CO Statement at 5.

It is a fundamental principle of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. TransAtlantic Lines, LLC, B-411242, B-411242.2, June 23, 2015, 2015 CPD ¶ 204 at 14. There is no requirement, however, that discussions be all-encompassing or extremely specific in describing the extent of the agency's concerns; agencies need only lead offerors into the areas of their proposals that require amplification. FAR § 15.306(d); PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8. However, we will not find discussions to be improper where the agency in good faith provides accurate information to an offeror, even where the offeror uses that information to its ultimate

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¹³ On December 31, the head of the contracting agency determined that urgent and compelling circumstances, which significantly affect the interests of the United States, would not permit waiting for the protest decision of the Comptroller General, and therefore overrode the automatic stay of performance. CO Statement at 5.

competitive detriment. See McConnell Jones Lanier & Murphy, LLP, B-409681.3, B-409681.4, Oct. 21, 2015, 2015 CPD ¶ 341 at 6. An agency fails to conduct meaningful discussions where it fails to apprise an offeror that its prices were viewed as unreasonably high. See i4 Now Solutions, Inc., B-412369, Jan. 27, 2016, 2016 CPD ¶ 209 at 12.

The record does not support the protester's assertions. Rather, the record shows that both the protester's and awardee's initial costs exceeded the IGE. In discussion letters, the agency invited both offerors--using identical language--to decrease their costs and both offerors chose to do so. Accordingly, we do not see how the agency failed to advise the protester that its cost was unreasonably high or made a misrepresentation regarding the protester's cost. Based on the record, the mere fact that the agency made award to CRL at a higher cost fails to show that the agency's discussions were not meaningful.¹⁴

Technical Evaluation

The protester next challenges the agency's technical evaluation. The protester first argues that for criterion 1, the agency relied on unstated evaluation criteria because the RFP did not require proposals to address the offerors' past performance or past experience providing husbandry care for more than 100 chimpanzees. Supp. Protest at 4; Comments at 9. The agency, in response, contends the protester is misconstruing and ignoring the plain language of the solicitation. Supp. Legal Memorandum at 7. Essentially, the agency argues that criterion 1, taken as a whole, required offerors to address not only the adequacy of their procedures, but also their experience in performing the requirements associated with the operation and maintenance of a large chimpanzee facility. Legal Memorandum at 9.

In reviewing a protest challenging the agency's evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency, as the evaluation of proposals is generally a matter within the agency's discretion. Stewart Title of Orange County, Inc., B-261164, Aug. 21, 1995, 95-2 CPD ¶ 75 at 4. Rather, we will review the record to determine whether the agency's evaluation was reasonable; consistent with the stated evaluation criteria, applicable procurement statutes, and regulations; and adequately documented. Sys. Integration & Dev., Inc., B-271050, June 7, 1996, 96-1 CPD ¶ 273 at 3. An offeror's disagreement with

¹⁴ To the extent the protester argues that the agency was required to engage in multiple rounds of discussions, we disagree. Where proposal defects are first introduced either in a response to discussions or in a post-discussion proposal revision, an agency has no duty to reopen discussions or conduct additional rounds of discussions. DRS C3 Sys., LLC, B-310825, B-310825.2, Feb 26, 2008, 2008 CPD ¶ 103 at 11.

an agency's judgment is insufficient to establish that the agency acted unreasonably. Imagine One Tech. & Mgmt., Ltd., See B-401503.4, Aug. 13, 2010, 2010 CPD ¶ 227 at 11.

To the extent that the protester asserts that experience was not an evaluation criterion under criterion 1, we disagree.¹⁵ Under criterion 1, the agency was to evaluate an offeror's competence in operating and maintaining a large chimpanzee facility, which included considerations regarding the evaluation of the adequacy of certain proposed procedures, as well as the offeror's experience and technical approach in certain other requirements. RFP at 80-82. We find the agency's evaluation was consistent with the terms of the RFP in this regard.

Next, the protester contends that its response to discussion questions demonstrated the required experience, and maintains therefore that the weakness was improperly assessed. Comments at 10-11. The record shows that the agency considered the protester's responses, but still had concerns regarding the protester's experience and ability to manage the large colony of chimpanzees, and to operate and maintain a facility like APF. See AR, Tab 13, Addendum to TEG Report, at 2; Tab 15, SSD, at 4-5. For example, in concluding that the protester failed to provide "experience [or] demonstrated ability to operate a facility like APF," the SSD states that the proposal failed to address the "finer details"--such as geriatric care, climate concerns and prevention of breeding--involved in the operation of a facility like APF. Id. at 3, 5. In this regard, the agency concluded that the lack of such details highlights the substantial distinction between an organization's ability to provide limited support to a facility and the ability to operate a facility such as APF as a prime contractor. Id. The protester's disagreement with this conclusion does not demonstrate that the agency's judgment and considerations are unreasonable. We find the agency's evaluation was reasonable.¹⁶

¹⁵ To the extent the protester is asserting that the agency was required to assess an offeror's proposed procedures in the evaluation of veterinary care and animal husbandry, we agree. However, to the extent the protester relies solely on this argument to challenge the reasonableness of the agency's evaluation, we find no basis to sustain the protest.

¹⁶ We find unavailing the protester's argument that the agency's evaluation was unreasonable because the references to experience considerations in Section M of the RFP did not specifically mention populations of over 100 chimpanzees or require an offeror to provide specific corporate experience for all 15 experience criteria. Supp. Comments at 3-4. As noted above, the population at the APF includes more than 100 chimpanzees. Therefore, it was not unreasonable that the agency would evaluate the 15 experience criteria based on their applicability to populations of over 100 chimpanzees. Additionally, the agency's evaluation of other technical factors shows the technical evaluation was reasonable. Considering
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Cost Realism

Priority One argues that it was unreasonable for the agency to increase its proposed costs to account for the NMGR tax, rather than rely on the protester's assertion that [deleted]. Supp. Protest at 2. The agency responds that the adjustment was proper, given that the government is required to pay the actual and allowable costs in a cost-reimbursement contract, regardless of the costs an offeror proposed. Supp. Legal Memorandum at 5. The agency asserts, moreover, that it could not rely on the protester's promise, which was included only in its discussion question responses and not in the revised proposal. Supp. Legal Memorandum at 6.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, as was required here, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. See FAR §§ 15.305(a)(1), 15.404-1(d); Bart & Assocs., B-407996.5 et al., Jan. 5, 2015, 2015 CPD ¶ 61 at 12. Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. Litton Sys., Inc., Amecom Division, B-275807.2, Apr. 16, 1997, 97-1 CPD ¶ 170 at 5. Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7.

The record shows that in its response to discussion questions, Priority One indicated it would [deleted] the tax, but its revised cost proposal did not contain this statement or any information on the NMGR tax. See AR, Tab 12A, Priority One Response to Discussion Questions, at 20; Tab 12C, Priority One Revised Cost Proposal. The protester is responsible for providing an adequately written proposal, and its failure to do so does not constitute improper agency action. See InfoPro, Inc., B-408642.2, B-408642.3, Dec. 23, 2014, 2015 CPD ¶ 59 at 12. As the revised proposal does not indicate that the protester will [deleted] the tax as it indicates in its response to the agency's discussion question--which specifically asked the protester to address the tax--we find that the protester's failure to provide an unambiguous commitment regarding payment of the tax represented a risk for the

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weaknesses that were identified regarding the newly-proposed facility director and the protester's ability to recruit and retain staff, the agency was validly concerned that the protester would not be able to perform the contract. While the protester argues that the RFP did not require a commitment letter for the proposed facility director, this argument offers no basis to sustain the protest.

agency. As a result, we find that the agency's adjustment to Priority One's proposed costs was reasonable, given the risk that the agency would have to repay the NMGR tax if the protester later sought reimbursement of the tax.

Best Value Tradeoff

Finally, the protester also argues that the agency's best-value determination was flawed. We find no merit to this argument. The SSD considered not only each offeror's strengths and weaknesses, but also accounted for CRL's technical superiority and associated price premium in determining that CRL's proposal offered the best value to the government. With regard to source selection decisions, agencies enjoy discretion in making cost/technical tradeoffs where the solicitation provides for the award of a contract on a best-value basis; the agency's selection decision is governed only by the test of rationality and consistency with the solicitation's stated evaluation scheme. Crowder Constr. Co., B-411928, Oct. 8, 2015, 2015 CPD ¶ 313 at 10. We find the award decision here unobjectionable.

The protest is denied.

Susan A. Poling
General Counsel