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Decision

Matter of: Zero Waste Solutions, Inc.

File: B-410774; B-410774.2

Date: February 13, 2015

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DIGEST

Agency's evaluation of proposals and its selection of higher-rated, higher-priced proposal for award, in a procurement where non-price considerations were more important than price, were unobjectionable where the record shows that despite errors in the evaluation, the protester would not have had a substantial chance of receiving an award.

DECISION

Zero Waste Solutions, Inc. (Zero Waste), of Concord, California, protests the award of a contract to Exemplar Enterprises, Inc. (Exemplar), of Oxnard, California, under request for proposals (RFP) No. GS-05P-14-SI-D-0017 issued by the General Services Administration (GSA) for janitorial and related services at the Ralph H. Metcalfe Federal Building in Chicago, Illinois. Zero Waste argues that the agency miscalculated its proposal and made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The RFP issued on April 14, 2014 as a competitive section 8(a) small business set-aside, sought proposals for a contractor to provide management, supervision, manpower, equipment, and supplies necessary to perform janitorial and related services including customer service, custodial cleaning, quality control, and other

additional services. RFP at 17. The solicitation provided for award of a fixed-price contract for a base year with four 1-year options and offerors were advised that award would be made on a best-value basis. The RFP identified the following evaluation factors, listed in descending order of importance: (1) experience in providing janitorial and related services in similar buildings;¹ (2) quality control plan (QCP); (3) qualification of key personnel; (4) past performance in providing janitorial and related services; and (5) price. The RFP stated that the combined non-price factors were significantly more important than price. Price proposals would not be assigned a numerical weight, point score, or adjectival rating. Id. at 218-19.

Of relevance to this protest, the RFP instructed offerors that their QCPs should, among other things, include a “Strike Contingency Plan (SCP) addressing support personnel and license and certification requirements as well as address [sic] employee absenteeism.” Id. at 213. The solicitation provided that in evaluating proposals under the QCP factor, one consideration would be whether the offeror had demonstrated an effective SCP. Id. at 218. Also of relevance, the RFP advised offerors that the current Collective Bargaining Agreement (CBA)--a copy of which was included in the solicitation--would expire on July 31, 2014, and that offerors should take this into consideration in preparing their offers.² Id. at 3. The CBA included a no strike/no lockout clause. Id. at 164.

GSA received timely proposals from nine offerors in response to the RFP, including the proposals of Exemplar and Zero Waste. In evaluating these proposals, the agency employed a numerical evaluation system with a maximum non-price score of 100 points, dividing the maximum score between the non-price evaluation factors as follows: 35 possible points for experience in providing janitorial and related services in similar buildings; 30 possible points for quality control; 20 possible points for qualification of key personnel; and 15 possible points for past performance in providing janitorial and related services.³ In the evaluation of initial proposals, the

¹ The RFP instructed offerors that in responding to this factor, they should (1) provide at least three examples, in the last five years, of experience providing janitorial services for a similar building, and (2) “[d]escribe in detail two challenges encountered during delivery of Janitorial & Related Services for each service example provided above that did affect or had the potential to affect the budget.” Id. at 212.

² This CBA is between Exemplar (the incumbent contractor) and the Laborers’ International Union of North America.

³ The agency established an adjectival weighting system of excellent, very good, good, fair, poor and unrateable that corresponds to the various percentages of the maximum possible points under each evaluation factor. Agency Report (AR) exh. 32, Price Negotiation Memorandum/Source Selection Decision (PNM/SSD), at 2-3 (Oct. 23, 2014).

agency assigned strengths and weaknesses to each proposal, and then considered those assessments in determining the appropriate score for each proposal under each evaluation factor. AR exh. 16, Initial Technical Ranking of Proposals. Based on the initial evaluations, the agency established a competitive range consisting of the proposals submitted by Exemplar, Offeror A, and Zero Waste. Id. exh. 17, Determination of Competitive Range (June 25, 2014).

After conducting discussions with, and receiving revised proposals from, the competitive range offerors, the agency assigned the proposals the following point scores:

	Exemplar	Offeror A	Zero Waste
Factor 1 Experience (35 pts)	33.25	30.75	25.75
Factor 2 QCP (30 pts)	27.25	24.00	23.25
Factor 3 Key Personnel (20 pts)	19.75	16.00	17.00
Factor 4 Past Performance (15 pts)	14.75	14.50	15.00
Overall Non-Price Rating (100 pts)	95.00	85.25	81.00
Non-Price Ranking	1	2	3
Total Evaluated Price	\$6,594,252	\$6,335,210	\$6,156,155

Id. exh. 57, Final Evaluation of Proposals, at 6-7 (July 29, 2014); exh. 46, Second Revised Technical Ranking by Contracting Officer (July 29, 2014).

In their evaluation of the protester’s proposal under the experience factor, the evaluators identified one strength and three weaknesses; the strength pertained to Zero Waste’s examples of similar experience, and the weaknesses pertained for the most part to its discussion of previous challenges encountered. PNM/SSD at 13. Under the QCP factor, the evaluators identified six strengths in the protester’s proposal, including that the protester was ISO9001 certified and CIMS GB certified (green buildings). Id. at 14. The evaluators also identified four weaknesses in the protester’s proposal under the QCP factor, three of which pertained to Zero Waste’s discussion of work not required under the contract (e.g., general maintenance, mowing, and cleaning court and jury rooms). The fourth weakness, which is of particular relevance to this protest, was as follows:

The contractor provides a [SCP] but makes no mention [of] the “No Strike Clause” in the CBA. The contractor did not state that the CBA included a “No Strike” policy and provided a [SCP], which made GSA believe the contractor did not read the CBA. . . .

Id. at 14.

Based on the evaluation, the contracting officer (who served as the source selection authority), performed a best value analysis between Exemplar’s proposal and the

proposals of Offeror A and Zero Waste. In comparing Exemplar's proposal to Zero Waste's, the contracting officer concluded that the agency would benefit by selecting Exemplar's proposal given the 14 point difference between the two offerors under the non-price factors. The contracting officer reasoned that the "7.12% or \$0.13 per square foot" price premium was warranted. In particular, the contracting officer found:

[Exemplar] has demonstrated experience by identifying and resolving real janitorial challenges, instead of stating issues that do not exactly relate [to] the past janitorial contracts. Another benefit of choosing Exemplar over [Zero Waste] is that Exemplar tailored their QCP to the contract instead of including unnecessary duties. This shows Exemplar took the time to read the solicitation and gain a full understanding of the duties outlined in Section C. Exemplar also noted the "no strike policy," demonstrating they fully read the CBA. Overall, Exemplar's attention to detail and resolutions to challenges make the firm a better value than Zero Waste Solutions.

Id. at 20.

GSA notified Zero Waste of the award to Exemplar, and provided the protester a debriefing. Zero Waste filed an initial protest with our Office. Following its receipt of the agency report responding to the initial protest, Zero Waste filed a supplemental protest challenging particular aspects of the agency's evaluation.

DISCUSSION

Zero Waste argues that it was unreasonable for the contracting officer to rely on Exemplar's mention of the "no strike policy" in the CBA as a discriminator supporting the award to Exemplar given that (1) the Service Contract Act does not require successor contractors to comply with any provision of a predecessor's CBA other than the wage and fringe benefit provisions, and (2) the CBA expired prior to the date work under the instant contract was to commence. Protester's Comments at 4-5. In a related vein, the protester argues that the agency evaluated proposals unequally by identifying the SCPs proposed by Exemplar and Offeror A as strengths under the QCP factor, but failing to identify its proposed SCP as a strength. Zero Waste also argues that the agency evaluated proposals unequally by assigning strengths to the proposals of the other two competitive range offerors for describing green cleaning programs, but failing to credit Zero Waste for the green cleaning program described in its proposal.⁴

⁴ The protester also complains that in his SSD, the contracting officer cited Exemplar's "great past performance" as a basis for finding its proposal the best value. PNM/SSD at 20. Zero Waste argues that this was improper since

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An agency's evaluation of competing proposals and its judgments regarding their relative merits are matters within the discretion of the contracting agency, and our Office will not substitute our judgment for that of the agency. See, e.g., METAG Insaat Ticaret A.S., B-401844, Dec. 4, 2009, 2010 CPD ¶ 86 at 4; PDI Ground Support Sys., Inc., B-299007, B-299007.2, Jan. 18, 2007, 2007 CPD ¶ 64 at 4. In this regard, a protester's disagreement with the agency's judgments does not render an evaluation unreasonable. Id.

In its reports, the agency provided no meaningful response to the protester's first argument and conceded that Zero Waste's second argument was meritorious. The agency further argued, however, that giving the protester's proposal proper credit for the proposed SCP would have increased the proposal's overall technical score by only approximately two points, which "would not nearly have eliminated [Zero Waste's] differential with the awardee." Supplemental AR Legal Memorandum, at 1 (Jan. 13, 2015). Regarding the protester's complaint pertaining to its green cleaning program, the agency maintained that it credited the protester's proposal "for not just having a Green Cleaning Plan, but for having received a certification in green building management." Id.⁵

Based on our review of the record here, we find that the agency erred in its evaluation under the QCP factor by failing to credit the protester's proposal with a strength for Zero Waste's SCP (the agency expressly concedes as much) and by assigning the proposal a weakness for failing to refer to the no strike clause in the expiring CBA (as implicitly conceded by the agency in its failure to respond to the protester's argument). We further find that the contracting officer improperly relied

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Exemplar's average past performance score was, in fact, lower than the protester's. The fact that the contracting officer referred to Exemplar's past performance as "great" in his SSD does not, in our view, establish that he distinguished between proposals based on offeror past performance. Instead, the record shows that all three proposals in the competitive range received scores of 14.5 or higher, out of 15 possible points. As a result, we find that this argument does not provide a basis to sustain the protest.

⁵ While in its comments on the supplemental report, the protester disputes the agency response regarding credit for its green cleaning program, arguing that in addition to being credited with a strength for green building certification, its proposal should have been credited with a strength for a green cleaning program, we need not resolve this issue because it is clear from the record here (as discussed in greater detail below) that another finding of strength pertaining to the protester's QCP would not have had a meaningful impact on the contracting officer's best value tradeoff decision.

upon the latter weakness as a discriminator in this SSD. Nonetheless, we deny the protest, because in addition to establishing errors in the agency's evaluation, the record shows a lack of prejudice stemming from these errors. In this connection, our Office will not sustain a protest absent a showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see also, Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Here, in addition to the discriminator to which the protester objects (pertaining to the no strike clause), the contracting officer distinguished between the protester's and the awardee's proposals on the basis of two discriminators to which Zero Waste has not objected: the difference in the quality of the two offerors' responses to the requirement for a description of challenges encountered under previous janitorial contracts, and the difference in the extent to which their QCPs were tailored to the work to be accomplished under the contract to be awarded. In view of these identified distinctions in the technical quality of the two proposals, and taking into account that the RFP here provided that non-price factors were significantly more important than price, we simply cannot find that but for the errors, the protester would have had a substantial chance of receiving award.

The protest is denied.

Susan A. Poling
General Counsel