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Decision

Matter of: Sauer Inc.
File: B-411137
Date: May 22, 2015

Mark O. Masterson, Esq., Moye, O'Brien, Pickert & Dillon, LLP; and Kevin J. Kelly, Esq., Sauer Inc., for the protester.
Richard J. McCarthy, Esq., and Ellen E. Espenscheid, Esq., National Aeronautics and Space Administration, for the agency.
Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of awardee's proposal and source selection decision is denied where record shows that agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations, and agency's source selection decision was rational and consistent with the terms of the solicitation.

DECISION

Sauer, Inc., of Jacksonville, Florida, protests the award of a contract to J.P. Donovan (JPD), of Rockledge, Florida, under request for proposals (RFP) No. NNK14527028R, issued by the National Aeronautics and Space Administration (NASA) to modify and refurbish the flame trench and construct a flame deflector at launch complex 39B (LC-39B) at Kennedy Space Center. Sauer maintains that the agency miscalculated the awardee's proposal and made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The RFP contemplates the award, on a best-value basis, of a fixed-price contract to perform construction activities associated with reconfiguring LC-39B from its previous configuration for use in Space Shuttle launches to a new configuration for use in connection with the agency's new Space Launch System. Contracting

Officer's Statement of Facts, at 1. Firms were advised that the agency would use a price/performance tradeoff evaluation process that considered two evaluation factors, past performance and price, and further advised that the two factors were approximately equal in weight. Agency Report (AR), exh. 3, RFP, at BATES 199.¹ For purposes of evaluating price, the RFP advised offerors that the agency would consider only the base prices submitted, and that the agency would not consider any prices for optional items included in the proposal. Id. at BATES 200. For purposes of evaluating past performance, the RFP advised that the agency would consider recent, relevant contracts of similar content and complexity and advised that NASA would assign proposals an overall performance confidence level rating based on its evaluation.² Id. at BATES 200-202.

Firms were advised that the agency's past performance evaluation would focus on certain specified considerations. As is relevant to the protest, the RFP advised that the agency would consider an offeror's demonstrated experience with fabrication, assembly, and erection of complex structural steel framing utilizing rolled heavy shapes and plates, as well as an offeror's demonstrated experience with installation of large areas (greater than 10,000 square feet) of refractory brick on vertical surfaces built to tight tolerances. AR, exh. 3, RFP, at BATES 201. The RFP also advised that additional emphasis would be placed on experience with the fabrication and installation of large diameter steel pipe, and also provided that the evaluation of past performance would include an assessment of the overall safety record of the offeror during performance of previous contracts, to include consideration of a firm's "Total Recordable Incident" (TRIR) rate and "Days Away Restricted or Transferred" (DART) rate.³ Id. at BATES 182-183, 201-202.

In response to the solicitation, the agency received a number of proposals. The agency evaluated proposals and, as is relevant to the protest, assigned a very high overall confidence level rating to the JPD proposal and a high overall confidence level rating to the Sauer proposal. AR, exh. 12, Source Selection Decision Document (SSDD) at BATES 1530, 1531. The record shows that Sauer proposed a price of \$19,654,000, while JPD proposed a nominally higher price of \$19,675,000. Id. at BATES 1533. Based on these evaluation results, the agency selected JPD, finding that its slightly higher price was merited by the superiority of its past

¹ In preparing its report, NASA used a BATES numbering system; our citations are to those numbers.

² The RFP advised that the agency would assign overall confidence level ratings of either very high, high, moderate, low or very low. AR, exh. 3, RFP, at BATES 202-203. The RFP further provided that an offeror without a record of past performance would not be evaluated favorably or unfavorably. Id.

³ These rates are standardized measurements of a firm's safety record used by the Bureau of Labor Statistics.

performance confidence level rating. Id. at BATES 1536. After being advised of the agency's source selection decision, Sauer filed the instant protest.

PROTEST

Sauer alleges that the agency misevaluated the JPD proposal in two areas, specifically, in the areas of safety information and fabrication and installation of large diameter steel pipe. In addition, Sauer alleges that the agency improperly gave undue weight to JPD's evaluated superiority for its demonstrated experience with the fabrication, assembly and erection of complex structural steel framing in making the agency's source selection decision.

We note at the outset that, in reviewing protests concerning an agency's evaluation of proposals, our Office does not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. In addition, we point out that source selection officials in negotiated procurements have broad discretion in making cost/technical tradeoffs; the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the evaluation criteria. World Airways, Inc., B-402674, June 25, 2010, 2010 CPD ¶ 284 at 12. On the record before our Office, we have no basis to object to the agency's actions here.

Safety Information

Sauer alleges that the JPD proposal failed to include mandatory safety-related information. In its initial protest, Sauer alleged that JPD failed to include TRIR rate and DART rate information in its proposal. Subsequent to its receipt of the agency report, Sauer alleged that, although JPD included safety-related information in its proposal, it was for a North American Industry Classification System (NAICS) code other than the code identified in the RFP. According to the protester, this rendered the JPD proposal unacceptable under the terms of the solicitation, and, therefore, ineligible for award.

We find no merit to this aspect of Sauer's protest. The RFP required offerors to submit TRIR and DART rates for a five-year period of time. AR, exh. 3, RFP, at 183. The RFP also identified a particular NAICS code for purposes of the offerors providing this information, specifically, NAICS code No. 236220. Id. The agency explains that it required this information to ensure that the offerors had an acceptable safety record.

The record shows that, although the RFP specified that information relating to a firm's safety record was requested in connection with NAICS code 236220, the JPD proposal explained that the firm had no reportable safety information under that

NAICS code because it had not performed any contracts under that NAICS code during the 5-year period specified in the RFP for such data. AR, exh. 6, JPD Proposal, at BATES 1232. Instead JPD explained that it included its TRIR and DART rates information under NAICS code No. 236210 because the firm had performed contracts under that NAICS code during the preceding 5-year period. Id.

The agency explains that it found this information acceptable because both of the identified NAICS codes are from the same “safety reporting family” of NAICS codes. Contracting Officer’s Statement of Facts at 11. In particular, the contracting officer explains that NAICS code No. 236220 is the code for commercial and industrial building contractors, while NAICS code No. 236210 is the code for industrial building construction. Id. Nonetheless, the agency found JPD’s safety information acceptable because both of these NAICS codes are under the same general safety reporting family of NAICS codes (specifically, heavy and civil engineering construction, NAICS code family 2362), and both codes specify the same incident rate thresholds for acceptable DART and TRIR rates. Id. at 11; Attach. No.1, Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types. The agency also points out that, in any event, JPD’s proposal demonstrates that the firm had no reportable incidents during the 5-year period specified in the RFP, and therefore had an exemplary safety record. AR, exh. 6, JPD Proposal, at BATES 1232.

We have no basis to object to the agency’s acceptance of the safety information offered in the JPD proposal under NAICS code No. 236210 rather than NAICS code No. 236220 based on the agency’s explanation. JPD was held to the same safety standard as it would have been held to under the RFP’s specified NAICS code, and, in any event, JPD’s proposal demonstrates that the firm had a safety record under the two specified safety metrics (TRIR and DART rates) that exceeded the safety threshold standards required by the RFP. Even if the agency arguably may have relaxed a solicitation requirement, Sauer still must show that it was prejudiced by the agency’s actions, since prejudice is an essential element of every viable protest. Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 4. Here, Sauer has not alleged that it would have changed its proposal had it known that the agency would accept safety-related information under a different NAICS code, nor has it explained why the agency’s acceptance of JPD’s safety-related information was unreasonable or improper in light of the considerations discussed above. In view of the foregoing, we deny this aspect of Sauer’s protest.

Fabrication and Installation of Large Diameter Steel Pipe

Sauer contends that the agency unreasonably gave JPD a rating similar to it in evaluating the firms’ proposals for experience in fabricating and installing large diameter steel pipe. In this connection, the record shows that the evaluators concluded that JPD had significant overall relevant experience in the area of fabrication and installation of large diameter steel pipe based on its performance of

a contract that involved installation of 10,000 linear feet of seamless stainless steel pipe ranging from 3 inches to 10 inches in diameter. AR, exh. 8, Past Performance Evaluation Report, at BATES 1482-83. The agency also found that Sauer had significant overall relevant experience in the area of fabricating and installing large diameter steel pipe based on its performance of two contracts, one for work on the LC-39B piping system that involved the installation of large diameter piping,⁴ and a second contract, also for fabrication and installation of piping larger than 24 inches in diameter. Id. at BATES 1491. Sauer maintains that it was unreasonable for the agency to have found that both firms had significant overall relevant experience in this area in light of their differing experience.

We find no merit to this aspect of Sauer's protest. As an initial matter, we point out that the RFP did not include any definition of what constituted large diameter pipe. It provided only that, in the agency's evaluation of proposals: "Additional emphasis will be placed on experience with the fabrication and installation of large diameter steel pipe." AR, exh. 3, RFP, at BATES 201. Since the RFP did not include any particular dimension of pipe that the agency would consider large, we find no basis to draw the distinction that Sauer advocates, namely, that 10 inch pipe is, by definition, not considered large, while 24 inch pipe is considered inherently large.⁵ While Sauer is correct that its contracts involved pipe larger than the contract the agency evaluated for JPD, it does not follow that the agency's evaluation was unreasonable.

The agency explains, and the record demonstrates, that NASA rated JPD's experience as significantly relevant overall based on the fact that the experience identified in the JPD proposal was fabricating and installing seamless stainless steel piping, as opposed to the carbon steel piping to be installed under the current requirement. The record shows that the agency viewed this experience as especially relevant because of the comparatively more difficult welding work and inherent quality demands in assembly required for seamless stainless steel, as opposed to carbon steel, pipe. AR, exh. 8, Past Performance Evaluation Report, at BATES 1482-82; See also AR, exh. 12, SSDD, at BATES 1532.

In view of the fact that the RFP advised offerors that the agency would consider not simply the dimensions of the piping installation reflected in an offeror's experience,

⁴ This is the same piping system that will be a part of the work under the currently solicited requirement.

⁵ Sauer directs our attention to the synopsis for this requirement which did include a reference to 42 and 60 inch diameter steel piping. AR, exh. 2, Procurement Strategy Materials, at BATES 79. However, those references were not included in the RFP and, in any event, the Sauer proposal does not include any specific reference to its experience fabricating and installing piping of that size.

but also the “fabrication and installation” experience of the firm, RFP at BATES 201, we have no basis to object to the agency’s consideration of the nature of JPD’s experience in fabricating and installing seamless stainless steel, as opposed to carbon steel, piping. See Morpho Detection, Inc., B-410876, Mar. 3, 2015, 2015 CPD ¶ 85 at 5-6 (agencies properly may evaluate proposals based on considerations not expressly stated in the solicitation where those considerations are reasonably and logically encompassed within the stated evaluation factor, and where there is a clear nexus between the stated and unstated criteria). We note additionally that Sauer has not challenged the agency’s underlying substantive conclusion that the fabrication and installation of seamless stainless steel pipe involves a greater level of difficulty and skill than the fabrication and installation of carbon steel pipe. We therefore deny this aspect of Sauer’s protest.

Source Selection Decision

Sauer alleges that the agency misapplied the solicitation’s evaluation weighting scheme in making award to JPD. We disagree. In this connection, as noted above, the RFP identified several equally-weighted subfactors for consideration in the agency’s evaluation of past performance, including: (1) a firm’s experience with the fabrication, assembly and erection of complex structural steel framing utilizing rolled heavy shapes and plates; (2) a firm’s experience with installing refractory brick; and (3) a firm’s experience with fabrication and installation of large diameter steel pipe. See, AR, exh. 3, RFP, at BATES 200-202.

The record reflects that Sauer’s proposal and JPD’s proposal were rated approximately equal in the area of fabrication and installation of large diameter steel pipe (as discussed, both proposals were found to have demonstrated significant overall relevant experience in this area). Sauer’s proposal was rated superior to JPD’s proposal in the installation of refractory brick area (Sauer’s proposal was found to have demonstrated significant overall relevant experience in this area, while JPD’s proposal was found to have demonstrated only moderate overall relevant experience in this area, AR, exh. 8, Past Performance Evaluation Report, at BATES 1482, 1490). JPD’s proposal, however, was rated superior to the Sauer proposal in the area of fabrication, assembly and erection of complex structural steel framing (JPD’s proposal was found to have demonstrated significant overall relevant experience in this area, while Sauer’s proposal was found to have demonstrated only moderate overall relevant experience in this area. Id.).

The record shows that, in the final analysis, the source selection official singled out JPD’s experience in fabricating, assembling and installing complex structural steel framing as a significant discriminator for purposes of making his selection decision. AR, exh. 12, SSDD, at BATES 1536. Sauer does not challenge the agency’s underlying finding regarding JPD’s relative superiority in this area. Instead, Sauer argues that this demonstrates that the agency gave exaggerated importance to this consideration in making its source selection decision, which was inconsistent with

the RFP's assignment of approximately equal weight to the principal considerations outlined above.

We find no merit to this aspect of Sauer's protest. Ultimately, Sauer's protest relies on a flawed underlying premise: that identifying some feature or element of a proposal as a discriminator--even a significant discriminator--necessarily shows that the agency has changed the relative weighting of the evaluation factors. However, the mere fact that an agency's source selection decision turns on an evaluation consideration that is identified as equal to--or even less important than--other evaluation factors is unobjectionable, since there is no requirement that the key award discriminator also be the most heavily-weighted evaluation consideration. National Forensic Science Technology Center, Inc., B-409457.2, B-409457.3, July 29, 2014, 2014 CPD ¶ 224 at 5-6. We therefore deny this aspect of Sauer's protest.

The protest is denied.

Susan A. Poling
General Counsel