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Decision

Matter of: Intercontinental Construction Contracting, Inc.

File: B-415040; B-415040.2; B-415041; B-415041.2

Date: November 8, 2017

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DIGEST

In a procurement conducted under the two-phase design-build selection procedures of Federal Acquisition Regulation subpart 36.3, protest of an agency's evaluation of the protester's phase one proposal and its decision to exclude the protester from phase two is denied where the agency's evaluation was reasonable and in accordance with the solicitation's evaluation criteria.

DECISION

Intercontinental Construction Contracting, Inc. (ICCI) of Passaic, New Jersey, protests its exclusion from the competitions by the Department of the Army, Corps of Engineers (Corps) under request for proposal (RFP) No. W912QR-17-R-0039 and RFP No. W912QR-17-R-0040 for the design and construction of full facility restoration projects to renovate and repair buildings 5509 and 5403, respectively, at Joint Base McGuire-Dix-Lakehurst in Burlington County, New Jersey. The protester contends that the Corps failed to engage in communications regarding negative past performance as required by Federal Acquisition Regulation (FAR) § 15.306, and that the Corps' evaluation of its past performance was unreasonable. The protester further contends the evaluations of its technical and past performance proposals were inconsistent, irrational, and undocumented.

We deny the protests.

BACKGROUND

The RFPs were issued on April 28, 2017, under the two-phase design-build provisions of FAR subpart 36.3, and were set aside for small businesses. Agency Report (AR),

Tab 1, RFP at 1 and 9.¹ Each RFP contemplated award of a fixed-price contract to the offeror whose proposal conformed to the terms and conditions of the solicitation and was determined to represent the overall best value to the government, all factors considered, using a tradeoff process. Id. at 9-10.

Under phase one, offerors were required to submit a three-volume proposal to address the following factors, listed in descending order of importance: past performance, technical approach, and pro forma information.² RFP at 9-11. Offerors were not required to submit any pricing information for phase one and were told not to assume they would have an opportunity to participate in discussions or be asked to submit a revised offer. Id. at 9, 10. Following the evaluation of phase one proposals, up to five offers would be selected to participate in phase two. Id.

The RFPs provided that past performance would be “rated based on recency/relevancy and confidence” and the technical approach would be “rated using an adjectival-based system.”³ Id. at 10. Regarding the past performance factor, the RFP instructed as follows:

Provide descriptions of up to three (3) projects substantially complete or completed by the prime contractor within the last seven (7) years which are similar to this project in size and scope. Projects are considered substantially complete if enough work has been performed such that it demonstrates the ability to successfully complete all phases of the project. Projects considered similar in size would include the renovation of a multi-story building, with a minimum of 30,000 square feet [(SF)]. Projects that are exclusively new construction are not considered similar in scope. Projects that include a combination of new construction and renovation may be submitted; however, the actual square footage of renovation must be provided and meet the minimum 30,000 SF requirement. Projects considered similar in scope to this project include

¹ The protest allegations and RFPs here are virtually identical. Therefore, the agency filed a consolidated agency report and our Office is issuing this consolidated decision. To avoid unnecessary redundancy, citations to the RFPs in this decision are to RFP No. W912QR-17-R-0040, unless otherwise indicated.

² Pro forma information would not be rated, and was to include certain documentation such as standard form 1442, joint venture and mentor-protégé agreements, bonding and financial information, and representations and certifications. RFP at 11, 16-18.

³ The RFP provided the following ratings for past performance relevancy: very relevant, relevant, somewhat relevant, and not relevant. RFP at 11. The RFP provided the following past performance confidence assessments: substantial confidence, satisfactory confidence, limited confidence, no confidence, and neutral confidence. Id. at 11-12. The technical approach ratings were as follows: outstanding, good, acceptable, marginal, and unacceptable. Id. at 12.

renovation of office/administrative space, classrooms, barracks, apartments, and/or hotel space (Government or non-Government Application).

The prime contractor must have self-performed at least 15% of the direct contract labor (including testing and layout personnel), exclusive of other general condition or field overhead personnel, material, equipment, or subcontractors to be considered similar. An [indefinite-delivery, indefinite quantity] contract may be submitted only if a single task order could be considered similar to this project. Task orders may not be combined in order for the contract to be considered similar. Formats for Project Details are included for your use. Use as many forms as necessary to meet the criteria. If you elect not to use the formats, all information identified on the formats is still required for evaluation of this item.

RFP at 13. Offerors were also to provide the same past performance information for the designer of record for the project. Id. In addition, the RFP stated that the agency may use other tools, such as the Past Performance Information Retrieval System (PPIRS) and Contractor Performance Assessment Reporting System (CPARS) to assist in its evaluation of an offeror's past performance. Id. at 14.

For each RFP, ICCI submitted the same three projects for consideration in its past performance proposal volumes: (1) design-build renovation of barracks building 5401, Joint Base McGuire-Dix-Lakehurst, New Jersey; (2) renovation of building 606 Malogne Clinic, West Point Military Academy, New York; and (3) renovation of Cadet Chapel, West Point Military Academy, New York. AR, Tab 2, ICCI Proposal for Building 5403, at 2; Tab 11, ICCI Proposal for Building 5509, at 2. The source selection evaluation board (SSEB) for each RFP evaluated ICCI's past performance and assigned different relevancy ratings. Specifically, both SSEBs found the renovation of the barracks building 5401 project to be very relevant and the renovation of the Cadet Chapel project to be somewhat relevant; however, for the renovation of the Malogne Clinic project, the SSEB for building 5509 found it to be very relevant while the SSEB for building 5403 found it to be somewhat relevant. AR, Tab 4, SSEB Report for Building 5509, at 27; Tab 7, SSEB Report for Building 5403, at 27.

Regarding the different relevancy ratings assigned by the SSEBs for the Malogne Clinic project, both SSEBs acknowledged that the project was for the "construction/renovation" of an 86,000 square foot four-story health clinic building, and noted that ICCI had failed to indicate what percentage of the project it had performed. The SSEB for building 5509 concluded that it could infer from the project description that ICCI self-performed at least 15 percent of the work, and therefore assigned a rating of very relevant. AR, Tab 4, SSEB Report for Building 5509, at 28. However, the SSEB for building 5403 concluded that because ICCI did not indicate how much of the project it self-performed,

the scope of work self-performed by ICCI was unclear and therefore assigned a rating of somewhat relevant.⁴ AR, Tab 7, SSEB Report for Building 5403, at 27-28.

In addition to reviewing the three projects ICCI submitted, the SSEBs also reviewed information on 13 projects obtained from PPIRS. The SSEB for building 5509 assigned a limited confidence rating to ICCI for its past performance, and explained its rating as follows:

The offeror submitted two (2) Very Relevant, highly rated projects performed as the prime contractor, and one (1) Very Relevant, highly rated project performed by the proposed designer of record. However[,] upon review of the offeror's PPIRS record, the SSEB identified eight (8) Unsatisfactory ratings and three (3) Marginal ratings for key areas within the evaluations. Many of the poor ratings were for projects that are considered less complex than the solicited requirement. However, the offeror did receive Marginal ratings on a renovation project considered similar in size and scope to the solicited requirement. Based on the issues with Schedule, Quality, and Management, the SSEB has a low expectation that the offeror will successfully perform the work of the solicited project.

AR, Tab 4, SSEB Report for Building 5509, at 27. Regarding ICCI's technical approach, the SSEB for building 5509 identified 12 strengths and assigned a rating of outstanding. Id. at 32-33. When selecting offerors to participate in phase two, the contracting officer recognized that ICCI "proposed an exceptional approach and understanding of the technical requirements of the solicitation," but concluded that ICCI's limited confidence rating for its past performance should result in its exclusion from phase two of the competition because its proposal was not considered to be among the highest-rated proposals. AR, Tab 6, Down Select Memorandum for Building 5509, at 2-3.

The SSEB for building 5403 also assigned a limited confidence rating to ICCI for its past performance, explaining as follows:

The offeror submitted one project that was considered Very Relevant and received a Satisfactory rating. The offeror also received Very Good and Exceptional ratings for Somewhat Relevant projects. The design firm demonstrated Exceptional performance on a Very Relevant and on a Somewhat Relevant project. The prime and design firm show a successful history of performing design-build projects together. However[,] PPIRS demonstrated marginal and unsatisfactory performance

⁴ The SSEB for building 5403 also assigned adjectival performance ratings for ICCI's projects as follows: (1) satisfactory for the barracks building 5401 project; (2) very good for the Malogne Clinic project; and (3) exceptional for the Cadet Chapel project. Tab 7, SSEB Report for Building 5403, at 27.

for the Prime contractor for similar projects, including a project that was Terminated for Default and that is now being managed by a bonding company. Past Performance information included negative comments regarding the contractor's performance and "Would Not Recommend". Comments stated that the subcontractors were not being paid and that "work was sub-par to say the least." The SSEB has concerns about the offeror's recent/relevant performance record, and has a limited expectation that the offeror will successfully perform the required effort based upon negative past performance information for other Government projects.

AR, Tab 7, SSEB Report for Building 5403, at 27. Regarding ICCI's technical approach, the SSEB for building 5403 identified seven strengths and assigned a rating of good. Id. at 31-32. When selecting offerors to participate in phase two, the contracting officer concluded: "Given that there are proposals with Substantial or Satisfactory Confidence in Performance ratings due to strong past performance information, and more strengths and/or fewer weaknesses in their Technical Approach, I do not consider [ICCI] to be among the highest rated proposals and they will not be invited to participate in Phase II." AR, Tab 8, Down Select Memorandum for Building 5403, at 3.

On July 20, 2017, ICCI was notified by the agency that it was not selected as one of the most highly-rated offerors to participate in phase two of the procurements. See Protests, Exh. A, Letters from the Corps to ICCI. On July 25, ICCI was provided a debriefing, and these protests followed.

DISCUSSION

ICCI raises multiple challenges to the Corps' evaluation of its phase one proposals and the decision to exclude it from participation in phase two of the competitions. We have fully considered all of ICCI's arguments and, although we do not address them all, we find that none provides a basis on which to sustain the protest.

The protester first argues that the Corps violated FAR § 15.306 by failing to engage in communications with ICCI regarding the negative past performance information in PPIRS. Protests at 9-11. Specifically, ICCI argues that the agency established a competitive range when it selected the most highly-rated proposals to participate in phase two, and therefore the agency was required to engage in communications with ICCI since the Corps relied on its negative past performance information to exclude ICCI from the competitions. Id. at 9-10; see also Comments & Supp. Protest at 3-4. The Corps responds that FAR § 15.306 is inapplicable because it could not and did not establish a competitive range; rather, as set forth in the RFPs, a competitive range would only be established after phase two of the procurement following the evaluation of proposed prices, and then only if the agency decided it could not make award without discussions. Consolidated Memorandum of Law (MOL) at 14-15.

Section 15.306(b)(1) of the FAR states that before establishing a competitive range, an agency must conduct “communications” with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range to allow the offeror to address adverse past performance information to which an offeror has not had a prior opportunity to respond. Part 15 of the FAR requires agencies to evaluate offerors’ cost or price prior to establishing a competitive range. FAR § 15.306(c)(1); see also id. at § 15.305(a); SPAAN Tech, Inc., B-400406, B-400406.2, Oct. 28, 2008, 2009 CPD ¶ 46 at 9. Under FAR subpart 36.3 procedures, the evaluation of phase one proposals does not permit the consideration of cost or price as an evaluation factor. FAR § 36.303-1(a)(2)(iii). Rather, the contracting officer selects the most highly qualified offerors to submit phase two proposals. Id. § 36.303-1(b). Only phase two of the procurement is to be conducted in accordance with FAR part 15, including the evaluation of technical and price proposals to be submitted by offerors. Id. § 36.303-2.

Here, in accordance with FAR subpart 36.3, the RFPs did not provide for the submission or evaluation of price proposals until phase two of the procurement. RFP at 9, 27-28, 32. Therefore, contrary to the protester’s assertions, FAR § 15.306(b) concerning exchanges before establishment of the competitive range does not apply. Further, our Office has stated before that there is nothing in the regulations concerning phase one 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.⁵ See Linc Government Servs., LLC, B-404783.2, B-404783.4, May 23, 2011, 2012 CPD ¶ 128 at 7.

⁵ ICCI also argues that the Corps failed to further investigate responses it provided in PPIRS to dispute the negative past performance information. Comments & Supp. Protest at 4-6. For example, ICCI believes the Corps should have contacted the CPARS evaluators. Id. at 6. The Corps responds that the RFPs advised that the agency intended to make award without discussions, and even if discussions were conducted the agency would not have been obligated to raise the negative past performance information because ICCI was previously provided with the opportunity to respond. MOL at 15.

It is clear from the record that ICCI had previously been provided an opportunity to respond to the negative information considered by the agency, but had generally declined to do so. See AR, Tab 5, ICCI PPIRS and CPARS Reports, at 8, 11, 13, and 17. With regard to acquisitions governed by FAR part 15, we have recognized that where an offeror was provided an opportunity to respond to adverse performance information during its performance of the affected contract, the agency need not provide an additional opportunity to respond during discussions. Erickson Helicopters, Inc., B-409903, B-409903.2, Sept. 5, 2014, 2014 CPD ¶ 288 at 7 n.12.

The protester also argues that the agency's evaluation of ICCI's past performance is unreasonable. ICCI argues that the Corps violated the RFPs' evaluation criteria by improperly considering information from other sources, such as PPIRS, rather than the past performance provided by ICCI in its proposal, when assigning an overall confidence rating. Protests at 11-12; Comments & Supp. Protest at 12-13. The protester further argues it was improper for the Corps to consider the projects with negative past performance information because they do not satisfy the RFPs' relevancy criteria and could not have been included by ICCI in its proposals. Comments & Supp. Protest at 7-9. ICCI also argues that all of its proposed projects should have been rated as very relevant. Protests at 11. The protester additionally argues that the Corps also failed to consider any positive past performance information in PPIRS. Comments & Supp. Protest at 10-12.

The Corps responds that the RFPs explicitly advised offerors that information from other sources would be considered to evaluate past performance, and that ICCI's poor performance on smaller and less complex projects was reasonably considered by the SSEBs when assigning ratings of limited confidence. MOL at 17-18. The Corps argues that both SSEBs reasonably rated at least one or two of the three projects submitted by ICCI as very relevant and considered the positive past performance on those projects, but that when considering the additional negative past performance information assigned a limited confidence rating. Id. at 18-19.

An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. Williams Building Co., Inc., B-413262.2, B-413262.3, Nov. 15, 2016, 2017 CPD ¶ 103 at 5; Bryan Constr., Inc., B-409135, Jan. 14, 2014, 2014 CPD ¶ 51 at 7. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror's disagreement with an agency's evaluation judgments does not demonstrate that those judgments are unreasonable. Bryan Constr., Inc., supra; Tri-Technic, Inc., B-412037, Dec. 11, 2015, 2016 CPD ¶ 5 at 5.

As an initial matter, the protester's interpretation of the RFPs is unreasonable, insofar as it argues that the assignment of a confidence rating was limited to consideration of only the information provided by the offerors in their proposals. Here, the RFPs explicitly stated:

The SSEB will evaluate the relevancy of recent past performance identified in the proposal. Documentation of projects similar in size and scope to this project will be considered relevant to the similar characteristics of the RFP. Conversely, proposals that do not show documentation of projects similar in size and scope will be considered less relevant to the similar characteristics of the RFP. . . .

The SSEB will assign a confidence rating to each offeror based on the degree of successful performance of all recent and relevant projects identified in the proposal in response to paragraph 5.1. . . . The Government may also use other tools such as PPIRS, CPARS, [Federal Awardee Performance and Integrity Information System (FAPIIS)], Dun & Bradstreet, etc. or any other relevant information to assist in its evaluation of an offeror's past performance.

RFP at 14. Thus, the RFPs clearly indicated that the Corps would assign relevancy ratings for the projects included in phase one proposals, and consider other sources of past performance information when assigning an overall confidence rating for past performance.

Further, as noted, both SSEBs concluded that at least one project submitted by ICCI, the barracks building 5401 project, was very relevant with satisfactory or higher past performance ratings. However, both SSEBs were concerned with ICCI's poor performance on smaller and less complex projects, and in particular in areas such as quality, schedule, cost control, and management, and concluded that poor performance in these areas presented a risk that ICCI would not successfully perform the contract. Based on our review of the record, the Corps reasonably assigned ratings of limited confidence to ICCI for its past performance.

Finally, the protester argues that the entire evaluation is inconsistent, irrational and undocumented because the record produced by the Corps does not resolve the differences between ratings assigned by the different SSEBs in their evaluations of ICCI's past performance and technical approach, or the differences between the high adjectival ratings assigned for its technical approach and the limited confidence ratings assigned for its past performance. Comments & Supp. Protest at 13-16. The agency responds that the difference between the ratings assigned by the SSEBs is unremarkable, the differences alone do not make any of the conclusions unreasonable, and the contracting officer was not required to compare the two evaluations and reconcile any of the differences. Supp. MOL at 3-5. The agency further argues that ICCI is not prejudiced by any differences in the evaluations because both SSEBs assigned a limited confidence rating for past performance, and the limited confidence rating on which the SSEBs agreed upon was the basis for the contracting officer's decision to exclude ICCI from phase two of the competitions. Id. at 5-6.

We find that the protester has not shown that the Corps acted unreasonably or inconsistently with the RFPs. Our Office has recognized that it is not unusual for different evaluators, or groups of evaluators, to reach different conclusions and assign different scores or ratings when evaluating proposals, since both objective and subjective judgments are involved. See MILVETS Sys. Tech., Inc., B-409051.7, B-409051.9, Jan. 29, 2016, 2016 CPD ¶ 53 at 7. Here, as noted, the SSEBs reached differing conclusions regarding the relevancy rating assigned to ICCI for the Malogne Clinic project. Although the SSEB for building 5509 inferred that ICCI had self-performed at least 15 percent of the work when it assigned a rating of very relevant for

this project, the fact that the SSEB for building 5403 did not make the same inference in its assignment of a rating of somewhat relevant for the same project does not make the SSEB's rating unreasonable.⁶ Moreover, since both SSEBs ultimately assigned the same rating of limited confidence to ICCI for its past performance, ICCI was not prejudiced by the different relevancy ratings assigned for the Malogne Clinic project.

We also find unavailing ICCI's argument that the Corps was required to resolve any disparity in the ratings assigned by the SSEBs for its technical approaches as compared to its past performance. Based on our review of the record, the SSEBs' evaluations of ICCI's technical approaches were reasonable and in accordance with the solicitation criteria. We find nothing unreasonable, and there is nothing incongruent, in the SSEBs' determinations to rate ICCI's technical approaches as outstanding or good, and yet conclude that its past performance warranted a rating of limited confidence. While ICCI disagrees with the Corps evaluations, its disagreement does not furnish a basis on which to sustain the protests. Johnson Controls, Inc., supra.

The protests are denied.

Susan A. Poling
General Counsel

⁶ As noted, the RFPs required that the projects submitted be at least 15 percent self-performed by the prime contractor and required that this information be included in an offeror's phase one proposal submission. RFP at 13 and 19. It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation and allows a meaningful review by the procuring agency. Johnson Controls, Inc., B-407337, Nov. 20, 2012, 2012 CPD ¶ 323 at 4. An offeror that does not affirmatively demonstrate the merits of its proposal risks rejection of its proposal. Id. The different evaluation conclusions reached by the SSEBs regarding ICCI's Malogne Clinic project was the result of ICCI's failure to indicate the amount of the project it had self-performed, as instructed by the RFPs.