



Decision

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Matter of: Herman Construction Group, Inc.

File: B-416778.2; B-416778.4

Date: December 21, 2018

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DIGEST

Protest is denied where the agency's evaluation of the proposal's safety factor was reasonable and in accordance with the solicitation.

DECISION

Herman Construction Group, Inc., a small business of Escondido, California, protests its elimination from phase one of a two-phase design-build procurement, conducted under request for proposals (RFP) No. N62473-18-R-5816 by the Department of the Navy, Naval Facilities Engineering Command Southwest, for the construction, renovation and repair of general building projects in the western and southwestern United States. The protester asserts that it should have received a rating of outstanding, rather than good, under the safety factor and that this error led to its improper exclusion from phase two of the competition.

We deny the protest.

BACKGROUND

On October 26, 2017, the Navy issued the RFP as an 8(a) competitive set-aside in accordance with the two-phase design-build procedures of Federal Acquisition Regulation subpart 36.3. RFP at 1, 23.¹ The agency intends to award three or more

¹ Citations to the RFP are to the document in the record at Electronic Protest Docketing System (EPDS) Docket No. 27.

indefinite-delivery, indefinite-quantity contracts with a one-year base period and four option years. RFP, Amend. 0001, at 6;² RFP at 3. The maximum dollar value of the combined contracts was \$249,000,000, with task orders values ranging from \$100,000 to \$5,000,000. RFP at 1. On November 14, the Navy issued the only amendment to the solicitation, which changed the instructions to offerors, the basis for award, and extended the date for receipt of proposals to December 6. See generally RFP, Amend. 0001. The solicitation anticipated that a maximum of five proposals would be selected to proceed from phase one to phase two, although the contracting officer, in his or her discretion, could select more. Id. at 6.

In phase one of the competition, offerors were to be evaluated under four factors: technical approach, experience, past performance, and safety. Id. at 8-14. As relevant to this protest, the solicitation advised offerors that the safety factor evaluation would consider numerical metrics reflecting an offeror's historical safety record and an offeror's technical approach to safety for this contract. Id. at 14. The safety evaluation would also consider an offeror's proposed review of subcontractor's safety performance; safety innovations; safety management systems; and strategies for incident prevention and correction of unsafe work practices. Id.

Under the safety factor, proposals would receive one of five adjectival ratings, ranging from unacceptable to outstanding. Agency Report (AR), Tab 3, Source Selection Plan, at 22. A rating of good would be assigned where the “[p]roposal indicates a thorough approach and understanding of the requirements and contains at least one strength, and risk of unsuccessful performance is low to moderate.” Id. Similarly, a rating of outstanding would be assigned where the “[p]roposal indicates an exceptional approach and understanding of the requirements and contains multiple strengths, and risk of unsuccessful performance is low.” Id.

The Navy evaluated Herman's proposal as follows:

Factor	Rating
Technical Approach	Acceptable
Experience	Outstanding
Past Performance	Substantial Confidence
Safety	Good

AR, Tab 4, Technical Evaluation Team (TET) Report, at 183-192. The agency concluded that Herman's numerical safety metrics warranted two strengths.³ Id. at 192.

² Citations to amendment 0001 are to the document at EPDS Docket No. 26.

³ As relevant to this protest, a strength was defined as “[a]n aspect of a proposal that has merit or exceeds specified performance or capability requirements in a way that will be advantageous to the Government during contract performance.” RFP, Amend. 0001 at 7.

The Navy assessed an additional strength for Herman's plan to evaluate subcontractors' safety records. Id. The Navy also noted the "[i]nnovative methods proposed to ensure and monitor safe work practices" and "[m]ethods to execute an effective program that facilitates sound mishap prevention techniques . . . [and] employee reporting of [unsafe practices.]" Id. However, the agency did not identify additional strengths in these or other areas of Herman's safety proposal. Id. After further reviewing Herman's safety record and plan, the Navy assigned the proposal a rating of good under the safety factor. Id. at 191.

On August 20, 2018, the Navy notified Herman that its proposal had not been selected as one of the most highly-qualified offerors to participate in phase two of the procurement. Protest, exh. A, Navy Phase Two Ltr. to Herman, Aug. 20, 2018. The agency provided the protester with a debriefing on August 23, and Herman filed a protest with the agency on August 27. Protest, exh. B, Agency-Level Protest. The agency denied the protest on September 13. Protest, exh. C, Navy Ltr. to Herman, Sept. 13, 2018. This protest followed on September 18.

DISCUSSION

Herman challenges the agency's evaluation of its proposal under the safety factor. The protester primarily argues that it should have received at least one additional strength for its innovative safety practices.⁴ Protest at 11. Herman contends that with a second strength for safety innovation, it would have received an adjectival rating of outstanding--rather than good--under the safety factor, and would have had a greater chance of participating in phase two of the procurement. For the reasons below, we deny the protest.

⁴ The protester raises various other protest grounds. We have carefully considered each of these and conclude that none provides a basis to sustain the protest. For example, Herman argues that the Navy did not define the terms innovation or innovative in the RFP. Protest at 9-10. The protester further objects to the agency's use of these terms according to their general meanings. Comments & Supp. Protest at 5. Our Bid Protest Regulations require offerors to raise challenges to the solicitation terms prior to the due date for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Herman's arguments, brought after this date, are dismissed as untimely. 4 C.F.R. § 21.5(e). In addition, Herman contends that the agency "mechanically" assigned adjectival ratings under the safety factor on the basis of the number of assigned strengths. Comments & Supp. Protest at 5. The record reflects that the agency considered and documented the various benefits of Herman's safety approach in detail, highlighting various positive aspects of the proposal, and thus the agency's analysis was well beyond a simple counting of strengths. AR, Tab 4, TET Report, at 191. Therefore, we have no basis to conclude that the agency overlooked aspects of Herman's proposal and this protest ground is denied. Raymond Assocs., LLC, B-299496, B-299496.2, May 29, 2007, 2007 CPD ¶ 107 at 3-4 (denying protest where agency supported adjectival rating with substantive narrative analysis).

The evaluation of an offeror's proposal is a matter within the agency's discretion. Bryan Constr., Inc., B-409135, Jan. 14, 2014, 2014 CPD ¶ 51 at 5. A protester's disagreement with the agency's judgment in its determination of the relative merit of competing proposals, without more, does not establish that the evaluation was unreasonable. Tri-Technic, Inc., B-412037, Dec. 11, 2015, 2016 CPD ¶ 5 at 5. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Engineering Design Techs., Inc., B-408811.2, June 17, 2014 CPD ¶ 182 at 4.

In arguing that it should receive another strength under the safety factor, the protester contends that it offered several innovative safety initiatives--such as a safety recognition program and a safety incentive program--for which the agency should have credited it with at least one additional strength. Comments & Supp. Protest at 3. In this regard, Herman argues that its "Safety Recognition program [DELETED]." Id. The protester asserts that the program is innovative because it "[DELETED]." Id. The Navy asserts that the methods described were evaluated, but simply "did not satisfy the criteria of being 'innovative.'" Supp. Memorandum of Law (MOL) at 2.

Herman's proposal provides that its safety recognition program "recognizes the safety best practices of Herman and subcontractor personnel" and is a "successful motivator" because it "recognize[es] [DELETED]." AR, Tab 9, Herman Proposal, at 4. The agency's evaluation noted Herman's "methodology in executing an effective program that facilitates sound mishap prevention techniques/ processes. . . ." AR, Tab 4, TET Report, at 191. However, the agency did not assign Herman a strength for this aspect of its proposal because "the minimal information provided [on this program, as well as on the other proposed safety programs] did not meet the threshold of 'innovative.'" Id. at 191-192; Supp. MOL at 2. The agency found that, although there were no cited weaknesses, Herman's proposal and safety record was strong enough to merit a good rating, but not sufficiently innovative so as to warrant a higher outstanding rating. AR, Tab 4, TET Report, at 191-192.

The record reflects that the agency comprehensively evaluated the proposal and, in its discretion, did not assign strengths for aspects of the safety proposal that Herman now argues merited additional strengths. No provision of the solicitation mandated a different result. Furthermore, given that the agency's contemporaneous evaluation shows that the Navy reviewed all aspects of Herman's safety proposal, the protester's disagreement with the agency's evaluation fails to provide a basis to sustain the protest. While Herman contends that its proposal was sufficiently detailed to warrant the higher rating, its argument amounts to disagreement with the agency's judgment, which, without more, does not render the agency's conclusions unreasonable. Systems Research & Applications Corp., B-298107, B-298107.2, June 26, 2006, 2006 CPD ¶ 103 at 5; Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3. Herman asserts that the Navy failed to identify a strength related to Herman's safety incentive program, which offers "[DELETED]." Comments & Supp. Protest at 3. The

Navy responds that certain details about Herman's safety programs that were highlighted in the protester's arguments were not included in the proposal itself. Supp. MOL at 3. The record confirms that the proposal contains only generalities about the safety incentive program, not these details. See, e.g., AR, Tab 9, Herman Proposal, at 4 ("This program says 'thank you' . . . to employees and subcontractors for working hard to reinforce safe work practices and a safe workplace.").

An offeror has a responsibility to submit a well-written proposal with adequately detailed information that demonstrates compliance with all solicitation criteria and allows for meaningful review by the agency. DLT Sols., Inc., B-412237 et al., Jan. 11, 2016 CPD ¶ 19 at 7. Thus, there is no basis to question the agency's judgment because the agency could not review information that Herman failed to include in its proposal. EMTA Insaat Taahhut Ve Ticaret, A.S., B-416391, B-416391.4, Aug. 13, 2018 CPD ¶ 280 at 4. An offeror that does not affirmatively demonstrate the merits of its proposal risks rejection of its proposal or risks that its proposal will be evaluated unfavorably where it fails to do so. Johnson Controls, Inc., B-407337, Nov. 20, 2012, 2012 CPD ¶ 323 at 3.

Herman also asserts that it should have received a strength for having its site safety and health officers (SSHOs) [DELETED], on the basis that these [DELETED] exceed the solicitation requirements for SSHOs. Comments & Supp. Protest at 2.

Initially, the Navy asserted that no strength was assessed because the solicitation required SSHOs to have these [DELETED]. MOL at 16. However, after Herman disputed the agency's characterization, arguing that these [DELETED] are not in fact required by the solicitation, the agency acknowledged that "these specific [DELETED] are not required" by the solicitation. Comments & Supp. Protest at 2; Agency Resp. to GAO Request, Dec. 4, 2018, at 4. The record reflects that the agency's first explanation was thus erroneous. The Navy maintains that, nevertheless, no additional strength was warranted because "Herman generically described its safety methods, but did not explicitly state how these methods would be applied to the work under this procurement." Supp. MOL at 4. Specifically, the agency explained that Herman's proposal was "unclear how they [SSHOs with these [DELETED]] exceed the required training" for the SSHO role, as described in the solicitation. Agency Resp. to GAO Request at 4. The agency also notes its discretion regarding the assignment of strengths and argues that Herman failed to describe the benefit created by these [DELETED]. Supp. MOL at 3.

The contemporaneous evaluation record reflects that the Navy performed a thorough evaluation of Herman's safety proposal. AR, Tab 4, TET Report, at 191-192. Here, Herman's proposal states only that the SSHOs will have these [DELETED]; it does not explain how these [DELETED] would be of value to the agency or enable Herman to provide superior performance. AR, Tab 9, Herman Proposal, at 4. Thus, despite the agency's initial erroneous statement, the record provides no basis for us to question the reasonableness of the agency's evaluation of Herman's proposal regarding the qualifications of its SSHOs. In this regard, when GAO invited the parties to address the

inconsistency directly, the protester asserted that because “[t]he [DELETED] offered by the Protester are ‘[DELETED],’ [they are therefore] ‘innovative. . . .’” Protester Resp. to Agency Resp. to GAO Req. for Briefing, Dec. 5, 2018, at 2. This response does not demonstrate that the agency unreasonably ignored “[a]n aspect of a proposal that has merit or exceeds specified performance or capability requirements in a way that will be advantageous to the Government during contract performance.” RFP, Amend. 0001 at 7. On this record, we have no basis to question the agency’s evaluation under the safety factor. Bryan Constr., Inc., B-409135, Jan. 14, 2014, 2014 CPD ¶ 51 at 7 (denying protest where proposal did not contain detail adequate to demonstrate required experience).

The protest is denied.

Thomas H. Armstrong
General Counsel