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Decision

Matter of: Up-Side Management Company

File: B-417440; B-417440.2

Date: July 8, 2019

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DIGEST

Protest against an agency's evaluation of five awardees' non-price proposals is denied where the record shows the allegations are without merit, or that any alleged evaluation errors did not result in competitive prejudice to the protester.

DECISION

Up-Side Management Company (Up-side), of Hubert, North Carolina, protests the award of contracts to five contractors under request for proposals (RFP) No. N40085-19-R-8000, issued by the Department of the Navy, Naval Facilities Engineering Command for maintenance and repair construction projects in New River, North Carolina and surrounding areas.¹ Up-side challenges the agency's evaluation of the awardees' proposals.

We deny the protest.

BACKGROUND

On October 26, 2018, the agency issued the RFP as a small business set-aside and contemplated the award of up to five indefinite-delivery, indefinite-quantity (IDIQ)

¹ The five awardees were Joyce & Associates Construction, Inc. (Joyce), Olympic Enterprises, Inc. (Olympic), Owens Construction, Inc. (Owens), Pyramid Contracting, LLC (Pyramid), and T.E. Davis Construction Company (TE Davis).

contracts with a performance period of a base year and four 1-year option periods. Agency Report (AR), Tab 2, RFP at 1, 3. The RFP sought a diverse range of general maintenance and repair construction services for small work requirements of a one-time nature that would be performed primarily at Marine Corps Base Camp Lejeune and Marine Corps Air Station in New River, North Carolina. Id. at 3. The RFP also sought performance of a seed project, entitled Repair Heads, Building 1747 and 516, that included various construction projects, such as painting and mounting lighting fixtures. Id.; AR, Tab 3, Government Estimate, at 1-2.²

The RFP contemplated award on a lowest-priced, technically acceptable (LPTA) basis. RFP at 9. In this regard, the RFP included an “efficient competition” provision, which explained that the agency would first screen proposals for price, and place them in order from lowest to highest priced. Id. Next, the agency would evaluate the eight lowest-priced proposals under the technical factors. Id. The RFP stated that the Navy intended to make award from among the eight lowest-priced proposals that were found to be technically acceptable. Id. Additionally, the RFP provided that the agency, at its sole discretion, reserved the right to increase the number of proposals it would review under this methodology. Id. The RFP advised offerors that “under this methodology, the technical factors of some proposals may not be evaluated by the Navy.” Id. The solicitation stated that the government intended to make award without discussions, and reserved the right to conduct discussions if later determined to be necessary. Id.

The RFP identified four non-price evaluation factors: (1) corporate experience; (2) safety; (3) management approach; and (4) past performance. Id. As relevant here, one element of the safety evaluation was to be based on the offeror’s experience modification rate (EMR). Id. at 11. The RFP required each offeror to submit its EMR “from the **three** previous complete calendar years,” and stated that EMRs would be evaluated to determine whether the offeror demonstrated a history of safe work practices. Id. at 11, 12 (emphasis in original). Further, the RFP noted that “the burden of providing detailed, current, accurate and complete safety information regarding these submittal requirements rests with the offeror.” Id. at 12.

An unacceptable rating in any of the evaluation factors would result in the non-price proposal being rated unacceptable. Id. at 9. An acceptable rating would be assigned to a proposal that met the minimum requirements of the solicitation; an unacceptable rating would be assigned to a proposal that did not meet the minimum requirements. Id. at 10.

By the November 27 closing date, 12 offerors submitted proposals, including Up-side and the five awardees. AR, Tab 7, Source Selection Evaluation Board (SSEB) Report, at 2. The agency performed a technical evaluation of only the eight lowest-priced

² Amendment 0003 removed the entirety of the work associated with building 516 from the requirements of the seed project. AR, Tab 4, RFP Amendments, at 12. Citations are to the pages in the Adobe pdf version of the document provided by the agency.

proposals and made award to the five proposals among this group that were evaluated as technically acceptable. Id. at 3, 47. In this regard, the agency did not evaluate the technical proposals of the 9th lowest-priced offeror or Up-side's proposal, which was the 10th lowest-priced. Id. at 3, 45-46.

On March 12, the agency awarded IDIQ contracts to Joyce, Olympic, Owens, Pyramid, and TE Davis. AR, Tab 10, Notice of Award, at 1. The agency also awarded the seed project to Joyce. Id. After requesting and receiving a debriefing, Up-side protested to our Office.

DISCUSSION

Up-side challenges the agency's evaluation of the awardees' proposals and the agency's responsibility determination for all of the awardees, arguing that all five awardees should have been found unacceptable.³ We have evaluated the protester's arguments and conclude that none provides a basis to sustain; we discuss a few representative examples below.

In reviewing protests challenging an 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. URS Fed. Servs., Inc., supra at 10. 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. See The HP Grp., LLC, supra at 4. An offeror's disagreement with an agency's judgment is insufficient to establish that the agency acted unreasonably. The COGAR Group, Ltd., B-413004 et al., July 22, 2016, 2016 CPD ¶ 189 at 4-5.

By way of example, the protester asserts that the agency's price evaluation and award decisions were flawed because various awardees failed to comply with the RFP requirement to submit a Veterans' Employment and Training (VETS)-4212 Report.⁴ Comments and Supp. Protest at 13. We disagree.

³ The record establishes that there was an intervening offeror, with a price lower than Up-side's but higher than the awardees'. AR, Tab 7, SSEB Report, at 3-4. Since the agency did not make any determination regarding the technical acceptability of the intervening offeror's proposal, our Office cannot conclude that Up-side lacks standing as an interested party to pursue this protest. See 4 C.F.R. § 21.0(a)(1); URS Fed. Servs., Inc., B-412580, B-412580.2, March 31, 2016, 2016 CPD ¶ 116 at 4 n.11; The HP Grp., LLC, B-415285, Dec. 14, 2017, 2017 CPD ¶ 385 at 4.

⁴ The protester represents that each contractor or subcontractor who enters into a contract or subcontract in the amount of \$100,000 or more with any department or agency of the United States for the procurement of personal property and non-personal services (including construction), and who is subject to 38 U.S.C. § 4212(a), must annually report to the Secretary of Labor, by filing the VETS-4212 Report, the number of
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The instructions for the price factor required offerors to submit various information, including, as relevant here, “confirmation of filing [the VETS-4212 Report] within the past calendar year” and a price proposal for the seed project. RFP at 5. With regard to evaluating proposals, the RFP stated that the government would evaluate the total price for the construction work and the seed project for fairness and reasonableness. Id. at 10.

We find no basis to sustain this ground of protest. Here, the RFP instruction required offerors to show “[c]onfirmation of filing [VETS-4212] within the past calendar year.” RFP at 5. In this regard, the RFP did not specifically require submission of the VETS-4212 Report. Id. Accordingly, despite the protester’s assertions to the contrary, the plain language of the RFP shows that the submission of the actual VETS-4212 report to the Navy was not a requirement. See Id. Similarly, the requirement to submit the VETS-4212 Report does not appear in the RFP’s evaluation factor for price, which indicated that an offeror’s total price would be evaluated. See Id. at 10. In this regard, agencies are required to evaluate proposals based on the evaluation factors stated in the solicitation, and even if a solicitation may establish additional information or requirements, those requirements may not be considered in connection with the evaluation of proposals, unless those additional requirements are also specified as a basis for proposal evaluation. See Metis Sols., LLC et al., B-411173.2 et al., July 20, 2015, 2015 CPD ¶ 221 at 5 n.6. Accordingly, we find the agency’s evaluation reasonable.

Additionally, the protester initially argued that the awardees’ “impossibly low” prices for the seed project should have put the agency on notice that the awardees did not understand the requirements of the management approach. Protest at 5. Prior to the submission of the agency report, the agency requested dismissal of this ground, asserting that this argument failed to state a valid basis of protest. As explained below, we agree.

Here, although this challenge is styled as a challenge to the agency’s technical evaluation, it is, in actuality, a price realism argument, i.e., an argument that the agency should have assessed technical risks based on the awardees’ allegedly unrealistically low prices. See NJVC, LLC, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 8 (noting that an allegation that the agency failed to consider the awardee’s low price as part of the agency’s technical analysis is an allegation that the agency failed to conduct a price realism analysis). Where a solicitation contemplates the award of a fixed-price contract, an agency may provide in the solicitation for the use of a price realism analysis for the purpose of measuring a vendor’s understanding of the

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its employees who belong to the categories of veterans protected under the Act and who were hired during the period covered by the report. Comments and Supp. Protest at 13, citing 41 C.F.R. § 61-300.1.

requirements or to assess price risk in its quotation. IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 at 10-11. In the absence of an express price realism provision, we will conclude that a solicitation contemplates a price realism evaluation only where the solicitation expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and the solicitation states that a quotation can be rejected for offering low prices. Dyncorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. As noted above, however, the solicitation here neither provided for a price realism assessment, nor required the agency to consider a vendor's price in the agency's technical evaluation. Accordingly, we dismiss this argument as it does not raise a valid basis of protest. See 4 C.F.R. § 21.1(f) and (i).

Finally, we address Up-side's contention that the agency improperly evaluated Pyramid's proposal under the safety factor.

For the safety factor, offerors were required to submit three elements: (1) the EMR; (2) Occupational Safety and Health Association (OSHA) days away from work, restricted duty, or job transfer (DART) rate and total recordable cases (TRC) rate, and (3) a narrative describing the technical approach for safety. RFP at 7. As relevant here, the RFP required the submission of data from the three previous complete calendar years and allowed for an offeror to submit an insurance company-provided equivalent rate if no EMR exists.⁵ Id. The RFP stated that the agency "[would] not average ratings from the **three** previous complete calendar years for the EMR," and that the agency would consider data trends. Id. at 11 (emphasis in original). The evaluation of the safety factor would collectively consider the three elements, and other sources of information available to the government, and assign an adjectival rating.⁶ RFP at 11-12. In this regard, the RFP stated that the agency would make a subjective evaluation of the safety narrative and a qualitative determination of the rating for safety considering the risk ratings for EMR, DART, and TRC.⁷ Id. at 11.

The record here shows that Pyramid's proposal included a letter, dated February 15, 2018, from its insurance company that provided Pyramid's EMR ratings, by stating "[p]lease accept this letter as verification of [Pyramid's EMR], effective March 24, of

⁵ The rate for EMR compares company's annual losses in insurance claims against its policy premiums. RFP at 7.

⁶ The RFP described other sources of information available to the government as sources that may include, but were not limited to OSHA data, the Navy Facilities Engineering Command's contractor incident reporting system in the Enterprise Safety Applications Management System, contractor performance assessment reporting system, and other related databases. Id. at 13.

⁷ As relevant here, the RFP identified numeric values for the EMR that corresponded to a risk rating, identified from highest to lowest, as extremely high risk, high risk, moderate risk, low risk, and very low risk. Id. at 12.

each year.” AR, Tab 16, Pyramid Technical Proposal, EMR Rating, at 1. The letter then identifies the provided EMR as corresponding to years 2016, 2017, and 2018. Id.

In its evaluation, the agency assessed Pyramid’s EMR as corresponding to years 2015/2016, 2016/2017, and 2017/2018.⁸ AR, Tab 7, SSEB Report, at 22. Based on this interpretation, the agency concluded that the EMR data in Pyramid’s proposal demonstrated moderate risk, and its EMR, DART, TRC, and narrative demonstrated an acceptable commitment to safety. Id. The agency assigned an acceptable rating to Pyramid’s proposal under the safety factor. Id.

Up-side contends that the RFP language required the submission of EMR data from the previous three complete calendar years, i.e., 2015 to 2017, and Pyramid’s submission of data from 2016 to 2018 failed to comply with that requirement and therefore should have resulted in an unacceptable rating. Comments and Supp. Protest at 10. In responding to this challenge, the agency recognizes that offerors were required to submit three previous calendar years’ worth of data for EMR, yet argues that there would be no impact to the agency’s evaluation based on the information Pyramid provided. Supp. Memorandum of Law at 7. The agency continues that “even [accepting] for the sake of argument, the Navy considered improper EMR . . . there

⁸ On June 20, 2019, our Office conducted a status conference with the parties pursuant to 4 C.F.R. 21.10(f) to discuss this issue and provided the parties the opportunity to submit a response, including any relevant documentation. In response, the agency submitted a declaration from the contracting officer that explains how the technical evaluation board interpreted the information from Pyramid’s insurance company. AR, Tab 33, Contracting Officer’s Supplemental Statement of Facts (COSSF), at 1. Id. In this regard, the agency explains that although it recognized that the letter listed EMR data for years 2016 to 2018, the agency interpreted this data as corresponding to years 2015 to 2017. Id. In this regard, the agency explains that because the February 15 letter was dated prior to the March 24 effective date for the policy/rating period, the board interpreted the EMR data to mean that the EMR period for 2015 corresponded to dates March 24, 2015 to March 23, 2016; the EMR period for 2016 corresponded to dates March 24, 2016 to March 23, 2017; and the EMR period for 2017 corresponded to dates for March 24, 2017 to March 23, 2018. Id. Based on this understanding, the agency concluded that Pyramid provided EMR data for 2015/2016, 2016/2017, and 2017/2018 and characterized the data in this manner in the SSEB report. Id. Although we generally give little weight to reevaluations and judgments prepared in the heat of the adversarial process, post-protest explanations that provide a detailed rationale for contemporaneous conclusions and simply fill in previously unrecorded details will generally be considered in our review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. YWCA of Greater Los Angeles, B-414596.7, B-414596.8, Mar. 11, 2019, 2019 CPD ¶ 104 at 8 n.11. Here, the contracting officer’s explanation is credible and consistent with the contemporaneous record.

would be no impact to the evaluation since the findings were moderate risk for all years reported.” Id.

On this record, we conclude that the agency’s evaluation was inconsistent with the terms of the RFP. In this regard, based on the November 2018 closing date, the three prior complete calendar years were January to December of 2015, 2016, and 2017. The record shows that Pyramid’s proposal included EMR data from March 2015 to March 2018, which met the requirement to provide EMR data for calendar years 2016 and 2017. The record also shows that although the RFP required the submission of EMR data for calendar year 2015, i.e., January to December, the agency based its evaluation on EMR data that covered only March to December of 2015. See AR, Tab 7, SSEB Report; Tab 33, COSSF, at 1. In this regard, the agency essentially waived the requirement to submit EMR data by calendar year for 2015, since three months of data for 2015 were not included. Nevertheless, we find that this minor error does not provide a basis to sustain the protest.

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the agency’s evaluation of proposals are found. Technology & Telecomms. Consultants, Inc., B-413301, B-413301.2, Sept. 28, 2016, 2016 CPD ¶ 276 at 14. If there is a discrepancy between the offered product and the stated requirement, where a solicitation sets forth requirements in very specific terms, a deviation may be waived if there is no prejudice to the other offerors and the offered product will meet the agency’s needs. See Palladian Partners, Inc., B-402391, Mar. 25, 2010, 2010 CPD ¶ 80 at 5-6. Even where an agency waives a material solicitation requirement, our Office will not sustain the protest unless the protester can demonstrate that it was prejudiced by the waiver, i.e., that the protester would have submitted a different proposal or quotation or that it could have done something else to improve its chances for award had it known that the agency would waive the requirement. Desbuild, Inc., B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 7.

Here, the agency accepted three previous years of EMR data submitted by Pyramid, and Up-side does not explain how it was prejudiced by the waiver of the “calendar year” aspect of the EMR data submission requirement. In short, Up-side does not assert that it would have done anything differently had it known that the agency would waive the calendar year requirement in evaluating EMR data. We therefore find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel