



Decision

Matter of: DURO Health, LLC

File: B-418582

Date: June 19, 2020

Randy Ziobro for the protester.

J. Bradley Reaves, Esq., and Beth V. McMahon, Esq., ReavesColey, PLLC, for LMR Technology Group, LLC, the intervenor.

Patricia S. Wiegman-Lenz, Esq., Lawrence Anderson, Esq., Beatrice K. Foster, Esq., Kevin P. Stiens, Esq., and Cheronne R. Wilson, Esq., Department of the Air Force, for the agency.

Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging agency improperly evaluated protester's technical proposal, past performance record, and price is denied where evaluation was reasonable and consistent with terms of solicitation.

DECISION

DURO Health, LLC, a small business of Portland, Oregon, protests the failure of the agency to award it a contract under request for proposals (RFP) No. FA4890-18-R-5035, issued by the Department of the Air Force, to provide pre-habilitation support services to fighter aircrew. The protester contends that the technical evaluation team was biased toward a rehabilitative approach, which led to an unreasonable evaluation of the protester's technical proposal, past performance record, and price.

We deny the protest in part, and dismiss it in part.

BACKGROUND

According to the agency, it has experienced difficulty retaining fighter aircrew due to the neck and back pain caused by the physical demands of flight in the Air Force's fighter aircraft. Agency Report (AR), Tab 1, Contracting Officer's Statement (COS) at 2. To address these physical needs and better prepare its aircrew, the agency is implementing a program referred to as "Optimizing the Human Weapon System"

(OHWS). *Id.* The solicitation here, issued in support of the OHWS program, seeks proposals to provide pre-habilitation services to increase the physical capacity of the fighter aircrew, decrease the rate of injuries, and accelerate the return of crew members to duty. COS at 2; AR, Tab 4, Performance Work Statement (PWS) at 42. The solicitation's PWS requires the contractor to provide a total of 63 core and 106 optional full-time equivalent personnel, including 46 core and 30 optional athletic trainers, 3 core and 59 optional certified strength and conditioning specialists, and 15 core and 17 optional massage therapists. COS at 3; PWS at 62-64.

The agency issued the subject solicitation on August 16, 2019 under the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15. AR, Tab 4, RFP at 1. The RFP was set aside for competition among small businesses, and contemplated award of a fixed-price contract with a five-year period of performance. *Id.* at 1. Award was to be made on a best-value tradeoff basis, considering technical approach, past performance, and price. *Id.* The solicitation stated that technical approach and past performance were equally important, and, when combined, were "significantly more important than cost/price." *Id.* at 4. The due date for proposals was September 27, 2019. *Id.* at 3.

As stated above, the solicitation listed three areas to be evaluated: (1) technical, (2) past performance, and (3) price. *Id.* at 5-7. The solicitation instructed offerors to assume that the agency had "no prior knowledge of the Offeror's capabilities." *Id.* at 5.

Under the technical factor, the solicitation required offerors to indicate how they intended to meet two stated criteria. COS at 5; RFP at 6. Criterion One required offerors to develop and provide a fitness program that addressed training preparation, strength development, and cardiovascular health. RFP at 6. The solicitation provided that the agency would evaluate responses under Criterion One to determine whether the proposal demonstrated "a sound understanding and knowledge of neck and back pain injuries, mitigation and prevention." *Id.* at 11. Criterion Two required offerors to indicate how their fitness program would reduce neck and back pain injuries, as well as duty time lost, while increasing the aircrew's retention rate, quality of life, and readiness. *Id.* at 6. The agency would evaluate responses under Criterion Two to determine whether the proposal provided a sound methodology for addressing these issues. *Id.* at 11.

Under the past performance factor, the agency was to assign an overall performance confidence rating based on assessment of the recency, relevancy, and quality of the offeror's past performance. *Id.* The solicitation required offerors to explain what aspects of the contracts they identified as references were relevant to the proposed effort, and the aspects of the proposed effort to which they related. *Id.*

Under the price factor, the agency would use techniques established in FAR 15.404-1 to ensure the price was "fair, reasonable, and balanced." *Id.* at 13. The solicitation also provided that if the agency considered an offer unrealistically low, it might perform a price realism analysis. *Id.*

The agency received ten proposals, including DURO's, prior to the September 27 deadline. COS at 8. The agency's technical evaluation panel convened on October 1, and completed its evaluation on October 8. *Id.* at 8-9. The agency informed DURO that it had selected LMR Technology Group, LLC for award on February 29, 2020. AR, Tab 2, Agency Memorandum of Law (MOL) at 7. On March 9, DURO requested a debriefing, which the agency provided on March 12. *Id.* DURO timely filed its protest with our Office on March 16. Protest at 1.

DISCUSSION

The protester alleges that the agency's evaluators were biased toward a rehabilitative approach, which led the agency to unreasonably evaluate the protester's technical approach, past performance record, and price. For reasons discussed below, we deny the protest in part, and dismiss it in part.¹

In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria, applicable procurement laws, and regulations. *MicroTechnologies, LLC*, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 7-8. A protester's disagreement with the agency's judgment, without more, does not establish that the agency's evaluation was unreasonable. *Palmetto GBA, LLC; CGS Administrators, LLC*, B-407668 *et al.*, Jan. 18, 2013, 2013 CPD ¶ 53 at 16.

Here, DURO contends that the agency's evaluation of DURO's technical approach and past performance was unreasonable for two main reasons. First, DURO alleges the agency unreasonably failed to include the "end-user" in the evaluation process. Comments at 4. Second, DURO argues that the technical evaluation panel improperly valued a rehabilitative approach over a prehabilitative approach. Protest at 2. In support of these arguments, DURO provides a list of "5 Essential Principles" that it argues the agency should have considered when evaluating proposals. Comments at 2-3. DURO also argues that the evaluators did not properly consider benefits of the MedX equipment it intended to use to perform the contract, or its past performance using a MedX-based approach. Protest at 2.

With respect to its first argument, the agency's alleged failure to include the end-user in the evaluation process, DURO is raising, in essence, a challenge to the composition of the agency's technical evaluation panel. The composition of a technical evaluation panel is within the discretion of the contracting agency; our Office will not object to the panel makeup in the absence of evidence of fraud, bad faith, conflict of interest, or actual bias. *Westec Servs., Inc.*, B-204871, Mar. 19, 1982, 82-1 CPD ¶ 257 at 5. DURO alleges that the evaluation panel exhibited bias by "failing to use an acceptable

¹ Although we do not specifically address each of the protester's arguments, we have considered them and find none provides a basis for sustaining the protest.

process to evaluate and rank all offerors.” Resp. to Intervenor’s Comments at 1-2. To prove bias, DURO must submit convincing proof that contracting officials had a specific and malicious intent to harm the protester, since contracting officials are presumed to act in good faith. *Institute of Modern Procedures, Inc.*, B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93 at 6. DURO does not allege, nor does the record support, that such intent existed. Even if DURO were correct that the agency failed to use an “acceptable process,” such a finding fails to show the panel possessed a malicious intent to harm the protester. Therefore, this argument is denied.

Next, DURO’s claim that the agency improperly valued a rehabilitative approach over prehabilitative approach is not supported by the record. The solicitation expressly stated that the objective of the requirement is “to support the OHWS program through prehabilitation,” and indicated that the agency would evaluate proposals based on the offeror’s ability to “provide prehabilitation for all assigned fighter aircrew.” RFP at 1, 45. The protester has furnished no evidence that the agency failed to evaluate its proposal in accordance with the solicitation’s terms. At best, DURO’s challenge amounts to disagreement with the agency’s evaluation. As mentioned above, such a disagreement, without more, does not show the evaluation was unreasonable.² This argument is thus denied.

Furthermore, while DURO asserts that the agency did not fully understand all aspects of its proposal, such as its use of a MedX-based approach, the protester also concedes that it “failed to provide enough detail to facilitate understanding in [its] bid proposal.” Protest at 2. The solicitation expressly instructed offerors to assume that the agency had “no prior knowledge of the Offeror’s capabilities.” RFP at 5. The burden thus rested with DURO is ensure that it properly explained all aspects of its proposal. DURO’s failure to do so does not render the agency’s judgment unreasonable, and this argument is denied.

DURO also asserts that the agency’s technical evaluation had a negative impact on the realism analysis of the protester’s proposed price. Protest at 2. Where the solicitation provides for it, an agency may perform a price realism analysis for the limited purpose of assessing an offeror’s understanding of the solicitation’s requirements and performance risk. *Emergint Techs., Inc.*, B-407006, Oct. 18, 2012, 2012 CPD ¶ 295

² To the extent DURO claims that the agency should have used different evaluation criteria, such as its suggested “5 Essential Principles,” this claim is an untimely challenge to the terms of the solicitation. Challenges to the terms of the solicitation must be brought before the due date for proposals. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. Because DURO did not file this challenge before the due date, we dismiss this challenge.

At 5-6. Here, the agency found DURO's price be realistic. COS at 18. The protester's complaint is therefore without basis, and this argument is also denied.

The protest is denied in part, and dismissed in part.

Thomas H. Armstrong
General Counsel