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Decision

Matter of: Bodell Construction Company

File: B-419213; B-419213.2

Date: December 28, 2020

Stowell B. Holcomb, Esq., Jackson Rosenfield LLP, for the protester.
Stacy Birkel, Esq., Department of the Army, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's evaluation of proposals is denied where record shows agency's evaluation was reasonable and in accordance with the terms of the solicitation and applicable statutes and regulations.
 2. Protest that agency engaged in unequal discussions is denied where record shows agency's discussions were consistent among offerors; an agency is not required to discuss every weakness identified in a proposal that results in the proposal receiving less than the maximum possible score.
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DECISION

Bodell Construction Company, of Salt Lake City, Utah, protests the award of a contract to Nova Group, Inc., of Napa, California, under request for proposals (RFP) No. W9128F-20-R-0056, issued by the Department of the Army, Corps of Engineers, for the replacement of a hydrant fuel system at Ellsworth Air Force Base, South Dakota. Bodell argues that the agency miscalculated its proposal and failed to engage in equal discussions.

We deny the protest.

BACKGROUND

The RFP contemplates the award, on a best-value tradeoff basis, of a fixed-price contract for a type III hydrant fuel system to be installed at Ellsworth Air Force Base, South Dakota. Proposals would be evaluated considering price and three non-price factors: contractor qualifications, past performance, and small business participation plan. Agency Report (AR), exh. 27, RFP at 38-39. Contractor qualifications was the

most important evaluation factor; past performance was the second most important factor; these two factors in combination were approximately equal to price, the third most important factor; and the small business participation plan factor was significantly less important than the first three factors. *Id.* The contractor qualifications factor had two equally weighted subfactors, prime contractor qualifications and subcontractor qualifications.¹ *Id.*

The agency received three proposals, including those of the protester and awardee. After evaluating proposals, engaging in limited discussions, and soliciting, obtaining and evaluating revised proposals, the agency arrived at the following evaluation results:

	Bodell	Nova	Offeror A
Factor 1 Overall	Acceptable	Good	Good
Contractor Qualifications	Acceptable	Good	Good
Subcontractor Qualifications	Acceptable	Good	Good
Past Performance	Relevant Satisfactory Confidence	Very Relevant Substantial Confidence	Very Relevant Substantial Confidence
Small Business Participation	Acceptable	Acceptable	Acceptable
Price	\$20,238,690	\$22,286,500	\$22,723,000

AR, exh. 9, Source Selection Decision Document Addendum, at 3. On the basis of these results, the agency selected Nova for award, concluding that its technically superior proposal offered the best overall value to the government. *Id.* at 8-9. After being advised of the source selection decision and requesting and receiving a debriefing, Bodell filed the instant protest.

DISCUSSION

Bodell takes issue with the agency’s evaluation of its proposal, and also argues that the agency evaluated its proposal disparately as compared to its evaluation of Nova’s proposal. Bodell also contends that the agency’s discussions were not meaningful and also were disparate. We have reviewed all of Bodell’s allegations and have no basis to object to the agency’s evaluation of proposals or conduct of discussions.

¹ The contractor qualifications factor would be assigned ratings of outstanding, good, acceptable, marginal or unacceptable; past performance would be evaluated on the basis of relevancy and assigned ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence or unknown confidence; and the small business participation factor would be rated acceptable or unacceptable. RFP at 37-38, 42. Price would be evaluated for fairness and reasonableness. RFP at 41.

Evaluation of the Bodell Proposal

The record shows that the agency assigned a number of weaknesses to Bodell's proposal, which ultimately resulted in the assignment of an acceptable rating under the contractor experience factor. Bodell's initial protest took issue with virtually every weakness assigned to its proposal under the contractor experience factor, and also alleged that the agency erred in failing to assign several strengths under the same factor.² Bodell also takes issue with the agency's evaluation of its past performance examples, maintaining that the agency should have assigned it a rating of substantial confidence rather than satisfactory confidence.

We have reviewed all of Bodell's evaluation allegations and find that none have merit. 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. *ARES Technical Services Corporation*, B-415081.5, Nov. 4, 2019, 2019 CPD ¶ 378 at 8. We discuss Bodell's principal allegations below.

By way of background, the RFP required offerors to provide two examples of projects completed by the prime contractor that were similar to the solicited project. The agency assigned several weaknesses to Bodell's proposal because its project examples were not similar to the solicited project, or were otherwise lacking. Our review of the record leads us to conclude that all of the assigned weaknesses were reasonably based. We discuss several of Bodell's weaknesses for illustrative purposes.

The agency assigned Bodell's proposal a weakness because one of its project examples was not for the construction of a "type III" hydrant refueling system. AR, exh. 18, Source Selection Board Technical Evaluation Report at 5. The agency explains that there are several features unique to a type III hydrant system that were not part of this example, including that it did not feature a hydrant servicing the aircraft directly through the use of a mobile servicing vehicle or "pantograph" that connects the fuel servicing system directly to the aircraft. AR, exh. 31, Unified Facilities Criteria at 84. In contrast, other systems use a fuel truck that is filled at the fueling system outlet. The truck is then disconnected and transported to the aircraft for refueling.

The record shows that the agency reasonably concluded that one of Bodell's project examples expressly lacks this feature. The proposal, in its entirety, provides the following narrative description of the project:

² In its comments responding to the agency report, Bodell made no further reference to its allegation that the agency failed to assign additional strengths to its proposal. We deem this aspect of Bodell's protest abandoned. *Yang Enterprises, Inc.*, B-415923, Mar. 12, 2018, 2018 CPD ¶ 109. Bodell also alleged in its comments that the agency was biased against the firm. After the agency responded to this aspect of Bodell's protest, Bodell withdrew its bias allegation.

Bodell Construction constructed three fuel storage tanks (100,000 gallon each) in a spill containment basin with piping and *fill stand equipment* for dispensing of Jet-A aircraft fuel from truck tanks and *aircraft refueler trucks* for the receipt [and], storage at Lihue Airport's own fuel depot. Auxiliary structures include a pump shelter, testing facility and canopy for the vehicle load racks. Scope also included installation of a completely new distribution system including equipment canopies, *truck unloading and loading stations*, fully integrated multi-load loading control system, ground verification system, SCADA [supervisory control and data acquisition] system, EFSO [emergency fuel shutoff] system, and a full high expansion foam fire suppression system with alarms located within a high security area to serve the Lihue Airport.

AR, exh. 19. Bodell Technical Proposal at 2 (emphasis supplied). Based on this description, the agency concluded that the system does not employ a hydrant system servicing the aircraft directly through the use of a mobile servicing vehicle or "pantograph" that connects the fuel servicing system directly to the aircraft. Instead, as described, the system uses aircraft refueler trucks and includes truck loading and unloading stations. We therefore have no basis to object to the agency's assignment of this weakness.

As a second example, the agency assigned a weakness to Bodell's proposal because its second project example was only 62 percent complete at the time of proposal submission. AR, exh. 18, Source Selection Board Technical Evaluation Report at 6. While Bodell's initial protest challenged the assignment of a weakness to its proposal based on this project not having been completed, it made no further mention of this weakness in its comments. We therefore conclude that Bodell effectively concedes the propriety of the agency's assignment of a weakness for this reason.³ In light of the discussion above, we have no basis to object to the agency's assignment of the identified weaknesses to Bodell's proposal.

Bodell also argues that it was unreasonable for the agency to have assigned it a satisfactory rating under past performance based on the assignment of a weakness for this same incomplete project described above under the past performance factor.⁴ See AR, exh. 17, Source Selection Decision Document at 9. The source selection authority also noted that both of Bodell's past performance projects exceeded their proposed

³ The agency also assigned a weakness to Bodell's proposal because neither of its project examples included construction of a 10,000 barrel fuel storage tank, and instead included construction of smaller tanks of 2,300 and 2,500 barrels respectively. Bodell's proposal bears out this weakness. AR, exh. 19, Bodell Technical Proposal at 2, 4.

⁴ Offerors were permitted to include up to two examples to demonstrate their prime contractor qualifications, and the RFP advised that these same two examples would be used in the past performance evaluation. RFP at 26, 28.

schedule and cost. *Id.* at 20; AR, exh. 9, Source Selection Decision Document Addendum at 8.

We have no basis to object to the agency's assignment of a weakness to Bodell's past performance in light of the fact that, as noted, the project was only 62 percent complete at the time of proposal submission. In addition, the record shows that both past performance examples exceeded their proposed cost and schedule. AR, exh. 20, Bodell Past Performance Proposal, at 4, 8. Notably, the project that is only 62 percent complete is identified as being almost 9 months behind schedule as of the date of proposal submission. *Id.* at 4. In light of these circumstances, we have no basis to object to the agency's evaluation of Bodell's past performance.

Finally, the record shows that the agency assigned a weakness to Bodell's proposal under the subcontractor qualifications subfactor because certain of its subcontractor's projects had not been in operation over a 3-year period, as required by the RFP. RFP at 27. Bodell does not dispute this finding, but argues that the agency should have assigned a similar weakness to Nova's proposal for the same reason. The agency concedes its error, but also points out that, since Nova's proposal was assigned five strengths--and no other weaknesses--under the subcontractor qualifications subfactor (compared to the two strengths and four weakness identified in Bodell's proposal under the subcontractor qualifications subfactor) its error was not prejudicial to Bodell. AR, exh. 18, Source Selection Board Technical Evaluation Report at 4, 6. We agree.

Prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, our Office will not sustain a protest, even where an agency's actions arguably are improper. *AECOM Management Services, Inc.--Advisory Opinion*, B-417506.12, Sept. 18, 2019, 2019 CPD ¶ 342 at 10. As pointed out by the agency, even with the assignment of a weakness to the Nova proposal under the subcontractor qualifications subfactor, the awardee's proposal remained technically superior compared to the Bodell proposal. Accordingly, while the agency may have erred in failing to assign this same weakness to the awardee's proposal as well as to Bodell's proposal, its actions did not prejudice the protester. We therefore have no basis to object to the agency's evaluation for this reason.

Discussions

Bodell next argues that the agency's discussions were prejudicially unequal, and also not meaningful, because Bodell was not afforded discussions in connection with its contractor qualifications and past performance examples, and was thereby deprived of an opportunity to improve its proposal. Bodell also notes that the discussions that were conducted led to Nova being able to revise its proposal in order to make it acceptable.

The record shows that the agency engaged in limited discussions with the offerors, and those discussions were confined to issues relating to the firms' small business participation plan and price. AR, exhs. 15, 16, Discussions Letters to Bodell and Nova. The record also shows that Nova was able to raise its score under the small business

participation plan evaluation factor from unacceptable to acceptable based on these discussions. AR, exh. 9, Source Selection Decision Document Addendum at 3-4. To the extent Bodell also argues that the agency should have disclosed some of its other evaluated weaknesses, we find no merit to this aspect of Bodell's protest. When agencies engage in discussions, they must be meaningful, equitable and not misleading. *DynCorp International, LLC*, B-417506, B-417506.10, July 31, 2019, 2019 CPD ¶ 338 at 7. While discussions must address deficiencies and significant weaknesses identified in a proposal, they need not be all-encompassing; agencies are not required "spoon-feed" offerors, or to discuss every weakness in a proposal that is found to be technically acceptable, but that receives less than the maximum possible score. *Id.*; *LexisNexis, a Division of RELX Inc.*, B-418885, B-418885.2, Oct. 8, 2020, 2020 CPD ¶ 346 at 8.

First, the record shows that the agency limited discussions with all offerors to issues relating to their proposals in the areas of price and small business participation plan. None of the offerors were afforded an opportunity to make proposal revisions in the areas of contractor qualifications or past performance, even though the record shows that all three offerors had at least some identified weaknesses in these areas. AR, exh. 18, Source Selection Evaluation Board Report at 3, 5, 6, 7.

Second, as noted, the agency found Bodell's proposal acceptable under the contractor qualifications and past performance evaluation factors, and did not identify any significant weaknesses or deficiencies in those areas. While the agency did identify weaknesses in Bodell's proposal under these factors, the agency was not required to discuss those weaknesses. *LexisNexis, a Division of RELX Inc.*, *supra*.

Finally, the protester has not alleged or demonstrated that it would have substituted either of its contractor qualifications (past performance) examples for different examples if given the opportunity to do so. Instead, Bodell argues only that it somehow would have explained the weaknesses identified by the agency in the examples submitted. But as noted, we conclude that the identified weaknesses were reasonable and based on the contents of Bodell's proposal as submitted. It is not apparent how discussions in those areas would have served to materially improve Bodell's proposal under the circumstances, and in light of our discussion above.⁵ We therefore have no basis to object to the agency's conduct of discussions for the reasons advance by Bodell.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁵ For example, as noted, neither of Bodell's two contractor qualifications examples included the construction of 10,000 barrel tanks, and Bodell has made no showing that the agency erred in its conclusion, or that Bodell could have provided other construction examples that would meet the solicitation's requirements.