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Decision

Matter of: Logistics Management Institute

File: B-419219; B-419219.2

Date: December 30, 2020

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DIGEST

1. Protest asserting that agency applied unstated evaluation criteria and unreasonably evaluated protester's proposal is denied where the agency reasonably found that the approach proposed by the protester failed to demonstrate an understanding of the statement of work requirements.
 2. Protest challenging the agency's discussions with the awardee as unequal is denied where the agency was not obligated to conduct discussions with an offeror whose proposal was reasonably found to be unacceptable on the basis of that offeror's failure to understand a significant statement of work requirement.
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DECISION

Logistics Management Institute (LMI), located in Tysons, Virginia, challenges the issuance of a task order to RELI Group, Inc., located in Catonsville, Maryland, under task order request for proposals (TORP) No. RMADA2-TORP-2020-0007, issued by the Department of Health and Human Services (HHS) for compliance support services. LMI contends that the agency unreasonably and unequally evaluated its technical proposal, conducted unequal discussions, and made a flawed best-value determination.

We deny the protest.

BACKGROUND

On June 17, 2020, the agency issued the TORP, which contemplates the issuance of a task order under the Research, Measurement, Assessment, Design, & Analysis (RMADA) 2 indefinite-delivery, indefinite-quantity (IDIQ) contract. The solicitation seeks compliance support services for multiple models of care delivery and payment on behalf of HHS's Center for Medicare and Medicaid Innovation (CMMI). These services cover a broad spectrum of compliance-related activities that include model participant vetting, monitoring, auditing, analytics, and education and outreach. Agency Report (AR), Tab 1, Contracting Officer's Statement (COS) at 2. The following models were included within the scope of this task order: the Direct Contracting Model (DC), the Primary Care First Model (PCF), the Kidney Care Choices Model (KCC), and the End-Stage Renal Disease Treatment Choices (ETC) Model. *Id.* at 3.

The TORP anticipated the issuance of a cost-plus-fixed-fee task order with a 12-month base period and five 12-month option periods. AR, Tab 4, TORP at 1. The agency stated that it intended to make award without conducting discussions. *Id.* To determine the awardee, the solicitation stated that HHS would make a "best-value determination award to the highest technically rated offeror(s) that also demonstrate fair and reasonable pricing, using trade off, if deemed necessary or applicable in order to make such a best value assessment." *Id.* at 11. In addition to evaluating cost and conflicts of interest, the solicitation anticipated the evaluation of three equally rated factors: technical approach, management plan, and personnel. *Id.*

For the technical approach factor, the agency would evaluate the offeror's understanding of the statement of work (SOW), nuances specific to the particular effort, and any possible challenges that the offeror might face and proposed solutions to overcoming those challenges. *Id.* For the management plan factor, the agency would evaluate each offeror's demonstrated ability to manage all aspects of the proposed effort including: technical performance, time and delivery constraints, quality of work, cost, communications, and any subcontractors. *Id.* For the personnel factor, the agency would evaluate each offeror's proposed staffing levels and skill mix to assess competency and whether the offeror had proposed appropriate time dedication, and relevancy of experiences, to the work required by the SOW. *Id.*

HHS received three proposals in response to the solicitation, including the proposals of LMI and RELI. The agency evaluated the proposals, but did not assign an adjectival rating for each evaluation factor. Instead, HHS assigned overall ratings for each proposal. Based on this evaluation, the agency found only RELI's proposal to be technically acceptable overall.

For LMI's proposal, the agency found that LMI had proposed a flawed approach that resulted in three significant weaknesses. COS at 15. Two of these significant weaknesses led to LMI's solution being rated technically unacceptable. *Id.* These two significant weaknesses stemmed from LMI's proposal of an insufficient number of targeted audits for the PCF model and an insufficiently low number of audits for the ETC

model. AR, Tab 8, Technical Evaluation Panel (TEP) Report at 8-9. The agency also assessed a third significant weakness with respect to LMI's proposed level of effort for certain functional leads, but this weakness was not relied upon in the agency's technical unacceptability determination. COS at 14.

On September 23, HHS notified LMI of the issuance of the task order to RELI in the amount of \$44,342,013. This protest followed.¹

DISCUSSION

The protester challenges the agency's evaluation of LMI's and RELI's proposals, its exchanges with RELI, and its best-value determination. With respect to its evaluation challenges, LMI contends that the agency unreasonably and unequally evaluated LMI's proposal, unreasonably evaluated RELI's technical proposal, and improperly found LMI's proposal to be technically unacceptable overall. The protester also argues that HHS engaged in unequal discussions by conducting two rounds of exchanges with RELI without providing LMI with discussions. The protester further asserts that the agency improperly rated its proposal as technically unacceptable overall and improperly excluded it from the agency's best-value determination. As discussed below, we find the protester's arguments to be without merit.²

Technical Evaluation

LMI challenges two significant weaknesses assessed in its proposal under the technical approach factor. In this respect, the agency found that LMI proposed an insufficient number of audits for the PCF and ETC models to meet the requirements of the SOW, and that accepting this low level would result in an "unacceptable risk to the model team." AR, Tab 8, TEP Report at 8-9. The protester notes that the solicitation did not contain a requirement for a specific number of audits to be performed, and that the SOW instead stated that the "sample, frequency, and function[ing] of the auditing will be determined by CMS and the [c]ontractor" in two post-award deliverables, the project

¹ Because the awarded value of the task order exceeds \$10 million, this protest is within our jurisdiction to consider protests of task orders placed under civilian agency IDIQ multiple award contracts, in this case CMS's RMADA 2 contract. See 41 U.S.C. § 4106(f)(1)(B).

² While we do not address in detail every argument raised by the protester, we have reviewed each issue and do not find any basis to sustain the protest. For example, we dismissed LMI's challenge to the technical evaluation of RELI's proposal as improperly premised on speculation since it relied on unsupported assertions about RELI's past performance to challenge the agency's evaluation of RELI's technical capabilities. We noted further that the solicitation did not provide that the agency's technical evaluation would consider offerors' past performance. Since this protest ground failed to provide the detailed statement of the legal and factual basis required under our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f), we dismissed it as legally insufficient.

plan and the standard operating procedure. AR, Tab 3B, SOW at 9. In support of its position, the protester points to the agency's response to a vendor question, in which HHS indicated vendors should "propose an approach to auditing based on their expertise and experience in compliance support of health care models and programs, as well as the totality of the information provided in the SOW and the CMMI model websites (including Requests for Applications (RFA), Frequently Asked Questions documents, webinars, and for ETC, Notice of Proposed Rule Making (NPRM))." AR, Tab 5A, Questions & Answers at 13. LMI argues that since the solicitation and the SOW did not require the performance of a particular number of audits for the PCF and ETC models, the agency's findings that LMI had proposed an insufficient number of audits amounted to the application of unstated evaluation criteria.

The evaluation of technical proposals is a matter within the agency's discretion. *Acquisition Servs. Corp.*, B-409570.2, June 18, 2014, 2014 CPD ¶ 197 at 7. In reviewing an agency's evaluation, we will not reevaluate technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. *Technology & Telecomms. Consultants, Inc.*, B-415029, Oct. 16, 2017, 2017 CPD ¶ 320 at 3. While agencies are not permitted to use unstated evaluation factors in evaluating quotations, an agency properly may take into account specific matters that are logically encompassed by, or related to, the stated evaluation criteria, even when they are not expressly identified as evaluation criteria. *Camber Corp.*, B-413505, Nov. 10, 2016, 2016 CPD ¶ 350 at 5.

Here, we find that the agency properly assessed significant weaknesses based on LMI's approach to auditing the PCF and ETC models. Contrary to the protester's argument, the evaluation record does not demonstrate that these significant weaknesses were the result of a mechanical determination that the proposed audit levels missed an undisclosed internal benchmark; rather, the record shows that they were assigned because LMI proposed an approach that significantly deviated from the one contemplated by the SOW. The SOW reflected the importance of audits to performing the work at issue, noting that "[a]udits will help determine if patient complexity levels, quality, and utilization scores can be substantiated, which will test the alternative payment structure and risk stratification methodology." AR, Tab 3B, SOW at 10; COS at 10. The PCF RFA, one of the background sources to which the agency directed offerors, further supported the importance of audits, stating that they "help mitigate financial and beneficiary vulnerabilities and risks associated with the professional [population based payments], flat visit fee[s], and [performance-based adjustments]." AR, Tab 10, PCF RFA at 48.

Despite the importance placed on audits by the SOW, for the PCF model, LMI proposed only [DELETED] quality and care delivery (QCD) audits per year, which represents only [DELETED] percent of PCF practices. AR, Tab 8, TEP Report at 8. In addition, LMI proposed to conduct only [DELETED] medical record review (MRR) and beneficiary outreach protocol (BOP) audits per performance year, which was only [DELETED] percent of PCF practices. *Id.* For the ETC model, the agency found that LMI proposed

only “[DELETED] audits’ for the life of the contract (including the base year and option years 1-5).” *Id.* at 9.

We find that the agency acted reasonably in questioning the protester’s approach of performing a minimal number of audits. Although the ultimate frequency of audits was to be decided after award, the agency reasonably determined that LMI’s approach demonstrated a lack of understanding of the role the agency envisioned audits would play during contract performance. *Id.* at 8-9. We therefore conclude that the agency acted reasonably in assessing significant weaknesses for this approach. While the protester argues that its experience on predecessor models demonstrates that audits are ineffective and burdensome, we find this explanation to be largely absent from LMI’s proposal and, more importantly, to be inconsistent with the importance placed on audits by the SOW.

The protester also argues that the agency unequally evaluated proposals by assigning LMI the above significant weaknesses. In this respect, the protester contends that there is a *de minimis* difference between the number of audits it proposed and the number proposed by RELI. The protester also contends that HHS defined the term “audit” differently for the two offerors. The protester contends that for RELI, the agency defined an audit to include methods used to cull the number of audits, including its audit sampling methodology. For LMI, the protester contends, the agency did not similarly define an audit to include LMI’s compliance and monitoring strategy, which LMI relied upon to reduce the number of audits it proposed.

Where a protester alleges that an evaluation is the product of unequal treatment, the protester must show that the difference in the evaluation result was, in fact, the result of unequal treatment, rather than differences in the offerors’ proposals. *See Beretta USA Corp.*, B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 6. Here, we find that the difference in the evaluation was the result of differences in the offerors’ proposals.

In this regard, we note that RELI proposed a different auditing approach than LMI, with RELI proposing significantly more potential audits than LMI. For example, for the PCF model, LMI proposed conducting [DELETED] QCD audits, [DELETED] MRR audits and [DELETED] BOP audits. AR, Tab 7B, LMI Business Proposal at 5. RELI, on the other hand, proposed to audit between [DELETED] percent of practices within each PCF group, using a method (the [DELETED] method) in which RELI would randomly select [DELETED] records and audit the first [DELETED]. AR, Tab 13A, RELI Technical Proposal at 19. If issues were found in those records, then RELI would review the remaining [DELETED] records. *Id.* If no issues were found in those [DELETED] records, then RELI would not review the remainder of the records. *Id.* We find that this approach, which could potentially result in the auditing of [DELETED] percent of practices, was substantially different from the approach proposed by LMI, which was to audit, at most, a fraction of that amount.

Similarly, we disagree with LMI’s contention that the two offerors proposed similar methods for culling the number of audits needed. In this regard, both offerors proposed

fundamentally different audit plans, with RELI proposing the [DELETED] method as a way to conduct targeted audits on as many as [DELETED] percent of practices and LMI proposing to conduct a minimal number of audits. While LMI sought to justify its audit plan by noting its compliance and monitoring strategy, we see this as dissimilar to RELI's plan to use audit sampling as a method to potentially reduce the number of audits. Ultimately, these were two different proposal approaches, and we find no reason to question the agency's judgment that LMI's approach, which did not provide for anything beyond minimal auditing, was less advantageous than RELI's approach, which could increase the number of audits being performed if warranted.

In addition to challenging these two significant weaknesses, LMI argues that the agency unreasonably assessed a significant weakness with respect to LMI's personnel mix and two weaknesses with respect to LMI's technical approach and proposed personnel.³ We have reviewed these challenges but do not find that they rise beyond disagreement with the agency's considered evaluation judgment.

For example, the agency found a significant weakness in LMI's personnel/skill mix due to LMI's proposal of [DELETED] functional leads (for compliance, data analytics, and education and outreach), each of which would have only [DELETED] percent of their time assigned to the contract. AR, Tab 8, TEP Report at 12. LMI contends that this significant weakness was unreasonable because, in addition to the functional leads, LMI proposed a project manager to be [DELETED] percent dedicated to the contract and four model leads to be [DELETED] percent dedicated; according to the protester, these individuals were "completely ignored in the AR." Comments and Supp. Protest at 17. The protester contends that as a group, these personnel represented the equivalent of [DELETED] full-time equivalents (FTEs) serving in project leadership positions, and therefore it was unreasonable for the agency to fault LMI for proposing three functional leads dedicated only [DELETED] percent to the contract.

The record shows that the agency evaluators recognized that LMI had proposed these other personnel, even assigning LMI's proposal strengths for them; however, these personnel were proposed to serve in other capacities (e.g., as model leads), rather than as functional leads. See AR, Tab 8, TEP Report at 10-11. Ultimately, we see no basis to question the agency's judgment that LMI proposed an insufficient amount of time for the personnel proposed to serve as the functional leads, who would be responsible for overseeing compliance, data analytics, and education and outreach.

Unequal Discussions

The protester contends that the agency engaged in unequal discussions by conducting discussions with RELI to fix issues in its proposal but not similarly conducting discussions with LMI. In this respect, the agency requested additional information

³ In response to these challenges, the agency notes that these weaknesses were not prejudicial since, unlike the two significant weaknesses noted above, they were not the basis for LMI's technical rating of unacceptable.

regarding RELI's technical approach for SOW tasks 6.3 and 6.3a and RELI's approach to managing its subcontractor. Supp. COS at 1. After this request, the agency engaged in a second set of what it refers to as "interchanges" with RELI after separately identifying two errors in RELI's cost proposal, specifically that two of RELI's indirect rates exceeded its IDIQ umbrella ceiling rates. *Id.* at 2. HHS asked RELI to provide an explanation or to adjust its proposal to conform to its indirect rate ceiling. *Id.* at 2.

In response to this protest ground, the agency asserts that the interchanges were clarifications and not discussions. HHS further argues that even if the interchanges were discussions, it was not obligated to conduct discussions with LMI because LMI's proposal was technically unacceptable and had already been eliminated from further consideration.

The "acid test" for deciding whether discussions have been held is whether it can be said that an offeror was provided an opportunity to revise or modify its proposal. *Allied Tech. Group, Inc.*, B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 6. When an agency does conduct discussions, it may limit the competitive range to only the most highly rated proposals and need not conduct discussions with offerors outside the competitive range. *See Priority One Servs., Inc.*, B-415201.2, B-415201.3, Apr. 13, 2018, 2018 CPD ¶ 182 at 9. Where a proposal is technically unacceptable as submitted and would require major revisions to become acceptable, the agency is not required to include the proposal in the competitive range. *Laboratory Sys. Servs., Inc.*, B-256323, June 10, 1994, 94-1 CPD ¶ 359 at 5.

Here, we find that the interchanges conducted with RELI amounted to discussions since the agency invited RELI to revise its proposal by providing new rate information and new technical approaches. This new information added to or revised the proposal, rather than simply clarifying it.

Despite these discussions, however, we find that the agency was not obligated to conduct discussions with LMI, because HHS had already eliminated LMI's proposal from further consideration for award. *See* Supp. COS at 2. In this respect, due to the two significant weaknesses noted above, the agency found LMI's proposal technically unacceptable based on LMI's failure to understand the SOW requirements. *Id.* at 3. Although the protester disagrees with this assessment, and contends that its proposal could have been easily corrected during discussions, we find no reason to question the agency's judgment that these weaknesses were significant enough to warrant the elimination of LMI's proposal from further consideration for award.

Best-Value Determination

Last, the protester contends that it was unreasonable for the agency to rate LMI technically unacceptable on the basis of the two significant weaknesses noted above since the agency did not assess any deficiencies in LMI's proposal. The protester argues that the absence of deficiencies means its proposal met all material requirements of the solicitation and should have been rated acceptable. The protester

further asserts that its proposal should have been included in a best-value tradeoff determination.

Here, the solicitation did not define an unacceptable rating or provide definitions for findings of deficiency or a significant weakness. The solicitation did indicate that an offeror's failure to demonstrate an understanding of the SOW requirements would result in a proposal being found unacceptable, stating that "[p]roposals that merely restate the requirements in the scope of work without providing substantive descriptions of the planned requirement will be considered technically unacceptable and will not be eligible for award." TORP at 4. As noted above, we find that the agency reasonably concluded that LMI's audit plan demonstrated a lack of understanding regarding an important SOW requirement. We therefore find no merit in the protester's argument that the labeling of these concerns as significant weaknesses, rather than deficiencies, precluded the assignment of an unacceptable rating. See *Network Runners, Inc.; Appteon, Inc.*, B-413104.26, B-413104.27, Mar. 18, 2019, 2019 CPD ¶ 123 at 10 (citing the Federal Acquisition Regulation 15.001 definition of "significant weakness" to reject a similar argument).

Since we find that HHS reasonably determined that LMI's technical proposal was unacceptable, we conclude that the agency was under no obligation to consider the proposal in its best-value determination. See *The McHenry Mgmt. Grp., Inc.*, B-409128 *et al.*, Jan. 23, 2014, 2014 CPD ¶ 56 at 5 (proposals rated technically acceptable are precluded from award).

The protest is denied.

Thomas H. Armstrong
General Counsel