

Decision

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Matter of: Fisher Sand & Gravel Company

File: B-419238

Date: January 7, 2021

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DIGEST

1. Protest that technical evaluation was unreasonable because the ratings assigned differed from ratings assigned by different evaluators under a different solicitation fails to state a valid basis for protest.
 2. Protest challenging agency's best-value tradeoff determination is denied where the determination was reasonable, consistent with the terms of the solicitation, and adequately documented.
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DECISION

Fisher Sand & Gravel Company, of Dickinson, North Dakota, protests the Department of the Army, Corps of Engineers' award of a task order to Southwest Valley Constructors Company (SWVC), pursuant to request for proposals (RFP) No. W9126G20R0087, for the design and construction of approximately 13 miles of border barrier in Laredo, Texas.¹ Fisher protests the agency's evaluation of Fisher's proposal under the non-price evaluation factors, and asserts that the agency failed to reasonably perform and/or document its best-value tradeoff determination.

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

¹ The procurement is titled the "Laredo North Design-Build Border Infrastructure Project" and generally referred to as "Laredo North." Agency Report (AR), Tab 3, RFP at 1, 4.

BACKGROUND

On July 31, 2020, the agency issued the solicitation to “all Eastern MATOC [multiple-award task-order contract] holders.”² AR, Tab 1, Contracting Officer’s Statement at 1. The solicitation contemplated the award of a fixed-price design-build task order, and provided that award would be based on a best-value tradeoff between the following evaluation factors: risk mitigation plan;³ management plan;⁴ small business participation;⁵ and price. AR, Tab 3, RFP at 18. The solicitation provided that the risk mitigation and management plan evaluation factors were of equal importance; the small business participation factor was the least important; and the non-price factors combined were approximately equal in importance to price. *Id.*

On or before the August 28, 2020 closing date, proposals were submitted by six offerors, including Fisher and SWVC. Thereafter, the proposals were evaluated by the agency’s source selection evaluation board (SSEB) and source selection advisory council (SSAC). The final ratings, as reflected in the SSAC’s report to the source selection authority (SSA), were as follows.⁶

² Eastern MATOC holders provide design and construction services for the U.S. Army Corps of Engineers Southwestern Division, which supports the Department of Homeland Security’s border infrastructure program. AR, Tab 11, Source Selection Advisory Council (SSAC) Report, at 1.

³ Under this factor, each offeror was directed to identify the risks associated with the task order requirements and how the offeror planned to mitigate those risks. *Id.* at 20. The solicitation further advised that, a plan that “demonstrates a proactive approach to mitigating risks . . . [and is] more specific and detailed may receive a higher adjectival rating.” *Id.*

⁴ Under this factor, each offeror was directed to provide a plan for coordinating the use of labor, resources, subcontractors, and material suppliers, and specifically directed to “[i]dentify the key subcontractors (to include the designer of record (DOR) and describe how you will: manage subcontractors [and] supervise subcontractors.” *Id.*

⁵ Under this factor, the solicitation established goals for various types of small business subcontractors; provided that the agency would evaluate the “[e]xtent of commitment to use such firms”; and stated that “enforceable commitments will be considered more favorably than non-enforceable ones.” *Id.* at 22.

⁶ In evaluating proposals under the non-price factors, the agency assigned ratings of outstanding, good, acceptable, marginal, or unacceptable. Of relevance here, a rating of good, was assigned to a proposal that indicated “a thorough approach [to] and understanding of” the requirements/objectives, and a rating of acceptable was assigned to a proposal that reflected an “adequate approach [to] and understanding of” the requirements/objectives. *Id.* at 18-19.

	Risk Mitigation Plan	Management Plan	Small Business Participation	Price
Fisher	Acceptable	Acceptable	Good	\$175,000,000
SWVC	Good	Good	Acceptable	\$208,550,000

AR, Tab 11, SSAC Report at 26.

In its report, the SSAC summarized and compared Fisher's and SWVC's proposals, stating, among other things, that:

Fisher Sand & Gravel Co. (Fisher) has the lowest priced proposal, \$175,000,000, and Southwest Valley Constructors Co. (SWVC) has the most highly ranked technical proposal, but their price proposal is \$33,550,000 (\$208,550,000) more than Fisher's. The Technical Factors 1 & 2 are of equal importance and more important than Factor 3 [small business participation] The narrative SWVC provided in Factor 1 [risk mitigation] significantly exceeds the other Offerors. . . . SWVC also clearly considered and identified risks specific to this project. They are the only Offeror that discussed risks such as [redacted]. These identified risks and how SWVC intends to mitigate them, increase the Government's confidence that SWVC will be able to overcome the construction challenges and complexities in these areas. Fisher did not discuss or consider these two important risks, or any other risks that were specific to this project (other than the general reference to [redacted]), and the SSAC is concerned that this may impact the Government. SWVC's Factor 1 proposal is superior to Fisher's.

In addition to having a stronger Factor 1 proposal, SWVC also had a much stronger Factor 2 [management plan] proposal. As noted above, SWVC's organization chart clearly showed the management hierarchy, they are [redacted], and they are [redacted]. SWVC clearly communicated its management plan, and appears to have spent time considering ways to manage the project to ensure successful performance. In contrast, Fisher's Factor 2 proposal was less clear about their approach and provided only a few sentences about the [redacted]. While Fisher's response met the minimum requirements of the RFP, it did not provide much detail. Due to the details presented and the strengths identified for SWVC, the Government has a much greater amount of confidence in SWVC's management plan.

Fisher does have a slightly better Factor 3 proposal for small business participation due to having several higher socioeconomic goals than provided

in the RFP. . . . [However, Fisher] did not provide letters of commitment, so it is not assured that they will exceed the RFP's socioeconomic goals. . . .

While Fisher has a slightly stronger Factor 3 proposal, Factor 3 is less important than Factors 1 and 2, which are of equal importance, and which are the most important technical factors. SWVC provided a much stronger proposal for Factors 1 and 2. Even though SWVC is not the lowest price, the SSAC considers the benefits detailed in their technical analysis [to] lower their risk of unsuccessful performance, and therefore warrant the additional cost of about \$33.6M. SWVC is the only Offeror that demonstrated a thorough approach and understanding of the requirements and [was] determined to have low risk of unsuccessful performance in the two most important factors. The SSAC determines [SWVC's] proposal provides the overall best value to the Government.

AR, Tab 11, SSAC Report at 33-34.

Thereafter, the SSA reviewed and summarized the evaluation record created by the SSEB and SSAC. Based on that review, the SSA adopted the SSAC's analysis and conclusions, stating:

After careful consideration of the technical and price proposals, the SSA concurs with the SSAC analysis and determination that [SWVC's] proposal provides the overall best value to the government.

AR, Tab 12, Source Selection Decision Document (SSDD) at 13-14.

On September 28, Fisher was notified that the agency had selected SWVC for award. This protest followed.

DISCUSSION

Fisher challenges the agency's evaluation of Fisher's proposal under the non-price factors and asserts that the agency failed to reasonably perform and/or document its best-value tradeoff determination. As discussed below, we find no basis to sustain the protest.

Evaluation of Fisher's Proposal

First, Fisher complains that, because the agency assigned higher ratings to a proposal Fisher previously submitted "on a nearly identical border wall solicitation,"⁷ the agency's

⁷ Fisher elaborates that the agency assigned "superior evaluations for those same factors in a nearly identical proposal for Solicitation No. W9126G20R0086 Laredo (continued...)

assignment of ratings under this solicitation (Laredo North) was unreasonable. Protest at 6. In this context, Fisher complains that both procurements “were administered by the same contracting officer”; were “for construction of border barrier in Laredo, Texas”; and “had similar, if not the exact same scope of work.” *Id.* at 6-7. Fisher further states that it submitted “nearly identical” proposals in response to the two solicitations, and that the proposal it submitted for Laredo South received higher ratings under the risk mitigation and management plan evaluation factors. On this basis, Fisher asserts that a “fair evaluation” of its proposal under the risk mitigation and management plan evaluation factors in the Laredo North procurement could only have resulted in ratings of, “at [a] minimum,” good. *Id.* at 4-5.

The agency first responds that the two procurements were conducted under separate solicitations; were for different portions of the border; and each had its own source selection team. Specifically, the contracting officer states: “Each procurement had a different Source Selection Evaluation Board (SSEB), a different Source Selection Advisory Council (SSAC), and a different SSA.” Declaration of Contracting Officer, Oct. 23, 2020, at 1. The agency further notes that both Fisher and SWVC received higher technical ratings under the Laredo South procurement than under the Laredo North procurement, stating that “[r]ather than evidence of impropriety, the differences in the ratings appear to be a result of ‘easy graders’ versus ‘hard graders,’ with no impact on the relative ratings between the offerors.” Agency Request for Dismissal, Oct. 23, 2020, at 4 n.1. Accordingly, the agency maintains that Fisher’s complaints regarding the non-price ratings it received in the Laredo North procurement fail to state a valid basis for protest. We agree.

As a general matter, the technical evaluation of an offeror’s proposal is a matter within the agency’s discretion, and a protester’s disagreement with the agency’s judgments does not establish that the evaluation was unreasonable. See, e.g., *IPlus, Inc.*, B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 12; *VT Griffin Servs., Inc.*, B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4. We have repeatedly recognized that individual evaluators may reasonably reach differing conclusions and assign different technical ratings, since both objective and subjective judgments are involved in technical evaluations; accordingly, ratings assigned by evaluators under one solicitation are not generally probative regarding the reasonableness of ratings assigned by different evaluators under a different solicitation. See *AdvanceMed Corp.*, B-415360 *et al.*, Dec. 19, 2017, 2018 CPD ¶ 4 at 4-7; *Nat’l Gov’t Servs., Inc.*, B-401063.2 *et al.*, Jan. 30, 2012, 2012 CPD ¶ 59 at 4-7; but see *C/GNA Gov’t Servs., LLC*, B-401062.2, B-401062.3, May 6, 2009, 2010 CPD ¶ 283 at 13-14 (recognizing a limited exception in situations involving evaluations of identical proposals under a single solicitation by a common source selection board and SSA).

(...continued)

South, Design/Build construction of 24 miles of border barrier.” Protest at 6. That procurement is generally referred to as “Laredo South.”

Here, the facts do not fall within the limited exception established in C/GNA. As noted above, the Laredo North and Laredo South procurements were conducted under separate solicitations, and each procurement had its own source selection team; that is, there were different SSEBs, SSACs, and SSAs for the two procurements. On this record, we reject Fisher's assertion that the ratings its proposal received under the Laredo South procurement constituted benchmarks against which the reasonableness of the ratings assigned under the Laredo North procurement should be considered. Accordingly, Fisher's challenge to the agency's evaluation of its proposal fails to state a valid basis for protest and is dismissed.⁸

Best-Value Tradeoff Determination

Next, Fisher protests that the agency's best-value tradeoff determination was unreasonable, contrary to the terms of the solicitation, and/or inadequately documented. More specifically, Fisher complains that the agency "failed to give sufficient consideration to price"; maintains there were only "minor technical differences" between the two proposals;⁹ and asserts that the agency "failed to identify" sufficient benefits associated with SWVC's proposal to justify its higher price, describing the record as reflecting the agency's "surface level comparison" and "conclusory analysis." Protest at 9-12; Protester's Comments, Nov. 16, 2020, at 5-9.

The Army responds that the agency specifically considered the magnitude of SWVC's price premium, along with the relative importance of the evaluation factors, but concluded that multiple beneficial aspects of SWVC's technical proposal warranted the price premium. AR, Tab 2, Memorandum of Law at 5-9; see SSAC Report at 33-34; SSDD at 13-14. The agency further responds that, rather than a "surface level" comparison" of the two proposals, its contemporaneous evaluation record reflects an in-depth, qualitative analysis in which the agency discussed the relative merits of each proposal, considered the applicable weights of the evaluation factors, and determined that the "substantial qualitative differences" between the two proposals warranted the price premium. AR, Tab 2, Memorandum of Law at 5, 7.

For example, the agency notes that, SWVC's proposal contained a detailed discussion of the specific risks associated with the Laredo North procurement, including "the [redacted]," and the necessity of [redacted] for this area; the potential for [redacted]; and the need to [redacted]. See AR, Tab 11, SSAC Report at 28-29. In contrast, the

⁸ Fisher also complains that the agency "fail[ed] to account for Fisher's . . . border wall experience" in evaluating its proposal. Protest at 6. As the agency points out, the solicitation did not establish experience as an evaluation factor. AR, Tab 2, Memorandum of Law, at 4 n.2. Accordingly, this complaint also fails to state a basis for protest and is dismissed.

⁹ Fisher asserts that the difference between a rating of good and acceptable is "not significant." Protest at 10-11.

agency notes that Fisher’s proposal primarily addressed risks that “are common to all the Border Wall Projects.” *Id.* at 28.

Similarly, the agency notes that SWVC’s management plan fully disclosed its management hierarchy along with its approach to managing subcontractors, including the provision of [redacted]. See AR, Tab 10, SSEB Report at 17; AR, Tab 11, SSAC Report at 23. In contrast, the agency notes that Fisher’s management plan met the solicitation requirements, but provided little detail. See AR, Tab 11, SSAC Report at 30.

In short, the agency maintains that it reasonably determined, consistent with the terms of the solicitation, that the value of the technical strengths in SWVC’s proposal warranted a \$33.6 million (19.2%) price premium, and that this determination was adequately documented. AR, Tab 2, Memorandum of Law at 5-11.

Source selection officials in best-value procurements have broad discretion in making price/technical tradeoffs, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the solicitation’s evaluation criteria. *PricewaterhouseCoopers LLP, IBM U.S. Federal*, B-409885 *et al.*, Sept. 5, 2014, 2014 CPD ¶ 289 at 20. More specifically, an agency may select a higher-priced proposal that has been rated technically superior to a lower-priced proposal where the award decision establishes a reasonable basis for concluding that the technical superiority warrants the price premium. See, e.g., *DKW Communications, Inc.*, B-411182, B-411182.2, June 9, 2015, 2015 CPD ¶ 178 at 5.

In this context, the source selection decision must be adequately documented. However, there is no requirement to document every consideration factored into the tradeoff decision, nor is there a requirement to quantify the benefits provided by a higher-priced higher-rated proposal. See *Terex Gov’t Programs*, B-404946.3, Sept. 7, 2011, 2011 CPD ¶ 176 at 3; *SBG Tech. Sols., Inc.*, B-410898.9, B-410898.12, Jun. 21, 2016, 2016 CPD ¶ 199 at 5. Rather, the requirement for adequate documentation is met where the record establishes that the selection official was aware of the relative merits and costs of the competing proposals. *Gen. Dynamics Information Tech., Inc.*, B-415568, B-415568.2, Jan. 25, 2018, 2018 CPD ¶ 63 at 12; *Wyle Labs., Inc.*, B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 11.

Here, based on our review of the record, we reject Fisher’s assertions that the agency’s best-value tradeoff was unreasonable, inconsistent with the terms of the solicitation, or inadequately documented. As discussed above, the agency’s contemporaneous evaluation record reflects the agency’s in-depth consideration of the relative merits of the competing proposals, including the various benefits reflected in SWVC’s proposal with regard to the risk mitigation and management plan evaluation factors. In this context, the agency considered and documented the basis for its assessment that SWVC’s proposal reflected substantial qualitative advantages over Fisher’s proposal, and Fisher’s protest has provided no meaningful challenge to the agency’s technical assessments.

Further, we find no basis to question the agency's determination that the evaluated strengths in SWVC's proposal warranted its associated price premium, and we reject Fisher's assertion that the determination was inadequately documented. As discussed above, the SSEB and SSAC performed and documented a comprehensive comparison and analysis of the competing proposals; thereafter, the SSA reviewed the evaluation record and concurred with the SSAC's conclusions and recommendations. As also noted above, an SSA's discretion in making price/technical tradeoffs, and the extent to which one may be sacrificed for the other, is governed only by the tests of rationality and consistency with the solicitation's evaluation criteria. Further, the requirement for adequate documentation of a best-value tradeoff is met where the record establishes that the SSA was aware of the relative merits and associated costs of the competing proposals. Here, those standards were met. Accordingly, Fisher's protest challenging the agency's best-value determination is without merit.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel