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Decision

Matter of: APC Construction, LLC

File: B-419771

Date: July 13, 2021

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DIGEST

Protest of an agency's evaluation of the protester's phase one proposal and the agency's decision to exclude the protester from phase two is denied where the agency's evaluation was reasonable, and in accordance with the solicitation's evaluation criteria and the design-build procedures of Federal Acquisition Regulation subpart 36.3.

DECISION

APC Construction, LLC, a small business of Harvey, Louisiana, protests its exclusion from consideration for award under request for proposals (RFP) No. W9127818R0003, a two-phase design-build solicitation issued by the Department of the Army, Corps of Engineers (Corps), for design, repair, and construction support for military construction projects in the south region of the Corps's Mobile District. The protester contends that the Corps could not exclude APC from phase two of the competition because the protester's proposal was found to be acceptable under phase one.

We deny the protest.

BACKGROUND

The Corps issued the RFP as a total small-business set-aside on May 21, 2020, under the two-phase design-build procedures of Federal Acquisition Regulation (FAR) subpart 36.3. Contracting Officer's Statement (COS) at 1, 3. The RFP contemplated award of indefinite-delivery, indefinite-quantity (IDIQ), multiple-award task order contracts (MATOCs) for 5-year terms to the offerors whose proposals were determined

to represent the overall best value to the government, using a tradeoff process.¹ Agency Report (AR), Tab 5, RFP at 46.² Task orders would be competed among the IDIQ contract holders, with the total value up to \$200 million for the entire pool of contracts. *Id.*, Statement of Work § 1.2 at 341.

Under phase one of the competition, offerors were required to submit proposals to address the following evaluation factors, listed in descending order of importance: (1) past performance information of the prime contractor; (2) overall management approach; and (3) quality control approach. RFP at 18. The solicitation notified offerors that under this phase, pricing information was not required, nor would it be considered. *Id.* at 17 (“In Phase One, price is not a submission requirement.”). The agency advised that it intended to select up to 10 offerors with the most highly rated phase one proposals to participate in phase two. *Id.*

The agency received 46 phase one proposals, including one submitted by APC. AR, Tab 11, Phase One Down Select Document at 1, 3. APC was rated satisfactory confidence for past performance; acceptable for overall management approach; and good for quality control approach. *Id.* at 60-62, 125, 140. Based on the agency’s evaluation, the source selection authority ranked APC as 21 of the 46 offerors. *Id.* at 150. The source selection authority selected only the top eight offerors to advance to phase two. *Id.* at 151.

On March 31, 2021, the agency notified APC that it was not selected as one of the most highly rated offerors to participate in phase two of the competition. AR, Tab 12, Unsuccessful Offeror Notification. After receiving a debriefing, APC filed this protest. See AR, Tab 14, Pre-award Debriefing.

DISCUSSION

The protester argues that the agency is not permitted to eliminate APC from phase two of the competition without considering price. The protester also challenges the agency’s evaluation of its phase one proposal under every evaluation criterion. For the reasons explained below, we deny APC’s protest.

Selection of Offerors to Participate in Phase Two

The protester first argues that the agency was obligated to advance APC to phase two of the competition because the agency found APC’s proposal technically acceptable

¹ The agency amended the solicitation once, but the changes were administrative and not relevant to the protest issues. See Memorandum of Law (MOL) at 2.

² The solicitation, provided as Tab 5 of the agency report, does not have consecutively labeled page numbers. Citations to the solicitation are to the pdf page numbers of Tab 5.

during phase one, and price was neither requested nor evaluated at that phase. Protest at 9. Specifically, APC asserts that the agency established a competitive range by selecting offerors to continue to phase two. *Id.* at 10. To support this proposition, APC cites to decisions from our Office stating that, in procurements conducted pursuant to FAR part 15, an agency cannot exclude a technically acceptable proposal from the competitive range without considering cost/price.³ *Id.* at 9-10. The protester argues that these cases govern the result here even though APC acknowledges that the solicitation was conducted under the procedures of FAR subpart 36.3, asserting that there is nothing unique about those procedures that would make the cases inapposite here. Comments at 2-3. The agency defends that the rule invoked by the protester is inapplicable to phase one of a FAR subpart 36.3 procurement, asserting that selecting only the most highly rated offerors to advance to phase two is not equivalent to establishing a competitive range. MOL at 11-12; COS at 3. We agree.

Under FAR subpart 36.3 procedures, the evaluation of phase one proposals does not permit the consideration of cost or price as an evaluation factor. FAR 36.303-1(a)(2)(iii). Rather, the contracting officer selects the most highly qualified offerors--based only on non-price factors--to submit phase two proposals. FAR 36.303-1(b). Consistent with these procedures, price proposals are submitted by offerors and evaluated by the agency at phase two.⁴ FAR 36.303-2(b).

Only phase two of a design-build procurement is conducted in accordance with FAR part 15, including the evaluation of technical and price proposals. FAR 36.303-2; *see also Intercontinental Constr. Contracting, Inc., B-415040 et al.*, Nov. 8, 2017, 2018 CPD ¶ 82 at 5 (reiterating that FAR part 15 procedures do not apply to phase one of the design-build selection procedures). In other words, the selection of a limited number of offerors from phase one of a FAR subpart 36.3 competition to continue to phase two does not constitute, and is not equivalent to, the establishment of a competitive range. *See Intercontinental Constr. Contracting, Inc., supra* at 5-6 (distinguishing the selection of offerors for phase two in a FAR subpart 36.3 competition from the establishment of a competitive range).

Here, consistent with the procedures of FAR subpart 36.3, the RFP did not provide for the submission or evaluation of price proposals until phase two of the procurement. RFP at 17-18. Although the agency reserved the right to establish a competitive range to conduct discussions as part of phase one, it also cautioned that the agency intended to make a determination of offerors for participation in phase two without discussions.

³ In procurements conducted pursuant to FAR part 15, before an agency enters into discussions with offerors, it “shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency” pursuant to a separate subsection. FAR 15.306(c)(1).

⁴ The two-phase design-build selection procedures described in FAR subpart 36.3 are authorized under section 2305a of title 10 and section 3309 of title 41 of the United States Code. FAR 36.300.

Id. at 27 (“The Government intends to make a determination of Offerors for participation in Phase Two based on initial Phase One proposals without holding discussions.”).

The record reflects that the agency did not establish a competitive range. See AR, Tab 11, Phase One Down Select Document at 1, 25. Instead, the agency evaluated the 46 proposals received at phase one--according to the solicitation’s stated evaluation criteria--and selected eight offerors to continue to phase two. *Id.* When making this selection, the agency did not consider price, nor could it have; the solicitation and applicable procedures under FAR subpart 36.3 prohibited the agency from doing so. RFP at 17-18; FAR 36.303-1(a)(2)(iii). As discussed earlier, FAR part 15 did not apply to this down selection. See *Linc Gov’t Servs., LLC*, B-404783.2, B-404783.4, May 23, 2011, 2012 CPD ¶ 128 at 7 (denying protest that offeror was not included in discussions held with only certain phase one offerors in FAR subpart 36.3 procurement because FAR part 15 procedures do not apply). Because the agency did not establish a competitive range by selecting offerors to proceed to phase two, the requirements to establish a competitive range do not apply. In short, the agency was permitted to make the selection without considering price.

The protester also argues, in the alternative, that “the establishment of a competitive range is not necessary for the rule that a technically acceptable proposal cannot be eliminated without the consideration of price,” citing *Kathpal Technologies, Inc.; Computer & Hi-Tech Management, Inc.*, B-283137.3 *et al.*, Dec. 30, 1999, 2000 CPD ¶ 6. Comments at 3-4. Our decision in *Kathpal* involved a procurement conducted under FAR part 15. There, we sustained the protest because the agency eliminated offerors from further consideration for award without considering price, contrary to the terms of the solicitation. *Kathpal Techs., Inc.*, *supra*, at 10. In *Kathpal*, our Office reached this conclusion in a context other than the elimination of offerors from a competitive range. *Id.* at 11. Thus, APC argues that our decision in *Kathpal* stands for the proposition that no agency may eliminate a technically acceptable offeror from further competition under any circumstances. Comments at 3-4. Specifically, APC argues that the agency here was not permitted to eliminate any technically acceptable offeror from proceeding to phase two. *Id.* The agency requests that our Office dismiss this argument as untimely because it was clear from the solicitation that price would not be considered in the selection of offerors for phase two. Req. for Dismissal at 2-3.

In response to the request for dismissal, the protester acknowledges that the solicitation did not provide for the evaluation of price proposals during phase one, and simply reasserts its argument about the competitive range. Resp. to Req. for Dismissal at 2-3. The protester again frames the allegation as an issue of the competitive range, arguing that the solicitation did not state that the agency would exclude a technically acceptable proposal from the competitive range established for phase two. *Id.* at 2-3. As discussed above, it is simply inaccurate to characterize the selection of offerors for phase two of a design-build procurement as the establishment of a competitive range. Moreover, our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting

or delaying the procurement process. *Logistics Mgmt. Inst.*, B-417601 *et al.*, Aug. 30, 2019, 2019 CPD ¶ 311 at 14. Under these rules, a protest based upon apparent improprieties in a solicitation shall be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(2).

Here, the RFP stated that price was not a submission requirement for phase one, and that “[n]on-priced proposals [would] be evaluated in Phase One to determine which [o]fferors will submit proposals for Phase Two.” RFP at 17. The RFP further specified that “[b]ased on the results of phase one, the Government intends to select a maximum of ten (10) of the most highly rated Offerors to participate in the Phase Two competition,” and “reserve[d] the right to reject any and/all offers.” *Id.* The solicitation made clear that price would not be evaluated in phase one and that offers could be rejected before moving to phase two. APC was therefore required to protest this alleged solicitation defect before the deadline for receipt of proposals. 4 C.F.R. § 21.2(a)(1); see *URS Fed. Servs., Inc.*, B-412580, B-412580.2, Mar. 31, 2016, 2016 CPD ¶ 116 at 5. An offeror simply cannot wait until after contract award to challenge the ground rules by which it elects to compete. *Veterans2Work, Inc.*, B-416935, Jan. 9, 2019, 2019 CPD ¶ 54 at 5; *DynCorp Int’l LLC*, B-415349, Jan. 3, 2018, 2018 CPD ¶ 12 at 9. As APC did not raise this challenge until April 23, 2021--nearly a year after the June 22, 2020, closing date--it is untimely and will not be considered further.

Phase One Evaluation Factors

Next, the protester challenges the agency’s evaluation of its proposal under the phase one evaluation factors. In filing and pursuing this protest, APC has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester’s arguments and conclude that none furnishes a basis on which to sustain the protest.

Past Performance Factor

Under the past performance factor, the agency evaluated six of APC’s seven past performance references as relevant or somewhat relevant, and assessed one reference--Hangar Building 125 Upgrades/Repairs at Naval Air Station Jacksonville, Florida--as not relevant. AR, Tab 9, Proposal Analysis Report (PAR) at 73-76. Based on its analysis of how well APC performed on the six relevant and somewhat relevant references, the agency assigned the protester an overall rating of satisfactory confidence for the past performance factor. *Id.*

The protester challenges the agency’s finding that the Hangar Building 125 reference was not relevant. Protest at 11-12. Specifically, the protester argues that the reference met the solicitation’s definition for a relevant project, and the agency nonetheless discounted the project as not relevant because it did not meet certain characteristics that the solicitation identified as preferred, but not mandatory. *Id.* The agency responds its evaluation was reasonable and consistent with the solicitation because the Hangar

Building 125 project did not reflect the scope and complexity of the work anticipated under the solicitation. MOL at 15; COS at 3-4.

When a protester challenges an agency's evaluation of past performance, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and with procurement statutes and regulations. *All Points Logistics, Inc.*, B-407273.53, June 10, 2014, 2014 CPD ¶ 174 at 10-11. An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion that we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. *PricewaterhouseCoopers Public Sector, LLP*, B-415504, B-415504.2, Jan. 18, 2018, 2018 CPD ¶ 35 at 10-11. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. *Sterling Med. Assocs., Inc.*, B-418674, B-418674.2, July 23, 2020, 2020 CPD ¶ 255 at 8.

According to the solicitation, the agency would review past performance to assess the "degree of probability that the [o]fferor will be able to meet the solicitation's requirements." RFP at 24. The agency began with an evaluation of the relevance of each past performance reference to assign a past performance relevancy rating of very relevant, relevant, somewhat relevant, or not relevant. *Id.* at 23. The solicitation advised that a relevant past performance reference is "one that is similar in scope (type, size, complexity and dollar value) to the project types described in this solicitation," with a dollar value between \$4 million and \$18 million. *Id.* at 19. It also specified "[f]or a project to be assessed any degree of 'relevancy' it must reflect performance of design, repair, and construction requirements as described by this solicitation." *Id.* Further, the RFP identified that "more consideration" would be given in the relevancy assessment for projects that reflected the following characteristics: (1) military construction; (2) primary location within the Corps's Mobile District Area of Responsibility; (3) dollar value similar to those anticipated under the solicitation; and (4) performance as the prime contractor rather than a subcontractor.⁵ *Id.* at 23.

The record here shows that the agency determined that the Hangar Building 125 reference, for which APC performed "the excavation, deep foundations, underground utilities, subsurface utilities, storm drainage, concrete construction installations, demolitions, and design and installation of the cofferdam structure" as a subcontractor, was not relevant. AR, Tab 9, PAR at 73-74. The technical evaluators identified several reasons for that conclusion, which was later reviewed and adopted by the source selection authority:

This project was considered "not relevant", because it reflected little to none of the aspects of the solicitation requirements. The design-bid-build

⁵ The solicitation also provided that more consideration would be given to "a project portfolio that reflects successful performance of a diversity of construction and repair type projects similar to those described by this solicitation." RFP at 23.

project was for the hangar upgrades and repairs at [Naval Air Station] Jacksonville that included repairs and alterations of roads, parking lots, retaining walls, and drainage improvements. The project scope included tanks, concrete slabs, utilities, trench drains, asphalt, and cranes. The Board did not assign a higher degree of relevancy because the [o]fferor performed as the subcontractor as opposed to the prime as compared to the solicitation. Furthermore, the project was limited in disciplines and the [o]fferor only performed the horizontal construction portions of the project. The scope and complexity of the work demonstrated is not reflective of the type of work anticipated under this solicitation.

Id. at 74; AR, Tab 11, Phase One Down Select Document at 9.

APC asserts that the agency's evaluation was unreasonable because the project "reflected the type of work required by the Solicitation, namely that it was (1) part of a full range of construction, namely a design-bid-build repair project; (2) was for the repair of a hangar, *i.e.*, an airfield structure; (3) included paving; and (4) was for the military." Comments at 5-7. From this assertion, APC concludes that "it appears the Agency discounted the project in its entirety because APC performed the work as a subcontractor instead of as a prime contractor." *Id.* at 7. We disagree.

Here, the agency found, and documented, multiple reasons supporting its conclusion that this particular past performance reference for APC was not relevant to the work to be performed under the solicitation. AR, Tab 9, PAR at 73-74. APC's claim that the agency's decision was based solely on APC's role as a subcontractor is simply unsupported by the record. Although the agency did identify APC's role as a subcontractor as one reason underlying the relevancy assessment, the agency also identified that "the project was limited in disciplines and the [o]fferor only performed the horizontal construction portions of the project" and that "[t]he scope and complexity of the work demonstrated is not reflective of the type of work anticipated under this solicitation." *Id.* at 74; AR, Tab 11, Phase One Down Select Document at 9.

APC does not demonstrate--or argue--that these assessments were incorrect; instead, APC asserts that the project should have been deemed at least somewhat relevant because the project involved at least some of the work contemplated by the solicitation. Comments at 5-7. The record reflects that the agency's evaluation was consistent with the terms of the solicitation; as such, we find nothing objectionable with the agency's assessment that this particular past performance reference was not relevant. The protester's disagreement with the agency's judgment, without more, does not establish that the evaluation was unreasonable. *Sterling Med. Assocs., Inc., supra* at 8.

Overall Management Approach Factor and Quality Control Approach Factor

The protester also contends that the agency's evaluations of its proposal under the overall management approach factor and the quality control approach factor were unreasonable. Specifically, the protester asserts that APC's proposal included

additional features that were “not rationally accounted for in the [a]gency’s evaluation” as strengths under each factor.⁶ Protest at 12-18. For example, APC asserts that the agency should have awarded a strength under the management approach factor because of APC’s experience with IDIQ MATOCs, and that the agency should have awarded an additional strength under the quality control approach factor because APC’s proposal stated that each subcontractor would be required to designate an on-site quality control representative. *Id.* at 14, 17. The agency asserts that the features the protester identifies do not represent benefits under the solicitation’s evaluation criteria, meaning that the protester is merely disagreeing with the agency’s documented evaluation judgments. MOL at 16-19; COS at 4-5.

When reviewing a protest challenging an agency’s evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency’s discretion. *Cognosante MVH, LLC*, B-418986 *et al.*, Nov. 13, 2020, 2021 CPD ¶ 3 at 4. Rather we will review the record to determine whether the agency’s evaluation was reasonable and consistent with the solicitation’s evaluation criteria and with applicable procurement statutes and regulations. *Id.*; *Quantech Servs., Inc.*, B-417347, B-417347.2, May 29, 2019, 2019 CPD ¶ 203 at 7. A protester’s disagreement with the agency’s judgment, without more, is insufficient to establish that the agency acted unreasonably. *Id.*; *PricewaterhouseCoopers Public Sector, LLP*, *supra* at 6.

In particular, an agency’s judgment of whether to assess unique strengths is a matter within the agency’s discretion and one that we will not disturb where the protester has failed to demonstrate that the evaluation was unreasonable. *See Lukos, LLC*,

⁶ APC also argues that, based on the solicitation’s definitions of acceptable and moderate risk, the agency should have assigned APC a higher rating than acceptable under the overall management approach factor. Protest at 15-16. APC quotes the solicitation’s definition of acceptable as including “risk of unsuccessful performance is no worse than moderate” and the definition of moderate risk as including a significant weakness or combination of weaknesses. *Id.* APC argues that an acceptable rating is inconsistent with the agency’s assessment in not identifying any weaknesses in APC’s overall management approach proposal. *Id.*

We need not address APC’s arguments here, because we agree with the agency; the solicitation defined acceptable as including “risk of unsuccessful performance is **no worse than** moderate,” there is nothing inconsistent with the assignment of an acceptable rating to a proposal without weaknesses. MOL at 17-18 (quoting RFP at 25). The protester fails to state a valid basis of protest because the allegation, as asserted, does not establish the likelihood the agency violated applicable procurement laws or regulations. Therefore, this allegation is dismissed. 4 C.F.R. §§ 21.1(c)(4) and (f); 4 C.F.R. § 21.5(f); *see also Computer World Servs.*, B-417356, May 16, 2019, 2019 CPD ¶ 185 at 4 (dismissing protest allegation that protester should have received better adjectival rating based on the agency’s assessment of “no worse than moderate risk” as factually and legally insufficient because “the terms of the solicitation provided for the rating assigned based on the evaluation”).

B-416343.2, Aug. 13, 2018, 2018 CPD ¶ 282 at 8 (finding that agency is not required to assign additional strengths where its evaluation was reasonable). Further, an agency is not required to document every single aspect of its evaluation or explain why a proposal did not receive a strength for a particular feature. See *22nd Century Techs., Inc.*, B-417336, B-417336.2, May 24, 2019, 2019 CPD ¶ 198 at 5; *InnovaSystems Int'l, LLC*, B-417215 *et al.*, Apr. 3, 2019, 2019 CPD ¶ 159 at 10.

The agency evaluated proposals under the overall management approach factor “to assess the [o]fferor’s overall organizational structure, self-performance, management of subcontractors, and safety plan to ensure it reflects an understanding of the requirements of the solicitation.” RFP at 24. Under the quality control approach factor, the solicitation provided for evaluation of “the quality control approach narrative for clarity, adequacy, capabilities and understanding of the [o]fferor’s quality program, tools to achieve design and construction excellence, and managing quality control for the entire design and construction including subcontractors.” *Id.* at 25.

For the management approach evaluation factor, the agency did not identify any strengths or weaknesses in APC’s proposal, and assigned an adjectival rating of acceptable. AR, Tab 9, PAR at 76. For the quality control approach factor, the agency identified a strength in APC’s proposal associated with APC’s description of the tools it uses on every project to achieve design and construction excellence, including two specific programs that the agency assessed would improve accuracy, design, and construction. *Id.* The agency assigned APC an adjectival rating of good. *Id.*

In its comments on the agency report, APC insists that the “numerous areas in its proposal” that APC described in its protest “provided a benefit to the Agency” and should have been considered strengths under the overall management approach and quality control approach factors. Comments at 8-11. Rather than expounding on these proposal features, APC argues that “the record shows that the Agency hardly evaluated APC’s proposal at all,” asserting that the agency “does not explain why APC’s proposal merited an Acceptable rating and not a higher rating” under overall management approach. *Id.* at 8-10. While acknowledging that the agency identified a strength associated with APC’s quality control approach proposal, APC makes the same argument about that factor, claiming that the evaluation is “only a cursory recitation of the Solicitation definition of the assigned technical rating” and the agency “does not further explain why APC did not receive a higher rating or additional Strengths for the numerous other benefits provided in APC’s proposal.” *Id.* at 10-11.

The record here reflects that the agency reasonably evaluated APC’s proposal and documented its evaluation conclusions. See AR, Tab 9, PAR at 76; AR, Tab 11, Phase One Down Select Document at 115-16, 125, 134-135, 140. The protester claims, for example, that it should have received a strength under the overall management approach factor because “[a]ll of APC’s [quality control] Managers have [DELETED]” and have [DELETED]. Protest at 14. The protester does not explain why it was unreasonable for the Corps to not assign a strength for the asserted experience and qualifications of APC’s proposed personnel now under the overall management

approach factor, which was to address overarching quality control approach and requirements, and the offeror's strategy for managing subcontractors. See RFP at 22. This is particularly true when the Corps intends to evaluate the qualifications of key personnel under a separate evaluation factor (key management personnel experience and qualifications) during phase two. See *id.* at 39.

In sum, the protester does not explain how the agency's evaluation was inconsistent with the stated evaluation criteria. APC's arguments reflect its view regarding the merits of its proposal, but they do not demonstrate an improper evaluation. In this regard, a protester's disagreement with an agency's evaluation judgments do not establish that the evaluation was unreasonable. *Vertex Aerospace, LLC*, B-417065, B-417065.2, Feb. 5, 2019, 2019 CPD ¶ 75 at 8.

The protest is denied.

Thomas H. Armstrong
General Counsel