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Decision

Matter of: McGoldrick Construction Services Corporation

File: B-409252.2

Date: March 28, 2014

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DIGEST

Protest that agency used an unstated evaluation criterion in assessing a significant weakness in protester's proposal is sustained where the agency's evaluation was inconsistent with the solicitation's stated requirement concerning quality control managers.

DECISION

McGoldrick Construction Services Corporation, of San Antonio, Texas protests the decision of the Department of the Army, Corps of Engineers, to exclude its proposal from the competition under request for proposals (RFP) No. W9126G-13-R-0017, for construction services at Fort Hood, Texas. McGoldrick challenges the agency's evaluation of its technical proposal.

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

BACKGROUND

On February 26, 2013, the Corps issued the solicitation seeking design-build firms for construction and maintenance at the Department of Public Works and Central Texas Area Office, located at the Fort Hood Army installation, Killeen, Texas. RFP, amend. 0003, at 4. The procurement was a small-business set-aside under North American Industry Classification System Code 236220, Construction, with a small business size standard of \$33.5 million in annual revenue. RFP at 3. The solicitation anticipated the award of at least two, but no more than ten, fixed-price,

multiple-award indefinite-delivery, indefinite-quantity task-order contracts (MATOCs), for one base year and two option years. RFP, amend. 00003, at 4, 22.

The procurement was conducted pursuant to Federal Acquisition Regulation (FAR) subpart 36.3, two-phase, design-build selection procedures. RFP, amend. 0003, at 4. During phase 1, the solicitation stated that the government would evaluate the qualifications of proposals, and select up to ten (or more if “warranted”) of the phase 1 offerors to compete in phase 2 of the competition. Id. The RFP explained that the phase 1 proposals would be evaluated based on the following two factors, which were equal in importance: (1) past performance, and (2) organization and technical approach. Id. at 5. As relevant here, the organization and technical approach factor required that offerors describe their resources and capabilities “to manage and execute several concurrent Task Orders, which may be located throughout the Southwestern Division and surrounding areas.” Id. at 9.

Under phase 2, the RFP provided for award on a best-value basis, considering five factors: (1) past performance, (2) organization and technical approach, (3) design technical, (4) summary schedule, and (5) price. Id. at 23. All factors, other than price, when combined, were to be considered significantly more important than price. Id. The solicitation explained that, after award, the MATOC contractors will be provided with opportunities to compete for task orders, but that the contractors will not be required to submit proposals for every RFP issued under the MATOC. Id. at 36.

Phase 1 Proposal Submission and Evaluation

The Corps received proposals from 56 offerors, including McGoldrick, for phase 1 of the competition. Contracting Officer (CO) Statement at 2. After evaluating proposals, the technical evaluation team rated McGoldrick’s proposal substantial under the past performance factor, and marginal under the organization and technical approach factor. Protest, Exh. B, Unsuccessful Offeror Letter (Oct. 22, 2013), at 1.

After assigning adjectival ratings to all phase 1 proposals, the agency divided the phase 1 proposals into groups based on the ratings. Id. The highest-rated group included twelve proposals, all of which received an overall rating of substantial/good.¹ CO Statement at 2. The next highest-rated group contained seven proposals, all with overall substantial/acceptable ratings. Id. The third highest rated group included 18 proposals with overall ratings of substantial/marginal or satisfactory/good. Id. After reviewing the source selection

¹ The substantial rating represented the offerors’ ratings under the past performance factor, and the good rating represented the offerors’ ratings under the organization and technical approach factor.

evaluation board (SSEB) report and the proposals, the source selection authority (SSA)² concluded that all twelve proposals in the most-highly rated group would advance to phase 2 of the procurement. CO Statement at 2.

On October 22, the Corps notified McGoldrick that its proposal was not among the most highly-rated phase 1 proposals, and that it would not be included in phase 2 of the competition. Id. McGoldrick requested a debriefing, which it received on October 24. As relevant here, the written debriefing explained that, under the organization and technical approach factor, McGoldrick's proposal was assessed seven strengths, three weaknesses, one significant weakness, and one uncertainty. Agency Report (AR), Tab 20, Initial Protest (Nov. 12, 2013), Exh. C, Debriefing, at 5-6. Specifically, the weaknesses and significant weakness were described as follows:

Weaknesses

6.1.3. [O]fferor does not clearly demonstrate specific familiarity with applicable codes and local conditions to the geographic region. A general statement the DB team has done multiple projects is not demonstrated in examples.

6.1.4. (Collaborative Approach for Design-Build). Offeror provide[s] little-to-no description on the role and interaction of the design team with the construction team during construction, addressing, shop drawing and submittal reviews and approvals; progress meetings; site visits, if any; contract completion, closeout and completion documentation.

6.1.5. (Planning and Scheduling). Offeror provide[s] little-to-no discussion on internal procedures for handling delays to minimize "schedule creep."

[Significant Weakness]

6.1.7. and subparagraphs. (S) Offeror cites a [DELETED] staff, [DELETED] of which are currently fulltime in the field. [A]lso cites \$[DELETED] in tools, plant, equipment, and cites [DELETED] projects on-going. Though offeror states they have expanded at times to between [DELETED] men, the [DELETED], of which [DELETED] is field staff, is their base field crew and would represent a limit on the supervising, [quality control] (QC), [site safety and health officer]

² The contracting officer for this procurement was also the SSA. CO Statement at 2.

(SSHO) field staff they would be able to use to readily address executing several concurrent task order[s] throughout the Ft Hood Geographic Area. Depending on size and duration of task orders this staff cited could quickly have more than they can address as most construction contract actions require supervisor QC, SSHO to be on site. Although offeror describes their resources in personnel and equipment, offeror provide[s] little-to-no description on their capabilities to support this project concurrently with other projected on-going or new work.

Id. at 4.

GAO Protest, Corrective Action, and Reevaluation

On November 12, McGoldrick protested to our Office the agency's evaluation of its proposal and decision to exclude its proposal from phase 2 of the competition. This protest was docketed as B-409252. In its protest, McGoldrick challenged as unreasonable all of the weaknesses and the significant weakness assessed to its proposal under the organization and technical approach factor. As a result of the protest, the Corps took corrective action, which included a reevaluation of McGoldrick's proposal for phase 1 of the competition.

After reevaluating McGoldrick's proposal, the technical evaluation team removed one of the weaknesses, and revised the phase 1 adjectival rating under the organization and technical approach factor from marginal to acceptable.³ AR, Tab 19, Debrief Letter (Dec. 17, 2013), at 1. The reevaluation did not result in the removal of the other two weaknesses or of the significant weakness. Id. at 7-8.

The Corps provided McGoldrick with a written debriefing on December 17, which explained that, as a result of the reevaluation, McGoldrick's rating under the organization and technical approach factor changed from marginal to acceptable. Id. The agency also explained, however, that because McGoldrick's proposal was still not among the most highly rated phase 1 proposals (i.e., did not receive overall ratings of substantial/good), McGoldrick would not be included in phase 2 of the competition. AR, Tab 18, Unsuccessful Offeror Letter (Dec. 18, 2013), at 1. This protest followed.

³ Specifically, during the reevaluation, the agency found that the technical evaluation team had not evaluated certain reports that demonstrated McGoldrick's familiarity with applicable codes and local conditions as required by the RFP. AR, Tab 16, CO Reevaluation Memo, at 2. The reevaluation included consideration of these reports, which resulted in the removal of one of the weaknesses. Id. at 7.

DISCUSSION

McGoldrick argues that the Corps' evaluation of its phase 1 proposal under the organization and technical approach factor was unreasonable.⁴ For the reasons discussed below, we find the agency's evaluation under the organization and technical approach factor was unreasonable, and sustain the protest on this basis. We deny the remaining protest grounds.⁵

Technical Evaluation

McGoldrick protests the Corps' evaluation of its phase 1 proposal under the organization and technical approach factor, challenging the agency's assessment of one significant weakness and two weaknesses under this factor. With regard to the significant weakness, McGoldrick argues that the agency unreasonably concluded that McGoldrick did not demonstrate a capacity to take on new task orders based on the agency's evaluation of the protester's quality control (QC) managers. In this regard, McGoldrick essentially argues that the agency applied an unstated evaluation criterion in its technical evaluation by applying a stricter standard in

⁴ McGoldrick also argues that the agency unreasonably permitted three offerors to proceed to phase 2 of the competition when the agency knew, or should have known, that the offerors were other than small businesses. The protester contends that information from USASpending.gov concerning contract awards to these firms, shows that the three offerors have revenues in excess of the \$33.5 million cap for this procurement. The Small Business Act gives the Small Business Administration (SBA), not our Office, the conclusive authority to determine matters of small business status for federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1) (2014). A limited exception applies where a protester argues that the awardee's quotation shows, on its face, that the awardee is not eligible for award as a small business; we will review the reasonableness of the contracting officer's decision not to refer the matter to the SBA. See Hydroid LLC, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20 at 3. Here, the contracting officer states that the offerors represented on the System for Award Management website that they were small businesses, CO Statement (Feb. 20, 2014), at 2, and the protester does not allege that anything on the face of these offerors' proposals should have led the contracting officer to question these representations. We therefore dismiss this basis of protest.

⁵ Initially, McGoldrick also challenged the agency's past performance evaluation of another offeror, arguing that the offeror did not have any relevant past performance experience, and therefore, should not have received a past performance rating of substantial confidence. The protester, however, did not further discuss this contention in its comments responding to the agency report, and we therefore deem this issue abandoned. See International Mgmt. & Commc'ns Corp., B-272456, Oct. 23, 1996, 96-2 CPD ¶ 156 at 2-3 n.2.

evaluating McGoldrick's proposal than the solicitation required. As for the other two weaknesses, McGoldrick asserts that the agency ignored information in its proposal that addressed the agency's concerns. For the reasons discussed below, we conclude that the agency's assessment of the significant weakness was unreasonable and inconsistent with the RFP's stated evaluation criteria, and sustain the protest on this basis. With regard to the other two weaknesses, we find no basis to question the agency's evaluation.

The evaluation of an offeror's proposal is a matter within the agency's discretion. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4; IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing an agency's evaluation, we will not reevaluate the proposals, but will examine the record of the evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. Carothers Constr., Inc., B-403382, Oct. 28, 2010, 2010 CPD ¶ 268 at 6. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, undocumented, or not reasonably based. DRS ICAS, LLC, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 4-5.

Evaluation of the Significant Weakness

As relevant here, under the organization and technical approach factor, the solicitation required that offerors describe their resources and capabilities "to manage and execute several concurrent Task Orders," and stated that the agency would evaluate an offeror's "capacity to successfully accomplish the task orders throughout the Southwestern Division and surrounding areas along with other ongoing work, and multiple task orders, all in a timely manner." RFP, amend. 0003, at 9, 11.

McGoldrick's proposal stated it presently has [DELETED] personnel, including [DELETED] QC managers, and [DELETED] superintendents.⁶ AR, Tab 13, McGoldrick Technical Proposal, at 65, 75. In response to the RFP requirement regarding concurrent task orders, McGoldrick's proposal stated the following:

We presently have a fulltime staff at Ft Hood on Ft Worth District Corps of Engineers contracts available to execute Task Orders consisting of [DELETED] completing a project in July 2013 and

⁶ Although McGoldrick's proposal includes more than [DELETED] QC managers, the additional QC managers come from McGoldrick's subcontractors' resources, and therefore, were not included in the consideration of McGoldrick's resources as the prime contractor. See AR, Tab 13, McGoldrick Technical Proposal, at 65.

[DELETED] and [DELETED] completing their project in April 2013. Our current workload elsewhere consists of three projects completing in April 2013 (less than \$[DELETED] work remaining) staffed with [DELETED] QC Managers and [DELETED] superintendents. We have two small contracts starting in April 2013 totaling approximately \$[DELETED]. We have staff available and bonding capacity for over \$[DELETED] for new work.

In the past we have performed on Government contracts ranging from White Sands, NM to Corpus Christi in South Texas to Beaumont near East Texas/Louisiana border. This MATOC will be limited to Ft Hood Texas per the RFP where we presently have a full [DELETED] person staff available.

AR, Tab 13, McGoldrick Technical Proposal, at 75.

The agency assessed a significant weakness because the protester “has not shown they can address executing several concurrent task orders.” AR, Tab 15, SSEB Evaluation Report Addendum, at 3. The evaluators explained the rationale for this conclusion as follows:

Offeror cites only [DELETED] QCs on staff They state they have jobs ending in April and July, with 2 starting in April, at that time until July, they show no capacity to take on new task order[s] as all [DELETED] QCs are then occupied (April through July they add two contracts with [DELETED] ongoing through July, 3 contracts [DELETED] QCs) A QC employed by the Prime must be present on a jobsite during construction or work may not be performed, so they have presented a condition showing at times they have no available capacity to take on a new task order.

Id.

In its response to the protest, the Corps points to the RFP’s quality control requirements, which state that “either the QC System Manager, or his designated representative for the task order site, must be on site at all times during construction.” Supp. AR (Feb. 7, 2014), at 1. Based on this requirement, the agency contends, it reasonably assessed a significant weakness because QCs must be on site at all times, the protester has only [DELETED] in-house QC managers, and the protester’s proposal indicated that the managers would be occupied with other work through July. Id. at 1-2.

We conclude that the Corps’ evaluation and assessment of a significant weakness to McGoldrick’s proposal was unreasonable for three reasons. First, as discussed above, the agency found that McGoldrick’s proposal failed to show how McGoldrick

could execute several concurrent task orders based on the rationale that “[a] QC [manager] employed by the Prime must be present on a jobsite during construction or work may not be performed.” AR, Tab 15, SSEB Evaluation Report Addendum, at 3. This rationale, however, is inconsistent with the solicitation requirement, which provided that either the QC manager, “or his designated representative for the task order site,” must be on the site at all times during construction. RFP, amend. 0003, at 47. McGoldrick argues that the solicitation did not require a quality control manager to be on site at all times, as long as a designated member of the quality control staff is present on site. In this regard, McGoldrick asserts that the agency’s evaluation was unreasonable because it focused on the number of McGoldrick’s quality control managers without analyzing the full extent of McGoldrick’s quality control staff. Although the agency continues to argue in response to the protest that its evaluation was reasonable, the agency has not been able to point to a requirement in the solicitation that reflects the more restrictive rationale relied upon by the agency in its evaluation. Based on our review of the record and the terms of the solicitation, we agree that the agency’s interpretation of this provision is not supported by the solicitation requirement. Accordingly, we find the agency’s reliance on this interpretation unreasonable.⁷

Second, as discussed above, the RFP requirement relied upon by the Corps for its evaluation--that either the QC, or his designated representative for the task order site, must be on site at all times during construction--was part of the solicitation’s quality control plan. Although the RFP contained performance requirements for a quality control plan, the RFP instructed offerors that they were “not [to] submit a quality control plan.” RFP, amend. 0003, at 47. Rather, the solicitation stated that, “[a]fter contract award, the successful Offerors will submit their [q]uality [c]ontrol [p]lan[s] for Government [a]pproval.” *Id.* McGoldrick argues that the agency’s assessment of a significant weakness to its proposal based on its quality control managers was also unreasonable because McGoldrick was not required to assign quality control staff until after completion of phase 2 of the competition. We agree, and conclude that the agency’s assignment of the significant weakness based on the quality control performance requirement was unreasonable because the RFP did not require offerors to demonstrate compliance with the requirement in their phase 1 proposals.

⁷ The contracting officer also expressed the view in his reevaluation memorandum that “[t]he fact that more people can be hired does not alleviate this concern” because “[n]ew people will have to be trained, will have to establish a working relationship with the current employees, etc.” AR, Tab 16, CO Reevaluation Memorandum, at 5. We note, however, that the contracting officer’s statement does not adequately explain why the hiring of additional quality control managers might not alleviate the problem, particularly considering the contract has a three year period of performance.

Third, we find that the Corp's assumptions regarding the timing of McGoldrick's projects and the availability of its staff were not reasonable. McGoldrick's proposal stated that McGoldrick had projects ending in April 2013, and July 2013. AR, Tab 13, McGoldrick Technical Proposal, at 75. McGoldrick's proposal also stated that it had two small contracts starting in April 2013, totaling approximately \$[DELETED], but that McGoldrick had staff available and bonding capacity for over \$[DELETED] for new work. Id. Based on this information, the evaluators found that McGoldrick "presented a condition showing at times they have no available capacity to take on a new task order." AR, Tab 15, SSEB Evaluation Report Addendum, at 3.

The RFP, however, required that offerors describe their resources and capabilities "to manage and execute several concurrent Task Orders." RFP, amend. 0003, at 9. The solicitation stated that the agency would evaluate an offeror's "capacity to successfully accomplish the task orders throughout the Southwestern Division and surrounding areas along with other ongoing work, and multiple task orders, all in a timely manner." Id. at 11. The solicitation did not include a requirement for offerors to demonstrate an ability to perform concurrent task orders by a set cut-off date--such as at the time of the MATOC contract award--or that phase 1 proposals would be evaluated on such a basis. Moreover, the agency does not explain why it was reasonable for its initial evaluation in April/May 2013, or its reevaluation in December 2013, to conclude that the protester's work in April through July 2013 reflected a lack of capability to perform multiple task orders. As the protester notes, McGoldrick's projects ended in April and July 2013, and it only had [DELETED] small projects beginning in April 2013, which totaled only [DELETED] of the staff and bonding capacity McGoldrick stated that it had available for new work if it received an award. AR, Tab 13, McGoldrick Technical Proposal, at 75.

On this record, we conclude that the agency's evaluation of a significant weakness based on the conclusion that McGoldrick's proposal did not demonstrate that McGoldrick could perform concurrent task orders as of the MATOC award date was not in accordance with the RFP's stated evaluation scheme. We sustain the protest on this basis.

Evaluation of the Two Weaknesses

Next, McGoldrick challenges the two weaknesses assessed under the organization and technical approach factor for collaborative approach and schedule creep, arguing that the agency ignored information in its proposal that addressed the agency's concerns regarding these weaknesses. As discussed below, we find these allegations provide no basis upon which to sustain the protest.

With regard to the first weakness concerning collaborative approach for design-build, the solicitation stated that the proposal should "[d]escribe interactions within the team and with the Corps during the design," including a discussion of "the

role and interaction of the design team with the construction team during design and construction,” and “[p]rovide information on how your design-build team will manage co-location of design and construction team members.” RFP, amend. 0003, at 8. The solicitation also stated that the proposal should “[d]escribe the role of the construction team members during design,” and the “role and interaction of the design team with the construction team during construction.” Id.

The Corps assessed a weakness for McGoldrick’s discussion of this RFP requirement, stating the following:

Offeror is light in parts of their description on the role and interaction of the design team with the construction team during construction, in addressing progress meetings (what frequency)[,] and provides little to nothing addressing contract completion, closeout and completion documentation.

AR, Tab 15, SSEB Evaluation Report Addendum, at 2.

McGoldrick argues that the agency’s reevaluation ignored detailed descriptions in its proposal regarding the role and interaction of the design team with the construction team during the construction phase. See AR, Tab 13, McGoldrick Technical Proposal, at 73-74. The agency responds that, while the referenced information in McGoldrick’s proposal is necessary and important, it does not provide sufficient information about the interaction between the design and construction team, nor does stating they “will meet internally” or are “actively involved” provide adequate information. AR at 10. During the reevaluation, the contracting officer’s review of the referenced pages found that “[w]hile the offeror appears to have a grasp of the processing necessary, the proposal provides little, if any insight as to how the design and construction teams will work together or which team will be responsible for the various elements.” AR, Tab 16, CO Reevaluation Memorandum, at 3. Based on this record, we find nothing unreasonable regarding the agency’s evaluation. To the extent McGoldrick contends that its proposal submission was adequate, the protester’s disagreement with the agency’s evaluation provides no basis to sustain the protest. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7.

Similarly, McGoldrick contends that its proposal adequately responded to the solicitation requirement to “[d]iscuss internal procedures for handling delays to minimize ‘schedule creep.’” RFP, amend. 0003, at 9. The agency found a weakness in McGoldrick’s proposal concerning this requirement, stating that the “[o]fferor provides little to no discussion of schedule creep,” and that the proposal states that the “[program manager] will develop a plan if they fall behind, but provid[es] no discussion of internal procedures for addressing it.” AR, Tab 15, SSEB Evaluation Report Addendum, at 2. McGoldrick’s protest does not point to other provisions in its proposal it believes satisfies the requirement. Rather, the protester disagrees with the agency’s evaluation. Such disagreement, however,

fails to render the agency's evaluation unreasonable. See Ben-Mar Enters., Inc., supra.

Prejudice

Based on our review of the record, we conclude that there is a reasonable possibility that McGoldrick's rating for the organization and technical approach factor could increase from acceptable to good without the significant weakness assessed to McGoldrick's proposal. Sentrillion Corp., B-406843.3, et al., Apr. 22, 2013, 2013 CPD ¶ 207 at 8 (protest sustained where protester demonstrated a reasonable possibility that it was prejudiced by the agency's actions). As relevant here, the RFP defined an "acceptable" rating as "[s]trengths and weaknesses are offsetting," and a "good" rating as "[p]roposal contains strengths which outweigh any weaknesses." RFP, amend. 0003, at 12. As discussed above, other than the significant weakness, McGoldrick's proposal was assessed two weaknesses and seven strengths. In response to this protest, the contracting officer stated that McGoldrick's proposal deserved an acceptable rating, rather than a good rating, because the seven strengths offset, rather than outweighed, the two weaknesses and one significant weakness. CO Statement, at 5-6. If the significant weakness is eliminated, we think there is a reasonable possibility the seven strengths would outweigh, rather than offset, the two weaknesses. If McGoldrick's proposal were to receive a good rating for this factor, its rating would be equal to the most highly rated proposals that the agency moved to phase 2 of the competition. On this record, we conclude that McGoldrick has been prejudiced by the agency's actions.

RECOMMENDATION

We recommend that the Corps reevaluate the protester's proposal in a manner that is reasonable and consistent with the RFP's evaluation criteria, and make a new determination regarding advancement of McGoldrick's proposal to phase 2 of the competition. We also recommend that McGoldrick be reimbursed its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

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

Susan A. Poling
General Counsel