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Decision

Matter of: NAE-TECH Remediation Services

File: B-402158

Date: January 25, 2010

Brian A. Bannon, Esq., Andrew W. Dyer, Jr., Esq., Brian S. Gocial, Esq., and Albert B. Krachman, Esq., Blank Rome LLP; and Wayne A. Keup, Esq., for the protester. Ryan A. Black, Esq., Steven W. Feldman, Esq., and Kathryn R. Sommerkamp, Esq., Department of the Army, Corps of Engineers, for the agency. Cherie J. Owen, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly excluded protester's proposal from the competitive range is denied where the record shows that the agency received a large number of proposals and reasonably concluded that the protester's proposal was not one of the most highly rated.

DECISION

NAE-TECH Remediation Services of Rapid City, South Dakota, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. W912DY-08-R-0016, issued by the Department of the Army, Corps of Engineers for worldwide environmental remediation services for contaminated lands. NAE-TECH contends that the agency acted unreasonably in assigning deficiencies and weaknesses to its proposal and that the exclusion of its proposal from the competitive range was improper.

We deny the protest.

BACKGROUND

The RFP, issued on January 7, 2009, anticipated the award of an indefinite-delivery/indefinite-quantity contract to a minimum of five contractors. RFP at 2. The RFP was restricted to small business offerors. The agency also issued a related solicitation that was open to all offerors (the unrestricted solicitation). Award was to be made on a "best value" basis, considering price and four non-price evaluation

factors: technical capability; technical approach to sample task orders; organization/management; and past performance. RFP at 175. The sample task order factor was broken into two parts: one part concerned sample task services in the continental United States (CONUS), while the other part covered sample task services outside the continental United States (OCONUS).

The RFP explained that the technical capability and technical approach to sample task orders evaluation factors were of equal importance. RFP at 175. The organization/management and past performance evaluation factors were of equal importance, but were significantly less important than technical capability and technical approach to sample task orders. Id. All factors, when combined, were significantly more important than cost/price. Id. The RFP also stated that the agency intended to award without discussions, RFP at 151, and that award would not be made to an offeror whose proposal contained a deficiency. RFP at 175.

The agency received 15 proposals in response to the solicitation. Agency Report (AR), Tab 7, Competitive Range Determination, at 1. The agency evaluated the proposals and assigned NAE-TECH's proposal a rating of good for the technical capability factor; marginal for the sample task order factor; marginal for the organization/management factor; and low risk for the past performance factor. AR, Contracting Officer's (CO) Statement at 3. The agency found the protester's price proposal to be acceptable. Id.

With regard to the protester's response to the CONUS sample task, the agency assessed 1 significant strength, 4 strengths, 4 significant weaknesses, 10 weaknesses, and 1 deficiency. AR, Tab 10, Debriefing Letter, at 5-8. With regard to the OCONUS sample task, the agency assessed four significant strengths, one significant weakness, and four weaknesses. Id. at 8-9. Under the organization/management evaluation factor, the Army assessed three significant strengths, three strengths, two significant weaknesses, three weaknesses, and five deficiencies. Id. at 9-11.

After reviewing proposals, the agency established a competitive range of the most highly rated proposals. In making the competitive range determination, the CO determined that issues relating to an offeror's understanding of sample task orders would not be raised during discussions, since, in the agency's view, the purpose of the sample task orders was to test the offeror's understanding of this work. AR, Tab 7, Competitive Range Determination, at 3. Based on the above ratings, the Army concluded that the protester's proposal was not among the most highly rated, and excluded it from the competitive range. Id. at 12. This protest followed.

DISCUSSION

The protester raises several challenges to the agency's evaluation of its proposal. For example, the protester argues that the agency's assignment of a deficiency for lack of detail under the CONUS sample task was unreasonable. Comments at 2-15.

The protester argues that, in fact, it did discuss some of the tasks the agency listed as being deficient. Comments at 3-4.

With regard to the procedures involved in performing the sample task that the protester did not discuss, the protester appears to argue that its failure to discuss these matters is actually evidence of its “comprehensive understanding of remediation efforts.” Protest at 7-8. The protester also argues that the agency’s assignment of a deficiency was unreasonable in light of the fact that the agency viewed as a strength its discussion of other, more complex procedures associated with the sample task order. Protest at 8. Finally, the protester argues that it has learned that another proposal submitted in response to the unrestricted solicitation used similar language and was not assigned a deficiency for its lack of detail. Thus, in the protester’s view, the agency’s assignment of a deficiency here was unreasonable or resulted from unequal treatment.¹ Id. We find each of these arguments to be without merit.²

The competitive range is to be comprised of the most highly rated proposals. Federal Acquisition Regulation (FAR) § 15.306(c)(1). The evaluation of proposals and resulting determination as to whether a particular offer is in the competitive range are matters within the discretion of the contracting agency. Chant Eng’g Co., Inc., B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45 at 3; Laboratory Sys. Servs., Inc., B-256323, June 10, 1994, 94-1 CPD ¶ 359 at 2. In reviewing challenges to an agency’s competitive range determination, our Office does not independently reevaluate proposals; rather, we examine the evaluation to determine whether it is reasonable. Tri-Services, Inc., B-253608, Sept. 7, 1993, 93-2 CPD ¶ 131 at 2; Educational Computer Corp., B-227285.3, Sept. 18, 1987, 87-2 CPD ¶ 274 at 2.

¹ The protester also argues that the solicitation’s page limitation impeded its ability to discuss each of these procedures in sufficient detail, and that any lack of detail in its sample task could have been supplied during discussions. Protest at 8. We dismiss this complaint as untimely. If the protester believed that the page limitation prevented it from providing the detail required by the solicitation, the protester should have protested this issue before the due date for proposals. 4 C.F.R. § 21.2(a)(1) (2009). Because the protester failed to do so, this complaint is now untimely.

² On January 8, after developing the record, the GAO attorney responsible for the protest conducted an outcome prediction alternative dispute resolution (ADR) conference at the request of the agency, and provided the parties with full detail regarding the merits of the issues raised by NAE-TECH, as well as the protest’s likely outcome. Notwithstanding the predicted outcome, the protester elected not to withdraw its protest.

As set forth above, the solicitation required offerors to provide a discussion of their field methods and stated that the agency would evaluate whether the offeror's submission demonstrated a good understanding of how to execute the work that needed to be performed. RFP at 178. The agency found that the protester failed to provide a discussion of how it would perform a large number of basic tasks, including: site preparation; surface sweeps; brush clearance; civil surveys; field observation for munitions response site prioritization protocol evaluations; management and disposal of material potentially presenting an explosive hazard; management, accountability, and disposal of "munitions and explosives of concern"; management and disposition of munitions debris; and management and disposal of investigation derived waste. AR, Tab 10, Debriefing Letter, at 7-8. We think it was reasonable for the agency to assign a deficiency for protester's decision to merely list these critical tasks rather than provide detail about how they would be performed.

We also find unpersuasive the protester's argument that it intended to supply the missing detail during discussions, given that the solicitation stated that the agency intended to make award without discussions. RFP at 151. Further, we see no contradiction in the fact that the agency assigned a strength for the firm's discussion of the more complex logistical problems and challenges, but assigned a deficiency for the firm's failure to discuss many of the more basic procedures.

With regard to what NAE-TECH contends was disparate scoring of proposals in response to the solicitation at issue here and the unrestricted solicitation,³ we note that it is not unusual for individual evaluators or separate evaluation teams to reach disparate conclusions when judging proposals since both objective and subjective judgments are involved. See Digital Radio Corp., B-216441, May 10, 1985, 85-1 CPD ¶ 526 at 8. Thus, the mere fact that one evaluation team assigned a deficiency and another evaluation team did not assign a deficiency for similar language in the context of a different evaluation does not render the evaluations invalid. See Panuzio/Rees Assocs., B-197516, Nov. 26, 1980, 80-2 CPD ¶ 395 at 9. We find no indication in the record that the scoring by the technical evaluation team reflects anything other than their professional judgment about the merits of NAE-TECH's proposal, or that the deficiency discussed above with respect to the protester was based on anything other than a reasonable assessment of the protester's proposal.

As noted above, while the protester contends that additional detail about the sample task could have been provided during discussions, the point is that the flaws in the protester's proposal caused it to be excluded from further consideration before discussions were held.

³ For the record, we note that one of the business components of NAE-TECH also participated in the unrestricted competition. Thus, the protester claims to be aware of differences in the evaluation of its affiliate's proposal.

Given our conclusion that the agency acted reasonably in assigning this deficiency and others to the protester's proposal, we think the agency reasonably concluded that NAE-TECH's was not one of the most highly rated proposals, and reasonably excluded it from further consideration.

The protest is denied.

Lynn H. Gibson
Acting General Counsel