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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Cornerstone Construction Company, Inc.

File: B-402747

Date: July 23, 2010

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Paul N. Wengert, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency failed to recognize that the awardee's proposal deviated from the solicitation requirement, and that the agency misevaluated proposals and engaged in unequal treatment, is denied where the record shows that the awardee's proposal met the requirements of the solicitation and the agency reasonably and fairly evaluated proposals in a manner that was consistent with the solicitation.

DECISION

Cornerstone Construction Company, Inc., of Anchorage, Alaska, protests the award of a contract to Davis Constructors and Engineers, Inc., of Anchorage, Alaska, by the Department of the Army, Corps of Engineers, under request for proposals (RFP) No. W911KB-09-R-0027 for the design and construction of an aero-medical services and mental health clinic at Elmendorf Air Force Base in Alaska. Cornerstone argues that the Corps overlooked unacceptable aspects of Davis's proposal, misevaluated proposals, and engaged in unequal treatment in the evaluation.

We deny the protest.

BACKGROUND

The Corps issued the RFP on September 18, 2009, seeking a contractor to design and build a health clinic adjacent to an existing hospital building at Elmendorf Air Force Base under a fixed-price contract. The project was a design-build project, where the RFP provided design requirements and requested that offerors propose a design

consistent with those requirements. The selected contractor would then finalize that design and construct the clinic.

The RFP contained a detailed statement of work that included minimum design and construction criteria, along with “room criteria sheets” that provided additional detail concerning usable space, and numerous drawings and attachments, including drawings that depicted four staircases in the clinic building. E.g., RFP amend. 4, Statement of Work, app. 1, Drawing A1.01. The minimum design and construction requirements included such things as requiring “unhindered” access to all mechanical equipment without having to crawl over or under structures or pipes. RFP amend. 4, Statement of Work, at 68 (¶ 2.6.4.F.2). Another minimum requirement provided that rooftop air handling units be constructed to prevent snow and rain from entering the unit, and that the units be attached to a “service corridor” so that unit coils could be removed under cover. Id. at 85 (¶¶ 2.6.16.G.1; 2.6.16.G.22).

Although the RFP advised offerors of the importance of complying with design requirements, it also informed them that the Corps would consider changes to the design, as follows:

B. The diagrams in the appendix depict a solution that is highly desired by users.

1. The [design-build] contractor may not deviate from the approved diagrams and Room Criteria Sheets without Government approval.

* * * * *

D. The [design-build] contractor may not deviate from the minimum requirements, site concept design, and room criteria sheets without Government approval. The Contractor may propose changes to the design via Contractor-Proposed Betterments to improve constructability, functionality, and value to the Government.

RFP amend. 5, Statement of Work, at 4 (¶ 1.5.4).

The RFP stated that award would be made to the offeror whose proposal conforms to the solicitation, is fair and reasonable, and provides the best value to the government, considering the following evaluation factors, listed in descending order of importance: design-technical, remaining performance capability, and price. RFP amend. 4, at 27. The two non-price evaluation factors combined were considered significantly more important than price. Id.

For the design-technical factor, the RFP identified four subfactors. The first two subfactors (building functional, aesthetics, and space; and quality of building systems and materials) were equal in importance, the third subfactor (site design) was less important than the first two subfactors, and the fourth subfactor

(sustainability) was to be rated on a go/no-go basis. RFP amend. 4, at 27-28. For the functional, aesthetics, and space subfactor, the RFP stated that the agency would consider the “overall ‘appeal’ of the facility and the desire that both the interior and exterior of the facility presents professional, attractive appearance.” In this regard, the RFP described eight aesthetic exterior considerations, and five aesthetic interior considerations. Id. at 30-31.

For the remaining performance capability factor, the RFP listed three subfactors, in descending order of importance: proposed contract duration and summary milestone schedule, key subcontractors, and utilization of small business concerns. RFP amend. 4, at 28. For the utilization of small business concerns subfactor, the RFP stated that the Corps would consider the level of commitment to use small businesses, including the extent to which small businesses were specifically identified in proposals, and “[t]he extent to which the Offeror provide[d] detailed explanations/documentation supporting the proposed participation percentages, or lack thereof.” Id. at 43.

For the price factor, the RFP stated that price would be evaluated as the sum of three line items for the basic work, plus several optional line item prices for an enclosed corridor connecting to the existing hospital, an ambulance garage, and communications improvements. RFP amend. 6, at 3.

The Corps received initial proposals from three firms, including Davis and Cornerstone. Cornerstone’s proposal depicted the exterior of its clinic in a set of drawings to illustrate the visual impression of its design, which divided the bulk of the exterior into seven visual elements—an entry and six sections—that alternated in color (blue, grey, blue, grey). Agency Report (AR), Tab 12, Cornerstone’s Rendered Perspective, at 1. Cornerstone also included four stairs in its proposed clinic design. AR, Tab 12, Cornerstone’s Initial Proposal, Vol. I, Drawing Sheet No. 8. In the small business subcontracting section of its proposal, Cornerstone identified **[DELETED]** small businesses, along with the expected scope of work for each, and a percentage share of the base contract to be performed by subcontractors, which Cornerstone described as its “Preliminary Estimated Small Business Use.” AR, Tab 12, Cornerstone’s Initial Proposal, Vol. II, Tab C, at 2.

Davis’s proposal also included graphic renderings of the exterior of its building, which showed the exterior as mainly white, with a central tan band. Davis’s clinic design included three staircases, rather than the four depicted in the RFP design. AR, Tab 13, Davis’s Initial Proposal, Vol. 1.1, Drawing Sheet No. 18. With respect to small business utilization, Davis affirmed its commitment to meet small business requirements, but explained that its “proposed design currently lacks the completion level that would be required to list each subcontractor/supplier that will eventually fulfill the stated goals.” AR, Tab 13, Davis’s Initial Proposal, Vol. II, Tab C, at 1. However, Davis’s proposal listed 11 types of work that the firm expected to subcontract, and stated that all 11 categories were suitable for award to small

businesses. AR, Tab 13, Davis’s Initial Proposal, Vol. II, Tab C, at 2; Davis’s Final Proposal, Vol. III, Tab C, at 3. The proposal also listed the percentage and dollar value of contract work that Davis planned to subcontract to each type of small business, and the proposal identified 27 small businesses that Davis had employed successfully in the past. AR, Tab 13, Davis Initial Proposal, Vol. II, Tab C, at 1-3.

After evaluating each proposal, the Corps held two rounds of discussions. The evaluators prepared an initial evaluation report and then updated this report based on their evaluation of discussion responses and proposal revisions. The evaluation reports explained the evaluated strengths, weaknesses, and deficiencies for each offeror’s proposal, and assigned adjectival ratings for each factor and subfactor. AR, Tabs 8-10, Initial, Interim, and Final Evaluation Reports. According to the final evaluation, the ratings for Cornerstone’s and Davis’s proposals, and the proposed prices, were as follows:¹

| Factor/Subfactor | Cornerstone | Davis |
|---|--------------------|------------------|
| Design-Technical | Good | Excellent |
| Building Function, Aesthetics | Good | Excellent |
| Quality of Building Systems | Good | Good |
| Site Design | Good | Excellent |
| Sustainability | Go | Go |
| Remaining Performance Capability | Good | Good |
| Contract Duration & Schedule | Good | Good |
| Key Subcontractors | Good | Excellent |
| Utilization of Small Business | Acceptable | Acceptable |
| OVERALL RATING | Good | Excellent |
| Price | \$21,197,383 | \$19,839,494 |

AR, Tab 9, Final Evaluation Report, at 4; Tab 7, Source Selection Decision, at 5, 14.

In the source selection decision, the source selection authority (SSA), who was also the contracting officer, discussed the evaluation of each offeror’s proposal, noting various strengths, weaknesses, and deficiencies for each proposal. For Cornerstone, the SSA listed 10 strengths, 10 weaknesses, and 4 deficiencies that had been assessed during the evaluation. The SSA found that Cornerstone had satisfactorily addressed all of the weaknesses and deficiencies that had been raised during discussions, but that “there is still a weakness pertaining to the overall facility design (to be further discussed in the Best Value Tradeoff section).” AR, Tab 7, Source Selection Decision, at 6-8. For Davis, the SSA listed 19 strengths, 8 weaknesses, and

¹ The third offeror’s proposal was rated lower than Cornerstone’s under each of the evaluation factors and was also lower in price. AR Tab 7, Source Selection Decision, at 5, 14.

4 deficiencies; and similarly, the SSA found that Davis had satisfactorily addressed each of the weaknesses and deficiencies during discussions. Id. at 8-10.

The SSA performed a tradeoff analysis by comparing the benefits of Davis's proposal to each of the other two offerors' proposals under each of the evaluation factors. As is relevant here, in discussing the design-technical factor, the SSA pointed out that Davis's design was "far more aesthetically pleasing" than Cornerstone's design, and it included an "end-user focus" that Cornerstone's design lacked. Furthermore, the SSA found that Cornerstone offered a less desirable hospital corridor design that could be impacted by falling snow and ice. With regard to the remaining performance capability factor, Davis's proposed schedule was considered to be the most expeditious and presented low risk to the government, while Cornerstone's schedule was determined to be less aggressive but still within the maximum construction period. Both firms were found to have proposed experienced subcontractors. With regard to price, as noted above, Davis's proposal was approximately \$1.5 million lower in price. AR, Tab 7, Source Selection Decision, at 12-14.

In concluding that Davis's proposal provided the best overall value to the government, the SSA determined that the technical merits and lower ratings of Cornerstone's proposal did not justify paying a higher price when compared to Davis's higher-rated and lower-priced proposal, especially given the more aesthetically desirable design presented by Davis. Id. at 14. The SSA selected Davis for award, and the contract was issued on February 25, 2010. AR at 2.

Upon receiving notice of the award to Davis on February 25, Cornerstone immediately requested a debriefing. On February 26, Cornerstone submitted a Freedom of Information Act (FOIA) request for a copy of Davis's proposal. AR Tab 26, FOIA Request from Cornerstone, at 1. The Corps held the debriefing for Cornerstone on March 3, to explain the evaluation of Cornerstone's proposal, which included a list of all of the strengths and weaknesses associated with its proposal. On April 6, in response to Cornerstone's FOIA request, the Corps released a copy of most of Davis's proposal. Cornerstone then filed this protest with our Office on April 16.

DISCUSSION

Cornerstone's protest argues that Davis's proposal deviated from the RFP. For example, Cornerstone contends that the Corps should have found unacceptable Davis's small business utilization proposal, Davis's design based on three staircases, and the lack of a direct connection between a staircase and rooftop air handling unit. Cornerstone also asserts that the agency improperly considered cost in the evaluation of technical proposals, and it asserts numerous other examples of a flawed evaluation or unequal treatment.

The Corps responds and explains why Davis's proposal not only met the requirements of the RFP, but was rated superior to Cornerstone's proposal. The Corps also denies evaluating proposals unequally.

Our Office reviews challenges to an agency's evaluation of proposals only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. Smiths Detection, Inc., B-298838, B-298838.2, Dec. 22, 2006, 2007 CPD ¶ 5 at 5. A protester's mere disagreement with the agency's judgment is not sufficient to establish that an agency acted unreasonably. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

Cornerstone contends that Davis's proposal was unacceptable under the utilization of small business subfactor of the remaining performance capability factor. The protester argues that the RFP required, and Davis's proposal failed to include, specific information about small business participation under its proposal. Specifically, Cornerstone alleges that Davis's proposal listed the names of small businesses with which it had previously done business, but it did not name and describe the role of each subcontractor and supplier that it would use in meeting its small business goals here, as the RFP allegedly required. In contrast, the protester contends, it provided all of the information required by the RFP. Protest at 7-8.

Although the RFP required the agency to consider the extent to which small businesses were specifically identified in the proposal and the role that the subcontractors would play, the RFP did not require firm commitments from offerors concerning the use of any particular subcontractor. RFP amend. 4, at 43. Furthermore, neither firm provided firm commitments from the subcontractors identified in their proposals. Indeed, in its proposal, Cornerstone represented only that it has made a "concerted effort to contact those qualified small businesses that could provide a price to our team." AR, Tab 12, Cornerstone's Initial Proposal, Vol. II, Tab C, at 1.

As noted above, Cornerstone identified [**DELETED**] potential small business contractors, along with their anticipated scope of work and the percentage of their anticipated participation in the project, which the proposal denoted as "Preliminary Estimated Small Business Use." Id. at 2. Davis provided a list of [**DELETED**] small business subcontractors that it had worked with in the past; Davis showed a long history (more than 10 years) of working with these same subcontractors, on numerous health facilities, in arctic conditions in this locality; and Davis showed the small business percentage goals achieved on similar projects. AR, Tab 13, Davis's Initial Proposal, Vol. II, Tab C, at 1-2; Tab 7, Source Selection Decision, at 13. Davis explained that because it was early in the design phase of this design-build project, it was unable to identify the specific contractors who would perform, but Davis also identified the construction areas where it typically uses small business subcontractors in similar projects, and it identified both the subcontracting dollars

as well as percentage goals planned for this project. AR, Tab 13, Davis's Initial Proposal, Vol. II, Tab C, at 1-2; Davis's Final Proposal, Vol. II, Tab C, at 1-2. Given the design-build nature of the project, considering that the RFP did not require a firm commitment to use identified subcontractors, and given the detailed information provided by Davis in its proposal, we find the Corps' determination that Davis submitted an acceptable proposal regarding its plans to utilize small businesses to be reasonable and not the result of unequal treatment.²

Cornerstone next argues that its clinic design met an RFP requirement to provide four staircases, while Davis's design included only three staircases. According to Cornerstone, the RFP diagrams and room criteria sheets depict or refer to four staircases. Cornerstone emphasizes the RFP statement that offerors "may not deviate from the approved diagrams and Room Criteria Sheets without Government approval." RFP amend. 5, Statement of Work, at 4 (¶ 1.5.4).

The Corps explains, and we agree, that although the RFP advised offerors not to deviate from the accompanying design without government approval, the RFP also advised that offerors could nevertheless propose "changes to the design via Contractor-Proposed Betterments to improve constructability, functionality, and value to the Government." *Id.* The record shows that, in accordance with the RFP, the Corps appropriately considered Davis's proposed change to the design and reasonably determined that three staircases were sufficient to meet the requirements of its building design. Although the protester disagrees with this assessment, it has not shown it to be unreasonable.

Cornerstone also argues that Davis's proposed design deviated from mechanical access requirements because the design failed to allow for unhindered, interior access to rooftop air handling units. Cornerstone contends that offerors were required to place the rooftop units adjacent to a staircase, as depicted by an RFP drawing, so that a person exiting the staircase would not be exposed to outside temperatures, or have to travel across a potentially snowy or icy roof, in order to access the mechanical equipment. Since Davis's proposal did not place the staircase exit adjacent to the mechanical room, Cornerstone argues that Davis's proposal should have been rated unacceptable. Protest at 8-9; Comments at 9-10.

The Corps responds, and we agree, that Cornerstone's argument is based on a misreading of the RFP requirements. Although the RFP contained a drawing that depicted a rooftop unit as being connected to stairs, there was no requirement in the technical specifications that the unit be constructed adjacent to stairs. Rather, the RFP required only that access to rooftop air handling units be unhindered and

² Even if the agency erred in performing this aspect of the evaluation, the protester has not shown that it was prejudiced, given that the utilization of small business subfactor was the least important subfactor of the least important non-price factor.

constructed to prevent snow and weather from entering the unit, and that the units be adjoined to a service corridor. RFP amend. 4, Statement of Work, at 68 (¶ 2.6.4.F.2), 85 (¶ 2.6.16.G.22). The Corps determined that Davis's approach met the RFP requirements and, based on our review of the record, we find this determination to be reasonable.

Cornerstone asserts that the Corps improperly and disparately considered price or cost in the evaluation of the technical merits of proposals. Protest at 11; Comments at 2-4. However, the RFP contemplated a best value analysis, and the record shows that the agency considered price or cost only in this context; that is, the agency considered the price advantages and disadvantages of offerors' technical approaches in a manner that was reasonable and consistent with the RFP. We find no evidence of unequal treatment in this aspect of the evaluation.

Cornerstone also asserts unequal treatment in the conduct of discussions. Comments at 13-16. Cornerstone specifically complains that Davis was provided more detailed discussions and an additional round of discussions as compared to the discussions provided to Cornerstone. *Id.* However, our review of this aspect of the evaluation shows that the discussions were tailored to each offeror's proposal consistent with the requirements of the Federal Acquisition Regulation, and the varying detail reflected the different concerns the agency had with each offeror's approach. Although it is true that Cornerstone was not provided any questions during the final round of discussions, the agency explains that this was because Cornerstone had already been advised of, and had an opportunity to address, all of its significant weaknesses and deficiencies, which had been raised by the agency during earlier discussions. Even so, Cornerstone was allowed the additional opportunity to revise and improve its proposal. *See* Contracting Officer's Supplemental Report at 6-7; AR, Tab 18, Cornerstone's Discussion Letters. Accordingly, we find that Cornerstone was treated fairly during discussions. *See General Dynamics--Ordnance & Tactical Sys.*, B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 7 (where earlier discussions raised all significant issues for protester, the final round of discussions with the protester properly invited it simply to submit a final proposal revision, while the discussions with eventual awardee raised substantive issues); *Cubic Commc's., Inc.*, B-254860.2, Mar. 22, 1994, 94-1 CPD ¶ 238 at 8 (discussions were meaningful although agency did not repeat issues that had been raised in earlier discussions), *recon. denied*, *Cubic Commc's., Inc.--Recon.*, B-254860.3, Aug. 11, 1994, 94-2 CPD ¶ 69.

Cornerstone also asserts numerous other allegations of miscalculation or disparate treatment, such as, for example, the evaluation of fire alarm control panels, square footage requirements, proposed schedules and requirements for performing winter work, and proposed commissioning plans. In these areas, the protester argues, its proposal was rated less favorably than Davis's proposal, even though the proposals contained similar approaches. Protest at 9-10; Comments at 2-6, 8-9, 11-13.

Cornerstone also contends that the agency misevaluated its proposed approach for providing vinyl composition tile and sealed ceilings.³ Comments at 3-4, 17-18.

Here, too, the record demonstrates that the agency's evaluation was consistent with the RFP. The record reflects that the agency took into account various strengths and weaknesses of each offeror's proposal under the evaluation factors, including their discussion responses that addressed nearly every deficiency and weakness. As noted above, the agency found the major discriminator between proposals was the difference in aesthetic detail and end user focus. The issues identified by the protester as evidence of disparate treatment were not found to be significant discriminators in the award.⁴ Thus, even if the agency evaluated proposals disparately in a few areas--a contention that the agency denies--the protester has not shown that any of these areas had an impact on the source selection decision. Because the protester has not shown that it was prejudiced by the alleged disparate treatment, we will not sustain the protest.⁵ McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

The protest is denied.

Lynn H. Gibson
Acting General Counsel

³ Cornerstone also alleges that the agency lowered its evaluation ratings when it did not exceed the RFP requirements, Comments at 4-5, but the record does not support this contention.

⁴ Although the protester argues briefly--in its comments on the supplemental contracting officer's statement--that discussions were inadequate because concerns about the aesthetics of its design were not raised, Supplemental Comments at 3 n.6, any challenge on that point is untimely. This issue was first raised more than 10 days after the protester received the agency report, which included the source selection decision that relied in part on that discriminator.

⁵ Cornerstone complains of other "irregularities" and "mistakes" in the evaluation, such as providing incorrect information during the debriefing and identifying the SSEB differently in the evaluation documents. Comments at 16-18. However, these issues do not call into question the reasonableness of the source selection decision.