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Decision

Matter of: Smith Enterprise, Inc.
File: B-407529; B-407529.2; B-407529.3
Date: December 28, 2012

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Kevin E. Bolin, Esq., Marvin D. Rampey, Esq., and Angela J. Cosentino, Esq., Department of the Navy, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly relaxed the delivery schedule, after excluding the protester's proposal from the competitive range due to the protester's high price, is denied where the record does not show that the protester was prejudiced.
 2. Protest challenging agency's evaluation of technical proposals is denied where the record shows that agency's evaluation was reasonable and consistent with the solicitation.
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DECISION

Smith Enterprise, Inc., of Tempe, Arizona, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. N00164-12-R-JN34, issued by the Department of the Navy for research and development services relating to gun muzzle suppressor technology. Smith objects to the agency's relaxation of the delivery schedule after Smith was excluded from the competitive range, and the agency's evaluation of proposals.

We deny the protest.

BACKGROUND

The RFP provided for the award of fixed-price, indefinite-delivery/indefinite-quantity contracts for research and development of a flash and sound suppressor for

the MK48 Mod1 lightweight machine gun.¹ RFP at 2. This procurement is the first step in a research and development effort known as the Small Arms Signature Reduction program, under which the agency intends to procure suppression technology for more than 26 types of weapons used by special operations forces. RFP at 94; Legal Memorandum at 5. The suppressor (colloquially known as a silencer) suppresses the weapon's "signature," that is muzzle flash and noise. Legal Memorandum at 4. The MK48 machine gun was chosen as the first weapon for development of a suppressor, because it was considered the most technically difficult to suppress.² Id. A detailed performance specification was provided that described the design and performance requirements of the suppressor for the MK48 machine gun. RFP, Performance Specification.

Offerors were informed that development of the suppressor was structured in five phases. RFP, Statement of Work, at 1. In the first phase, the written technology proposal task, offerors would submit proposals that would identify the firm's conceptual approach and timeline for meeting the solicitation's requirements. Id. at 2. Offerors were to provide a cost estimate for phases two and three, and were invited to submit any test or analysis "that may provide insight as to [the] feasibility of the design or technology." Id.

In the second phase, the core technology development prototyping task, the contractor would submit 4 product test samples, which would be subject to live testing by the agency to verify that "the proposed technology works and can be physically manufactured." Id. at 3. Offerors were informed that at the completion of the testing the contractor would be allowed an opportunity to tune the design and address any deficiencies.

In the third phase, the development task, selected contractors would provide 5 additional, revised product samples. Id. at 3. The contractor was also to provide a cost estimate for the fourth and fifth phases.

In the fourth phase, the user assessment task, selected contractors would provide an additional 12 production samples for a further operational assessment by the user, and in the final, fifth phase, the low rate initial production task, the selected contractor would provide 50 production samples along with detailed documentation. Id.

¹ The MK48 Mod1 is a belt-fed machine gun firing 7.62x51 millimeter cartridges that was designed for and is used by the U.S. Special Operations Command.

² The agency states that previous efforts to find a suitable suppressor for the MK48 Mod1 machine gun failed. The suppressors [DELETED]. Legal Memorandum at 6.

As relevant here, the RFP provided for the first three development phases, and requested that offerors submit proposals providing their proposed schedule and costs for performing the procurement through the third phase. In this regard, the RFP included three contract line items numbers (CLIN): CLIN 1 sought a single lot price for research and development through phase three; CLIN 2 sought unit prices for the product samples and stated a minimum quantity of 4 units and a maximum quantity of 50; and CLIN 3 sought a single lot price for the technical data associated with the effort. RFP at 2-3. The RFP informed offerors that the delivery date for the product samples under CLIN 2 was 90 days after contract award. RFP at 14.

The RFP provided that award(s) would be made on a best value basis, considering the following evaluation factors: technical evaluation, past performance, and price. The technical evaluation factor was significantly more important than past performance and price, and past performance was more important than price. RFP at 56. The technical evaluation factor included four subfactors: innovative technology, requirement compliance, producibility, and schedule.³ Id.

The agency received proposals from four offerors, including Smith, Offeror A, and FN Manufacturing, LLC. The three firms each offered different delivery schedules.⁴ Smith proposed to provide product samples within 90 days, and to complete phases two and three within [DELETED]. Smith Price Proposal, Research and Development Schedule, at 5. Offeror A proposed to provide product samples within 6 months and to complete phases two and three within 30 months. Offeror A Proposal at 79, 89. FN proposed to provide the product samples within 12 months and to complete phases two and three within 24 months. FN Proposal at 86-87.

³ The innovative technology subfactor was stated to be significantly more important than the requirement compliance, producibility, and schedule subfactors (individually or combined). The requirement compliance was stated to be significantly more important than the producibility and schedule subfactors (individually or combined), and the producibility subfactor was stated to be significantly more important than schedule. RFP at 56.

⁴ The fourth offeror's proposal was found to be technically unacceptable, and is not discussed further.

The agency evaluated the initial proposals as follows:⁵

		FN	Offeror A	Smith
Technical		Outstanding	Acceptable	Acceptable
	Innovative Technology	Outstanding	Good	Acceptable
	Requirements	Outstanding	Good	Acceptable
	Producibility	Good	Acceptable	Acceptable
	Schedule	Unacceptable	Unacceptable	Acceptable
Past Performance⁶		Neutral	Limited	Neutral
Price		\$772,797	\$760,179⁷	\$1,805,965

AR, Tab 3j, Competitive Range Determination, at 2.

The source selection evaluation board (SSEB) found that Smith's offer to improve their existing suppressor design was acceptable, but offered little innovation, which the SSEB noted as a major weakness under the innovative technology evaluation subfactor. See AR, Tab 3i, SSEB Report, at 9. The SSEB identified no strengths in Smith's proposal, and no other weaknesses. FN's and Offeror A's higher ratings reflected the firms' offer of innovative technology. In this regard, FN's proposal was evaluated as having a number of major strengths, and Offeror A's proposal had some major and minor strengths, and two minor weaknesses. Id. at 5-9. Both FN's and Offeror A's proposals were found to be unacceptable under the schedule subfactor, because neither offered to provide the phase two product samples within

⁵ Technical proposals were evaluated as outstanding, good, acceptable, marginal, or unacceptable. An outstanding proposal had an exceptional approach and understanding of the requirements; strengths that far outweighed weaknesses; and very low risk of unsuccessful performance. A good proposal had a thorough approach and understanding of the requirements; strengths that outweighed weaknesses; and low risk of unsuccessful performance. An acceptable proposal had an adequate approach and understanding of the requirements; strengths and weaknesses that offset each other and have little or no impact on performance; and a risk of unsuccessful performance that is no worse than moderate. An unacceptable proposal did not meet the requirements and contained one or more deficiencies; the proposal was unawardable. Agency Report (AR), Tab 3h, Source Selection Plan, at 6.

⁶ Past performance was evaluated as substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral). Id. at 7.

⁷ Offeror A proposed prices ranging from \$760,179 to \$825,134, which reflected its approach to variations of the scope of work. Legal Memorandum at 12.

90 days. Id. at 7, 9. However, both proposals were found to be technically acceptable overall.

The contracting officer determined that only the proposals of FN and Offeror A would be included in the competitive range. AR, Tab 3j, Competitive Range Determination, at 3. Smith's proposal was not included in the competitive range because of its significantly higher price. The contracting officer concluded that there was "no reasonable expectation" that Smith would reduce its pricing such that it would be competitive with FN or Offeror A.⁸ Id.

The agency conducted discussions with FN and Offeror A, and received revised proposals. During discussions, the agency amended the solicitation to change the delivery schedule for submission of product samples under CLIN 2. Specifically, the agency amended the RFP to provide for submission of two product samples within 180 days of contract award and another two product samples within 270 days. See RFP amend. 2, at 3. FN submitted a revised price of \$717,137, and Offeror A submitted a revised price of \$839,389.⁹ AR, Tab 3m, Agency Notice of Award.

Award was made to FN on September 27. This protest followed a debriefing.

DISCUSSION

Smith initially complained that, among other things, the agency had unequally shared information relating to the agency's estimated cost and budget.¹⁰ Specifically, Smith argued that some offerors had been improperly informed at an industry conference that the agency's budget for this procurement was \$2.3 million, and not \$9 million, as Smith had believed. Smith contends that, had it known of the lower budget, it "would have prepared a significantly lower [proposal] that was much closer, if not less expensive than [FN's proposal]."¹¹ Protest at 8.

In response to the protest, the agency stated that the protester's understanding of the agency's budget was incorrect because the agency's budget was, in fact,

⁸ The contracting officer found that Smith's and Offeror A's proposals were essentially technically equal. AR, Tab 3j, Competitive Range Determination, at 3.

⁹ FN informed the Navy prior to award that the firm was able to reduce its price because it had completed additional work on this project at its own expense after submission of its initial proposal. AR, Tab 3b, FN Letter to Agency, Sept. 25, 2012.

¹⁰ We have considered all of the protester's arguments, although we address only the primary ones, and we find that none provides a basis to sustain Smith's protest.

¹¹ In further explanation, the protester stated that "[it] had a bidding strategy of [DELETED]." Protest at 8.

approximately \$9.9 million. See Legal Memorandum at 16. The protester withdrew this ground of protest in its comments.

In a supplemental protest, Smith argues that the agency improperly relaxed the delivery requirement without giving the protester an opportunity to compete for the agency's actual requirements. Smith contends that its price would have been significantly lower if it had not had to provide the phase two product samples within 90 days. Specifically, Smith argues that its proposed price would have been less than FN's awarded price. In support of this, Smith provided a declaration from its procurement manager that describes the protester's proposed pricing under each of the first three procurement phases. The declaration explains how Smith, to account for the relaxed delivery schedule, would have reduced its proposed \$1.81 million price for the three phases by more than \$1.12 million. See Protester's Supp. Protest and Comments, exhib. A, Decl. of Smith Procurement Manager, at 2-8.

Where an agency's requirements materially change after a solicitation has been issued, it is generally required to issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond. Federal Acquisition Regulation (FAR) § 15.206(a); Murray-Benjamin Elec. Co., L.P., B-400255, Aug. 7, 2008, 2008 CPD ¶ 155 at 3-4. Amending the solicitation provides offerors an opportunity to submit revised proposals on a common basis that reflects the agency's actual needs. Multimax, Inc., et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 at 6.

Here, the basis for the agency's exclusion of Smith's proposal from the competitive range was the proposal's significantly higher price. The record shows that Smith was the only offeror that proposed to satisfy the RFP's delivery schedule for the phase two product samples. After exclusion of Smith's proposal from the competitive range, the agency amended the RFP to relax the delivery schedule. We think that it should have been reasonably apparent to the Navy that the relaxation of the delivery schedule could affect the firms' proposed prices and that the Navy should have allowed Smith an opportunity to provide a revised proposal that met the relaxed delivery schedule.

Nevertheless, we do not find that the protester was prejudiced by the agency's actions. Competitive prejudice is an essential element of a viable protest; where no prejudice is shown or otherwise evident, our Office will not sustain a protest, even if a deficiency in the procurement is evident. Moon Eng'g Co., Inc., B-256079, May 5, 1994, 94-1 CPD ¶ 296 at 4. In its initial protest, Smith stated that its higher proposed price was based upon the protester's understanding of the amount of available government funding, and not the solicitation's delivery schedule.¹² See

¹² The protester also stated it would have had a lower price had the firm known that this procurement was the first in a series of procurements for other weapons.

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Protest at 6-8. After being informed that the protester's understanding of the available government funding was not mistaken, Smith withdrew this protest allegation without explanation. Smith now asserts that its much higher price is based upon the solicitation's delivery schedule. Smith, however, does not reconcile this new claim with its earlier assertion that its higher price was based upon its understanding of the amount of funding available.

Smith provides a declaration from its procurement manager to support its claim that Smith would have reduced its overall price by nearly 62 percent had Smith known of the agency's actual delivery requirements for the phase two product samples. See Protester's Supp. Protest and Comments, exhib. A, Decl. of Smith Procurement Manager. This statement purports to explain how the protester's research and development and production costs for all three development phases would be significantly reduced to reflect the relaxed schedule for the four product samples. In this regard, the procurement manager identifies reduced cost elements (such as, for example, engineering and production labor costs, and material costs) for each development phase. This statement, however, is not supported by any documentation or detail (such as, labor hours or labor mix underlying the bottom line labor or production costs) demonstrating how Smith's proposed price was derived or why it would change.

We accept on its face Smith's assertions in its supplemental protest that the relaxed schedule would have allowed it to reduce its overall costs by [DELETED]. In other words, we accept that Smith's overall price could be lower based upon the relaxed schedule. Nevertheless, the record does not show any reasonable possibility that the relaxation of the delivery schedule for the four product samples would result in a nearly 62 percent reduction in Smith's total price. In light of Smith's earlier statement that its proposed price was based upon the amount of government funding the firm believed was available, we are not persuaded by the unsupported declaration of Smith's procurement manager, and we will not sustain the protest on this basis.

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Protest at 8. The agency responded that Smith attended a presolicitation conference where offerors were informed of this fact. See AR, Tab 5d, Pre-Solicitation Brief. Smith also withdrew this allegation.

Technical Evaluation

The protester also challenges the “major weakness” evaluated in its proposal for “limited innovation” under the innovative technology subfactor, arguing that its proposed solution demonstrated numerous ways in which its suppressors “significantly improved the current state of suppression technology.” Protest at 9. In this regard, Smith identifies seven technological aspects/design features of its suppressors that, according to the protester, demonstrate its innovative design. Protest at 10-17.

The Navy responds that it considered each of Smith’s seven identified design features and disagrees that these feature show that Smith proposed innovative technology. In this regard, the agency provided a statement from the SSEB responding to Smith’s protest and explaining why the evaluators did not view most (six of the seven) of these features to be innovative. Rather, the SSEB found that most of Smith’s claimed innovations were “appropriation, retracement, and slight variations of existing technologies on the market.” AR, Tab 6a, SSEB Statement, at 2. For example, the SSEB explained, with citation to other manufacturers, that Smith’s proposed method of suppressing the muzzle flash was based neither upon new technology nor technologies unique to Smith. See id. at 2-3.

In reviewing protests challenging the evaluation of proposals, we do not conduct a new evaluation or substitute our judgment for that of the agency but examine the record to determine whether the agency’s judgment was reasonable and in accord with the RFP evaluation criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. A protester’s mere disagreement with the agency’s evaluation provides no basis to question the reasonableness of the evaluators’ judgments. See Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 10-11

Here, the record, including the agency’s detailed explanation, supports the agency’s judgment that Smith’s proposal reflected a lack of technical innovation. Although the protester disagrees with the Navy (asserting, for example, that its device to hide the muzzle flash has a unique [DELETED]), we find that the protester has failed to show that the agency’s determination was unreasonable.¹³

¹³ The protester objects that the SSEB’s post-protest statement is inconsistent with the contemporaneous evaluation record, and contends that we should disregard the post-protest explanations. Specifically, the protester contends that the agency’s concession that Smith’s proposal included one “unique innovation” is inconsistent with the agency’s determination that Smith’s proposal showed “limited innovation.” We do not limit our review to contemporaneous evidence, but consider all the information provided, including a party’s arguments and explanations. See Serco, Inc., B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216 at 7. Although we

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The protester also challenges the evaluation of its proposal as merely acceptable under the requirement compliance subfactor. Smith argues that its proposal should have received a higher rating because the firm offered to meet [DELETED] of the 67 threshold requirements identified in the RFP and [DELETED] of the 20 solicitation's objectives.

The agency responds that, although Smith stated that it would meet the requirements, the protester had failed to provide support for this assertion for certain requirements relating to noise reduction and heat management. See AR, Tab 3i, SSEB Report, at 10. In this regard, the agency notes that Smith did not provide preliminary tests results or studies supporting its technical approach. See AR, Tab 6a, SSEB Statement, at 7. Thus, while Smith "checked off the box" in its proposal that the requirements would be met, the lack of supporting documentation and explanation of specific approaches led the agency to find that Smith's proposal was merely acceptable under this subfactor. The protester's continuing disagreement does not show that the agency's evaluation judgment was unreasonable.

Smith also challenges the agency's evaluation of FN's technical proposal and award to this firm. From our review of the record and Smith's arguments in this regard, we find no basis to object to the agency's evaluation of FN's proposal. In any event, given our decision above finding that the agency reasonably excluded Smith's proposal from the competitive range on the basis of its significantly higher price, we conclude that Smith is not an interested party to challenge the Navy's evaluation of FN's technical proposal.

The protest is denied.

Susan A. Poling
General Counsel

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generally give little or no weight to reevaluations and judgments prepared in the heat of the adversarial process, Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review as long as those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16. The SSEB's explanation here is consistent with the contemporaneous evaluation record.