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Decision

Matter of: M&M Investigations, Inc.

File: B-299369.2; B-299369.3

Date: October 24, 2007

Alison L. Doyle, Esq., and Kara M. Klaas, Esq., McKenna Long & Aldridge, for the protester.

Jennifer L. Longmeyer-Wood, Esq., Department of Homeland Security, Immigration and Customs Enforcement, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's exclusion of protester's proposal from competitive range is denied where record shows that evaluation was reasonable and consistent with solicitation's evaluation terms, and that agency reasonably determined that protester did not have a reasonable chance for award based on its proposal's lower technical rating and significantly higher price.

DECISION

M&M Investigations, Inc. protests the exclusion of its proposal from the competitive range and the proposed award to Eagle Technologies, Inc. under request for proposals (RFP) No. PIADC-07-01, issued by the Department of Homeland Security for security guard services at Plum Island Animal Disease Center. The protester contends that, to the extent there were weaknesses in its proposal, they are minor and could have been cured during discussions. M&M contends that excluding its proposal from the competitive range was unreasonable, especially because it resulted in a competitive range of only one proposal.

We deny the protest.

The RFP, issued on December 6, 2006 as a small business set-aside, contemplated the award of a fixed-price indefinite-delivery/indefinite-quantity contract for a base year and four 1-year option periods for security guard services. RFP at 2. The evaluation of proposals was to be conducted in two phases; Phase I involved an evaluation of the minimum qualifications of each offeror's proposed Program Manager. *Id.* at 122. Offerors with acceptable Phase I submissions were to submit

proposals for a Phase II evaluation under the following factors: demonstrated technical/management capability (including evaluation of quality control plan, key personnel, management plan, and relevant experience); past performance; and price. Id. at 123-25. Award was to be made to the firm submitting the proposal deemed to offer the best value to the agency, with demonstrated technical/management capability slightly more important than past performance; both factors combined were significantly more important than price. Id. at 126. The RFP advised that an award would not be made at a significantly higher price to achieve only slightly superior technical capability. Id.

Four of the 12 offerors' submissions passed the Phase I evaluation; each of those firms then submitted a technical and price proposal for the Phase II evaluation. Eagle's proposal (which offered the second lowest price, at \$14,594,037.69) was rated highest technically, with adjectival ratings of good for demonstrated technical/management capability and outstanding for past performance. M&M's proposal, which at \$21,209,617.95 offered the highest price of all of the Phase II proposals, was approximately 28 percent higher than the agency's cost estimate for the work, and more than 30 percent higher than the prices proposed by the other offerors, including Eagle. The protester's proposal, rated second highest technically, received ratings of acceptable for demonstrated technical/management capability and good for past performance.¹

The protester's proposal was found to have weaknesses under the demonstrated technical/management capability factor; one major weakness concerned the firm's failure to provide sufficient information about its proposed quality control plan. The firm's price proposal was also cited for weaknesses relating to its failure to include transition costs or a high enough escalation rate over the 5 years of the contract. As discussed below, the agency reports that the firm's proposal was excluded from the competitive range due to its significantly higher price and lower technical ratings.

¹ In its supplemental protest, the protester contends that a typographical error in a chart of proposal ratings in the source selection documentation at tab 5 of the agency report (listing the protester's proposal's past performance rating as acceptable instead of good) may have negatively affected the firm's chances for award. Our review of the record, however, squarely supports the agency's position that the erroneously recorded rating did not influence the exclusion determination. The document at issue itself confirms that the findings therein were based on the selection authority's review of the properly recorded proposal ratings listed in the technical evaluation panel's report (at tab 6 of the agency's report). Likewise, while a similar transcription error (showing an acceptable rather than a good rating for the protester's past performance) is evident in a chart in the competitive range documentation at tab 8 of the agency report, that document's detailed narrative explanation for the exclusion of the M&M proposal accurately identifies the protester's proposal's past performance rating as good.

Source Selection Decision at 2; Amended Agency Report at 7 and 9. Compared to the Eagle proposal's significantly lower price and higher technical merit, the agency determined that the M&M proposal did not have a reasonable chance for receiving the award. The two lower-rated proposals were also excluded from the competitive range. Discussions were held with Eagle, the only firm in the competitive range; however, neither the firm's proposal rating nor its price changed as a result of the discussions. This protest followed a pre-award debriefing provided to the protester upon its exclusion from the competitive range.

The protester, which is currently providing security guard services at the Plum Island facility as a subcontractor, challenges the propriety of the agency's exclusion of its proposal, contending that the cited technical weaknesses are minor and did not render the proposal technically unacceptable. M&M generally contends that its proposal should have been included in the competitive range because it was technically acceptable and discussions with the firm would have cured the evaluators' concerns; in terms of price, the protester generally asserts that it may have been able to support its higher price with a superior technical approach during discussions, or that it could have adjusted its price in response to the agency's concerns. M&M, which does not challenge the agency's price analysis, further contends that its proposal should be included in the competitive range despite its significantly higher price.

As a preliminary matter, while M&M challenges the agency's decision to limit the competitive range here to one firm, we have held that there is nothing inherently improper in a competitive range of one. Cobra Techs., Inc., B-272041, B-272041.2, Aug. 20, 1996, 96-2 CPD ¶ 73 at 3. Contrary to M&M's suggestion, agencies are not required to retain in the competitive range a proposal that the agency reasonably concludes has no realistic prospect of award compared to a substantially lower priced and higher technically rated proposal, even if that proposal is, as here, the second highest-rated. See SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5-6.

The determination of whether a proposal is in the competitive range is principally a matter within the discretion of the procuring agency. Dismas Charities, Inc., B-284754, May 22, 2000, 2000 CPD ¶ 84 at 3. Our Office will review an agency's evaluation of proposals and determination to exclude a proposal from the competitive range for reasonableness and consistency with the terms of the solicitation. Novavax Inc., B-286167, B-286167.2, Dec. 4, 2000, 2000 CPD ¶ 202 at 13. Here, as explained in greater detail below, we conclude that the evaluation of M&M's proposal and its elimination from the competitive range was reasonable and consistent with the solicitation.

As an initial matter, we note that M&M has not challenged its lower past performance rating (M&M was rated good for past performance and Eagle was rated outstanding); the firm instead challenges the acceptable rating assigned to its

proposal under the demonstrated technical/management capability factor, arguing that both proposals were found to have some degree of weakness in some of the same subject areas, such as quality control plan. In this regard, M&M basically alleges that it was treated unequally because the Eagle proposal (which received a rating of good) was included in the competitive range for discussions and its proposal was not.

Our review of the record supports the reasonableness of the agency's evaluation ratings for the two firms' proposals and we find nothing in the record to support M&M's claim of unequal treatment. Rather, our review confirms that while both offerors may have had a weakness in the same subject area, their weaknesses varied in degree. For instance, the weakness cited for the quality control plan in Eagle's proposal was minor; a weakness was noted because the firm's comprehensive quality control plan exceeded requirements (and could easily be scaled back regarding inspections, for instance). M&M's proposal, on the other hand, was cited for a major weakness for its critical lack of detail regarding its quality control plan; the agency found that the protester failed to provide sufficient detail about its intended quality control methodologies and procedures. While the agency allowed the protester's prior experience as the incumbent subcontractor of the services to mitigate much of its concern, the evaluators also noted that the past contract did not emphasize quality control; consequently, the evaluators found a significant performance risk in the protester's failure to clearly detail its proposed quality control methodologies and plans.²

Our review confirms that while the protester generally noted in its proposal that it has a set of quality control procedures to guarantee high quality services, including, for instance, hiring qualified personnel, conducting inspections, analyzing performance data and conducting equipment tests, no comprehensive description is provided to explain the methodologies used to complete them. M&M Investigations, Inc. Proposal at § 3.1. A detailed quality control plan was required for evaluation here, and, in our opinion, the protester's proposal was reasonably found to lack sufficient detail in this critical area. Accordingly, our review of the record provides no basis to question the reasonableness of the lower rating of acceptable assigned to M&M's demonstrated technical/management capability. The Eagle proposal, on the other hand, was reasonably cited with only a minor weakness for in fact exceeding the RFP's requirements for a detailed quality control plan.

² We have reviewed all of the protester's evaluation challenges to each weakness cited for the firm's proposal, and we do not find any basis to question the evaluation of the protester's proposal. We discuss here, as an example of our review of the proposal evaluations, the quality control plan evaluations.

Regarding the price proposal evaluations, M&M points out that similar weaknesses were cited in both the M&M and Eagle proposals, for instance, concerning the firms' failure to include transition costs or escalation rates that are as high as those anticipated by the agency. Again, however, there is a distinct difference in the degree of weakness cited for each firm's proposal. For instance, regarding the escalation rates, the record shows that since Eagle's proposed escalation rate is closer to the agency's, it was considered only a minor weakness, while M&M's very low escalation rate was considered a more serious weakness as it varied from the agency's rate considerably more than Eagle's.

The M&M proposal was excluded from the competitive range due to its significantly higher price, which was more than 30 percent higher than Eagle's price and approximately 28 percent higher than the agency's estimate for the work, and its lower technical ratings. Our review of the record confirms that in accordance with the best value evaluation terms of the solicitation, it was wholly reasonable for the agency to conclude that M&M had no reasonable chance for award here in light of its lower technical ratings and significantly higher price and to exclude M&M's proposal from the competitive range.³ See Intown Props., Inc., B-272524, Oct. 21, 1996, 96-2 CPD ¶ 149 at 4-5. Accordingly, the protest is denied.

Gary L. Kepplinger
General Counsel

³ M&M also contends that the agency treated the firms unequally in excluding M&M's proposal from the competitive range but including Eagle's for purposes of conducting discussions about similar weaknesses. Our review of the evaluation record, however, confirms that while both Eagle and M&M were cited with some similar weaknesses (e.g., no transition costs and a low escalation rate), contrary to M&M's position, it did not constitute unequal treatment for the agency to hold discussions with Eagle, but not M&M, as M&M's proposal already had been reasonably excluded from the competitive range based on its significantly higher price and lower technical ratings. M&M also has not shown in any persuasive way that had discussions been held with the firm, it would have lowered its price more than 30 percent to be competitive with Eagle's price. The protester's general contention that it might have adjusted its price during discussions is insufficient to show competitive prejudice to the firm. See Myers Investigative and Sec. Servs., Inc., B-286971.2, B-286971.3, Apr. 2, 2001, 2001 CPD ¶ 59 at 3. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Trauma Serv. Group, B-254674, B-254674.2, Mar. 14, 1994, 94-1 CPD ¶ 199 at 6; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).