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Washington, DC 20548

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Decision

Matter of: CTI-NAN JV, LLC

File: B-400979

Date: April 6, 2009

Brian A. Darst, Esq., Brian A. Darst Law Office, for the protester.
Julio Ocampo, Esq., Naval Facilities Engineering Command, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In design-build acquisition for construction of new, complete multi-story military housing facility, agency reasonably excluded protester's proposal from further consideration based on its finding that firm's experience was limited to renovation, and that it had no experience building such facilities.

DECISION

CTI-NAN JV, LLC, of Tamuning, Guam, protests the exclusion of its proposal from phase two of a two-phase design-build competition under request for proposals (RFP) No. N40192-09-R-1314, issued by the Naval Facilities and Engineering Command, Marianas, for the construction of a new Bachelor Enlisted Quarters (BEQ) facility at Naval Base, Guam. CTI asserts that the agency misevaluated its proposal.

We deny the protest.

The solicitation contemplated the award of a fixed-price contract to design and build a multi-story building to serve as a BEQ facility, with reinforced concrete walls, flooring, roofing and foundations, 140 furnished, two-person residential rooms that include central services (kitchen and laundry facilities) within each room, as well as various other facilities, such as mechanical and telecommunications rooms, lounge and vending machine areas, storage areas for personnel stationed at the facility, and public restrooms. RFP at 8. Also contemplated were various external supporting facilities, a surface parking lot, and all utility services. Id. The overall design and construction also was required to include anti-terrorism force protection features and sustainable design features. Id.

The RFP established a two-phase acquisition process. During phase one, at issue here, offerors were required to submit detailed information relating to their own experience and past performance and that of their proposed lead design firm, and also were to submit information relating to the experience and technical qualifications of proposed key personnel, and management approach. RFP at 9-10. This information was to be evaluated to select up to five firms deemed by the agency to be the most highly qualified; these five firms would then submit phase two proposals. RFP at 16. During phase two, the selected firms will make a second proposal submission comprised of a small business utilization plan, proposed engineering solution to the requirement, and proposed price. RFP at 10. Based on an evaluation of the phase two submissions, award will be made to the firm offering the best overall value to the government based on price and technical considerations (approximately equal in weight). RFP at 17.

The phase one proposal submissions were to be evaluated using three equally-weighted factors: specialized experience and technical competence (with subfactors for experience of the offeror and lead design firm, and technical qualifications and experience of the firm's proposed key personnel), past performance (with subfactors for past performance of the offeror and lead design firm, past performance safety, and past performance small business utilization), and management approach. RFP at 17.

For purposes of evaluating experience, firms were to provide information relating to a maximum of five design-build projects that the offeror had completed or substantially completed within a 5-year period, and a maximum of five design-build projects that the lead design firm had 100-percent completed within a 5-year period. RFP at 18. The RFP described the types of projects to be considered for experience as follows:

The basis of evaluation will include experience of the Offeror and Lead Design Firm with the design and construction of Bachelors Enlisted Quarters [BEQ] Bachelor Officer Quarters [BOQ], Barracks, Lodges, College Dormitories, and Mid-Rise Residential Buildings similar in scope, size (single building construction cost above \$15,000,000), type, and complexity to the project in the RFP.

RFP at 18. For the past performance evaluation, the agency would consider information related to the same five projects listed for the offeror under the experience section of the proposal. Id. at 22. The past performance evaluation would take into account the offeror's history of reasonable and cooperative behavior, commitment to client satisfaction, record of conforming to specifications and applicable law, quality of workmanship, record of recommending and/or implementing innovative approaches and/or technologies, record of controlling costs, adherence to schedules, and prior support for small businesses. RFP at 21.

The agency received seven phase one proposals, including the protester's. After evaluating the proposals, the agency excluded four, including the protester's, based on unacceptable ratings under the experience factor. Agency Report (AR), exh. 21, at 50. The agency determined that none of the protester's five listed projects demonstrated relevant experience, because all consisted of the renovation of preexisting structures, rather than the design and construction of a complete new structure. AR, exh. 21, at 30-31.

CTI asserts that the projects it submitted to demonstrate its experience should have been deemed relevant because, although they were not for the design and construction of a complete new structure, they nonetheless demonstrated its experience in every type of construction activity (such as the construction of a foundation, roofing and reinforced concrete walls) that might be called for in connection with the requirement. The protester points out, in this regard, that the RFP did not expressly state that only the design and construction of a complete new structure would be considered relevant; rather, the RFP provided that the projects only had to be similar, not identical, to the current requirement.

In considering protests challenging the evaluation of proposals, our Office will not reevaluate proposals; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. Engineered Elec. Co. d/b/a/ DRS Fermont, B-295126.5, B-295126.6, Dec. 7, 2007, 2007 CPD ¶ 4 at 3-4. While agencies are required to limit their evaluation to the factors stated in the solicitation, they properly may apply evaluation considerations that, while not expressly stated in the solicitation, are nonetheless reasonably and logically encompassed by the stated evaluation factors. American Artisan Prods., Inc., B-293801.2, June 7, 2004, 2004 CPD ¶ 127 at 3.

The agency's evaluation here was unobjectionable. While the solicitation did not expressly state that the agency would limit its consideration to firms with experience in constructing complete, new structures, we think this was reasonably and logically encompassed by the solicitation's experience factor. The RFP is for the design and construction of a new, multi-story housing facility, and the RFP advised that the agency sought concerns with experience in construction projects similar in scope, size and complexity to the solicited project. We find nothing unreasonable in the agency's determining that the projects listed by CTI, which involved only the renovation of preexisting structures, not the ground-up construction of a new facility, was not sufficiently similar in scope, size, and complexity to the ground-up project required here. While CTI may well have experience in the different construction areas involved in the requirement, again, we find that it was reasonable for the agency to conclude that there was a significant qualitative difference between this segmented experience and the desired experience performing a complete ground-up project. There thus is no basis for us to object to the evaluation.

To the extent that the protester maintains that it was misled by the manner in which relevance was described in the solicitation, there is no basis for such a finding. In this regard, CTI's proposal does not reflect any experience with the design and construction of new, complete multi-story housing facilities, and the protester has not asserted or demonstrated that it possesses such experience and would have listed it had the RFP expressly required it.¹ Thus, there is no basis for finding that CTI was prejudicially misled into not providing the agency with past projects that would have been found relevant. See Metcalf & Eddy Servs., Inc., B-298421.2, B-298421.3, Nov. 29, 2006, 2006 CPD ¶ 61 at 6 (prejudice is an essential element of every viable protest).

CTI asserts that the evaluation of its proposal was fundamentally inconsistent because, while the agency found its prior projects not relevant for purposes of evaluating CTI's experience, it found the very same projects relevant in evaluating CTI's past performance. CTI maintains that this inconsistency is fatal to the evaluation.

This argument is without merit. To the extent that the agency's evaluation under the past performance factor was inconsistent with its evaluation under the experience factor, the agency may have erred, but only insofar as it considered CTI's past performance information relevant. As explained above, we find nothing unreasonable in the agency's determining that the projects listed by CTI, which involved only the renovation of preexisting structures, not the ground-up construction of a new facility, were not sufficiently similar to be deemed relevant. Since, as CTI points out, relevance was defined in similar terms for both experience and past performance, it would naturally follow from our conclusion that the agency also should not have considered these same projects relevant in evaluating CTI's past performance. Nonetheless, CTI suffered no competitive prejudice, since the agency's error in this regard inured to CTI's favor.

CTI raises several assertions to the effect that the agency improperly relaxed the experience factor for the firms whose proposals advanced to phase two. These assertions are without merit. For example, the protester asserts that the agency improperly considered one offeror's project that did not meet the \$15 million threshold specified in the RFP. The record shows, however, that this was the result

¹ In addition to the five projects the protester listed as meeting the experience requirement, its proposal made reference to a large number of additional projects. The overwhelming majority of these projects appear similar to its enumerated projects—that is, BEQ or BOQ renovation projects—but do not appear to involve new construction; CTI does not assert otherwise. Of those projects that appear possibly to have involved new construction, the projects are either not of similar scope, size and complexity, are not for the construction of a multi-story housing facility, or are not design-build projects. AR, exh. 7, Tab 1, at 6-10.

of the agency's rounding approach; it rounded up where a number was 5 or larger and down where the number was lower than 5. The offeror in question listed several projects with values near the \$15 million threshold. Based on the agency's approach, one of the offeror's projects, valued at \$14.4 million, was excluded from consideration, while a second, valued at \$14.8 million was considered. AR, exh. 10, Contracts No. N62742-99-C-1330, N62742-98-C-1323. The agency's approach was reasonable and there is no indication that it was not applied in a consistent manner.²

Finally, CTI asserts that two offerors were selected to advance to phase two despite marginal ratings under the past performance factor; this was improper, CTI maintains, because the RFP provided that the agency would not make award to any firm whose proposal received a marginal rating. This assertion is without merit. As CTI correctly notes, the RFP precluded the agency from making award to a firm whose proposal received a marginal rating; however, the RFP did not preclude the agency from selecting a firm for phase two despite a marginal rating, and then addressing the rating through discussions. Nothing in the record suggests that the agency will make award to firms whose proposals ultimately are rated marginal in some respect.

The protest is denied.

Gary L. Kepplinger
General Counsel

² To the extent that the agency can be viewed as having waived the strict \$15 million threshold in favor of an "approximately" \$15 million threshold, CTI was not competitively prejudiced; there is no indication that CTI could have listed relevant prior projects valued at amounts that would have been rounded up to \$15 million.