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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: The Austin Company

File: B-291482

Date: January 7, 2003

Keith L. Baker, Esq., Barton, Baker, McMahon & Tolle, for the protester.

Edward H. Kim, Esq., Whiteford, Taylor & Preston, for Poole & Kent

Company/Gaudreau, Inc. Joint Venture, an intervenor.

J.J. Cox, Esq., and Madeline Shay, Esq., U.S. Army Corps of Engineers, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In procurement for the design and construction of a laboratory to conduct research of toxic chemical warfare agents, agency properly excluded protester's proposal from the competitive range where protester's proposal was reasonably evaluated as requiring a virtual rewrite due to its failure to comply with the solicitation requirements under each of four evaluation factors.

DECISION

The Austin Company protests the U.S. Army Corps of Engineers' elimination of Austin's proposal from the competitive range under request for proposals (RFP) No. DACA31-02-R-0013 to design and construct an advanced chemistry laboratory (ACL) at Aberdeen Proving Ground, Maryland. Austin protests that exclusion of its proposal was based on the agency's unreasonable application of the solicitation's stated evaluation factors.

We deny the protest.

BACKGROUND

On December 19, 2001, the agency issued RFP No. DACA31-02-R-0013, seeking proposals for the design and construction of an ACL research facility, advising offerors that the facility would be dedicated to "the study of super-toxic chemical warfare agents, lethal industrial materials, related weapons of mass destruction, and defensive counter-measures." Agency Report, exh. 1, RFP at 5. Due to the facility's

intended use, the solicitation directed that the proposals “shall employ the necessary engineering controls and building systems to accommodate a safe working environment,” advising offerors that “this project has critical life safety, health and environmental issues.” Id. In this context, the solicitation further directed that proposed facilities must include, among other things, “custom-built chemical fume hoods,” “ultra-efficient carbon and HEPA [high efficiency particulate air] filters in the exhaust systems,” and “sophisticated ventilation and air distributions systems and environmental controls.” Id.

The solicitation provided that the procurement would be conducted in two phases. In phase I, offerors were required to submit “qualifications” proposals, consisting of information regarding their past performance, prior experience, and technical qualifications. Agency Report, exh. 1, RFP at 13. The solicitation explained that, following review of phase I proposals, the agency would issue an RFP amendment containing the design and construction requirements for phase II proposals, and would request proposals from the most qualified phase I offerors.

On February 15, 2002, eleven offerors, including Austin, submitted phase I proposals; these proposals were thereafter reviewed and evaluated. Based on that evaluation, the agency selected six offerors, including Austin, to proceed to phase II.

On July 2, the agency issued RFP amendment No. 0004, establishing the requirements and evaluation criteria for phase II proposals. Agency Report, exh. 2(D). As finally amended, the RFP provided that the agency’s source selection decision would be made on a “Best Over-all Value” basis considering both price and non-price factors, and established the following, equally weighted non-price factors: materials and equipment; subcontractor qualifications, past performance and personnel; review of presented design and criteria; and oral presentations.¹ Under the heading “cost limitation,” the amended RFP also provided as follows:

The target ceiling for contract award for the design and construction is \$38,000,000 based on funds made available for this project. The Government cannot guarantee that additional funds will be made available for award. Offerors are under no obligation to approach this ceiling.

Agency Report, exh. 2(G), at 3.

On August 22, five of the offerors selected to proceed to phase II, including Austin, submitted price and technical proposals; thereafter, each offeror made an oral presentation to the agency’s evaluators. Following oral presentations, the agency’s

¹ The solicitation provided that the combined non-price factors were approximately equal in importance to price.

technical evaluation committee (TEC) rated each offeror's proposal under an adjectival rating system using the following ratings: "excellent," "above average," "high average," "average," "low average," "poor" and "unacceptable." Agency Report, exh. 8, at 2.

Austin's proposal received ratings under each of the four non-price evaluation factors reflecting its failure to meet some or all of the requirements for the factor. With regard to the first factor, equipment and material, Austin's proposal was rated [deleted];² among other things, the TEC noted that Austin's proposal failed to identify the specific equipment and materials that it intended to use. Agency Report, exh. 6, at 4. With regard to the second factor, subcontractor qualifications/past performance/personnel, Austin's proposal was rated [deleted];³ among other things, the TEC noted that Austin's proposal did not provide necessary subcontractor information. Agency Report, exh. 6, at 4. With regard to the third factor, review of the presented design and criteria, Austin's proposal was rated [deleted];⁴ among other things, the TEC expressed concern that Austin did not understand its responsibility to "advance the design or approach beyond what was provided in the RFP." Agency Report, exh. 6 at 5. Finally, with regard to the fourth factor, oral presentations, Austin's proposal was rated [deleted]; the TEC noted that Austin's oral presentation failed to resolve the agency's concerns regarding, among other things, Austin's responsibility for final project design. Id.

Overall, Austin's technical proposal was ranked fifth of the five proposals and the agency concluded that "a virtual re-write of the entire proposal [would be required] to be considered acceptable." Agency Report, exh. 7, at 2. Based on this overall assessment, the agency established a competitive range which excluded Austin's proposal.⁵ Id. By letter dated September 9, Austin was advised that its proposal would not be further considered. This protest followed.

DISCUSSION

Austin protests that the agency's evaluation of its proposal under each of the evaluation factors was unreasonable and that, in any event, the agency was required to include Austin's proposal in the competitive range and afford Austin an opportunity to address the agency's concerns during discussions. We disagree.

² An [deleted] rating was defined as [deleted]. Agency Report, exh. 6, at 2.

³ A [deleted] rating was defined as [deleted]. Agency Report, exh. 6, at 2.

⁴ A [deleted] rating was defined as [deleted]. Agency Report, exh. 6, at 2.

⁵ The competitive range consisted of three proposals. The agency subsequently requested final proposal revisions from these offerors, and selected for award the proposal submitted by Poole & Kent Company/Gaudreau, Inc. Joint Venture.

The evaluation of technical proposals is a matter within the discretion of the contracting agency, since that agency is responsible for defining its needs and determining the best method of accommodating them, and must bear the results of a defective evaluation. Orion Research, Inc., B-253786, Oct. 21, 1993, 93-2 CPD ¶ 242 at 3. Where an agency's technical evaluation is challenged, our Office will not independently reevaluate the proposals; rather, we will examine the evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. Integrity Private Sec. Servs., Inc., B-255172, Dec. 17, 1993, 93-2 CPD ¶ 332 at 3. A protester's mere disagreement with the agency's conclusions does not render them unreasonable. Id.

With regard to the first evaluation factor, materials and equipment, the solicitation directed that "[t]he offeror will submit design details for specific equipment and material to be used in the project." Agency Report, exh. 2(D), RFP § 8.1. Further, this section of the solicitation specifically listed the following items for which this directive was applicable: fumehoods, casework, chillers, cooling tower, steam turbines, steam converters, exhaust fans, air handling units, exterior steam and condensate system, major pumps, air compressors, vacuum pumps, waste decontamination systems, generators, and switchgear. Id.

Contrary to the requirement to identify the specific equipment intended to be used, Austin's proposal stated that all of the material and equipment identified therein were Austin's "preliminary selections," and that "final selection" would subsequently occur. Agency Report, exh. 17, Austin's Technical Proposal, at 3. Austin repeated this qualification, specifically referring to "preliminary equipment" and "final selection" under each required item of equipment listed in the solicitation.⁶ Agency Report, exh. 17, Austin Technical Proposal, at 36-37.

As noted above, the solicitation advised offerors that, due to the agency's intent to conduct research involving toxic chemical warfare agents, the offerors' proposed design and construction of the facility "has critical life safety, health, and environmental issues." Agency Report, exh. 1, RFP at 5. It was in this context that the solicitation expressly directed offerors to identify the "specific equipment and materials to be used." Our Office has long held that, where a procurement involves matters of human life and safety, an agency has greater discretion to establish

⁶ Austin's proposal asserted that it would, ultimately, provide "equal or better" equipment than that proposed. Id. We do not view this statement as complying with the solicitation requirement that offerors identify the "specific equipment and material to be used in the project." Austin's assertion regarding "equal or better" equipment leaves unresolved the issue of whether one piece of equipment actually is "equal [to] or better" than another and effectively precluded the agency's evaluating the "specific equipment" that Austin intended to use.

requirements that achieve the highest possible level of reliability and effectiveness. See, e.g., American Airlines Training Corp., B-217421, Sept. 30, 1985, 85-2 CPD ¶ 365 at 6; Marine Transport Lines, Inc., B-224480.5, July 27, 1987, 87-2 CPD ¶ 91 at 4. Here, we find no basis to question the agency's determination that Austin's multiple, express qualifications regarding its "preliminary selection" of the multiple items of equipment listed by the solicitation as necessary for contract performance, rendered its proposal unacceptable.

In addition to evaluating Austin's proposal as [deleted] with regard to material and equipment, Austin's proposal was reasonably evaluated as failing to meet the solicitation's requirements under each of the other three non-price evaluation factors.

With regard to the next evaluation factor, subcontractor qualifications/past performance/key personnel, the solicitation stated, among other things: "Identify the subcontractor's proposed personnel team. Submit resumes detailing the qualifications and experience for the key personnel." Agency Report, exh. 2(D), RFP amend. No. 0004 § 8.2. In evaluating Austin's proposal as [deleted],⁷ the agency stated, "No details were provided on personnel for the St. Charles [f]umehood [sub]contractor."⁸ Agency Report, exh. 6, at 4. Austin does not dispute this criticism, complaining only that, if it had been given an opportunity during discussions, it could have addressed this deficiency.

Regarding the third non-price factor, review of presented design and criteria, the solicitation noted that the successful offeror "will be required to design and construct the [laboratory]" and "be responsible for the final design." The solicitation further required that offerors review the agency's preliminary design and performance criteria and "present items of concerns and solutions to problematical criteria." Agency Report, exh. 2(D), RFP amend. No. 0004 § 8.3. In evaluating Austin's proposal as [deleted] under this factor,⁹ the agency found that Austin "did not advance the design or approach beyond what was provided in the RFP." Agency Report, exh. 6, at 5. The agency notes that, in responding to this portion of the solicitation, Austin submitted what the agency describes as a "scant two page narrative." Agency Report, Contracting Officer's Statement at 7. Rather than discussing specific design issues, this portion of Austin's proposal included the

⁷ As noted above, a [deleted] rating was defined as [deleted]. Agency Report, exh. 6, at 2.

⁸ As noted above, the solicitation required that proposed facilities include "custom-built chemical fume hoods." Agency Report, exh. 1, at 5.

⁹ As noted above, a rating of [deleted] was defined as [deleted]. Agency Report, exh. 6, at 2.

statements, “[Austin] assumes that the lab and equipment layout as prescribed in the RFP drawings have been approved by the Government” and, similarly, “[Austin] assumes that [structural steel framing as prescribed in a particular RFP drawing] has been reviewed . . . and is an acceptable design.” Agency Report, exh. 17, Austin Technical Proposal, at § 3. The agency expressed concern that these statements indicated Austin’s intent to avoid design responsibility, contrary to the solicitation requirement that the successful offeror will be responsible for final design. Agency Report, exh. 2(D), RFP amend. No. 0004 § 8.3.¹⁰ Overall, the TEC expressed concern that “[Austin’s] proposal has a high risk for change order[s] during construction,” concluding that the proposal “was not indicative of understanding the requirements of the project.” Agency Report, exh. 6, at 5.

Finally, with regard to the fourth evaluation factor, oral presentation, the solicitation provided: “The offeror will address the following items in an oral presentation: An implementation of the proposed design of the [ACL] . . . addressing the items of concerns and solutions to the problematical criteria.” Agency Report, exh. 2(D), RFP amend. No. 0004 § 8.4. In evaluating Austin’s proposal as [deleted] under this factor, the agency concluded that Austin’s oral presentation did not resolve many of the agency’s concerns; among other things, during the oral presentation, Austin stated, “Lab programming is complete and we will move forward,” and indicated it would do engineering/design on site as a “voluntary alternative.” Agency Report, Contracting Officer’s Statement at 7-8.

Thus, in addition to our conclusion, above, that the agency reasonably evaluated Austin’s proposal as [deleted] with regard to materials and equipment—which, in our view, provides ample basis for rejecting Austin’s proposal—our review of the record regarding the agency’s evaluation of the remaining three non-price evaluation factors provides no basis to question the agency’s ratings under those factors. On the basis of the entire evaluation record, we find nothing unreasonable in the agency’s conclusion that, due to Austin’s lack of detail and responsiveness to the solicitation requirements, Austin would have had to virtually rewrite its entire proposal in order for the proposal to be made acceptable.

An agency is not required to include an offeror in the competitive range when the proposal, to be acceptable, would have to be revised to such an extent that it would be tantamount to a new proposal. Source AV, Inc., B-234521, June 20, 1989, 89-1 CPD ¶ 578. Even where individual deficiencies may be susceptible to correction through

¹⁰ The agency also noted that, in responding to this portion of the solicitation, Austin requested that the agency waive (“as a supplemental agreement to this contract”) the solicitation requirement that 20 percent of the total contract work be performed by the prime contractor. Agency Report, exh. 17, Austin Technical Proposal, § 3. The agency expressed concern that Austin intended to subcontract more work than the solicitation permitted.

discussions, the aggregate of many such deficiencies may preclude an agency from making an intelligent evaluation, and the agency is not required to give the offeror an opportunity to rewrite its proposal. Ensign-Bickford Co., B-211790, Apr. 18, 1984, 84-1 CPD ¶ 439. Accordingly, on the basis of the record here, we find no basis to question the agency's exclusion of Austin's proposal from the competitive range.

The protest is denied.¹¹

Anthony H. Gamboa
General Counsel

¹¹ Austin also complains that the agency failed to consider its low proposed price, and/or failed to properly apply the solicitation's "cost limitation" provision to the other offerors' proposals. With regard to Austin's proposed price, a technically unacceptable proposal cannot be considered for award; accordingly, any purported cost savings flowing from the offeror's stated price regarding its technically unacceptable proposal are irrelevant. See EMSA Ltd. Partnership, B-254900.4, July 26, 1994, 94-2 CPD ¶ 43; Color Ad Signs and Displays, B-241544, Feb. 12, 1991, 91-1 CPD ¶ 154. Further, with regard to the "cost limitation" provision, Austin erroneously asserts that this provision established a "ceiling" which, if exceeded, rendered proposals unacceptable. To the contrary, the specific language of the provision, quoted above, describes the limitation as a "target ceiling," based on currently available funds, and merely warns offerors that the agency "cannot guarantee" that additional funds will become available. Accordingly, to the extent Austin challenges the agency's actions based on allegedly improper consideration of Austin's or the other offerors' proposed prices, none of Austin's assertions provide a basis for sustaining the protest.