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Decision

Matter of: Kiewit Texas Construction L.P.

File: B-402090; B-402090.2

Date: January 12, 2010

Neil H. O'Donnell, Esq., and Dennis J. Callahan, Esq., Rogers Joseph O'Donnell, for the protester.

Richard B. Oliver, Esq., and Keith Byers, Esq., McKenna Long & Aldridge LLP, for the intervenor.

P. Alex Petty, Esq., Corps of Engineers, 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 of agency's rejection of proposal as technically unacceptable for failure to demonstrate ability to schedule and accomplish timely performance is denied where record shows evaluation was reasonable and consistent with solicitation's terms.

DECISION

Kiewit Texas Construction, L.P. of Fort Worth, Texas, protests the issuance of a task order to Environmental Chemical Corporation (ECC), of Burlingame, California, by the Corps of Engineers under request for proposals (RFP) No. LARUR-09-R-001 for levee repairs and improvements in Galveston County, Texas. Kiewit contends that the agency unreasonably rejected its proposal as technically unacceptable based on unstated evaluation criteria.¹

¹ Our Office's consideration of the protest is authorized by section 843 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3, 236-39 (2008), which modified protest limitations previously imposed by the Federal Acquisition Streamlining Act of 1994 regarding permissible protests; NDAA specifically provides that, in addition to previously permitted task order protests, a protest is authorized with regard to "an order valued in excess of \$10,000,000." 122 Stat. 237. We view the NDAA's authorization as extending to protests asserting, as argued here, that an agency's selection decision failed to reasonably reflect the ground rules established for the task order competition.

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We deny the protest.

The RFP, issued on September 3, 2009, sought proposals from firms holding contracts under a multiple award task order contract for the issuance of a fixed-price task order for levee repair (identified as the base bid items) and levee improvement work (identified as the option items).² Offerors were advised that the agency intended to make its source selection based upon initial proposals without conducting discussions, and offerors were instructed to submit sufficiently detailed proposals demonstrating compliance with RFP requirements. RFP at 00100-6; 00110-1. The task order was to be issued to the firm that submitted the technically acceptable, low-priced proposal. *Id.* at 00010-1. Price proposals were to be evaluated based on proposed prices for the base work items plus option items, although the agency advised it was not obligated to exercise the options. *Id.* at 00010-6. Technical proposals were to be evaluated (as either acceptable or unacceptable, with rejection of the proposal if any area of evaluation was rated as unacceptable) for, among other things, the offeror's understanding of the requirements, proposed approach and methodology, and the timeliness of proposed performance; the RFP instructed offerors to demonstrate the "ability to schedule and successfully perform the work and to satisfy all solicitation requirements." *Id.* at 00110-3. Each offer was to include a proposed preliminary schedule for performance demonstrating the ability to timely perform the work and meet solicitation requirements. *Id.* at 00120-2. The RFP further provided that

[t]he contractor shall be required to commence levee work under this contract within 10 calendar days after the date of acknowledgement of Notice to Proceed, to prosecute said work diligently and complete the base work ready for use not later than 90 calendar days after the date of acknowledgment of Notice to Proceed. The government may exercise one or more option(s) no later than 20 calendar days after notice of contract award. An additional time of 60 calendar days will

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Triple Canopy, Inc., B-310566.4, Oct. 30, 2008, 2008 CPD ¶ 207 at 5-7. Although this was a task order competition, the agency adopted the nomenclature normally associated with negotiated procurements, and, for purposes of this decision, we have used these terms in discussing the acquisition.

² The RFP specified certain work to be performed as "base bid" repair and "option" improvement work at Placement Area (PA) Nos. 28, 33, 34 and 35 along the Gulf Intracoastal Waterway in Galveston County, Texas. For example, the RFP's bid schedule included base work items for PA No. 28 involving draining standing water, repairing the levee embankment, and removing and replacing a drop outlet structure; the option work items listed for PA No. 28 included raising the embankment of the levee and adding new cellular concrete matting. RFP at 00010-3, 00010-5.

be added to the contract completion date [for a total of 150 days for contract performance] should one or all of the options be executed.

Id. at 01100-1.

Three offerors, including Kiewit and ECC, submitted proposals by the September 18 closing date. Kiewit's proposal, which offered the low evaluated price of \$13,142,100, was rejected as technically unacceptable for failing to demonstrate the ability to schedule and accomplish timely performance of the work. The firm's preliminary schedule assumed issuance of the task order on October 29, and issuance of the notice to proceed and the start of performance on the same date, January 5, 2010, a date that is almost 4 months after the September 18 date of proposal submission, approximately 3 months after the agency had anticipated issuing the task order and notice to proceed (in early or mid-October, according to the agency's evaluation documentation), and more than 2 months after the date for issuance of the task order assumed in the protester's own schedule (October 29). The protester's proposal was rejected as technically unacceptable for its schedule's inclusion of dates indicating the start (and, accordingly, the completion) of performance substantially later than anticipated by the agency, and for failing to provide dates demonstrating performance of the base bid work within a 90-day period from the notice to proceed date.

ECC's proposal, which offered the next low evaluated price (\$14,349,880.56), was found to be technically acceptable. The evaluators determined that ECC's proposed schedule, which provided for the start of performance on October 8, fully demonstrated, through detailed alternate schedules, that ECC could timely accomplish the base work within 90 days, and, in the event one or more options were exercised, the base and option work within 150 days. An order was issued to ECC on September 30; at that time, the contracting officer decided to exercise the options for the levee improvement work.

Kiewit, alleging it was told at its debriefing only that its proposal was rejected for proposing a notice to proceed/performance start date later than the date the agency anticipated, filed an initial protest with our Office on October 9 contesting that finding. In that protest, Kiewit contends that, since the firm's proposal elsewhere stated that it accepted the RFP's terms, which include a requirement to timely start performance within 10 days of the agency's notice to proceed, the agency should have found its proposal technically acceptable. Kiewit argues that the agency should not have interpreted its schedule's dates as showing a late performance start date, since the firm intended the dates to be mere placeholders for any dates actually required by the agency after issuance of the task order. Kiewit further argues that, since firms were not told of the anticipated dates for issuance of the task order or the notice to proceed, the agency applied an unstated evaluation factor in finding its proposal technically unacceptable.

Kiewit subsequently filed a supplemental protest, on November 30, after receiving the agency's report, from which, the protester alleges, it first learned that the agency also rejected its proposal for failure to demonstrate that performance of the base work items would be completed within 90 days of the notice to proceed.³ In its supplemental protest, the protester contends that the RFP did not require a demonstration that the base work items would be completed within 90 days of the notice to proceed, but instead allowed a firm to choose to instead show it could perform all the work (base and options) within a 150-day period; the protester also generally contends that the demonstration of the ability to perform the base work within a 90-day period, even if a requirement of the RFP, is irrelevant, since the agency ultimately exercised the options, thus authorizing performance of the base and option work within a 150-day period.

In reviewing a protest against the propriety of an evaluation, it is not our function to independently evaluate proposals and substitute our judgment for that of the contracting activity. Barents Group, L.L.C., B-276082, B-276082.2, May 9, 1997, 97-1 CPD ¶ 164 at 6. Rather, we will review an evaluation to ensure that it was reasonable and consistent with the evaluation criteria in the solicitation and applicable procurement statutes and regulations. Id.

Kiewit first contends that it was unreasonable for the agency to reject its proposal on the basis that the protester's proposed preliminary schedule for performance included what the agency perceived as an unreasonably late date for the issuance of the notice to proceed and start of performance. Since the agency's anticipated notice to proceed date was not shared with the competitors prior to proposal submission, Kiewit contends that the agency applied an unstated criterion in evaluating its proposal; that its experience supports its schedule's notice to proceed/ performance start date; and that the firm's proposal, in any event, included a statement of the firm's intention to comply with all solicitation requirements. As discussed below, our review of the record provides no basis to question the agency's evaluation of the proposal.

³ The agency reports that, at the debriefing, Kiewit was told not only that its proposal was rejected for presenting a late notice to proceed date, but also because the firm's schedule, by not separating its performance of the base work from the base plus option work, failed to show timely performance in accordance with the RFP. Given the lack of persuasive evidence in the record to show Kiewit was in fact earlier informed of this second basis for rejection, we consider the firm's supplemental protest timely. We note, however, that we do not agree with Kiewit to the extent it implies it had no reason to know until it received the agency's report that the options had been exercised; the award notice published on the FedBizOpps website on October 1, of which the firm has constructive knowledge, reports the exercise of the options. See PR Newswire Ass'n, LLC, B-400430, Sept. 26, 2008, 2008 CPD ¶ 178 at 2.

An offeror has the burden of submitting an adequately written proposal with sufficiently detailed information to clearly demonstrate the merits of its proposal and risks the rejection of its proposal if it fails to do so. See HDL Research Lab, Inc., B-294959, Dec. 21, 2004, 2005 CPD ¶ 8 at 5. As stated above, the RFP required evaluation of, among other things, the timeliness of the proposed performance, and offerors were to demonstrate the “ability to schedule and successfully perform the work and to satisfy all solicitation requirements.” RFP at 00110-3. Kiewit’s schedule assumed a notice to proceed/performance start date approximately 3 months from when the agency states that it anticipated issuing the task order (and more than 2 months from the date Kiewit itself assumed the task order would be issued). The protester provided no information in its proposal to explain or support the proposed schedule’s assumption that the notice to proceed and start of performance would not occur until months after issuance of the task order. While the firm argues that it intended the dates it submitted on its proposed schedule to be placeholders for the actual notice to proceed and performance start dates, our review of the record shows there is no explanatory narrative or notation in its proposal to support that intention. Likewise, the proposal does not explain what experience the firm relies on in supporting its anticipation of a delay by the agency in issuing the notice to proceed.

We find reasonable the agency’s evaluation of Kiewit’s unexplained, later than anticipated performance start date and the uncertainty presented by the proposed schedule, in relation to the agency’s anticipated dates for issuance of the task order and the notice to proceed with performance. Although Kiewit contends the agency applied an unstated evaluation criterion in this regard, timeliness of proposed schedule and ability to schedule and successfully perform the work were areas for evaluation. As the agency points out in its report, in light of the delay Kiewit’s proposal assumed between issuance of the task order and start of performance, if the agency promptly issued the task order and notice to proceed, it was uncertain from Kiewit’s proposal whether performance would be completed within the required period.⁴ Based on our review of the record, given the insufficiency of the

⁴ The agency points to the fact that Kiewit’s proposal assumes [deleted] days lead time to obtain the [deleted] required for performance, making it unclear whether Kiewit could commence performance if the agency issued the notice to proceed before the date (January 5) on which Kiewit assumed the notice to proceed would be issued and on which Kiewit based its schedule. The agency also notes in response to the protest that had it accepted the firm’s proposed schedule, but issued an earlier notice to proceed than the date indicated on the firm’s proposed schedule, an award to the firm could have resulted in the increased potential for legal disputes and additional costs to the agency if the firm successfully argued after award that, since its schedule specifically offered a January 5 notice to proceed and start to performance, an earlier start date entitled it to an upward equitable adjustment to the task order price. In this regard, we note that while the agency’s post-protest

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firm's blanket statement of compliance in light of the uncertainty introduced by Kiewit's proposed start of performance months after issuance of the task order, and the failure of the firm to demonstrate in its proposal that its proposed dates were mere placeholders for the actual dates the agency's notice to proceed would trigger, we have no basis to question the reasonableness of the agency's concerns and its conclusion that the proposal was technically unacceptable.⁵

The protest is denied.

Lynn H. Gibson
Acting General Counsel

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arguments are given less weight than the contemporaneous evaluation record, they present reasonable concerns associated with the acceptance of the proposal's unexplained, later than anticipated start of performance.

⁵ As noted above, the protester also contends that, to the extent the agency rejected the firm's proposal for failing to submit a schedule for completion of the base bid work within 90 days of the notice to proceed, the rejection was improper. Given our conclusion that the protester's proposal was reasonably rejected as technically unacceptable for the firm's unexplained, later than anticipated notice to proceed/performance start, we need not discuss the firm's challenges to this additional basis for rejection of its proposal.