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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

## **Decision**

**Matter of:** Engineering Design Technologies, Inc.

**File:** B-408811.2

**Date:** June 17, 2014

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Nicholas T. Solosky, Esq., and Reginald M. Jones, Esq., Fox Rothschild LLP, for the protester.

Steven W. Feldman, Esq., and Margaret P. Simmons, Esq., Department of the Army, Corps of Engineers, for the agency.

Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

In a procurement conducted using two-phase design-build selection procedures, protest of agency's decision to eliminate protester's phase 1 proposal from the competition is denied where the record shows that, although the agency concedes an error in the evaluation of the protester's past performance, this error did not prejudice the protester, and the protester's other challenges to the evaluation of its proposal have no merit.

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### **DECISION**

Engineering Design Technologies, Inc. (EDT) of Marietta, Georgia, protests the exclusion of its proposal by the Department of the Army, Corps of Engineers, under request for proposals (RFP) No. W912DY-13-R-0015, for facility repair and renewal. EDT argues that the agency improperly evaluated its proposal and unreasonably eliminated it from further competition.

We deny the protest

### **BACKGROUND**

The RFP, which was issued on June 19, 2013, contemplated the award of indefinite-delivery, indefinite-quantity (ID/IQ), multiple award task order contracts (MATOCs), in support of the U.S. Army Engineering and Support Center, Huntsville

Facility Repair & Renew (FRR) Program. RFP at 64.<sup>1</sup> The contracts will have fixed-price and time-and-materials orders. Id.

The FRR program extends from fiscal year (FY) 2014 to FY 2018 and provides for repair and renewal services under NAICS Code 236220 for failed or failing government facilities, systems and equipment. The services to be provided under the FRR program include facility repair, renovation, conversion, alteration, additions, construction, and equipment procurement/installation. Id. at 3.

The solicitation notified offerors that the agency intended to conduct three separate competitions for award of a single MATOC “pool” to support the FRR program’s requirements, amongst the following three groups: (1) small business offerors; (2) participants in the Small Business Administration’s 8(a) program; and (3) unrestricted offerors. Id. The RFP stated that the agency anticipated a “target” of three 8(a) awardees, three small business awardees, and four unrestricted awardees, but reserved the right to make more or fewer awards, or to make no awards. Id.

The solicitation provided for a two-phase procurement under the design/build source selection procedures of Federal Acquisition Regulation (FAR) subpart 36.3. As relevant here, the phase 1 evaluation was to be based on three evaluation factors: (1) key personnel and management approach; (2) specialized experience; and (3) past performance.<sup>2</sup> Id. at 71. The first two evaluation factors were of equal importance, and the third evaluation factor was slightly less important than either of the first two factors. Id. The agency also informed offerors that they were responsible for including “sufficient details, in a concise manner, to permit a complete and accurate evaluation.” Id. at 70. Offerors were also cautioned that they “[s]hould not assume that they will have an opportunity to clarify or correct anything in their proposal after submitting it in response to Phase 1.” Id. at 78. The RFP advised that the agency intended to select a target of 16 offerors to compete for the contracts in phase 2 of the competition. Agency Report (AR) at 6.

For the key personnel and management approach factor, firms were required to provide the following information regarding their proposed key personnel: “areas of responsibility, relationship with the management structure, and experience in performing design/build construction and construction only services.” RFP at 73. As relevant here the key personnel position of program manager required 10 years of experience in managing engineering and repair and renewal projects, and 5

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<sup>1</sup> Citations herein are to the conformed version of the RFP provided by the agency.

<sup>2</sup> The solicitation stated that price would not be considered in the phase 1 evaluation, and would be considered in phase 2. RFP 2.2.

years of experience in a supervisory position.<sup>3</sup> Id. at 73. The contract administrator position required 5 years of experience in repair and renewal projects. Id. The corporate design manager position required 10 years experience in engineering design and review of repair and renewal projects, and 5 years of experience in a supervisory position. Id. The corporate safety manager position required 10 years experience with the safety requirements of repair and renewal projects, and five years of supervisory experience. Id.

Under the third factor, past performance, the RFP provided that the agency would consider information related to the project examples submitted under the specialized experience factor, as well as past performance information gathered from the Past Performance Information Retrieval System. Id. at 76-77.

The agency received 83 proposals by the proposal due date of August 13, with 26 from 8(a) firms, 30 from small businesses, and 27 from unrestricted firms. AR, Tab 8, Source Selection Evaluation Board (SSEB) Final Report, at 5. The agency selected 17 offerors that were to proceed to the phase-2 competition: five 8(a) firms, six small businesses, and six unrestricted firms. AR, Tab 9, Source Selection Authority Decision (SSAD), at 11. EDT, a small business, received an “acceptable” rating for the key personnel and management approach factor, an “outstanding” rating for the specialized experience factor, and “substantial confidence” for past performance.<sup>4</sup> Id. at 5; Tab 6, SSEB Consensus Report (EDT), at 1-3. EDT was notified that its proposal was not amongst the highest rated, and that the firm would not be permitted to participate in phase 2 of the competition. AR, Tab 3, Email from Army to EDT (Feb. 6, 2014). This protest to our Office followed.

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<sup>3</sup> The agency acknowledges that the RFP contained a contradiction regarding the documentation regarding experience. The phase 1 instructions, section 5.1.2, told offerors to describe in narrative form for each key personnel position, their “experience in performing design/build construction and construction only services,” in contrast to the specific instructions for each key personnel position later in the same section, which are as described above. RFP at 73. In light of this contradiction in the solicitation the agency decided to credit the offerors under either standard. AR at 7 n.2.

<sup>4</sup> The agency assigned offerors’ proposals one of the following ratings for the key personnel and management approach factor and the specialized experience factor: outstanding, good, acceptable, marginal, and unacceptable. AR, Tab 9, SSAD, at 7. For the past performance factor, the agency assigned one of the following performance risk ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral). Id.

## DISCUSSION

EDT argues that the Corps unreasonably excluded its proposal from award based on errors in the evaluation of its proposal under the key personnel and management approach factor and the past performance factor. The protester also argues that the agency treated it in a disparate manner as compared to other offerors with similar ratings who were allowed to participate in phase 2 of the competition. For the reasons discussed below, we find no basis to sustain the protest.

The evaluation of an offeror's proposal is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3.

First, EDT challenges the Corps's evaluation of its proposal under the first evaluation factor, key personnel and management approach. Protest at 12-13. According to EDT, the agency improperly concluded that its proposal failed to demonstrate that its proposed key personnel met the minimum solicitation requirements. As discussed below, we find that EDT's protest is without merit.

The Corps found that the resumes of EDT's proposed key personnel lacked details regarding the individuals' work experience; the agency was therefore unable to evaluate whether they met the requirements for technical and supervisory experience. AR, Tab 6, SSEB Consensus Report (EDT), at 1. For example, EDT claimed that its proposed program manager had "more than 22 years experience as a constructor and project manager" and cited four projects on which this person had worked. AR, Tab 2, EDT's Proposal, Vol. II, at 12-13. The agency found that the description of the proposed program manager's 22 years of experience did not address whether the individual had the requisite 10 years of experience in construction or repair and renewal type projects, and the 5 years of experience as a supervisor. AR, Tab 6, SSEB Consensus Report (EDT), at 1. The Corps identified similar concerns regarding EDT's proposed key personnel for the corporate safety officer, corporate design manager, and contract administrator positions. Id. The agency therefore assigned EDT's proposal an "uncertainty" regarding the

qualifications of the protester's key personnel, which led to an overall rating of acceptable for this factor.<sup>5</sup> Id.

An offeror has the responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows for a meaningful review by the procuring agency. ProActive, LLC, B-403545, Nov. 18, 2010, 2011 CPD ¶ 56 at 5. An offeror that does not affirmatively demonstrate the merits of its proposal risks rejection of its proposal or risks that its proposal will be evaluated unfavorably where it fails to do so. Johnson Controls, Inc., B-407337, Nov. 20, 2012, 2012 CPD ¶ 323 at 3. Here it was EDT's responsibility to establish that its proposed personnel met the specific number of years experience required by the RFP for each key personnel position. We find that the Corps reasonably concluded that EDT's proposal failed to demonstrate that its key personnel met the minimum requirements set forth in the RFP.

EDT also argues that the evaluators noted a "need to clarify" with EDT regarding the years of experience of its proposed key personnel under the key personnel and management approach factor. AR, Tab 6, SSEB Consensus Report (EDT), at 1. The protester argues that if the agency had engaged it in clarifications, the protester could have "easily explained where all of the required information is located in its proposal." Protest at 14; Supp. Comments at 2. EDT also contends that if the agency had conducted clarifications, the protester could "have easily clarified that the years of experience provided for its employees do, in fact, encompass the type of experience required by the RFP." Comments at 7.

To the extent EDT contends that the Corps should have allowed the protester to explain where its proposal discussed the experience of its key personnel, EDT has not explained--nor can we discern--where its proposal demonstrates that its proposed key personnel met the solicitation's experience requirements. Instead, as discussed above, the record shows that the agency reasonably evaluated the protester's proposal.

To the extent the protester argues that the Corps should have provided an opportunity to "clarify" the experience of its key personnel through the submission of additional information, the agency states that it did not conduct discussions, clarifications, or communications (as those processes are defined in FAR § 15.306)

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<sup>5</sup> Proposals under this factor could receive significant strengths, strengths, significant weaknesses, deficiencies, or uncertainties. An uncertainty is defined as "[a]ny aspect of a non-cost/price factor proposal for which the intent of the offeror is unclear (e.g., more than one way to interpret the offer or inconsistencies in the proposal indicating that there may have been an error, omission or mistake)." AR, Tab 7, Revised SSEB Report, at 65.

with any offeror in this procurement. AR at 11. As discussed above, this two-phase design/build procurement was conducted under the provisions of FAR subpart 36.3; as our Office has held, the provisions of FAR part 15 regarding discussions do not apply to phase 1 of design/build competitions, absent specific solicitation provisions to the contrary. See Linc Gov. Servs., LLC, B-404783.2, B-404783.4, May 23, 2011, 2012 CPD ¶ 128 at 7. Even if FAR part 15 applied here, there is no obligation for an agency to engage in clarifications or discussions where it has advised offerors that the agency may evaluate proposals as submitted, without further exchanges. See DJW Consulting, LLC, B-408846.3, Dec. 18, 2013, 2014 CPD ¶ 77 at 5. In this regard, the RFP specifically advised that offerors “[s]hould not assume that they will have an opportunity to clarify or correct anything in their proposal after submitting it in response to Phase 1.” RFP at 78. On this record, we find no basis to conclude that the agency acted improperly in its evaluation of EDT’s proposal.

Next, EDT challenges the Corps’ evaluation of its past performance. The protester was initially assessed a rating of “satisfactory confidence” for its past performance because the agency found that EDT had failed to include in Volume IV certain information that was required in the RFP, such as a narrative and reference for each identified project. AR, Tab 6, SSEB Consensus Report (EDT), at 3-4. The protester contested this evaluation in its protest, arguing that this information was included in Volume III of its proposal. Protest at 9-12. In response to the protest the agency reexamined EDT’s proposal and concluded that the identified information was included in EDT’s proposal, albeit in the incorrect volume. The agency therefore agrees that EDT’s past performance should have received the higher rating of “substantial confidence.” AR at 3.

The Corps contends, however, that EDT was not prejudiced by this error. In this regard, the agency notes that all of the other six small business offerors that advanced to phase 2 of the competition received the highest rating of outstanding under all of the evaluation factors. AR, Tab 9, SSAD, at 5, 11. In contrast, even if the protester’s past performance rating was increased to substantial confidence, its proposal was rated only acceptable under the key personnel, factor, and thus would not have been as highly-rated as the other small business firms that advanced to phase 2. Id. at 5. Prejudice is an essential element of every viable protest, and we will not sustain a protest where it is clear from the record that a protester suffered no prejudice as a result of an agency evaluation error. A-Tek, Inc., B-404581.3, Aug. 22, 2011, 2011 CPD ¶ 188 at 10.

Finally, EDT argues that the Corps evaluated its proposal in an unequal manner as compared to two proposals submitted by 8(a) firms, because those firms were included in the phase 2 competition, even though they did not received the highest rating in all three evaluation factors. Comments at 2. The facts do not support EDT’s argument. As stated above, the RFP provided for three separate competitions for the MATOC awards, one for 8(a) firms, one for small business

firms, and for unrestricted firms. RFP at 3. The solicitation stated that the three competitions would be conducted separately with any tradeoffs conducted within each respective pool. Id. Therefore, contrary to the protester's argument, the 8(a) firms and the small business firms were not competing in the same pool. Supp. AR at 1. We have no basis to find the agency's evaluation unreasonable in this regard.

The protest is denied.

Susan A. Poling  
General Counsel