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Decision

Matter of: Avon Protection Systems, Inc.

File: B-411569.2

Date: November 13, 2015

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DIGEST

Protest that the agency improperly evaluated the protester's proposal is denied where the record demonstrates that the proposal was reasonably evaluated under the solicitation's evaluation factors.

DECISION

Avon Protection Systems, Inc., of Belcamp, Maryland, protests the award of a contract to Ocenco Inc., of Pleasant Prairie, Wisconsin, under request for proposals (RFP) No. N61331-13-R-0004, issued by the Department of the Navy, Naval Surface Warfare Command, for emergency escape breathing devices (EEBD). Avon challenges the Navy's evaluation of proposals and its best-value decision.

We deny the protest.

BACKGROUND

An EEBD is a self-contained emergency escape breathing apparatus used by Navy personnel to facilitate escaping when the atmosphere aboard Navy vessels has been classified as immediately dangerous to life or health as a result of shipboard fires. See RFP at 63. The RFP was issued on March 20, 2013, as a commercial item solicitation under the procedures in Federal Acquisition Regulation (FAR)

parts 12 and 15, and sought proposals to provide up to 97,550 EEBDs, up to 750 training units, and up to 250 EEBD instructional videos with training materials.¹ The solicitation contemplated the award of a fixed-price, indefinite-delivery, requirements contract for a base year and four 12-month options. See RFP at 40.

As relevant here, RFP section C.3.1.2., required an offeror's proposed EEBD to be approved by the National Institute of Safety and Health (NIOSH) with a "Cap 1" capacity rating (which pertains to volume of breathing gas) and a shelf-life of not less than 15 years. Id. at 65. In this regard, the solicitation required NIOSH certification of an offeror's EEBD device, as well as any third-party testing of the device, to be completed prior to proposal submission. See RFP amend No. 0001, at 8; RFP amend No. 0002, at 3; RFP amend. No. 0004, at 2. The solicitation also required all volumes of an offeror's proposal to be packaged in a sealed container and delivered to the location specified in the RFP by the closing date. See RFP at 56.

The RFP provided for award on a best-value basis considering technical merit and price. See RFP at 17. The evaluation factors were: (1) technical approach, compliance with the EEBD specification, (2) maintenance requirements, (3) quality assurance, (4) past performance, and (5) price. Id. at 16-17. The RFP, as initially issued, also included an evaluation factor for sample product and instruction video with training materials, but this factor was deleted by RFP amendment No. 0012, which was issued on April 14, 2015, after the Navy received initial proposals. See RFP amend. No. 0012. For evaluation purposes, factor 1 was the most important factor; factors 2, 3, and 4 were of equal importance; and the combination of the non-price factors were more important than price. RFP at 17. The RFP also advised, however, that the government reserved the right to conduct a tradeoff between technical and price factors, and that "[price] premiums in excess of 10% of the lowest acceptable offeror[s] total evaluated price requires higher level approval, which [would] only be sought in extraordinary cases." See RFP at 17.

Under the technical approach factor, the Navy was to consider an offeror's approach to meeting the EEBD specifications, the hazardous materials requirements, and the EEBD warranty requirements. Id. at 19. Under the maintenance requirements factor, the agency was to evaluate an offeror's requirements for maintaining its EEBD unit, including the preventive or corrective maintenance requirements. Id. at 19-20. Under the quality assurance factor, the agency was to consider an offeror's quality program and quality assurance plan. The validity and thoroughness of its plan was to be evaluated as evidence of its understanding and capability to successfully perform the technical requirements. Id. at 20. Under the past performance factor, the agency was to consider the relevance of the offeror's past performance and to assess a confidence-level rating.

¹ The agency issued twelve amendments to the RFP.

Id. at 18, 20. Under the price factor, the agency was to evaluate an offeror's price for reasonableness, including whether the price was fair, reasonable, and balanced. Id. at 20-21.

Avon and Ocenco² submitted proposals in response to the RFP by the closing date of December 2, 2014. A source selection evaluation board (SSEB) evaluated proposals by assigning the proposals an adjectival rating and risk rating for the technical factors, and a relevance rating and confidence assessment rating for past performance.³ The agency also analyzed offerors' prices for reasonableness. See Agency Report (AR) at 1. In this connection, the evaluators identified whether each offerors' proposal contained any strengths, weaknesses, significant weaknesses, deficiencies, or risk. See id. After the evaluation, on April 2 the Navy conducted discussions with Avon concerning two weaknesses that were identified in its proposal under the technical approach factor regarding the [DELETED] on its EEED, and the [DELETED] of the device. See AR, Tab C, Discussions at 2-3. No other weaknesses or deficiencies were identified by the agency. The agency conducted further discussions with Avon concerning these weaknesses on April 6. Id. at 9.

On April 14, the Navy issued RFP amendment No. 0012, which deleted the sample product and instruction video with training materials evaluation factor, and requested final proposals. The agency determined that Avon's final proposal, which was received on April 20, addressed the weaknesses identified during discussions; as a result, the protester's proposal was found to have no weaknesses or deficiencies. See Contracting Officer's (CO) Statement at 3. Based on the results of the evaluation, on May 13, the Navy selected Ocenco's proposal as the best value. On May 22, Avon filed a protest with our Office (B-411569), challenging the agency's evaluation of offerors' proposals and best-value determination. On June 18, we dismissed the protest as academic because the Navy advised our Office that it would take corrective action by re-evaluating proposals.

The reevaluation resulted in Avon's proposal and Ocenco's proposal receiving essentially the same ratings as the prior competition, except Avon's past performance improved to very relevant/substantial confidence and a slight increase

² Offerors were permitted to submit alternate proposals. Ocenco submitted two proposals, and the award here was based on its alternate proposal B.

³ The technical ratings were outstanding, good, acceptable, marginal, and unacceptable. The past performance relevance ratings were: very relevant, relevant, somewhat relevant, and not relevant. The confidence assessments were substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence. RFP at 17-19.

in Avon's evaluated price.⁴ The overall results of the evaluation pertinent here were as follows:

	Avon	Ocenco
Technical Approach	Good/low risk	Good/low risk
Maintenance Requirements	Acceptable/moderate risk	Good/low risk
Quality Assurance	Acceptable/moderate risk	Acceptable/moderate risk
Past Performance	Very relevant/Substantial confidence	Very relevant/Substantial confidence
Price	\$33,865,689	\$21,962,150

See AR, Tab E, Source Selection Decision, at 44.

The source selection authority (SSA) independently reviewed each offeror's proposal under the evaluation factors. See *id.* at 45. The SSA identified the relative merits of proposals and assessed whether any differences between proposals were worth a price premium. *Id.* The SSA concluded that Ocenco's proposal offered the best value based on its higher technical evaluation ratings and lower evaluated price. *Id.* at 52. Ocenco was selected for the award on July 28. This second protest from Avon followed.

DISCUSSION

Avon raises several challenges to the Navy's evaluation of offerors' proposals. Specifically, Avon contends that: (1) the Navy should have rejected Ocenco's proposal as unacceptable for failing the requirement that its EEEB be NIOSH certified at the closing date of December 2; (2) the agency should have found that Ocenco's proposed price was unrealistically low and reflected a lack of understanding of the RFP requirements; (3) the agency failed to properly evaluate Ocenco's proposal under the technical factors by not downgrading the proposal for failing to meet the solicitation's NIOSH requirement and for what the protester contends was the awardee's unrealistically low price; (4) the Navy improperly evaluated Avon's proposal under the technical factors by not crediting the proposal with additional strengths; and (5) the Navy failed to conduct a proper tradeoff and best-value determination due to the flawed evaluation of proposals.

⁴ The Navy initially evaluated Avon's price at \$33,865,201. The record does not indicate the basis for this increase; however, we find that this slight difference in Avon's evaluated price has no impact on the resolution of the protest.

For the reasons, discussed below, we only address two of Avon's arguments: that the Navy failed to properly evaluate Avon's proposal under the technical factors; and that the Navy's tradeoff and/or best-value determination was unreasonable. As discussed below, we find no basis to sustain these protest contentions.

In reviewing a protest challenging the agency's evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency, as the evaluation of proposals is generally a matter within the agency's discretion. Del-Jen Educ. & Training Group/Fluor Fed. Solutions LLC, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 8. Rather, we will review the record to determine whether the agency's evaluation was reasonable; consistent with the stated evaluation criteria, applicable procurement statutes, and regulations; and adequately documented. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. An offeror's disagreement with an agency's judgment is insufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

Previous Partial Dismissal of Protest

The Navy requested dismissal of Avon's protest on the basis that it failed to state legally sufficient grounds. Under our Bid Protest Regulations, a protest is required to include a detailed statement of the legal and factual grounds for the protest, and those grounds must be sufficient, if un rebutted, to establish the likelihood that the protester will prevail on its claim of improper agency action. See 4 C.F.R. § 21.1(c)(4), (f).

Avon and Ocenco were permitted to respond to the agency's dismissal request. Following these responses, our Office dismissed three of the protester's arguments because they did not set forth a valid basis of protest. These arguments were: (1) the Navy should have rejected Ocenco's proposal because it did not comply with the requirement that its EEBD be NIOSH certified by the closing date; (2) the Navy should have found that Ocenco's price proposal was so low that it demonstrated a lack of understanding of the requirements; and (3) the Navy should have downgraded Ocenco's proposal under the technical factors based on its failure to meet the NIOSH requirement and its low price. See GAO Email, Aug. 25, 2015.

In connection with the first allegation, the record showed that Ocenco's NIOSH certification for its EEBD was obtained on December 2, 2014, as required by the solicitation, and that Ocenco provided the contracting officer with notice of its certification via an email sent that same day. See Motion to Dismiss at 1-2; Intervenor's Comments in Support of Motion, exh. B, NIOSH Approval Letter, Dec. 2, 2014, at 1. In response, Avon argued that even if Ocenco obtained its NIOSH certification on December 2, Ocenco's proposal could not have complied with the requirement that the proposal be delivered in a sealed container, along with

the proper NIOSH labels on its sample product, by the December 2 proposal due date.

We dismissed this contention for failing to state a valid basis of protest because RFP amendment No. 0012, issued on April 14, 2015, deleted the requirement to submit a sample product. RFP amend. No. 0012, at 1. As a result, we concluded that even if Ocenco's initial submission did not have the proper NIOSH certification labels on its product sample, there was no requirement for even submitting a sample product after the issuance of amendment No. 12. See GAO Email, Aug. 25, 2015. We also noted that the protester did not file a timely protest objecting to the removal of the sample product requirement. Id.

With respect to Avon's second argument, that the Navy failed to properly evaluate Ocenco's price, we again found that Avon failed to state a valid basis of protest. Id. We reached our conclusion because the solicitation provided for the award of a fixed-price contract, and did not anticipate a review of the realism of the proposed prices. See RFP at 21. In this regard, we have held that, absent a solicitation provision providing for a price realism evaluation, agencies are neither required nor permitted to assess price realism in awarding a fixed-price contract. See CACI-WGI, Inc., B-408520.2, Dec. 16, 2013, 2013 CPD ¶ 293 at 5.

Avon's third dismissed allegation met the same fate as the two allegations discussed above. In essence, Avon relied on both of these baseless contentions to argue that these alleged shortfalls should have been addressed in the technical evaluation of Ocenco's proposal. Since both contentions relied on requirements that were not imposed in this solicitation, the evaluation challenge was similarly dismissed. See GAO Email, Aug. 25, 2015. We turn next to Avon's remaining protest arguments, which were addressed in the Navy's report.⁵

⁵ Following our partial dismissal of Avon's three arguments, discussed above, the protester requested that we reconsider our partial dismissal of its protest based on the legal sufficiency of these allegations on September 3. We did not separately docket this request, as the underlying protest was still in development. Nonetheless, we denied the request because the protester essentially repeated arguments it made previously and was expressing its disagreement with our decision. Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

Technical Evaluation

Avon argues that the Navy unreasonably evaluated its proposal under the three non-price evaluation factors. Specifically, the protester argues that the agency should have assigned its proposal numerous additional strengths, and that its proposal should have received the highest-possible rating for all three of the non-price evaluation factors. We find no merit to these arguments.

With regard to the evaluation of Avon's proposal under the technical approach factor, the record reflects that the SSEB identified two strengths in the proposal, but no weaknesses, significant weaknesses or deficiencies.⁶ As a result, Avon's proposal received a rating of good/low risk.⁷ See AR, Tab D, Technical and Past Performance Consensus Report, at 6. The two strengths identified were for [DELETED]. Id. at 8. Although the SSEB found that the protester's device met all technical requirements, and indicated a thorough approach and understanding of the requirements, id., the SSEB also noted the following:

EEBD Specification paragraph C.3.2.1. Donning Time states the time required to fully don the EEBD shall not be greater than 30 seconds. The proposed device meets the requirements on average, but the distribution of donning times indicates there is complexity with operation. Specifically, [DELETED] (Proposal page 1-1-17). Nevertheless, the Evaluation Team did not find this to increase the risk of unsuccessful performance and thus no weakness was assigned.

Id. at 7-8.

Avon argues that the agency unreasonably assigned only two strengths to its proposal under the technical approach evaluation factor because it ignored numerous other areas where the proposal exceeded requirements in the specifications. See Protester's Comments at 5-9. In this connection, the protester

⁶ The RFP defined a strength as: "an aspect of an offeror[']s proposal that has merit or exceeds specified performance or capability requirements in a way that will be advantageous to the Government during contract performance." RFP at 19.

⁷ The RFP defined an outstanding rating as: "Proposal meets requirements and indicates an exceptional approach and understanding of the requirements. Strengths far outweigh any weaknesses. Risk of unsuccessful performance is very low." RFP at 17. The RFP defined a good rating as: "Proposal meets requirements and indicates a thorough approach and understanding of the requirements. Proposal contains strengths which outweigh any weaknesses. Risk of unsuccessful performance is low." Id.

argues that the agency was required to identify as a strength any aspect of its proposed EEBD or technical approach that exceeded the specifications. For example, Avon argues that in changing from a [DELETED] to a [DELETED], its EEBD device [DELETED]. Other arguments include Avon's contention that the [DELETED] of its EEBD is less than (and hence exceeds) the solicitation's requirement; and that the [DELETED] with its EEBD is [DELETED] percent less than (and hence exceeds) the performance requirement.⁸

We find no merit to the protester's arguments that the agency was required to assign strengths for these features of Avon's product. The RFP provided that a strength would be assigned in evaluating a proposal where the proposal exceeded specified performance requirements in a way that would be advantageous to the government during contract performance. RFP at 17. While the protester argues that the agency should have considered every instance where its proposal exceeded requirements as strengths, the agency was not required to reach such a conclusion unless it also concluded that these features would be advantageous to the government.

Here, the record reflects that the evaluators found no basis to assign Avon's proposal an outstanding rating for this factor (rather than a rating of good) because, in their judgment, the proposal did not provide an "exceptional approach and understanding of the requirements," as required by the solicitation. See RFP at 17. The SSEB specifically noted that the two strengths that were identified only pertained to three of the twenty relevant specifications. See AR, Tab D, Technical and Past Performance Consensus Report, at 8. In addition, the agency states that in reevaluating Avon's proposal during corrective action, the agency thoroughly reviewed the proposal under this factor but did not identify any additional aspects of the proposal that constituted a strength, including the areas identified by the protester in the protest. See AR, Tab G, Decl. of Technical Evaluation Team Chair, at 1. We find that the protester's arguments reflect its disagreement, but do not show that the agency abused its discretion in evaluating this proposal.

The protester's arguments regarding the other two evaluation factors are similarly unpersuasive. In this regard, the protester argues that the Navy was required to consider as strengths any area where its proposal exceeded the requirements under the maintenance requirements and quality assurance evaluation factors. However, as discussed above, the RFP did not require the agency to consider as a strength every area where its proposal exceeded requirements. Instead, the RFP permitted the agency to determine whether the features of an offeror's proposal

⁸ The protester also identified other examples where its product exceeded the requirements. See Protester's Comments at 5-6. Although we only reference the above examples for purposes of our discussion, we have considered each of the protester's specific examples in resolving the protest.

provided the government an advantage, which resulted in a strength being assigned to the proposal. See RFP at 19. For these reasons, we conclude that Avon has not shown that the Navy's evaluation of its technical proposal was unreasonable.

Meaningful Discussions

Next, Avon argues that the Navy failed to conduct meaningful discussions with the protester regarding the time for donning its proposed EEBD. We find no merit to this argument.

With regard to FAR part 12 procurements conducted under negotiated procedures, as here, agencies are authorized to use in conjunction with part 12 the policies required for solicitation, evaluation, and award prescribed in FAR part 15. See FAR § 12.203. Under FAR part 15, when conducting discussions, an agency is not required to raise with each offeror every possible area where its proposal could be improved. See, e.g., PWC Logistics Servs., Inc., B-299820, B-299820.3, Aug. 14, 2007, 2007 CPD ¶ 162 at 6. Rather, discussions need only be meaningful, that is, they must identify deficiencies, significant weaknesses, and adverse past performance to which the offeror has not yet had an opportunity to respond. FAR § 15.306(d)(3).

As noted above, the SSEB evaluation of Avon's proposal under the technical approach evaluation factor identified concerns as to whether Avon's proposed EEBD could be donned by users within the required time of 30 seconds. See AR, Tab D, Technical and Past Performance Consensus Report, at 7-8. As also noted above, the SSEB specifically documented that this circumstance did not increase the risk of unsuccessful performance, nor did the SSEB assign the proposal a weakness for this finding. Id. For this reason, the agency contends, there was no reason to address this matter during discussions.

While Avon contends that the Navy's concern regarding the donning time for its proposed EEBD was a basis for not assigning the protester the highest possible rating under the technical approach evaluation factor, this is not the standard for holding discussions. The record here shows that the agency did not assign the protester a significant weakness or deficiency regarding donning time; in fact, the contemporaneous record shows that the agency did not assign the protester any weakness for this issue. We therefore find no basis to conclude that the agency failed to conduct meaningful discussions with the protester.

Award Decision

Finally, Avon argues that the Navy's award decision was flawed because it was based on the alleged errors discussed above, and because the decision fails to set forth a rational basis for award. We find no merit to these arguments.

Selection officials have considerable discretion in making price/technical tradeoff decisions. American Material Handling, Inc., B-297536, Jan. 30, 2006, 2006 CPD ¶ 28 at 4. When proposals are compared for purposes of a best value tradeoff decision, the number of identified strengths is not dispositive; rather, it is the qualitative information underlying the ratings that the source selection authority should consider in assessing whether and to what extent meaningful differences exist between proposals. Walton Constr. a CORE Co., LLC, B-407621, B-407621.2, Jan. 10, 2013, 2013 CPD ¶ 29 at 6. The propriety of a cost/price technical tradeoff decision does not turn on the difference in the technical scores or ratings per se, but on whether the selection official's judgment concerning the significance of the difference was reasonable and adequately justified in light of the RFP's evaluation scheme. Johnson Controls World Servs., Inc., B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88 at 6.

As discussed above, we find no merit to the protester's challenges to the evaluation of the offerors' proposals. As also discussed above, the agency here considered the relative merits of the competing proposals, and concluded that Ocenco's higher-rated, lower-priced proposal offered the best value. AR, Tab E, Source Selection Decision, at 52. We conclude that the award decision here was unobjectionable, particularly because the RFP provided for, in essence, a qualified or limited best-value decision. In this regard, although the RFP provided that technical evaluation factors were more important than price, it also established on its face the outer boundary of any price premium the agency would consider in making a tradeoff between the technical and price factors. See RFP at 17 ("[Price] premiums in excess of 10% of the lowest acceptable offeror[s] total evaluated price requires higher level approval, which [would] only be sought in extraordinary cases").

Because the awardee's proposal was the highest-rated and lowest-priced, there was no requirement for the agency to perform a price/technical tradeoff. See RFP at 17; Segovia, Inc. d/b/a Inmarsat Gov't, B-408376, B-408376.2, Sept. 3, 2013, 2013 CPD ¶ 203 at 10 (tradeoff not required when selecting highest-rated, lowest-priced proposal); Rotech Healthcare, Inc., B-410203, B-410203.3, Nov. 5, 2014, 2014 CPD ¶ 333 at 10 (same). Moreover, the difference between Avon's and Ocenco's proposed prices was 54 percent. See AR, Tab E, Source Selection Decision, at 44. In these circumstances, selecting Avon's proposal would have violated the express terms of the solicitation, in that the protester's proposal was not

more highly-rated than the awardee's. We find that the agency's selection decision was reasonable.

The protest is denied.

Susan A. Poling
General Counsel