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Decision

Matter of: EA Engineering, Science, and Technology, Inc.

File: B-411967.2; B-411967.3; B-411967.4

Date: April 5, 2016

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Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of the awardee's proposal under the price and non-price factors, and the protester's proposal under the non-price factors, is denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

EA Engineering, Science, and Technology, Inc., of Hunt Valley, Maryland, protests the issuance of a task order to Engineering/Remediation Resource Group, Inc., (ERRG), of Martinez, California, by the Department of the Army, Corps of Engineers, under request for proposals (RFP) No. W912PP-15-R-0014 for environmental remediation services. EA challenges the agency's evaluation of the awardee's proposal under the price and non-price factors as well as the evaluation of its own proposal under the non-price factors.

We deny the protest.

BACKGROUND

The Corps issued the RFP on April 30, 2015, to the small business vendor pool of the agency's Nationwide Multiple Environmental Government Acquisition (MEGA)

indefinite-delivery, indefinite-quantity (ID/IQ) multiple-award task order contract (MATOC) for environmental remediation services in support of the military munitions response program at three munition sites and the Hawthorne Army Depot, Mineral County, Nevada. RFP Cover Letter at 1.

The RFP detailed “broad-spectrum environmental services” to be performed by the selected contractor, including design, implementation, construction and operation associated with environmental cleanup activities at three munition response sites. RFP, Performance Work Statement (PWS), at 2. As relevant here, contractors were required to develop and maintain a project schedule, defined as follows:

As part of the [project management plan], the Contractor shall develop and maintain an Activity-Based Schedule that fully supports the technical approach and outlines activities and milestones defined at the appropriate detail level and logically sequenced to support and manage completion of the performance objectives in this PWS.

PWS at 9.

The PWS also identified seven key personnel positions, each with specific experience and education requirements. PWS at 21; RFP at § 6.0. As relevant here, three positions had the following requirement, “[m]ust be a Graduate of a military Explosives Ordnance Disposal school with the Phase II certification.” RFP at § 6.0.

Proposals were to be evaluated on a best-value basis considering price and four non-price factors: technical approach, management, key personnel experience and education, and past performance/experience. RFP at §§ 4.0-7.0. The non-price factors, when combined, were to be significantly more important than price. Id. at § 9.4. With respect to price, proposals were to be evaluated for reasonableness. However, offerors were also informed that, “[s]hould the Government determine that the proposed prices are unrealistically low, this will be considered a performance risk.” Id. at § 8.2.1. The RFP also states that, “[t]he Government will examine price proposals for artificially low unit prices when unit pricing is applicable. Offerors found to be unreasonably high, unrealistically low, or unbalanced, may be considered unacceptable and may be rejected on that basis.” Id.

Six proposals were evaluated by the agency during the initial evaluation. Agency Report (AR), exh. 14, Source Selection Decision (SSD), at 2. Of the six proposals, four proposals were excluded from further consideration for receiving a marginal rating under at least one of the non-price factors, including ERRG. Id. at 26. Of the two remaining proposals, EA was selected as the best overall value to the government. Id.

Following the selection of EA as the apparent awardee, ERRG filed a protest with our Office challenging the agency's award decision. As a result, the agency decided to take corrective action by establishing a competitive range, entering into discussions with selected offerors, conducting new price analysis, and making a new award decision. AR, exh. 15, ERRG Protest; exh. 16, Notice of Corrective Action. The agency did not terminate EA's task order at that time, but as discussed below, did so after completing its corrective action. On September 11, we dismissed ERRG's protest as academic.

In furtherance of its corrective action, the agency established a competitive range consisting of ERRG, EA, and one other offeror, and conducted discussions. AR, exh. 17, Competitive Range Determination, at 1. After receiving revised proposals, and conducting a new evaluation, the relevant results were as follows:

	ERRG	EA	Offeror A
Technical Approach	Good	Good	Good
Management	Acceptable	Good	Good
Key Personnel	Outstanding	Good	Good
Past Performance	Substantial Confidence	Substantial Confidence	Substantial Confidence
Price	\$8,679,791.32	\$14,577,369.80	\$17,500,480.28

AR, exh. 32, SSD, at 27-29.

The source selection authority (SSA) found that both EA and Offeror A were rated marginally higher technically than ERRG. Id. at 29. However, after a substantive review of the relative merits of each proposal, she recognized that while there was a "slight difference" in technical rating, "the clear choice in the trade-off is ERRG" as the price premium of almost \$6 million could not be justified for EA's marginally higher technical rating. Id. at 30. In the end, the SSA concluded that ERRG's highly-rated technical proposal and low price provided the best value to the government, and made award on this basis. Id. On December 18, the agency provided notice to EA of the award to ERRG. AR, exh. 34, Notification of Award, at 1. In the notice, the agency informed EA that because of the determination to award to ERRG, EA's task order was hereby terminated. Id. This protest followed.

DISCUSSION

In its initial protest, EA challenged the termination of its task order, arguing that the agency unreasonably evaluated the realism of ERRG's proposed price and failed to recognize the performance risk for ERRG under the non-price factors given ERRG's allegedly unrealistic price. Protest at 13-17. EA also argued that the agency unreasonably evaluated its own proposal under the technical approach, management, and key personnel factors. Id. at 17-19. Subsequent to its review of the record, EA also argued that ERRG should have been eliminated from

consideration for failing to satisfy two PWS requirements. Supp. Protest at 1-6. However, prior to turning to the merits, we must first consider our jurisdiction over this protest.

Jurisdiction

The record shows that this procurement was conducted using the agency's MEGA ID/IQ MATOC. As such, our jurisdiction must be found in the statutory grant of authority to hear protests related to the issuance of task orders under multiple-award, ID/IQ contracts, which is limited to orders valued in excess of \$10 million. 10 U.S.C. § 2304c(e)(1)(B). The record also shows that the task order awarded to ERRG was in the amount of \$8,679,791.32, which places the order outside of our statutory bid protest jurisdiction. In its protest, however, EA argues that our Office has jurisdiction over this matter because the firm challenged the unreasonable termination of its task order, which exceeds \$10 million.

We conclude that while EA cannot challenge the award of the task order to ERRG, EA may challenge the termination of its own order, which exceeds the \$10 million statutory threshold. In this regard, while we generally do not review terminations for convenience of the government, we will review such a termination where it is based upon an agency determination that the initial contract award was improper. Severn Companies, Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181 at 2; 31 U.S.C. § 3551(1)(D). Our review of such terminations extends to the termination of task orders where the protest is based in whole or in part on alleged improprieties concerning the award of the order. See Bay Area Travel, Inc.; Cruise Ventures, Inc.; Tzell-AirTrak Travel Group, Inc., B-400442 et al., Nov. 5, 2008, 2009 CPD ¶ 65 at 7-8 (use of the term "protests" in 10 U.S.C. § 2304c(e)(1)(B) includes substantive review of protest allegations).

Here, EA timely challenged the agency's decision to terminate its task order after it reevaluated proposals and determined to issue a task order to ERRG instead of EA. While our Office would not ordinarily have jurisdiction to review the propriety of an award of an order valued under \$10 million, the termination of EA's task order is so intertwined with the decision to award an order to ERRG that we find no basis to separate the termination from the award. Thus, under these circumstances, we will review the reasonableness of the agency's decision to issue an order to ERRG as part of our review of the reasonableness of the agency's decision to terminate EA's task order. However, as discussed more fully below, we see no basis to question the reasonableness of the agency's decision to terminate EA's task order.

Price Realism

EA challenges the agency's evaluation of the realism of ERRG's proposed price. The firm argues that the price realism analysis conducted by the agency pursuant to corrective action was not necessary, that the evaluation is "inherently unreliable"

because it was created in the heat of litigation, and that it “carries with it multiple unanswered questions regarding why it was created and how it reconciles with the first analysis.” Protester’s Comments at 14-15. In fact, a review of EA’s pleadings shows that most of its arguments focus on the propriety of the agency undertaking corrective action, and specifically undertaking a new price realism analysis as part of corrective action.

However, we conclude that such arguments are untimely as they were not made within 10 days of when the protester knew, or should have known, that the agency was to conduct a new price realism analysis. In this regard, the record shows that on September 5, 2015, the agency informed our Office that it would take corrective action by entering into discussions with offerors and accepting revised proposals prior to preparing a new source selection decision. AR, exh. 16, Notice of Corrective Action, at 1. On October 1, the agency clarified its proposed corrective action, confirming to ERRG and EA that a price realism analysis would be conducted, as required by the RFP. AR, exh. 17b, Clarification of Proposal Reevaluations, at 1-2. Consequently, as of October 1, EA knew that the agency would conduct a price realism analysis, and if it had objections to the agency’s conduct, it was required to raise those objections to our Office no later than October 12. Since it did not do so, EA’s challenge to the agency’s corrective action is untimely. See 4 C.F.R. § 21.2(a)(2).¹

Moreover, we conclude that EA’s challenges to the post-corrective action realism analysis of ERRG’s proposal are without merit. First, the protester argues that the agency’s evaluation was inherently unreliable, and should not receive deference from our Office, because it was created in what the protester terms “the heat of litigation.” See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 11 (expressing concern that post-protest documents that constitute reevaluations and redeterminations prepared in the heat of an adversarial process may not represent the fair and considered judgment of the agency). However, the memorandum conveying the agency’s price realism analysis is dated December 14, 2015. AR, exh. 30, ERRG Cost Realism Analysis, at 1. Thus, the record shows that the agency’s realism analysis did not occur during

¹ While EA did oppose the dismissal of the prior protest arguing that the corrective action was unnecessary, we found that the firm’s objections did not call into question the conclusion that ERRG’s protest had been rendered academic by the agency’s action. See Engineering/Remediation Resources Group, Inc., B-411967, Sept. 11, 2015 (unpublished decision), at 2. Our Office further informed EA that to the extent it intended to raise challenges to the adequacy of the corrective action, it could file a protest consistent with the requirements of our Bid Protest Regulations. Id. However, EA did not submit a protest challenging the corrective action until the instant protest was filed.

the course of the protest, but during corrective action well after the original protest was dismissed. Protester's Comments at 14.

Second, EA argues that the agency's post-corrective action analysis improperly utilized a different methodology than its pre-corrective action analysis and, in any event, was not adequately documented. Protester's Comments at 15. We disagree. Agencies have broad discretion on the type of analysis conducted to determine the realism of offeror's prices in a fixed-price contract. Logistics 2020, Inc., B-408543.4, Feb. 28, 2014, 2014 CPD ¶ 110 at 7. Our review of a price realism analysis is limited to determining whether it was reasonable and consistent with the terms of the solicitation. Smiths Detection, Inc.; Am. Sci. & Eng'g, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 17. The nature and extent of an agency's price realism analysis are matters within the agency's discretion. Star Mountain, Inc., B-285883, Oct. 25, 2000, 2000 CPD ¶ 189 at 6.

The fact that the agency's post-corrective action evaluation differed in methodology from the pre-corrective action evaluation provides no basis to object to the methodology so long as the analysis is otherwise reasonable and consistent with the terms of the solicitation. In this regard, EA has not shown, nor do we otherwise conclude, that the agency's post-corrective action price realism evaluation was unreasonable or contrary to the terms of the solicitation. In fact, the record shows that the post-corrective action evaluation, which provided a detailed per-contract line item number (CLIN) analysis of ERRG's technical approach analyzing such aspects as price, labor rates, labor hours, and methodology, compared to historical data, and the information of other offerors, was reasonable, detailed, and consistent with the terms of the solicitation.

Finally, EA argues that the post-corrective action analysis was unreasonable because the agency found risks in ERRG's initial proposal for proposing to seek change orders and equitable adjustments from the agency under certain circumstances, but did not find risks in its revised proposal despite ERRG instead proposing to take on that risk by absorbing the cost of more expensive digging methodologies. Protester's Comments at 15. However, an offeror's disagreement with an agency's subjective evaluation judgments, standing alone, does not render the evaluation unreasonable. See Ball Aerospace & Techs. Corp., B-411359, B-411359.2, July 16, 2015, 2015 CPD ¶ 219 at 7. Other than pointing out the difference between the pre-corrective action evaluation and the evaluation subsequently performed, EA has provided no argument as to why the post-corrective action evaluation was unreasonable. Having concluded that the post-corrective action methodology was reasonable, and absent any additional arguments, we are provided no basis to question the agency's decision to not assign a risk to ERRG's proposal based on its revised analysis.

ERRG's Non-Price Proposal

EA raises two challenges to the evaluation of ERRG's proposal under the non-price factors. First, the protester argues that the agency unreasonably found ERRG to be eligible for award even though ERRG did not satisfy an express requirement of the RFP. Protester's Comments at 1. Second, EA argues that the agency unreasonably failed to eliminate ERRG from the competition for not meeting all of the personnel requirements under the key personnel factor. We have reviewed both allegations, and find both to be equally without merit.

The evaluation of technical proposals is a matter within the discretion of the contracting agency, since the agency is responsible for defining its needs and the best method for accommodating them. SRA Int'l, Inc., B-408624, B-408624.2, Nov. 25, 2013, 2013 CPD ¶ 275 at 4. In reviewing an agency's evaluation, we will not reevaluate technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. Id.

EA argues that ERRG's proposal should have been found to be unacceptable because the revised project schedule submitted by ERRG did not address the annual Land Use Control (LUC) inspections provided for in CLIN 1009 of the RFP, despite this being identified as a weakness in the proposal during discussions. Protester's Comments at 12. The agency responds that the source selection evaluation board (SSEB) reasonably determined that the RFP's submission requirements did not require every CLIN activity to be included in the detailed project schedule, and that the detail on CLIN 1009 included elsewhere in ERRG's proposal was at a sufficient detail level to merit a weakness and not a deficiency. Supp. Legal Memorandum at 3. The agency also notes that the SSEB considered that the work required by CLIN 1009 was independent of all other activities under the contract so logical sequencing of this activity was not critical, scheduling of the activity would not impact other activities, and the scope of work was a very minor part of the contract in terms of work, time and price. Id.

The RFP required offerors to submit a detailed project schedule, which was to include an "activity-based schedule that outlines activities and milestones defined at the appropriate detail level and logically sequenced to support and manage completion of the performance objectives." RFP at § 5.1. The RFP also states that, "[t]he offeror MUST, at minimum, address the key points listed above. Failure to address all of the key points will result in an Unacceptable rating." Id. at 5.2. We conclude that this language required offerors to submit a detailed, activity-based project schedule, but, consistent with the agency's understanding, did not require the inclusion of every CLIN activity in order to be found acceptable. In this regard, we read the use of the term "key points" to refer to the schedule itself, with the evaluation of "appropriate detail" to be within the discretion of the agency. Given the assessment of the relative importance of the CLIN 1009 scope of work, its

relationship to other scopes of work, and details found elsewhere in the proposal, we see no basis to question the agency's assignment of a weakness, instead of a deficiency here.

EA next argues that ERRG's proposal should have been deemed ineligible for award because three key personnel listed in the firm's proposal did not expressly satisfy the RFP's minimum requirement that each of these key personnel, "[m]ust be a Graduate of a military [Explosives Ordnance Disposal (EOD)] school with the Phase II certification." Protester's Comments at 5-6; RFP at § 6.1. In this regard, EA argues that while ERRG's proposal shows the key personnel graduated from a military explosives ordnance disposal school, it does not show these individuals obtained a Phase II certification. Protester's Comments at 5-6.

The agency responds that the SSEB found that ERRG's relevant key personnel met the requirement because the Phase II certification language referred to the school and all graduates from the Navy Explosive Ordnance Disposal school listed in ERRG's proposal received Phase II certification. Supp. Legal Memorandum at 3. EA responds, however, that while the school indicated in ERRG's proposal offers Phase II certification, not all attendees of the school obtain Phase II certification. Protester's Supp. Comments at 8. In support of this contention, the protester refers to the school's public webpage, which states:

The course is broken down into 10 separate training divisions: CORE, Demolition, Tools and Methods, Biological and Chemical, ground Ordnance, Air Ordnance, Improvised Explosive Devices, Nuclear Ordnance, [weapons of mass destruction (WMD)] and Underwater. For Army, Air Force and Marine Corps students the school consists of 143 academic training days and for Navy students 200 academic training days.

Protester's Supp. Comments at 9. Our review of the information presented by the protester does not convince us that the agency's evaluation was unreasonable. The parties appear in agreement that the relevant Navy EOD school offers Phase II certification, and despite having access to the entirety of ERRG's proposal, EA makes no arguments that would cause us to question that the specific personnel listed in ERRG's proposal did not graduate with a Phase II certification. It is EA's burden of proof with regard to allegations that an agency's procurement actions are improper, a burden which the protester has not met.² See Piezo Crystal Co., B-236160, Nov. 20, 1989, 89-2 CPD ¶ 477 at 9.

² On March 18, EA filed a supplemental pleading arguing that we should sustain the protest because ERRG's comments on the agency report did not confirm that its personnel have Phase II certifications, which EA asserts should "create a strong inference that some or all of ERRG's proposed [unexploded ordnance] personnel
(continued...)

EA's Non-Price Proposal

Finally, EA argues that it should have received outstanding ratings under the technical approach and management factors, instead of the good ratings assigned. EA also challenges the assignment of a weakness to the firm's proposal under the technical approach factor. Supp. Protest at 5-6. Finally, after reviewing the agency report, EA argues that it should have received an outstanding rating under the key personnel factor, and that the agency engaged in disparate treatment when it assigned an outstanding rating to ERRG's proposal, but not EA, under this factor. Protester's Comments at 17. We have reviewed each allegation and find each to be without merit.

As mentioned, the evaluation of technical proposals is a matter within the discretion of the contracting agency, which we examine only to ensure that the evaluation was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. SRA Int'l, Inc., *supra*, at 4. Moreover, as a general matter, adjectival descriptions and ratings serve only as a guide to, and not a substitute for, intelligent decision-making. Science Applications Int'l Corp., B-407105, B-407105.2, Nov. 1, 2012, 2012 CPD ¶ 310 at 7. Thus, the relevant question here is not the adjectival rating assigned by the agency but, rather, whether the underlying evaluation was reasonable and supported the source selection decision. We conclude that the evaluation was reasonable.

EA's primary argument is that the number of strengths assigned to its proposal, as well as the language used by the agency to describe aspects of its proposal, warrant higher adjectival ratings. For instance, with respect to the technical approach factor, EA points out that the agency awarded its proposal 12 strengths and one weakness, "lauded" its proposal for various innovative approaches to

(...continued)

did not have the required Phase II certification at the time of proposal submission." Protester's Supp. Filing at 3. EA also argues that ERRG made a material misrepresentation in that the firm's proposal states that all proposed personnel exceed the minimum requirements as defined in the PWS, which EA asserts is not the case. *Id.* at 4. Again, it is the protester's burden to prove its allegations, a burden which does not shift to the awardee. The relevant inquiry is whether the agency reasonably evaluated the information in ERRG's proposal; information submitted by ERRG in response to the protest is irrelevant to that inquiry. The record shows that the agency reasonably concluded from the information presented in ERRG's proposal that the firm's personnel met the substantive certification requirements. Likewise, with respect to the issue of misrepresentation, we see no basis in the record to question the representations made by ERRG in its proposal, and relied on by the agency in its evaluation.

performing work, and concluded that EA's risk of unsuccessful performance was low. Protester's Comments at 16. However, the record shows that ERRG and Offeror A, both of which also received an overall good rating for the technical approach factor, had similar numbers of strengths and weaknesses, evidencing a consistency in the evaluation regardless of the adjectival rating assigned. EA has made no effort to show, on a qualitative or quantitative basis, why its own proposal should have been rated higher than either ERRG's or Offeror A's under this factor, or why the agency's evaluation was unreasonable under the other factors, when considering the relative merits of proposals. See generally AR, exh 32, SSDD.

With respect to EA's allegation of disparate treatment under the key personnel factor, the record shows an apparent distinction between ERRG and EA's proposals, in that the evaluators recognized three strengths in ERRG's proposal and two strengths in EA's proposal under the key personnel factor. Id. at 10, 16. EA has not shown why this distinction in the evaluation should not have reasonably translated into different ratings for each offeror, instead only arguing that the agency has not explained why ERRG deserves an outstanding rating, whereas EA only received a good rating. The record provides a basis for these ratings, and EA has not given us any basis to question the agency's evaluation in this regard.

The protest is denied.

Susan A. Poling
General Counsel