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Decision

Matter of: enrGies, Inc.

File: B-408609.9

Date: May 21, 2014

Jon D. Levin, Esq., Gary L. Rigney, Esq., Justin Burney, Esq., and Matthew H. Moore, Esq., Maynard Cooper & Gale, P.C., for the protester.
Robert E. Korroch, Esq., William A. Wozniak, Esq., and Anthony H. Anikeeff, Esq., Williams Mullen, for BOSH Global Services, an intervenor.
Debra J. Talley, Esq., and Peter G. Tuttle, Esq., Department of the Army, U.S. Army Materiel Command, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of proposals and source selection decision is dismissed where protester either withdrew or abandoned its substantive challenges to the agency's evaluation of technical proposals, and its remaining allegations are untimely, fail to state a basis for protest, or do not demonstrate that the agency's actions were prejudicial to the protester.

DECISION

enrGies, Inc. (EI), of Huntsville, Alabama, protests the award of a contract to BOSH Global Services, of Newport News, Virginia, by the Department of the Army under request for proposals (RFP) No. W911QY-13-R-0007, issued to acquire small unmanned aircraft systems (SUAS) training, logistics support and technical program management services. EI principally maintains that the agency miscalculated proposals and made an unreasonable source selection decision.

We dismiss the protest.

BACKGROUND

The RFP contemplates the award, on a best-value basis, of a fixed-price, indefinite-delivery/indefinite-quantity contract to provide flight training, logistics support and miscellaneous engineering support services for a base period of 3 years and up to

two 1-year options. Broadly speaking, the agency is contracting for flight training services, as well as SUAS maintenance and repair services for its fleet of SUAS. Agency Report (AR), exh. 3-4, Statement of Objectives.

The RFP provided that proposals would be evaluated considering price and several non-price factors. RFP at 168-169. The non-price factors were: contractor's flight and ground operations, technical, and past performance, with the first two factors deemed equal in importance and more important than the past performance factor. Id. Past performance was more important than price, and all of the non-price factors together also were more important than price. Id. The contractor flight and ground operations and technical factors also included numerous subfactors that were deemed equal in importance within each factor.¹ Id.

In response to the RFP, the agency received a number of proposals. The agency engaged in discussions and solicited and received final proposal revisions (FPRs). After evaluating the FPRs, the agency made award to BOSH, finding that its proposal offered the best value to the government. As relevant here, the record shows that both the protester and BOSH were assigned the same adjectival ratings under the non-price evaluation factors ("good" for the contractor flight and ground operations factor, "outstanding" for the technical factor and "relevant/substantial confidence" for the past performance factor), albeit with varying adjectival ratings for the subfactors, and with differing numbers of significant strengths and strengths. AR, exh. 7-1, Source Selection Decision Document (SSDD) No. 1, July 8, 2013, at 3, 9, 11. The agency's source selection authority (SSA)² concluded that the proposals of the two firms were broadly comparable, and made award to BOSH based on its lower evaluated price (BOSH's total evaluated price was \$62,267,014, while EI's was \$70,758,715). Id.

After being advised of the source selection decision, both EI and another concern filed protests with our Office. The agency proposed to take corrective action in response to those protests by reevaluating proposals and making a new source selection decision. AR, exh. 7-8, Agency Corrective Action Notice, Sept. 9, 2013. Based on the agency's proposed corrective action, we dismissed the protests as academic on September 10.

¹ The RFP advised that the agency would assign adjectival ratings to each subfactor and factor under the contractor's flight and ground operations and technical factors of outstanding, good, acceptable, marginal or unacceptable. RFP at 184-185. The RFP advised that the agency would assign relevancy ratings to the offerors' past performance of either relevant or not relevant, and also would assign performance confidence ratings of substantial, satisfactory, limited, no, or unknown confidence. RFP at 185-186.

² The agency's SSA is also the contracting officer for this acquisition.

The agency subsequently reevaluated proposals and prepared a new SSDD. Once again, the agency assigned the same adjectival ratings to both the EI and BOSH proposals under the non-price evaluation factors (the same adjectival ratings previously assigned) but, again, the agency assigned different subfactor adjectival ratings, and differing numbers of strengths and significant strengths. AR, exh. 7-2, SSDD No. 2, at 3, 13, 14. The agency again selected BOSH, finding that its proposal and EI's were broadly comparable, albeit with different numbers of strengths and significant strengths (EI had been assigned more strengths and significant strengths), but concluding that those strengths did not warrant payment of the price premium associated with EI's higher evaluated price. Id.

After being advised of the second source selection decision, EI and the other concern protested to our Office again. In response to those protests, the agency proposed to take corrective action a second time. The Army stated that it would conduct a new price evaluation and make a new source selection decision. AR, exh. 7-9, Agency Corrective Action Notice, Dec. 9, 2013.

The agency reevaluated proposals and made a new source selection decision. For a third time, the agency selected BOSH. For this third reevaluation, the agency only reviewed price proposals for realism. Consequently, the agency did not change any of the adjectival ratings assigned to the proposals or the strengths and significant strengths identified. Once again, the agency concluded that award to BOSH represented the best value to the government. AR, exh. 5-1, SSDD No. 3, Jan. 27, 2014. After being advised of the agency's latest source selection and requesting and receiving a debriefing, EI filed the instant protest.

PROTEST

EI raised numerous allegations in its initial protest. The firm challenged the agency's evaluation of its technical proposal, as well as the technical proposal of BOSH. EI also challenged the agency's evaluation of price proposals in several areas, and raised allegations in connection with the agency's source selection decision. Finally, EI alleged that certain actions on the part of the SSA demonstrate that he is biased in favor of award to BOSH, and against EI. We have carefully reviewed all of EI's contentions and dismiss all of those not withdrawn.

Withdrawn Issues

EI made several initial allegations that it subsequently withdrew in its comments on the agency report. These issues include the following arguments: that BOSH failed to affirmatively respond to the RFP's requirements relating to a contractor-provided repair/inventory control point facility; that the agency improperly ignored derogatory information relating to BOSH in the past performance evaluation; that the agency improperly failed to engage EI in additional discussions in performing its latest

round of corrective action; and that the agency's third SSDD was inadequate because it normalized the overall technical ratings among proposals, penalized EI for its incumbent status, and failed to discuss strengths previously assigned to the EI proposal, but subsequently removed from consideration. Protester's Comments, Mar. 1, 2014, at 2 n.1. Because EI has withdrawn these issues, we do not consider them further.

Abandoned Issues

EI also initially made numerous arguments in connection with the agency's reevaluation of its proposal. Specifically, EI expressly argued that the agency improperly removed a significant strength previously assigned to its proposal under the logistics subfactor of the technical factor. Protest, Feb. 11, 2014 at 18-20. EI also expressly argued that the agency improperly removed one significant strength and two strengths under the pre-award survey subfactor of the flight and ground operations factor. Id. at 20-22. In addition to these specific arguments, EI included a chart in its protest that identified two significant strengths that had been removed, one significant strength that had been "downgraded," one strength that had been "bundled" with another significant strength, and four strengths that had been removed. Id. at 17-18. This chart appears in the portion of EI's protest where it discusses the allegedly improper removal of the significant strength under the logistics subfactor, but that discussion is characterized as an example of a broader misevaluation of the EI proposal.

In response to these allegations, the agency submitted a detailed, point-by-point discussion of its reevaluation of the EI proposal under each of the solicitation's evaluation factors and subfactors in order to rebut EI's allegations relating to the agency's removal of previously-assigned significant strengths and strengths. AR, exh. 1, Combined Contracting Officer's Statement/Legal Memorandum, at 37-47. In its comments responding to the agency's report, EI does not discuss the merits of these allegations. While it makes reference to the arguments in a footnote, EI Comments, Mar. 24, 2014, at 2 n.1, and includes a table that references the reduction in the number of significant strengths and strengths assigned to its proposal in the subsequent evaluation, id. at 18, EI does not substantively rebut the agency's position. We therefore conclude that these assertions have been abandoned, and do not consider them further. Avaya Gov't Solutions, Inc., B-409037 et al., Jan. 15, 2014, 2014 CPD ¶ 31 at 3-4.

Untimely and Legally Insufficient Allegations

EI asserts that the agency improperly "double counted" the price of personnel in calculating the offerors' prices under contract line items (CLINS) Nos. 2 and 3. These CLINS were for the provision of flight training; CLIN 2 is to provide flight training at the government's facility, while CLIN 3 is for the same services at the contractor's facility. AR, exh. 1, Combined Contracting Officer's Statement/Legal

Memorandum, at 56. The RFP directed offerors to calculate a total “daily rate” for providing flight training. AR, exh. 3-5, Pricing Workbook, at “Schedule” Spreadsheet.

In calculating the offerors’ evaluated prices for these CLINS, the agency multiplied the daily rates proposed for each CLIN by the total number of training days used to calculate the independent government estimate. AR, exh. 1, Combined Contracting Officer’s Statement/Legal Memorandum, at 56; AR, exh. 5-4, Final Price Evaluation Spreadsheet, at “TEP” Spreadsheet. EI asserts that this was improper because CLINS 2 and 3 are mutually exclusive and, by multiplying each CLIN by the agency’s total estimated quantity, the agency essentially included twice the estimated price for these CLINS.

This aspect of EI’s protest is untimely. Our Bid Protest Regulations require protesters to file their protests within 10 days of when they know or should have known of their basis for protest. 4 C.F.R. § 21.2(a)(2) (2014). Where, during the agency’s ongoing conduct of an acquisition, a protester is apprised of—and disagrees with—the agency’s evaluation methodology, it may wait to raise its allegation until after receiving a requested and required debriefing, but it must nonetheless raise its objection within 10 days of having received its debriefing. Id.; The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 27-28.

The record shows that EI was specifically apprised of the agency’s method for calculating the offerors’ prices for CLINS 2 and 3 during discussions. Specifically, the record shows that EI was sent a letter dated June 3, 2013, that provided the firm discussion questions. AR, exh. 5-9, EI’s Discussions Letter. EI was advised how the agency calculated the offerors’ evaluated prices for CLINS 2 and 3 as follows:

To ensure offerors were evaluated on equal footing for CLINs 0002 and 0003 (plus options), the Government multiplied the daily rate proposed by each offeror by the number of training days in the Independent Government Cost Estimate. For the base period, the Government estimated 197,216 hours for CONUS training, that number divided by 8 equaled 24,652 training days. For the 2 options the Government estimated 21,913 per year divided by 8 equaled 2,739 training days for each option. All other CLINs were evaluated based on the offeror’s proposed price and the plug in number provided by the Government.

Id. at 7. EI also was given the total evaluated price the agency had calculated for the firm. Id. EI therefore was aware, during discussions, of the agency’s method for calculating its price for CLINS 2 and 3, and, by extension, its method for

calculating all offerors' prices for these CLINS.³ Although EI raised several challenges to the agency's price evaluation in its original protest (including an unrelated allegation concerning CLINS 2 and 3), EI did not raise this issue in its initial protest. EI Initial Protest, Aug. 5, 2013, at 10-12. Accordingly, EI's attempt to raise this assertion in its subsequent protests (both its second protest and its current, third, protest) is untimely. We therefore dismiss this aspect of EI's protest.

Next, EI argues that the agency's SSA is biased in favor of making award to BOSH. EI argues that this is evident in what it characterizes as several examples of inappropriate behavior on the part of the SSA.

First, EI contends that the SSA placed a phone call to EI on the day of its second debriefing (which occurred on October 30, 2013), and made several inappropriate comments during the course of that phone call. According to EI, these comments show that the agency's SSA is biased against it, and in favor of BOSH. This contention fails to state a basis for protest and is untimely.

Our Bid Protest Regulations, 4 C.F.R. § 21.5(f), contemplate that our Office may dismiss allegations that fail to state a legally sufficient ground of protest. In this connection, a protest allegation must provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that we will find improper agency action. American Ordnance, LLC, B-292847 et al., Dec. 5, 2003, 2004 CPD ¶ 3 at 6 n.3. A mere assertion, without further supporting details or evidence, essentially is no more than speculation and does not meet the standard contemplated by our Regulations for a legally sufficient protest. Id.

Here, EI has not supported its bias allegation with any evidence. EI's protest pleadings include alleged verbatim quotes from the SSA, Protest, Feb. 11, 2014, at 14-15, 40-42, but these alleged quotes are not founded on any evidence (for example, affidavits from the EI employees allegedly present during the claimed phone call).⁴ Government officials are presumed to act in good faith and, when a protester alleges bias, it not only must provide convincing evidence clearly demonstrating a bias against the protester or for the awardee, but also must demonstrate that this bias translated into action that unfairly affected the protester's competitive position. Empire Veteran Grp, Inc., B-408866.2, B-408866.3, Dec. 17,

³ EI suggests that the language quoted above was ambiguous regarding the agency's calculations. We disagree that the language was ambiguous. In any event, since all of the other CLINS are lump-sum amounts, and since EI was given the agency's calculation of its total evaluated price, a simple math calculation should have led EI to understand the agency's evaluation methodology.

⁴ EI's November protest also did not include any evidence to support its bias allegation.

2013, 2013 CPD ¶ 294 at 6. Because EI's allegation is not founded in any evidence, we conclude that this allegation fails to state a valid basis for protest.⁵

Second, EI alleges that the agency attempted to award BOSH a short-term, bridge contract on a sole-source basis. EI maintains that this action, while ultimately unsuccessful, further evidences the SSA's bias against EI and in favor of BOSH.

This allegation also fails to state a basis for protest. As an initial matter, the agency never awarded the bridge contract. We therefore do not understand how the agency's alleged attempt to award such a contract could have constituted bias that translated into action that unfairly affected the protester's competitive position. Empire Veteran Grp, Inc., supra. Moreover, there is nothing necessarily improper in an agency's award of a sole-source bridge contract during the pendency of protest litigation (or corrective action in the wake of such litigation) in order to meet its ongoing requirements in appropriate circumstances. See Unified Indus., Inc.,

⁵ We also find EI's allegation of bias untimely. In its second protest filed on November 10, 2013, EI specifically requested that our Office find that the SSA was biased, and also specifically requested that we recommend that the agency remove him and select a new SSA for its acquisition. EI Protest, Nov. 10, 2013, at 34-35, 38. The agency's corrective action notice in response to EI's protest made no mention of this aspect of EI's protest. AR, exh. 7-9, Corrective Action Notice, Dec. 9, 2013. The notice stated only that the agency intended to reevaluate price proposals and make a new source selection decision. Based on the agency's corrective action notice, we dismissed EI's protest as academic on December 12. In so doing, we expressly found that EI's protest was academic in light of the agency's representation that it would reevaluate proposals and make a new source selection decision. We made no reference to EI's bias allegation.

In light of the seriousness of EI's allegation, the firm either should have filed an objection to the adequacy of the agency's proposed corrective action before we dismissed the protest, or should have requested reconsideration of our original dismissal within 10 days of December 12. EI did neither of these things, and instead elected to allow the agency to proceed with its reevaluation and new source selection while the original SSA was retained, notwithstanding EI's belief that he was biased. EI's current reassertion of this allegation, some two months after we dismissed its previous protest is untimely. 4 C.F.R. § 21.2(a)(2).

The corrective notice did reserve to the agency discretion to reopen discussions and take additional corrective action should the agency deem it appropriate. However, given the seriousness of EI's allegation and the specificity of its requested relief, it was unreasonable for EI simply to assume that the agency might act on that aspect of its protest based on this general language in the corrective action notice.

B-241010, B-241010.2, Dec. 19, 1990, 91-1 CPD ¶ 11. We therefore dismiss this aspect of EI's protest.

Finally, EI argues that the agency improperly reduced the number of strengths assigned to the other technical proposals submitted in response to the RFP, and increased the number of strengths assigned to the BOSH technical proposal. EI asserts that this also shows that the agency was biased against the other offerors and in favor of BOSH, characterizing the agency's action as "a demonstrably flawed game of Three Card Monte." Protester's Comments, Mar. 24, 2014, at 1.

This allegation also fails to state a basis for protest. As discussed above, EI raised extensive challenges to the substance of the agency's evaluation of both its proposal, as well as BOSH's proposal. In its comments, EI either specifically withdrew these arguments or abandoned them. Consequently, this aspect of its protest is not based on a substantive challenge to the agency's underlying evaluation of the technical proposals but, rather, merely on the number of strengths assigned to the proposals.

Our Office has long held that evaluation scores--be they numeric or adjectival--are merely guides to intelligent decision making. SGT, Inc., B-405736, B-405736.2, Dec. 27, 2011, 2012 CPD ¶ 149 at 8. It follows that the point scores (or the number of strengths) assigned to proposals are not dispositive metrics for an agency to express a proposal's merit. What is important is not the scores themselves, but the underlying substantive merits of the proposals as embodied in, or reflected by, the scores.

This aspect of EI's protest essentially contends that the agency made changes to the number of strengths assigned to the proposals, but does not provide any reason or explanation to show that the changes were improper. In effect, EI is challenging the number of strengths assigned to the proposals, but not the underlying reasons for assigning them. Such a challenge, standing alone, does not provide a basis for our Office to object to the agency's evaluation of the proposals. Correspondingly, the mere fact that the agency changed the number of strengths assigned to the proposals, standing alone, does not demonstrate bias on the part of the agency. We therefore dismiss this aspect of EI's protest.

Allegation Lacking Prejudice

Finally, EI argues that the agency improperly failed to evaluate the BOSH proposal for price realism in connection with its prices for CLINS 6 and 7, associated with the repair of the SUAS. EI maintains that BOSH understaffed this aspect of the requirement, and that, had the agency properly evaluated its proposal in this area, it would have discovered this to be the case, and would have rejected the proposal for offering unrealistic pricing under CLINS 6 and 7.

We dismiss this aspect of EI's protest because there is no basis in the record to show that EI was prejudiced by the agency's actions, even if what EI alleges is true. Prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper. Avaya Gov't Solutions, Inc., *supra* at 6.

Here, EI's complaint centers on the agency's evaluation of the BOSH proposal under CLINS 6 and 7. Even if EI were correct, the result would be that the BOSH proposal would be eliminated from consideration as unrealistically low.⁶ However, the record shows that an intervening offeror had a total evaluated price of \$65,183,671, higher than that of BOSH but lower than that of EI. AR, exh. 5-1, SSDD No. 3, at 3.

EI does not challenge the agency's realism evaluation (or technical evaluation) of this intervening offeror. The record shows that EI and the intervening firm were rated comparably during the technical evaluation and, in fact, the intervening offeror's proposal was rated technically superior to that of the protester under one of the contractor's flight and ground operations subfactors. AR, exh. 5-1, SSDD No. 3, at 18. Moreover, the SSA characterized all of the proposals as "broadly comparable." *Id.* at 7.

As a result, the record shows that the intervening concern would properly be in line for award ahead of the protester. It follows that there is no showing on this record that EI could have been prejudiced by the agency's allegedly improper realism evaluation of the BOSH cost proposal for CLINS 6 and 7. We therefore dismiss this aspect of EI's protest.

⁶ We also point out that the protester's challenge to the agency's evaluation of BOSH's prices for these CLINS is premised on the manning EI proposed for this aspect of the requirement, in other words, EI's own technical approach. The record shows that the agency's evaluation conclusion was based on a finding that BOSH, using its technical approach, could perform an average of 10 repairs per-week, per-full time equivalent. *See*, AR, exh. 7-23, e-mail from the agency's SUAS warehouse manager, Feb. 21, 2014. However, the protester has raised no substantive challenge to the awardee's technical approach in this area. In any event, an agency is under no obligation to verify each and every cost element used by an offeror to generate its fixed prices, and there is nothing inherently improper in an agency accepting a low-priced, or even below-cost, proposal in acquisitions where the agency is required to perform a price realism evaluation. Optex Sys., Inc., B-408591, Oct. 30, 2013, 2013 CPD ¶ 244 at 5-6.

The protest is dismissed.

Susan A. Poling
General Counsel