



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Xtreme Concepts Inc

File: B-413711

Date: December 19, 2016

Marshall Yates, Esq., for the protester.
Kathleen Miller, Esq., and Stephen Sowell, Esq., Department of the Army, Corps of Engineers, for the agency.
Lois Hanshaw, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly eliminated protester's proposal from the competitive range where that elimination was based solely on the protester's neutral past performance rating.

DECISION

Xtreme Concepts Inc. (Xtreme), of Birmingham, Alabama, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. W91278-16-R-0038, issued by the Department of the Army, Corps of Engineers, for the installation of transformers at Millers Ferry Powerhouse, in Camden, Alabama. Xtreme challenges the agency's evaluation of past performance and its failure to conduct discussions with Xtreme.

We sustain the protest.

BACKGROUND

On June 9, 2016, the RFP was issued as a small business set-aside, and in accordance with the commercial item procedures of Federal Acquisition Regulation (FAR) part 12 and the simplified acquisition procedures of FAR part 13. RFP at 1, 3. The RFP contemplated award of a fixed-price contract, on the basis of a best-value tradeoff that considered the following: (1) proposal compliance review; (2) technical proposal evaluations; (3) price analysis; and (4) technical-price tradeoff analysis. Id. at 120.

For the technical proposal evaluations, the RFP stated that proposals would be assigned adjectival ratings with regard to the following evaluation factors: (1) past performance of the prime contractor;¹ (2) technical approach for work; (3) technical approach for schedule; and (4) technical data for transformers. Id. at 125. The solicitation stated that the prime contractor's past performance was the most important factor, and that the other three factors were equal to each other and all were less important than past performance. Id. at 125.

As relevant here, the RFP required the submission of past performance information for the prime contractor; stated that the contractor that was listed on and signed the Standard Form (SF) 1449 would be considered the prime contractor; and provided that only the prime contractor's past performance information would be evaluated. Id. at 120, 125. The RFP advised that if an offeror intended to submit a proposal as a joint venture (JV), the JV was required to obtain a Data Universal Number System (DUNS) number and be registered in the System for Award Management. Id. at 123.

With regard to discussions, the RFP stated that, in accordance with FAR provision 52.212-1, the agency intended to make award without discussions, but reserved the right to conduct discussions if it was determined to be in the government's best interest.² Id. at 130. The RFP provided that, if discussions were determined to be necessary, they would include only those firms whose proposals were the most highly rated and were considered to have a reasonable chance for award. Id.

On August 17, the agency received a small number of proposals.³ As relevant here, Xtreme's proposal included an SF 1449 that identified Xtreme as the offeror,

¹ In evaluating past performance, the agency anticipated using ratings of substantial confidence, satisfactory confidence, neutral, limited confidence, and no confidence. RFP at 127.

² We note that the simplified acquisition procedures of FAR part 13 do not require formal evaluation plans, the establishment of a competitive range, or the conduct of discussions. See FAR § 13.106-2(b). Nonetheless, where an agency avails itself of these negotiated procurement procedures, it must treat firms fairly and reasonably. See, e.g., Kathryn Huddleston & Assocs. Ltd., B-289453, Mar. 11, 2002, 2002 CPD ¶ 57 at 6.

³ Because no protective order was issued in this matter, our discussion of some aspects of the evaluation is necessarily general to avoid reference to proprietary or source-selection information. Moreover, consistent with the ongoing status of this procurement, information regarding the ranking of the offerors has been excluded from our decision. Nonetheless, our conclusions are based on our review of the entire record.

was signed by Xtreme's vice-president, and listed only Xtreme's DUNS number (as opposed to a JV's DUNS number). Agency Report (AR), Tab 7, Xtreme Proposal, at 8. The proposal also expressly identified Xtreme as the prime contractor, naming another firm as a subcontractor. Id. at 4. That is, Xtreme's proposal reflected a prime contractor/subcontractor relationship, and was not submitted on behalf of a JV. Nonetheless, with its proposal, Xtreme submitted five past performance references for contracts performed by Xtreme's proposed subcontractor. AR, Tab 9, Xtreme Past Performance Proposal, at 7, 15, 23, 29, 38.

In evaluating proposals, the source selection evaluation board (SSEB) determined that Xtreme was the prime contractor and, consistent with the terms of the solicitation, concluded that none of its subcontractor's past performance information could be considered. Id. at 2. Accordingly, the agency assigned a neutral past performance rating to Xtreme's proposal, since it failed to submit any projects for which past performance could be evaluated.⁴ Id. At the conclusion of the evaluation, the SSEB stated, "The SSEB does NOT recommend entering discussions with [Xtreme] based on their 'Neutral' Past Performance Rating." (emphasis in original) AR, Tab 3, SSEB Technical Report, at 9.

The source selection authority (SSA), relying on the SSEB evaluation as well as his own conclusions, determined that Xtreme should not be included in the competitive range. AR, Tab 4, Competitive Range Determination, at 3. In making his determination, the SSA concluded that Xtreme's proposal was not among the most highly-rated proposals due to its neutral past performance rating. AR, Tab 4, Competitive Range Determination, at 2-3; Legal Memorandum at 6.

With regard to the offerors retained in the competitive range, the record shows that the proposals were assigned a past performance rating of either satisfactory confidence or substantial confidence.⁵ Tab 4, Competitive Range Determination, at 1. Otherwise, all of the proposals received very similar ratings, except Xtreme's proposal which was rated higher than one of the competitive range offerors under the third evaluation factor (technical approach for schedule), and offered the lowest price of any offeror. Id. Finally, all of the proposals, including those retained in the

⁴ A neutral rating reflected a proposal in which an offeror could not be evaluated favorably or unfavorably on the factor of past performance where the proposal offered no recent/relevant performance record or the offeror's performance record was so sparse that no meaningful confidence assessment rating can be reasonably assigned. RFP at 127.

⁵ A satisfactory confidence rating reflected a proposal for which the government had a reasonable expectation of successful performance, and a substantial confidence rating reflected a proposal for which the government had a high expectation of successful performance. Id.

competitive range, were rated unacceptable under the fourth evaluation factor (technical approach for schedule).⁶ Id.

On August 25, the agency initiated discussions with the competitive range offerors. Legal Memorandum at 3. On August 31, after engaging in those discussions, the agency notified Xtreme that it had been excluded from further consideration. AR, Tab 8, Competitive Range Determination and Debriefing, at 1. On September 9, Xtreme filed this protest.

DISCUSSION.

Xtreme argues that it should have been included in the competitive range for the purposes of conducting discussions, and that it was wrong to exclude its proposal without even considering its price. Protest at 2. The agency responds that it was not required to include Xtreme in the competitive range because Xtreme's proposal was not among the most highly-rated due to its failure to include any past performance information for the prime contractor. The agency also asserts that it is unlikely that Xtreme will be able to submit any relevant past performance information, because Xtreme admits it has none. Legal Memorandum at 7-8. In responding to the agency report, Xtreme argues that the agency could not properly exclude its proposal from the competitive range solely because of its neutral past performance rating. Comments at 3-4. On these limited issues, we agree with the protester.⁷

⁶ The agency's consideration of price appears to have been limited to considering whether each offeror's proposal was higher or lower than the independent government estimate. AR, Tab 3, SSEB Report, at 9; AR, Tab 4, Competitive Range Determination, at 2-3.

⁷ Xtreme also argued that the agency erred by not considering the past performance information submitted for Xtreme's subcontractor. Protest at 1. In response, the agency argued that Xtreme failed to assert a valid basis for protest given that Xtreme's Vice-President signed the SF 1449 as the prime contractor, and the RFP expressly advised offerors that only the prime contractor's past performance would be evaluated. Dismissal Request at 4. We agree with the agency's assertions regarding the past performance evaluation, and dismiss this ground of protest for failure to state a valid basis. See 4 C.F.R. § 21.5(f). If Xtreme wanted to challenge the solicitation's scheme for evaluating past performance, it was required to do so before the closing date for receipt of proposals. See 4 C.F.R. § 21.2(a)(1). In addition, Xtreme has argued that the agency should have recognized that the company was offering to perform as a JV, despite the company's identification of itself as the offeror on the face of its proposal. On this issue, as well, the RFP included express instructions about submitting an offer as a JV. RFP at 123. Xtreme could have complied with these requirements, or challenged them. It did neither. Under these circumstances, the agency is under
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Although the determination of whether a proposal is properly included within the competitive range is primarily a matter within the procuring agency's discretion, the agency's exercise of that discretion must be reasonable and consistent with law and regulation. See, e.g., Ryan P. Slaughter, B-411168, June 4, 2015, 2015 CPD ¶ 344 at 5-6; Smart Innovative Solutions, B-400323.3, Nov. 19, 2008, 2008 CPD ¶ 220 at 3. Where an agency's exclusion of an offeror from the competitive range is unreasonable, inconsistent with the terms of the solicitation, or contrary to law or regulation, we will sustain a protest challenging the exclusion. See, e.g., Wilson Beret Co., B-289685, Apr. 9, 2002, 2002 CPD ¶ 206 at 8-9. In this regard, we have specifically held that an agency's exclusion of an offeror from the competitive range based solely on a neutral or "unknown" past performance rating constitutes "unfavorable treatment" and is improper. Ryan P. Slaughter, supra.

As discussed above, the agency's exclusion of Xtreme's proposal from the competitive range was based solely on its neutral past performance rating, and on the erroneous conclusion that the neutral rating rendered Xtreme's proposal not among the most highly-rated. For the record, it appears that Xtreme had a higher overall rating than one of the offerors included in the competitive range, as well as the lowest price of any offeror. With respect to the neutral rating, the FAR requires that an offeror without a record of relevant past performance, or for whom information on past performance is not available, may not be evaluated favorably or unfavorably on past performance. FAR § 15.305(a)(2)(iv). The agency's conclusion that Xtreme's proposal's neutral rating made it a lower-rated offeror--and its use of that distinction alone to exclude Xtreme's proposal from further consideration--was improper.⁸ Ryan P. Slaughter, supra. Given that the agency was not permitted by either the terms of the solicitation or FAR § 15.305(a)(2)(iv) to evaluate offerors favorably or unfavorably when they lack a record of relevant past performance, we sustain the protest.

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no obligation to assume that the company submitting the proposal intended that another legal entity--in this case, a JV--be viewed as the offeror.

⁸ As discussed above, it is not clear that the agency considered the offerors' respective prices in establishing the competitive range. In this regard, an agency must consider the offerors' respective prices in making its competitive range determination. See Arc-Tech, Inc., B-400325.3, Feb. 19, 2009, 2009 CPD ¶ 53 at 3.

RECOMMENDATION

We recommend that the agency make a new competitive range decision that does not exclude Xtreme's proposal on the basis of its neutral past performance rating. In making the competitive range determination, the agency should also consider the offerors' respective prices. We also recommend that Xtreme be reimbursed the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling
General Counsel