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Decision

Matter of: BES Federal Solutions JV, LLC

File: B-420550; B-420550.4

Date: May 11, 2022

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Colonel Frank Yoon, Lawrence M. Anderson, Esq., and Scott B. McLauthlin, Esq., Department of the Air Force, for the agency.

Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of the protester's proposal as unacceptable is denied where the evaluation was reasonable and consistent with the solicitation and procurement law and regulation.

DECISION

BES Federal Solutions JV, LLC, of Silver Spring, Maryland, protests the award of a contract to Katmai Health Services, LLC, of Anchorage, Alaska, under request for proposals (RFP) No. FA700021R0003, issued by the Department of the Air Force for personal clinical support services for the Colorado Military Health System (CMHS). The protester challenges the reasonableness of the agency's evaluation of technical proposals.

We deny the protest.

BACKGROUND

The agency requires clinical support services for the CMHS, servicing a patient population of 217,000--consisting of cadets, active duty service members, retirees and their families, and other TRICARE beneficiaries--at various locations in the Colorado Springs region. Contracting Officer's (CO's) Statement at 2. This effort encompasses

multiple labor categories, including both professional and non-professional services, to provide surgical, outpatient, and ancillary services. *Id.*

The RFP, issued as a Small Business Administration (SBA) 8(a)¹ set-aside, sought proposals for the award of a single, fixed-price, indefinite-delivery, indefinite-quantity contract, for a 5-year base period of performance, and one 6-month optional extension of services. Agency Report (AR), Tab 7, RFP at 403.

The solicitation included three evaluation factors: (1) price, (2) past performance, and (3) technical (staffing plan). *Id.* at 253. The technical (staffing plan) factor contained three subfactors: staffing plan, mission essential plan (MEP), and professional employee compensation plan (PECP). AR, Tab 12, RFP amend. 5 at 210-211. Each of those subfactors would be evaluated as acceptable or unacceptable; to receive an overall acceptable rating under the technical (staffing plan) factor, a proposal would have to be evaluated as acceptable under all three subfactors.² *Id.* at 209.

The agency would take the following steps to determine the proposal offering the best value to the government. First, the government would determine whether a proposal was responsive to the RFP's requirements--meaning it met all of the terms, conditions, and specifications in this RFP. Only responsive proposals would be evaluated for award. RFP at 253. The agency would next rank responsive proposals by total evaluated price (TEP), from lowest to highest. *Id.* If at any point during this evaluation process the agency determined that an offeror's proposed TEP was "unaffordable," that proposal would be considered unawardable and would not be further evaluated. *Id.* Beginning with the lowest TEP, the agency would evaluate proposals under the past performance factor until a proposal received a rating of substantial confidence.³ *Id.* at 253. The first proposal to receive a past performance rating of substantial confidence would be evaluated under the technical (staffing plan) factor. If the agency evaluated that proposal as acceptable under the technical (staffing plan) factor, that proposal would represent the best value to the government and award would be made to that offeror. If that proposal was not acceptable under the technical (staffing plan) factor, the evaluation would continue following these steps. *Id.*

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. See 13 C.F.R. § 124.501(a) (SBA may enter into all types of awards, including contracts and orders). This program is commonly referred to as the 8(a) program.

² An acceptable proposal is defined as one that meets all of the RFP requirements, and an unacceptable proposal as one that does not meet all the RFP requirements. AR, Tab 12, RFP amend. 5 at 211.

³ The possible past performance ratings were substantial confidence, satisfactory confidence, neutral confidence, limited confidence, and no confidence. RFP at 259.

As relevant to this protest, under the technical factor (staffing plan) factor, offerors were to provide three plans, corresponding to the three subfactors: staffing plan, the MEP, and the PECP. Under the MEP subfactor, which is the focus of this decision, offerors were to explain how they would continue performance during a crisis. Among the points that the MEPs were to address were the offeror's "[p]lan on handling an employee that is either sent home or self-identified as exposed to COVID-19 or other pandemic exposure to include provision of testing and quarantine policy," and their "[r]eturn to work (RTW) policy to include compliance with [military treatment facilities (MTF)] policy." AR, Tab 12, RFP, amend. 5 at 210.

The agency received offers from 22 firms, including the protester and the intervenor. AR, Tab 21, Source Selection Evaluation Board (SSEB) Report and Source Selection Decision Document (SSDD) at 14. The agency evaluated six proposals--including the protester's and the awardee's--as responsive. *Id.* at 50. BES proposed the lowest TEP, \$79,333,447. *Id.* The agency evaluated BES's proposed price as complete, reasonable, and balanced. *Id.* at 50-51.

Following the steps outlined above, the agency then proceeded with an evaluation of BES's proposal under the technical (staffing plan) factor. The agency evaluated the protester's proposal as unacceptable under both the MEP and the PECP subfactors. *Id.* at 66, 68-69. With regard to the former, the evaluators found that the protester had not acceptably addressed the two above points pertaining to the coronavirus disease 2019 (COVID-19) pandemic.⁴

According to the agency's announced evaluation criteria, BES's proposal was unawardable, because the Air Force evaluated it as unacceptable under each of two of the technical (staffing plan) subfactors. AR, Tab 12, RFP amend. 5 at 211 (noting that "[i]f any single subfactor is rated 'Unacceptable,' that rating will immediately render the entire technical factor 'Unacceptable'") and (noting that a proposal rated unacceptable under the technical (staffing plan) factor would not be further evaluated). RFP at 253. Katmai proposed the next lowest TEP of \$80,910,990, and the agency evaluated its proposal as technically acceptable. AR, Tab 21, SSEB Report and SSD at 50, 69. The Air Force made award to Katmai as the firm whose proposal represented the best value to the agency. *Id.* at 248. This protest followed.

DISCUSSION

BES challenges the agency's evaluation of its proposal as unacceptable under the MEP and PECP subfactors. With regard to the former subfactor, the protester alleges that the agency ignored portions of its MEP and relied on unstated evaluation criteria. Protest at 16, 19-21. BES also asserts that the agency unreasonably found the protester's proposal unacceptable for [DELETED]. *Id.* at 14. As discussed below, we

⁴ The Air Force also evaluated the protester's proposal as unacceptable under the MEP subfactor for [DELETED]. *Id.* at 645.

conclude that the Air Force reasonably evaluated the protester's proposal as technically unacceptable under the MEP subfactor--and, therefore, ineligible for award--based on concerns pertaining to the protester's COVID-19 pandemic plan. As a result, we do not address the protester's third challenge to the evaluation of its proposal under the MEP subfactor or its challenges under the PECP subfactor.⁵

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. See *Mercom, Inc.*, B-413419, B-413419.2, Oct. 25, 2016, 2016 CPD ¶ 316 at 3. Rather, we will review the record only to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. *IN2 LLC*, B-408099 *et al.*, June 18, 2013, 2013 CPD ¶ 149 at 5. A protester's disagreement with reasonable evaluation judgments does not provide a basis to sustain its protest. *RIVA Sols., Inc.*, B-418408, Mar. 31, 2020, 2020 CPD ¶ 133 at 4.

As noted above, offerors were to include in their proposals MEPs explaining how they would continue performance during a crisis. Among other things, the MEPs were to provide a "[p]lan on handling an employee that is either sent home or self-identified as exposed to COVID-19 or other pandemic exposure to include provision of testing and quarantine policy." RFP at 252. Additionally, offerors were to propose a return to work plan that "include[d] compliance with MTF policy." *Id.*

Evaluators' Findings

In response to the above requirements, BES's proposal stated that "[DELETED]." AR, Tab 16, BES Technical Proposal at 149. The agency noted that the protester's proposal did not define "[DELETED]." AR, Tab 21, SSEB Report and SSDD at 65. The protester's plan stated that, "[DELETED]," adding that "[DELETED]." AR, Tab 16, BES Technical Proposal at 13. The evaluation team could not confirm a meaning for the proposal's use of the term "[DELETED]." AR, Tab 21, SSEB Report and SSD at 65. The failure to define "[DELETED]" was important, in the agency's view, because [DELETED] might have included MTFs, and contracted employees were not to receive medical care or testing related to COVID-19 at MTFs. *Id.*; see AR, Tab 12, RFP amend. 5, Performance Work Statement (PWS) ¶ 1.9.8.3, Medical Tests (stating that "[n]o medical tests or procedures required by the contract may be performed at the MTF").

The evaluators also noted the failure of BES's proposal to state a quarantine policy or the course of action to be followed if an individual tested positive for COVID-19. AR, Tab 21, SSEB Report and SSD at 65. The protester's proposal stated that "[DELETED]." AR, Tab 16, BES Technical Proposal at 149. That statement, the evaluators concluded, "did not specifically address a quarantine policy or COVID-19

⁵ While we do not address each of the protester's allegations, we considered them all and found none provided a basis on which to sustain the protest.

positive test result.” AR, Tab 21, SSEB Report and SSD at 65. For example, the protester’s proposal did “not describe a procedure for notification to the [contracting officer’s representative (COR)] or Program Manager for employees exposed to COVID-19,” nor did the MEP “mention how positive COVID-19 notifications will be made to the COR if the contractor was in close contact with other MTF personnel/patients.” *Id.* While the protester’s plan referenced the “[DELETED],” the evaluators noted that the plan was silent as to the health of patients. *Id.*

The Air Force concluded that “[s]imply stating that the contractor ‘[DELETED]’ for quarantined personnel does not ‘demonstrate their approach and ability’ as is required in the solicitation for an ACCEPTABLE rating.” *Id.* While such a statement indicated knowledge of CDC guidelines, the protester’s “MEP was silent on the contractor’s ‘ability’ to follow the CDC guidelines.” *Id.* The Air Force therefore assigned the protester’s proposal a rating of unacceptable for the first part of the mission essential plan subfactor’s requirement related to the COVID-19 pandemic: a plan on handling an employee that is either sent home or self-identified as exposed to COVID-19, including a policy for testing and quarantining. *Id.*

Similarly, the agency assigned an unacceptable rating to the protester’s proposal with regard to the requirement for a return to work plan that included compliance with MTF policy. Again, the agency found that the protester’s proposal did not demonstrate BES’s ability to meet this PWS requirement. *Id.* at 66. The agency noted the RFP’s requirement that “[t]he proposal shall not simply rephrase or restate the Government’s requirements, but rather shall provide convincing rationale to address how the Offer intends to meet these requirements.” *Id.*, *citing* RFP at 251. The agency concluded that “BES FED[’s proposal] failed to provide convincing rationale of their ability to follow CDC guidelines and onsite Occupation Health regulations” with respect to a return to work policy, and the agency assigned a second rating of unacceptable to the protester’s proposal under the MEP subfactor. AR, Tab 21, SSEB Report and SSDD at 66.

Consideration of Proposal Narrative

The protester alleges that the Air Force failed to consider the BES proposal’s “narrative” when evaluating the firm’s COVID response solution. Comments at 16-19. Rather, BES contends that the Air Force improperly confined its evaluation to a consideration of the “summary” chart at the end of BES’s proposed MEP. *Id.*

The narrative that the protester references and quotes is BES’s proposed MEP, which, according to the proposal, “[DELETED].” AR, Tab 16, BES Technical Proposal at 146. Nowhere in that narrative does BES identify information that the SSEB found lacking in the protester’s MEP. See Comments at 16-19. In fact, outside of the summary chart at the end of the protester’s MEP, the only specific mention of the protester’s preparation for managing a pandemic-related crisis is the [DELETED]. See AR, Tab 16, BES Technical Proposal at 146. Otherwise, the MEP does not provide the detail that the

agency found missing in BES's proposed response to the specific threat of the COVID-19 pandemic. See *id.* at 146-149.

Although the protester asserts that the agency's evaluation unreasonably ignored the narrative portion of the MEP, that narrative offers nothing responsive to the agency's evaluated concerns. The Air Force's evaluation of the protester's proposal reasonably focused on the summary chart at the conclusion of the MEP, because that chart contained nearly all of the substance of BES's proposed plan to respond to the threat of COVID-19. The assertion that the agency unreasonably failed to consider the totality of the protester's proposal when evaluating BES's planned response to the COVID-19 pandemic is without merit.

Unstated Evaluation Criteria

In the alternative, BES argues that the Air Force employed unstated evaluation criteria when it evaluated the protester's proposal as unacceptable under the MEP subfactor. Agencies may properly evaluate a proposal based on considerations not expressly stated in the RFP where those considerations are reasonably and logically encompassed within the stated evaluation criteria, and where there is a clear nexus between the stated and unstated criteria. *Pond Constructors, Inc.*, B-418403, Mar. 23, 2020, 2020 CPD ¶ 129 at 5.

BES identifies two evaluation requirements that the protester contends were unstated: "(1) a requirement to state where COVID-19 testing would be performed, and (2) a requirement to detail how the contractor would notify the COR of a COVID exposure." Comments at 14. The requirement that the MEP identify the location of COVID-19 testing is reasonably encompassed within the requirement for a testing policy; there is a clear nexus between the requirement for a testing policy and the related requirement that the offeror indicate the location of the testing. *Pond Constructors, Inc.*, *supra*.

There is also a clear nexus between the Occupational Safety and Health Administration (OSHA) reporting guidance that the MEP committed the protester to follow and the requirement that an offeror's plan provide detail on how the firm will institute that guidance--including how the contractor would notify the COR.⁶ More important, the RFP required testing and quarantining policies, which necessarily entail communication

⁶ BES's MEP stated that, [DELETED]. For workplace guidance on responding to the COVID-19 pandemic, the CDC references OSHA guidance. See <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>, (last visited May 4, 2022), referencing *OSHA Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*. OSHA rules require that employers report confirmed cases of COVID-19 if the case is work related and involves medical treatment and time away from work. <https://www.osha.gov/coronavirus/safework#what-workers-need-to-know>, (last visited May 4, 2022), citing 29 CFR part 1904.

with the agency regarding positive COVID-19 test results. The Air Force reasonably included in its evaluation the two requirements that BES argues were unstated--the identification of the place for COVID-19 testing, and detail on how the contractor would notify the COR of COVID exposure--where both requirements were reasonably encompassed within stated evaluation criteria.

Conclusion

In summary, BES alleges that the Air Force failed to read the entirety of the protester's proposed response to the COVID-19 pandemic and contends, in the alternative, that the agency's evaluation of the protester's proposal under the MEP subfactor relied on unstated criteria. The record does not support the protester's claim that the Air Force's evaluation ignored relevant information regarding BES's proposed response to the COVID-19 pandemic. The record confirms that the shortcomings the agency identified in BES's MEP were related to explicit RFP requirements and not the result of the application of unstated evaluation criteria. The allegation that the Air Force unreasonably evaluated BES's proposal as unacceptable under the MEP subfactor of the technical (staffing plan) factor is denied.

Because we conclude that the agency reasonably found the protester's proposal unacceptable, we need not address the protester's remaining challenges to the agency's evaluation of either the protester's or the awardee's proposal. *The McHenry Mgmt. Grp., Inc.*, B-409128 *et al.*, Jan. 23, 2014, 2014 CPD ¶ 56 at 5-6 (a protester reasonably found unacceptable is not interested to challenge the evaluation of the remainder of its proposal); *Tyonek Worldwide Servs., Inc.; DigiFlight, Inc.*, B-409326 *et al.*, Mar. 11, 2014 2014 CPD ¶ 97 at 7 (where there is another acceptable proposal eligible for award, a protester is not an interested party to challenge the award where it would not be in line for award were its protest sustained).

The protest is denied.

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General Counsel