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Decision

Matter of: ECC Infrastructure, LLC

File: B-423143; B-423143.2

Date: January 27, 2025

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Robert Nida, Esq., Nida & Romyn, PC, for TPC-NAN Joint Venture, the intervenor.
Rebecca J. Wrightson, Esq., Department of the Navy, for the agency.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined that protester’s proposal failed to comply with material solicitation requirements, thereby rendering the proposal ineligible for award.

DECISION

ECC Infrastructure, LLC, of Burlingame, California, protests the Department of the Navy’s issuance of a task order to TPC-NAN Joint Venture, pursuant to request for proposals (RFP) No. N40192-24-R-2004, for the design and construction of waterfront repairs at Apra Harbor, Naval Base Guam. ECC challenges the agency’s evaluation of its proposal, including the agency’s assessment of deficiencies. Supp. Consolidated Protest at 8-27.¹

We deny the protest.²

¹ The page numbers referenced in this decision are the Adobe PDF page numbers in the documents submitted.

² After the protest was filed, the agency executed a written determination and findings (D&F), concluding that the best interests of the government necessitated a partial override of the Competition in Contracting Act’s (CICA) performance stay that was triggered by ECC’s protest. Specifically, the agency stated:

(continued...)

BACKGROUND

In May 2024, pursuant to subpart 16.5 of the Federal Acquisition Regulation, the agency issued the RFP to five contractors (including ECC) that were previously awarded waterfront multiple-award Navy construction contracts. See Agency Report (AR), Tab 3, RFP at 1; Tab 15, RFP amend. 0007 at 11. The solicitation sought proposals for the design and construction of “a Waterfront Structure System . . . as specified throughout this RFP.” AR, Tab 3, RFP at 3. More specifically, the solicitation sought proposals for “repairs to the Admiral Glass Breakwater armor, repairs to rock revetment along Polaris Point . . . and repairs to the Sumay Cove Marina.” Tab 6, RFP Parts 2-5 at 10. Among other things, the RFP sought proposals for the “fabrication and installation [of] Concrete Armor Units (CAU) on the Glass Breakwater, revetment, shoreline stabilization, and marina slip repair and replacement.” *Id.* at 352. In this context, the applicable engineering system requirements (ESR) and performance technical specifications (PTS) contained various requirements and specifications including, of particular relevance here, multiple references to the use of “marine concrete.”³ *Id.* at 363-483.

For example, under the heading “Contractor-Furnished Concrete Mix Design,” the ESR states that precast concrete floats “shall conform to Unified Facilities Guide Specifications (UFGS) section 03 31 30, ‘Marine Concrete.’” *Id.* at 373. Similarly, under the heading “[Wave] Attenuator Material of Construction,” the ESR states: “Precast/prestressed concrete elements . . . shall conform to the Unified Facilities Guide Specifications (UFGS) Section 03 31 30, Marine Concrete, American Concrete Institute (ACI) Standard 318, Building Code Requirements for Structural Concrete.” *Id.* at 376.

This is a mission critical project for the immediate repair of the physically eroded and typhoon-damaged breakwater along the Philippine Sea side of the Glass Breakwater at Apra Harbor on Guam. . . .

Apra Harbor is strategic to the Indo-Pacific region for military logistics, operations, and mission readiness. The Glass Breakwater provides safe passage for all marine vessels and safe harbor for all waterfront structures within Apra Harbor. Due to the high potential and frequency of storms within this region, another storm could emerge, expedite breakwater damages, and limit the military logistics and operations in the region. . . . It is imperative that Glass Breakwater maintains its coastal defense capabilities to ensure accessible marine passage through Apra Harbor.

D&F Supporting Partially Override of CICA Stay, Nov. 27, 2024 at 1-2.

³ Marine concrete is a type of reinforced concrete designed to withstand exposure to corrosive environments such as saltwater. See *Unified Facilities Guide Specifications*, §§ 03 31 29 and 03 31 30.

Further, section H10 of the solicitation's performance technical specifications (PTS) contains a paragraph with the heading "Marine Concrete," stating:

The Designer of Record must utilize UFGS section 03 31 29, Marine Concrete with *Service Life Modeling*,^[4] including the use of epoxy coated rebar, for the project specification covering concrete components used in waterfront superstructure, substructure, deck and mooring and berthing systems, unless noted otherwise.

Id. at 448.

Under the heading "Pile Caps," section H10 of the PTS states: "Pile caps that are in contact with the water (including ground water), and water spray must meet the requirements of the 'Marine Concrete' paragraph . . . in this PTS Section." *Id.* at 455. Similarly, under the heading "Curbs and Bullrails," the solicitation states: "[c]urbs and bullrails must consist of reinforced concrete construction meeting the requirements of the "Marine Concrete" paragraph in this PTS Section." *Id.* at 460.

The solicitation advised offerors that source selection would be based on a tradeoff between the following evaluation factors: technical approach, small business utilization/participation, past performance, and price.⁵ With regard to evaluation under the technical approach factor, the solicitation stated that "[o]fferors will be evaluated based on their demonstrated technical capability, methodology, and understanding of the planning required for all major components of the work," further noting that proposals "must be sufficiently detailed to demonstrate an understanding of, and an ability to comply with, the requirements of the RFP." AR, Tab 15, RFP amend. 0007 at 43-44. Finally, the solicitation provided that the agency would assign confidence ratings based on its assessments of strengths/significant strengths, weaknesses/significant weaknesses, uncertainties, and deficiencies in offerors' proposals. As relevant here, the solicitation defined a deficiency to include "a material failure of a proposal to meet a Government requirement," and stated that a proposal found to have a deficiency would be ineligible for award. *Id.* at 48.

On or before the July 2 closing date, proposals were submitted by ECC and TPC-NAN. ECC does not dispute the fact that its proposal did not commit to using either marine

⁴ Section 03 31 29 of the UFGS contains specifications for marine concrete in projects with a defined service life; section 03 31 30 of the UFGS contains specifications for marine concrete in projects without a defined service life.

⁵ The solicitation provided that the technical approach and small business evaluation factors were of equal importance and, when combined, were of equal importance to the past performance factor, and that the non-price factors were approximately equal to price. AR, Tab 15, RFP amend. 0007 at 43. The solicitation also stated that the agency intended to issue the task order without conducting discussions. *Id.* at 42.

concrete or even any type of reinforced concrete.⁶ Specifically, ECC states that it “decided not to propose a design that utilized reinforced concrete.” Comments at 7. Instead, ECC’s proposal stated that it would “collaborate on the concrete mix design” with its designer of record and subcontractors, and would adhere to certain “guidance” documents, including “EM1110-2-2000, *Standard Practice for Concrete Structures (for Civil Works Structures)*.”⁷ Comments, exh. 3, ECC Technical Proposal at 35.

Thereafter, the agency evaluated the proposals as follows:

	Technical Approach	Small Business Utilization/Participation	Past Performance	Price
ECC	No Confidence	Good	Neutral Confidence	\$487,200,071
TPC-NAN	High Confidence	Good	Neutral Confidence	\$562,918,116

Req. for Dismissal, exh. C, Debrief at 38.

In assigning a rating of “no confidence” to ECC’s proposal under the technical approach evaluation factor, the agency identified two deficiencies, including a deficiency based on the proposal’s failure to meet the solicitation requirements for marine concrete.⁸ In assessing a deficiency regarding the marine concrete requirements, the agency stated:

[ECC’s] proposed design criteria uses EM 1110-2-2000 Standard Practice for Concrete for Civil Works Structures as guidance stating that there is no

⁶ As noted above, marine concrete is a type of reinforced concrete designed to withstand exposure to corrosive environments.

⁷ EM 1110-2-2000, Standard Practice for Concrete for Civil Works, is an engineering manual published by the U.S. Army Corps of Engineers that provides guidance for the selection of concrete materials for civil works concrete structures.

⁸ The agency assigned a second deficiency to ECC’s proposal for failing to comply with the solicitation requirements regarding “transition zones.” In addition, the agency assessed a significant weakness to ECC’s proposal for failing to adequately demonstrate “in-water environmental mitigation efforts”; a weakness regarding ECC’s “crane and excavator calculations”; a weakness regarding ECC’s proposed approach to performing work at night; and seven “uncertainties” regarding various solicitation requirements. Req. for Dismissal, Exh. C, Debriefing at 30-32. In light of our determination, discussed below, that the agency reasonably identified a deficiency with regard to the solicitation’s requirements for marine concrete, we do not further address the agency’s evaluation of ECC’s proposal.

UFC specific to concrete for CAUs; however, the RFP design criteria requires the use of marine concrete for CAUs.

Req. for Dismissal, exh. C. Debrief at 33.

Thereafter, the agency selected TPC-NAN for issuance of the task order. This protest followed.⁹

DISCUSSION

ECC's protest challenges virtually every aspect of the agency's evaluation of ECC's proposal, including the assessment of a deficiency for failing to comply with the solicitation requirements regarding marine concrete. In this regard, ECC asserts that "nothing in the Solicitation required ECC to use marine concrete," maintaining that "use of marine concrete was discretionary," and states that, based on ECC's "20+ years of concrete experience," it "decided not to propose a design that utilized reinforced concrete." Comments at 2, 7-8. In this context, ECC asserts that any solicitation requirements for marine concrete were applicable only if a proposal offered reinforced concrete. *Id.* 7-8. ECC also complains that, because the solicitation's stated evaluation criteria did not "specifically" reference marine concrete, the agency was precluded from considering that matter in its evaluation of proposals. Supp. Consolidated Protest at 19. Overall, ECC asserts that the agency's assessment of a deficiency due to ECC's failure to propose marine concrete was based on "an imaginary requirement" and, therefore, constituted application of an unstated evaluation factor.¹⁰ *Id.*

The agency first responds that, contrary to ECC's allegations of an "imaginary requirement," the solicitation clearly mandated use of marine concrete multiple times. As noted above, the ESR provided that the contractor-furnished concrete mix design for precast concrete "shall conform to Unified Facilities Guide Specifications (UFGS)

⁹ The awarded value of the task order at issue exceeds \$25 million. Accordingly, at the time this protest was filed on September 23, 2024, this procurement was within our jurisdiction to hear protests related to the issuance of orders under multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts that were awarded under the authority of title 10 of the United States Code. 10 U.S.C. § 3406(f)(1)(B); see National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, 138 Stat. _____ § 885 (2024) (amending jurisdictional threshold to \$35 million for protests of orders placed under IDIQ contracts awarded under authority of title 10, effective December 23, 2024); *Technatomy Corp.*, B-405130, June 14, 2011, 2011 CPD 107 at 5,6 (changes to jurisdiction will not be given retroactive effect, absent specific statutory direction).

¹⁰ Based on its speculation regarding TPC-NAN's proposal, ECC also asserts that the agency's evaluation reflected unequal treatment. However, a protest allegation which relies on speculation does not provide a legally sufficient basis for protest and will not be considered. See, e.g., *Raytheon Blackbird Techs., Inc.*, B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 3.

section 03 31 30, 'Marine Concrete.'" See AR, Tab 6, RFP Parts 2-5 at 373, 376-377. Similarly, the PTS stated that an offeror's design "must utilize UFGS Section 03 31 29, *Marine Concrete with Service Life Modeling*" for concrete components used in the waterfront superstructure, substructure, deck and mooring and berthing systems. *Id.* at 448. More specifically, the solicitation directed the use of marine concrete for, among other things, wave attenuators, pile caps, and waterside curbs/bullrails. See *id.* at 376-377, 455, 460. Further, the agency points out that the solicitation specifically advised offerors that the agency would evaluate each offeror's proposed methodology, along with its demonstrated understanding of, and ability to comply with, the solicitation's stated requirements. Finally, the agency notes that the solicitation warned offerors that a material failure to demonstrate compliance with a solicitation requirement would be assessed as a proposal deficiency, which would render the proposal ineligible for award. See AR, Tab 15, RFP amend. 0007 at 43-44, 48. Accordingly, the agency maintains that its evaluation of ECC's proposal, specifically including its assessment of a deficiency for failing to comply with the solicitation's marine concrete requirements, was reasonable, consistent with the terms of the solicitation, and properly formed a basis for excluding ECC's proposal from further consideration. We agree.

In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate the proposals or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria, as well as applicable statutes and regulations. See, e.g., *Batelco Telecomms. Co. B.S.C.*, B-412783 *et al.*, May 31, 2016, 2016 CPD ¶ 155 at 3. Where a dispute exists as to a solicitation's requirements, we begin by examining the plain language of the solicitation. *TriWest Healthcare Alliance Corp.*, B-415222.3 *et al.*, May 2, 2019, 2019 CPD ¶ 152 at 12. Finally, while a solicitation must inform offerors of the basis for proposal evaluation by identifying the evaluation factors and their relative importance, a solicitation need not specifically identify each and every element an agency considers during an evaluation where such elements are intrinsic to, or reasonably subsumed within, the stated evaluation factors. *Horizon Indus., Ltd.*, B-416222, B-416222.2, July 11, 2018, 2018 CPD ¶ 235 at 6.

Here, based on our review of the record, we find no basis to question the agency's evaluation of ECC's proposal, including its assessment of a deficiency for failure to comply with the solicitation's marine concrete requirements. First, as discussed above, there is no dispute that ECC "decided" not to propose any form of reinforced concrete, including marine concrete--despite the plain language of the solicitation's multiple provisions mandating use of this material and referencing the applicable specifications. That is, the plain language of the solicitation repeatedly stated that an offeror's proposal "must" use marine concrete for various portions of the project. ECC's assertions to the contrary are inconsistent with those provisions and are therefore unreasonable.¹¹

¹¹ In its comments responding to the agency report, ECC asserts for the first time that the agency's responses to questions prior to the solicitation closing date were inconsistent with the solicitation provisions regarding marine concrete. Comments

(continued...)

Further, ECC's assertion that the agency was precluded from assessing a deficiency because the requirement to use marine concrete was not specifically referenced in the evaluation criteria is without merit. As noted above, the solicitation clearly stated that the agency would evaluate each offeror's proposed methodology, along with its demonstrated understanding of and ability to comply with the solicitation's requirements. As discussed above, the plain language of the solicitation required the use of marine concrete and, thus, an offeror's failure to demonstrate its compliance with that requirement was reasonably subsumed within the stated evaluation criteria. In short, ECC's failure to demonstrate compliance with the solicitation requirements regarding use of marine concrete constituted a valid basis for the agency to exclude ECC's proposal from consideration, and none of ECC's complaints provides a basis for sustaining its protest.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

at 6-8. ECC's allegations in this regard are not timely raised, since they are based on purported ambiguities that were apparent on the face of the solicitation before proposals were submitted. See, e.g., *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.