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Decision

Matter of: Encorp-Samcrete Joint Venture

File: B-284171; B-284171.2

Date: March 2, 2000

James J. McCullough, Esq., and Catherine E. Pollack, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.

Edward J. Tolchin, Esq., Fettmann, Tolchin & Majors, for Contrack International, Inc., the intervenor.

Richard C. Bennett, Esq., and Nancy J. Williams, Esq., Department of the Army, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's rejection of the protester's proposal on a construction project as technically unacceptable is unobjectionable where the proposal's project schedule failed to address demobilization, which was reasonably considered to be a material solicitation requirement; the fact that neither the protester's nor the awardee's proposals addressed final inspection does not render the agency's rejection improper, because final inspection was the agency's responsibility, so that the offerors' failure to address this item was immaterial.

DECISION

Encorp-Samcrete Joint Venture protests the award of a contract to Contrack International, Inc. under request for proposals (RFP) No. DACA78-99-R-0015, issued by the United States Army Corps of Engineers, for the construction of a stock control administration facility for F-16 aircraft in El Bassateen, Egypt. Encorp-Samcrete contends that the agency's evaluation of its proposal as technically unacceptable was unreasonable.

We deny the protest.

The RFP provided for the award of a fixed-price contract to the offeror submitting the lowest-priced, technically acceptable offer. RFP at 00100-4. The RFP stated that the agency would "determine technical acceptability by evaluating the technical

features of each proposal on a pass/fail basis against the technical requirements specified in [the RFP]" under the experience, past performance, and management/execution plan criteria. Id. at 00100-4-7.

With regard to the management/execution plan evaluation criterion, the RFP informed offerors that the agency would "review and evaluate the offeror's management and execution plan to confirm it includes all the elements specified in the solicitation and all milestones and completion terms identified conform to the solicitation requirements," and noted that any plan which failed to include the specified elements, milestones or completion terms would be considered technically unacceptable. Id. at 00100-6. The RFP required that offerors submit, among other things, a project schedule to be evaluated under the management/execution plan evaluation criterion, and stated that it was to include, at a minimum, the following major phases of work: (1) Mobilization; (2) Site Preparation; (3) Submittal process; (4) Demolition; (5) Construction duration; (6) Equipment/materials procurement; (7) Delivery duration; (8) Shipping; (9) Finish Work; (10) Final Inspection; and (11) Demobilization. Id.

The RFP also included a price schedule to be completed by the offerors, which listed eight items, including, for example, "Mobilization and Demobilization" and "Site Development to include Paving, Sidewalks, and Landscaping to Building 1.5 meter line, complete as shown and specified." Id. at 00010-3.

The RFP stated that the agency intended to evaluate proposals and award the contract without discussions unless it found that discussions were necessary, and thus advised offerors that their initial proposals should contain their best terms from a price and technical standpoint. Id. at 00100-12.

The agency received a number of proposals, including those of Encorp-Samcrete and Contrack, by the RFP's closing date. The technical proposals of three offerors, including Encorp-Samcrete and Contrack, were forwarded to the cognizant technical evaluation team (TET) for review.¹ The members of the TET individually rated each of these three proposals on a pass/fail basis under numerous evaluation factors that corresponded to the evaluation criteria set forth in the RFP.² Agency Report, Tab 4A, TET Memorandum for Record, Nov. 4, 1999, at 3-4. The TET reached a consensus

¹ The RFP provided that "[i]n order to enhance the efficiency of the procurement process, the [agency] intends to evaluate only the three lowest-priced responsive proposals for technical acceptability. RFP at 00100-4. The RFP added that if any of these three proposals were determined technically unacceptable, the fourth (and if necessary, the fifth) lowest-priced proposal would be evaluated until three technically acceptable proposals were identified. Id.

² The TET was comprised of three voting members and one non-voting member.

finding that both Encorp-Samcrete's proposal, priced at [DELETED], and Contrack's proposal, priced at \$8,906,426, were technically acceptable under each of the evaluation criteria. Id. at 5, 7; Agency Report, Tab 4B, Source Selection Authority's (SSA) Memorandum for Contract File, Nov. 12, 1999, at 1. However, the TET noted, among other things, that one member believed that Encorp-Samcrete's proposal was unacceptable under the management/execution plan evaluation criterion because the proposed project schedule failed to address demobilization as required by the RFP. Agency Report, Tab 4A, TET Memorandum for Record, at 4-6. The Chairman of the TET thus recommended that the "SSA review this aspect concerning the offeror's failure to include a demobilization activity in [its] project schedule," but noted that, in the Chairman's view, "the said omission does not justify a finding of technical unacceptability." Id. at 6.

The SSA reviewed the three lowest-priced, technically acceptable proposals and the TET report, and concluded that contrary to the TET's consensus evaluation, Encorp-Samcrete's proposal was technically unacceptable under the management/execution plan evaluation criterion because the proposed project schedule failed to address demobilization. Agency Report, Tab 4B, SSA's Memorandum for Contract File, at 1. In this regard, the SSA noted that demobilization was set forth in the RFP as one of the "major phases of work" that offerors were expressly required to address in their project schedules. Id. The SSA explained as follows:

Demobilization of a contractor on an Egyptian Air Base is not an easy undertaking in Egypt. The contractor must satisfy the Egyptian Air Force as well as other Egyptian Government Agencies of their compliance with Egyptian rules and regulations in order to accomplish this phase. There are questions regarding taxes on labor as well as equipment, and excess materials. This phase can linger for months into years if the contractor has not properly planned for demobilization. On this project, the Egyptian Air Force is looking for a very prestigious appearance in the building for which they are having us manage construction. Once this project is completed and turned over to the Egyptians, the appearance of a contractor who has not demobilized might hinder the visible appearance of the building.

Id. The SSA also considered Encorp-Samcrete's price schedule, and found among other things that the "low cost for mobilization and demobilization might be a reflection of the fact that they have not considered demobilization as an element of work as indicated in the technical proposal and the cost associated."³ Id. at 2. The SSA concluded that Encorp-Samcrete's proposal was technically unacceptable, and

³ The SSA also noted that the agency's price analysis found Encorp-Samcrete's price "unreasonable due to low equipment costs, mobilization and demobilization, and material cost." Id.

determined that the contract should be awarded to Contrack as the offeror submitting the low-priced, technically acceptable proposal. Id.

Encorp-Samcrete protests that its proposal should not have been rejected as technically unacceptable for failing to address demobilization in its project schedule. In this regard, the protester first points out that its proposal included a completed price schedule that set forth a price of \$420,000 for “Mobilization and Demobilization.” The protester explains here that because the RFP included a “Payment for Mobilization and Demobilization” clause, it was clear that Encorp-Samcrete’s “proposal committed \$168,000 toward demobilization.”⁴ Protest at 4. The protester also points out that its project schedule set forth “several completion-related activities, including two ‘punchlist’ items,” and concludes that “[d]emobilization is [an] implicit aspect of these punchlist activities, since demobilization must be complete so that all items on the punchlist can be checked off.” Id.

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 of accommodating them. Matrix Int’l Logistics, Inc., B-277208, B-277208.2, Sept. 15, 1997, 97-2 CPD ¶ 94 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. Id. An offeror’s mere disagreement with the agency does not render the evaluation unreasonable. Id.

As mentioned previously, the RFP expressly required that proposals include project schedules that address demobilization. Although Encorp-Samcrete’s project schedule does, as the protester argues, address in a couple of instances matters that are, at best, arguably related to demobilization, such as the punchlist items, the submitted schedule simply does not specifically address demobilization, as was required by the RFP. In light of the agency’s explanation as to the importance of demobilization to the project’s success, which led to the RFP’s specific requirement that demobilization be specifically set forth in the project schedule, we have no basis on which to conclude that the agency acted unreasonably in finding that Encorp-Samcrete’s proposal was technically unacceptable in this regard, and,

⁴ RFP § 52.236-7004, “Payment for Mobilization and Demobilization” (which is nearly identical to Defense Federal Acquisition Regulation Supplement § 252.236-7004), provides that 60 percent of the lump-sum price for mobilization and demobilization shall be paid upon completion of the Contractor’s mobilization at the work site, with the remaining 40 percent to be paid upon completion of demobilization.

because of the evaluation scheme set forth in the RFP, technically unacceptable overall.⁵

Encorp-Samcrete argues that Contrack's proposal should have been evaluated as technically unacceptable by the agency because the project schedule submitted by Contrack failed to address final inspection as required by the RFP. Protester's Comments/Supplemental Protest at 9. Although Encorp-Samcrete's project schedule also fails to specifically address final inspection, the protester nevertheless contends that it did "indicate the timing of final inspection in its proposed schedule, through the main building punchlist item." Protester's Supplemental Comments at 7.

As mentioned previously, the RFP expressly required that proposals include project schedules that address final inspection. RFP at 00100-6. The RFP also provided for the performance of a "Final Acceptance Inspection" and stated that "[t]he final acceptance inspection will be formally scheduled by the Contracting Officer based upon results of the Pre-Final inspection." RFP § 01451, at 9. The RFP added with regard to the pre-final inspection that "[t]he Government will perform this inspection." Id.

In response to the protester's argument concerning Contrack's project schedule's failure to address final inspection, the agency first points out that, based upon the agency's review of the proposals, neither Contrack's nor Encorp-Samcrete's proposal "included final inspection as a specific term in their proposed schedules." Agency Supplemental Report at 2. The agency states that, nevertheless, neither proposal was determined technically unacceptable because of their failure in this regard because under the RFP (and resultant contract) provisions, as set forth above, "the timing and duration of final inspection is ultimately the government's responsibility . . . [and] [s]ince the government controls the activity, it is difficult to reason that the offeror[s'] failure to show the duration of the activity is a material omission." Id. at 3. The agency adds that in any event "both offerors were treated equally with respect to the inclusion of final inspection as a [proposed] schedule item." Id. at 2.

Although the Encorp-Samcrete's proposed project schedule again refers to certain activities which are related to the conduct of the final inspection, and may be construed as "indicat[ing]" the timing of final inspection, the fact remains that the protester's project schedule is, at best, unclear as to when the protester believed that the agency's final inspection should be conducted. Accordingly, the agency's conclusion that neither offeror's proposal addressed final inspection as required by the RFP was reasonable. Because the agency treated Encorp-Samcrete and Contrack equally by effectively waiving for both offerors the RFP's requirement that

⁵ The fact that Encorp-Samcrete priced, and was therefore legally bound to perform, demobilization is irrelevant, given that firm's failure to address this material requirement in its schedule.

the offerors' proposed project schedules address final inspection, Encorp-Samcrete has no basis to challenge the waiver as to Contract. See Serv-Air, Inc.; Kay and Assocs., Inc., B-258243 et al., Dec. 28, 1994, 96-1 CPD ¶ 267 at 12-13; PADCO, Inc., B-270445, Mar. 6, 1996, 96-1 CPD ¶ 142 at 4; Bannum, Inc., B-248169.2, Sept. 29, 1992, 92-2 CPD ¶ 216 at 5.

The protester nevertheless contends that it was unreasonable for the agency to waive the RFP's requirement that the offerors' proposed project schedules address final inspection while at the same time choosing to enforce the RFP's requirement that proposed project schedules address demobilization. Protester's Comments/Supplemental Protest at 9. As explained by the agency and described above, the agency concluded that whether the offerors' project schedules addressed final inspection was immaterial because, according to the RFP, the agency, not the protester, was responsible for scheduling the final inspection. On the other hand, as explained by the SSA and set forth above, whether the offerors' project schedules addressed demobilization was material, given the importance of demobilization to the completion and overall success of the project, the potential difficulties in accomplishing this task, and the fact that its scheduling was the responsibility of the contractor (rather than the agency). As such, the agency did not act unreasonably or treat the offerors in an unfair manner by waiving the RFP's immaterial requirement that the offerors' proposed project schedules address final inspection, while at the same time choosing to enforce the RFP's material requirement that proposed project schedules address demobilization.

The protester argues that the agency acted improperly in rejecting Encorp-Samcrete's proposal without providing the protester with clarifications "to resolve the perceived deficiency in [the] proposal" regarding the failure of its proposed project schedule to address demobilization. Protester's Comments/Supplemental Protest at 7. We disagree. Given that the agency reasonably found Encorp-Samcrete's proposal technically unacceptable because its proposed project schedule failed to address demobilization, the purpose of any communication with Encorp-Samcrete with respect to its scheduling of demobilization would have been to provide Encorp-Samcrete with the opportunity to cure a material defect in its proposal, and the communication would therefore have constituted discussions. Wellco Enters., Inc., B-282150, June 4, 1999, 99-1 CPD ¶ 107 at 7. Because there is generally no obligation that a contracting agency conduct discussions where, as here, the RFP specifically advises offerors of the agency's intent to award a contract on the basis of initial proposals without discussions,

Robotic Sys. Tech., B-278195.2, Jan. 7, 1998, 98-1 CPD ¶ 20 at 11, and the protester does not argue that the agency was required to conduct discussions with the offerors, this aspect of Encorp-Samcrete's protest will not be considered further.

The protest is denied.

Comptroller General
of the United States