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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: R&D Maintenance Services, Inc.

File: B-292342

Date: August 22, 2003

Alan M. Grayson, Esq., Brian T. Scher, Esq., and James A. McMillan, Esq., Grayson, Kubli & Hoffman, for the protester.
James R. Thornton, Jr., Esq., and Connie Ledford Baran, Esq., Department of the Army, Corps of Engineers, for the agency.
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DIGEST

1. Allegation that technical evaluation was improper is denied where the record establishes that the evaluation was reasonable and consistent with the solicitation criteria.

2. Agency is not required to address offeror's relatively high proposed cost during discussions where the cost is not considered unreasonable or unacceptable for award.

3. Protest that awardee engaged in "bait and switch" is denied where there is no allegation that specific key personnel were proposed and evaluated but not provided; in the circumstances here, the allegation that the awardee may subcontract certain work which it proposed to perform itself does not provide a valid basis for a "bait and switch" allegation.

DECISION

R&D Maintenance Services, Inc. (R&D) protests the award of a cost-plus contract to Ferguson-Williams, Inc. (FW) under request for proposals (RFP) No. DACW21-02-R-0005, issued by the United States Army Corps of Engineers for certain power plant and dam maintenance and construction work. R&D initially protested that the Corps failed to evaluate proposals in accordance with the RFP criteria and failed to conduct meaningful discussions. In response to the agency report, R&D added allegations that the awardee engaged in prohibited "bait and switch" practices and that the agency's evaluation was unreasonable.

We deny the protest.

While this was a "best value" procurement under which the technical factors were set forth as significantly more important than cost, because the R&D and FW proposals received identical technical and past performance evaluations and were determined to be technically equal, cost became the determining factor. Accordingly, FW's proposal was selected for award based on its final proposed cost of $20,206,787 versus R&D's final proposed cost of $[deleted]. The protester's principal contention is that the Corps failed to conduct meaningful discussions because it knew that R&D's initial proposed cost of $[deleted] exceeded the government estimate of $20,927,373 by more than [deleted] percent but failed to bring this to R&D's attention during discussions. To support this contention, R&D cites Biospherics, Inc., B-278278, Jan. 14, 1998, 98-1 CPD ¶ 161, in which the protester was encouraged to reduce its price during discussions and, after Biospherics did so, its price in its best and final offer was evaluated as so "unrealistically low [as to] evidence a lack of understanding. . . ." Id. at 4. In Biospherics, not only had the agency failed to inform the protester that its pricing was already viewed as unrealistically low, but the agency had advised the protester that its pricing was rather high and encouraged the firm to review its proposal for additional savings. Under those circumstances, we found that the agency had conducted inadequate and misleading discussions. Obviously, the facts at hand bear no meaningful similarity to the situation in Biospherics.

While an agency is required to inform a protester that its costs are so low as to evidence a lack of understanding, an agency is not required to afford offerors all-encompassing discussions, or to discuss every aspect of a proposal that receives less than the maximum score. Nor is an agency required to advise an offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinate factor in choosing between two closely ranked proposals. Northrop Grumman Info. Tech., Inc., B-290080 et al., June 10, 2002, 2002 CPD ¶ 136 at 6. An agency may, but is not required to, address cost variances during discussion. Hydraulics Int'l, Inc., B-284684, B-284684.2, May 24, 2000, 2000 CPD ¶ 149 at 17. In particular, if an offeror's proposed cost is not so high as to be unreasonable and unacceptable for contract award, the agency may reasonably conduct meaningful discussions without advising the higher-cost offeror that its proposed cost is not competitive. MarLaw-Arco MFPD Mgmt., B-291875, Apr. 23, 2003, 2003 CPD ¶ 85 at 6. Simply stated, because the agency concluded that R&D's proposed cost was not unreasonable or unacceptable in light of its technical proposal, the agency was not under any obligation to address the protester's proposed cost during discussions.

The protester also contends that the Corps did not evaluate the proposals in accordance with the RFP evaluation criteria. In particular, the protester objects that the Corps improperly "performed an initial screening to determine which proposals were technically acceptable," and "then awarded the contract to the lowest cost

offeror." Protest at 6. The record does not support the allegation that the agency performed any improper technical screening or evaluation. At the direction of the contracting officer, the technical evaluation team simply performed an initial screening of the proposals in accordance with section M.2(a)(1) of the RFP for the purpose of determining whether the proposals satisfied the submission requirements under section L. This initial screening was to assess the completeness of the proposal submissions, not to perform an evaluation to determine relative technical merit. The record supports the agency's explanation that cost was used as the determining factor only after the final evaluations of technical, past performance, and cost factors were completed.

The protester further argues that the Corps's evaluation was unreasonable and unsupported. Where an evaluation is challenged, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. Lear Siegler Servs., Inc., B-280834, B-280834.2, Nov. 25, 1998, 98-2 CPD ¶ 136 at 7. The fact that the protester disagrees with the agency does not render the evaluation unreasonable. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7. Our review of this record discloses no basis to question the agency's evaluation.

The protester's allegation is based principally on the agency's application of an escalation factor to adjust future labor costs for purposes of a most probable cost assessment. The agency adopted local economic forecasts that resulted in a 5-year average annual escalation for local wages of approximately 4.8 percent annually. R&D, working from the Consumer Price Index and the Cost of Labor Changes, proposed escalations of [deleted] percent for management and non-management wages, respectively. [Deleted]. R&D maintains that there is nothing in the record explaining why the escalation applied by the agency is more reliable than that of R&D.

An agency's judgment as to the methods used in developing the government's cost estimate and the conclusions reached in evaluating the proposed costs are entitled to great weight. Pioneer Contract Servs., Inc., B-197245, Feb. 19, 1981, 81-1 CPD ¶ 107, at 35. Our Office will not second-guess an agency's cost evaluation unless it is not supported by a reasonable basis. Id. Here, the agency reasonably applied specifically developed local escalation rates to labor costs; this evaluation is neither unreasonable nor unsupported, and the protester's decision to use other indexes that are broader and more general in application does not call into question the agency's determination. In any event, the net result of the agency's application of its higher escalation rate was to increase R&D's most probable cost by $483,000, which is far less than the cost difference between the proposals. Thus, the agency's application of escalations based on local economic forecasts could not have prejudiced the protester.

The protester alternatively argues that the agency penalized R&D for not adopting the Corps's labor cost forecasts and, therefore, improperly applied an undisclosed evaluation criterion. Where, as here, an agency evaluates proposals for the award of a cost-reimbursement contract, in which the government bears the risk and responsibility to pay the contractor its actual allowable costs regardless of the costs proposed by the offeror, the agency's analysis must also determine the realism of the offeror's proposed costs and what the costs are likely to be under the offeror's technical approach, assuming reasonable economy and efficiency. Federal Acquisition Regulation § 15.404-1(d)(1), (2); Pueblo Envtl. Solution, LLC, B-291487, B-291487.2, Dec. 16, 2002, 2003 CPD ¶ 14 at 13. Here, as noted above, the agency had a rational basis for application of the escalation factor that it used, and the increased escalation was applied to R&D's most probable cost, and did not provide a basis to downgrade R&D's technical proposal. Further, as noted above, R&D's costs would remain high even without the agency's cost adjustment based on local, economic forecasts. Thus, the protester's contention that the Corps's action in this regard somehow penalized R&D is without merit.

Finally, the protester contends that the awardee engaged in prohibited "bait and switch" practices by revising after award its technical approach to performing portions of the contract by electing to pursue performance of some portions through subcontracting. R&D claims that FW submitted its proposal intending to subcontract parts of the contract. However, to establish actionable "bait and switch," a protester must show that a firm either knowingly or negligently made a misrepresentation regarding employees that it does not expect to furnish during contract performance, that the misrepresentation was relied upon by the agency in the evaluation, and that this had a material impact upon the evaluation results. USATREX Int'l, Inc., B-275592, B-275592.2, Mar. 6, 1997, 98-1 CPD ¶ 99 at 9-10. R&D does not present any evidence that FW falsely represented its intent to perform the entire contract with specific in-house personnel, and there is no evidence that FW has actually subcontracted, or will subcontract, for any part of the work. Moreover, even if FW does ultimately rely on subcontractors more than indicated in its proposal, R&D has not established that doing so should be viewed as an improper "bait and switch." Thus, there is no basis for R&D's allegation of "bait and switch." Apache Enters, Inc., B-278855.2, July 30, 1998, 98-2 CPD ¶ 53 at 4.

The protest is denied.

Anthony H. Gamboa
General Counsel