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Decision

Matter of: Metcalf & Eddy Services, Inc.

File: B-298421.2; B-298421.3

Date: November 29, 2006

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Vinson & Elkins LLP, for the protester.

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for CDM International, Inc., an intervenor.

Warren D. Leishman, Esq., Agency for International Development, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of protester's presentation is denied where record shows that evaluation was consistent with terms of solicitation and instructions provided to competitors.

DECISION

Metcalf and Eddy Services, Inc. (M&E) protests the U.S. Agency for International Development's (AID) selection of CDM International, Inc. for cost negotiations under solicitation No. 263-06-017, issued to acquire engineering services for various small-scale infrastructure projects in Egypt. M&E maintains that the agency misevaluated the firms' presentations and failed to provide adequate discussions.

We deny the protest.

The acquisition was conducted under the authority of the Brooks Act, 40 U.S.C. §§ 1101-1104 (2002), which, together with the applicable implementing regulations, Federal Acquisition Regulation (FAR) part 36, provides for the acquisition of architectural-engineering (A-E) services. The solicitation called for the submission of expressions of interest and prequalification information from interested concerns. The agency received four submissions and invited all four concerns to make oral presentations supported by written materials. These invitations included a draft statement of work, a statement of the minimum qualifications of key personnel, a list of applicable documents and drawings for projects contemplated for performance under the contract, and a statement of the evaluation criteria, which were as follows:

experience with the type of services required (20 of 100 available points); organizational structure and qualification of personnel (20 points); familiarity with the locality where the projects are situated (20 points); past performance (15 points); cost effectiveness (approaches to reducing and controlling costs) (10 points); and technical approach and timeline (15 points).

Based on the firms' submissions and oral presentations, the agency selected M&E for final cost negotiations. CDM challenged the selection decision in a protest filed with our Office, alleging that the agency improperly had failed to engage in discussions. In response, the agency advised our Office that it intended to take corrective action by providing discussions, and we dismissed the protest as academic (B-298421, July 6, 2006).

By letter dated July 2, the agency advised the four firms that they would be allotted 3 hours for their presentations—2 hours for making the presentation and 1 hour for questions from the agency's technical evaluators. Agency Report (AR), exh. 4, at 2. The firms were further advised that they were free to make any desired changes to their original written presentation materials, that the agency would make its selection decision based on the revised presentations, and that an entirely new technical evaluation panel would evaluate the revised presentations. Id. Each firm's letter also included the evaluation scores assigned by the agency during the original presentations (M&E's score was 92.6 points), and also narratives that discussed each firm's strengths and areas for improvement. By follow-up letter dated July 18, the agency further advised the firms that they should anticipate making any desired changes to their written presentation materials in response to the discussions during the oral presentation.

The agency conducted presentations with three firms (one firm declined to participate further) and accepted written presentation materials from them at the conclusion of those presentations. The agency then evaluated the firms as follows:

	CDM	M&E¹	Offeror A
Experience of firm and subcontractors	20	19.33333	18.5
Organizational structure & qualifications of personnel	18.66667	17.2	19.1
Familiarity with the locality of projects	19.33333	20	16.33333

¹ The total scores for M&E and offeror A, as presented in the agency's source selection document contain mathematical errors; the sum of M&E's evaluation factor scores is 95.43333 and the sum of offeror A's evaluation factor scores is 91.63333. We do not consider this error significant, since in both cases the total score presented to the source selection official was higher than the mathematically correct sum; therefore, neither firm was prejudiced by the agency's calculation error.

Past performance	15	15	14.3
Cost effectiveness	10	8.9	9.2
Technical approach and timeline	15	15	14.2
Total Score	98	96.08333	92.16667

On the basis of these evaluation results, the agency selected CDM for cost negotiations as the most highly ranked firm. M&E was advised of the agency's decision by letter dated August 16; by letter dated August 17, M&E was provided its point scores, as well as a list of the strengths and weaknesses found in its presentation.

EVALUATION

M&E protests various aspects of the agency's evaluation of the presentations. In reviewing an agency's selection of a contractor for A-E services, our function is not to make our own determination of the relative merits of the submissions, or to substitute our judgment for that of the procuring agency by conducting an independent examination. Rather, our review is limited to examining whether the agency's evaluation and selection were reasonable and in accordance with the published evaluation criteria. Pickering Firm Inc., B-277396, Oct. 9, 1997, 97-2 CPD ¶ 99 at 4. The evaluation and selection here were reasonable.

Consideration of First and Second Presentation

M&E maintains that the agency improperly considered only information included in its second written and oral presentations, and did not consider information from their first presentation. According to the protester, the agency did not advise firms that only the second presentation would be evaluated for purposes of the agency's source selection decision.

This argument is without merit. The agency's letters inviting firms to participate in the second presentation stated as follows:

The revised presentation will be used for the final selection of the firm for conducting the work as a result of RFP 263-06-017. Firms are free to add, subtract, or make any other changes to any of the information presented originally. Please note that we will constitute a new Evaluation Board, none of whose members will have been at the original presentations.

AR, exh. 4, at 2. The same letter went on to state that "[t]he following commentary [a statement of the strengths and areas for improvement] on M&E's [first] Presentation may be of help in preparing for the final presentation." Id. at 3. It is clear from this letter that the second presentation would be the principal source of evaluation information, but it is also clear from the inclusion of the "commentary" that the

evaluation would be conducted with reference to the identified strengths and weaknesses from the first presentations. It appears that the evaluation panel adhered to the terms of the letter; it clearly considered the second presentation, and also considered at least the extent to which the second presentation improved on the first. See AR, exh. 1, at 6-8. There was nothing unreasonable or otherwise improper in the agency's considering the oral presentation information in this manner.

Oral Presentation

M&E also maintains that the agency improperly failed to consider the firm's oral presentation at all, and instead based its evaluation solely on its written presentation materials. In this regard, the protester notes that, in responding to its protest, the agency refers only to its written presentation materials to support the reasonableness of its evaluation, and that some of the evaluators' worksheets are either undated or dated several days after its presentation. To illustrate its point, the protester cites the agency's evaluation conclusion that it was "[n]ot clear who will perform archeological monitoring, no affiliation with prominent archeologist highlighted." AR, exh. 10, at 5. The protester states that, in fact, its written materials identified an archeological firm and a particular prominent archaeological architecture specialist who would be used to perform, and that it mentioned the firm and the names of the individuals at the oral presentation. Protester's Comments, Sept. 29, 2006, exh. 1, at 2.

This allegation is without merit. The agency's technical evaluation team chairman states in an affidavit that the evaluators considered both the oral and written presentation materials, and there is nothing in the record establishing otherwise. Agency Motion to Dismiss, Oct. 11, 2006, exh. 1, at 2. The fact that the evaluators' worksheets memorializing their observations from the oral presentations were prepared some time after the presentations--the chairman states that there was a 1 or 2-day delay, id.--does not establish that the agency failed to consider the oral presentations.

With regard to the the quality of M&E's archaeological team, the chairman's affidavit states: "Although M&E's presentation and materials were on the whole excellent, we felt that they could have been a little clearer about their . . . archeological expert." Agency Motion to Dismiss, Oct. 11, 2006, exh. 1 at 2. This representation is consistent with M&E's written presentation materials; the slide detailing the firm's archaeological monitoring subcontractor, [deleted], describes the concern as a [deleted] but makes no mention of the firm's role in performing archaeological monitoring, Protest, exh. I, and the slide relating to M&E's use of particular well-known archaeologists states only that the firm intended to use a "[deleted]," id. at exh. H, with no mention of who these individuals would be. While the protester claims it provided specifics during its oral presentation, it is not clear why it did not incorporate this information into its written materials. In this regard, the agency's instructions to the firms made clear it anticipated that firms would make written

changes to their final submissions so that they were consistent with their oral presentations. Those instructions specifically provided:

It is our intention that in order for the exchange between the Presenters and the government to be as meaningful as possible, that the Presenters will be given the opportunity to make adjustments to the presentation and the materials left behind for the government to conduct their final evaluation.

* * * * *

In the event that the Presenters wish to make any changes to the materials left behind for the evaluation, then these changes should be made simultaneously with-in (or during) the presentation time period of three hours. With four presenters, it seems that there will be sufficient resources in the room to make these adjustments, if needed.

The oral presentation and any written presentation, changes or otherwise must be consistent.

AR, exh. 4, Letter from USAID to M&E, July 18, 2006, at 1-2 (emphasis added).

In light of M&E's failure to comply with these explicit instructions by amending its written materials during the oral presentation, M&E ran the risk that its materials would be viewed as somewhat inconsistent or confusing, given that its written materials did not include the specific information M&E maintains it presented orally. Certainly, the agency's approach to evaluating this aspect of M&E's materials in no way evidences a general failure by the agency to consider M&E's oral presentation information. (In any case, M&E's proposal was only nominally downgraded for this weakness—it received 19.33333 of 20 possible points under the relevant criterion (experience of the firm and subcontractor)).

Job Descriptions

M&E takes issue with the agency's evaluation conclusion that the firm did not provide detailed job descriptions for all of its personnel. In this connection, the record shows that the agency specifically noted this as an "area for improvement" in its invitation to M&E to participate in the second presentation. M&E states that it supplemented its presentation materials in response to this commentary. This argument is without merit. The record shows that, as the agency found, M&E included information in its written presentation materials [deleted]. AR, exh. 5, at unnumbered pages 14-21. The agency therefore reasonably assessed this as a weakness in M&E's presentation materials.

Principal-In-Charge

M&E asserts that the agency improperly downgraded its presentation for being unclear as to the role of its principal-in-charge. The agency's evaluation materials state in this respect: "Role of the 'Principal-in-Charge' not clearly defined in the presentation. Having both a Principal-in-Charge and Chief of Party redundant." AR, exh. 10, at 5. M&E states that it was unreasonable to downgrade its presentation for this reason, since both its first and second presentations included information showing that the principal-in-charge, [deleted].

The evaluation in this area was reasonable. As noted by the agency, M&E's presentation materials identified [deleted]. AR, exh. 5, at 14-15. The agency reasonably could conclude from these multiple designations that the role of the the principal-in-charge was not clearly defined.

Moreover, an examination of the [deleted]. AR, exh. 5, at 14-15. The [deleted], AR, exh. 5 at 15-16, issues which would appear to be encompassed by [deleted].

Design/Engineering Manager

The agency assessed M&E a weakness based on the fact that its design/engineering manager was [deleted], and its view that it might be unnecessary to use [deleted] manager given the availability of qualified local design and engineering specialists. M&E takes issue with this finding, explaining that, during its first oral presentation (as well as during the firm's initial cost negotiations with the agency after that presentation) the agency had insisted that M&E [deleted]; in response, it had agreed with the agency that it would use [deleted] design/engineer manager.

Given the protester's un rebutted account of its dealings with the agency on this point, the basis for the agency's concern is not clear. The record shows, however, that the agency did not deduct any points from M&E's score for this reason; the evaluation worksheets show that each of the evaluators assigned M&E the maximum score for the subfactor of maximum use of well-qualified local personnel (5 points) (under the factor of organizational structure and qualification of personnel). AR, exh. 9, at 7, 24, 41, 58, 75. Since CDM ultimately was selected on the basis of its higher score, there is no indication that this agency concern had any impact on the selection decision. Consequently, M&E was not prejudiced by any improper evaluation in this area. GS Servs., Ltd. P'ship, B-298102, B-298102.2, June 14, 2006, 2006 CPD ¶ 96 at 7-8 (prejudice is an essential element of every viable protest, and where none is evident, we will not sustain a protest even if the agency's actions arguably were improper).

Disparate Treatment

M&E asserts that it was evaluated disparately because the agency deducted four points from its final score while deducting only two from CDM's, despite the fact that the weaknesses identified in CDM's presentation (allegedly) were more serious than

those in M&E's presentation. This argument is without merit. The evaluation reflected both strengths and weaknesses, and while the agency identified the same number of weaknesses for both firms, it identified significantly more strengths (12 versus 8) for CDM than it did for M&E. Thus, the agency reasonably evaluated CDM as superior and there is no basis to assume--as the protester's argument necessarily does--that the precise difference in point scores reflected disparate consideration of the firms' weaknesses rather than the greater number of strengths assigned CDM.

DISCUSSIONS

M&E asserted in its initial protest submission that the agency failed to provide M&E with "meaningful discussions" during its oral presentation because it did not bring identified weaknesses to M&E's attention and permit the firm to address them. In support of this argument, M&E cited decisions from our Office concerning the requirement for meaningful discussions under FAR part 15. The agency responded by asserting that, because this procurement was governed by the A-E services regulations under FAR part 36, the discussions requirements under FAR part 15 did not apply. In response to the agency's position, M&E asserted for the first time (in its comments on the agency report) that the agency failed to provide discussions as required under FAR part 36.

Under our Bid Protest Regulations, protests must be filed no later than 10 days after the protester knew or should have known its bases of protest. 4 C.F.R. § 21.2(a)(2) (2006). M&E's assertion that it was not afforded adequate discussions within the meaning of FAR part 36 is based on information of which it was aware more than 10 days before its comments were filed. Specifically, as evidenced by M&E's letter of protest, the firm was well aware that the acquisition was being conducted under the authority of FAR part 36; thus, to the extent M&E believed it had not been afforded adequate discussions under FAR part 36, M&E was required to protest on this basis at least at the time it filed its initial protest. Because it did not do so, this aspect of the protest is untimely and will not be considered.²

² Although we do not decide here whether the agency was required to conduct more extensive discussions, we note that, in contrast to FAR part 15, the Brooks Act and its implementing regulations in FAR part 36 provide that agencies "shall conduct discussions with at least 3 firms to consider anticipated concepts and compare alternative methods for furnishing the services." 40 U.S.C. § 1103(c) (2002); FAR § 36.602-3(c). In explaining this requirement, Congress stated the expectation that the source selection authority:

through discussions with an appropriate number of the firms interested in the project, will obtain sufficient knowledge as to the varying architectural and engineering techniques that, together with the

(continued...)

The protest is denied.

Gary L. Kepplinger
General Counsel

(...continued)

information on file with the agency, will make it possible for him to make a meaningful ranking.

S. Rep. No. 92-1219 at 8 (1972), reprinted in 1972 U.S.C.C.A.N., 4767, 4774; see also, Mounts Eng'g; Dept. of the Interior--Request for Advance Decision, B-218489 et al., Aug. 16, 1985, 85-2 CPD ¶ 181 at 6.