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Decision

Matter of: TtEC-Tesoro, JV

File: B-405313; B-405313.3

Date: October 7, 2011

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DIGEST

Protest that agency improperly evaluated proposals, resulting in a flawed best value determination, is denied where the record shows that the agency reasonably evaluated proposals in accordance with the terms of the solicitation, and that the agency's best value determination was reasonable.

DECISION

TtEC-Tesoro, JV, of Virginia Beach, Virginia, protests the issuance of a task order to M.A. Mortenson Company, of Minneapolis, Minnesota, by the U.S. Coast Guard, under request for proposals (RFP) No. HSCG47-09-R-3EFK03/X0007 for a 2-phase design/build construction project. The protester challenges the agency's evaluation of proposals as well as the agency's best value decision.

We deny the protest.

BACKGROUND

The RFP contemplated the issuance of a fixed-price task order for a design-build, 2-phase construction project. Under phase 1, the contractor will be required to design and construct a "4-story building" and supporting infrastructure at Ellington Field North, Houston, Texas. RFP at 2. The building is to include office and training spaces, vessel traffic and command centers, medical and dental facilities, shop areas,

berthing rooms, a cafeteria, a fitness center, and other support spaces. These spaces were set forth in the RFP's statement of work, which included detailed floor plans identifying the location of each functional area within the contemplated 4-story building. Upon its completion, the Coast Guard plans to relocate its Sector Houston activities to this building. Under phase 2, the contractor will be required to demolish Sector Houston's existing facility, and then design and build a new parking area at that location, as well as other improvements. The government estimated the price of the procurement to be between \$46 million and \$51 million. Id.

According to the RFP, the task order was to be issued on a "best value" basis considering three criteria: technical, past performance, and price. Id. at 7. Technical was composed of three factors—means and method, LEED,¹ and schedule. As it is relevant to the protest, under the means and methods factor, the RFP required a discussion of, at a minimum, the following: execution strategies, processes and approach as they relate to the project's requirements, project site, geography and proposed facilities; materials, systems, design and technologies that would be used to provide an energy efficient, easily maintained, and sustainable facility; and the life cycle costs, considering the frequency, cost and ease of maintenance. With respect to schedule, firms were required to provide a discussion of their preliminary schedule for design and construction. Id. In this regard, the RFP required a task-oriented, graphically-presented, preliminary design and construction schedule that indicated the number of calendar days by which milestones would be achieved. The RFP stated that "[a] more favorable rating will be given to a schedule that will complete the project ahead of schedule." Id.

The RFP established that the three technical factors and past performance, when combined, were significantly more important than price. Id. Price, according to the RFP, was to be evaluated "on the basis of the total sum of the Base Items." In this regard, firms were required to complete a price schedule, which provided for three separate base item prices. Id. at 6.

The RFP also stated that the government "encourage[d] innovations, technical improvements, and betterments." Id. at 6. As provided by the RFP, innovations and technical improvements were included in a firm's proposal solution and base item price and were to be considered in the technical evaluation. Id. Betterments, on the other hand, were defined as elements which added value to the project; they were to be considered in the technical evaluation and were to be separately priced in firms' proposals. Id. Acceptance of proposed betterments was "at the sole discretion of the government." Id.

¹ Leadership in Energy and Environmental Design (LEED) is a third-party certification program administered by a nationally accepted organization for design, operation and construction of high performance green buildings. See www.lead.net.

By the terms of the RFP, firms were advised that the agency would conduct oral presentations, at the end of which the agency would ask clarification questions but would not entertain questions from firms. Throughout the procurement, apart from the oral presentations, the agency did in fact address several dozen questions regarding specific requirements. As it relates to the protest, one such question and answer follows:

[Question] 11: Will there be a formal design review meeting required after each specified design review shown in [section] 011660-2.1.2.1?

Response: The RFP does not require design review meetings.

RFP, Amend. 0006 at 5.

The Coast Guard received timely proposals from the protester, the awardee, and three other firms. Tesoro proposed a 3-story building, instead of the 4-story design contemplated by the agency, combining on its second floor the functions that the agency's design had housed on floors two and three. In evaluating the protester's 3-story approach under the means and methods factor, the agency identified "the risk that the reconfigured floor plans may not meet the customer's needs with regards to proper space sizing, adjacencies and segregations" as the reason an otherwise superior rating was reduced to good. Agency Report (AR), Tab 13, TET Memorandum to Source Selection Official (TET Memo), May 10, 2011 at 2. Under the schedule factor, the protester provided for completing performance 30 calendar days prior to the required deadline. The agency was concerned, however, that given the significance of the changes to the floor plans, they would need to be thoroughly vetted with the building users. Given the time required to conduct such a review, the agency estimated that the protester would not be able to meet its accelerated schedule and rated the protester's proposal satisfactory under the schedule factor.

The following table summarizes the agency's final technical evaluation of the proposals:

Contractor Name	Factor 1	Factor 2	Factor 3	Overall Technical Rating
	Means & Methods	LEED	Schedule & Phasing	
Firm A	Good	Good	Good	Good
TtEC-Tesoro, JV	Good	Superior	Satisfactory	Good
Mortenson	Superior	Good	Good	Good
Firm B	Good	Superior	Good	Good
Firm C	Satisfactory	Satisfactory	Satisfactory	Satisfactory

Id. at 12.

The table below summarizes the proposed base prices and the total prices, which included adjustments for betterments accepted by the agency:

Contractor Name	Base Bid	Betterments	Total
Firm A	\$38,104,400	\$502,200	\$38,606,600
TtEC-Tesoro, JV	[DELETED]	[DELETED]	\$40,006,276
Mortenson	[DELETED]	[DELETED]	\$41,906,000
Firm B	\$42,200,000	\$8,000	\$42,208,000
Firm C	\$42,386,152	\$0	\$42,386,152

AR, Tab 15, Memo from Source Selection Evaluation Board to Source Selection Authority, May 25, 2011 at 1.

With or without adjustment for the betterments, the rank order of the firms by price does not change. When the base bid prices are compared, the protester has a [DELETED] advantage over the awardee. When comparing prices including betterments, that advantage is reduced to [DELETED].

The Technical Evaluation Team (TET) recommended the selection of the awardee’s proposal “primarily because [of the awardee’s] rating for the Means and Methods factor, which is due [to] the fact that they had no weaknesses, risks or concerns, had more strengths, offered more technical improvements/innovation, and was more thorough than all the others in identifying and resolving design issues.” AR, Tab 13, TET Memo, May 10, 2011 at 12. Considering the TET’s findings and recommendations, as well as the recommendations of the Source Selection Evaluation Board (SSEB), the Source Selection Authority (SSA) determined that Mortenson represented the best value to the government and selected that firm for performance of the task order. This protest followed.²

² The agency asserted that Tesoro was not an interested party to bring this protest because its proposal for a 3-story facility failed to comply with the terms of the RFP, and was therefore ineligible for award. The protester argued that the RFP invited innovative solutions to the building requirement, and that its innovative, 3-story proposal “result[ed] in various technical improvements to the Coast Guard.” Protester’s Response to Agency’s Motion to Dismiss, Exh. A, Decl. of Professional Engineer at ¶ 6. Moreover, the protester asserted that during the debriefing the agency informed Tesoro that its proposal had satisfied the RFP requirements. According greater weight to contemporaneous source selection materials than to judgments made in response to protest contentions, Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, we have no basis to conclude that the protester’s proposal failed to comply with the terms of the RFP as the agency indicated in a request for summary dismissal. As noted above, the contemporaneous agency evaluation did not in fact consider the protester’s 3-story design to be a disqualifying deviation from the terms of the RFP. Thus, to the extent
(continued...)

DISCUSSION

Tesoro challenges various aspects of the agency's evaluation of proposals with most of its principal arguments centered around the agency's consideration of Tesoro's 3-story approach. In this regard, Tesoro alleges that the agency improperly and unequally considered the risk associated with its 3-story approach under the means and methods factor and schedule factors. Tesoro also contends that the agency's evaluation of Mortenson's proposal under the schedule factor was inconsistent with the terms of the RFP. Finally, Tesoro argues that the agency's best value decision was unreasonable and inconsistent with the terms of the solicitation. Based on our review of the record, we conclude that there is no basis on which to sustain Tesoro's protest.

In reviewing a protest challenging an agency's technical evaluation, we will examine the record to determine whether the agency's evaluation conclusions are reasonable and consistent with the terms of the solicitation and applicable laws and regulations. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 4. Mere disagreement with the agency's evaluation is not sufficient to call it into question. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7.

Evaluation of Tesoro's Proposed 3-Story Building

First, Tesoro asserts that it was improperly penalized based on the agency's failure to perform its duties in analyzing the feasibility of its 3-story approach, and not for any risk of contractor performance.³ As discussed above, the RFP anticipated a 4-story design for the Sector building. The protester's 3-story design created a concern for the agency that beneficial floor plan adjacencies, developed over months of internal agency deliberations, would be disrupted to such an extent that the facility, as proposed by the protester, would be unacceptable to the building's users.

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Tesoro asserted two protest grounds predicated on the agency's post-protest claim that its proposal was found to be ineligible for award, namely, that the agency conducted improper discussions when it failed to identify the 3-story design as not conforming to the RFP requirements, and that, similarly, the agency misled the protester into proposing an innovative design, these two allegations do not state valid bases of protest since they are inconsistent with the underlying agency evaluation.

³ To the extent that the protester argues that risk, in and of itself, was an undisclosed evaluation criterion, we note that agencies may always consider risk to successful performance where, as here, that risk is intrinsic to a stated evaluation factor. AIA-Todini-Lotos, B-294337, Oct. 15, 2004, 2004 CPD ¶ 211 at 5.

In this regard, the risk that resulted in the downgrading of the protester's proposal under the means and methods factor--as described in the contemporaneous evaluation documents--was that the building users would find the protester's proposal unsuitable thereby undermining the viability of Tesoro's approach. Furthermore, as the agency notes, given Tesoro's indications during oral presentations that its 3-story approach could not be converted to a 4-story building, this risk was of a paramount concern. Thus, Tesoro is misplaced in its allegation that agency work-avoidance was the cause of its failure to be rated more highly.⁴

Second, the protester alleges that, because the RFP did not contemplate the performance of design reviews, as indicated through Q&A 11 noted above, the agency's claim that such a review would be necessary to consider the acceptability of the protester's proposed design was contrary to the RFP's terms. The protester's reliance on question 11 and the agency's response to it is misplaced. The question at issue asked whether the Coast Guard would require a formal design review meeting after each specified design review shown in section 011660-2.1.2.1 of the specifications. Given the limited focus of the question, the Coast Guard's response to that question could not reasonably be interpreted to mean that under no circumstances would the agency require a design review. Thus, the agency's determination that the breadth of the changes contained in the protester's design warranted a design review meeting to ascertain the suitability of the proposed facility for the user was in no way inconsistent with the agency's response to question 11 or the terms of the RFP.

Third, the protester asserts that the agency disparately evaluated proposals, where the awardee's design and Tesoro's own 3-story approach deviated in comparable ways from the agency's draft design.⁵ According to Tesoro, if it was proper for the

⁴ Tesoro also argues that the agency improperly double-counted the same risk associated with its 3-story approach under the means and methods factor as well as the schedule factor. This contention is without merit. The risks associated with its 3-story approach reasonably related to both factors, albeit in different ways. Under the means and methods factor, as discussed above, the agency considered the risk associated with the fundamental viability of the approach for the end user, whereas under the schedule factor, the agency considered the impact that Tesoro's approach would have on its ability to meet its proposed schedule given the need for further review by the end user.

⁵ The protester also asserted that the awardee's proposal failed to conform to the requirements of the RFP. Protester's Comments, Aug. 16, 2011, at 3-4. Because the agency substantively responded to this allegation in the agency report and the protester did not further address these issues in its response, we consider the protester to have abandoned this issue, and we will not consider it. Analex Space Sys., Inc.; PAI Corp., B-259024, B-259024.2, Feb. 21, 1995, 95-1 CPD ¶ 106 at 8.

agency to evaluate whether Tesoro's proposal fulfilled the building user's needs, the agency should have similarly questioned the risks associated with the awardee's proposed design approach. As explained below, the protester's allegation is unsupported by the record.

The Coast Guard identified specific ways in which the protester's proposed floor plans deviated from the plans that had been developed in conjunction with the building's users based on a consideration of their needs.⁶ Agency's Comments, Sept. 27, 2011, at 3. Those alterations to the established floor plans included, among others, the following: separating the planning and response spaces, which had been adjacent, by three other spaces; relocating the "intel offices," which had been centrally located, to the other side of the building; separating the Division Chief's and the Supervisor Officer's offices, which had been adjacent; and reducing the number of restrooms. *Id.* at 3-8. These deviations fundamentally reconfigured the floor plans from those included with the RFP, which had been prepared after extensive collaboration with the facility's end users and consideration to their functional needs.

In contrast, the awardee's proposal included changes that, according to the agency, would "enhance the user's experience but would have virtually no visibility to the user community." *Id.* at 13-14. Among the 73 such changes identified in the awardee's proposal were relocating a janitorial closet (#10), increasing the size of an electrical room (#33) and a restroom (#34), and adding 4 additional parking spaces to the main parking lot (#53). *Id.* 14-16. Given the fundamental difference in the ways in which Tesoro's and Mortenson's proposals modified the design set forth in the RFP, we see nothing unreasonable or disparate in the agency's evaluation of the two proposals under the means and methods factor.

Mortenson's "Good" Rating for Schedule

Tesoro also challenges Mortenson's "good" rating under the schedule factor. In this regard, the Tesoro argues that the agency employed an unstated evaluation criterion when it upgraded the rating for Mortenson's schedule from satisfactory to good based on the considerable detail provided by Mortenson in its proposal. According to the protester, the RFP only allowed for a more favorable rating where a firm's schedule provided for completion of the project prior to the deadline established by the RFP, which Mortenson's proposal did not do.

⁶ Tesoro complains that maintaining adjacencies between the various functions was not a stated evaluation criterion. Given that the agency supplied firms with detailed floor plans, we see no merit to the argument that the agency could not consider whether Tesoro's markedly different floor plans created risk that the users' preferences and needs, as established by the provided floor plans, would be met.

As a general matter, while agencies are required to identify the major evaluation factors in a solicitation such as the one here, they are not required to identify all areas of each factor which might be taken into account, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. Techsys Corp., B-278904.3, Apr. 13, 1998, 98-2 CPD ¶ 64 at 9.

When an RFP asks firms to provide a discussion of their approach, schedule, transition plan, or the like, the agency evaluation may reasonably consider the level of detail provided in the requested discussion. We have repeatedly held, where a firm merely indicates that it will meet a particular requirement, thereby discussing only the end results, but provides little or no detail about how it plans to meet or exceed the requirement, the agency may reasonably downgrade the proposal. Leader Commc'ns Inc., B-298734, B-298734.2, Dec. 7, 2006, 2006 CPD ¶ 192 at 6. Conversely, a greater level of detail may increase agency confidence in the firm's ability to do what it says it will do, resulting in a higher rating. Ultimately, an agency's evaluation is dependent upon information furnished in a proposal, and it is the firm's burden to submit an adequately written proposal for the agency to evaluate. Id. at 7.

Here, the RFP did not ask simply for a final schedule completion date. Rather, as noted above, the Coast Guard required firms to provide a discussion of their proposed schedule, specifying that the schedule be task-oriented, graphically-presented, and indicate the number of calendar days by which milestones are to be achieved. Moreover, to the extent the RFP alerted potential firms to the fact the agency would view accelerated schedules "more favorably," this provision cannot reasonably support the proposition that the existence of an accelerated schedule was the only basis for achieving a "good" rating, as argued by Tesoro. Because the announced evaluation criterion reasonably encompassed an assessment of the level of detail provided by firms in their proposals, we have no basis to conclude the agency's evaluation of the awardee's proposal under the schedule factor was inconsistent with the terms of the RFP.⁷

Consideration of Betterments

The protester also challenges the agency's consideration of the betterments proposed by the firms in its price evaluation and selection decision, where the RFP simply stated that price would be evaluated on the basis of the total of the base items. The record reflects that the agency identified two prices for each firm, one reflecting the total for the base items and a second reflecting the price of the base

⁷ The protester argues that, in any event, its schedule was more detailed than the awardee's. The record contains no basis to challenge the reasonableness of the agency's assessment that it valued the detail in the awardee's proposal more than the level of detail provided by the protester.

items plus the price associated with any betterments that the agency believed were worthy of award as a result of the technical evaluation. As noted above, Tesoro's total price for the base bid items only is approximately [DELETED] less than Mortenson's base bid price. When the prices of the betterments are considered, Tesoro's total price is approximately [DELETED] less than Mortenson's total price.

While Tesoro correctly notes that, pursuant to the terms of the RFP, price was to be evaluated "on the basis of the total sum of the Base Items," RFP at 6, it fails to recognize the fact that the RFP also required firms to separately price their proposed betterments, advised that the betterments would be considered in the technical evaluation, and provided that the government reserved "the right to award some, none, or all of the proposed betterments." *Id.* Thus, to the extent the agency decided that certain betterments proposed by Tesoro and Mortenson had value based on the technical evaluation, and would be awarded if the firm received the task order, see AR, Tab 14, Technical Evaluation Report (Addendum) Analysis of Betterments, it was incumbent on the agency to also consider the price associated with these betterments as part of any selection decision. Failing to consider the price associated with the betterments in the selection decision, as Tesoro suggests, is fundamentally inconsistent with the best-value tradeoff concept, which, to be meaningful, requires a weighing of the value and benefits associated with a firm's approach against their associated cost to the government. See e.g., Health Net Federal Servs., LLC, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 (sustaining protest where agency gave credit for feature in technical evaluation but failed to also consider the cost savings associated with that feature in its best value selection analysis).⁸

To the extent the solicitation did not clearly establish that accepted betterments would be considered as part of the selection decision, the protester has not established that it suffered any prejudice as a result of any such ambiguity. Specifically, the protester has not asserted that it would have altered its proposal in any meaningful way had it known the agency intended to consider the prices including betterments as part of its selection decision, thus it has not demonstrated a reasonable possibility that it was prejudiced by the agency's actions.⁹ See Qualicon

⁸ Furthermore, the SSA advised our Office that she was aware of the firms' base bid totals, as those values were presented to her in the SSEB report, and that when she made her selection decision, it was her view that Mortenson represented the best value notwithstanding the price impact of the betterments. AR, Tab 18, SSA Declaration.

⁹ The protester elsewhere asserted, for example, that it would have provided a 4-story design if it had known the agency would evaluate design risk for a 3-story proposal. Protester's Opposition to Motion to Dismiss, Aug. 5, 2011, Exh. A, Decl. of Professional Engineer at ¶¶ 16 & 17.

Corp., B-309989.2, Dec. 3, 2007, 2007 CPD ¶ 221 (denying protest alleging that agency had deviated from stated price evaluation scheme where protester failed to establish any prejudice associated with agency's failure to make clear that certain bid items were alternatives, with one or the other, not both, to be considered in the evaluation of overall total cost). Consideration of competitive prejudice is an essential element of every viable protest, and we will not sustain a protest unless prejudice is evident from the record.¹⁰ Id. at 3.

Best-Value Decision

Finally, the protester challenges the reasonableness of the agency's best-value tradeoff. Where, as here, a solicitation provides for a price/technical tradeoff, the agency retains discretion to make award to a firm with a higher technical rating, despite a higher price, so long as the tradeoff decision is properly justified and otherwise consistent with the stated evaluation and source selection scheme. Midwest Metals, B-299805, July 17, 2007, 2007 CPD ¶ 131. As discussed above, we find nothing unreasonable in the agency's technical evaluations, on which the best-value tradeoff was made. The agency recognized that the awardee was higher priced and, as discussed above, documented that it judged the value added by the awardee's proposal to be worth the additional cost.

The protest is denied.

Lynn H. Gibson
General Counsel

¹⁰ We see no merit to the protester's related claim that the agency added the cost of the protester's accepted betterments to the evaluated cost without also crediting the protester's technical proposal. The agency itself recognized that, were it not for the concern with the suitability of the proposed design for the users, the agency would have rated the protester's proposal as superior under the means and methods factor. The protester's proposal was rated good under the means and methods factor not because the agency failed to credit it with the value of betterments, but because of the risks presented by the protester's 3-story approach.