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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Earth Resources Technology, Inc.

File: B-406659; B-406659.2

Date: July 30, 2012

J. Patrick McMahon, Esq., McMahon, Welch and Learned, PLLC, for the protester.
Kenneth A. Martin, Esq., The Martin Law Firm, PLLC, for the intervenor.
Madeline Shay, Esq., Department of the Army, for the agency.
Mary G. Curcio, Esq., Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency unreasonably evaluated the protester's proposal is denied where the evaluation was consistent with the terms of the solicitation and reasonably based.
 2. Agency reasonably assigned protester unknown confidence for past performance where it did not receive the requisite number of past performance questionnaires required by the solicitation.
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DECISION

Earth Resources Technology, Inc. (ERT), of Laurel, Maryland, protests the award of contracts to EA Engineering, of Hunt Valley, Maryland; Cape Environmental Management, Inc., of Norcross, Georgia; PIKA-MP JV, LLC, of Stafford, Texas; Kemron Environmental Services, Inc., of Atlanta, Georgia; and Plexus-PARS JV, LLC, of Alexandria, Virginia, under solicitation No. W912DR-10-R-0098, issued by the Department of the Army, U.S. Army Corps of Engineers, for environmental services. ERT asserts that the agency improperly evaluated its technical proposal and improperly awarded a contract to Plexus-PARS JV.

We deny the protest.

BACKGROUND

The RFP contemplated the award of five indefinite-delivery, indefinite-quantity contracts on a "best value" basis considering the following evaluation factors:

corporate experience (with subfactors for corporate experience and project listing); hypothetical scenario; management; quality/safety; past performance; personnel; and price. RFP § M.1. The first four listed factors were considered equally important and more important than factors 5 and 6, which were equal to each other. Technical factors were more important than price. Id.

The agency received 18 proposals in response to the solicitation. Following the submission and evaluation of proposals, the five awardees and the protester were rated as follows¹:

	EA	PIKA	Kemron	Plexus PARS	Cape	ERT
Experience	VG	E	E	VG	VG	VG
Hypothetical Scenario	S	VG	S	VG	VG	VG
Management	E	E	E	VG	VG	VG
Quality/Safety	E	VG	VG	VG	E	VG
Past Performance	Unknown	Unknown	Unknown	Very Low Risk	Unknown	Unknown
Personnel	E	VG	VG	E	VG	VG
Price	\$5.9 Million	\$6.17 Million	\$6.07 Million	\$5.25 Million	\$5.44 Million	\$5.55 Million

Source Selection Decision Document at 3, 9. The agency made a best value analysis and selected the five most highly rated technical offers for award. Id. at 9-10. ERT was ranked ninth. Id. Following a debriefing ERT filed this protest.

DISCUSSION

ERT challenges the evaluation of its technical proposal. In reviewing challenges to the agency's proposal evaluation, we do not reevaluate proposals, but, rather, review the agency's evaluation to ensure that it was reasonable, consistent with the terms of the solicitation, and consistent with applicable statutes and regulations. Phillips Med. Sys. of N. Am. Co, B-293945.2, June 17, 2004, 2004 CPD ¶ 129 at 2. We have considered all of ERT's allegations and find that none provide a basis for questioning the awards.

¹ The adjectival ratings for the technical factors were excellent (E), very good (VG), satisfactory (S), marginal (M), and unsatisfactory (U); and for past performance the ratings were very low risk, low risk, moderate risk, high risk, very high risk, and unknown risk.

Hypothetical Scenario

ERT first protests the evaluation under the hypothetical scenario evaluation factor. In this regard, the solicitation required offerors to respond to a hypothetical problem--undertaking interim remedial measures to prevent further migration of a toxic substance at a Pennsylvania landfill--with, among other things, a background discussion of the problem, including the sources of data, points of contact, coordination required, relevant regulations or guidance, problems, and topics relevant to the project. RFP §§ L.3.2.2, M.1.1(b).

ERT's proposal was rated very good for its solution. ERT asserts that at the debriefing it was told that its hypothetical scenario solution was assigned 5 strengths and 2 weaknesses, including that (1) it should have listed more data sources, such as the Pennsylvania Department of Environmental Resources (PADER) permit for the site and county records, and (2) it did not provide for a regulatory review of work plans. According to ERT, it included additional data sources in its proposal, mentioning the PADER permit as well as other data sources, and also discussed regulatory review of its work plans. ERT asserts that as its proposal did not contain the assigned weaknesses, it should have been rated excellent, rather than very good, for its hypothetical scenario solution.

In response, the agency explains that ERT was not assigned any weaknesses for its proposed approach to the hypothetical scenario. Instead, according to the agency, at the debriefing, it simply provided ERT, in response to the protester's request, examples of how ERT might have improved its proposal in this area.

ERT's protest of the evaluation in this regard is without merit. As an initial matter, we review the evaluation record, not the agency's alleged statements during a debriefing. We are concerned with the manner in which the evaluation was conducted, notwithstanding the protester's understanding of the agency's subsequent explanation of how it conducted the evaluation. In this regard, a debriefing is only an explanation of the agency's evaluation and source selection decision, not the evaluation or decision itself. Del-Jen Int'l Corp., B-297960, May 5, 2006, 2006 CPD ¶ 81 at 4.

Here, as found by the agency, while ERT referred to PADER and county agencies in different contexts in its discussion of the hypothetical scenario, it did not include them among the "three data sources" from which, according to its proposal, "we developed our understanding of the site conditions and history, geology/hydrogeology, and contaminants of concern." ERT Technical Proposal at 2-1. Likewise, while ERT's proposed scenario schedule includes entries for "Gov't/Regulator Review" of the draft final addendum report beginning December 15, 2011, and the draft final design beginning May 31, 2012, it only provided for "Gov't Review" of the addendum work plans beginning May 23, 2011, with no indication of concurrent regulatory review of the work plans. Id. at 2-19.

Furthermore, there is no requirement that a proposal that complies with solicitation requirements without any weaknesses receive all available evaluation credit. International Business & Technical Consultants, Inc., B-310424.2 et al., Sept. 23, 2008, 2008 CPD ¶ 185. Here, whether the considerations discussed by the agency at the debriefing with respect to ERT's proposed approach to the hypothetical scenario were weaknesses, or merely examples of how ERT's proposal could have been improved, the fact remains that the agency determined that there were areas in which ERT's hypothetical scenario response was less than excellent. ERT simply has failed to show that the agency was unreasonable in rating its proposal as overall very good, rather than excellent, under this evaluation factor.

Past Performance

ERT also challenges its past performance rating. In this regard, the solicitation provided that "[t]he offeror **shall** submit five (5) past performance questionnaires (PPQs). . . . It is solely the responsibility of the offeror to ensure that the individuals responsible for filing past performance questionnaires do so prior to the submission deadline." RFP § L.3.2.5. The solicitation further provided that:

[t]he Government will evaluate the past performance areas to assess the relative risk in the contractor[']s ability to successfully perform the services required. . . . In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.

RFP § M.1.1(e).

The agency received 4 past performance questionnaires for ERT; because this was fewer than the 5 past performance questionnaires required by the solicitation, ERT was rated unknown confidence for past performance.² ERT asserts that since it received very favorable ratings from the references that filled out the four past performance questionnaires, it should have been rated low risk, rather than unknown confidence for past performance.

We find the evaluation in this regard to be unobjectionable. The solicitation required offerors to submit five questionnaires, which presumably is the number of questionnaires the agency believed it needed for an adequate basis to evaluate past performance, and specifically provided that if the offeror did not have relevant past performance, or if the information was not available, the offeror would not be rated

² This is the same approach the agency followed whenever it did not have five past performance questionnaires for an offeror.

favorably or unfavorably. Since there was inadequate evidence of relevant past performance as defined by the solicitation, it was consistent with the solicitation, and reasonable, for the agency to assign ERT a rating of unknown confidence for past performance. Thomas Brand Siding Company, Inc., B-286914.3, Mar. 12, 2001, 2001 CPD ¶ 53 at 4.

Plexus-PARS

ERT asserts that the agency improperly awarded the contract to PARS-Plexus JV, rather than to Plexus-PARS JV, LLC, allegedly a separate legal entity which submitted the proposal. The Army, however, reports that the name used for the awardee on the contract document, PARS-Plexus, was simply the result of a transposition error. According to the agency, the actual entity submitting the offer was the same entity which received the award.

Only an interested party may protest a federal procurement. 31 U.S.C. §§ 3551-3556 (2006). That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1) (2012). A protester is not an interested party if it would not be next in line for award if we were to sustain its protest. Resource Title Agency, Inc., B-402484.2, May 18, 2010, 2010 CPD ¶ 118 at 9. Here, the agency ranked the offerors, ranking ERT's proposal ninth, and considered only the first 7 for award in its trade-off decision. SSDD at 10. Since we have denied ERT's protest of the evaluation of its own proposal, ERT remains ranked ninth. Thus, since there are three offerors ranked higher than ERT that would be next in line for award if we sustained ERT's protest against the award to Plexus-PARS, and ERT has not challenged the evaluations of their proposals, ERT is not an interested party to pursue this issue.

The protest is denied.

Lynn H. Gibson
General Counsel