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Decision

Matter of: Engineering Design Technologies, Inc.

File: B-413281

Date: September 21, 2016

Reginald M. Jones, Esq., and Nicholas T. Solosky, Esq., Fox Rothschild LLP, for the protester.

Connie L. Baran, Esq., Department of the Army, Corps of Engineers, for the agency.

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DIGEST

Agency did not engage in misleading discussions where it gave the protester a choice in how to respond to identified weaknesses, and the protester exercised its business judgment in electing to respond to many of the weaknesses with a simple statement of compliance as opposed to a narrative providing detail.

DECISION

Engineering Design Technologies, Inc. (EDT), of Marietta, Georgia, protests the award of a task order to Whitesell-Green, Inc., of Pensacola, Florida, under request for proposals (RFP) No. W9126G-13-X-1401, issued by the Department of the Army, Corps of Engineers (Corps) for the Trainee Barracks Upgrade Program at Ft. Benning, Georgia. The protester asserts that the agency conducted improper discussions and applied an unstated factor in its evaluation.

We deny the protest.

BACKGROUND

The RFP was issued on May 15, 2015, “to all Offerors in the MATOC [multiple-award task order] pool.”¹ RFP at 1. The solicitation provided for award on a best-

¹ The Corps advises that its multiple-award task order contract is styled, “Small Business Indefinite Quantity (IDIQ) MATOC for Construction Services for the US

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value basis. Proposals were to be evaluated on the basis of price and non-price factors including design technical (with subfactors building function and aesthetics and quality of building services), proposed contract duration and summary schedule, and past performance. RFP at 7. Design technical was more important than proposed contract duration and summary schedule, which was in turn more important than past performance. The non-price factors combined were equal in importance to price. Id. at 7-8.

EDT, Whitesell-Greene, and a third offeror submitted proposals on July 26, 2015.² After receipt of proposals, several post-closing RFP revisions were issued. The agency received revised proposals from EDT and Whitesell-Green by April 19, 2016.

On September 2, 2015, after evaluation of proposals, the contracting officer (CO) sent a discussion letter to EDT, identifying 15 total weaknesses. The letter instructed EDT to “address each weakness item directly,” with at least one of the following responses:

Concurrence that the comment is valid, and that your firm will comply with the comment if your firm is awarded the task order.

Non-concurrence that the comment is valid, with explanation of why the presentation in your proposal is correct.

Narrative response clarifying your intent to comply with the comment.

Agency Report (AR), Tab 3a, Discussion Letter at 1.³

EDT responded to the discussion letter on September 9, 2015. With regard to 12 of the identified weaknesses, EDT responded with the statement, “We concur that the comment is valid and our firm will comply with the comment and requirements of the RFP if awarded the task order.” AR, Tab 3b, Discussions Response at 1-2. With regard to the remaining three identified weaknesses, EDT responded with the above statement of concurrence, but added specific information about how it would

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Army Corps of Engineers Southwestern Division and other SWF [Southwestern Division, Fort Worth District] & SWD [Southwestern Division] customers on a limited nationwide basis.” Agency email to GAO, Sept. 19, 2016.

² The third offeror ultimately withdrew its proposal.

³ The letter also advised the protester that if its responses affected its price proposal, it should submit a new price proposal.

comply with the requirement, e.g., “The existing roof will be demolished down to the structure.” Id. at 1.

After RFP revisions, EDT and Whitesell-Green submitted revised price proposals. CO Statement (COS) at 2. Final ratings and proposed prices were as follows:

	EDT	Whitesell-Green
Design Technical--Overall	Acceptable	Outstanding
■ Building Function and Aesthetics	Acceptable	Good
■ Quality of Building Systems	Good	Outstanding
Proposed Contract Duration and Summary Schedule	Good	Outstanding
Past Performance	Unknown	Unknown
Price	\$32,070,000	\$32,498,000

AR, Tab 7a, Price Negotiation Memorandum-Addendum, May 12, 2016, at 2, 4. With regard to the trade-off analysis, the CO determined that Whitesell-Greene offered the best value and was “worth the additional cost.” Id. at 5.

By letter dated May 26, 2016, the agency advised EDT that award had been made to Whitesell-Green. The agency informed EDT of its evaluation ratings, that Whitesell-Green “offered a better value despite its slightly higher price,” and that EDT was entitled to a debriefing. AR, Tab 3c, Award Letter.

EDT requested a debriefing on May 27. The agency provided EDT a written debriefing dated June 14, 2016. The debriefing included the final non-price ratings identified above. The debriefing letter did not identify any weaknesses for EDT’s proposal under any factor or subfactor. The letter identified two strengths under the quality of building systems subfactor, and one strength under the proposed contract duration and summary schedule factor.

Pertinent here, the debriefing also included the agency’s answers to specific questions posed by EDT in its debriefing request. The first of those questions, relating to the building function and aesthetics subfactor, asked for “general or specific examples” that had contributed to the subfactor rating of acceptable, and sought guidance as to “areas where we could improve.” AR, Tab 3d, Debriefing at 4. The CO responded that overall the proposal indicated an adequate approach and understanding of the requirements, but “where you could improve is the way in which you responded in Discussion Letters.” Id. The CO elaborated by contrasting the following responses from the protester:

Very Good and Specific Response from you below:

EDT Response: We concur that the comment is valid and our firm will comply with the comment and requirements of the RFP if awarded the task order. The existing roof will be demolished down to the structure.

Valid Response but Not Very Specific from you below on three other Weaknesses in Factor 1-1:

EDT Response: We concur that the comment is valid and our firm will comply with the comment and requirements of the RFP if awarded the task order.

Id. The CO further responded to EDT's request for information regarding areas for improvement by advising the protester to "[b]e more specific in responses like the first one above and even pull in the RFP paragraphs that state where the requirement comes from that you are referencing and tell the Government exactly what you will do." Id.

The CO provided a similar response to a similar EDT question regarding the quality of building systems subfactor, advising the protester that "[s]imply stating you will comply with the RFP does not explain and show the Technical Board exactly what you will be doing." Id. at 5. Also, in response to the protester's request for further information regarding its rating of good under the proposed contract duration and summary schedule factor, the CO advised that its response "was specific and detailed," and that "[g]iving some other additional strengths besides the fast tracking of the demolition and abatement plans may have been enough to increase your GOOD to an OUTSTANDING." Id.

After receiving the written debriefing, EDT protested to our Office.⁴

DISCUSSION

EDT maintains that there were "significant procurement administration errors" in the acquisition. Protest at 2. Specifically, EDT contends that the agency engaged in improper and misleading discussions. In this connection, EDT asserts that each of the three response options set forth in the Corps' discussion letter "is presented as equal," and that the discussion letter "provided no indication that one type of response is preferred over another." Protest at 12. EDT explains that it "took the discussion letter at face value in submitting its comments," and, as a consequence, employed the first option where "an identified weakness was self-evident (that is, a detailed narrative response was not necessary to explain how it would comply with

⁴ The estimated value of the task order at issue is greater than \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts. 10 U.S.C. § 2304c(e)(1)(B).

the RFP requirements).” Id. at 12-13. EDT further argues that the CO’s comments in the debriefing letter revealed the agency’s “previously unstated preference for narrative responses to its discussion questions.” Id. at 14. According to the protester, it was arbitrary for the agency to consider narrative responses more favorably than mere acknowledgments of compliance given that the discussion letter indicated that both would be acceptable. As explained below, we find EDT’s argument to be unpersuasive.

The regulations concerning discussions under Federal Acquisition Regulation (FAR) part 15, which pertain to negotiated procurements, do not, as a general rule, govern task and delivery order competitions conducted under FAR subpart 16.5, such as the procurement here. NCI Info. Sys. Inc., B-405589, Nov. 23, 2011, 2011 CPD ¶ 269 at 9. In this regard, FAR § 16.505 does not establish specific requirements for discussions in a task order competition; nonetheless, when exchanges with the agency occur in task order competitions, they must be fair and not misleading. CGI Fed. Inc., B-403570 et al., Nov. 5, 2010, 2011 CPD ¶ 32 at 9. In our decisions addressing an agency’s obligations in conducting discussions under FAR part 15, we have held that an agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency’s actual concerns, or otherwise misinform the offeror concerning a problem with its proposal. Refinery Assocs. of Texas, Inc., B-410911.2, Mar. 18, 2015, 2015 CPD ¶ 116 at 6. CEdge Software Consultants LLC, B-408203, July 19, 2013, 2013 CPD ¶ 177 at 7.

The discussion letter here advised EDT that it could respond in “at least one” of three ways, including an option that permitted a clarifying narrative response. Although the protester is correct that the discussion letter did not indicate that one response was preferred by the agency over another, the discussion letter also did not indicate that all permitted response options would be equally advantageous to an offeror.

EDT appears to have made a business decision to rely on simple statements of compliance with regard to most of the weaknesses identified by the agency in discussions. Where an agency affords an offeror a choice in how to respond to a weakness identified during discussions, and the offeror exercises its business judgment in electing one of the alternatives, the agency has not engaged in misleading discussions. See Onyx-Technica, JV, B-412474, B-412474.2, Feb. 26, 2016, 2016 CPD ¶ 65 at 4. In addition, it was not reasonable for EDT to assume that, because a simple statement of compliance, without explanatory information, would be acceptable under the RFP, submission of associated explanatory information could not improve its chances of a higher evaluation rating. When an RFP asks firms to provide a discussion of their technical approach, the agency evaluation may reasonably consider the level of detail provided in the requested discussion. TtEC-Tesoro, JV, B-405313, B-405313.3, Oct. 7, 2011, 2012 CPD ¶ 2 at 8. Furthermore, 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. SunGard Data Sys., Inc., B-410025, Oct. 10, 2014, 2014 CPD ¶ 304 at 4; Leader Commc'ns Inc., B-298734, B-298734.2, Dec. 7, 2006, 2006 CPD ¶ 192 at 6. 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. A simple statement of compliance promises but does not demonstrate compliance. As the agency points out, "[a]n offeror can say that it intends to comply with the requirements in the RFP but if it describes how it will comply with the requirements, the evaluators have more information with which to judge the quality and likelihood of successful performance by the offeror." Memorandum of Law at 2-3. In sum, we find to be without merit the protester's argument that the agency misled it by failing to advise it that narrative responses to discussion questions might result in more favorable ratings than simple statements of compliance.

EDT further argues that the Corps improperly used unstated evaluation criteria by preferring narrative responses over straightforward statements of the intent to comply. The protester also asserts that the agency's best-value trade-off was flawed and resulted in an erroneous award decision. These arguments are based on substantially the same arguments raised by EDT in its challenge to the agency's discussions, which, as indicated above, we found unpersuasive. We also note that the agency responded to both arguments in its agency report, and the protester did not take issue with or seek to rebut the agency response in its comments on the report; thus, we consider it to have effectively abandoned these arguments. TPMC-Energy Solutions Envtl. Servs. 2009, LLC, B-408343.2 et al., Aug. 23, 2013, 2013 CPD ¶ 215 at 8.

The protest is denied.

Susan A. Poling
General Counsel