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Decision

Matter of: HydroGeoLogic, Inc.

File: B-311263; B-311263.2

Date: May 27, 2008

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DIGEST

1. In a procurement for architecture-engineer (A-E) services, protest challenging the agency's decision not to select the protester as the highest-ranked firm with which to negotiate is denied where the record shows that the agency reasonably relied on key discriminators to select the highest-ranked firm.

2. In a procurement for A-E services, protest that the agency conducted inadequate discussions by failing to properly advise the protester on weaknesses in its submission is denied where the questions posed by the agency concerned the offeror's concepts and methods, consistent with the Federal Acquisition Regulation (FAR) provisions applicable to A-E procurements; FAR provision regarding content of discussions in negotiated procurements does not apply to A-E procurements.

DECISION

HydroGeoLogic, Inc. (HGL) protests the failure of the Environmental Protection Agency (EPA) to select it as the highest-ranked firm, with whom the EPA would then negotiate an architect-engineer (A-E) contract for professional services to support remedial planning and oversight activities in EPA's Region 9. HGL alleges that the agency's evaluation of its submission under certain factors was unreasonable; the agency failed to conduct adequate discussions and unreasonably evaluated the firm's submission based on the discussions that it did hold; and the most highly-ranked firm was ineligible for award because information contained in its submission indicated that it is incapable of complying with the subcontracting limitation.

We deny the protest.

BACKGROUND

This procurement of A-E services is being conducted pursuant to the procedures set forth in the Brooks Act, 40 U.S.C. §§ 1101, 1104 (2002), and its implementing regulations, Federal Acquisition Regulation (FAR) subpart 36.6. In accordance with those regulations, on May 16, 2007, the EPA synopsisized the requirement. The procurement envisioned the award of two “response action contracts” (RAC), one under full and open competition and one as a small business set-aside (RAC II); the subject of this protest is the RAC II contract, which is to be awarded under solicitation No. PR-R9-07-10112. To be considered for negotiations with the agency, firms were invited to submit a completed standard form (SF) 330 (A-E Qualifications) detailing their qualifications to provide various A-E services, including site management; remedial investigation feasibility studies; engineering services to design remedial actions; engineering evaluation and cost analysis for one-time critical removal actions; construction management for implementing remedial actions and one-time critical removal actions; enforcement support; and other technical assistance.

Firms were advised that their qualifications would be evaluated under six factors, listed in descending order of importance, two of which had subfactors:

- Factor 1: Specialized Experience and Technical Competence
 - Sub-Factor 1: Fund-Lead Site Specific Work Areas
 - Sub-Factor 2: Enforcement Support Site Specific Work Areas
 - Sub-Factor 3: Other Technical Assistance Site Specific Work Areas
- Factor 2: Past Performance
- Factor 3: Knowledge of, and Experience with, Environmental Regulations
- Factor 4: Professional Qualifications
 - Sub-Factor 1: Management Personnel
 - Sub-Factor 2: Technical Personnel
- Factor 5: Location in the General Geographical Area and Ability to Maintain Appropriate Office and Staff Presence in Region IX
- Factor 6: Capacity to Accomplish the Work in the Required Time

Solicitation at 3-6. Thirty-two work areas--the tasks that would need to be accomplished to complete the statement of work--were listed under the three subfactors in factor 1.

Firms were advised that “[a]t least fifty (50) percent of the cost of contract performance incurred for personnel shall be expended for employees of the prime contractor.” Id. at 2. Firms were instructed that, after an initial evaluation by the agency’s architectural and engineering evaluation board (AEEB), a short list of firms would be invited to participate in oral presentations, and that each firm’s subsequent evaluation would depend on both its written submission and oral presentation. Following that second AEEB evaluation, the AEEB would rank the firms, the source selection official (SSO) would make the final ranking, and the contracting officer would then begin negotiations with the highest-ranked firm.

Eight firms, including HGL and Innovative Technical Solutions, Inc. (ITSI), submitted their qualifications for evaluation. In its initial evaluation, the AEEB reviewed each firm’s submission, chose the three highest-ranked firms, HGL, ITSI, and Offeror C, and invited those three firms to make oral presentations. The firms were advised to limit their oral presentations to approximately 15 minutes, allowing an additional 70 minutes to respond to questions from the board, which the offerors would receive 1 hour prior to their presentations. Firms were advised that the oral presentation team must include the program, contract, and financial managers and no more than seven other people.

At the conclusion of its second review, which included a consideration of the oral presentations, the AEEB rated the three firms--in order of rank, ITSI, Offeror C, and HGL--as follows:

Offeror	Factor 1 Specialized Experience	Factor 2 Past Performance	Factor 3 Regulation Knowledge	Factor 4 Professional Qualifications	Factor 5 Location	Factor 6 Capacity
ITSI	Excellent	Excellent	Excellent	Excellent	Excellent	Excellent
C	Excellent	Good	Excellent	Excellent	Excellent	Excellent
HGL	Excellent	Excellent	Excellent	Excellent	Excellent	Good

Each of these firms received an overall rating of “excellent.” After a review of the AEEB’s evaluation, the SSO ranked the firms as follows: ITSI; HGL; and Offeror C. While noting that ITSI and HGL were the “two strongest offerors,” the ranking analysis stated that “HGL’s overall proposal was slightly weaker than ITSI’s proposal.” Agency Report (AR), Tab 12, Ranking Determination, at 20. The SSO based her decision principally on the ground that the protester’s submission was unclear as to how HGL would adequately staff the contract, as reflected in its

evaluation under factor 6 (Capacity), and noted concerns about the quality of the protester's oral presentation.

By letter dated February 5, 2008, the agency notified the protester that it was not the top ranked offeror. On February 6, the protester requested a debriefing, which was held on February 14. This protest followed.

DISCUSSION

HGL challenges the AEEB's decision on numerous grounds. 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. Foundation Eng'g Sci., Inc., B-292834.2, Dec. 12, 2003, 2003 CPD ¶ 229 at 3. Rather, our review is limited to examining whether the agency's selection was reasonable and consistent with the evaluation factors and applicable procurement statutes and regulations. Id. A protester's mere disagreement with the agency's evaluation does not make it unreasonable or improper. See CH2M Hill, Ltd., B-259511 et al., Apr. 6, 1995, 95-1 CPD ¶ 203 at 4. Here, we have considered all of HGL's arguments and find that none has merit.¹ Our decision addresses HGL's most significant arguments, beginning with the role of the ranking discriminators.

Evaluation under Factor 6--Capacity

As noted above, HGL and ITSI received the same rating (excellent) under the first five evaluation factors; under factor 6--Capacity, HGL received a rating of good, while ITSI received a rating of excellent. HGL's rating reflects the agency's uncertainty regarding whether the protester would be able to adequately staff the contract at its inception, which the agency characterized as the "decisive point" in making the decision to rank ITSI over HGL. AR, Tab 12, Ranking Determination, at 28. As explained below, we see no basis to object to the agency's evaluation.

Under factor 6, the agency required offerors to demonstrate their "ability/capacity to staff the contract with experienced trained personnel at the appropriate levels and disciplines in an effective and timely manner. The offeror[s] will be evaluated on current and projected workload commitments." Solicitation at 6.

¹ The protester raised several issues in its comments on the supplemental agency report, including, for example, a challenge to the agency's assessment of a notable weakness under factor 5. Comments on Supplement AR, Apr. 18, 2008, at 11-12. Those grounds, raised more than 10 days after receipt by the protester of the initial agency report, and based on information contained therein, are untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2008).

The protester's submission stated as follows:

Assuming an estimated maximum resource requirement of 55 full-time equivalents (FTEs), the over [DELETED] staff from within Region 9 Team offices represents [DELETED] times the amount of the estimated maximum requirement. Currently, the Team has [DELETED] FTE's in excess capacity to perform all expected services and accommodate peak workloads in excess of [DELETED] FTEs at any one time. . . . Based on current contracted workload, our key personnel and technical staff will have approximately 50% availability in six months and up to 80% availability within 12 months.

Protester's SF 330 at 41 (emphasis added).

In its pre-oral presentation evaluation, the AEEB assigned a notable weakness to the protester's submission under factor 6, stating that the "Offeror did not clearly explain [how] it would adapt to increasing capacity of this contract. The Offeror stated that they would be operating at 50% capacity in 6 months and 80% capacity in 12 months." AR, Tab 6, AEEB Report, at 6.

As noted above, offerors were provided at the oral presentations with a list of questions to which they should respond. The last of HGL's questions stated: "The proposal includes an estimate that key staff will have 50% availability in 6 months and 80% availability at the end of the year. Please describe the personnel and companies included in this estimate." *Id.* at 4.² In its post-oral presentation analysis, the AEEB stated that "during the oral presentation, HGL was asked to explain a statement in the written document regarding capacity (that HGL would be able to provide service at 50% at 6 months, 80% in 12) and did not satisfactorily explain how this would work to the AEEB." AR, Tab 11, AEEB Final Report, at 3.

The protester argues that the agency unreasonably took one sentence in its submission out of context, when the submission, read as a whole, repeatedly asserted that HGL would be prepared to fulfill the contract requirements at the inception of contract performance. We disagree.

An offeror has the responsibility to submit a well-written proposal, with adequately detailed information, which clearly demonstrates compliance with the solicitation

² Other related questions included: "6. If you are awarded RAC II, what assurance can you give us that the personnel in the proposal will be working on the contract?"; and "14. You have proposed to expand the San Francisco office. . . . What lag-time do you anticipate before this office will be fully staffed and operating to meet EPA's needs?" *Id.*

requirements and allows a meaningful review by the procuring agency, CACI Techs., Inc., B-296946, Oct. 27, 2005, 2005 CPD ¶ 198 at 5, and that contains all the information that was requested or necessary to demonstrate its capabilities in response to the solicitation. HealthStar VA, PLLC, B-299737, June 22, 2007, 2007 CPD ¶ 114 at 2. A protester's mere disagreement with the evaluation, as noted above, provides no basis to question the reasonableness of the evaluators' judgments. See CH2M Hill, Ltd., *supra*.

In our view, based on the reference in HGL's submission to "50% availability in six months and up to 80% availability within 12 months" of its "key personnel and technical staff," it was not unreasonable for the agency to seek confirmation from HGL regarding the availability of the personnel proposed for the contract. To that end, four of the 15 oral presentation questions presented to HGL by the agency concerned staffing, including the last question, quoted above, which was specifically directed at obtaining clarification of the statement in the protester's SF 330 regarding staffing availability.³ The record shows, however, that the protester failed to persuade the agency that it would have the key individuals with which it intended to staff the contract ready at the inception of performance, and that it was prepared to deal with the staffing contingencies that might arise. Because HGL did not provide the confirmation the agency was seeking,⁴ it was reasonable for the agency to characterize this area as a notable weakness and ultimately rely on it as the primary discriminator between the two strong submissions from HGL and ITSI.

Oral Presentations

While the primary discriminator in the ranking determination was the personnel staffing issue discussed above, the record shows that the agency also considered the fact that HGL's oral presentation was considered weaker than the other two offerors' presentations. AR, Tab 12, Ranking Determination, at 30. The specific weaknesses

³ See, in particular, questions four ("Considering that you have other RAC contracts with other EPA Regions, what is your approach for managing the RAC II contract without becoming over extended? What is your staffing plan if you become over extended?") and six ("If you are awarded RAC II, what assurance can you give us that the personnel in the proposal will be working on the contract?"). AR, Tab 7, HGL Interview Questions at 1.

⁴ The protester states that it reached the last question with only 2 minutes remaining in the time allotted to respond to questions during its oral presentation, and unlike with other questions, the agency did not ask follow-up questions or for additional clarifications. The ground rules of the oral presentation were clear, and the fact that HGL apparently had only a short time left in which to respond to the question at issue provides no basis to question the agency's evaluation of its submission in this area.

are memorialized in a contemporaneous written summary of the evaluation of the oral presentations, where the AEEB noted, for example, that HGL did not present “an in-depth understanding of the Superfund that was [commensurate] with the written proposal.” AR, Tab 11, AEEB Final Report, at 3. While HGL vigorously disputes the agency’s evaluation, the agency’s contemporaneous evaluation record contains a detailed summary of why the agency considered HGL’s oral presentation, though sound, inferior to ITSI’s, and we see nothing unreasonable in the evaluation.

On a related point, the protester argues that the oral presentations did not satisfy the requirement for meaningful discussions in the FAR. The Brooks Act and its implementing regulations in FAR subpart 36.6 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). The protester asserts that the agency’s meetings with the offerors did not constitute adequate discussions under the Brooks Act because the agency’s “failure to discuss any potential weaknesses. . . negates any meaningfulness of any discussions.” Comments, Mar. 31, 2008, at 22. We disagree.

The questions that the agency posed to HGL more than adequately probed “concepts and the relative utility of alternative methods of furnishing the required services,” as provided in FAR § 36.602-3(c). Specifically, questions 7 through 13 asked for examples of innovative approaches, methods for implementing certain processes, and examples of projects where certain processes were successfully used. Each of those seven questions, nearly half of the 15 questions asked, dealt with the relative merits of various methods of delivering services. In our view, this is precisely the kind of discussion that is contemplated under FAR § 36.602-3(c). See URS Consultants, B-275068.2, Jan. 21, 1997, 97-1 CPD ¶ 100 at 5-6 n.4. Moreover, FAR § 36.602-3(c) includes no requirement that, during discussions, an agency identify any weaknesses in an offeror’s proposal; in fact, FAR § 36.601-3(b) states that FAR part 15—which includes the requirement to discuss proposal deficiencies and significant weaknesses with offerors whose proposals are included in the competitive range—is inapplicable to A-E procurements under FAR subpart 36.6. Id. In any event, the record clearly shows that the protester was advised of the agency’s concerns with its proposed staffing during discussions.

Evaluation under Factor 1: Fund-Lead Projects

The protester challenges the agency’s evaluation of its submission under factor 1, the most important factor, which identified as a significant weakness the fact that HGL “provided some ‘Fund-lead’ example projects which were not ‘Fund-lead’, but rather DOD/PRP lead.”⁵ This did not demonstrate a clear or complete understanding of what

⁵ As the agency uses the terms, Fund-lead projects are those projects funded by the EPA. The term “Fund” is a shorthand reference to “Superfund.” The term

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a Fund-lead project is including the associated level of work. This may result in more agency oversight.” AR, Tab 12, Ranking Determination, at 17. The protester asserts that the agency’s assessment of a notable weakness on this basis was unreasonable, and that the protester’s submission instead should have been rated “outstanding,” the highest rating available.

The protester argues that, besides the funding source distinction between Fund-lead and non-Fund-lead projects, which the protester argues is inconsequential, the various types of projects are functionally equivalent because they are governed by the same statutes and “[a]ny work that the DoD would undertake pursuant to Superfund using its appropriated funds would be the equivalent of an EPA Fund-lead action.” Comments, Mar. 31, 2008, at 5. Therefore, the protester argues, the agency’s concern that the protester’s lack of “understanding about the regulatory context under which RAC actions occur, which could lead to more agency oversight during contract performance,” Additional Agency Comments, May 1, 2008, at 3, is unreasonable.

Even assuming the regulatory framework is the same for Fund-lead and non-Fund-lead projects, as the protester argues, it does not necessarily follow that the methods by which different agencies oversee such projects are the same, and we cannot find unreasonable the agency’s assertion that the protester’s apparent failure to appreciate this distinction might require additional agency supervision during contract performance.⁶ In our view, the agency reasonably assessed the protester’s submission a notable weakness when it concluded in its evaluation that the protester may have misunderstood that distinction and may have failed to appreciate the administrative ramifications of which agency had contracted for the remediation services.

Further, even assuming the agency unreasonably assessed the protester’s submission a notable weakness under factor 1, we see no resulting prejudice to the protester. Our Office will not sustain a protest absent a showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency’s actions, it would have a substantial chance of being the highest-ranked firm. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see also Statistica, Inc. v. Christopher, 102 F.3d 1577, 1681 (Fed. Cir. 1996). Here and throughout its arguments, HGL incorrectly assumes

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“DOD/PRP” refers to the Department of Defense (DOD) or a “potential responsible party” (PRP).

⁶ The protester argues for the first time in its May 1 comments that the agency disparately treated offerors in its evaluation under factor 1. This protest ground is based on information contained in the agency report that was produced more than 10 days prior to those comments, and it is therefore untimely. See 4 C.F.R. § 21.2(a)(2).

that the absence of a notable weakness would necessarily lead to a higher rating under a particular SF 330 factor (which would in turn lead to the highest SF 330 ranking). There is nothing in the adjectival rating system's definitions that directly or indirectly correlates the number of, or lack of, weaknesses to ratings, except for the rating of "poor."⁷ We thus see no reason to conclude that the removal of a notable weakness from its evaluation under factor 1 (where the protester was rated "excellent") would necessarily improve its rating under that factor to "outstanding."⁸ The agency's evaluation clearly spells out the reasons that each of the submissions, including the protester's, received the rating that it did under factor 1, and we see no basis to question the agency's assertion that the criterion most influencing the factor 1 ratings was the quality of the relevant experience of each offeror.

Adequacy of the Evaluation Documentation

The protester asserts that the agency failed to sufficiently document its evaluation, because the agency did not comment on the strength of each SF 330 at the level of the 32 work areas in factor 1, nor did the evaluators engage in a point-by-point comparison of the SF 330s, tallying up each of the instances where the offerors' SF 330s claimed to show experience relevant to the 32 work areas.

It is clear from the final evaluation conducted by the agency, which included an assessment of each submission under each evaluation factor, including the subfactors under factors 1 and 4, that the SSO was aware of the strengths and weaknesses of each offeror's SF 330. A selection official's judgment must be documented in sufficient detail to show it is not arbitrary, but a failure to discuss the SF 330s in the detail that the protester argues is necessary does not affect the validity of the decision where, as here, the record shows that the agency's ranking was reasonable. See Carmon Constr., Inc., B-292387.3, Sept. 5, 2003, 2003 CPD ¶ 158 at 4. In our view, the evaluators were not required to tally and compare, in the evaluation summaries, the number of work areas in each SF 330 for which experience was provided, or to perform various other comparisons that the protester alleges were not made. Indeed, the evaluation of proposals and the assignment of adjectival ratings generally should not be based upon a simple count of strengths and weaknesses, but upon a qualitative assessment of the proposals consistent with the evaluation scheme. Sherrick Aerospace, B-310359.2, Jan. 10, 2008, 2008 CPD ¶ 17 at 6. On the record here, as discussed above, we conclude that the agency made and documented just such a qualitative assessment.

⁷ The solicitation defines a "poor" submission as one which addresses the factor, "but contains deficiencies and/or weaknesses." AR, Tab 5, Evaluation Factors, at 5.

⁸ In the evaluation of HGL's submission under factor 2, for example, the agency cited no notable weaknesses in the protester's submission but nevertheless rated the submission "excellent" rather than "outstanding."

The protester makes several allegations that, under certain factors, its SF 330 was better than ITSI's, and that the agency thus should have rated its submission higher under those factors and ranked its submission first. As an initial matter, we note that evaluations are conducted by comparing proposals to the evaluation factors, not to each other; two proposals that are of different quality under a particular factor might still reasonably receive the same rating for that factor. Moreover, the particular rating under each factor is not conclusive of which proposal an agency will rank most highly. It is well-established that ratings are mere guides for intelligent decision-making in the procurement process. *Id.* Where an agency reasonably considers the underlying bases for the ratings, including advantages and disadvantages associated with the specific content of competing proposals, in a manner that is fair and equitable and consistent with the terms of the solicitation, the protester's disagreement over the actual adjectival ratings, as in this case, does not affect the reasonableness of the judgments made in the source selection decision.

Subcontracting Limitation

In its original protest, HGL argued that ITSI cannot comply (*i.e.*, does not have the "experience, qualifications, capability and availability" necessary to comply) with the small business subcontracting limitation requirements in the solicitation. We dismissed this issue on the ground that it presents a question of responsibility for review by the Small Business Administration, not our Office. *See TYBRIN Corp.*, B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 6-7.

The protester subsequently renewed this protest ground, arguing that the information contained in ITSI's SF330 shows that the firm "cannot comply with a material condition of the Solicitation which is that work performed by [ITSI's] personnel alone must constitute at least 50% of the cost of contract performance." Comments on Supplemental AR, Apr. 18, 2008, at 1. The issue of compliance with a subcontracting limitation concerns the acceptability of an offeror's proposal, rather than the offeror's responsibility, only where the proposal, on its face, should lead the agency to conclude that the offeror has not agreed to comply with the subcontracting limitation. *See TYBRIN Corp.*, *supra*. Based on our review, we see

no basis to conclude that ITSI's SF 330, on its face, should have led to such a conclusion.⁹

The protest is denied.

Gary L. Kepplinger
General Counsel

⁹ To arrive at its position that, on its face, ITSI's submission fails to comply with the subcontracting requirement, the protester assumed that subfactors one, two, and three under factor 1 each comprise one third of the personnel cost required by the statement of work, and that each of the subfactors is evenly divided into various elements. After identifying those elements under the three subfactors where it says that ITSI's resumes indicated that the firm will have its own employees performing the statement of work, the protester took a weighted average of ITSI's employee performance under the three subfactors and calculated that the firm's employees will perform no more than [DELETED] percent of the value of the statement of work. Comments on Supplemental AR, Exh. 1. Calculations of whether an offeror will comply with the subcontracting limitation must consider the cost of performance by the prime and subcontractor employees, and cannot, as the protester has done here, rely simply on a numerical comparison of staffing levels. See Symtech Corp., B-285358, Aug. 21, 2000, 2000 CPD ¶ 143 at 12.