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

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Decision

Matter of: Engineering Construction Services, Inc.

File: B-310311.2

Date: December 12, 2007

Telena Moore for the protester.

Charmaine A. Howson, Esq., Young Ha Cho, Esq., and Dationa Carter, Esq.,

Department of Energy, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee materially revised its proposal after the agency established a competitive range and that the agency failed to consider the revisions in its reevaluations is denied where there is no evidence in the record to support the allegation.
 2. Protest that the agency failed to conduct several portions of the required evaluations is denied where the record shows that the agency in fact conducted the evaluations.
 3. Protest that the agency conducted inadequate discussions is denied where the record shows that the agency included in the first request for revised proposals all of the significant weaknesses identified in the final evaluation of the protester's proposal.
 4. Protest that agency improperly evaluated subcontractor's relevant experience is denied where the requirement that relevant experience references must be for contracts that have been in performance for a minimum of 6 months merely established a minimum, and the agency reasonably considered the subcontractor's relative lack of experience as a weakness in the proposal.
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DECISION

Engineering Construction Services, Inc. (ECS) protests the award of a contract to Environmental Safety & Health, Inc. (ES&H) by the Department of Energy under request for proposals (RFP) No. DE-RP05-07OR23256 for roads, grounds, and heavy equipment maintenance services. The protester challenges various aspects of the

technical and price proposal evaluations and alleges that the agency conducted inadequate discussions with the protester.¹

We deny the protest.

The RFP, issued on December 1, 2006 as a small business set-aside,² contemplated the award of an indefinite-delivery/indefinite-quantity contract for a 2-year base period with three 1-year options, under which the agency would issue both time-and-materials and fixed-price task orders. The RFP contained the following three evaluation criteria and percentage weights: technical and business management approach (35 percent); key personnel (35 percent); and relevant experience and past performance (30 percent), with sub-criteria relevant experience (25 percent) and past performance (5 percent). The RFP called for an evaluation of the relevant experience of the offeror and its teaming partners and subcontractors. Proposals would be assigned adjectival scores based on the number of points earned, with a possible perfect score of 1,000 points. The RFP stated that the agency reserved the right to conduct oral or written discussions with all offerors whose proposals were in the competitive range.

The RFP specified that the agency would develop an evaluated price by “applying the offeror’s proposed labor prices to the labor hours (adjusting for any increase or decrease in estimated hours resulting from the technical evaluation) and material costs (adjusting for any increase or decrease in proposed material costs resulting from the technical evaluation).” *Id.* § M.6(b)(2), Cost/Price Evaluation Criteria. Award was to be made to the offeror whose proposal represented the best value to the government, using the evaluated price. The RFP stated that the agency was more concerned with obtaining a superior technical proposal than in making an award at the lowest evaluated price, but that the agency would not pay a price premium that it

¹ The protester also alleges various improprieties in the way that the agency conducted the protester’s debriefing. Because the conduct of debriefings is a procedural matter which has no effect on the evaluation of proposals or the validity of the agency’s determinations, this basis of protest, that the agency failed to properly debrief the protester, will not be considered. See Wilderness Mountain Catering, B-280767.2, Dec. 28, 1998, 99-1 CPD ¶ 4 at 4.

² To the extent the protester challenges the agency’s decision not to set aside the RFP for Historically Underutilized Business Zone small businesses, the protest, filed after award was made, is untimely. Under our Bid Protest Regulations, a protest based upon alleged improprieties in a solicitation, which are apparent prior to the time set for receipt of initial proposals, must be filed prior to the time set for receipt of initial proposals. See Bid Protest Regulations 4 C.F.R. § 21.2(a)(1) (2007). Likewise, the protester’s allegation that the terms of the RFP precluded the agency from making a true comparative price analysis, Protest at 5, is untimely.

considered “disproportionate to the benefits associated with the evaluated superiority of one proposal over another.” Id. § M.3, Basis for Contract Award. To the extent that the technical proposals were evaluated as “similar in merit,” the RFP provided that the proposals’ evaluated prices could be the deciding factor. Id.

The agency received seven timely proposals, including the awardee’s and the protester’s. The protester’s proposal included a “seconding agreement”³ between the protester and a subcontractor, Revolutions Performance Management Group, LLC (RPM), for RPM to supply the project manager. The protester’s project manager would not be an ECS employee but, under the seconding agreement, he would be authorized to act on behalf of ECS for all contract-related matters. See ECS Proposal, Vol. II, part II, Key Personnel at 36.

The agency evaluated the initial proposals, created a competitive range of four offers, which included the protester’s and the awardee’s, and conducted two rounds of written discussions. The following chart summarizes the final technical evaluations and evaluated prices.

Offeror	Technical/ Business Mgmt. Approach 350 pts.	Key Personnel 350 pts.	Relevant Experience 250 pts.	Past Perform. 50 pts.	Total Technical Score 1,000 pts.	Evaluated Price
Offeror 1	Excellent 350	Excellent 350	Excellent 250	Good 40	990	\$12,525,523
Offeror 2	Excellent 350	Excellent 350	Good 200	Excellent 50	950	\$12,832,909
ECS	Good 280	Excellent 350	Good 200	Excellent 50	880	\$16,067,015
ES&H	Excellent 350	Excellent 350	Good 200	Good 40	940	\$10,980,708

Thus, after the final evaluations, the protester’s proposal had the lowest technical score, with an evaluated price (\$16,067,015) over 40 percent higher than the awardee’s (\$10,980,708) and over 25 percent higher than the next highest evaluated price (\$12,525,523). The agency concluded that all the proposals were similar in merit and that price would be the determining factor. The source selection official determined that the strengths of ES&H’s technical proposal, combined with its lowest evaluated price, made its proposal the best value to the government, and the agency made the contract award to ES&H. The protester’s written debriefing identified three weaknesses in the protester’s final proposal: RPM’s limited project

³ A seconding takes place when an employee (or group of employees) is temporarily assigned to work for another organization or a different part of their employer.

management experience, the potentially awkward reporting relationships involving the seconded employee, and the low ratings that the protester's proposed business manager received.

The protester alleges that it has first-hand knowledge that the awardee materially changed the composition of its team--by removing its large business mentor from the team--after the agency placed the awardee's proposal in the competitive range and that the agency's subsequent reevaluations failed to account for those changes. The agency has produced excerpts from the awardee's proposal that show that the awardee's initial proposal did not include its mentor as a team partner and that the protester's allegation is factually incorrect. The protester has furnished no factual support for its allegation that the awardee substantially changed the composition of its team during the evaluation process, and we can find nothing in the record to support the claim. eMind, B-289902, May 8, 2002, 2002 CPD ¶ 82 at 5.

The protester alleges that the agency failed to conduct several required portions of the evaluation, including a comparative analysis of the proposed prices and the independent government estimate (IGE) of \$13,575,773 and a comparative assessment of proposals against the RFP's source selection criteria. As a preliminary matter, the RFP contains no requirement for a comparison of the proposals' evaluated prices with the IGE. See RFP § M.6, Cost/Price Evaluation Criteria. In any event, the record shows that the agency in fact conducted such a comparison. See Agency Report (AR), Tab 13, Source Evaluation Board (SEB) Report, § E, Price Proposals, 37-41. Moreover, to the extent that the protester argues that the agency improperly made award to an offeror with a proposed price below the IGE, the mere fact that an offeror's price is below the IGE is not a basis for finding the price realism evaluation inadequate. EC Corp., B-266165, B-266165.2, Feb. 21, 1996, 96-1 CPD ¶ 153 at 4 n.2.

Nor does the record support the protester's other allegation. The source selection statement contains an extensive consideration of the proposals in the competitive range, comparing each of the proposals to the source selection criteria and each other. AR, Tab 15, Source Selection Statement at 8-12; see also AR, Tab 13, SEB Evaluation Report. There is ample evidence in the record that the agency conducted a thorough evaluation of the proposals against the RFP requirements.

The protester alleges that the final evaluation of its proposal identified significant weaknesses that were not identified in the two rounds of discussions, and that therefore the agency conducted inadequate discussions. Where contracting agencies conduct discussions with offerors whose proposals are within the competitive range, the discussions must be meaningful; that is, an agency must, at a minimum, point out deficiencies and significant weaknesses that must be addressed in order for the offeror to have a reasonable chance for award. Federal Acquisition Regulation § 15.306(d)(3); PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8. Agencies are not required to afford an offeror multiple opportunities to cure a weakness

remaining in a proposal that previously was the subject of discussions. Portfolio Disposition Mgmt. Group, LLC, B-293105.7, Nov. 12, 2004, 2004 CPD ¶ 232 at 2. An agency's continuing concern with an offeror's proposal does not obligate the agency to reiterate those concerns during successive rounds of discussions. Id.

The record does not support the protester's allegation that it was not made aware, during discussions, of the weaknesses in its proposal. A comparison of the agency's first request for revised proposals, AR, Tab 7, with the agency's notification of selection of contractor, AR, Tab 16, demonstrates that the three weaknesses for which the protester's proposal was downgraded in the final evaluation--RPM's limited project management experience, the potentially awkward reporting relationships involving the seconded employee, and the low ratings that the protester's proposed business manager received--were all clearly identified in the first request for revised proposals.

The protester challenges the agency's finding that a lack of relevant experience of RPM, one of the protester's proposed subcontractors, is a weakness in the protester's proposal. Because the evaluation of proposals is a matter within the discretion of the contracting agency, we will not reevaluate proposals, but will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria and applicable statutes and regulations. Kellogg Brown & Root, Inc., B-291769, B-291769.2, Mar. 24, 2003, 2003 CPD ¶ 96 at 6. An offeror's mere disagreement with the agency's evaluation does not render the evaluation unreasonable. Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 4.

The RFP required major subcontractors to list "the three most recently awarded contracts which each major subcontractor has been performing for at least six months as of the deadline for proposal submission." RFP, § L.23(b)(2), Proposal Preparation Instructions, Relevant Experience & Past Performance. Each of the three relevant experience references supplied by RPM was for a contract that had been in place for less than a year, and the agency evaluated this as a weakness in the protester's proposal. The protester argues that the agency had advised offerors that it would consider contracts having been performed for 6 months or more and that, because the subcontractor met this 6-month requirement, the agency's evaluation was improper. We disagree. The 6-month requirement was a minimum length of time that a contractor needed to have been performing a contract before that contract, if it met certain other requirements, could be included in a proposal. The 6-month period was only a minimum, and meeting that minimum was not sufficient by itself to establish that the contractor otherwise met the RFP's experience requirements. See AHNTECH, Inc., B-291044, Oct. 10, 2002, 2002 CPD ¶ 182 at 3. Further, even though the protester's proposal was assessed a weakness under this technical evaluation factor, the proposal received an overall rating of "good" for relevant experience, and we see nothing unreasonable in the agency's evaluation of the protester's proposal.

The protester alleges that the agency improperly reduced its proposal's score because the proposal included a seconding agreement, when the RFP did not prohibit the use of seconding agreements to fill key personnel positions. The protester also disputes the agency's evaluation finding that the seconding agreement was not provided in the proposal as specified in the RFP. We dismiss this protest ground, and other ancillary grounds, because the protester is not an interested party to raise them.⁴ Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000 & Supp. V 2005), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Id.

Here, even if the protester prevailed on this protest ground and received all of the points available under the technical and business management approach criterion, its score would increase by 70 points, for a total score of 950. Two other offers with substantially lower evaluated prices received the same or higher technical scores, and those offers would be next in line for award. Because there has been no viable challenge to those intervening offers that precede the protester's in eligibility for award under this solicitation, the protester is not an interested party to raise these grounds of protest.⁵ Medical Info. Servs., B-287824, July 10, 2001, 2001 CPD ¶ 122 at 5-6.

The protester also alleges that the agency should have evaluated the offerors' prices to account for the differing number of hours that proposals included for a safety

⁴ Moreover, the protester mischaracterizes the agency's principal concern, noted above, which was that the seconding agreement created awkward reporting relationships involving a key member of the protester's team, with the operations maintenance manager, an ECS employee, reporting to the project manager, an RPM employee, who reported to the ECS president. The agency had misgivings that the project manager was essentially a subcontractor to his subordinates. Contracting Officer's Statement of Facts at 4-5.

⁵ The protester also speculates that the awardee could not have proposed minimum labor hours required under the RFP--a claim the agency denies. Because there are intervening offers in line for award, whose ratings are unchallenged by the protester, once again the protester is not an interested party to raise this ground of protest.

specialist.⁶ Again, the protester is not an interested party to raise this issue. The evaluated price of the protester's proposal was over \$5 million more than the awardee's, and over \$3 million more than the prices of the intervening offerors' proposals. Based on this record, any adjustment to the offerors' prices, as a result of differences in the hours included for the position of safety specialist, would be immaterial.⁷

The protest is denied.

Gary L. Kepplinger
General Counsel

⁶ In its filing dated November 8, the protester notes several other positions that it maintains were required to perform the work called for under the RFP. To the extent that the protester is alleging that the agency failed to properly evaluate the way that the various proposals treated these positions, the protest is untimely. See 4 C.F.R. § 21.2(a)(2). Similarly, the protester's allegation that the agency's price evaluation is flawed because it failed to account for the cost of those positions is untimely. Id.

⁷ Moreover, the protester's argument ignores the potential for differing numbers of hours based on the firms' different technical approaches. General Atomics, B-287348, B-287348.2, June 11, 2001, 2001 CPD ¶ 169 at 7.