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Decision

Matter of: ViroMed Laboratories, Inc.

File: B-310747.4

Date: January 22, 2009

David H. Laufman, Esq., Joanna Baden-Mayer, Esq., and Elizabeth C. Scanlan, Esq., Kelley Drye & Warren LLP, for the protester.

Karen R. Harbaugh, Esq., and Robert E. Gregg, Esq., Squire, Sanders & Dempsey LLP, for the intervenor.

Diane-Marie Carrero, Esq., Naval Supply Systems Command, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Consideration of innovations and/or creative approaches in proposals' responses to solicitation requirements did not constitute reliance on an unstated evaluation criterion where solicitation provided for relative weighting of evaluation factors in the evaluation rather than review for acceptability alone.
 2. Protest that price/technical tradeoff was improperly based on price where technical factors were to be more important than price is denied where the record shows that the contracting officer reasonably determined that the price premium associated with the higher-rated proposal was not warranted, given the level of technical competence available at the lower price.
 3. Protest that the source selection decision failed to consider the full range of the protester's technical capabilities is denied where the record shows that the contracting officer conducted a comprehensive review of the technical proposals that supported the stated evaluation conclusions.
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DECISION

ViroMed Laboratories, Inc., of Minnetonka, Minnesota, the incumbent contractor, protests the award of a contract to Center for Disease Detection, LLC (CDD), of San Antonio, Texas, by the Department of the Navy under request for proposals (RFP) No. N00189-07-R-Z027, for HIV testing services.

We deny the protest.

The RFP, issued on April 18, 2007, called for the award of an indefinite-delivery/indefinite-quantity contract for HIV screening and confirmatory testing and other testing services on specimens provided by approximately 1,300 Navy activities and/or program blood donors worldwide. The RFP provided that award was to be made to the responsible offeror whose technical and price proposals represented the best value. RFP at 37.

The evaluation of technical proposals was to be based on four technical factors: technical approach, corporate experience, past performance, and socio-economic plan. Id. The RFP provided that the technical factors would be more important than price, and that technical approach, corporate experience, and past performance would be of equal weight, but each significantly more important than socio-economic plan. Id.

Technical proposals were to be evaluated by a technical evaluation board (TEB) using an adjectival rating system consisting of four ratings: highly acceptable, acceptable, unacceptable (a), and unacceptable (b). Source Selection Plan (SSP), Enclosure 5, at 1. Unacceptable (a) referred to proposals containing deficiencies that were considered correctable through discussions, while unacceptable (b) referred to proposals containing deficiencies so substantial that they were considered not correctable through discussions. Id.

Four proposals were received by the solicitation's November 7, 2007, closing date. After an initial evaluation, the contracting officer determined that award could not be made on the basis of initial proposals.¹ Source Selection Decision Memorandum (SSDM) at 2. As a result, the contracting officer decided to conduct discussions and established a competitive range consisting of CDD's and ViroMed's proposals.²

¹ ViroMed submitted the only technically acceptable initial proposal, which was rated highly acceptable. However, the contracting officer could not determine that ViroMed's proposed price was fair and reasonable. In its comments, ViroMed protested the agency's decision not to make an award on the basis of initial proposals where ViroMed's submission was highly acceptable. We dismissed that protest because the decision whether to award on the basis of initial proposals is discretionary, and an offeror has no right to insist that award be made on that basis. See Kisco Co. Inc., B-216953, Mar. 22, 1985, 85-1 CPD ¶ 334 at 3.

² Subsequent to the establishment of the competitive range, one of the offerors whose proposal was not included in the competitive range filed a protest with our Office. The agency agreed to include the proposal in the competitive range, rendering the protest academic. That offeror's proposal was lower-rated and higher-priced than either CDD's or ViroMed's proposals, and is not relevant to the challenges presented in this protest.

Discussions with the offerors began on July 1, 2008, and the agency received final revised proposals from CDD and ViroMed on August 22. With regard to the final revised technical proposals, the TEB rated both proposals acceptable under the technical approach factor and highly acceptable under the corporate experience and past performance factors. Id. at 3. Under the socio-economic plan factor, the TEB rated CDD's proposal highly acceptable and ViroMed's proposal acceptable. Id. The TEB rated both proposals highly acceptable overall. Id. With regard to the final revised price proposals, CDD offered a total price of \$36,889,449.50, while ViroMed offered a total price of \$41,854,629. Id.

The contracting officer reviewed the final revised proposals and the TEB's technical ratings, and concurred with the TEB's evaluation. As relevant here, the contracting officer noted under the technical approach factor that "both ViroMed and CDD submitted a revised Technical Approach that met all the requirements of the solicitation," but that neither "offered innovations and/or creative approaches that were deemed beneficial." SSDM at 7. In fact, the contracting officer stated, "the only excess that existed among each of the offeror's revised Technical Approaches was their [College of American Pathologists (CAP)] accreditation, which resulted in an equivalent rating at the high end of acceptable." Id. Under the corporate experience and past performance factors, the contracting officer recognized that both offerors' proposals had exceeded the RFP requirements for corporate experience and demonstrated excellent past performance, warranting technical ratings of highly acceptable. Id. at 8. However, the contracting officer also noted that ViroMed had performed testing services virtually identical in scope and complexity to that required by the RFP, and had done so in volumes that exceeded the RFP requirements to a greater degree than had CDD. Id. at 4-5. With respect to the least important factor, socio-economic plan, the contracting officer considered CDD slightly superior on the basis of its status as a small business and [DELETED]. Id. at 7-8.

In the SSDM, the contracting officer concluded that, despite the offerors' equal, highly acceptable overall ratings, ViroMed should be ranked first technically on the strength of its superior corporate experience and past performance, stating, "ViroMed's highly rated, virtually identical Corporate Experience and Past Performance, coupled with its high [end] of Acceptable rating for Technical Approach, provides complete assurance . . . [guaranteeing] no impacts or delays in Naval operational and deployment tempos or schedules. . . ." SSDM at 8. However, the contracting officer also stated that CDD's proposal "confidently demonstrate[s] that CDD can successfully complete the Navy's large scale screening requirements . . . while sustaining health force protection and Naval operational and deployment readiness at all times." Id. In reaching the award decision, the contracting officer stated that "[w]hile the RFP specified that the evaluation of proposals considers the offeror's technical proposal more important than the offeror's price proposal, the Contracting Officer has determined that the technical superiority of ViroMed's proposal cannot be offset by the overall price differential of \$4,965,179.50 or 13.46%

that exists between ViroMed and CDD,” id., and determined that the proposal submitted by CDD represented the most advantageous offer.

The contracting officer made the award to CDD on October 2, and notified the unsuccessful offerors, including ViroMed, by letter. ViroMed then requested a debriefing, which the agency provided by telephone on October 9. This protest followed. In this protest ViroMed alleges that the agency improperly considered an unstated evaluation criterion in evaluating its proposal, and that the agency’s source selection decision was based improperly on price and failed to consider the technical benefits of the technology it proposed.

With respect to the allegation that the agency improperly relied on an unstated evaluation criterion, ViroMed states that during its debriefing the agency informed it that, while its proposal met all requirements of the solicitation under the technical approach factor, it had not included any “innovations” or “excesses,” and therefore received an acceptable rather than highly acceptable rating for technical approach. ViroMed contends this represents an agency admission that it relied on “innovations” as a technical factor in its award determination and thereby violated the requirement that an agency identify all major evaluation factors in the solicitation.

The agency responds that “innovations” was not an unstated evaluation criterion, but was properly included as an element of the TEB evaluation guidelines in the SSP. The TEB guidelines were used in assigning the adjectival ratings, which represented how well the evaluation criteria were met or exceeded by an offeror’s proposal. Specifically, the TEB guidelines for three of the four adjectival ratings—acceptable, unacceptable (a), and unacceptable (b)—concerned whether a proposal met some or all of the RFP requirements. SSP, Enclosure 5, at 1. On the other hand, the adjectival rating “highly acceptable” required more than simply meeting the RFP’s requirements. According to the TEB guidelines, a rating of “highly acceptable” was warranted where some or all of the following four criteria were met:

- (1) the proposal exceeds the solicitation requirements, and the excesses are beneficial to the Navy;
- (2) the proposal offers innovations and/or creative approaches that are beneficial to the Navy;
- (3) the proposal demonstrates a superior understanding of the solicitation requirements and/or;
- (4) the level or performance risk associated with the proposal is substantially less than the level expected from a competent offeror.

Id. The agency argues that under the evaluation criteria included in the RFP, identifying “excesses,” creative and innovative approaches, and superior understanding of the requirements was a proper means of distinguishing between proposals that met the technical requirements and proposals that exceeded the technical requirements.

We agree. Where, as here, a solicitation indicates the relative weights of evaluation factors, as opposed to providing for selection of the lowest-priced, technically acceptable proposal, the agency is not limited to determining whether a proposal is merely technically acceptable; rather, proposals may be evaluated to distinguish their relative quality by considering the degree to which they exceed the minimum requirements or will better satisfy the agency's needs. IAP World Servs., Inc., B-297084, Nov. 1, 2005, 2005 CPD ¶ 199 at 4. With specific regard to the consideration of "innovations and/or creative approaches" to distinguish the relative quality of proposals, we have held that an agency can properly consider both the extent to which proposals exceed the RFP requirements and the extent to which offerors used innovative measures to respond to those requirements. Id. Accordingly, under the circumstances here, the agency's consideration of any "innovations" contained in a proposal's response to the technical requirements does not amount to reliance on an unstated evaluation criterion.

ViroMed next argues that the agency's price/technical tradeoff was based improperly on price where the RFP indicated that technical proposals would be more important than price. Our review of price/technical tradeoff decisions is limited to determining whether the tradeoff was reasonable and consistent with the solicitation's evaluation criteria. WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 8. Notwithstanding a solicitation's emphasis on technical merit, an agency may properly select a lower-priced, lower technically rated proposal if it decides that the cost premium involved in selecting a higher-rated, higher-priced proposal is not justified, given the acceptable level of technical competence available at the lower price. Id.

The record in this case indicates that the contracting officer did not give undue weight to price in making the award decision. Rather, the record demonstrates that the contracting officer acted in accordance with the RFP's direction that technical factors were more important than price, but concluded that CDD's lower-priced, lower-rated proposal represented the best value to the government. As noted above, while CDD's proposal was rated equal to ViroMed's proposal under the technical approach, corporate experience, and past performance factors, and higher than ViroMed's proposal in socio-economic plan, ViroMed in fact was ranked first technically on the basis of the contracting officer's independent judgment that ViroMed's corporate experience and past performance were superior to CDD's, despite the equal, highly acceptable, technical ratings. SSDM at 4, 8. In making the selection decision, however, the contracting officer, after recognizing that "the RFP specified that the evaluation of proposals considers the offeror's technical proposal more important than the offeror's price proposal," determined that "the technical superiority of ViroMed's proposal cannot be offset by the overall price differential of \$4,965,179.50 or 13.46% that exists between ViroMed and CDD." SSDM at 8. Given that under the RFP here it was within the contracting officer's discretion to decide that the price premium involved in selecting ViroMed's higher-rated, higher-priced proposal was not justified in light of the acceptable level of technical competence

available at CDD's lower price, we see no basis to conclude that the contracting officer's decision here was inconsistent with the RFP or otherwise unreasonable.

Finally, ViroMed asserts that the agency's source selection decision was unreasonable because the record does not demonstrate that the contracting officer considered the full range of ViroMed's technical capabilities in making the determination that its proposal was not worth the price premium over the CDD proposal. Specifically, ViroMed alleges that the agency's source selection decision unreasonably failed to consider the technical benefits of its proposed testing system, including mitigation of false positive test results due to cross contamination, which ViroMed asserts is a concern associated with the highly sensitive HIV screening tests required by the solicitation.

An agency need not address each and every feature of a proposal in documenting a source selection decision, but must show only that its evaluation conclusions are reasonably based. Houston Air, Inc., B-292382, Aug. 25, 2003, 2003 CPD ¶ 144 at 6. Here, the SSDM demonstrates that the contracting officer thoroughly and independently reviewed the offerors' proposals, and made specific comparisons to differentiate between the two proposals. For example, under the corporate experience and past performance factors, the SSDM notes that ViroMed had performed testing services virtually identical in scope and complexity to that required by the RFP, and had done so in volumes that exceeded the RFP requirements to a greater degree than had CDD, which resulted in ViroMed being ranked first technically. SSDM at 4. Under the corporate experience and past performance factors, however, the contracting officer noted that:

this greater magnitude or volume of testing in and of itself does not attribute to ViroMed's technical superiority. With increasing automation, clinical laboratory testing has achieved greater scalability over the years. This is demonstrated by the fact that both ViroMed and CDD have exceeded the magnitude requirements of the solicitation . . . thereby demonstrating that both offerors possess the requisite instrumentation, personnel, management skills, pre/post analytical and quality assurance protocols, etc. to successfully perform the requirements of the solicitation.

Id. (emphasis added).

With regard to technical approach specifically, the technical approach factor under the RFP encompassed far more than an evaluation of each offeror's proposed testing systems. In this regard, the SSDM demonstrates that in evaluating each offeror's proposed technical approach, the contracting officer, consistent with the RFP and SSP, considered (1) how the offerors intended to maintain facilities, automated data processing services and data transmissions at the level of security required for Department of Defense networks; (2) how they intended to secure electronic data transfers using an approved encryption standard that meets federal security

guidelines; (3) the specific technology and resources, and the extent of automation they proposed to meet the high volume testing requirements of the RFP; (4) how they intended to successfully accomplish the required shipping transportation services for specimens from locations both within and outside the United States; (5) the specific tests and test manufacturers they proposed to use to accomplish each test required by the solicitation; and (6) the labor mix and quantity of personnel they proposed to use to accomplish the requirements of the RFP.

Concerning ViroMed's specific allegation that the agency failed to consider the technical benefits of its proposed testing system, the record shows that the contracting officer did specifically discuss that testing system, [DELETED], in the SSDM. The contracting officer noted that [DELETED] would "provide the same quality control features and the same operating capabilities as currently in place, but would result in much more cost efficiencies." SSDM at 6. However, after a detailed review of the six areas of each offeror's technical approach, including each offeror's proposed testing system, the contracting officer concluded that "the only excesses that existed among each of the offerors' revised Technical Approaches was their CAP accreditation." SSDM at 7. Contrary to ViroMed's assertion that the contracting officer's conclusion indicates a failure to consider the full range of ViroMed's capabilities, the record shows that the contracting officer thoroughly reviewed the offerors' technical approaches and concluded that of the technical features proposed by the two offerors, only the CAP accreditation exceeded the RFP requirements.³

In sum, the record in this case provides ample support for the agency's evaluation conclusions, and demonstrates that the contracting officer's selection decision, based on her determination that the benefits of ViroMed's proposal above and beyond those benefits also offered by CDD's proposal did not warrant the payment of the associated price premium, was reasonable.

The protest is denied.

Gary L. Kepplinger
General Counsel

³ With regard to ViroMed's specific example, our conclusion is reinforced by the fact that the contracting officer was clearly aware of the issue of higher false positive test result rates when using new, highly sensitive, HIV tests. This is demonstrated by the contracting officer's discussion of the issue with CDD, due to the contracting officer's concern that CDD may not have accounted for the costs associated with the increased sensitivity of the new HIV tests. Post-Negotiation Memorandum at 7. CDD responded that it had validated all of its testing instrumentation for the new tests required under the solicitation. Id.