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Decision

Matter of: Arc-Tech, Inc.

File: B-400325.3

Date: February 19, 2009

Andrew P. Hallowell, Esq., Pargament & Hallowell, PLLC, for the protester.
Richard G. Bergeron, Esq., Department of Health and Human Services, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency may not exclude from the competitive range a proposal that has not been determined technically unacceptable without taking into account the proposal's price.

DECISION

Arc-Tech, Inc., of Ashburn, Virginia, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. 263-2008-P(GG)-0238, issued by the Department of Health and Human Services (HHS) for custodial services at National Institutes of Health buildings located in Bethesda, Rockville, and Poolesville, Maryland. The protester argues that the agency's evaluation of its proposal was unreasonable and that the agency improperly failed to consider price in its competitive range determination.

We sustain the protest.

The RFP, which was set aside for competition among 8(a) firms,¹ contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for a base and 4 option years. The procurement was conducted using the procedures under Federal Acquisition Regulation (FAR) part 12 for the acquisition of commercial items. The

¹ The solicitation advised offerors that pursuant to a partnership agreement between the Small Business Administration (SBA) and HHS, SBA had delegated to HHS the authority to enter into 8(a) contracts directly with eligible 8(a) firms.

solicitation provided for award to the offeror whose proposal represented the best value to the government, technical, cost/price, and past performance considered.² Factors to be considered in the technical evaluation were technical approach and understanding of the requirement (worth 50 points), personnel (20 points), and corporate experience and capability (30 points).

Several days prior to the scheduled closing date for receipt of proposals, the protester filed an agency-level protest alleging that, among other things, the solicitation was ambiguous with regard to the amount of space to be cleaned and whether certain buildings were included within the RFP's scope. The agency proceeded with receipt of proposals without responding to Arc-Tech's protest, and the protester submitted a timely proposal.

The agency received 10 proposals. Each of four technical evaluators assigned each proposal a score under each of the technical evaluation factors; these scores were then averaged to determine the proposal's overall technical score. Arc-Tech's proposal received scores of [deleted]. The evaluators then used the overall technical scores to determine which proposals should be included in the competitive range. The three proposals with technical scores of [deleted] were included within the competitive range, whereas the seven proposals with technical scores of [deleted] were labeled "unacceptable" and excluded from further consideration.³

On November 7, 2008, the agency notified the protester that its proposal had not been included in the competitive range. The letter included the following summary of the weaknesses in the protester's proposal:

[deleted]

Agency Report (AR), Tab 9. Arc-Tech then protested to our Office on November 17.

² The RFP furnished the following internally inconsistent guidance as to the relative weights of the various evaluation factors:

The factors in order of importance are: technical, cost, and past performance. Although technical factors are of paramount consideration in the award of the contract, past performance and cost/price are also important to the overall contract award decision. All evaluation factors other than cost or price, when combined, are approximately equal to cost/price.

RFP at 65.

³ The overall technical scores of the three proposals included in the competitive range were [deleted].

The protester argues that both the evaluation of its own proposal and the agency's competitive range determination were unreasonable. In the latter connection, Arc-Tech contends that the agency failed to consider price in determining the competitive range and instead based its determination as to which proposals were included on an arbitrary technical cut-off score.⁴

The determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency. Smart Innovative Solutions, B-400323.3, Nov. 19, 2008, 2008 CPD ¶ 220 at 3. In reviewing an agency's evaluation of proposals and subsequent competitive range determination, we will not evaluate the proposals anew in order to make our own determination as to their acceptability or relative merits; rather, we will examine the record to determine whether the evaluation was reasonable and consistent with the evaluation criteria. Foster-Miller, Inc., B-296194.4, B-296194.5, Aug. 31, 2005, 2005 CPD ¶ 171 at 6.

Here, based upon our examination of the record, we conclude that the agency's competitive range determination was unreasonable in that there is no evidence that price was considered in deciding whether a proposal should be included or excluded. In this connection, we recognize that an agency may properly exclude a technically unacceptable proposal from the competitive range regardless of its price. TMC Dev. Corp., B-296194.3, Aug. 10, 2005, 2005 CPD ¶ 158 at 4. We also recognize that an agency has the discretion to exclude a technically acceptable proposal that is not among the most highly rated proposals where it determines that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted (provided that the solicitation notifies offerors, as the RFP here did, that the competitive range might be limited for purposes of efficiency). See FAR § 15.306(c)(2); Computer & Hi-Tech Mgmt., Inc., B-293235.4, Mar. 2, 2004, 2004 CPD ¶ 45 at 6. An agency may not exclude a technically acceptable proposal from the competitive range, however, without taking into account the relative cost of that proposal to the government. Kathpal Techs., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6 at 9; Meridian Mgmt. Corp., B-285127, July 19, 2000, 2000 CPD ¶ 121 at 4. That is, an agency may not exclude a technically acceptable proposal from the competitive range simply because the proposal received a lower technical rating than another proposal or proposals, without taking into consideration the proposal's price. A&D Fire Protection Inc., B-288852, Dec. 12,

⁴ The protester also argued that the agency improperly failed to consider past performance in determining the competitive range. The RFP included a provision, which the protester did not timely challenge, stating that past performance would be evaluated after the competitive range had been determined. RFP at 67. Protester's raising of the issue in this post-closing date protest is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1).

2001 CPD ¶ 201 at 3. Similarly, an agency may not limit a competitive range for the purposes of efficiency on the basis of technical scores alone. See Kathpal Techs., Inc.; Computer & Hi-Tech Mgmt., Inc., *supra*, at 9-10.

In this case, the record shows that Arc-Tech's proposal was excluded from the competitive range not because it had been determined technically unacceptable, but because it was not among the most highly rated proposals technically. While the competitive range determination and the technical evaluation panel (TEP) report both label the protester's proposal "unacceptable," neither of those documents provides any explanation for such a finding, and there is no support for it anywhere else in the record. On the contrary, the score sheets of the individual evaluators reflect ratings of [deleted]. In fact, it is apparent from the TEP report—in particular, the statement that "the results [of the individual technical evaluations] were averaged to provide a total score to determine whether the company was in the competitive range or not," TEP Report, Oct. 6, 2008, at 1—that the evaluators used the offerors' technical scores to determine whether their proposals should be included in the competitive range, and that proposals excluded from the competitive range based on their technical scores were, simply as a consequence of their exclusion, labeled unacceptable. Further, there is no indication in the record that the agency considered the protester's proposed price as part of the competitive range determination.⁵ In sum, because the record shows that the agency's decision to exclude the protester's proposal from the competitive range was based on its technical score alone—without consideration of its relative cost to the government and without a documented finding that the proposal was unacceptable—the decision was improper, and on that basis we sustain Arc-Tech's protest.

We recommend that the agency make a new competitive range determination, taking into consideration offerors' proposed prices, as well as their technical scores.⁶ We

⁵ The competitive range determination states that the contracting officer did review the prices proposed by the three offerors whose proposals were included in the competitive range and decided that the prices were so close that there was no meaningful distinction among them. There is no evidence that the contracting officer considered the price proposed by the protester, or any other offeror whose proposal was excluded from the competitive range, before making the competitive range determination. [deleted].

⁶ Given our recommendation that the agency make a new competitive range determination (which could result in inclusion of the protester's proposal in the competitive range), we need not resolve the protester's challenges to the technical evaluation of its proposal on which the agency based its initial decision to exclude the protester's proposal from the competitive range. If the agency again decides to exclude the protester's proposal from the competitive range, the protester then may challenge the evaluation findings in a timely-filed protest after the new competitive range determination is made.

also recommend that the agency reimburse the protester for its cost of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2008). The protester's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Gary L. Kepplinger
General Counsel