



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: AT&T Corporation

File: B-414886; B-414886.2; B-414886.3

Date: October 5, 2017

Daniel R. Forman, Esq., Jonathan M. Baker, Esq., Judy Y. Choi, Esq., Christian N. Curran, Esq., and Sharmistha Das, Esq., Crowell & Moring LLP, for the protester. David M. Nadler, Esq., David Y. Yang, Esq., Adam Proujansky, Esq., Brian S. Gocial, Esq., Phillip E. Beshara, Esq., and Carolyn Cody-Jones, Esq., Blank Rome LLP, for CDW Government LLC, the intervenor.

Wilmary Bernal, Esq., and Jeremiah Kline, Esq., Department of Commerce, for the agency.

Lois Hanshaw, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The protest is sustained where the record shows that the agency's evaluation and source selection decision were not adequately documented, the agency's conduct of discussions was improper, and there is a reasonable possibility that the protester was prejudiced by the agency's errors.

DECISION

AT&T Corporation (AT&T), of Oakton, Virginia, protests the issuance of a task order to CDW Government LLC (CDWG), of Vernon Hills, Illinois, under request for proposals (RFP) No. YA1323-17-LW-0001 issued by the Department of Commerce, U.S. Census Bureau (USCB) for a mobile devices solution to support the 2020 Decennial Census. AT&T contends that the agency engaged in unequal discussions, conducted a flawed evaluation, and made an improper source selection decision.

We sustain the protest.

BACKGROUND

On December 6, 2016, the USCB issued Phase II of the RFP to six holders of the National Institutes of Health Information Technology Acquisition and Assessment Center (NITAAC) Chief Information Officer Commodities and Solutions (CIO-CS)

government-wide agency contract (GWAC).¹ RFP at L.3. The agency sought to award a fixed-price task order to the contractor providing a single integrated solution for mobile devices and related services to support the 2020 Census operations, from the 2018 end-to-end test to the 2020 Decennial Census. RFP at C.2. The RFP provided that proposed solutions should include, as relevant here, mobile devices that meet USCB usability, performance, and security requirements; continuous, reliable cellular network coverage; and a technology refresh assessment.² Id.

Award would be made on a best-value basis considering six evaluation factors, including, as relevant here, past performance/experience and technical approach.³ RFP at M.2. The past performance/experience factor was the most important factor, and the remaining non-price factors were of equal importance. Id. The non-price factors were significantly more important than the price factor. Id. The agency would evaluate the extent to which technical proposals satisfied the requirements, and assess strengths, weaknesses, and risks. Id.

With regard to the past performance/experience factor, offerors were required to provide three references demonstrating past performance similar in size, scope, and technical complexity to the RFP requirements. RFP at L.4.2.2. In evaluating proposals under this factor, the agency would compare the similarity of an offeror's prior activities to the RFP requirements, specifically considering: (1) geographic dispersion of mobile devices; (2) quantity of devices provisioned, kitted, and delivered; (3) ramp-up/ramp-down velocity and execution time frame; and (4) types of services rendered. RFP at M.2.1. Proposals would also be evaluated to assess whether the offeror consistently delivered quality services in a timely manner. Id.

The technical approach required offerors to address their understanding of, and ability to execute, the technical requirements. RFP at L.4.3. In this regard, the technical approach required offerors to address 13 elements including, as relevant here, a description of the specific mobile device proposed and why it was selected; how the

¹ In Phase I, offerors who provided answers that best demonstrated appropriate experience performing similar requirements were determined to be best-quality vendors (BQV), and were invited to participate in Phase II. Agency Report (AR), Tab 9, RFP at L.3. On November 23, AT&T and CDWG were notified of their selection as BQVs, and invited to participate in Phase II. AR, Tab 7, Notification to AT&T of Phase I Evaluation Results, at 1; Tab 8, Notification to CDWG of Phase I Evaluation Results, at 1.

² The technology refresh assessment required an assessment of all hardware and software be conducted, on a six month technology refresh cycle, to determine if any upgrades were needed based on technology innovation. RFP, Performance Work Statement (PWS), at C.2.

³ The other evaluation factors included project and subcontractor management approach, logistics approach, key personnel, and price. RFP at M.2.

offeror would provide a cellular service solution and maximize signal strength/reliability by designating the best carriers for each area;⁴ and how the offeror would address the requirements for technology refresh cycles for mobile devices. RFP at L.4.3.

By December 28, 2016, the agency received four proposals, including AT&T's and CDWG's. Contracting Officer's Statement at 8. After the technical evaluation team (TET) evaluated proposals, the agency engaged in discussions with offerors, and requested and received revised proposals. CDWG's proposal was ranked technically highest, with a price of \$283,492,962; AT&T's proposal was ranked second, with a price of \$191,850,841.⁵ AR, Tab 44, Source Selection Decision (SSD), at 3.

As relevant here, AT&T's proposal was assessed a risk under the past performance/experience factor related to its multi-carrier solution. AR, Tab 40, Technical Evaluation Report (TER), Attach. A, at 35. Under the technical approach, AT&T's proposal was assessed a risk related to the development of its [DELETED]. Id. at 38; Tab 39, TER, at 12. As also relevant here, the agency noted that "[DELETED]." AR, Tab 44, SSD, at 7.

In the source selection decision, the source selection authority (SSA) outlined four overarching themes critical to USCB's success: (1) [DELETED]; (2) [DELETED]; (3) [DELETED]; and (4) [DELETED]. Id. at 5-6. The agency determined that CDWG's proposal best addressed these four themes. Id. at 7. In explaining why CDWG's proposal merited the payment of a \$92 million price premium, the SSA highlighted the strength of CDWG's [DELETED],⁶ [DELETED], [DELETED], and [DELETED]. Id. at 7.

On June 23, the agency made award to CDWG. After requesting and receiving a debriefing, AT&T timely protested to our Office.⁷

⁴ Census activities will be conducted in the continental United States, Alaska, Hawaii and certain U.S. territories. RFP at C.2.

⁵ Because the contemplated value of the task order is in excess of \$10 million, our Office has jurisdiction to consider this protest. 41 U.S.C. § 4106(f).

⁶ CDWG proposed use of the [DELETED], and the agency highlighted the power, application speed, and memory of that device. AR, Tab 44, SSD, at 6. As relevant here, the agency also asserted, "[DELETED]." Id. at 5, 6. AT&T proposed the [DELETED], which the agency described as a "[DELETED]" device. Id. at 6.

⁷ The agency overrode the stay of contract performance during the pendency of this protest. Email from Agency to GAO, July 17, 2017. On July 27, the protester notified our Office that it was challenging the agency's override, and seeking declaratory and injunctive relief with the U.S. Court of Federal Claims. Email from Protester to GAO, July 27, 2017. On August 31, the protester notified our Office that the court had overturned the agency's decision to override the stay, and enjoined the agency from moving forward on this procurement. Email from Protester to GAO, August 31, 2017.

DISCUSSION

The protester challenges various aspects of the agency's evaluation and source selection decision. As discussed below, we sustain the protest on the basis of the agency's unequal discussions, and flawed technical evaluation and selection decision.⁸

Misleading and Unequal Discussions

The protester asserts that the agency's discussions were misleading and unequal. Specifically, AT&T contends that AT&T's and CDWG's proposals were both evaluated to have potential bias in their multi-carrier approaches, but only CDWG's technical exchange addressed potential bias. Comments and Supp. Protest (.3) at 22.

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 part 16, such as the procurement for the task order here. See 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. Id. More specifically, 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. Nexant, Inc., B-407708, B-407708.2, Jan. 30, 2013, 2013 CPD ¶ 59 at 3. When holding discussions, procuring agencies are not permitted to engage in conduct that favors one offeror over another. Deloitte Consulting, LLP, B-412125.2, B-412125.3, Apr. 15, 2016, 2016 CPD ¶ 119 at 17; SRA Int'l, Inc., B-410973, B-410973.2, Apr. 8, 2015, 2016 CPD ¶ 32 at 7.

Here, the record shows that CDWG's proposal initially stated that it had pre-negotiated data plans and fees with [DELETED], and provided details on service plan changes. AR, Tab 22, CDWG Initial Proposal, at 22. The agency evaluated CDWG's technical approach, and expressed concern that "CDWG's pre-negotiated rates with [DELETED] [presented] a risk that could result in bias during the cellular carrier analysis,"--that is, the rates could affect carrier selection. AR, Tab 27, Draft TET Ranking, at 11. The agency's technical exchange asked, "[h]ow does CDWG plan to ensure that its pre-negotiated rates with cellular carriers are unbiased." AR, Tab 30, CDWG Technical Exchange Letter, at 2. In response, CDWG continued to mention its pre-negotiated data plans with [DELETED], and heavily revised its response, stating, as relevant here,

⁸ AT&T raises various challenges in addition to those discussed in this decision, including an assertion that CDWG's proposed device, the [DELETED] the solicitation's requirements. We have reviewed all of AT&T's challenges and conclude that none furnishes a basis to sustain this protest other than those discussed below.

“[DELETED].” AR, Tab 33, CDWG Revised Proposal, at 31-32. The agency evaluated CDWG’s response and concluded that the response eliminated the technical risk. AR, Tab 41, TER, Attach. B, at 5.

The record shows that AT&T initially proposed to use [DELETED] carriers⁹ and detailed their approach to selecting the best carrier for [DELETED]. AR, Tab 21, AT&T initial Proposal at 29-30. The agency evaluated AT&T’s technical approach, and noted, “[DELETED].” AR, Tab 27, Draft TET Evaluation at 30. Unlike the exchange with CDWG, the agency’s technical exchange with AT&T did not mention bias, even though the evaluators expressly raised a concern about bias for both companies. Instead, the agency asked, “[how] does AT&T plan to include multiple cellular carriers into their cellular network approach?” Tab 29, AT&T Technical Exchange Letter, at 2. In response, AT&T stated that its approach to multi-network carrier selection would include [DELETED] to determine the best-value carrier. AR, Tab 32, AT&T Revised Proposal, at 45-47. AT&T’s proposal also stated that it would use [DELETED] to select the best carrier for each geographic area, and provided a chart that detailed the selection process. *Id.* at 46. As reflected in the source selection decision, “[DELETED].” AR, Tab 44, SSD, at 7.¹⁰

Here, the record as a whole demonstrates the impropriety in the conduct of discussions.¹¹ To the extent the agency contends that it was concerned about CDWG’s rates, and AT&T’s lack of detail--rather than bias--the record does not support the agency’s contentions. As noted above, AT&T’s response was found lacking because it did not address bias in carrier selection. To the extent the agency was concerned with the potential bias in each offeror’s approach, and raised bias with CDWG, it was obligated to similarly raise this concept with AT&T. Accordingly, the agency’s discussions with CDWG were misleading and unequal in this respect, and we sustain the protest.

⁹ The [DELETED] carriers are [DELETED].

¹⁰ Below, we further discuss the agency’s evaluation of AT&T’s multi-carrier solution under the technical factor and find that it was unreasonable.

¹¹ Additionally, it appears that the agency’s evaluation of AT&T’s proposal under the past performance/experience factor suffers from a similar flaw regarding discussions and potential bias. In this regard, the agency concluded that the lack of details in AT&T’s proposal regarding experience with a multi-carrier solution presented a risk and “[DELETED].” AR, Tab 27, Draft TET Evaluation, at 26. The record shows that the agency’s technical exchange stated, “[c]an AT&T provide additional information regarding their experience using a multiple carrier solution and provide additional information regarding their experience with Android deployments?” AR, Tab 29, AT&T Technical Exchange Letter, at 2. Despite not raising bias during discussions, the agency concluded “[DELETED],” and assessed AT&T’s proposal a risk. AR, Tab 40, TER, Attach. A, at 35.

Technical Evaluation

AT&T also challenges the agency's evaluation of proposals and source selection decision. We sustain the protester's arguments below primarily due to a lack of adequate documentation in the contemporaneous record.

In reviewing an agency's evaluation, we will not reevaluate technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. DKW Commc'ns, Inc., B-411182, B-411182.2, June 9, 2015, 2015 CPD ¶ 178 at 9.¹² While the evaluation of offerors' proposals generally is a matter within the procuring agency's discretion, our Office will question an agency's evaluation where it is unreasonable, inconsistent with the solicitation's stated evaluation criteria, or undocumented. Tantus Techs., Inc., B-411608, B-411608.3, Sept. 14, 2015, 2015 CPD ¶ 299 at 6. An agency that fails to adequately document its evaluation of proposals or source selection decision bears the risk that its determinations will be considered unsupported, and absent such support, our Office may be unable to determine whether the agency had a reasonable basis for its determinations. Sterling Med. Corp., B-412407, B-412407.2, Feb. 3, 2016, 2016 CPD ¶ 73 at 7.

Multi-Carrier/Cellular Approach

The protester asserts that the agency's evaluation of its technical approach was unreasonable because the agency never asked AT&T how it planned to handle bias in its multi-carrier approach, and the TET acknowledged that AT&T addressed the risks regarding AT&T's multi-carrier and cellular approaches. Comments and Supp. Protest (.3) at 25-26. Additionally, the protester contends that the SSA improperly relied on this issue as a discriminating factor in making her source selection decision. Id.

Here, the record shows that AT&T proposed to use [DELETED] carriers, as well as [DELETED] carriers, and the agency initially assessed two risks under the technical approach for AT&T's multi-carrier network approach and [DELETED]. AR, Tab 21, AT&T Proposal, at 44;¹³ Tab 41, TER, Attach. B, at 3. The agency engaged in discussions with AT&T regarding these issues. AR, Tab 29, AT&T Technical Exchange, at 2. In this regard, the record does not clearly demonstrate the agency's assessment

¹² As stated earlier, this procurement was conducted as a competition between contractors holding CIO-CS GWAC contracts and, as such, was subject to the provisions of FAR part 16, not FAR part 15. Nonetheless, in reviewing protests challenging FAR part 16 procurements, our Office will review the agency's interpretation of the solicitation provisions, and its evaluation of proposals, to determine whether the agency's evaluation was reasonable. URS Fed.Servs., Inc., B-412580, B-412580.2, Mar. 31, 2016, 2016 CPD ¶ 116 at 7 n.14.

¹³ Our Office applied consecutively numbered pages to the pages in this tab.

of the risk related to AT&T's multi-carrier solution. Depending on the document, the risk was either not assessed, considered "eliminated," or viewed as a "risk [that] may be mitigated." See, e.g., Tab 39, TER, at 12 (risk not assessed), 14 (risk could be mitigated); Tab 40, TER, Attach. A, at 38 (risk not assessed); Tab 41, TER, Attach. B, at 3 (risk eliminated); Tab 43, Best-Value Determination, at 7, 14 (risk not assessed). However, the source selection decision states, "[DELETED]." AR, Tab 44, SSD, at 7.

In our view, the record fails to clearly and adequately document the risk identified in the source selection decision.¹⁴ Accordingly, when comparing AT&T's and CDWG's proposals during the tradeoff determination, it was unreasonable for the SSA to reference, or rely on, a risk that was inadequately documented. As discussed below, we find unavailing the agency's assertion that the mention of cellular bias in the source selection decision was neither prejudicial, nor a deciding factor in the tradeoff decision.

Technology Refresh

The protester also contends that the agency unequally evaluated the protester's and awardee's technology refresh approaches, and used the likelihood of a technology refresh as a key discriminator in the best-value tradeoff decision. Comments and Supp. Protest at 9. We agree.

The RFP required offerors to provide a description of the specific mobile device proposed and why it was selected, and how the offeror would address the requirements for technology refresh cycles for mobile devices. RFP at L.4.3.

The record here shows that the agency assessed a significant strength for CDWG's selected mobile device based on the agency's conclusion that the device exceeded the technical specifications. See AR, Tab 39, TER, at 9; Tab 40, TER, Attach. A, at 22; Tab 43, Best-Value Determination, at 6. Nothing in the technical evaluation reports leading up to the best-value determination report includes a discussion of the potential likelihood for a technology refresh with CDWG's mobile device.¹⁵ However, in the summary section of the best-value decision, the agency notes--for the first time--that CDWG's device creates a "[DELETED]." AR, Tab 43, Best-Value Determination, at 16.

¹⁴ We have additional concerns with the record regarding whether the risk assessed under the past performance/experience factor was adequately documented. See AR, Tab 39, TER, at 12 (risk not assessed), at 16 (risk assessed); Tab 40, TER, Attach. A, at 35 (risk assessed); Tab 43, Best-Value Award Determination, at 7 (risk not assessed), at 14 (risk assessed).

¹⁵ While the record shows that in the draft TET rankings, CDWG's technology refresh plan was assessed a strength because the "[DELETED]," AR, Tab 27, Draft TET Ranking, at 10, in our view, this strength does not clearly relate to the likelihood of whether CDWG's device would require a technology refresh, and the assessment of this strength is not mentioned in subsequent evaluation documents.

The source selection decision incorporates this undocumented conclusion in describing the strengths of CDWG's device. AR, Tab 44, SSD, at 6. On this record, we conclude that the discussion of the likelihood for a technology refresh, and the SSA's reliance on this representation in the source selection decision was improper where the record shows that the basis for this representation was not adequately documented in the contemporaneous record.

Prejudice

As discussed above, the record shows that the agency's evaluation of proposals and selection decision was flawed in various respects. Our Office will not sustain a protest, however, unless the record establishes a reasonable possibility that the protester was prejudiced by the agency's actions; that is, but for the agency's actions, the protester would have had a substantial chance of receiving the award. See, e.g., Raytheon Co., B-409651, B-409651.2, July 9, 2014, 2014 CPD ¶ 207 at 17.

Here, we cannot say with certainty whether AT&T might have addressed the agency's concern about bias in carrier selection, or whether the SSA would have determined that AT&T's lower-rated, lower-priced proposal may have represented the best value if the source selection process and evaluation results were adjusted to account for the flaws discussed above. In such circumstances, we resolve doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. Target Media Mid-Atl. Inc., B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358 at 11. Accordingly, we conclude that AT&T has established the requisite competitive prejudice to prevail in a bid protest.

RECOMMENDATION

We recommend that the agency reopen the competition, conduct discussions, accept revised proposals, reevaluate, and make a new selection decision in accordance with the evaluation criteria set forth in the RFP. Specifically, the agency should ensure that the strengths, weaknesses, and risks assigned to offerors' proposals are adequately and accurately documented. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protests, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling
General Counsel