



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: LB&B Associates, Inc.

File: B-281706

Date: March 24, 1999

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Joel S. Rubinstein, Esq., and Andrew N. Cook, Esq., Bell, Boyd & Lloyd, for Four Seasons Environmental, Inc., an intervenor.
Marion T. Cordova, Esq., Department of Agriculture, 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

1. Protester's argument that it should have received higher past performance score than awardee under solicitation calling for work in a "hot" laboratory, *i.e.*, a laboratory in which live viruses are present, since it has experience working in a "hot" laboratory, whereas awardee does not, is denied, where record demonstrates that awardee does in fact have experience working in a "hot" laboratory.
2. Discussions were meaningful where they led the protester into the area of its proposal that required revision.

DECISION

LB&B Associates, Inc. protests the award of a contract to Four Seasons Environmental, Inc. (FSE) under request for proposals (RFP) No. 3-3K06-98, issued by the Department of Agriculture, Agricultural Research Service (ARS), for operations and maintenance support services for ARS's South Atlantic Area facilities. The protester contends that the agency miscalculated its proposal and misled it during discussions.

We deny the protest.

BACKGROUND

The RFP sought offers for the performance of operations, maintenance, and support services at ARS research facilities located in the Athens, Georgia area, including the

Russell Research Center (where research focusing on ensuring and improving the safety and quality of food and feed is conducted); the Southeast Poultry Research Laboratory (where research on emerging and exotic infectious poultry diseases and food-borne pathogens is conducted); and the J. Phil Campbell, Sr., Natural Resource Center (where research focusing on the southern Piedmont agricultural ecosystem is conducted). Services to be provided include buildings and grounds maintenance; repair and maintenance of heating, ventilation, air conditioning, refrigeration, and electrical systems; and housekeeping.

The solicitation contemplated award of a fixed-price contract for the routine tasks, with additional work to be performed under a time-and-materials, indefinite-delivery, indefinite-quantity line item. Award was to be made to the offeror whose proposal represented the best value to the government, with technical merit of greater importance than price in the determination. RFP § M.3. In the event that offerors were considered essentially equal in terms of technical competence, the government reserved the right to award to the offeror with the lowest realistic price. Id.

Section M.2 of the RFP identified the following evaluation factors (and subfactors), along with their respective point values:

<u>Evaluation Criteria</u>	<u>Value</u>
1. Past Performance	60
a. Demonstrated Success in Laboratory	25
b. Customer Satisfaction	20
c. Proposed Management	15
2. Innovativeness	20
a. Staffing	8
b. Performance	7
c. Cost avoidance/Cost reduction	5
3. Personnel/Management	10
a. Corporate and Management Control	4
b. Utilization of Automated System	3
c. Employee Training	2
d. Subcontracting	1
4. Technical Understanding	10
a. Biocontainment Knowledge	5
b. Performance Based Knowledge	3

Offerors were instructed to address the first evaluation factor, past performance, in a written business proposal and the other three in an oral presentation to the source evaluation board (SEB). RFP § L.6.

Eleven offerors submitted business and price proposals by the July 23, 1998 closing date; 10 offerors made oral presentations during the week of August 31 to September 4.¹ At the conclusion of the oral presentations, the evaluators assigned technical scores; LB&B and FSE tied for the highest score of 86 of 100 available points. Contracting Officer's Statement at 2. Both received 53 (of a possible 60) points under the past performance criterion and 9 (of a possible 10) points under the technical understanding factor; under the innovativeness factor, LB&B received a score 1 point higher than FSE's (16 vs. 15, of a possible 20), whereas under the Personnel/Management factor, FSE received a score 1 point higher than LB&B's (9 vs. 8, of a possible 10). Technical Evaluation Consensus Scoring Sheets, LB&B and FSE. LB&B's and FSE's proposals were included in the competitive range, along with those of the next three highest scoring offerors.² Contracting Officer's Statement at 2. Discussion questions were forwarded to each of the competitive range offerors on October 13, with revised proposals due by October 27. After reviewing the revised proposals and determining that neither LB&B's nor FSE's technical scores should be changed, the SEB determined that FSE's offer, which was technically equivalent to, but lower in price than, LB&B's, represented the best value to the government.³ *Id.* at 6. Accordingly, the SEB recommended award to that firm. The contracting officer approved the SEB's recommendation and awarded FSE a contract on November 24.

ANALYSIS

Past Performance

LB&B takes issue with the evaluation of its and FSE's proposals under the past performance factor. The protester contends that it should have received a higher score than FSE under this factor because it has more relevant experience than FSE. Protest at 5-6. In this regard, the protester notes that the Southeast Poultry

¹One offeror withdrew its proposal prior to making an oral presentation.

²These other three offers received technical scores of 82, 80, and 67.

³FSE's price was \$12,183,907; LB&B's was [deleted].

Research Laboratory is an Agricultural Biological Level P-3⁴ facility and the contractor must perform work in the facility while it is "hot," i.e., while live viruses are present. LB&B contends that it has performed a highly similar operation and maintenance support services contract at another Level P-3 facility, the Plum Island, New York Animal Disease Control Center, which requires entry into the facility while it is "hot." The protester concedes that FSE performs an operations and maintenance contract at a facility with an even higher hazard rating, i.e., the Centers for Disease Control (CDC) Virology Biosafety Level 4 Research and Development Laboratory in Atlanta, but argues that FSE's experience under this contract is less relevant than its own experience at Plum Island because FSE is not required to enter the laboratory while it is "hot." (According to the protester, FSE enters the hazardous facility only after it has been cleaned and the hazards removed.) The protester maintains that because it has experience working in a "hot" laboratory, whereas FSE does not, it should have received a higher past performance score than FSE.

First, we note that although LB&B and FSE received identical overall scores under the past performance factor, they did not receive identical scores under the various subfactors comprising the factor. Under the subfactor under which the relevance of an offeror's prior experience was considered, i.e., Demonstrated Success in Laboratory, LB&B did in fact receive a higher score than FSE (23 vs. 22).⁵ Technical Evaluation Consensus Scoring Sheets. The contracting officer explains that although both offerors demonstrated highly acceptable experience in performing similar contracts, LB&B received a score 1 point higher than FSE because it had experience at a research laboratory operated by the Department of Agriculture, whereas FSE did not. Contracting Officer's Supplemental Statement at 3.

With regard to the protester's allegation that its experience at the Plum Island Animal Disease Control Center is more relevant than FSE's experience at the CDC Virology laboratory because FSE employees are not required to enter the CDC laboratory while it is "hot," the agency denies that such is the case. The contracting officer explains that the CDC Virology laboratory is divided into Biosafety Level 3 and Biosafety Level 4 sections, and notes that FSE employees have been entering

⁴Level P-3 indicates the level of biological hazard present; the higher the number, the greater the hazard.

⁵LB&B also received a higher score than FSE under the Proposed Management subfactor (14 vs. 12). FSE received a score 3 points higher than LB&B's (i.e., 19 vs. 16) under the Customer Satisfaction subfactor, however, leaving the two offerors with identical overall scores of 53 under the Past Performance factor.

the Biosafety Level 3 section weekly since 1988.⁶ Contracting Officer's Response to GAO Questions, Mar. 12, 1999. The contracting officer's position is supported by an affidavit from Dr. Henry Matthews, the safety manager for the National Center for Infectious Diseases, who has oversight responsibility for the health and safety programs at the CDC Virology laboratory. Dr. Matthews affirms that "FSE personnel regularly enter the Level 3 laboratories while they are in use with special pathogens or 'hot,' including any containment rooms in those laboratories;" in addition, "FSE is . . . required to enter the Level 3 in use or 'hot' Animal Holding Suite, which requires FSE to wear gowns, scrub suits, masks, shoe covers and abide by other requirements." Affidavit of Dr. Henry Matthews, Mar. 19, 1999, at 1, 2. Thus, the protester's allegation that FSE does not have experience working in a "hot" laboratory is without foundation.

To the extent that the protester is arguing that its proposal deserved a score higher than 23 under the Demonstrated Success in Laboratory subfactor, it is not the role of our Office to make independent determinations regarding the merit of technical proposals. Orion Research, Inc., B-253786, Oct. 21, 1993, 93-2 CPD ¶ 242 at 3. The evaluation of proposals is within the discretion of the procuring agency since it is responsible for defining its needs and the best method of accommodating them, and must bear the burden arising from a defective evaluation. Id. Our function is to examine the agency evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. General Offshore Corp., B-251969.5, B-251969.6, Apr. 8, 1994, 94-1 CPD ¶ 248 at 3.

Here, the agency explains that the protester received an excellent, but not perfect, score under the Demonstrated Success in Laboratory subfactor because the evaluators viewed its performance as excellent, but not perfect. We have no basis upon which to question the evaluators' judgment in this regard. Moreover, we note that the scoring of LB&B's proposal appears to have been consistent with the scoring of FSE's, which also failed to receive a perfect score under the Demonstrated Success in Laboratory subfactor despite FSE's outstanding performance on the CDC Virology laboratory contract.

The protester further argues that the evaluators did not have a reasonable basis for assigning its proposal a lower score than FSE's under the Customer Satisfaction subfactor. Protester's Supplemental Comments, Feb. 4, 1999, at 8. In this regard, FSE received a Customer Satisfaction score of 19 of 20 available points, while LB&B received a score of 16.

We have reviewed the record and find that it does provide a reasonable basis for assigning LB&B's proposal a lower score than FSE's under the Customer

⁶FSE employees also enter the Level 4 section semiannually, but only after it has been decontaminated.

Satisfaction subfactor. According to the competitive range determination, LB&B received one customer satisfaction rating of outstanding and three of acceptable; in contrast, all four of the FSE references contacted rated its performance as outstanding. Competitive Range and Prenegotiation Position, Oct. 7, 1998, at 29, 34-35. We see nothing unreasonable in the agency's having assigned an offeror with four ratings of outstanding a higher score than an offeror with one rating of outstanding and three of acceptable.

LB&B also objects to the fact that its score under the Customer Satisfaction subfactor, 16 points, was lower than the average of the individual evaluators' ratings. Protester's Supplemental Comments, Feb. 4, 1999, at 8. In this regard, the six individual evaluators assigned scores of 18, 18, 17, 16, 16, and 15, which yields an average score of 16.7, or 17. The agency explains that after scoring the proposals individually, the evaluators met as a group, discussed the merits and weaknesses of each offeror, and collectively agreed on a single numerical consensus score. We have previously considered and affirmed the propriety of this method of consensus scoring. Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 at 6 n.5; The Cadmus Group, Inc., B-241372.3, Sept. 25, 1991, 91-2 CPD ¶ 271 at 7-8.

Misleading Discussions

LB&B argues that the agency misled it during discussions by failing to inform it that the work management system that it had proposed was unacceptable. Protest at 6-8.

The RFP required the contractor to provide an automated work management system accessible to the government on the ARS Local Area Network (LAN). RFP §§ 2.1, 2.1.3. Amendment 3 clarified that 15 government personnel would need to be able to read and enter data in the system via the LAN. The solicitation noted that various items of government-owned computer hardware and software would be furnished for use by the contractor, including "Elke Main tracker version RELO 3M001," the software used by the incumbent contractor for work management. RFP § 2.1.3.

In its oral presentation, LB&B proposed [deleted]. The evaluators awarded the proposal only 1 (of a possible 3) points under the relevant subfactor (Utilization of Automated System), noting that [deleted], was unacceptable since it did not meet the requirement for ARS LAN access. The evaluators were concerned that if [deleted] were used, the government would not be able to interface with the work order system. Competitive Range and Prenegotiation Position, Oct. 7, 1998, at 32.

During discussions, the contracting officer asked LB&B to explain how [deleted] would meet "the requirement" and how the government would interface with the

work order system.⁷ LB&B responded by explaining that [deleted]. The evaluators did not change LB&B's score after reviewing its response to this (and other) discussion questions.

The protester asserts that it learned for the first time at its debriefing that the evaluators considered its proposed use of [deleted] a "significant weakness" in its proposal. LB&B contends that the agency misled it by failing to inform it that [deleted] was mandatory or that [deleted] was discouraged. Protest at 6-7.

The Federal Acquisition Regulation (FAR) requires that contracting officers discuss with each offeror being considered for award "significant weaknesses, deficiencies, and other aspects of its proposal . . . that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR § 15.306(d)(3). The statutory and regulatory requirement for discussions with all competitive range offerors (41 U.S.C. § 253b(d)(1)(A) (1994); FAR § 15.306(d)(1)) means that such discussions must be meaningful, equitable, and not misleading. Du and Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156 at 7; I.T.S. Corp., B-280431, Sept. 29, 1998, 98-2 CPD ¶ 89 at 6. For discussions to be meaningful, they must lead offerors into the areas of their proposals requiring amplification or revision; the agency is not required to "spoon-feed" an offeror as to each and every item that could be revised so as to improve its proposal, however. Du and Assocs., Inc., *supra*, at 7-8; Applied Cos., B-279811, July 24, 1998, 98-2 CPD ¶ 52 at 8.

Here, even to the extent that the agency's first discussion question regarding the protester's proposed work management system (*i.e.*, "Please discuss how [deleted] will meet the requirement") was somewhat general and did not focus on the agency's particular area of concern (*i.e.*, that [deleted] was not accessible on the ARS LAN), its second question (*i.e.*, "How will the Government interface with the Work Order System?") was very specific and clearly placed the protester on notice that it had not adequately addressed the issue of government access to its work management system. We think that this should have led a reasonably diligent offeror to examine the capabilities of the software that it was proposing to determine if it did in fact satisfy the agency's requirements regarding accessibility. The protester chose not to perform such an examination, however; instead, it proposed to wait until after award to examine the capabilities of [deleted]. Thus, it was the protester's failure to follow up on the agency's question, and not the agency's failure to ask an appropriate question, that resulted in the protester's

⁷The specific questions posed were: "Please discuss how [deleted] will meet the requirement" and "How will the Government interface with the Work Order System?" Letter from the Contracting Officer to the Protester, enclosure, Issues for Discussion (Oct. 13, 1998)

failing to realize that, in the agency's view, the software that it had proposed would not meet the solicitation's requirements.

The protester also argues that the agency failed to conduct meaningful discussions with it by failing to bring to its attention, and allow it to address, concerns of the evaluators regarding the working relationship between two of its key proposed employees. LB&B alleges that after submission of its best and final offer, the agency contacted [deleted] inquiring about the working relationship between two of its employees. Protest at 7.

The record reflects that the agency contacted each offeror's best reference after receipt of revised proposals to reconfirm its view of the offeror's performance; in LB&B's case, that reference was [deleted]. There is no evidence in the record that the working relationship between LB&B's employees was discussed during that call, however, nor is there any evidence that LB&B's proposal was downgraded based upon such concern. LB&B's proposal received an excellent score (14 of 15) under the relevant subfactor, Proposed Management, and the two proposed employees [deleted] were both rated as highly acceptable. Thus, we find nothing in the record to substantiate the protester's allegation.

Innovativeness

LB&B alleges that the agency improperly downgraded its proposal under the Innovativeness factor based on its proposed use of [deleted]. The protester notes, in this regard, that the evaluators referred to its proposed use of [deleted] as a "weakness" under the Innovativeness factor. Memorandum from the Chairperson, SEB, to the Contract File 7 (Sept. 14, 1998). Since it was the only weakness that the evaluators identified under the Innovativeness factor, and since the proposal received a score of 4 less than perfect under the factor (*i.e.*, 16 of 20), its proposal would have received a technical score up to 4 points higher had its proposed use of [deleted] not been considered, LB&B contends.

The agency responds that the protester, in arguing that its proposal was downgraded under the Innovativeness factor, misunderstands how proposals were scored. Offerors gained points for each innovation they proposed; they did not lose points because an aspect of their proposal was not innovative.⁸ Supplemental Agency Report, Feb. 2, 1999, at 8-10. Thus, LB&B gained points for the innovations that it proposed, which included increased management support and use of a predictive maintenance program; since its proposed use of [deleted] was not

⁸The agency explains that the reason that it referred to the protester's proposed use of [deleted]--which it did not consider innovative--in evaluating LB&B under the Innovativeness factor was that the protester had brought up its proposed use of [deleted] during that portion of its oral presentation.

considered innovative, it neither gained nor lost points for it. The protester's allegation that its proposal was downgraded under the Innovativeness factor based on its proposed use of [deleted] is thus without basis.

Price/Technical Tradeoff

The protester argues that the agency deviated from the evaluation scheme set forth in the solicitation by placing greater emphasis on price than on technical merit. Specifically, LB&B maintains that the agency selected FSE's proposal over its own technically superior one due to its marginally lower price.

As discussed above, LB&B's proposal was not determined to be technically superior to FSE's; the two proposals were determined to be technically equal. The solicitation explicitly provided for award to the offeror with the lowest realistic price in the event that offerors in the competitive range were considered essentially equal in terms of technical competence. Accordingly, the agency did not deviate from the terms of the RFP in selecting FSE for award.

The protest is denied.

Comptroller General
of the United States