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Decision

Matter of: Interfor US, Inc.

File: B-410622

Date: December 30, 2014

Julie Weis, Esq., and Michael Haglund, Esq., Haglund Kelley LLP, for the protester. Lori Polin Jones, Esq., Department of Agriculture, for the agency. Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency improperly evaluated proposals utilizing an unstated evaluation criterion is denied where the allegedly unstated criterion was reasonably encompassed by the solicitation's evaluation scheme.
 2. Protest that the agency improperly evaluated the awardee's proposal as technically acceptable is denied where the agency either evaluated proposals in a manner consistent with the solicitation or otherwise similarly did not require strict compliance from the protester.
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DECISION

Interfor U.S., Inc., of Gilchrist, Oregon, challenges the award of a contract to Scott Logging, Inc., of La Pine, Oregon, by the Department of Agriculture, Forest Service, under the solicitation for the Yen Stewardship Integrated Resource Timber Contract (agency file code 2430/2450). Interfor alleges that the agency's technical evaluation was flawed.

We deny the protest.

BACKGROUND

On August 1, 2014, the Forest Service issued a letter to prospective offerors soliciting proposals for the Yen Stewardship Integrated Resource Timber Contract. Agency Report (AR), Tab I.2, Agency Letter to Prospective Offerors (Aug. 1, 2014). The contract will require the awardee to remove timber and complete two mandatory service projects meant to improve ecological conditions within the

Deschutes National Forest. Id. at AR-209; see also Solicitation at AR-219.¹ The contractor will be required to pay the agency for the timber harvest, but will earn stewardship credits, equal to the value of the mandatory service work completed and accepted, that will be offset from the amount of timber proceeds due to the agency. AR, Tab I.2, Agency Letter (Aug. 1, 2014), at AR-209. Prospective offerors were notified that the minimum acceptable offer for the timber was \$1,308,192.65. Id. at AR-210; but see Solicitation at AR-219 (stating minimum acceptable offer was \$1,307,075.90).

The solicitation required offerors to address three areas in their technical proposals: (1) technical approach; (2) capability and past performance; and (3) utilization of local work force. Solicitation at AR-224.² The technical approach and utilization of local work force factors are relevant to the issues in this protest.

Under the technical approach factor, offerors were to address--and were to be evaluated based on--their respective: (a) plan of operations and project timeline; (b) quality control plan and safety; (c) supervision; (d) equipment; and (e) production capability. See, e.g., Solicitation at AR-224; AR, Tab A.2, Proposal Template, at AR-21.

In the utilization of local work force section, offerors were to identify how they intended to utilize labor, subcontractors, and other workforce from the local area, with additional evaluation preference to be given for the use of labor or subcontractors located closest to the local area. Solicitation at AR-224. Credit was to be given for utilizing work forces, creating jobs, and maintaining infrastructure in (in descending order): (1) the local area; (2) eastern Oregon; and (3) Oregon. AR, Tab A.2, Proposal Template, at AR-21. The solicitation defined local to mean Deschutes and all adjacent counties. Solicitation at AR-224. The following sub-factors were also to be evaluated: (a) local hires; (b) the permanent place of operation of the prime contractor; (c) the location of key personnel; (d) the permanent place of operation of subcontractors; and (e) benefits to local area communities, including delivery and processing of forest products and positive economic impact. AR, Tab A.2, Proposal Template, at AR-21.

¹ Citations to page numbers (e.g., AR-#) are to the pagination provided by the agency in the AR.

² In addition to the solicitation, the agency also provided offerors with two additional documents bearing on the preparation and evaluation of proposals, an Integrated Resource Timber Contract Prospectus (Prospectus), AR, Tab I.3, and a Region 6 Technical Proposal Template for the Integrated Resource Timber Contract (Proposal Template), AR, Tab A.2.

For purposes of award, the non-price evaluation factors, when combined, were to be equal in weight to price. Solicitation at AR-225; AR, Tab A.2, Proposal Template, at AR-21. Award was to be made to the offeror whose proposal was technically acceptable, and the most advantageous to the government, when considering both price and non-price evaluation factors. Solicitation at AR-225; AR, Tab I.3, Prospectus, at AR-217.

The agency evaluated the two acceptable proposals received in response to the solicitation as follows:

	Interfor	Scott Logging
Total Price for Timber	\$1,317,155.00	\$1,405,877.25
Price for Contractor's Performance of Services	\$594,869.00	\$744,100.00
Excess Timber Receipts to the Government	\$723,402.75	\$661,777.25
Technical Rating	Acceptable	Acceptable

AR, Tab A.3, Interfor Debriefing, at AR-27.³

The source selection authority's (SSA) tradeoff analysis recognized that "Interfor's price would generate an additional \$61,625.50 in excess receipts over Scott Logging Inc." AR, Tab H, Source Selection Decision, at AR-204. The SSA, however, ultimately selected Scott Logging's proposal for award because it was technically superior, in part, because it "demonstrated an understanding of the high level of recreational activity within the project area as well as addressed how they would mitigate recreational concerns," and because Interfor's price advantage did not offset the awardee's technical advantage. Id.

DECISION

Interfor argues that the Forest Service's evaluation of the offerors' technical proposals was unreasonable because the agency relied on an unstated evaluation criterion and relaxed material solicitation requirements for the awardee. For the reasons that follow, we find that the protester's objections to the agency's evaluation do not provide a basis on which to sustain the protest.⁴

³ Interfor's alternative proposal was rated as "marginal" because it proposed to use an impermissible method for pre-commercial thinning operations. See AR, Tab A.3, Interfor Debriefing, at AR-27. A third offeror's proposal was also rejected based on its proposed pricing. See CO's Statement (Nov. 10, 2014) at AR-50.

⁴ As a general matter, sales by a federal agency, such as timber sales, are not procurements of property or services, and are therefore not within our Office's bid protest jurisdiction. See 31 U.S.C. § 3551(1)(a). We have recognized, however,
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In reviewing protests against allegedly improper evaluations, our Office examines the record to determine whether the agency's evaluation was reasonable and consistent with the evaluation criteria in the solicitation and applicable procurement statutes and regulations; a protester's mere disagreement with the evaluation does not show that it lacked a reasonable basis. Lanmark Tech., Inc., B-408892, Dec. 19, 2013, 2013 CPD ¶ 295 at 5; VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

Unstated Evaluation Criterion

Interfor first argues that the Forest Service unreasonably evaluated the offerors' proposals based on an unstated evaluation criterion. Specifically, the protester alleges that the agency improperly credited Scott Logging for addressing, and downgraded Interfor for not addressing, an approach for protecting recreational trail systems and working with the agency to address recreational issues. See, e.g., Protest (Oct. 8, 2014) at 6-7; Protester's Comments (Nov. 20, 2014) at 4-8. The Technical Evaluation Board (TEB) found that "Scott Logging showed the greatest understanding and gave the most specifics about protecting recreation infrastructures within the project area," including coordinating with the agency regarding trail crossing markings and rehabilitation of trails at the end of harvesting operations. AR, Tab G.2, TEB Consensus Report, at AR-136. The Source Selection Authority similarly viewed favorably Scott Logging's "understanding of the importance of recreational timing restrictions," and plan for how the awardee would protect recreational trails. AR, Tab H, Source Selection Decision, at AR-205.

Although agencies are required to identify in a solicitation all major evaluation factors, they are not required to identify all areas of each factor that might be taken into account in an evaluation, provided that the unidentified areas are reasonably related to or encompassed by the stated factors. Caduceus Healthcare, Inc., B-407791, Feb. 21, 2013, 2013 CPD ¶ 77 at 5.

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that certain transactions can involve both a sale of government property and a procurement of goods or services, and we have taken jurisdiction in these so-called "mixed transaction" cases. See, e.g., Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192. As relevant here, we will also consider protests concerning sales by a federal agency if that agency has agreed in writing to have protests decided by our Office, 4 C.F.R. § 21.13(a) (2014); the Forest Service has expressly agreed to have protests concerning timber sales decided by our Office. Delta Timber Co., B-290710, Sept. 6, 2002, 2002 CPD ¶ 161 at 1 n.1. Because the agency has agreed to have our Office consider protests concerning timber sales, we need not also address whether this procurement is a mixed transaction.

Here, offerors were required to “present sufficient information to reflect a thorough understanding of the requirements and a detailed description of the techniques, procedures, and program for achieving the objectives of the specifications/ statement of work.” See AR, Tab A.2, Proposal Template, at AR-23. Sample contract specification KT-GT.4.1#--Specific Requirements included several conditions relating to the maintenance and protection of hiking areas and trails, including for example, “[s]tump heights within 10 feet of either side of hiking trail shall not exceed 4 inches in height,” and “[c]ross trails with machinery at intervals no closer than 200 feet apart along the length of hiking trail.” See AR, Tab A.4, Sample Contract Specifications, at AR-33-34. Sample contract provision KT-GT.3.1.5#--Project Operation Schedule also notified offerors that certain of the harvest units were subject to schedule limitations due to recreational and special uses. See id. at AR-29-30. In light of the requirements concerning maintaining and preserving hiking areas and trails and schedule limitations to accommodate recreational usage, we find that recreational issues were reasonably encompassed within the overall technical approach to be evaluated by the agency.

The record here further shows that the agency found that the awardee’s level of detail regarding recreational issues was a strength that differentiated its proposal from Interfor’s proposal. AR, Tab H, Source Selection Decision, at AR-204.⁵ Where, as here, a solicitation provides for award on a best-value basis--as opposed to selection of the lowest-priced, technically acceptable proposal--evaluation of proposals is not limited to determining whether a proposal is merely technically acceptable; rather, proposals may be further differentiated to distinguish their relative quality by considering the degree to which technically acceptable proposals exceed the standard minimum requirements or will better satisfy the agency’s needs. Interlog, Inc., B-282139, Apr. 27, 1999, 99-1 CPD ¶ 87 at 3. Because we find that the agency’s evaluation of offerors’ approach as to recreational issues was reasonably encompassed within the solicitation’s evaluation criteria, we do not find a basis to sustain Interfor’s protest on this ground.

Relaxation of Material Solicitation Requirements

Interfor next alleges that the Forest Service unreasonably evaluated Scott Logging’s technical proposal. Specifically, the protester alleges that the awardee’s proposal

⁵ Notwithstanding the heading under which the agency’s discussion of recreational issues appears in Interfor’s debriefing (AR, Tab A.3, at AR-26), the contemporaneous evaluation record does not indicate that the agency evaluated a weakness or deficiency in Interfor’s proposal for not adequately addressing recreational issues. See, e.g., AR, Tab G.2, TEB Consensus Report, at AR-137-38 (discussing evaluation of Interfor’s proposal); AR, Tab H, Source Selection Decision, at AR-201 (same).

did not comply with the solicitation's requirements regarding mechanical brush work and the utilization of local workforces, and that the agency improperly waived these defects. See Protest at 7; Protester's Comments at 9-12.⁶

Regarding the mechanical brush treatment work, sample contract provision KT – GT.9#--Stewardship Projects required mechanical treatment of brush on 3,027 acres. Supp. AR (SAR), Sample Contract Specifications, at SAR-6, 17. Offerors were required to address their production capabilities to accomplish the project within the allotted project time. AR, Tab A.2, Proposal Template, at AR-23. Interfor argues that the awardee failed to adequately address its production capability in connection with this requirement. See Protest at 7; Protester's Comments at 10-11.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. Analytical Innovative Solutions, LLC, B-408727, Nov. 6, 2013, 2013 CPD ¶ 263 at 3.

The Forest Service contends that Scott Logging's proposal contained sufficient information to allow the agency to reasonably evaluate the awardee's production capability and ability to meet the mechanical brush requirements within the allotted project time. Specifically, the agency found that Scott Logging's proposal identified the specific, experienced subcontractors that would perform the mechanical brush clearing work, and provided a detailed list of equipment that would be used on the contract. See Supp. Legal Memo. (Dec. 3, 2014) at 1-2; Contracting Officers's (CO's) Supp. Statement (Dec. 3, 2014) at SAR-2, 3. The agency also asserts that Interfor proposed, at least in part, to use the same subcontractors as Scott Logging did to perform the mechanical brush treatment work. See CO's Supp. Statement at SAR-2-3.

Based on the record, we find that the agency reasonably concluded that the awardee demonstrated its commitment and ability to perform the mechanical brush work based on the use of experienced subcontractors and a detailed list of equipment available for use on the contract. In this regard, the agency reasonably relied on the evaluators' personal knowledge regarding Scott Logging's proposed subcontractors in the evaluation of the awardee's technical approach. See CO's

⁶ The protester also alleged that the awardee did not address the capability and past performance of two subcontractors that it proposed to perform the mechanical brush treatment work. See Protest at 7. The agency responded to this allegation. See Agency Legal Memo. (Nov. 10, 2014) at 18. Interfor, however, did not address the allegation in its comments. Therefore, we deem this protest ground to have been abandoned, and do not address it further herein. See, e.g., Edmond Scientific Co., B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336 at 9 n.12.

Supp. Statement at 2-3; AR, Tab G.4, Individual Evaluator Notes for Scott Logging, at AR-140, AR-144, AR-152. We have held that an agency is not bound by the “four corners” of an offeror’s proposal, and may properly use information known by its own evaluators, as with any other references, to aid in the evaluation of proposals. Northrop Grumman Sys. Corp., B-406411, B-406411.2, May 25, 2012, 2012 CPD ¶ 164 at 11; Park Tower Mgmt., Ltd., B-295589, B-295589.2, Mar. 22, 2005, 2005 CPD ¶ 77 at 6.⁷

On this record, we find that the protester’s challenge to the agency’s evaluation of the awardee’s technical approach does not provide a basis on which to sustain the protest.

Regarding the utilization of local workforces, offerors were required to, among other requirements, “(C) List the geographic location of your key personnel,” and “(D) List your subcontractors’ business addresses and County, and geographic places of operation.” AR, Tab A.2, Proposal Template, at AR-24. Interfor alleges that Scott Logging’s proposal “incompletely addressed” these requirements. Protest at 7. Interfor’s objections to the agency’s evaluation under this factor, however, fail because the agency similarly did not require strict compliance from Interfor. We have found that where an agency waives a requirement for both the protester and awardee that neither fully meets, there is no basis for our Office to find that the protester was prejudiced by the agency’s action. See, e.g., Chandler Solutions, LLC, B-409655.2, Aug. 13, 2014, 2014 CPD ¶ 239 at 6, recon. denied, Chandler Solutions, LLC--Recon., B-409655.3, Sept. 18, 2014, 2014 CPD ¶ 275. Competitive prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency’s actions arguably were improper. edCount, LLC--Protest & Costs, B-407556.3 et al., Aug. 15, 2013, 2013 CPD ¶ 195 at 6.

⁷ Interfor correctly notes that the source selection plan stated: “[e]valuation must be based on the proposal as submitted and not on any personal knowledge of an offeror’s capabilities with regards to Key Personnel and Technical Approach.” See Protester’s Supp. Comments (Dec. 8, 2014) at 4 (quoting AR, Tab G.1, Source Selection Plan, at AR-122). In contrast, the evaluators were permitted to consider personal knowledge regarding the experience and past performance of offerors. See id. This distinction, however, does not provide a basis for sustaining the protest. Alleged deficiencies in the application of an agency’s source selection plan--as opposed to deviations from the solicitation’s evaluation scheme--do not alone provide a basis for questioning the validity of an evaluation; such plans are internal agency instructions and do not give outside parties any rights. SWR, Inc.--Protest & Costs, B-294266.2 et al., Apr. 22, 2005, 2005 CPD ¶ 94 at 5. Moreover, there is no evidence that the agency treated the offerors unequally with regard to the consideration of the evaluators’ personal knowledge.

Here, neither the protester nor the awardee completely listed the geographic location of their key personnel. Compare AR, Tab D.1, Interfor Technical Proposal, at AR-77 (providing only telephone, fax, and email information for its project management team) with AR, Tab C, Scott Logging Technical Proposal, at AR-53-54 (providing that at least one of its three quality control supervisors would be on-site daily). Similarly, neither party provided a complete list of their subcontractors' business addresses, counties, or geographic places of operation. Compare AR, Tab D.1, Interfor Technical Proposal, at AR-82-87, 88 (providing physical addresses only for some of its subcontractors, and making a general representation regarding the geographic location of its subcontractors) with AR, Tab C, Scott Logging Technical Proposal, at AR-58 (making a general representation regarding the geographic location of its subcontractors). Thus, since neither offeror provided all of the required information for the utilization of local work force factor, there is no basis to find that Interfor suffered any competitive prejudice.

Interfor also alleges that the awardee misrepresented that its subcontractors were "local to Deschutes, Northern Klamath and Jefferson Counties," AR, Tab C, Scott Logging Technical Proposal, at AR-58, because at least one of the awardee's proposed subcontractors is based in Oregon City, Oregon, which is located in Clackamas County. See Protest at 7; Protester's Comments at 11-12. We find no basis to determine that Interfor was competitively prejudiced by this alleged misstatement. First, there was no prohibition on offerors utilizing subcontractors from outside of the local area. See, e.g., AR, Tab A.2, Prospectus, at AR-22 (providing a sliding scale of credit for subcontractors located in the solicitation's defined local area, eastern Oregon, and Oregon). Indeed, Interfor proposed to utilize the same subcontractor. See AR, Tab D.1, Interfor Technical Proposal, at AR-77, 85. The evaluators also recognized that the subcontractor at issue was not located in the local area, but determined that fact had only a minor impact on Scott Logging's "acceptable" rating in light of the many other evaluated sub-factors under the utilization of local work force factor. See AR, Tab G.4, Individual Evaluator Notes for Scott Logging, at AR-155; CO's Statement at AR-49. Thus, we find no basis to conclude that Interfor suffered any prejudice based on the agency's evaluation of proposals under this factor.

The protest is denied.

Susan A. Poling
General Counsel