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United States General Accounting Office
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Decision

Matter of: S^3 LTD

File: B-287019.2; B-287019.3; B-287021.2; B-287021.3

Date: September 14, 2001

Robert A. Klimek, Esq., Nicholas H. Cobbs, Esq., and Darrell Craft, Esq., Klimek, Kolodney & Casale, for the protester.
Daniel R. Weckstein, Esq., Michael L. Sterling, Esq., Walter T. Camp, Esq., and David W. Lannetti, Esq., Vandeventer Black, for MANCON, Inc., an intervenor.
Philip E. Adams, Esq., Department of the Navy, Naval Supply Systems Command, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest contention that an agency conducted misleading discussions by orally changing the terms of the solicitation is denied because, even if the agency made the claimed change, offerors cannot reasonably rely on an oral modification to a solicitation which is inconsistent with its written terms, absent a written amendment, or confirmation of the modification, as required by Federal Acquisition Regulation § 15.206(f).

2. Protester's assertion that an awardee's outstanding past performance rating is unreasonable as it was partially based on the responses of an agency reference who provided a photocopy of identical performance ratings and narrative responses as an answer to a request for his assessment of the awardee's performance under each of four separate contracts is denied where the record shows that, while the reference's approach was less than ideal, his answers were consistent with the answers of other references, and consistent with his responses in a telephonic interview conducted by the contract specialist, and where there is no showing that the photocopied responses were inaccurate for any of the four contracts.

DECISION

S^3 LTD protests the award of two contracts to MANCON, Inc., by the Department of the Navy's Fleet and Industrial Supply Center, Jacksonville, Florida, pursuant to requests for proposals (RFP) Nos. N68836-00-R-0012 and N68836-00-R-0025, for personnel support services. S^3 argues that the Navy failed to hold meaningful

discussions by improperly encouraging the company to raise its direct labor rates to the point where it was no longer the lowest-priced offeror for these contracts. S[3] also argues that the Navy misevaluated both its and the awardee's past performance.

We deny the protests.

BACKGROUND

The Navy issued these solicitations to procure certain personnel support services for the Department of Defense and other federal agencies in transition as a result of being reorganized, realigned, streamlined, or closed, due to regionalization, consolidation of functions, or cost comparison studies conducted pursuant to Office of Management and Budget Circular A-76. These support services are provided by the Fitting Out and Supply Assistance Center, Norfolk, Virginia, under the Navy's Intra Fleet Supply Operations Program. Both solicitations anticipate the purchase of temporary personnel services for various professional and Service Contract Act labor categories, including accounting, information technology, administration, engineering, environmental, finance, logistics, human resources, transportation, child care, mechanical trades, custodial, food service, clerical, drafting, electronics, library services, laboratory services, social services, and hazardous material services. Agency Report (AR) at 3. These solicitations are similar, with the differences related to the geographical areas covered by each: RFP No. N68836-00-R-0012 (R-0012) has 2,541 separately priced contract line items (CLIN) covering the eastern United States and Puerto Rico; RFP No. N68836-00-R-0025 (R-0025) has 5,112 CLINs covering the western United States, Guam and Hawaii. Id.

The RFPs[1] here anticipated award of indefinite-delivery/indefinite-quantity, time and materials contracts, for a 1-year base period with two 1-year options, to the offeror whose proposal was determined most advantageous to the government, price and other factors considered. To determine the most advantageous proposal, the RFPs identified four evaluation factors--price/cost, past performance, technical, and subcontracting plan--and advised that each factor was approximately equal in importance. RFPs at 20. Only two of the factors--past performance and technical--

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[1]Since these RFPs are identical in terms of performance periods, evaluation factors, award criteria, and other matters not related to the geographic place of performance, this decision will describe the solicitations jointly as "the RFPs." In addition, both RFPs use a system of pagination wherein the pages of sections A through J are numbered sequentially, while section K begins again with page 1 and continues sequentially through the end of section M. Since sections K through M are identical in the two RFPs, and since these identical provisions appear on the same pages in both solicitations, they will be referenced hereinafter as "RFPs at __." Any citation to the earlier portions of the solicitations will be referenced as "R-0012 at ___" or "R-0025 at ___."

were to be given adjectival ratings; a proposal's subcontracting plan was to be assessed as either acceptable or unacceptable, and its price was to be assessed only for reasonableness (after application of a 10-percent price evaluation preference for HUBZone offerors). Under the past performance factor, a proposal was rated either outstanding, good, average, marginal, or neutral; under the technical factor, a proposal was rated either outstanding, good, average, or marginal.

Seven offers were received in response to R-0012 (East Coast), and six offers were received in response to R-0025 (West Coast). S^3 and MANCON submitted offers in response to both solicitations. In reviewing the initial offers, the agency determined that both S^3 proposals lacked pricing on some labor categories, and a Professional Employee Compensation Plan, which was required by the solicitations. As a result S^3 was initially excluded from the competitive range for award in both procurements. After S^3 filed protests with our Office challenging its exclusion, the agency reinstated the company to the competitive range in both procurements, advised that it would request revised proposals from all offerors, and sought dismissal of the protests, which was granted. See S^3 LTD, B-287019, B-287021, Jan. 9, 2001.

The record shows that the agency held discussions with S^3 on three separate occasions--March 23, April 13, and April 20. The discussions held on April 13 were specifically tailored to the East Coast solicitation (R-0012), and final revised proposals for that solicitation were due April 17. Affidavit of Contract Specialist, Aug. 9, 2001, at 2. The discussions on April 20 were specifically tailored to the West Coast solicitation (R-0025), and final revised proposals were due April 24. Id.; AR at 7.

In evaluating the final revised proposals, the agency assigned the same evaluation ratings in the areas of technical and past performance to an offeror's proposal under both solicitations, and concluded that all of the large businesses (including MANCON and S^3) had proposed acceptable small business subcontracting plans for both solicitations. After reviewing these ratings, as well as the proposed prices, the agency concluded that the proposals of MANCON and S^3 received the highest ratings with the lowest proposed prices under both solicitations. Accordingly, we set forth below the evaluation results of only these two offerors under both solicitations (and the prices shown do not include the 10 percent HUBZone price evaluation factor):

	MANCON	**S^3**
Technical Rating	Outstanding	Outstanding
Past Performance	Outstanding	Good
OVERALL RATING	Outstanding	Outstanding
Total Price (R-0012)	$30,214,085	$30,625,581
Total Price (R-0025)	$11,739,353	$12,024,293

AR, Tab 25 at 4, 8 (R-0012); AR, Tab 26, at 4, 8 (R-0025). Based on MANCON's higher-rated, lower-priced offers, the agency awarded both contracts to MANCON on May 29. These protests followed.

DISCUSSION

As indicated above, S^3's protests essentially raise three issues in two areas, price and past performance. In the area of price, S^3 argues that during discussions the agency improperly encouraged it to raise its direct labor rates to the point where it was no longer the lowest-priced offeror. In the area of past performance, S^3 raises a single challenge to MANCON's past performance rating, and multiple challenges to its own past performance rating.[2]

With respect to pricing, S^3 notes that both its initial proposed prices, and interim prices, were lower than those of MANCON, leading the protester to complain generally that the agency used discussions to wrongly encourage the company to raise its direct labor rates until it was no longer in line for award. In its supplemental protest, S^3 complains specifically that during negotiations the contract specialist directed the company to raise its rates for professional employees to a level comparable to the federal government's general service (GS) step 5 rate for the appropriate GS grade.[3] In addition, S^3 claims that the oral guidance it received regarding the use of the GS step 5 rate was contrary to guidance in the solicitation directing the use of a step 1 rate.

In negotiated procurements, contracting agencies generally must conduct discussions with all offerors whose proposals are within the competitive range. 10 U.S.C. § 2305(b)(4)(A)(i) (1994); Federal Acquisition Regulation (FAR) § 15.306(d)(1). Although discussions must be meaningful, leading an offeror into the areas of its proposal requiring amplification or revision, the agency is not required to "spoon-feed" an offeror as to each and every item that could be raised to improve its proposal. Du & Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156 at 7-8. An agency has not satisfied its obligation to conduct meaningful discussions if it

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[2]In its initial and supplemental protests, S^3 raises 10 separate issues. Of the total, S^3 withdrew three of its issues, and folded one into other issues. The remaining six issues all fall within the areas of price and past performance, as explained above.

[3]The federal government's GS schedule identifies the annual salary for federal employees for each of 15 grades. Each grade has 10 pay steps, with step 1 representing the lowest salary within that grade, and step 10 representing the highest salary within that grade. In this context, S^3's allegation regarding pay is that it was improperly directed to increase its compensation rates for professionals closer to the middle of the range of what federal employees are paid to perform comparable work, rather than the bottom of the range.

misleads an offeror or conducts prejudicially unequal discussions. Biospherics,Inc., B-278278, Jan. 14, 1998, 98-1 CPD ¶ 161 at 6.

With respect to S^3's general contention that it was improperly urged to raise its rates, our review of the record shows that during discussions, the contract specialist encouraged upward adjustments to the professional rates of almost all the offerors, including MANCON. For example, the record shows that during discussions related to R-0012, S^3 was advised that the professional rates in its initial proposal for computer specialists, facilities administrators, engineers, environmental specialists, financial managers, and ILS specialists appeared low; MANCON was advised that its professional rates for environmental specialists, engineers, and ILS specialists appeared low. AR Tab 25, Post-Clearance Memorandum at 6-7. Similarly, during discussions related to R-0025, S^3 and MANCON were given the same direction regarding the categories of professional employees described above, as well as advice on unique issues related to doing business in Hawaii. AR Tab 26, Post-Clearance Memorandum at 6-8.[4] In response, both offerors claimed to have reviewed their rates carefully, and raised them in several areas. Given the similarities in the discussions here, and the nuanced responses to the agency direction from both offerors in their revised proposals, there is no evidence in this record to support a conclusion that S^3 was treated unfairly. Biospherics,Inc., supra.

In its supplemental protest, S^3 moves from its general challenge to a specific claim that during negotiations the contract specialist orally directed the use of GS step 5 rates for professionals, despite language in the RFP which, in S^3's view, mandated the use of GS step 1 rates. In support of its contention, S^3 appended to its supplemental protest numerous affidavits from its employees--five of which contain claims of hearing the contract specialist direct the use of GS step 5 rates, and five of which indicate that the affiant learned from others that the contract specialist directed the use of such rates.

FAR § 15.206(a) requires that when "the Government changes its requirements or terms and conditions, the contracting officer shall amend the solicitation." On the subject of whether such changes may be communicated orally, the FAR permits oral notice of changes, but requires that contracting officers formalize the oral notice with an amendment to the solicitation. FAR § 15.206(f).

Here, both solicitations incorporated a question from an offeror, and the agency answer thereto, addressing the use of GS step rates as follows:

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[4]We note for the record that the agency report's description of the general content of discussions with S^3 is confirmed by transcripts prepared from tape recordings of portions of the discussions, which were made by S^3 (apparently without the Navy's knowledge); these transcripts were appended to S^3's comments on the agency report.

11. Which step should be used for the GS equivalent rates?
Ans: Step 1

RFPs, Amend. 0002 at 4. Despite the agency's contention that this direction applied to other groups of employees, and not professionals, S^3's filings leave no doubt that it viewed this direction as applicable to an offeror's professional rates. Supp. Protest at 2; Supp. Comments at 5-6. In fact, S^3 expressly acknowledges that it viewed the direction it alleges it received during discussions--i.e., to use Step 5 rates for professional employees--as contrary to the terms of the RFP. Supp. Protest at 2-3.

Even if, as alleged, the agency orally indicated during discussions that offerors should use GS step 5 rates to set professional compensation--and the agency vigorously asserts it did not--offerors cannot reasonably rely on oral modifications to an RFP which are inconsistent with its written terms, absent a written amendment, or confirmation of the oral modification. Fluid Power Int'l, Inc., B-278479, Dec. 10, 1997, 97-2 CPD ¶ 162 at 3 n.1; Occu-Health, Inc.; Analytical Sciences, Inc., B-258598.2 et al., Feb. 9, 1995, 95-1 CPD ¶ 59 at 4. This clear principle provides fairness to all parties by ensuring that competitions are conducted under equal terms, and protects both protesters and agencies from the kind of credibility disputes raised here, as well as protecting the integrity of the procurement process overall.[5] Since S^3's assertion that discussions were improper is premised upon oral direction inconsistent with the written terms of the RFP, we will not consider this issue further.

With respect to S^3's challenge to the past performance evaluation, we turn first to its allegation that the agency's assessment of MANCON's past performance was unreasonable. In this regard, S^3 alleges that one of the MANCON's past performance references photocopied his ratings and detailed comments, and provided identical answers for each of the four contracts for which he was identified as a reference. In the area of past performance, as in any other area of proposal evaluation, our review

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[5]For the record, we note that the protester argues that its affidavits, and the contrast between them and the contract specialist's denial of having directed the use of step 5 rates, requires our Office to convene a hearing in this matter. We disagree. The purpose of a hearing here would be to take testimony from the contract specialist, and perhaps from all of the S^3 affiants, regarding the content of discussions, in order to determine which witness or witnesses appear most credible. For the policy reasons set forth above, we will not consider claims of alleged oral changes to the express terms of a solicitation. Thus, no hearing to explore these claims is needed, or appropriate. We also note that there is nothing in the record to support S^3's implied claim that MANCON must have received different direction during discussions. Rather, the Navy's materials (which, as noted above, are consistent with S^3's transcripts of recordings made during its own discussions) indicate that MANCON, like S^3, was advised in general terms, and with respect to specific categories, that its professional rates appeared low.

consists of examining the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7.

The past performance evaluation materials related to MANCON and provided with the agency report (AR Tab 20) consist, in part, of eight separate questionnaires, completed by two individuals, covering four prior MANCON contracts. Thus, there is a completed questionnaire from both individuals addressing all four contracts. In addition, the materials include copies of handwritten notes prepared by the contract specialist memorializing telephone conversations with both of the individuals who completed questionnaires, as well as with a third Navy individual familiar with MANCON's performance. Based on our review of these materials, it appears that S^3 is correct in its assertion that the answers and ratings from one of MANCON's references were photocopied and provided under separate cover sheets identifying each of the four contracts and its contract value.

Before turning to the specifics of the evaluation here, we note that providing identical photocopied questionnaire answers and comments in response to a request for information about an offeror's performance under different contracts, is a less than ideal way for agency references to provide the specific and detailed feedback needed to assess past performance during a competitive procurement. Under different circumstances, such an approach could place at risk the reasonableness of an agency's past performance assessment, and hence its procurement decisions. On the other hand, we conclude that the answers at issue here are sufficiently consistent with the individualized ratings provided by the other respondent, and with the information provided by all three individuals in their telephone conversations with the contract specialist, to merit a conclusion that the overall assessment of MANCON's past performance was reasonable.

For example, while the reference who photocopied his ratings and provided the same responses for all four contracts answered 52 times that MANCON's performance was outstanding, the reference whose replies were individualized awarded 45 outstanding ratings, and 7 ratings of good. In addition, the 7 ratings of good did not hinder this reference from rating MANCON's performance outstanding overall on all four contracts. The congruity between these ratings, and the telephonic responses of all three of the individuals interviewed by the contract specialist, leads us to conclude that the outstanding past performance rating given MANCON was, in fact, reasonable. We also note that S^3 has made no showing that the information provided was incorrect. As a result, we have no basis to question the past performance rating here.

With respect to S^3's three challenges to its own past performance rating of good (versus MANCON's outstanding rating), we need not address in detail the protester's specific contentions. During the course of this protest, S^3 raised a procedural challenge to the agency's inclusion of an incomplete Contractor Performance

Assessment Report (CPAR) in its past performance file; a challenge to the agency's failure to advise it during discussions of certain negative comments received from some of S^3's references; and a challenge to the agency's apparent, but not established, reliance on certain negative backup information about S^3's performance included with the agency report. We have reviewed each of these arguments, as well as the totality of the past performance materials submitted for both S^3 and MANCON, and conclude that--even if we accept at face value each of S^3's contentions, and even if S^3's overall past performance rating were raised from good to outstanding as a result of these contentions--the specific ratings, comments, and concerns raised throughout the materials would not support a decision to select S^3's higher-priced offer over MANCON's offer. In this regard, we note that MANCON's outstanding rating is supported nearly universally throughout the past performance materials; in contrast, the materials paint a more complex picture of S^3's past performance--including allegations of personality issues, and performance problems during a bankruptcy, which, the evaluators concede, as S^3 points out, were eventually addressed. Given these differences, we conclude that S^3 cannot show a reasonable possibility that it has been prejudiced by the agency's actions, or claim that but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

The protests are denied.

Anthony H. Gamboa
General Counsel