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Decision

Matter of: IAP-Hill, LLC

File: B-406289; B-406289.2; B-406289.3

Date: April 4, 2012

J. Alex Ward, Esq., Daniel Chudd, Esq., Carrie Apfel, Esq., Ethan E. Marsh, Esq., and Charles L. Capito, Esq., Jenner & Block LLP, for the protester.
William A. Roberts, III, Esq., Richard B. O’Keeffe, Jr., Esq., John R. Prairie, Esq., and Samantha M. Shinsato, Esq., Wiley Rein LLP, for Fluor Federal Solutions, LLC, an intervenor.
William C. Waller, Esq., and Joe D. Baker II, Esq., Department of the Navy, for the agency.
Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency’s evaluation of proposals is denied where record shows that agency’s evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations.
 2. Protest that solicitation included a latent ambiguity is denied where protester’s reading of the solicitation is not reasonable.
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DECISION

IAP-Hill, LLC, of Cape Canaveral, Florida, protests the award of a contract to Fluor Federal Solutions, LLC (FFS), of Greenville, South Carolina, under request for proposals (RFP) No. N69450-10-R-1255, issued by the Department of the Navy for base operating services at three military installations in the Jacksonville, Florida Area.¹ IAP maintains that the agency misevaluated proposals and made an unreasonable source selection decision.

¹ The services are to be performed at the Naval Air Station, Jacksonville, the Marine Corps Blount Island Command, and the Naval Station, Mayport.

We deny the protest.

BACKGROUND

The RFP contemplates the award of a fixed-price contract for specified requirements, as well as indefinite-delivery, indefinite-quantity requirements, for a base year, four one-year options and three additional one-year award options. RFP, amend. 10, at 7. The RFP provided for award on a “best value” basis, considering six equally weighted non-price evaluation factors (corporate experience/capability of key personnel, past performance, management, technical approach, small business utilization and safety) which, collectively, were approximately equal to price. RFP, amend. 11, at 12-13.²

In response to the solicitation, the agency received 10 proposals, 9 of which were included in the competitive range (the 10th proposal was eliminated from consideration because the agency determined that it had been submitted by a concern with an organizational conflict of interest). Contracting Officer’s Statement at 4, 18. The agency then engaged in several rounds of discussions with the competitive range offerors. Ultimately, final proposal revisions (FPR) were obtained and evaluated.³

The record shows that the protester’s proposal was ranked the highest among all offerors under the non-price considerations, receiving adjectival ratings of excellent under all 6 evaluation factors. AR, exh. 29, at 6. FFS’s proposal was ranked second under the non-price considerations, receiving excellent ratings under all of the evaluation factors except management and safety; under those factors it received good ratings. Id. FFS submitted the second lowest price (\$317,753,818.20), while the protester submitted the fourth lowest price (\$[deleted]). Id.

When price and the non-price factors were considered together, the record shows that FFS was ranked first, while the protester was ranked third overall. AR, exh. 29, at 70-73. The agency concluded that the technical superiority of the FFS proposal merited paying a price premium as compared to the lowest priced offeror, but that the technical superiority of the protester’s proposal did not merit the price premium associated with award to IAP. Id. On the basis of these evaluation results, the agency selected FFS as the offeror submitting the proposal offering the

² Proposals were evaluated and assigned adjectival ratings of either excellent, good, satisfactory, marginal, poor (or, in the case of past performance “no rating”) under each of the non-price factors. Agency Report (AR), exh. 26, at 21.

³ The agency obtained two FPRs; the second FPRs were used in the agency’s source selection.

best value to the government. AR, exh. 30. After being advised of the agency's source selection decision and receiving a debriefing, IAP filed this protest.

PROTEST

IAP challenges the agency's evaluation of proposals under virtually all of the non-price evaluation factors. IAP also maintains that the RFP contained a latent ambiguity concerning how prices were to be submitted, and that this ambiguity resulted in the offerors submitting prices on a differing basis. IAP alleges that, as a result of these evaluation errors, the agency's source selection decision was unreasonable. We have considered all of IAP's challenges and find none of them has merit. We discuss IAP's principal allegations below.

Evaluation of Corporate Experience and Past Performance

The record shows that the agency attributed the experience and past performance information of Fluor Corporation (the parent concern of FFS), as well as that of FFS's affiliated concerns, to FFS during its evaluation of the FFS proposal under the corporate experience/capability of key personnel and past performance evaluation factors. According to the protester, the agency erroneously attributed the corporate experience/past performance information of these other business elements of the Fluor group of companies to FFS; IAP asserts that FFS has no experience of its own and, therefore, should not have been credited with the experience/past performance of the other business elements of the Fluor group of companies. The protester maintains that the resources and capabilities of these other Fluor business elements were not offered in FFS's proposal. IAP therefore concludes that the agency erroneously assigned the FFS proposal excellent ratings under the corporate experience/capability of key personnel and past performance evaluation factors, and that the agency's evaluation under the other non-price factors (management, technical approach, small business utilization and safety) also was unreasonable because the record shows that FFS was given strengths under those factors based on experience it does not possess.

We find no merit to this aspect of IAP's protest. An agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. Ecompex, Inc., B-292865.4, et al., June 18, 2004, 2004 CPD ¶ 149 at 4-5. The relevant consideration is whether the resources of the parent or affiliate--its workforce, management, facilities or other resources--will be provided or relied upon for contract performance, such that the parent or affiliate will have meaningful involvement in contract performance. Id. Where the proposal shows a significant nexus between the parent or affiliate concern's resources and the contracting entity--for example, use of the affiliate's employees as key personnel or a commitment of the parent's financial resources--

there is nothing objectionable in attributing the experience or past performance of the related entities to the business entity entering into the contract. Id.

The record here demonstrates that, by the terms of the FFS proposal, the resources of the Fluor group of companies will be available to FFS in its performance of this contract. By way of initial explanation, Fluor's proposal includes two of its annual Form 10-Ks filed with the United States Securities and Exchange Commission for the two years preceding submission of its proposal. Fluor describes its business model in its Form 10-Ks as follows:

Fluor Corporation is a holding company that owns the stock of a number of subsidiaries. Acting through these subsidiaries, we are one of the largest professional services firms, providing engineering, procurement, construction and maintenance as well as project management services on a global basis.

AR, exh. 38.h.94, at 484, 616. The proposal goes on to provide additional specific information relating to the resources of Fluor Corporation (the parent company), as well as the resources of the subsidiaries/affiliates of the parent company and FFS, that will be used in performing the contract. For example, in describing its approach to handling workload surges for natural disasters, FFS's proposal provides:

Fluor's team has more than [deleted] craft personnel working on various military bases within Florida that can support emergency requirements.

[deleted]

AR, exh. 37.c.14, at 262. FFS's proposal also explains the relationship between FFS and another wholly owned Fluor Corporation subsidiary, [deleted]:

[deleted]

AR, exh. 37.c.14, at 37.

The record also shows that the overwhelming majority of the key personnel and company leadership being proposed to perform this contract are employees of other business elements of the Fluor group of companies. Of the [deleted] leadership/key personnel positions proposed by FFS ([deleted] key personnel plus FFS's proposed president), [deleted] currently are employed by one or another business element of the Fluor group of companies. AR, exh. 37.c.14, at 1-77-1-101e. Specifically, the record shows that the proposed president of FFS, as well as the proposed Jacksonville and Mayport site managers are [deleted] employees; as noted [deleted] is a wholly owned subsidiary of Fluor Corporation. Id. FFS's port services manager and its transportation manager for Jacksonville also are [deleted]

employees. Id. FFS's proposed quality control, safety and environmental managers are employees of [deleted]. Id. Finally, FFS's proposed weight handling equipment operations and maintenance manager is an employee of [deleted], yet another wholly-owned subsidiary of Fluor Corporation. Id. In sum, the record shows that FFS's proposed leadership/key personnel are overwhelmingly from the Fluor group of companies.

Finally, the FFS proposal makes an unconditional commitment of the financial resources and capabilities of Fluor Corporation, along with the "Fluor family" of companies. Specifically, the proposal provides:

[deleted]

AR, exh. 38.h.94, at 9-1.

In light of the foregoing considerations, we conclude that FFS proposed to perform the contract with an integrated amalgam of resources from the Fluor group of companies. Correspondingly, we conclude that the agency reasonably credited FFS with the experience and past performance of its parent and affiliated companies. We therefore deny this aspect of IAP's protest.

Adequacy of Proposed Staffing

IAP challenges the agency's evaluation of the awardee's proposed staffing in both its technical and price evaluations. According to the protester, had the agency adequately evaluated FFS's proposed staffing, it would have concluded that it was inadequate to perform the requirements and posed a serious risk to successful contract performance. In support of its position, IAP notes that FFS's proposed staffing is significantly lower than IAP's proposed staffing (the protester proposed a total of [deleted] full time equivalents (FTEs) versus FFS's proposal of [deleted] FTEs). The protester also points out that FFS's proposed staffing is lower than the government estimate for the requirement ([deleted] FTEs) as well as the average proposed staffing for all offerors ([deleted] FTEs). The protester maintains that, because it is the incumbent contractor for the solicited requirement, its proposed staffing represents a realistic benchmark against which to assess the awardee's proposed staffing.

We find no merit to this aspect of IAP's protest. In considering protests relating to an agency's evaluation of proposals, we do not independently evaluate proposals; rather we review the agency's evaluation to ensure that it is consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. A protester's mere disagreement with the agency's evaluation conclusions does not provide a basis for

our Office to object to the evaluation. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 6.

As an initial matter, we point out that, as noted by the agency, this is a performance based requirement that did not dictate any particular staffing approach or labor mix. Offerors were free to propose a staffing approach that, consistent with the offeror's technical approach, accomplished the work contemplated under the solicitation. Both the awardee's and the protester's staffing deviated from the government estimate by [deleted]; FFS proposed [deleted] (or approximately [deleted] percent) fewer total FTEs than the government estimate while IAP proposed [deleted] (or approximately [deleted] percent) more total FTEs than the government estimate. We find that the evaluators' acceptance of such relatively small deviations from the benchmark established by the government estimate are reasonable in a performance based requirement context. Moreover, there is nothing in the record to show that the protester's proposed staffing (or the average proposed staffing among all offerors) necessarily is the more appropriate mark against which to measure the adequacy of the awardee's proposed staffing in light of the fact that the offerors all used different technical approaches.

More fundamentally, the record shows that, as between the protester and FFS, both firms proposed essentially identical [deleted], and that the difference between the offerors' proposed staffing was attributable entirely to differences in their proposed [deleted]. Specifically, the record shows that FFS proposed [deleted] FTEs for [deleted], while IAP proposed an almost identical [deleted] FTEs for [deleted]. AR, exh. 28, attach. A (cost evaluation summary tables), at 10-15, 35-38, 50-51, 59-60. In comparison, the IAP proposal offered a total of [deleted], AR, exhs.36.h.220, at 1-2; 36.h.230, at 37-38, while the FFS proposal offered a total of [deleted]. AR, exh. 38.h.94, attach. J-B1, at 5.

The record therefore demonstrates that, from the perspective of accomplishing the substantive tasks required under the RFP, both firms had [deleted]. It follows that there was no basis for the agency to have found FFS's proposed staffing inherently inadequate simply because it differed from IAP's proposed staffing. We therefore deny this aspect of IAP's protest.

Alleged Latent Ambiguity

IAP asserts that the RFP, as amended, contained a latent ambiguity regarding how offerors should prepare their price proposals. In particular, the RFP instructed offerors as follows:

B.11 UNIT PRICE ADJUSTMENTS IN OPTION PERIODS

This contract incorporates Davis Bacon Wage Determinations, Service Contract Acts (SCAs), and Collective Bargaining Agreements (CBAs)

from the previous service provider. In accordance with subparagraph (b) of the Fair Labor Standards and Service Contract Act—Price Adjustment Clause, FAR 52.222-43 and subparagraph (b) of the Davis-Bacon Act—Price Adjustment Clause, FAR 52.222-32 offerors shall not include escalation of wage and fringe benefit rates for Service Contract Act covered employees and/or Davis-Bacon Act covered employees in the option periods of performance. Wage and fringe benefit rates used for the base performance period will be used in pricing labor costs for all periods of performance in the option years. In accordance with the referenced clauses, the contractor may be entitled to an adjustment in contract price only when a new SCA or DBA wage determination is modified into the contract and it affects wages and fringe benefits of covered employees.

RFP at 19. Amendment No. 14 to the solicitation, which was issued prior to the submission of FPRs incorporated a new collective bargaining agreement (CBA), effective from July 2011 through June 2014, between IAP (the current incumbent contractor) and the cognizant labor union. This new CBA included escalated wage rates through 2014.

In preparing its FPR, IAP used the escalated wage rates to calculate its price for the option years. The record shows, however, that all of the remaining firms, consistent with the terms of the original RFP, did not use escalated rates for the option years. IAP maintains that the terms of amendment No. 14 introduced a latent ambiguity into the solicitation that led it to price its proposal in a manner that differed from the other offerors.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2; Fox Dev. Corp., B-287118.2, Aug. 3, 2001, 2001 CPD ¶ 140 at 2.

We find the protester's reading of the solicitation unreasonable. As quoted above, the RFP instructions to offerors were unequivocal, expressly instructing the offerors not to escalate their proposed wage rates for SCA wage rate employees for the option years of the contract (all of the employees covered by the CBA issued with amendment No. 14 are SCA wage rate covered employees). Furthermore, the RFP also incorporated the terms of Federal Acquisition Regulation (FAR) § 52.222-43 which specifically requires the contractor to warrant that it has not included any amount in its price to cover contingencies for which increased costs would be allowable pursuant to an equitable adjustment under that provision: "b) The Contractor warrants that the prices in this contract do not include any allowance for

any contingency to cover increased costs for which adjustment is provided under this clause.” FAR §52.222-43(b).

Amendment No. 14 did nothing to alter or modify the express instructions to the offerors (or the applicable FAR provision); it simply provided an updated CBA, without further elaboration. It follows that the instructions in the RFP remained in full force and continued to direct offerors to use only base year rates in calculating their prices.

To the extent that it appeared to IAP that the terms of amendment 14 somehow altered or modified the earlier proposal preparation instructions, this would have been a patent ambiguity inasmuch as the two provisions would directly be in conflict. The earlier instructions directed offerors not to escalate prices to account for increases in wages during the option years, but, according to IAP, the CBA required offerors to increase prices to account for escalation of wages in the option years. Since the RFP presented what appeared to IAP to be a direct conflict between its provisions, this amounted to a patent ambiguity rather than a latent ambiguity. LS3, Inc., B-401948.11, July 21, 2010, 2010 CPD ¶ 168 at 3. As such, any objection to the terms of the RFP, to be timely, had to be filed prior to the closing date for FPRs.⁴ Id.

The protest is denied.

Lynn H. Gibson
General Counsel

⁴ IAP suggests that the RFP distinguishes between compliance with SCA wage rates and Davis-Bacon Act wage rates on the one hand, and CBA wage rates on the other. According to the protester the prohibition against escalating proposed prices was confined to SCA- and Davis-Bacon Act-dictated wage rates, but not CBA-dictated wage rates. IAP Comments, Feb. 13, 2012, at 30-32. This reading of the solicitation is unreasonable. The prohibition against escalating prices in the option years is stated in terms of the types of employees, not the types of wage rates: “offerors shall not include escalation of wage and fringe benefit rates for Service Contract Act covered employees and/or Davis-Bacon Act covered employees in the option periods of performance.” RFP at 19. As noted, the CBA provides wage rates in lieu of SCA-dictated wage rates, but the employees in question are SCA wage rate covered employees. Thus, the RFP’s prohibition against escalation applies with equal force to employees covered by the CBA.