



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: Del-Jen Education & Training Group/Fluor Federal Solutions LLC

File: B-406897.3

Date: May 28, 2014

William A. Roberts III, Esq., Richard B. O’Keeffe, Jr., Esq., and Samantha S. Lee, Esq., Wiley Rein LLP, for the protester.

G. Lindsay Simmons, Esq., Hopewell H. Darneille III, Esq., and Katherine A. Calogero, Esq., Jackson Kelly PLLC, for Adams & Associates, Inc., the intervenor. Colin W. O’Sullivan, Esq., Dennis Adelson, Esq., and David R. Koepfel, Esq., Department of Labor, for the agency.

Louis A. Chiarella, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that a solicitation was defective because it did not represent the agency’s changed requirements, which developed after the initial proposals had been submitted and which did not provide offerors with an opportunity to submit revised proposals, was required to be filed within 10 days of when the protester knew or should have known of the basis of its protest.

2. Protest challenging the agency’s evaluation of protester’s proposal is denied where evaluation was reasonable and consistent with the stated evaluation criteria.

DECISION

Del-Jen Education & Training Group/Fluor Federal Solutions LLC, of Phoenix, Arizona, protests the award of a contract to Adams and Associates, Inc., of Reno, Nevada, under request for proposals (RFP) No. DOL111RP20421, issued by the Department of Labor (DOL) to operate the Kittrell Job Corps Center (KJCC), in Kittrell, North Carolina. Del-Jen argues that the contract was awarded on the basis of a solicitation that no longer accurately represents the agency’s requirements, and challenges the evaluation of its proposal.

We dismiss the protest in part and deny it in part.

BACKGROUND

The RFP, issued on September 23, 2011, contemplated the award of a cost-plus-award-fee contract for a 2-year base period with three 1-year options.¹ In general terms, the statement of work required the contractor to provide all material and personnel necessary to operate the KJCC, including the provision of academic, career technical, social skills, career development training, and related support services.² RFP §§ B, C.1. Offerors were informed that the KJCC “shall operate at an estimated planned average on-board strength” totaling 350 students-- 300 residential students and 50 nonresidential students. RFP § C.1.

The RFP stated that award would be made on a best-value basis, considering the following factors, subfactors, and sub-subfactors, generally in descending order of importance:

Technical	
	Technical Approach
	Career Development Period
	Career Preparation Period
	Outreach
	Administrative & Management Support Services
	Staff Resources
	Level and Adequacy of Staffing
	Qualifications of Proposed Management Team
	Center Director Credentials, Experience, and Accomplishments
	Staff Development, Retention, and Incentives
	Transition/Phase-Out Plan
Past Performance	
Business Management	
	Cost
	Subcontracting Plan

RFP § M.1; amend. 2, at 12. The noncost factors, when combined, were significantly more important than cost. RFP § M.2.

¹ Although the solicitation stated the agency intended to award a cost-plus-incentive-fee contract, the RFP indicated that the fee determination was actually to be based on the quality of the contractor’s performance. See Federal Acquisition Regulation (FAR) § 16.405-2 (cost-plus-award-fee contracts).

² The RFP incorporated by reference the Job Corps Policy and Requirements Handbook (PRH), which set forth mandatory program operation requirements. RFP § C.1.D.

DOL received proposals from seven offerors, including Del-Jen (the incumbent) and Adams, which were evaluated by the agency's technical evaluation panel (TEP) using an adjectival rating scheme stated in the solicitation.³ The agency evaluated offerors' costs for both reasonableness and realism, but assigned adjectival ratings to offerors' cost proposals based on various criteria (e.g., accurate calculations). See RFP § M.1. DOL selected Adams' proposal for contract award. AR, Tab 13, KJCC Award Notice, May 14, 2012. Following a debriefing,⁴ see AR, Tab 14, Del-Jen Debriefing, June 14, 2012, Del-Jen protested to our Office, challenging the evaluation of its proposal and the agency's best-value decision. Protest, B-406897, June 18, 2012. On July 18, the agency informed our Office and Del-Jen that it would take corrective action by reevaluating proposals and making a new award decision. AR, Tab 16, DOL Email to GAO, July 18, 2012. We dismissed Del-Jen's protest as academic. Del-Jen Educ. & Training Group, B-406897, July 20, 2012.

DOL reevaluated proposals and again selected Adams for award. AR, Tab 18, KJCC Award Notice, Dec. 7, 2012. Del-Jen timely requested a debriefing on December 9, which the contracting officer provided in writing on December 21.⁵ Following its debriefing, Del-Jen again protested to our Office, challenging the agency's evaluation and selection decision. Protest, B-406897.2, Dec. 26, 2012. On January 18, 2013, the agency stated that it would again take corrective action by reevaluating offerors' proposals and making a new award decision. AR, Tab 23,

³ Proposals were rated as exceptional, very good, satisfactory, marginal, unsatisfactory, or, with regard to the past performance factor, neutral. RFP § M.1. Notwithstanding the stated adjectival rating scheme, the TEP actually evaluated offerors' subcontracting plans on a pass/fail basis. See Agency Report (AR), Tab 37, Source Selection Decision, Jan. 27, 2014, at 32, 34.

⁴ The FAR provides that a post-award debriefing should be provided, to the maximum extent practicable, within 5 days of a timely request, see FAR § 15.506(a)(2); the debriefing here was provided 30 days after receipt of Del-Jen's request.

⁵ The agency declined to provide Del-Jen with an opportunity to ask questions in the debriefing. AR, Tab 21, DOL Letter to Del-Jen, Dec. 21, 2012, at 2. While our Office will not review the adequacy of an agency's debriefing (as it is a procedural matter that does not affect the validity of an awarded contract or issued task order), a decision not to provide an offeror the opportunity to ask reasonable questions as part of a debriefing is not consistent with applicable procurement regulations, and may unnecessarily cause an unsuccessful offeror to file a bid protest in order to obtain such information. Optimal Solutions & Techs., B-407467, B-407467.2, Jan. 4, 2013, 2013 CPD ¶ 20 at 3; see FAR § 15.506(d)(6) (at a minimum, a debriefing is to provide "[r]easonable responses to relevant questions about whether the source selection procedures . . . were followed.").

DOL Email to GAO, Jan. 18, 2013. We then dismissed Del-Jen's December 26 protest as academic. Del-Jen Educ. & Training Group, B-406897.2, Jan. 22, 2013.

Following another evaluation, the parties' proposals were rated as follows:

		Adams	Del-Jen
Technical			
	Technical Approach	Very Good	Very Good
	Career Development Period	Exceptional	Satisfactory
	Career Preparation Period	Very Good	Very Good
	Outreach	Very Good	Very Good
	Administrative & Management Support Services	Very Good	Very Good
	Staff Resources ⁶	Very Good	Very Good
Past Performance		Very Good	Very Good
Business Management			
	Cost Proposal	Satisfactory	Satisfactory
	Subcontracting Plan	Acceptable	Acceptable
Proposed Cost		\$43,742,649	\$44,224,270
Evaluated Cost		\$44,446,745	\$44,224,270

AR, Tab 37, Source Selection Decision, Jan. 27, 2014, at 33-34.

The TEP's adjectival ratings were supported by a narrative discussion that identified the offerors' respective strengths and weaknesses. For example, under the technical approach subfactor, the agency evaluators identified a total of five strengths and no weaknesses in Adams' proposal, and three strengths and two weaknesses in Del-Jen's proposal. Id. at 6-7, 14-16.

On January 27, 2014, the contracting officer, the source selection authority for this procurement, determined that the technical superiority of Adams' proposal outweighed Del-Jen's evaluated cost advantage (\$22,475, or 0.50 percent), and that Adams' proposal represented the best value to the government. Id. at 36. On January 31 the agency notified Del-Jen of the agency's selection of Adams' proposal, and Del-Jen immediately requested a debriefing, which the contracting officer provided in writing on February 14.⁷ This protest followed.

⁶ To the extent the TEP assigned adjectival ratings to offerors' proposals under the staff resources sub-subfactors, DOL did not provide this part of the evaluation for the record.

⁷ Again the contracting officer did not provide Del-Jen with the opportunity to ask questions about DOL's final evaluation and award decision as part of the debriefing. (continued...)

DISCUSSION

Del-Jen raises two grounds of protest. First, Del-Jen argues that the award was improper because the solicitation allegedly no longer reflects the agency's requirements. Next, the protester contends that the agency's evaluation of its proposal under the technical approach and staff resources subfactors was unreasonable in certain regards. We have considered all issues and arguments advanced by Del-Jen and although we do not address them all, find that none provide a basis on which to sustain the protest.

Inaccurate Requirements

Del-Jen protests that the award was improper because the solicitation no longer reflects the agency's requirements, because of changes that have occurred between the time the RFP was issued and award was made. Specifically, the protester states that the RFP informed offerors that the KJCC would operate with an estimated average on-board strength of 350 students, but that reductions in DOL's funding have resulted in an on-board strength of 275 students, as reflected in the 2013 bridge contract awarded to Del-Jen. Del-Jen contends that it would have changed its technical approach, in light of the more than 20 percent reduction in student enrollment, which may have also altered the relative cost difference between the offerors' proposals. Protest, Feb 19, 2014, at 23-25.

The record shows that effective January 28, 2013, new student enrollment at all Job Corps Centers was suspended as a result of DOL's budgetary shortfalls. See AR, Tab 24, Job Corps Program Instruction No. 12-26, Jan. 18, 2013, at 1. While DOL subsequently lifted the new enrollment suspension, it also asked Del-Jen for recommendations on downsizing (referred to as "right sizing") the KJCC operations in terms of both costs and on-board strength.⁸ AR, Tab 29, DOL Email to JCC

(...continued)

Specifically, when Del-Jen asked to submit questions in response to the debriefing information received, the contracting officer replied, "I am not extending Del-Jen's [] debriefing session," and "consider[] the debriefing closed." AR, Tab 42, Contracting Officer Email to Del-Jen, Feb. 17, 2014. It was only after Del-Jen filed its current protest with our Office that the contracting officer agreed to provide the offeror with the opportunity to ask questions as part of a debriefing. AR, Tab 46, Contracting Officer Email to Del-Jen, Feb. 19, 2014.

⁸ Del-Jen states that DOL's April 11 email informed the contractor that the KJCC average on-board strength would be reduced from 350 students to 275 students, and instructed the contractor to develop commensurate program, staffing, and cost reductions. Protest, Feb. 19, 2014, at 23; see AR, Tab 31, Del-Jen Letter to DOL, May 3, 2013, at 1.

Directors, Apr. 11, 2013, at 2. Based on the contractor's input, the parties modified Del-Jen's incumbent contract and reduced the estimated on-board strength from 350 students to 275 students. AR, Tab 32, Mod. 6, Contract No. DOLJ13UA200004, June 14, 2013, at 2. Similarly, the short-term bridge contract subsequently awarded to Del-Jen on July 31 for continued KJCC operations also had a total estimated enrollment of 275 students. AR, Tab 34, Contract No. DOLJ13UA200006, July 31, 2013, at 3.

The record also shows that Del-Jen was aware that for at least one other Job Corps Center solicitation, DOL issued an amendment in light of reduced estimated student enrollment. Specifically, with regard to the Hooks Job Corps Center in Memphis, Tennessee, the agency amended the solicitation in response to an approximate 20 percent reduction in the estimated on-board strength. AR, Tab 33, Amend. 003, RFP No. DOL12UA20001, July 31, 2013, at 1. By contrast, with regard to the KJCC solicitation, at no time prior to award did Del-Jen inquire about whether the agency planned to amend the solicitation, and at no time did the agency amend the solicitation.

The agency argues that Del-Jen's protest is factually inaccurate; notwithstanding the temporary reductions in student enrollment during 2013, the awarded contract requires Adams to operate the KJCC based on an estimated average on-board strength of 350 students (as set forth in the RFP). AR, Mar. 26, 2014, at 11-12, 19. DOL also argues that Del-Jen has failed to demonstrate how it was prejudiced; that is, failed to show how it would have proposed the cost-reimbursement effort here any differently based on a lower on-board strength estimate. Id. at 22-24. As a preliminary matter, however, the agency argues that Del-Jen's protest is also untimely, as Del-Jen was required to challenge the solicitation defect within 10 days of when it knew of its reason for protest rather than after award. Id. at 15-17.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of providing parties a fair opportunity to present their cases, and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Peacock, Myers & Adams, B-279327, Mar. 24, 1998, 98-1 CPD ¶ 94 at 3-4; Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 at 2. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1). Where alleged improprieties do not exist in the initial solicitation, but subsequently occur (e.g., via an amendment to the solicitation), they generally must be protested not later than the next closing time for receipt of proposals. Id.; see Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 5. This rule, however, is silent regarding a situation where, as here, the agency does not provide an opportunity to submit revised proposals after the alleged solicitation defect occurs. In such circumstances we have held that an offeror is obligated to protest the issue, which concerns the fundamental ground rules of the procurement,

within 10 days after knowing of the reason for protest.⁹ Armorworks Enters., LLC, supra, at 6; U.S. Bank, B-404169.3, Feb. 15, 2011, 2011 CPD ¶ 43 at 5 n.2. Moreover, because the purpose underlying the debriefing exception to our timeliness rules for negotiated procurements is not present in a solicitation impropriety challenge (i.e., to preclude the filing of a protest before actual knowledge that the basis for protest exists), we have declined to apply the debriefing timeliness rules under these circumstances. Armorworks Enters., LLC, supra, at 7; see 4 C.F.R. § 21.2(a)(2).

We conclude that Del-Jen's protest alleging that the solicitation did not accurately reflect the agency's changed requirements is untimely and therefore not for consideration by our Office. As detailed above, as the incumbent contractor Del-Jen was fully aware of the facts on which it bases its protest many months in advance of the protest's filing. As early as April 11, 2013, Del-Jen was instructed that the KJCC estimated student enrollment would be reduced by over 20 percent from 350 students to 275 students. This was followed by formal contract actions in both June and July 2013 that reduced the estimated average on-board strength for the KJCC. Del-Jen was also aware that DOL had in July 2013 amended the solicitation for another Job Corps Center procurement to reflect the reduced student enrollment estimates, but had not done so here. While Del-Jen may have had no responsibility to notify the agency that its needs appeared to have changed, as the protester argues, we find that it was incumbent upon Del-Jen to protest this issue, which concerns the fundamental grounds rules of the procurement, within 10 days of when the basis of protest was known or should have been known.¹⁰

⁹ Underlying our timeliness rules regarding solicitation improprieties is the principle that challenges which go to the heart of the underlying ground rules by which a competition is conducted, should be resolved as early as practicable during the solicitation process, but certainly in advance of an award decision if possible, not afterwards. Armorworks Enters., LLC, supra, at 7. Such a rule promotes fundamental fairness in the competitive process by preventing an offeror from taking advantage of the government as well as other offerors, by waiting silently only to spring forward with an alleged defect in an effort to restart the procurement process, potentially armed with increased knowledge of its competitors' position or information. Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308, 1313-14 (Fed. Cir. 2007). It also promotes efficiency by ensuring that concerns regarding a solicitation are raised before contractor and government resources are expended in pursuing and awarding the contract, thus avoiding costly and unproductive litigation after the fact. Id.

¹⁰ Del-Jen argues that in light of the fact that DOL amended another Job Corps Center solicitation because of the reduced on-board strength estimate, it could reasonably expect and await DOL to do the same here. Protest, April 7, 2014, at 6-7. We find that Del-Jen's waiting of more than 6 months from when it knew of the other solicitation amendment (and from when the 2013 bridge contract was

(continued...)

Del-Jen also argues that our decision in Armorworks is distinguishable, insofar as the solicitation amendment at issue in that case introduced the alleged defect (without establishing a new closing date), while the defect here was not introduced but came about because of the passage of time. Protest, Apr. 7, 2014, at 7. We find this to be a distinction without a difference. Regardless of how the alleged solicitation defect occurred, it concerned the fundamental ground rules of the procurement against which all offerors were to propose. Allegations that a solicitation is or has become defective, by whatever means, are ones to be raised and resolved as early as possible in the procurement process. Quite simply, Del-Jen was in a position to be fully aware of the facts which formed the basis of its protest, and could not wait until after contract award to protest an alleged solicitation defect.¹¹

Evaluation of Del-Jen's Technical Proposal

Del-Jen also protests the evaluation of its technical proposal, challenging one weakness assigned under the staff resources subfactor and two weaknesses assigned under the technical approach subfactor.¹² The protester contends that, if DOL had reasonably evaluated its technical proposal, Del-Jen's proposal would have been found to offer the best value to the government. Protest, Feb. 19, 2014, at 25-34.

In reviewing a protest challenging the agency's evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency, as the evaluation of proposals is generally a matter within the agency's discretion. Swift & Staley, Inc., B-408792, Dec. 6, 2013, 2013 CPD ¶ 284 at 4; J5 Sys., Inc., B-406800, Aug. 31, 2012, 2012 CPD ¶ 252 at 6. Rather, we will review the record to determine whether the agency's evaluation was reasonable; consistent with the stated evaluation criteria, applicable procurement statutes, and regulations; and adequately documented. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. An offeror's mere disagreement with an agency's judgment is insufficient to establish that the agency acted

(...continued)

awarded using the lower on-board strength estimate) without once inquiring whether DOL planned to amend the solicitation here was not reasonable.

¹¹ In any event, we find the contract awarded to Adams does not materially differ from that solicited, and that Del-Jen has failed to demonstrate how its proposal for this cost reimbursement contract would have been materially different had the estimated average on-board strength been 275 students rather than 350 students.

¹² Del-Jen does not challenge the agency's evaluation of its proposal in any other regard, nor does Del-Jen protest any aspect of DOL's evaluation of Adams' proposal.

unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

Here, the record shows that the agency's evaluation of Del-Jen's technical proposal was reasonable, consistent with the stated evaluation criteria, and adequately documented. Further, we find that Del-Jen has failed to demonstrate that it was prejudiced by any of the alleged evaluation errors.

For example, with respect to the staff resources subfactor, offerors were required to submit a detailed organization chart; staff schedules; position descriptions and resumes of key personnel; an explanation of corporate oversight; and a plan for developing, retaining, and rewarding staff. RFP § L.7. Relevant to the protest here, the PRH (the Job Corps Policy and Requirements Handbook incorporated into this solicitation) establishes minimum staff qualifications (education and/or experience) for various KJCC positions, requires the contractor to ensure that all staff meet minimum qualifications, and requires the contractor to request written approval or waivers from the Job Corps Regional Director for the hiring of staff who do not meet those minimum qualifications or approved position descriptions. AR, Tab 3, PRH § 5.2-2, exhib. 5-3, Minimum Staff Qualifications.

Del-Jen's staff resources proposal included the offeror's development, retention, and reward plan, which stated in part that:

We have found through our experience in hiring qualified staff at our Job Corps centers that finding applicants with specific educational qualifications is at times challenging We make every effort to hire qualified candidates with the appropriate credentials, but when this is not possible, we ensure that we are able to select a candidate that has an equivalent number of years of work experience for a specific position.

As indicated in the position descriptions, substitutions between work experience and academic credentials are possible However, such tradeoffs for top management positions require the approval of the President of [Del-Jen's] Education and Training Group.

AR, Tab 12, Del-Jen Proposal, Nov. 8, 2011, Staff Resources, at 13.

The TEP rated Del-Jen's staff resources proposal as very good, identifying three strengths and one weakness. Regarding Del-Jen's staff development plan, the agency evaluators found that:

Del-Jen's proposal is ambiguous at best regarding whether Del-Jen understands the above-referenced PRH waiver requirements,

introducing risks regarding the hiring of staff who do not meet minimum qualifications In fact, Del-Jen's proposal contains no suggestion that it understands the requirement for requesting a written approval or waiver from the [Job Corps] Regional Director for hiring staff who do not meet the minimum qualifications.

AR, Tab 37, Source Selection Decision, Jan. 27, 2014, at 19.

As set forth above, Del-Jen's proposal details how it will employ substitutions between work experience and academic credentials as part of selecting candidates for the KJCC positions. Although the protester's proposal discussed its own internal approval process for permitting such tradeoffs, Del-Jen's proposal made no mention of the fact that such qualification substitutions would also require the contractor to request written approval or waiver from the Job Corps Regional Director. As a result, agency evaluators concluded that Del-Jen's proposal did not clearly reflect that the offeror understood the requisite approval process. While Del-Jen argues that it is the company's practice to submit waiver requests to the Job Corps Regional Director for approval after the internal approval has occurred, see Protest, Feb. 19, 2014, at 27, the protester does not demonstrate (or allege) that this was stated in its proposal.¹³ Since Del-Jen's proposal failed to demonstrate recognition of applicable PRH waiver requirements, we conclude that the TEP reasonably found that this introduced a performance risk into Del-Jen's staff hiring plan.¹⁴

We also find that Del-Jen has failed to demonstrate that it was prejudiced by the agency action it protests. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it

¹³ Similarly, although Del-Jen's proposal separately referred to the "appropriate approval" for experience and educational requirement substitutions, see AR, Tab 12, Del-Jen Proposal, Staff Resources, at 3, the proposal does not indicate that the offeror knew what the "appropriate approval" was.

¹⁴ We also find reasonable the agency's decision to assess two weaknesses against Del-Jen's proposal under the technical approach subfactor--one for the timing of resume development as part of career transition readiness, and the other related to Del-Jen's student standards of conduct incentive program. The record reflects the TEP reasonably concluded that Del-Jen's proposal was ambiguous regarding when student resume development would occur relative to projected graduation, and that Del-Jen's incentive program (a color card system) lacked sufficient detail regarding how it would operate and incentivize student behavior. It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information, which clearly demonstrates an understanding of the solicitation requirements and allows a meaningful review by the procuring agency. See J5 Sys., Inc., supra, at 9.

would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Lockheed Martin Integrated Sys., Inc., B-408134.3, B-408134.5, July 3, 2013, 2013 CPD ¶ 169 at 8; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

As detailed above, the TEP identified three strengths and one weakness in Del-Jen's staff resources proposal and rated it very good. The record shows that even without the challenged weakness, Del-Jen's "very good" rating under the staff resources subfactor would not have changed. Similarly, even without the two challenged weaknesses under the technical approach subfactor, Del-Jen's overall "very good" rating would have remained unchanged.

Further, although the contracting officer mentioned the existence of Del-Jen's weaknesses in the selection decision when determining Adams' technical superiority, the record reflects that the contracting officer's judgment here was based primarily on the many strengths identified in the awardee's proposal, including: [DELETED]. AR, Tab 37, Source Selection Decision, Jan. 27, 2014, at 35. In sum, it was Adams' many strengths (especially with regard to the career development period, where the offeror received an exceptional rating) rather than Del-Jen's weaknesses that led to the contracting officer's finding that Adams' proposal was technically superior to the proposal submitted by Del-Jen, and offered the overall best value to the agency. Accordingly, we find the agency's evaluation of Del-Jen's technical proposal was reasonable.

The protest is dismissed in part and denied in part.

Susan A. Poling
General Counsel