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Decision

Matter of: FEDSYNC BEI, LLC

File: B-417492; B-417492.2

Date: July 23, 2019

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DIGEST

Protest challenging the agency's evaluation of technical proposals is denied where the evaluation was reasonable and consistent with the solicitation requirements.

DECISION

FEDSYNC BEI, LLC (FED-B), of Alexandria, Virginia, protests the award of a contract to Seventh Sense Consulting (SSC), of Woodbridge, Virginia, under request for proposals (RFP) No. 80NSSC18R0025, issued by the National Aeronautics and Space Administration (NASA) for acquisition support services. The protester challenges the agency's evaluation of proposals.

We deny the protest.

BACKGROUND

The RFP, issued in accordance with Federal Acquisition Regulation (FAR) part 12-- Acquisition of Commercial Items--was set aside for participants in the Small Business Administration's section 8(a) program. The solicitation sought proposals for the award of a single contract, under which the agency would issue fixed-price/level-of-effort task orders. Agency Report (AR), Tab 1, RFP at 1-2. The base period of the contract would be 1 year, with four 1-year options. Id. at 2. Award would be made on a best-value tradeoff basis considering two non-price factors--mission suitability and past

performance--and price. Id. at 35. The mission suitability (MS) factor contained two subfactors: MS-1, staffing, recruitment and retention; and MS-2, phase-in approach. Id. at 37-38. Under the mission suitability factor, the agency would assign a total possible point score of 1,000, with 850 possible points under staffing, recruitment, and retention, and 150 possible points under phrase-in approach. Id. at 38. The agency would also assign proposals adjectival ratings under the mission suitability subfactors.¹ The mission suitability and past performance factors were approximately equal in weight; together, those two factors were significantly more important than price. Id. at 35.

Under the staffing, recruiting, and retention subfactor of the mission suitability factor, the RFP required proposals to include an “organizational structure chart describ[ing] how it demonstrates efficiency and effectiveness in managing the work, onsite and/or offsite, particularly across the multiple sites (NASA Centers).” Id. at 31. The offeror was required to describe “the responsibilities and authority, as well as the qualifications and experience (resumes), of the Contract Program Manager and Deputy Program Manager (Key Personnel)” and “its proposed interfaces with its subcontractors and identify the specific Performance Work Statement [PWS] sections the prime and each subcontractor is proposed to perform.” Id.

Under the above subfactor, the RFP also required proposals to include a staffing plan that “demonstrates the offeror’s approach for recruiting, retaining, and managing attrition so as to provide a qualified and highly motivated workforce for the contract[.]” Id. The RFP provided that “[p]roposals that demonstrate an increased potential for recruiting and maintaining a qualified workforce, especially in the area of acquisition support services, will be evaluated more favorably.” Id. at 38. The staffing plan was required to “demonstrate the offeror’s approach for ensuring commitment of key personnel in the management of the contract, to include the extent of their availability, and company commitment.” Id. at 31. The RFP required that offerors provide “personal commitment letters (form not provided), signed by the individuals listed as key personnel.” Id. The solicitation did not specify the content of the commitment letters, nor did it specify how the letters would be evaluated. See id. at 31, 38.

Under the phase-in approach subfactor, the RFP required offerors to provide a phase-in plan that would be incorporated into the contract and that met the requirements of the solicitation. Id. at 31.

Under the past performance factor, the RFP “requested” offerors to provide information on up to five previous government contracts involving effort that was “recent and relevant to the effort required by this solicitation.” Id. Recent effort was defined as the effort was in-progress or completed within the last 3 years. Id. An offeror without five government contracts within the last 3 years could submit information on recent and

¹ The agency would evaluate proposals under the mission suitability factor as excellent, very good, good, fair, or poor, based on the combined point total for the two subfactors. Id. at 36.

relevant subcontracts and/or commercial contracts. Id. Relevant effort was defined as an effort that was “of similar scope, magnitude, and complexity to the requirements as set forth in this solicitation.” Id. Scope of the effort was defined as effort providing “[e]xperience in the areas defined in this PWS.” Id. at 32.

Under the past performance factor, the agency would evaluate its level of confidence in the offeror’s ability to perform the solicitation requirements as very high, high, moderate, low, very low, or neutral. Id. at 37. The definitions of the two highest confidence levels are relevant to this protest. A very high level of confidence indicated that the “offeror’s relevant past performance is of exceptional merit and is very highly pertinent to this acquisition, indicates exemplary performance in a timely, efficient, and economical manner and very minor (if any) problems with no adverse effect on overall performance.” Id. A high level of confidence indicated that the “offeror’s relevant past performance is highly pertinent to this acquisition; demonstrating very effective performance that would be fully responsive to contract requirements. Offeror’s past performance indicates that contract requirements were accomplished in a timely, efficient, and economical manner for the most part, with only minor problems that had little identifiable effect on overall performance.” Id.

With regard to price, the solicitation instructed offerors to provide a completed copy of the price schedule and “sufficient detail to support and explain all proposed costs.” Id. at 34. The price schedule, in turn, included three sections: (1) pricing for various categories of contract close-out services, to be provided on a unit price per transaction basis; (2) pricing for acquisition support services, to be provided as burdened labor rates for various labor categories; and (3) a lump sum for phase-in services. The RFP advised offerors that their prices would be evaluated for reasonableness in accordance with FAR subpart 15.404-1(b). Id. at 39. The RFP did not indicate that the agency would evaluate prices for realism. See id. While, as noted above, offerors were to provide loaded labor rates for the acquisition support services, the RFP did not require offerors to provide direct labor rates. See id. at 5.

The agency received and evaluated 22 proposals, including those of the protester and the awardee. The following evaluation findings are relevant to the protest allegations.

SSC’s proposal received two significant strengths under the staffing, recruitment, and retention subfactor--one for a demonstrated ability to efficiently and effectively manage the work, particularly across multiple centers, and another for proposing a program manager and deputy program manager with extensive acquisition experience. Only SSC’s proposed deputy program manager was performing on the incumbent contract. AR, Tab 3, Source Evaluation Board (SEB) Report at 113-14. SSC’s proposal also received a strength under that subfactor for demonstrating a “robust approach to recruiting and retention” through the use of a proprietary system that pulls from six different sources for recruiting, as well as for the use of another proprietary staffing system. Id. at 115.

FED-B’s proposal received three significant strengths under the staffing, recruitment, and retention subfactor: for demonstrating an ability to efficiently and effectively manage across multiple sites; for demonstrating an approach to providing a qualified workforce; and for proposing a program manager and deputy program manager who perform on the incumbent contract. Id. at 61-63.

The agency evaluated the protester’s proposal as high confidence under the past performance factor, noting that FED-B had submitted five recent past performance references for prior efforts demonstrating relevant performance in all areas of the PWS except one--section 5.1.1, requirements document development support. Id. at 198. The agency evaluated three of the five references as similar in magnitude/size, and four of the five references as similar in complexity (managing work in multiple locations). Id. The agency further noted that one of the partners comprising FED-B (which is a joint venture) had “received ‘Very Effective’ performance on its 3 references,” and the other “demonstrated ‘Exemplary’ performance on its 2 references.” Id. The agency explained that “[b]ecause the preponderance of relevant performance was ‘Very Effective,’ the [joint venture] received an overall performance rating of Very Effective.” Id.

The table below summarizes the evaluation results for the protester’s and awardee’s proposals under the mission suitability and past performance factors and price:

Offeror	MS Points	MS Rating		Confidence Rating	Price
		MS-1	MS-2		
FED-B	946	Excellent	Excellent	High	\$32,815,679
SSC	939	Excellent	Excellent	Very High	\$24,622,952

AR, Tab 14, Source Section Statement at 4.

The source selection authority excluded 11 proposals from further consideration for award because they contained deficiencies; neither the awardee’s nor the protester’s proposals were excluded. Id. at 28. The source selection authority began his best-value tradeoff analysis with SSC’s proposal, which he identified as the lowest-priced proposal with the third-highest score under the mission suitability factor. Id. In his trade-off of SSC’s and FED-B’s proposals, the source selection authority noted that both proposals received ratings of excellent under the staffing, recruitment, and retention subfactor. Id. at 34. The source selection authority noted that FED-B’s proposal “demonstrated the capability to recruit and retain qualified personnel” and “outlined their existing incumbent staff already positioned” at NASA. Id. FED-B’s proposal also offered a “slight advantage” over SSC’s, the source selection authority explained, because FED-B offered a program manager and a deputy program manager with desired NASA experience, and only SSC’s offered deputy program manager matched that level of experience. Id. Overall, the source selection authority concluded that, under the staffing, recruitment, and retention subfactor, FED-B’s proposal offered an “advantage.” Id.

Both proposals also received excellent ratings under the phase-in subfactor. The source selection authority evaluated SSC's proposal as having a "slight advantage" under this subfactor, because it offered a detailed, robust, five-phased approach to execute the phase-in. Id.

Under past performance, the source selection authority noted that SSC's proposal was evaluated as very high confidence, and FED-B's as high confidence, providing SSC a "slight advantage." Id. at 34-35.

While FED-B's proposal was technically superior to SSC's, FED-B's price was approximately 33 percent higher than SSC's. Id. at 35. The source selection authority concluded that "the added benefits [of selecting FED-B's proposal] would not be valuable enough to offset and justify paying an approximately 33% cost premium." Id.

Considering that non-price factors, when combined, were considerably more important than price, and that the mission suitability and past performance factors are approximately equal in importance, the source selection authority concluded that SSC's proposal represented the best value to the government. Id. at 36. Award was made to SSC, and this protest followed.

DISCUSSION

The protester argues that the solicitation required offerors to furnish their direct rates of employee compensation as part of their price proposals, and that the awardee failed to meet a material term of the RFP by failing to furnish this information. FED-B further argues that the agency unreasonably failed to consider whether the awardee had proposed adequate rates of direct compensation under the staffing, recruitment, and retention subfactor. As explained below, we find these arguments to be without merit.

The protester asserts that "[a]ny analysis of a recruitment and retention plan necessarily requires review of direct pay rates to employees," and SSC's failure to provide those rates "precluded NASA from conducting the Solicitation-required inquiry" into whether SSC's direct pay rates would be sufficient for the awardee to recruit, retain, and manage a qualified and highly-motivated workforce. Protester's Reply to GAO Questions at 1-2. Although the solicitation required offerors to provide loaded labor rates, not direct labor rates, FED-B contends that the requirement that offerors supply direct labor rates was implied in the requirement to provide "sufficient detail to support and explain all proposed costs, giving figures and narrative explanation," as well as "the basis for estimate to determine [the offeror's] labor rates for each Center." Id. at 2, quoting RFP, amend. 1, at 34.

The protester's contention is not supported by our decisions.² It is well settled that we will examine the agency's evaluation of technical proposals only to ensure that it was fair and reasonable and consistent with the evaluation criteria stated in the RFP. JWK Int'l Corp., B-237527, Feb. 21, 1990, 90-1 CPD ¶ 198 at 3. Where a solicitation requires that offerors provide loaded--but not direct--labor rates and requires additional supporting information not precisely defined, the requirement for additional information does not mean that offerors must provide direct labor rates. Applied Res. Sols., B-414719, Aug. 28, 2017, 2017 CPD ¶ 276 at 5 (noting that, even in a solicitation where, unlike here, the agency announced that it would evaluate price realism, we do not construe the requirement that offerors produce loaded labor rates and "supporting data" to mean that offerors are also required to produce direct labor rates). An agency is required to evaluate proposals consistent with the stated evaluation criteria, and, here, the stated evaluation criterion was loaded labor rates. The protester's assertion that the agency should have evaluated direct labor rates is an untimely challenge to the terms of the solicitation, and, on this record, we see no basis on which to object to the agency's evaluation. See 4 C.F.R. § 21.2(a)(1).

We also point out that nothing the record suggests that the agency should have been concerned that the awardee was planning to pay its employees rates of direct compensation so low as to call into question its ability to recruit and retain employees.

² The protester offers two decisions in support of its argument, and neither decision is applicable. FED-B argues that an evaluation of recruitment and retention factors, to be reasonable, should include at least some consideration of proposed compensation. Protester's Comments at 3, citing Alutiq Pacific, LLC, B-409584, B-409584.2, June 18, 2014, 2014 CPD ¶ 196. In Alutiq, we found unreasonable the agency's conclusion that the awardee could retain the incumbent workforce where the awardee "intend[ed] to offer compensation" that was "significantly below that currently being paid by [the protester]." Alutiq Pacific, LLC, supra, at 9. In this case, the protester concedes that its loaded labor rates do not materially differ from the awardee's. Protester's Reply to GAO's Questions at 2 (stating that "[w]e acknowledge that Seven Senses[]" and FED-B's loaded labor rates are, in many cases, similar"). Nothing in the record suggests that the awardee intends to offer significantly low compensation. The protester also cites CALNET, Inc., B-413386.2, B-413386.3, Oct. 28, 2016, 2016 CPD ¶ 318. We found in CALNET that "[t]he underlying policy consideration for such a requirement [that an agency determine that labor rates are realistic] is that, unless an agency evaluates the realism of the offerors' proposed direct rates of compensation (as opposed to its fully-burdened rates), the agency has no basis to determine whether or not those rates are realistic to attract and retain the types of personnel to be hired." CALNET, Inc., supra at 6. The issue in CALNET concerned a cost-reimbursement contract, where the agency was required to perform a cost realism analysis and where the agency had required the submission of direct labor rates. Id. In contrast, this protest concerns a fixed-price competition where the agency did not require the submission of direct labor rates. Neither case cited by the protester in any way supports its contention that the agency acted unreasonably.

The protester's initial complaint to our Office about SSC's "apparent plan to pay personnel significantly lower rates," Protest at 1, was premised on the protester's assumption that SSC's lower overall evaluated price was the result of SSC having proposed lower burdened labor rates than the protester. The record revealed, among other things, that the awardee had not offered a lower evaluated price for the acquisition support services that were to be acquired using the burdened labor rates. Rather, the record showed that the discrepancy between the two offerors' overall evaluated prices was attributable to the substantially higher prices that the protester proposed for the close-out services, which were to be acquired on a unit price per transaction basis.³

The protester also asserts that the agency "did not determine whether [the protester's proposed deputy program manager's] subsequent--and exclusive--commitment to work for FED-B vitiated his previous 'commitment' to work for [SSC]".⁴ Protester's Comments at 7. The individual in question signed a commitment letter⁵ dated March 2, 2018, to serve as the awardee's deputy program manager. AR, Tab 4, SSC Proposal, Vol. I, Mission Suitability, at 1B-2. On March 7, he signed a commitment letter stating his "exclusive commitment" to serve as the protester's deputy program manager. AR, Tab 8, FED-B Proposal Vol. I, Mission Suitability, at I-20. FED-B asserts that the agency failed to consider this "material issue" which called into question the awardee's compliance with the solicitation's requirements. Protester's Comments at 7.

As a general matter, in evaluating proposals an agency may reasonably accept as accurate information provided by an offeror in its proposal. Able Bus. Techs., Inc., B-299383, Apr. 19, 2007, 2007 CPD ¶ 75 at 5; NCR Gov't Sys. LLC, B-297959, B-297959.2, May 12, 2006, 2006 CPD ¶ 82 at 8-9. Nonetheless, an agency may not accept proposal representations at face value where there is significant countervailing evidence reasonably known to the agency evaluators that should create doubt as to

³ Specifically, the record showed that SSC's evaluated price for the acquisition support services was \$[DELETED], in contrast to the protester's evaluated price of \$[DELETED], whereas SSC's price for the close-out services was \$[DELETED], in contrast to the protester's price of \$[DELETED]. AR, Tab 3, SEB Report, at 228.

⁴ The protester does not assert that the agency was unaware that both the protester and the awardee proposed the incumbent deputy program manager. In fact, the agency was aware that both the protester and the awardee proposed the incumbent deputy program manager. See AR, Tab 3, SEB Report at 63, 114; see also AR, Tab 14, Source Section Statement at 34 (noting that, while the protester offered a program manager and deputy program manager who "have experience with the current contract," only the awardee's proposed deputy program manager "match[ed] that level of experience").

⁵ Generally speaking, a letter of commitment is "a signed statement by each key employee (or prospective key employee) whose resume is submitted, which generally confirms that he or she has made a commitment to work for the offeror on the pending contract if its proposal is successful." Native Am. Indus. Distributions, Inc., B-310737.3 et al., Apr. 15, 2008, 2008 CPD ¶ 76 at 8.

whether the representations are accurate. See Alpha Marine Servs., LLC, B-292511.4, B-292511.5, Mar. 22, 2004, 2004 CPD ¶ 88 at 4. Where an offeror claims that it has an “exclusive representation agreement[]” with an individual, a proposal representation to that effect, without more, does not meet the test of “significant countervailing evidence.” Vinculum Sols., Inc., B-406760, B-406760.2, Aug. 22, 2012, 2012 CPD ¶ 249 at 9.

Here, the protester asserts that its form letter of commitment was sufficient to have required the agency to question the awardee’s compliance with the RFP’s terms. The exclusive commitment offered by the protester’s proposed deputy program manager did not differ from the commitment of the awardee’s proposed program manager in any meaningful respect. See AR, Tab 8, FED-B Proposal Vol. I, Mission Suitability, at I-20. Countervailing evidence of exclusive right to employ might be employment agreements or employment contracts. See Vinculum Sols., Inc., *supra*. FED-B’s proposal did not include such evidence. We thus see no merit to the allegation that the agency unreasonably accepted the awardee’s letter of commitment from its proposed deputy program manager.

The protester also challenges the agency’s rating of its past performance as merely high confidence, as opposed to very high confidence. In particular, FED-B disputes the SEB’s finding that its proposal failed to demonstrate relevant performance in PWS functional requirement area 5.1.1, Requirements Document Development Support.⁶

Before addressing the protester’s complaint pertaining to PWS 5.1.1, we again note that the RFP defined a rating of very high confidence as reflecting very highly pertinent past performance of exemplary quality, whereas a rating of high confidence reflected highly pertinent past performance of very effective quality. RFP at 37. In other words, to receive a rating of very high confidence, an offeror needed to demonstrate both very highly pertinent past performance and performance of exemplary quality. In this regard, the contracting officer explained that “[a]cross the board, the SEB team did not give a Very High Level of Confidence rating unless the offeror demonstrated experience in each of the PWS sections and had [an] exemplary performance rating.” Contracting

⁶ Section 5.1.1 stated as follows:

The contractor shall provide advice, recommendations, and document support to multiple offices in areas of the acquisition requirements phase. Requirements support includes but is not limited to assisting in the development and preparation of preaward Performance Work Statements, Statements of Objective and other requirements documents. This effort includes assisting program offices in researching and drafting specifications and standards; developing performance measures; providing consultation and recommendations; and coordinating requirements documents.

RFP, attach. A, PWS at 8-9.

Officer's Statement at 15. As noted previously, the protester did not receive an overall rating of exemplary for the quality of its past performance; rather, "the JV received an overall performance rating of Very Effective." AR, Tab 3, SEB Report, at 198. It thus appears that it was not simply FED-B's failure to demonstrate relevant past performance in PWS 5.1.1 that prevented it from receiving a very high confidence rating.

Further, with regard to the reasonableness of the agency's conclusion pertaining to PWS 5.1.1, FED-B asserts that its past performance references substantiated the protester's experience in document development support. FED-B cites the experience of one of the joint venture partners at the National Institutes of Health, where "[s]everal of [the protester's] employees on different task orders are currently working as Procurement Technicians," performing "continuous procurement requests for materials, equipment, supplies, software, hardware, etc." Protester's Comments at 5, citing AR, Tab 9, FED-B Proposal, Vol. II, Past Performance, at 6-7. Moreover, according to the protester, its staff prepare purchase requests for office supplies and equipment, answer questions and investigate discrepancies related to purchases, and perform other administrative tasks related to acquisitions. Protester's Comments at 6, citing AR, Tab 9, FED-B Proposal, Vol. II, Past Performance, at 7.

Where a solicitation requires the evaluation of offerors' past performance, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria, because determining the relative merits of offerors' past performance information is primarily a matter within the contracting agency's discretion. DGR Assocs., Inc., B-285428, B-285428.2, Aug. 25, 2000, 2000 CPD ¶ 145 at 11. A protester's disagreement with the agency's judgment, without more, is not sufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

In response, the agency contends that the work performed by the joint venture partner was dissimilar to the work required here. The requirement spelled out in PWS section 5.1.1 "goes well beyond drafting procurement requests for supplies and materials," the agency argues. Supplemental Memorandum of Law at 4. The "repetitive nature" of the tasks performed by the protester is incomparable to the current functional requirement, which, the agency argues, requires "the application of independent thought and analytic skills." Id. The protester disagrees with the agency's assessment, but we see no merit to the protester's claim.

FED-B also argues that in its evaluation, the agency unreasonably ignored the following language in its proposal indicating that one of the JV partners had relevant experience in functional area 5.1.1 as the incumbent contractor:

As BEI is the incumbent contractor – the relevancy of our performance, supporting NSSC [NASA Shared Services Center] and all its customer NASA Centers, exactly matches the scope, magnitude and complexity of the current procurement. Our contract matches the volume, dollar value and/or duration

of the work actually performed – anticipated by the current procurement/PWS. This Contract provides us recent and relevant experience in all functional areas defined in this PWS [including PWS section 5.1.1].

AR, Tab 9, FED-B Proposal, Vol. II, Past Performance, at 2, as cited in Protest at 9. The protester argues that the agency unreasonably failed to consider what the agency knew of BEI's performance on the incumbent contract. Protester's Comments at 6.

Here, the joint venture partner at issue was the incumbent contractor on a requirement at the Stennis Space Center in Mississippi; the contracting officer for that requirement also was located at the Stennis Space Center. AR, Tab 9, FED-B Proposal, Vol. II, Past Performance, at 2. The protested acquisition is being conducted by personnel located at the Goddard Space Flight Center in Greenbelt, Maryland. RFP at 29. The contracting officer for this procurement was not the contracting officer on the requirement at the Stennis Space Center. See Agency Response to GAO Questions at 1. Under the facts of this case, the protester has not demonstrated that information that may have been known to a contracting officer in Mississippi should be considered known by a contracting officer in Maryland.

Moreover, it is a well-established principle that an offeror is responsible for submitting a well-written proposal with adequately-detailed information that allows for a meaningful review by the procuring agency. SNAP, Inc., B-409609, B-409609.3, June 20, 2014, 2014 CPD ¶ 187 at 8. Here, the protester's past performance reference listed functional requirements of the PWS without any explanation of how the incumbent's performance of that requirement satisfied the RFP's requirements. The agency reasonably regarded this as failing to demonstrate relevant performance in PWS section 5.1.1. For all the above reasons, we see no merit in the protester's challenge to the agency's evaluation of FED-B's past performance.

The protest is denied.

Thomas H. Armstrong
General Counsel