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Decision

Matter of: KeyW Corporation

File: B-417774; B-417774.2

Date: October 4, 2019

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Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's evaluation of protester's cost/price submission is denied where the record shows that the evaluation was reasonable and consistent with the terms of the solicitation.
 2. Protest allegations that agency engaged in a disparate evaluation of proposals under the past performance factor, and that the source selection decision was flawed, are dismissed where protester's proposal was ineligible for award as a result of flaws in its cost submissions; thus protester is not an interested party to challenge other aspects of the evaluation or the selection decision.
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DECISION

KeyW Corporation (KeyW), of Hanover, Maryland, protests the issuance of a task order to ManTech Advanced Systems International, Inc. (ManTech), of Herndon, Virginia, under request for task order proposals (RFTOP) No. SSESNG-19-R-2089, issued by the Department of the Army, Army Contracting Command--Aberdeen Proving Ground, for software and systems engineering support, and interoperability engineering technical services. The protester challenges the evaluation of proposals and the selection decision.

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

BACKGROUND

The Army issued the RFTOP on April 4, 2019, to holders of the Army's unrestricted Software and Systems Engineering Services Next Generation multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts to provide engineering and technical maintenance for the Army's distributed common ground family of systems to support the U.S. Army Communications-Electronics Command, Software Engineering Command. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 1-2. The RFTOP contemplated award of a cost-plus-fixed-fee task order with a period of performance consisting of a 30-day phase-in period, 11-month base period, and four 1-year option periods. Agency Report (AR), Tab 10, RFTOP, at 8.

Proposals were to be evaluated against the following factors, listed in descending order of importance: past performance, cost/price, and quality assurance surveillance plan (QASP). RFTOP at 86. Past performance was to be evaluated for recency, relevancy, and quality, and assigned the following ratings: substantial confidence, satisfactory confidence, neutral confidence, limited confidence, or no confidence. Id. at 86-88. The QASP was to be evaluated as acceptable or unacceptable. Id. at 89-90. Award was to be made using a best-value tradeoff selection methodology. Id. at 86.

As relevant here, for the cost/price factor, the RFTOP required offerors and their proposed subcontractors to provide their cost/price proposals in a Microsoft Excel workbook, and permitted subcontractors to submit proprietary data directly to the government. See RFTOP at 80-85. The workbook was to include several worksheets, including an indirect rate worksheet that showed the proposed indirect cost rates. Id. at 81, 83. The RFTOP advised offerors that "[f]ailure to provide [the cost/price proposals] as directed shall result in the entire proposal being considered ineligible for award." Id. at 80.

Further, the RFTOP required that offerors propose a direct labor rate for each labor category, and stated as follows:

In accordance with [Federal Acquisition Regulation (FAR)] 15.404-1(d), the Government has established a proposal pricing range (Proposal Pricing Range) and a separate direct labor rate range (Direct Labor Rate Range) that, by definition, is realistic and fair and reasonable. Proposal pricing and or direct labor rates proposed outside of these Government determined parameters will be ineligible for award as those proposals below the threshold or floor of the established Proposal Pricing Range shall be deemed unrealistic while those above the threshold or ceiling shall be determined as not fair and reasonable.

Id. at 74. The RFTOP defined the direct labor rate as "unburdened labor rates for both the Primes and the Subcontractors," and advised that "[p]roposals that contain Prime and Subcontractor Direct Labor Rates that fall outside of the predetermined range will

not be evaluated further and will not be considered for award.” Id. The RFTOP provided the Army’s predetermined direct labor rate range for each required labor category. Id. at 75-79.

The agency received six proposals by the due date. AR, Tab 22, Source Selection Decision Document (SSDD), at 3. The Army’s evaluation of the ManTech and KeyW proposals was as follows:

	ManTech	KeyW
Past Performance	Substantial Confidence	Satisfactory Confidence
QASP	Acceptable	Acceptable
Proposed Price	\$131,698,062	\$123,916,355
Probable Cost	\$131,698,062	Undetermined

Id. The agency concluded that it could not analyze a probable cost for KeyW because one of KeyW’s subcontractors proposed direct labor rates below the associated labor rate floor provided in the RFTOP. Id. at 8-9. In addition, the Army found that [DELETED] of KeyW’s subcontractors did not include the required information regarding indirect rates in their cost proposal submissions, as required by the RFTOP. Id. at 9. The Army also identified a discrepancy between the amount proposed in a KeyW subcontractor’s cost proposal submission and the amount indicated in KeyW’s prime contractor cost proposal submission. Id. For these reasons, the Army concluded that KeyW’s proposal was ineligible for award and would not be further considered. Id.

On June 28, the Army notified KeyW that ManTech was selected for the task order award. AR, Tab 23, KeyW Unsuccessful Offeror Letter. KeyW timely requested and received a debriefing. See AR, Tab 24, KeyW Written Debrief; Tab 25, Agency Response to KeyW Debrief Questions. This protest followed.¹

DISCUSSION

The protester argues that it was unreasonable for the Army to disqualify KeyW from award based on minor inconsistencies in its subcontractors’ cost/price submissions. Protest at 10-15. Specifically, KeyW argues that the Army’s evaluation unduly elevated the importance of the minor errors found in KeyW’s subcontractors’ submissions beyond that which could reasonably be expected, and unfairly disqualified KeyW for minor errors “over which KeyW had no control and for which KeyW has been provided only limited information.” Id. at 12. The Army argues that its evaluation of KeyW’s proposal was reasonable because KeyW failed to comply with the solicitation’s requirements. As a result, the Army states that KeyW’s proposal was properly found ineligible for award

¹ The task order at issue is valued in excess of \$25 million, and was placed under an IDIQ contract established by the Army. Accordingly, our Office has jurisdiction to consider KeyW’s protest. 10 U.S.C. § 2304c(e)(1)(B).

and not further considered. COS/MOL at 20-27. For the reasons discussed below, we find no basis to sustain the protest.²

The evaluation of proposals in a task order competition, including the determination of the relative merits of proposals, is primarily a matter within the agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Wyle Labs., Inc., B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 6. An offeror's disagreement with the agency's judgment, without more, is insufficient to establish that the agency acted unreasonably. STG, Inc., B-405101.3 et al., Jan. 12, 2012, 2012 CPD ¶ 48 at 7. Offerors are responsible for submitting a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation and allows for meaningful review by the procuring agency. Aero Simulation, Inc., B-411373, B-411373.2, July 2, 2015, 2015 CPD ¶ 233 at 3. In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. MicroTechnologies, LLC, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 4-5.

As noted, the RFTOP provided direct labor rate ranges for each labor category required for task order performance. RFTOP at 74-79. The Army included a warning in the RFTOP that only rates within these ranges could be found realistic, fair, and reasonable. Id. The RFTOP required that offerors' and their subcontractors' cost/price proposals be submitted in Microsoft Excel format, and that the spreadsheets include "all calculation formulas that effectively show the cost build up in the excel workbook." Id. at 80. In addition to direct labor rates, the RFTOP required that the Excel workbook submitted by a prime or subcontractor include indirect cost rates in an Indirect Rate worksheet. Id. at 83. The RFTOP stated that "[f]ailure to provide this document as directed shall result in the entire proposal being considered ineligible for award." Id. at 80. The RFTOP further stated that the prime offeror's cost/price proposal submission should trace directly to a proposed subcontractor's cost/price information included in the prime's proposal or submitted directly by the subcontractor to the government. Id. at 84. The RFTOP warned that "[a]ny discrepancies between the proposed [subcontractor/interdivisional entity] effort in the Prime's proposal and any [subcontractor/interdivisional entity] proposals will result in no further consideration of the Offeror's proposal." Id.

The RFTOP set forth the Army's cost/price evaluation methodology, in pertinent part, as follows:

² The protester has presented arguments that are variations of those discussed below. We have considered all of these allegations and find none provide a basis to sustain the protest.

In accordance with FAR 15.404-1(d)(1), the Government will verify that all direct labor rates proposed by the prime AND its subcontractors are within the Direct Labor Rate Range as specified in paragraph L.2.2.1.3 of Section L of this solicitation for cost realism analysis because the ranges are based upon historical rates. If any of the proposed direct labor rates by either the prime or its subcontractors are outside of the Government established Direct Labor Rate Range, the Offeror will be ineligible for award. Offerors are reminded that they are responsible for ensuring that any and all [subcontractors/interdivisional entities] provide a full and complete labor rate build that provides complete transparency for the direct labor rate component, and each indirect rate applied to it, along with the profit or fee, regardless of contract type.

Id. at 89. The RFTOP further stated that “[f]ailure to follow the instructions and/or provide all of the submission requirements will result in the proposal being rejected, determined unacceptable, and no longer considered for award.” Id.

The record shows that the agency identified three deficiencies in the cost/price proposal submissions of KeyW and its subcontractors. First, the agency found that a KeyW subcontractor proposed direct labor rates below the RFTOP-provided floor for two of the labor categories it proposed to perform. AR, Tab 19, KeyW Cost/Price Evaluation, at 5; compare RFTOP at 74-79 with AR, Tab 13, KeyW Subcontractor Excel Worksheet Screenshot. Second, the agency concluded that [DELETED] of KeyW’s subcontractors failed to include an indirect rate worksheet in their Microsoft Excel workbooks, as directed by the RFP. AR, Tab 19, KeyW Cost/Price Evaluation, at 1; see Tabs 14-16, KeyW Subcontractor Excel Worksheet Screenshots. Finally, the agency identified a discrepancy between the cost/price proposal submitted by one of KeyW’s subcontractors (\$[DELETED]) and the cost/price indicated for the subcontractor in KeyW’s prime cost/price proposal (\$[DELETED]). AR, Tab 19, KeyW Cost/Price Evaluation, at 1; compare Tab 15, KeyW Subcontractor Excel Worksheet Screenshot with Tab 12, KeyW Excel Worksheet Screenshot. For all of these reasons, the KeyW proposal was deemed ineligible for award, and not further considered. AR, Tab 19, KeyW Cost/Price Evaluation, at 5.

On this record, we conclude that the agency’s evaluation was reasonable. The RFTOP clearly indicated that failure to follow the instructions and provide all of the required information would result in no further evaluation or consideration of the proposal for award. RFTOP at 89. The RFTOP specifically stated that a cost/price proposal would not be considered for award if it: proposed rates outside of the direct labor rate ranges identified in the RFTOP; failed to include all of the required information in the Microsoft Excel workbook template; and contained a discrepancy between the prime and subcontractor proposal submissions. Id. at 74, 80, 84. The RFTOP also explicitly stated that it was the offeror’s responsibility to ensure that its subcontractors’ proposal submissions complied with the RFTOP instructions. Id. at 84. Insofar as the protester

argues that it could not have complied with this requirement because it had no control over its subcontractors' submissions, this argument constitutes an untimely challenge to the express terms of the solicitation, and is dismissed. 4 C.F.R. § 21.5(e); see Land Shark Shredding, LLC, B-415908, Mar. 29, 2018, 2018 CPD ¶ 133 at 2-3 n.2. The RFTOP clearly advised offerors that subcontractors could provide cost/price information directly to the agency. To the extent KeyW had concerns about this process, the protester was required to file a protest challenging this aspect of the solicitation prior to the closing time for receipt of proposals.

The protester further argues that the "minor errors" in its cost/price proposal and that of its subcontractors could have been resolved with clarifications. Protest at 12-13. The Army argues that it was not required to engage in clarifications. COS/MOL at 27. The Army also argues that the errors and omissions in KeyW's cost/price proposal could not have been resolved with clarifications, and any communication with KeyW to remedy the identified deficiencies would have required the agency to engage in discussions and provide KeyW the opportunity to revise its proposal. Id. at 27-30.

The FAR explains that the policies of FAR subpart 15.3 are inapplicable to task order competitions such as the instant procurement. FAR § 16.505(b)(1)(ii). Further, FAR subpart 16.5 does not establish specific requirements for conducting clarifications or discussions. See FAR subpart 16.5. Nonetheless, where, as here, an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness, will, in large part, reflect the standards applicable to the negotiated procurements in FAR part 15. Technatomy Corp., B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 7.

Part 15 of the FAR describes a spectrum of exchanges that may take place between a contracting agency and an offeror during negotiated procurements. Clarifications are limited exchanges between the agency and offerors that may occur when contract award without discussions is contemplated; an agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. FAR § 15.306(a); SOC LLC, B-415460.2, B-415460.3, Jan. 8, 2018, 2018 CPD ¶ 20 at 7. Although agencies have broad discretion whether to seek clarifications from offerors, offerors have no automatic right to clarifications regarding proposals, and such communications cannot be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. FAR § 15.306(b)(2); Abacus Tech. Corp.; SMS Data Prods. Grp., Inc., B-413421 et al., Oct. 28, 2016, 2016 CPD ¶ 317 at 19-20.

Here, the RFTOP stated that "[t]he Government intends to evaluate proposals and award a [task order] without any questions or clarifications to Offerors." RFTOP at 90. Accordingly, the agency was not obligated to communicate in any way with KeyW

regarding the deficiencies identified in its cost/price proposal. Moreover, we agree with the agency that KeyW would need to revise its proposal in order to remedy the deficiencies. Specifically, as discussed above, one of KeyW's subcontractors would need to propose new direct labor rates that fell within the predetermined ranges in the RFTOP; [DELETED] of KeyW's subcontractors would need to provide the omitted indirect rate information; and either KeyW or its subcontractor (or both) would need to revise their Excel workbook to propose an identical cost/price for the subcontractor. To permit KeyW to revise its proposal to correct any of these errors and omissions would have required the agency to engage in discussions. FAR § 15.306(d); NOVA Corp., B-411851, Nov. 6, 2015, 2015 CPD ¶ 346 at 6 (acceptance of Form DD254 omitted from proposal submission would have constituted discussions, not clarifications); Wolverine Servs. LLC, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 6 (allowing offeror to provide missing past performance questionnaire would have constituted discussions).

Finally, KeyW contends that the agency's evaluation under the past performance factor was unreasonable and disparate, and that the source selection decision is flawed. Protest at 15-19; Supp. Protest at 1-7. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. DynCorp Int'l LLC, B-411126.4 et al., Dec. 20, 2016, 2017 CPD ¶ 333 at 6. We dismiss KeyW's remaining allegations because the protester is not an interested party to raise them.

As noted, the Army received six proposals in response to the RFTOP. KeyW and three other offers were found to be ineligible for award, and the agency performed a best-value tradeoff between the awardee and another offeror whose proposal was eligible for award. See AR, Tab 22, SSDD, at 11-14. Because we conclude that the agency reasonably found the protester's proposal ineligible and did not further consider the proposal for award, KeyW is not an interested party to raise these other issues. See DynaLantic Corp., B-416855, Dec. 26, 2018, 2019 CPD ¶ 11 at 5-6 n.7 (protester not an interested party to challenge unequal treatment in evaluation of technical approach subfactor where agency reasonably found protester's proposal unacceptable under logistics subfactor); Wyle Labs., Inc., B-412964, B-412964.3, May 27, 2016, 2016 CPD ¶ 144 at 7 n.5 (protester not an interested party to challenge unequal treatment of

offerors under a subfactor where agency reasonably determined protester ineligible for award on basis of a deficiency).

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel