



Decision

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Matter of: Education Development Center, Inc.

File: B-418217; B-418217.2

Date: January 27, 2020

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DIGEST

1. Protest that agency failed to raise significant weaknesses during discussions is denied where the weaknesses were not significant and need not have been raised.
 2. Protest that agency disparately evaluated proposals is denied where the difference in ratings stem from differences in the offerors' proposals.
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DECISION

Education Development Center (EDC), Inc., of Waltham, Massachusetts, protests the award of a contract to Creative Associates International (CAI), of Washington, D.C., under request for proposals (RFP) No. 72062318R00004, issued by the U.S. Agency for International Development (USAID) for educational services in Somalia. EDC alleges that the agency failed to conduct meaningful discussions and disparately evaluated proposals.

We deny the protest.

BACKGROUND

The RFP, issued on November 16, 2018, contemplated the award of a cost-plus-fixed-fee contract for services to increase access to quality education for out-of-school children and youth in Somalia. Agency Report (AR), Tab 4, amend. RFP, at 1,6. The

contract seeks to increase student enrollment in accelerated education program (AEP) sites and improve the safety, literacy, numeracy and socio-emotional skills among those enrolled. Id. at 6.

Award was to be made on a best-value tradeoff basis, considering price and non-price factors. Id. at 150-151. The non-price factors to be considered were: technical approach; key personnel and staffing plan; institutional experience; and past performance. Id. In terms of relative weight, the technical approach factor was deemed the most important factor. Id. The key personnel and institutional experience factors were of equal importance, and each factor, individually, was deemed more important than past performance. Id. The non-price factors, when combined, were significantly more important than price. Id.

The agency received four proposals in response to the solicitation, including from EDC and CAI. Contracting Officer's Statement, (COS) at 2. The Technical Evaluation Committee (TEC) performed an initial evaluation of proposals. AR, Tab 8, TEC Initial Evaluation Memorandum, at 1.¹

Based on the evaluation of initial proposals, the contracting officer established a competitive range consisting of all four offerors that submitted proposals. AR, Tab 9, Competitive Range Determination, at 5. The agency entered into discussions with these firms, sending each offeror a letter, notifying the offerors of the significant weaknesses, deficiencies, and adverse past performance found in their respective proposals. COS at 6. Relevant here, EDC's proposal had been assessed three weaknesses and one deficiency under the technical factors. AR, Tab 8, TEC Initial Evaluation Memorandum, at 31-40. Consistent with the agency's understanding of its obligations under section 15.306(d)(3) of the Federal Acquisition Regulation (FAR), the agency's discussion letter to EDC only notified the firm of the assessed deficiency related to EDC's failure to provide the required three references as part of the curriculum vitae (CV) for its proposed "chief of party," a key personnel position. AR, Tab 10, Notice of Inclusion in the Competitive Range, at 1.

All four offerors submitted final revised proposals (FRPs). The TEC reconvened and evaluated FRPs. AR, Tab 22, TEC FPR Evaluation Memorandum, at 1. EDC's ratings remained unchanged, except for its rating under the key personnel and staffing factor, which was upgraded from a marginal rating to a satisfactory rating based on EDC's inclusion of recent references in its chief of party's CV. Id. at 32. The results of the evaluation of offerors were as follows:

¹ The agency titled this tab to the AR as the "Final TEC Evaluation Memorandum," because it was the final evaluation at the competitive range determination. COS at 6, n.1. Because it reflects the agency's initial evaluation of proposals, to avoid confusion, we refer to it as the "TEC Initial Evaluation Memorandum."

	EDC	CAI
Technical Approach	Very Good	Exceptional
Key Personnel and Staffing	Satisfactory	Very Good
Institutional Experience	Very Good	Exceptional
Past Performance	Very Good	Very Good
Price	\$48,997,878	\$48,596,508

AR, Tab 16, EDC Debrief Letter, at 2.

The contracting officer, acting as the source selection authority (SSA), reviewed the TEC's analysis and performed an integrated assessment of proposals against the RFP's evaluation criteria. AR, Tab 12, Source Selection Decision Document (SSDD), at 1. The SSA concluded that CAI's proposal, with a price of \$48,596,508, represented the best value to the agency. *Id.* at 12. In making award, the SSA compared CAI's and EDC's proposal, concluding that CAI's proposal was both technically superior and lower-priced than EDC's proposal, which had a price of \$48,997,878. *Id.* at 10.

On October 11, the agency notified the unsuccessful offerors, including EDC, of award to CAI. AR, Tab 15, EDC Debrief Request, at 2. After requesting and receiving a debriefing, EDC's protest followed.

DISCUSSION

EDC argues that the agency did not hold meaningful discussions with it because USAID did not disclose significant weaknesses in EDC's proposal under the technical approach factor and key personnel and staffing factor. In addition, EDC alleges that the agency disparately evaluated proposals. In filing and pursuing this protest, EDC has made arguments that are in addition to, or variations of, those discussed below. Although we do not discuss all of the protester's arguments, we have considered all of them and find that none provide a basis to sustain its protest.

Lack of Meaningful Discussions

Technical Approach

EDC argues that the agency failed to engage in meaningful discussions where USAID failed to inform the protester about weaknesses, which the protester contends were significant weaknesses assessed against its proposal.

The RFP contained four performance requirements.² RFP at 10-12. Relevant here, under the technical approach factor, proposals were to be evaluated based on the extent to which their approach to performance requirement three (student learning outcomes in AEPs improved) convincingly demonstrated a likelihood of successful implementation.³ RFP at 11, 150.

The agency assigned EDC's initial proposal a rating of "very good" under the technical approach factor.⁴ AR, Tab 8, TEC Initial Evaluation Memorandum, at 31-35. Overall, the agency found that EDC's proposal demonstrated a strong approach to performance requirement three, *i.e.*, improving student learning outcomes in AEPs. *Id.* at 31. The agency said that it "believes EDC will be able to meet the performance requirements stated in [performance requirement three] in a contextually-relevant and conflict-sensitive manner." *Id.* at 32. EDC's proposal was assigned eight strengths under this factor, but also two weaknesses.

The agency assessed EDC's initial proposal a weakness with the description "vague and delayed implementation," noting that EDC's proposal "only vaguely describes using existing models and beginning to teach learners" which made it sound like "learners will only begin to be taught in year two." *Id.* at 34-35. In addition, the agency assessed a weakness to EDC's proposal for what it called "[l]imited numbers reached and at a high cost." *Id.* at 35. In this regard, the agency found that EDC's "slow approach to roll-out and low number of AEP" centers reached was "too cautious" and did "not appear ambitious enough." *Id.* Specifically, the agency found that EDC's goals of "reach[ing] only [DELETED] students through [DELETED] AEP [c]enters" would not allow EDC to reach "a sufficient number of [youth]" over the life of the requirement. *Id.*

In its evaluation of EDC's initial proposal, USAID deemed these critiques as weakness rather than significant weaknesses, and the agency did not raise them during

² The performance requirements were: (1) enrollment in AEPs is increased; (2) safety of AEP learning environments improved; (3) student learning outcomes in AEPs improved; and (4) government capacity to regulate AEPs enhanced. RFP at 10-11.

³ The contracting officer explains that the "intent of this innovative and specific evaluation criterion is to ensure that [o]fferors do not regurgitate all the performance requirements, but creatively demonstrate their ability to respond solely to [p]erformance [r]equirement [t]hree as a proxy for the ability to perform all requirements of the contract." COS at 9.

⁴ A "very good" rating was assigned to proposals with the following characteristics: the proposal demonstrates a strong grasp of requirements, meets RFP requirements and presents a low overall degree of risk of unsuccessful contract performance; strengths outweigh any weaknesses. AR, Tab 8, Initial TEC Evaluation Memorandum, at 5.

discussions with EDC.⁵ AR, Tab 10, Notice of Inclusion, at 1-2; COS at 8-9. In submitting its FRP, EDC did not revise its proposal concerning those areas. AR, Tab 22, TEC FRP Evaluation Memorandum, at 29. As part of its evaluation of FRPs, the TEC identified the same weaknesses found in the initial evaluation of EDC's proposal under this evaluation factor. The evaluators observed that EDC had not addressed the weaknesses, noting that "[a]lthough EDC, like the other offerors, [was] not asked to address its weaknesses, EDC was the only offeror that did not take advantage of being given two extra pages to add to their proposals." Id. at 29. EDC's final rating remained a "very good." Id.

EDC contends that the agency failed to hold meaningful discussions by not raising these weaknesses that, while styled as only weaknesses, were allegedly viewed by the agency as substantively significant. Protest at 10-13. The firm asserts that the weakness associated with the "vague and delayed implementation" description indicates that the agency found EDC's proposed approach would, in essence, result in "no learning by [the children] in the first year" and that a much smaller number of children will be given access to "quality education over the life of the contract." Protester Comments at 5-6. EDC adds that improving educational outcomes is "the very core" of the requirement, and the agency's conclusion that its proposal does not reach an adequate number of students is a significant criticism that "calls into question whether EDC will successfully perform the contract." Protest at 12 (emphasis omitted). EDC argues that the agency's conclusion that its "slow roll-out results in too few students being educated, and none in the first year," are actually "massive criticism[s] that [go] to the very purpose of the contract." Protester Comments at 7.

When an agency engages in discussions with an offeror, the discussions must be meaningful. In order to be meaningful, discussions must be sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror's potential for receiving award. Powersolv, Inc., B-402534, B-402534.2, June 1, 2010, 2010 CPD ¶ 206 at 7. In conducting discussions, an agency may not, through its questions or silence, lead an offeror into responding in a manner that fails to address the agency's actual concerns; may not misinform the offeror concerning a problem with its proposal; and may not misinform the offeror about the government's requirements. Id. While the precise content of discussions is largely a matter of the contracting officer's judgment, such discussions must, at a minimum, address deficiencies and significant weaknesses identified in the proposal. FAR § 15.306(d)(3); American States Utilities Services, Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 5.

An agency is not required, though, to afford offerors all-encompassing discussions, or to discuss every aspect of a proposal that receives less than the maximum score, and is

⁵ A weakness was defined as a "flaw in the proposal that increases the risk of unsuccessful contract performance," while a significant weakness was defined as a "flaw in the proposal that appreciably increases the risk of unsuccessful contract performance." AR, Tab 22, FRP Technical Evaluation Memorandum, at 3.

not required to advise of a weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor in choosing between two closely ranked proposals. L-3 STRATIS, B-404865, June 8, 2011, 2011 CPD ¶ 119 at 6-7. As stated above, a significant weakness in a proposal is a flaw that appreciably increases the risk of unsuccessful contract performance. FAR § 15.001; AR, Tab 22, FRP Technical Evaluation Memo, at 3. In determining whether a concern is a significant weakness, our Office does not look solely to the label or term used by the agency, but additionally looks to the context of the evaluation. Raytheon Company, B-404998, July 25, 2011, 2011 CPD ¶ 232 at 4; Planning and Development Collaborative International, B-299041, Jan. 24, 2007, 2007 CPD ¶ 28. The fact that the agency does not expressly characterize the concern as a significant weakness is not controlling. AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 8.

We have reviewed the record and do not agree that the assessed weaknesses were significant such that the agency had improperly failed to disclose them during discussions. In this regard, the record shows that none of the weaknesses identified were considered by the agency to be flaws that appreciably increased the risk of unsuccessful contract performance. Even with these weaknesses assessed, the agency assigned EDC's proposal a rating of "very good" under the technical approach factor, indicating that EDC's proposal demonstrated a strong grasp of the requirements, presented a low overall degree of risk of unsuccessful contract performance, and the proposal's strengths outweighed its weaknesses. AR, Tab 8, TEC Initial Evaluation Memorandum at 31; Tab 22, TEC FRP Evaluation Memorandum at 29-30.

Even looking beyond the name assigned to these critiques, the record does not evidence that the agency believed that either of these issues appreciably increased EDC's risk of unsuccessful performance.⁶ The RFP did not specify a minimum number of children or AEP centers to be reached, nor did it delineate a specific time at which instruction needed to begin. Rather, as the agency explains, this factor entailed a qualitative assessment of whether offeror's proposed an approach that, broadly speaking, would increase learning outcomes. COS at 11 (citing RFP at 150). The agency's critique is that EDC's proposal would provide less than the desired amount of value, but the critique is not tantamount to a conclusion that EDC's proposal would be unsuccessful at improving learning outcomes for the target population. Cf. AT&T Corp., supra (finding that the agency improperly failed to disclose significant weakness where it stated that the risk associated with that offeror's staffing plan could jeopardize the overall success of the project).

⁶ EDC's reliance on our decision in Mevacon-NASCO JV; Enanto Facility Servs., LLC, B-414329 et al. May 11, 2017, 2017 CPD ¶ 144, is misplaced. In that case, we found that the agency had failed to disclose a weakness that was substantively significant where the record showed that the agency believed the weakness "reflected a high risk of unsuccessful performance," concluding that the proposal "has not demonstrated an adequate approach and understanding of the requirements." Id. at 17. The record here does not show that the agency viewed the weaknesses at issue as reflecting a high risk of unsuccessful performance.

The agency's evaluative conclusions that the proposal's slow implementation approach might result in students only beginning to be taught in year two, and that EDC's proposed low number of AEPs would reach a less than desired amount of youth, were unquestionably critiques of the efficacy and value associated with EDC's approach. As the agency explains, the TEC considered this a "gauge of an [o]ffer's level of ambition and value," finding that while it did increase the risk of unsuccessful contract performance, it did not do so appreciably. COS at 11. While the agency could have alerted EDC of these critiques to enable the firm to address them in EDC's revised proposals, USAID was not required to do so where the record shows that the agency did not consider these weaknesses to be significant. L-3 STRATIS, supra, at 7 ("Since the record does not reflect that the particular weakness at issue was characterized as 'significant' or reflected a deficiency, there is no basis to conclude that the agency's discussions were improper.").⁷

Key Personnel and Staffing Plan

EDC also complains the agency failed to raise during discussions a weakness assessed against the firm's proposal under the key personnel and staffing plan factor. The firm argues the agency considered this weakness significant.

The key personnel and staffing plan factor provided that proposals would be evaluated on the extent to which their staffing plan, including the proposed chief of party, convincingly demonstrated the offeror's ability to successfully implement the contract.⁸ RFP at 150. The RFP additionally noted that offerors should "consider how this activity will be structured" and include "a discussion of how the [o]fferor will manage program activities." Id. at 139.

EDC's initial proposal was assigned a "marginal" rating under this factor. AR, Tab 8, TEC Initial Evaluation Memorandum, at 35. In its FPR, EDC addressed the identified

⁷ EDC also notes, and the record confirms, that the SSA considered these weaknesses in its source selection decision. Protester Comments at 8-9 (citing AR, Tab 12, SSDD, at 5). However, as highlighted by the agency, a weakness is not rendered significant by virtue of becoming a determinative factor in choosing between two closely ranked proposals. See, e.g., L-3 STRATIS, supra (discussing that the mere fact that the weakness at issue served as a discriminator in choosing between two closely ranked proposals does not mean that the weakness was significant). If anything, while the agency ultimately selected CAI's proposal as representing the best value, the SSA's consideration illustrates the confidence that the agency had in EDC's proposal to successfully perform this requirement. AR, Tab 12, SSDD, at 10.

⁸ Offerors were required to propose a chief of party as a key person for this requirement. RFP at 42. In addition, offerors were required to include a CV for their proposed chief of party that included a minimum of three references. Id. at 142.

deficiency related to the references for its proposed chief of party. As a result, the agency upgraded EDC's rating for this evaluation factor to a "satisfactory."⁹ AR, Tab 22, TEC FRP Evaluation Memorandum, at 32. EDC's revised proposal retained its assessed strength (for the experience of its chief of party) under this factor, but the proposal also retained the assessed weakness under this factor. Id. The agency assessed this weakness due to its perception that EDC's proposed staffing was "dispersed across consortium partners," which could lead to "inefficiencies in advancing technical deliverables due to a greatly increased management burden." Id. As EDC did not revise this portion of its proposal, this weakness remained in the final evaluation. Id.

EDC argues that this weakness was substantively significant. Highlighting the fact that the TEC characterized EDC's staffing plan as "extremely complicated and inefficient," EDC asserts that the record shows the agency believed EDC's staffing inefficiency would prevent it from successfully implementing the technical aspects of the contract. Protester Comments at 11 (citing AR, Tab 22, TEC FRP Evaluation Memorandum, at 32). EDC also notes that the significance of this weakness is evidenced by the fact that it was the agency's only critique of its proposal under this factor, yet the firm only received a "satisfactory" rating. Id. at 11.

While the record supports EDC's contention that the identified weakness factored into the agency's "satisfactory" rating--and that the agency characterized this staffing approach as "extremely complicated"--it nonetheless shows that the agency thought this would only moderately increase the risk of unsuccessful performance, but not appreciably enough to warrant an assignment of a significant weakness. AR, Tab 22, TEC FRP Evaluation Memorandum, at 32; AR, Tab 12, SSDD at 10. Specifically, the agency found that EDC proposed an inefficient reporting structure, but in light of EDC's proposed chief of party's experience with managing education activities, USAID did not find that this weakness was sufficient to appreciably increase the risk of unsuccessful performance. COS at 16 (citing AR, Tab 8, TEC Initial Evaluation Memorandum, at 35).

In sum, the record shows that the agency did not consider these weaknesses to be significant. While they reflect criticisms of aspects of EDC's approach, at no point does the record indicate that the agency believed that any of these aspects significantly increased the risk of unsuccessful contract performance. To the contrary, the record shows that the agency had confidence in EDC's ability to successfully perform the contract but chose CAI due to the combination of its technical superiority and lower price. AR, Tab 12, SSDD at 10. Accordingly, we find that there was nothing improper in the agency's decision not to disclose these weaknesses during discussions.

⁹ A satisfactory rating was assigned to proposals with following characteristics: the proposal demonstrates a reasonably sound response and a good grasp of the requirements; and the proposal meets RFP requirements and presents a moderate overall degree of risk of unsuccessful contract performance; strengths outweigh weaknesses. AR, Tab 8, Initial TEC Evaluation Memorandum, at 5-6.

Disparate Treatment

Finally, EDC contends that the agency unequally evaluated proposals. Supp. Protest at 2-5. In evaluating CAI's proposal under the technical approach factor, the agency assigned the firm a significant strength for exceeding performance requirements for its focus on teacher well-being. AR, Tab 22, TEC FRP Evaluation Memorandum, at 22. The agency's evaluation noted that CAI's proposal focused on teacher well-being, and "not simply the delivery of SEL [socio-emotional learning] instruction," suggesting a "greater understanding of the issues facing teachers in the Somali crisis conflict, greatly increasing the likelihood of successful performance." Id.

EDC contends that it "proposed essentially the same strategy as CAI to effectuate teacher well-being--training teachers on the very social and emotional skills that teachers are expected to teach to students" Protester Comments on Supp. AR at 2. EDC argues that its proposal, likewise, proposed training teachers on SEL curriculum and on competencies in teacher well-being, but the agency failed to equally credit the firm. Id. at 4-11. To support this assertion, EDC points to the following from the "teacher professional development (TPD)" section of its proposal:

The [TPD] curriculum will prioritize instructional strategies for reading, math and SEL—the core curriculum . . . The [DELETED] curriculum uses the [DELETED] approach to training in these environments. The approach, which we will consider adopting as a key module in the training curriculum, is organized around competencies for teachers that include the teacher's role and well-being, child protection, and well-being and inclusion pedagogy.

Id. at 4-5 (citing AR, Tab 11A, EDC Revised Technical Proposal, at 26) (emphasis omitted).

EDC further argues that, like CAI's approach, it explained the well-being benefits of training teachers in the SEL curriculum, contending that the record does not provide a reasonable basis that would justify the disparate evaluation. Protester Comments on Supp. AR at 8.

It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. Cubic Applications, Inc., B-411305, B-411305.2, July 9, 2015, 2015 CPD ¶ 218 at 7; Rockwell Elec. Commerce Corp., B-286201 et al., Dec. 14, 2000, 2001 CPD ¶ 65 at 5. Where a protester alleges unequal treatment in a technical evaluation, it must show that the differences in rating did not stem from differences between the offerors' proposals. Raytheon Co., Space & Airborne Sys., B-411631, Sept. 16, 2015, 2015 CPD ¶ 361 at 8.

On this record, EDC has failed to show that the differences in ratings did not stem from differences between the offerors' proposals. CAI's proposal included a separate section titled "[s]upport teacher well[-]being" that demonstrated awareness that teachers in regions affected by conflict "are vulnerable to stress, with impacts on psychosocial

well[-]being and motivation.” AR, Tab 18, CAI Revised Technical Proposal, at 19-20. To address this, CAI proposed to [DELETED]. Id. at 20. The proposal further explained that these [DELETED] would emphasize stress management and self-care. Id.

In contrast, while EDC’s proposal generally mentions teacher well-being, it did not similarly propose any specific approach for addressing teacher well-being.¹⁰ AR, Tab 20, TEC Chair Statement, at 2. The referenced portions of EDC’s proposal discuss training teachers on the delivery of SEL instruction, but it does not propose strategies for supporting teachers’ well-being. Id. The agency explains that training teachers in SEL instruction promotes well-being in students, which is distinct (albeit related) from proposing a detailed approach to providing teachers themselves with stress management and self-care support in the conflict environment. Supp. Memorandum of Law at 9-10. Thus, our review of the record shows that the difference in evaluation stems from differences in the offerors’ proposal. See Deep Space Sys. Inc., B-417714, Sept. 26, 2019, 2019 CPD ¶ 347 at 16. As such, this allegation is denied.

The protest is denied.

Thomas H. Armstrong
General Counsel

¹⁰ EDC contends that the agency’s responses to this argument constitute post-hoc rationalizations. Protester Comments on Supp. AR at 5-6. As our Office has noted we do not expect an agency’s evaluation report to “prove a negative.” BillSmart Solutions, LLC, B-413272.4, B-413272.5, Oct. 23, 2017, 2017 CPD ¶ 325 at 4 n.19. Thus, there was no requirement for the agency’s evaluation to document why this aspect of EDC’s proposal did not merit a strength, and we view the evaluators’ declarations to be post-protest explanations that provide a detailed rationale for contemporaneous conclusions and not post-hoc rationalizations. Id.