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Decision

Matter of: Engility Services, LLC

File: B-416588.3; B-416588.4

Date: March 20, 2020

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Jason A. Carey, Esq., J. Hunter Bennett, Esq., Andrew R. Guy, Esq., Evan R. Sherwood, Esq., and Brooke G. Stanley, Esq., Covington & Burling, LLP, for PAE Government Services, Inc., the intervenor.

John R. Caterini, Esq., and Kristen B. Hahn, Esq., Department of Justice, for the agency.

Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the awardee's professional compensation plan was unrealistic is denied where the record shows the agency reasonably determined that awardee's professional compensation plan was sufficient to recruit and retain personnel.
 2. Protest that the awardee's proposal did not conform to a material solicitation requirement is denied where the record shows the agency reasonably evaluated the awardee's technical proposal in accordance with the terms of the solicitation.
 3. Protest that the agency unreasonably made its source selection decision is denied where the agency compared the proposals, determined that they were technically equal, and selected the lower-priced proposal in accordance with the terms of the solicitation.
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DECISION

Engility Services, LLC, of Reston, Virginia, protests the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract to PAE Government Services, Inc., of Arlington, Virginia, under request for proposals (RFP) No. DJJI-17-RFP-1037, issued by the Department of Justice (DOJ) for training support services. Engility alleges that the DOJ unreasonably evaluated PAE's price and technical proposals.

We deny the protest.

BACKGROUND

On July 15, 2017, the DOJ issued the RFP to procure administrative, logistical, professional, and technical services to support the International Criminal Investigative Training Assistance Program (ICITAP) and the Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT). Combined Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2; RFP, at 2. ICITAP and OPDAT primarily partner with foreign countries to develop criminal investigative and prosecutorial institutions. RFP, at 9-10. The selected contractor would provide supplies and services to plan, develop, implement, and present training courses, conferences, and technical seminars. Id. at 23-25.

The RFP contemplated the award of an IDIQ contract to be performed over a 2-month transition period, a 1-year base period, and six 1-year option periods. RFP, amend. 2, at 2. Task orders could be issued on a fixed-price, time-and-material, or labor-hour basis. Id.

Award would be made on a best-value tradeoff basis considering technical merit and price factors. RFP, at 86. For the technical merit factor, the agency elected to use a numerical, weighted scoring system. Id. at 87. Offerors could receive a maximum point score under four subfactors, including: management (45 points); corporate experience (20 points); past performance (20 points); and staffing (15 points). Id. For price, offerors were advised that the agency would determine whether proposed prices were realistic. Id. at 86, 88. The RFP also incorporated Federal Acquisition Regulation (FAR) provision 52.222-46 "Evaluation of Compensation for Professional Employees" by reference. Id. at 67.

Engility, PAE, and another firm not relevant here submitted proposals by the October 5, 2018, closing date. COS/MOL at 4-5. The agency's evaluation produced the following relevant results:

	Maximum Score	Engility	PAE
Management	45.0	43.2	38.7
Staffing	20.0	13.2	12.9
Past Performance	20.0	17.2	18.0
Corporate Experience	20.0	18.8	18.0
Total Technical Scores	100.0	92.4	87.6
Total Evaluated Price		\$335,852,010	\$287,389,579

Agency Report (AR), Tab Q, Best-Value Determination (BVD), at 2. Based on the evaluation results, the source selection authority (SSA) identified PAE's proposal as offering the best value. The SSA compared the proposals of Engility and PAE, and determined that Engility's proposal did not offer any technical benefit that would outweigh the \$48.6 million price premium. Further, the SSA determined that the

technical proposals were substantially equal. Id. As a result, the SSA selected PAE's proposal for award based on its lower evaluated price. Id. at 10-11. This protest followed.

DISCUSSION

Engility primarily alleges that the agency unreasonably failed to assign risk to PAE's technical proposal based on PAE's low price. Supp. Protest at 3-9. Engility also alleges that the DOJ unreasonably evaluated PAE's technical proposal, and improperly made its source selection decision. Id. at 9-12; Protest at 23-27. We have reviewed all of Engility's allegations and find no basis to sustain the protest. We discuss the chief allegations below.

Evaluation of PAE's Professional Compensation Plan

Engility argues that the DOJ failed to conduct a proper price realism evaluation of PAE's professional compensation. Engility asserts that the DOJ failed to recognize that PAE's staffing approach represented a risk of unsuccessful performance. Engility also asserts that the DOJ failed to compare PAE's fringe benefits plan against the incumbent contractor's and the other offerors' plans. We disagree.

The purpose of FAR provision 52.222-46, "Evaluation of Compensation for Professional Employees," is to evaluate whether offerors will obtain and keep the quality of professional services needed for adequate contract performance, and to evaluate whether offerors understand the nature of the work to be performed. MicroTechnologies, LLC, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 8. In the context of a fixed-price labor hour contract, our Office has explained that this FAR provision anticipates an evaluation of whether an awardee understands the contract requirements and has proposed a compensation plan appropriate for those requirements--in effect, a price realism evaluation regarding an offeror's proposed compensation. SURVICE Eng'g Co., LLC, B-414519, July 5, 2017, 2017 CPD ¶ 237 at 5. The depth of a price realism analysis is a matter within the sound exercise of the agency's discretion. Obsidian Sols. Grp., LLC, B-416343, B-416343.3, Aug. 8, 2018, 2018 CPD ¶ 274 at 7. In reviewing protests challenging price realism evaluations, our focus is on whether the agency acted reasonably and in a manner consistent with the solicitation's requirements. Id.

The solicitation required offerors to submit completed pricing tables as part of their business proposals. RFP at 77. The pricing tables required offerors to provide fully burdened unit prices for law enforcement advisor, corrections advisor, forensics advisor, and administrative logistics specialist personnel. RFP at 78; RFP, amend. 3, Pricing Tables. The RFP included three sets of pricing tables requiring offerors to express the unit prices in hourly, daily, and monthly rates. RFP, amend. 3, Pricing Tables. All of the pricing tables included predetermined quantities. Id. Additionally, offerors were required to provide direct labor rates, fringe benefits, indirect costs, profit, escalation factors, and any other factors used to determine the fully burdened labor rates as

additional pricing information. RFP at 79. As noted above, the solicitation incorporated FAR provision 52.222-46 by reference. Id. at 67.

The record shows that the agency conducted a thorough evaluation of PAE's professional compensation plan to ensure that it reflected a sound management approach and understanding of the contract's requirements in accordance with FAR provision 52.222-46(b). Indeed, the price evaluation report shows that, during discussions, the DOJ instructed PAE to explain how its compensation levels were sufficient to retain, attract, and recruit highly qualified personnel since the difference between its direct rates and unit prices was nominal. AR, Tab O, Price Evaluation Report, at 23-24. In response, PAE explained that most instructor candidates are either retirees or on leave from another job, and therefore already have fringe benefits. Id. PAE further explained that most instructor candidates were motivated only by a high direct wage rate, and that because it offered a competitive direct wage rate, PAE would be successful at staffing and performing the requirement. Id. at 24. PAE supported its response by showing that it successfully employs the same staffing approach for another contract (i.e., the Global Anti-Terrorism Training Program (GATA)), which provides similar overseas training services for the Department of State. Id. at 18.

When analyzing PAE's response, the DOJ compared the GATA contract's requirements against the instant contract's requirements, and determined that the nature of the work was similar. AR, Tab O, Price Evaluation Report at 19-20. The DOJ contacted the GATA contracting officer and contracting officer's representative, and learned that PAE's lack of fringe benefits did not impact PAE's ability to recruit or retain qualified instructors. Id. at 23. The GATA contracting officer and contracting officer's representative also explained that PAE's compensation plan was ideal for acquisitions involving overseas highly specialized training because PAE's approach emphasizes a higher take-home wage and allows for more flexible scheduling. Id. Based on this information, the DOJ concluded that instructor candidates were not motivated by fringe benefits and that PAE would be able to perform the requirement, so long as it offered competitive direct rates. See Supp. COS/MOL at 2.

The DOJ also examined PAE's proposed labor rates to determine whether they were comparable to the market rates. AR, Tab O, Price Evaluation Report, at 25-27. The DOJ compared PAE's proposed unit prices and direct rates to those of the incumbent and other offerors. Id. at 25-26, 28-29. The DOJ also compared PAE's unit prices to the unit prices for the GATA contract. Id. at 26-27. Based on these comparisons, the DOJ concluded that PAE's compensation plan included competitive direct hourly rates. Id. at 30; COS/MOL at 11. The DOJ also noted that PAE provided fringe benefits to select labor categories in order to ensure sufficient compensation was provided to account for unique situations. Id. As a result, the DOJ concluded that PAE's compensation plan was realistic to recruit and retain qualified candidates because its

direct rates were competitive, and instructor candidates were not motivated by fringe benefits.¹ Id.; COS/MOL at 11-13.

According to Engility, the agency's analysis was flawed because it did not consider whether PAE's professional compensation plan would be sufficient to retain incumbent instructors. Protester's Comment at 3. Engility argues that PAE's staffing plan relied heavily on recruiting incumbent instructors. Id. at 3-4.

While the DOJ's analysis did not specifically address whether it viewed PAE's approach as realistic in terms of hiring incumbent personnel, the agency explains that it viewed PAE's professional compensation plan as sufficient to recruit the incumbent personnel since the compensation levels would also be sufficient to recruit new, highly qualified personnel.² Supp. COS/MOL at 1. Additionally, the agency points out that PAE's staffing approach was not entirely dependent on the incumbent instructors because the firm's staffing plan proposed recruitment strategies for new instructors as well, including a specialized recruitment process. Supp. COS/MOL at 4; AR, Tab K.1, PAE Technical Proposal, at Staffing 13-14. Thus, the agency's analysis is unobjectionable because, by determining that PAE's compensation was competitive in the labor market, the DOJ could reasonably conclude that PAE was capable of hiring both incumbent and outside instructors as set forth in its technical proposal. Cf. Insight Tech. Sols., Inc., B-417388.2, June 19, 2019, 2019 CPD ¶ 239 at 12 (protester's allegation that awardee's rates were too low to hire incumbent staff did not demonstrate that the agency's price realism analysis was unreasonable where the awardee's technical proposal identified alternatives for hiring in the event incumbents were not retained). Further, we note that Engility has not provided us with any basis to find that the agency's conclusion that the incumbent instructors were not motivated by fringe benefits represents an irrational assumption or a critical miscalculation. See Protester's Comments at 4-6. Accordingly, we deny this protest allegation.

¹ To the extent Engility argues that the DOJ considered only PAE's direct labor rates or unit prices, see Protester's Supp. Comments at 2-4, we deny that allegation. The record shows that the DOJ considered the fact that PAE was not extending fringe benefits as part of the price realism evaluation. AR, Tab O, Price Evaluation Report, at 23-24, 30.

² Engility contends that the agency's response constitutes a post-protest explanation that should be afforded little weight. In our view, the agency's response addresses a logical corollary to the finding that PAE's professional compensation plan was sufficient to recruit new, qualified personnel, and, to that end, fills a gap in the evaluation record. Wackenhut Servs., Inc., B-286037, B-286037.2, Nov. 14, 2000, 2001 CPD ¶ 114 at 4 ("While we generally accord greater weight to contemporaneous evidence, we will consider post-protest explanations that provide a rationale for contemporaneous conclusions, so long as those explanations are credible and consistent with the contemporaneous record."). Accordingly, we do not find persuasive the protester's position that the agency's response constitutes a post-protest explanation.

Engility also argues that the analysis failed to comply with FAR provision 52.222-46 because the agency did not compare PAE's fringe benefits plan to the plans of the incumbent contractor and the other offerors. Protester's Comments at 2-3. According to Engility, had the agency compared the fringe benefits plans, it would have determined that PAE's professional compensation plan was extremely low. Id. at 3.

Our Office has stated that in a recompetition, FAR provision 52.222-46(b) requires an agency to conclude whether a proposal "envisio[n] compensation levels lower than those of predecessor contractors" by comparing proposed compensation rates to those of the incumbent. See SURVICE Eng'g Co., supra at 6; Obsidian Sols. Grp., LLC, supra at 9. Where a professional compensation plan offers lower compensation, the agency must evaluate the proposal on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of competent professional service employees. FAR provision 52.222-46(b); SURVICE Eng'g Co., supra at 6.

Assuming that the agency failed to compare PAE's fringe benefits plan against the incumbent contractor's plan, we do not find that this error caused Engility to suffer any competitive prejudice. Competitive prejudice is an essential element of every viable protest, and we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. Orbit Research, LLC, B-417462, July 17, 2019, 2019 CPD ¶ 258 at 7. At best, a side-by-side comparison would have informed the agency that PAE's total compensation was lower than the predecessor contract; that finding only would have necessitated that the agency conduct additional evaluation. Because the DOJ ultimately evaluated whether PAE could recruit and retain qualified personnel and therefore maintain program continuity, high-quality work, and competent staff, we do not think that the alleged error resulted in competitive prejudice. AR, Tab O, Price Evaluation Report, at 23-30. Accordingly, we deny this protest allegation.

Finally, Engility appears to argue that the price realism analysis was unreasonable because PAE's approach relies on offering a high wage rate, and PAE's proposed direct rates were not higher than the other offerors' direct rates or the direct rates for PAE's other contract. Protester's Supp. Comments, at 4-9. The record shows that the DOJ found PAE's total compensation to be realistic because it offered competitive wages. AR, Tab O, Price Evaluation Report, at 30 ("In order to attract and retain highly qualified and skilled labor, PAE compensates their 1099 contractor staff with competitive direct hourly rates."). Thus, the agency was only concerned with determining whether PAE's rates were competitive (i.e., high enough to support its technical approach). In this regard, the agency's evaluation was reasonable because PAE's direct rates were similar to most of the other offerors' rates and PAE's rates for the other contract. Id. at 26-30; COS/MOL at 11. The record also shows that some of PAE's wages were within the top 10 percent of wages for those particular positions. AR, Tab O, Price Evaluation Report, at 28. Accordingly, we deny this protest allegation because the agency's evaluation was consistent with the pricing data.

Evaluation of PAE's Technical Proposal

Engility argues that PAE's technical proposal should have been rejected for failing to meet solicitation requirements. Engility argues that the solicitation required each offeror to submit five past performance references and licensing information for its subcontractors, and that PAE failed to satisfy that requirement because PAE did not submit that information for its instructors. Supp. Protest at 9-10. The DOJ responds that the solicitation distinguished between subcontractors and independent contractors, and that therefore PAE was not required to submit that information for its instructors. COS/MOL at 22.

In reviewing an agency's evaluation, our Office will not substitute our judgment for that of the agency; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's terms. Nexant, Inc., B-417421, B-417421.2, June 26, 2019, 2019 CPD ¶ 242 at 6. Further, the evaluation of proposals is a matter within the agency's discretion. Id.

The solicitation instructed offerors that "[i]f any portion of the work will be subcontracted or performed by a team member, provide five (5) references for the subcontractor/team member as described above." RFP at 82. The solicitation also required that "[t]he Contractor shall be licensed or registered, or employ a licensed or registered subcontractor, as required by law, in all countries where ICITAP and OPDAT operate." Id. at 14. Contrary to the protester's position, we do not find that these provisions required PAE to submit past performance references or licensing information for each of its instructors.

The agency points out that the solicitation created a distinction between independent contractors and subcontractors. See COS/MOL at 22. For example, as part of the security requirements clause, the solicitation provided that "[a]ll references to 'contract(or) personnel and 'contract employee' in this clause include all individuals that will perform under this contract, including individuals employed by the Contractor, team member, subcontractor, consultant, and/or independent contractor." RFP at 44. In addition, the solicitation provided that Defense Base Act insurance is "federally mandated for all contractor employees and independent contractor personnel or subcontractors working outside the United States and its territories." Id. at 5.

Based on these provisions, we agree that the solicitation viewed independent contractors (i.e., subcontracted persons) and subcontractors (i.e., subcontracted entities) as distinct. COS/MOL at 22. Thus, even though the independent contractors will technically be subcontracted personnel, we think the agency reasonably did not require PAE to submit past performance references or licensing information for each

individual instructor given the solicitation's terms.³ Moreover, we note that, whereas the agency's interpretation is reasonable because it is consistent with the RFP as a whole, the protester's interpretation is unreasonable because it effectively renders superfluous the solicitation's references to "independent contractors." See Anders Constr., Inc., B-414261, Apr. 11, 2017, 2017 CPD ¶ 121 at 3-4 (protester's interpretation unreasonable where it rendered superfluous part of the solicitation).

In any event, an agency may waive or relax a material solicitation requirement when the award will meet the agency's actual needs without prejudice to the other offerors. Lockheed Martin Corp., B-411365.2, Aug. 26, 2015, 2015 CPD ¶ 294 at 14. Unfair competitive prejudice from a waiver or relaxation of the terms and conditions of the RFP for one offeror exists where the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. Id.

Here, we have no basis to conclude that Engility was prejudiced by PAE's alleged failure to include past performance references for each of its instructors. Engility has not alleged that, had it known the agency would not require past performance references, it would have subcontracted more instructor personnel. See Supp. Protest at 10-13; cf. Platinum Business Corp., B-415584, Jan. 18, 2018, 2018 CPD ¶ 34 at 4 (protester was not prejudiced by agency's relaxing of a material solicitation requirement where it did not specify how it would have changed its proposal). Accordingly, we deny this protest allegation because Engility has failed to demonstrate that it suffered any competitive prejudice.⁴

³ Engility also points out that the RFP requires the contractor to maintain all necessary foreign permits and licenses for subcontractors, and that the RFP provides that any permitting and licensing fees are reimbursable. Supp. Protest at 10-11. Since Engility asserts that PAE's instructors are subcontractors, it argues that the agency failed to consider that PAE's licensing costs will be extremely high because the firm must obtain licenses for each instructor. Id. at 10-11. As noted above, we do not find that the licensing provision applies to PAE's instructors because the solicitation distinguished between independent contractors and subcontractors. Accordingly, we deny this protest allegation because the subcontractor licensing requirement does not apply to PAEs independent contractors.

⁴ Engility also argues that the agency's technical evaluation was unreasonable because PAE assumed that it would have lower training costs since it intended to hire incumbent instructors. Supp. Protest at 11-12. Because we previously concluded that the agency reasonably determined that PAE would be able to hire incumbent instructors, we have no basis to sustain this protest allegation.

Source Selection Decision

Engility alleges that the DOJ unreasonably made its best-value tradeoff decision. Protest at 23-27. Specifically, Engility argues that the agency improperly concluded that its and PAE's technical proposals were equal because Engility's technical proposal received a higher score. Id. at 24.

In reviewing an agency's source selection decision, we examine the supporting record to determine if it was reasonable and consistent with the solicitation's evaluation criteria and applicable procurement statutes and regulations. Altavian, Inc., B-417701, B-417701.2, Sept. 17, 2019, 2019 CPD ¶ 323 at 9. In this regard, ratings, whether numerical, color, or adjectival are merely guides to intelligent decision-making. Id. The evaluation of proposals and consideration of their relative merits should be based upon a qualitative comparison of the proposals consistent with the evaluation scheme. Id.

Here, the BVD shows that the SSA reviewed the technical evaluation report, compared the assessments against the solicitation's evaluation criteria, and independently determined that PAE's proposal offered the best value. AR, Tab Q, BVD, at 2. Furthermore, while Engility received higher technical scores under three of the subfactors, the SSA concluded that Engility's proposal did not offer significant technical advantages over PAE's proposal. Id. at 3-10. For example, although the technical evaluators concluded that Engility's proposed management structure was superior, the SSA independently concluded that Engility's proposal did not offer an advantage in this regard because the total amount of program management support staff was similar amongst all three proposals. Id. at 4. Because the SSA determined that the proposals were technically equal, the SSA selected PAE's proposal as offering the better value due to PAE's lower price. Id. at 10. Thus, the record shows that the SSA compared the quality of the proposals in light of the solicitation's evaluation scheme. RFP, at 86 ("The total evaluated price will be the determining factor for award where competing proposals are considered substantially equal from a technical merit standpoint."). Accordingly, we deny this allegation.

Finally, we dismiss Engility's allegation that the SSA's source selection decision was unreasonable because the decision was predicated on unreasonable technical and price evaluations. Protest at 23. We dismiss this allegation because it is derivative of the protester's challenge to the agency's price realism analysis and technical evaluation. Safeguard Base Operations, LLC, B-415886.6, B-415886.7, Dec. 14, 2018, 2018 CPD ¶ 426 at 4 (derivative allegations do not establish independent bases of protest).

The protest is denied.

Thomas H. Armstrong
General Counsel