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Decision

Matter of: Cellebrite Inc.

File: B-420371.2

Date: April 28, 2022

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DIGEST

Agency decision to limit corrective action is unobjectionable where the corrective action is adequate to remedy the procurement improprieties at issue.

DECISION

Cellebrite, Inc., of Parsippany, New Jersey, protests the actions of the Department of Homeland Security (DHS), United States Secret Service (USSS), in its implementation of corrective action in response to Cellebrite's prior protest with our Office. Cellebrite's prior protest challenged the award of a contract to KACE Company, LLC, of Ashburn, Virginia, under request for proposals (RFP) No. 70US0921R70090039, for instructional services for the USSS. Cellebrite alleges that the limitations imposed on the scope of the final proposal revisions (FPRs) as part of the agency's corrective action are unreasonable and reflect an unfair agency bias in favor of KACE.

We deny the protest.

BACKGROUND

The RFP, issued on July 6, 2021, for instructional services contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity (IDIQ) contract. Agency Report (AR),

Tab 4, RFP at 274.¹ The solicitation provided that the agency would make award on a best-value tradeoff basis utilizing the following evaluation factors and subfactors:

- Factor 1 - Program Manager and Instructor Experience
 - Subfactor 1 - Personnel Qualifications and Experience
 - Subfactor 2 - Evidence of Personnel Availability
- Factor 2 - Corporate Experience
- Factor 3 - Management and Staffing Approach
- Factor 4 - Curriculum Demonstration
- Factor 5 - Price

Id. at 309. The solicitation provided for a two-phase evaluation process. In phase I the agency would determine a proposal’s viability based on an evaluation of the following factors: program manager and instructor experience, corporate experience, and management and staffing approach. After evaluation of the phase I proposals, the agency would establish a competitive range of the most highly rated proposals. *Id.* at 312. In phase II, the agency would then evaluate the competitive range proposals under the curriculum demonstration factor and price, and select the best-value offeror. *Id.* at 312-313.

On August 2, the agency received four phase I proposals, including proposals from Cellebrite and KACE. AR, Tab 2, Contracting Officer Statement (COS) at 100. After reviewing proposals, the agency established a competitive range that included only the proposals of Cellebrite and KACE. *Id.* at 101. The agency then conducted discussions, referred to as exchanges, with both offerors. At the conclusion of phase II discussions, the competitive range offerors were given the opportunity to submit a complete final revised proposal (technical and price). The proposals of KACE and Cellebrite were evaluated as follows:

	KACE	Cellebrite
Program Manager and Instructor Experience	High	High
Corporate Experience	High	High
Management and Staffing Approach	High	High
Curriculum Demonstration	High	Some
Price (Total Evaluated Price)	\$39,932,474	\$50,130,649

AR, Tab 6, Unsuccessful Offeror Notice at 320; AR, Tab 10, Agency Price Analysis Memorandum at 587. Based on this evaluation, the agency determined that KACE’s proposal provided the best overall value to the government. COS at 103. On November 9, the agency awarded the contract to KACE. *Id.*

¹ All references to the solicitation are to amendment No. 5. In preparing its report, USSS used a BATES numbering system; our citations are to those numbers.

On November 19, Cellebrite filed a protest of the award to KACE, which our Office docketed as B-420371.1. On December 29, the agency took corrective action by rescinding the award to KACE, and issuing amendment No. 5. AR, Tab 5, Corrective Action Notice at 316; RFP at 250. As relevant here, amendment No. 5 clarified language contained in the corporate experience factor and the management and staffing approach factor by stating the following:

The Government will take into account experience regarding predecessor companies and key personnel with recent and relevant experience.

Id. at 310 and 311. The amendment also revised the curriculum demonstration factor to permit subcontractor instructors to present during the curriculum demonstration presentation, provided they were previously included in the previous key personnel proposal submission. *Id.* at 305; AR, Tab 5, Corrective Action Notice at 317. Offerors were notified that they could request an opportunity to amend other portions of their proposals if they could demonstrate that “these narrowly tailored corrections materially impacted previous proposal submissions.” *Id.*; COS at 107.

On January 25, 2022, the protester requested that the agency allow it to amend its price because its investment and growth in the interceding 5 months, as a newly listed public company, resulted in increased efficiencies and reduced operating costs. AR, Tab 7, Cellebrite’s Jan. 25, 2022 letter to agency. The agency, on January 28, denied Cellebrite’s request. AR, Tab 8, Agency Response to Cellebrite’s Jan. 25, 2022 letter. The protester then filed this protest to our Office, prior to the deadline for proposal submissions.

DISCUSSION

Cellebrite argues that given the agency’s decision to consider the experience of predecessor companies and key personnel, offerors should have been provided the option to revise any aspect of their proposals, including price. Protest at 16. In addition, Cellebrite maintains that the agency’s changes to the solicitation were unfair because they were “[t]ailored” to benefit KACE. *Id.* at 18.

The agency responds that it reasonably crafted its amended solicitation language to clarify its intended evaluation of the corporate experience, and management and staffing approach factors. The agency notes that it did not change the evaluation criteria, but instead simply clarified the criteria to make it clear that the agency would consider the experience of predecessor companies and key personnel. In this regard the agency notes that Federal Acquisition Regulation (FAR) subsection 15.305(a)(2)(iii) already permits agencies to “take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.” Memorandum of Law (MOL) at 10.

In addition, the agency asserts that Cellebrite’s request to revise its price is not based on any changes made to its proposal in response to the solicitation amendment. *Id.*

at 8. In this regard, the agency notes that the protester acknowledged that it made a “business judgment” to price its proposal “in the way that it did” because it believed that the agency would not consider the past performance of predecessor companies and key personnel, thereby limiting the applicant pool. Protest at 16. Further, the agency contests Cellebrite’s argument that the corrective action solely benefitted KACE. The agency notes that the portion of the corrective action permitting a new curriculum demonstration presentation, using subcontractor instructors, could also benefit Cellebrite by providing the company with an opportunity to improve its rating under the curriculum demonstration factor. *Id.* at 9-10.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *The Matthews Group, Inc. t/a TMG Constr. Corp.*, B-408003.2, B-408004.2, June 17, 2013, 2013 CPD ¶ 148 at 5. As a general matter, the details of corrective action are within the sound discretion and judgment of the contracting agency. *Evergreen Helicopters of Alaska, Inc.*, B-409327.3, Apr. 14, 2014, 2014 CPD ¶ 128 at 8. An agency may reasonably limit the scope of proposal revisions, provided such limitation is appropriate to remedy the procurement impropriety. See, e.g. *Honeywell Tech. Solutions, Inc.*, B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4; *Networks Elec. Corp.*, B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3. We generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *Id.*

Here, we have no basis to object to the agency’s corrective action. The record establishes that the corrective action was narrowly tailored to clarify that the agency would consider “experience regarding predecessor companies and key personnel with recent and relevant experience.” RFP at 304, 310, and 311. As noted by the agency, it was already permitted to consider such information under FAR subsection 15.305(a)(2)(iii). Indeed, our decisions have stated that, absent solicitation language to the contrary, an agency properly may consider the relevant experience and past performance of key individuals and predecessor companies; as such experience and past performance may be useful in predicting success in future contract performance. *Harbor Services, Inc.*, B-408325, Aug. 23, 2013, 2013 CPD ¶ 214 at 5.

While the protester contends that the solicitation, as originally issued, barred consideration of the experience or performance of key individuals and predecessor companies, we do not agree. In this regard, the solicitation, as issued, stated under the corporate experience factor that an offeror must submit examples of “its own corporate experience.” Comments at 7-8 (*quoting* RFP at 304). In our view, this language did not prohibit the agency’s consideration of experience regarding predecessor companies and key personnel; rather the solicitation was silent on this matter. Indeed, the language cited by the protester remained in the solicitation, even after the RFP was amended. RFP at 304.

The protester also argues that our decision in *Power Connector, Inc.*, B-404916.2, Aug. 15, 2011, 2011 CPD ¶ 186, is similar to the facts of its protest. In that decision,

our Office sustained a protest challenging an agency's plan to permit only limited proposal revisions following a solicitation amendment, where the amendment changed a material requirement under the past performance evaluation scheme. Cellebrite argues that, similarly here, the agency did not clarify the solicitation, rather it changed the type of experience that it would consider. Accordingly, the protester contends that our Office should find that the agency materially changed the evaluation criteria. Protest at 17.

We disagree. In *Power Connector*, the original solicitation did not contain a specific time limitation for the evaluation of past performance, and did not limit relevant past performance to providing the leather items sought in the procurement. Rather the agency added these considerations to the solicitation, but claimed it had only clarified its requirement for recent and relevant past performance information. Our Office sustained Power Connector's protest after concluding that these changes were material--i.e. the revised evaluation scheme was clearly different from the scheme set forth in the original RFP. *Power Connector, Inc., supra* at 3.

Here, however, we agree with the agency that the clarification did not change how offerors would be evaluated. Rather, the amendment clarified that the agency would consider information it was already permitted to consider under FAR subsection 15.305(a)(2)(iii). Thus, unlike in the case of *Power Connector*, there is no change, material or otherwise, in the past performance information that can be considered. On this record, we find no basis to question the agency's limited corrective action.

We also find that the agency reasonably denied Cellebrite's request to modify its price. In this regard, Cellebrite's request to modify its price was not precipitated by proposal changes resulting from the agency's corrective action. Rather, Cellebrite sought to revise its price because its business judgment with regard to price proved to be incorrect, and also to pass along efficiencies associated with its recent corporate restructuring. Protest at 16; AR, Tab 7, Cellebrite's Letter to the Agency (Jan. 25, 2022).

Cellebrite also argues that the agency's corrective action was narrowly tailored to only benefit KACE, and reflects bad faith towards Cellebrite.² We note that government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition, or

² Cellebrite contends as well that KACE misappropriated Cellebrite's intellectual property, including pricing information. Protest at 19. The protester argues that allowing it to revise its price would rectify the competitive inequities resulting from KACE's alleged theft of the protester's intellectual property. *Id.* Cellebrite's complaint regarding a disputed use of intellectual property is essentially a contract dispute between private parties, which our Office does not review. *Controlled FORCE, Inc.*, B-408853, Sept. 18, 2013, 2013 CPD ¶ 226 at 1.

unsupported speculation. *Career Innovations, LLC*, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8.

Here, apart from Cellebrite's unsupported argument, there is no evidence in the record showing bias in favor of KACE. In fact, as noted above, the corrective action provision under the curriculum demonstration factor, permitting subcontractor instructors to participate in an offeror's curriculum demonstration, could potentially benefit Cellebrite, as it received a rating of only "some confidence" during its first curriculum demonstration. AR, Tab 5, Corrective Action Notice at 317; AR, Tab 6, Unsuccessful Offeror Notice at 320. In sum, the record does not support the protester's assertion that the agency acted in bad faith in implementing this corrective action. *Infrastructure Def. Techs.*, B-401860.2, B-401860.3, July 27, 2010, 2010 CPD ¶ 185 at 5.

The protest is denied.

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General Counsel