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Decision

Matter of: DynCorp International LLC

File: B-409874.2; B-409874.3

Date: May 13, 2015

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Robert Nichols, Esq., Anuj Vohra, Esq., Nooree Lee, Esq., Kayleigh Scalzo, Esq., and Brandon Meyers, Esq., Covington & Burling LLP, for PAE Government Services, Inc., an intervenor.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency failed to provide protester an opportunity to address adverse past performance information to which the protester had not previously been given an opportunity to respond.
 2. Protest that agency's evaluation of technical proposals following corrective action was flawed because it varied from the agency's prior evaluation provides no basis for sustaining the protest.
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DECISION

DynCorp International LLC, of Falls Church, Virginia, protests the Department of State's (DOS) award of a task order to PAE Government Services, Inc., of Arlington, Virginia, pursuant to task order request (TOR) No. SAQMMA13R0132 to provide life and mission support services at designated facilities in Afghanistan.¹ DynCorp

¹ The services at issue support the DOS's Bureau of International Narcotics and Law Enforcement Affairs, which provides assistance to the Government of the Islamic Republic of Afghanistan in programs that are "designed to build Afghan government capacity throughout the justice sector, from law enforcement to corrections, and to combat narcotics trade in the country." Agency Report (AR), Tab 2, TOR, at 12; Contracting Officer's Statement (COS), March 4, 2015, at 1.

protests that the agency failed to conduct meaningful discussions and that the agency's final evaluation of technical proposals was flawed.

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

BACKGROUND

On August 10, 2013, the agency published the solicitation at issue,² seeking proposals to provide life and mission support services³ at certain facilities in Afghanistan.⁴ The solicitation contemplated award of a fixed-price task order, with limited cost-reimbursement and labor-hour elements,⁵ for a 12-month base period and four 1-year option periods.⁶ TOR at 7, 84. The solicitation further provided that award would be made on a best-value basis and established the following

² The solicitation was issued to holders of multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) contracts, referred to as Criminal Justice Program Support (CJPS) contracts, that had been previously awarded to various firms, including DynCorp and PAE.

³ Life support services include those associated with providing electrical power, water systems, sewage/waste treatment, trash collection, dining facilities, food storage facilities, housing, and laundry. Mission support services include those associated with providing government/contractor personnel with armored and non-armored vehicles, equipment, furniture, ballistic helmets, protective vests, and uniforms. AR, Tab 2, TOR, at 12-13.

⁴ The designated facilities included six facilities in Kabul (Camp Falcon, Camp Gibson, the National Investigative Unit/Special Investigative Unit, the Drug Enforcement Administration Compound, the Counter Narcotics Justice Center, and the Judicial Security Unit); the Regional Law Enforcement Center in Herat; and the Justice Center in Parwan, located on Bagram Air Field. TOR at 10. This solicitation consolidated requirements that have previously been performed under several separate contracts. AR, Tab 8, Technical Evaluation Panel (TEP) Final Report, Oct. 23, 2014, at 24. DynCorp is the incumbent contractor for a significant portion of the solicitation requirements. AR, Tab 3, Source Selection Authority (SSA) Decision, at 10.

⁵ The solicitation stated "this task order will be firm-fixed price," but added, "[t]he task order will also include cost-reimbursement and labor-hour (day) contract line items." TOR at 7. The solicitation provided "normalized values" (that is, plug numbers) for most of the cost-reimbursable items, and offerors were advised that their indirect rates would be applied to the plug numbers for purposes of the cost/price evaluation. Id. at 8.

⁶ The 12-month base period included a 3-month transition period. TOR at 18-19.

evaluation factors: technical,⁷ past performance,⁸ and cost/price.⁹ Id. at 70-73. Offerors were advised that the non-cost/price factors were significantly more important than cost/price. Id. at 70.

On August 16, 2013, initial proposals were submitted by DynCorp and PAE and were evaluated by a technical evaluation panel (TEP). Thereafter, discussions were conducted and revised proposals were submitted. As reflected in a TEP report, dated March 10, 2014, DynCorp's proposal was rated good, overall, under the technical evaluation factor.¹⁰ AR, Tab 32, Pre-Corrective Action TEP Report, at 5. PAE's proposal was rated marginal, overall, under the technical evaluation factor. Id. at 11. The TEP report concluded that DynCorp's proposal was technically superior to PAE's, and recommended award to DynCorp. Id. at 3. Nonetheless, on May 14, 2014, the source selection authority (SSA) selected PAE for award on the basis of PAE's lower evaluated cost/price. AR, Tab 34, Pre-Corrective Action Price Negotiation Memo/SSA Decision, at 7-8.

On May 28, 2014, DynCorp filed a protest challenging the award to PAE, asserting, among other things, that PAE's proposed cost/price failed to reflect performance of various solicitation requirements. On June 19, the agency advised our Office that corrective action was necessary and stated that it would: re-open discussions,

⁷ With regard to evaluation under the technical factor, the solicitation advised offerors, among other things, that: "The government may elect to include an assessment of the Offeror's past experience, as it relates to the services to be provided under this factor." TOR at 70.

⁸ With regard to evaluation under the past performance factor, the solicitation advised offerors, among other things, that: "The government may also use this [past performance] data to evaluate the credibility of the Offeror's proposal." TOR at 72-73.

⁹ The solicitation provided that an offeror's evaluated cost/price would be "the sum of all values for all proposed contract type items [that is, cost-reimbursement, labor hours, and fixed-price] for all required services," and provided that proposed prices would be evaluated for reasonableness and realism. TOR at 73.

¹⁰ The solicitation established four equally-weighted technical subfactors-- (1) Afghan capacity/collaboration; (2) program/logistics management; (3) mobilization/continuity of operations; and (4) reporting/forecasting--under which the agency assigned adjectival ratings of excellent, good, marginal or unacceptable for each subfactor; the agency similarly assigned an adjectival rating to each technical proposal, overall. TOR at 70-73. As shown in the March 10, 2014 TEP report, DynCorp's technical proposal was rated good, overall, and was rated excellent, good, good, and good, under the four subfactors, respectively. AR, Tab 32, Pre-Corrective Action TEP Final Report, at 3.

request proposal revisions, evaluate those revisions, and make a new award decision. AR, Tab 45, Corrective Action Letter, at 2. On June 25, we dismissed DynCorp's protest as academic, based on the agency's pending corrective action.

On August 8, 2014, the agency reopened discussions with DynCorp and PAE, seeking responses to various questions regarding the offerors' technical proposals. During these discussions, the agency directed DynCorp's attention to five aspects of its proposal that were causes for concern.¹¹ AR, Tab 4, DynCorp Discussions, at 3-4. With regard to past performance, the agency's August 8 discussion questions stated: "DOS did not identify any adverse past performance information to which [DynCorp] has not yet had an opportunity to respond." Id. at 4.

On August 18, DynCorp and PAE submitted their responses to the agency's questions, along with various changes to their proposals. In evaluating DynCorp's revisions to its technical proposal, the TEP downgraded the proposal from good to marginal under both the second technical subfactor, program/logistics management, and the fourth subfactor, reporting/forecasting, identifying various evaluated weaknesses. AR, Tab 8, TEP Final Report, Oct. 23, 2014, at 29-33, 34-36. In identifying weaknesses, the agency relied on the personal experience of the TEP members regarding DynCorp's past performance.

For example, in downgrading DynCorp's proposal to marginal under the second subfactor, program/logistics management, the TEP concluded that the proposal contained "numerous weaknesses," elaborating that:

The weaknesses are related to significant ambiguity in the proposal in multiple areas including logistics, motor pool, quality management and claims of staffing flexibility. Members of the panel have personally experienced or observed difficulties with [DynCorp] in these areas.

Id. at 29-30.

¹¹ Specifically, with regard to the first subfactor, Afghan capacity/collaboration, the agency expressed concern that DynCorp's plan to [redacted] was "prolonged and incremental," and also expressed concern that DynCorp's intent to [redacted], rather than [redacted], appeared to be "passive." AR, Tab 4, DynCorp Discussions, at 3. With regard to the second subfactor, program/logistics management, the agency expressed concern regarding inconsistencies within DynCorp's proposal as to the number of staff being proposed, and also expressed concern regarding DynCorp's submission of invoices within required time periods. Id. at 3-4. With regard to the fourth subfactor, reporting/forecasting, the agency expressed concern regarding the unavailability of DynCorp's subcontractors' data. Id. at 4.

Similarly, the TEP criticized DynCorp's subcontract management under the program/logistics management subfactor, stating:

[DynCorp] has historically used inadequately trained personnel to oversee subcontractors which has resulted in numerous instances of delays and additional expense as known to the TEP and documented in the incumbent performance.

Id. at 31.

In downgrading DynCorp's technical proposal to marginal under the fourth technical subfactor, reporting/forecasting, the TEP stated:

The panel additionally finds [DynCorp's] proposal lacking in the necessary safeguards to ensure that the subcontractors reporting is accurate Based on past experience known to the evaluators, the major concerns with this portion of contract performance [are] the contractor's tracking of issues once submitted and their disposition.

Id. at 35.

On September 5 and December 19, 2014, the agency conducted additional rounds of discussions, raising only cost/price issues with both offerors. On January 16, 2015, final proposal revisions were submitted and evaluated as follows:

	DynCorp	PAE
Technical	Good	Good
Afghan Capacity/Collaboration	Good	Excellent
Program/Logistics Management	Marginal	Excellent
Mobilization/Continuity of Operations	Good	Good
Reporting/Forecasting	Marginal	Good
Past Performance	Good	Good
Evaluated Cost/Price	\$134,223,658	\$131,145,664

AR, Tab 3, SSA Decision, at 3, 8-9.

On January 25, the agency notified DynCorp that PAE had, again, been selected for award. This protest followed.

DISCUSSION

DynCorp protests that the agency's discussions were not meaningful for various reasons, including that the agency failed to provide DynCorp an opportunity to discuss adverse past performance information that it had not previously been given

an opportunity to address. DynCorp further asserts that the agency's evaluation of technical proposals was flawed. As discussed below, we sustain the protest based on the agency's failure to discuss adverse past performance with DynCorp.

Meaningful Discussions

DynCorp asserts that the agency's discussions were not meaningful for various reasons, first asserting that the agency failed to meet its obligation to conduct discussions with DynCorp regarding adverse past performance that it had not previously been given an opportunity to address. Specifically, DynCorp refers to the various negative assessments the TEP members made based on their "personal experience" with DynCorp's past performance, maintaining that the agency was obligated to give DynCorp an opportunity to address the bases for TEP members' assessments. We agree.

When an agency conducts discussions with offerors, the discussions must be meaningful; that is, they must reasonably lead an offeror into the areas of its proposal that require modification, amplification, or explanation. See, e.g., Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 at 17-18. Specifically, the Federal Acquisition Regulation (FAR) requires that, when discussions are conducted, an agency must, at a minimum, advise an offeror of deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. FAR § 15.306(d)(3).

Here, the record establishes that DynCorp's incumbent performance of the Afghanistan Civilian Adviser Support (ACAS) contract, as assessed by the TEP members, formed the basis for several evaluated weaknesses in DynCorp's proposal. Specifically, as discussed above, in the process of downgrading DynCorp's proposal from good to marginal under two of the four technical evaluation subfactors, the agency assessed various weaknesses based on DynCorp's adverse past performance that TEP members "personally experienced or observed."¹² AR, Tab 8, TEP Final Report, Oct. 23, 2014, at 29-30, 31, 35. The record further indicates, and the agency does not dispute, that it did not discuss DynCorp's adverse past performance under the ACAS contract with DynCorp.¹³ Supp. AR at 15-17. Rather than identifying any prior opportunity DynCorp had to discuss its performance of the ACAS contract, the agency asserts that "there was no obligation to discuss [adverse past performance] information known personally to

¹² The TEP report states, "the CO [contracting officer] and TEP members are intimately aware of [DynCorp's] performance as the incumbent on ACAS, the TO [task order] to be replaced." AR, Tab 8, TEP Final Report, Oct. 23, 2014, at 37.

¹³ The record states "there was not an available CPARS [contractor performance assessment report system] entry [for the ACAS contract]." Id. at 40.

the Agency evaluators.” Id. at 16. The agency is wrong on this point as a matter of law.

As noted above, the FAR requires that, at a minimum, discussions must advise an offeror of deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. FAR § 15.306(d)(3). While an agency is authorized to make assessments based on the personal knowledge of individual evaluators, see Apptis, Inc., supra, such authority does not eliminate the FAR requirements regarding meaningful discussions.¹⁴

Here, as discussed above, DynCorp’s incumbent performance of the ACAS contract formed the basis for the TEP’s assessment of various weaknesses in DynCorp’s proposal. Further, the TEP’s evaluation incorporating its past performance assessments was materially different from its earlier evaluation, where the TEP concluded that DynCorp’s proposal was technically superior to PAE’s and, on that basis, recommended award to DynCorp. On this record, we are unable to conclude that the past performance assessments did not prevent DynCorp from receiving the task order award. Finally, the record establishes that DynCorp was not afforded an opportunity to address, respond to, or rebut the TEP members’ negative assessments regarding DynCorp’s past performance of the ACAS contract.¹⁵

¹⁴ The agency erroneously relies on General Dynamics-Ordnance & Tactical Systems, B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114, as support for its assertion that it need not discuss past performance information “known personally to the Agency evaluators.” In General Dynamics-Ordnance & Tactical Systems, the solicitation provided that award would be made without conducting discussions; the agency did not engage in discussions with any offeror; and, in that context, it was within the agency’s discretion not to discuss adverse past performance information with the protester. FAR § 15.306(a)(2). In contrast, where, as here, an agency has in fact conducted discussions, those discussions must be meaningful, as required by the FAR—including the requirement to discuss adverse past performance information.

¹⁵ As noted above, the solicitation advised offerors that, in evaluating proposals under the technical factor the agency “may elect to include an assessment of the Offeror’s past experience, as it relates to the services to be provided.” TOR at 70. Accordingly, we do not question the propriety of the agency’s consideration of DynCorp’s past performance in performing its evaluation under the technical factor. However, in this context, we do not view the FAR requirements regarding discussion of adverse past performance information as applicable only to discussions conducted in connection with the agency’s evaluation under the past performance factor. Rather, the agency was obligated to discuss with DynCorp the adverse past performance information on which it relied in evaluating DynCorp’s proposal under the technical evaluation factor.

On this record, the agency failed to comply with the FAR requirements regarding meaningful discussions, and we sustain the protest on that basis.

DynCorp also asserts that the agency's discussions were not meaningful based on various other allegations, including an assertion that the agency directed DynCorp to assume full performance during the 3-month transition period, but did not provide the same direction to PAE.

In its protest, DynCorp challenged the agency's cost/price evaluation on the basis that the agency should not have required offerors to price their proposals on the basis of full performance during the transition period. Protest, Feb. 2, 2015, at 43. In this context, DynCorp acknowledged that its initial cost/price proposal "included only nine months of costs for most of the cost-reimbursement CLINs during the [12-month] base period." Id. During the discussions conducted with DynCorp on December 19, the agency directed DynCorp to revise its cost/price proposal "to reflect 12 months of complete performance during the base period, including 12 months of field labor and other in-country cost items." AR, Tab 4, DynCorp Discussions, at 11. DynCorp responded by increasing its cost/price proposal as directed.¹⁶

In a supplemental protest, filed after receipt of the agency report, DynCorp asserts that the agency's discussions with PAE did not similarly seek cost/price submissions for the full 12-month base performance period, arguing that discussions were therefore unequal. Supp. Protest, Mar. 16, 2015, at 34-36. The record does not support DynCorp's protest. Specifically, in conducting discussions with PAE, the agency stated: "PAE must provide 12 for all quantity types listed as months." AR, Tab 37, PAE Discussions, at 9. On this record, we find no merit in DynCorp's assertion that the agency's discussions with the offerors regarding the 12-month transition period were unequal.

DynCorp also challenges the equality of the agency's discussions on the basis that the agency provided more detailed and comprehensive discussions to PAE than to DynCorp, noting, for example, that the agency conducted only one round of technical discussions, but two rounds of cost/price discussions. Supp. Protest at 38-44. DynCorp asserts that because PAE's cost/price reflected more flaws than DynCorp's, the agency's second round of cost/price discussions favored PAE and rendered the discussions unequal. Id.

¹⁶ Since the record is clear that, prior to submitting its final proposal revision in January 2015, DynCorp was aware of the agency's intent to evaluate cost/price proposals on the basis of full performance during the transition period, DynCorp's February 2 protest challenging that aspect of the agency's cost/price evaluation is not timely filed. 4 C.F.R. § 21.2(a)(1). In any event, DynCorp subsequently abandoned all of its challenges to the agency's cost/price evaluation.

In connection with the requirement that discussions be meaningful, offerors may not be treated unequally. However, the requirement for equal treatment does not mean that discussions with offerors must, or should, be identical. To the contrary, discussion must be tailored to each offeror's proposal. FAR §§ 15.306(d)(1), (e)(1); WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6.

Here, we have reviewed DynCorp's various assertions regarding the scope and quantity of the agency's discussions and conclude that the agency reasonably complied with the FAR requirement that discussions be tailored to each offeror's proposal. Based on our review, we find no basis to sustain DynCorp's protest challenging any aspect of the agency's discussions other than the agency's failure to discuss DynCorp's adverse past performance information.

Evaluation of Technical Proposals

Finally, DynCorp protests that the agency's final evaluation of DynCorp's proposal was flawed because the agency's documentation of that evaluation did not provide a "justification" for the differences between the final evaluation and the agency's pre-corrective action evaluation. Supp. Protest at 17-23. Specifically, DynCorp compares the strengths and weaknesses the agency identified in the pre-corrective action evaluation against those identified in the final evaluation, asserts that the agency had an obligation to justify its final evaluation in the context of the earlier evaluation, and maintains that absent such documentation, the agency's final evaluation was unreasonable.¹⁷ Id. DynCorp's assertions are without merit.

The fact that an agency's reevaluation varies from an original evaluation does not constitute evidence that the reevaluation was unreasonable. Sabre Sys., Inc., B-402040.2, B-402040.3, June 1, 2010, 2010 CPD ¶ 128 at 5 n.3. Indeed, it is implicit that a reevaluation could result in different findings and conclusions. Id.

Here, DynCorp's assertions that the agency's final evaluation is per se flawed for failing to be supported by documentation that "justifies" the evaluation in the context of the pre-corrective action evaluation provide no basis for sustaining its protest. The mere fact that the agency determined that reevaluation was appropriate

¹⁷ DynCorp also complains that, because the final evaluation of PAE's proposal did not vary from the pre-corrective action evaluation to the extent that DynCorp's evaluation did, the agency engaged in "unequal treatment." Supp. Protest at 20-21. However, other than this broad allegation, DynCorp's protest does not challenge the substance of PAE's evaluation in any way and, as discussed in the text above, DynCorp's complaints regarding its own evaluation provide no basis to sustain its protest. On this record we reject DynCorp's assertion of unequal treatment in the evaluation.

indicates that the agency viewed the initial evaluation as flawed. Accordingly, DynCorp's assertion that the agency's initial evaluation constituted a benchmark against which the subsequent evaluation had to be compared and "justified," is based on a false premise. Here, the agency's final evaluation record provides considerable explanation and support for its substantive assessments--most of which DynCorp's protest fails to address in any way. We have reviewed the entire record, along with DynCorp's various complaints regarding the agency's evaluation of technical proposals, and find no basis for sustaining its protest challenging the agency's technical evaluation.

The protest is sustained in part and denied in part.

RECOMMENDATION

As discussed above, the agency failed to conduct meaningful discussions with DynCorp with regard to adverse past performance information. Accordingly, we recommend that the agency reopen discussions with the offerors and afford DynCorp an opportunity to discuss all adverse past performance information that it was not previously afforded an opportunity to address, request and evaluate revised proposals, and rely on that evaluation in making a new source selection determination. If, upon reevaluation of proposals, DynCorp is found to offer the best value to the government, the agency should terminate PAE's contract for the convenience of the government and make award to DynCorp. We also recommend that DynCorp be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees, limited to the costs relating to the basis on which we have sustained the protest. 4 C.F.R. § 21.8(d)(1). DynCorp should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Susan A. Poling
General Counsel