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Decision

Matter of: Mission Essential Personnel, LLC

File: B-410431.9; B-410431.10

Date: March 18, 2015

Bryant S. Banes, Esq., Sean D. Forbes, Esq., and Stormy N. Mayfield, Esq., Neel, Hooper & Banes, PC, for the protester.

Scott E. Pickens, Esq., Barnes & Thornburg LLP, for SRA International, Inc.; Edward C. Reddington, Esq., and Nicholas T. Matich, Esq., Williams & Connolly LLP, for Booz Allen Hamilton; and Craig S. King, Esq., Patrick R. Quigley, Esq., Christopher Bowen, Esq., and Richard J. Webber, Esq., Arent Fox LLP, for CACI Technologies, Inc., the intervenors.

Erica S. Beardsley, Esq., CPT Evan Williams, and Scott N. Flesch, Esq., Department of the Army, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably did not select protester's proposal for award where proposal was rated unacceptable under small business participation evaluation factor due to protester's offering of a small business participation percentage substantially below agency's stated goal.

DECISION

Mission Essential Personnel, LLC (MEP), of Columbus, Ohio, protests the failure of the Department of the Army, Intelligence and Security Command to award it a contract under request for proposals (RFP) No. W911W4-13-R-0005, for global intelligence support services.¹ The protester challenges the agency's evaluation of its proposal.

¹ According to the agency, the solicitation requirements encompass four mission areas: (1) intelligence and security operations; (2) information operations; (3) mission support for facilities management, logistics, training, and intelligence systems support; and (4) sustainment services, including program management,

(continued...)

We deny the protest.

BACKGROUND

The RFP, issued on March 15, 2013, contemplated the award of multiple indefinite-delivery/indefinite-quantity (IDIQ) contracts on a best-value basis to offerors in each of two pools (a restricted pool reserved for small businesses and an unrestricted pool). Proposals were to be evaluated on the basis of the following four factors: technical approach; small business participation; past performance; and cost/price.² RFP at 459.

Of relevance to this protest, under the technical approach factor, offerors in the unrestricted pool were to describe their approach to performing each of four cost-plus-fixed-fee sample task orders.³ Under the small business participation factor, offerors were to identify the extent to which they would use small business concerns as first-tier subcontractors in the performance of the proposed contract. The solicitation instructed offerors to provide the percentage of small business participation using the following table format:

Business Category	Percentage of Small Business Participation
SB	%
SDB	%
WOSB	%
VOSB	%
SDVOSB	%
HUBZone SB	%
Additional SB Types	%

(...continued)

strategic planning, and requirements analysis. Contracting Officer's Statement of Facts (COSOF) at 1.

² Technical approach was the most important factor, and cost/price, the least important; the two intervening factors, small business participation and past performance, were of equal importance.

³ The RFP identified the sample task orders as alpha, bravo, charlie and delta. For the purpose of evaluating cost, the RFP established that the agency would perform a cost-realism evaluation for each of these task orders in order to determine the most probable cost to the government of the sample tasks. RFP at 464-466.

RFP at 447.⁴ The RFP also instructed offerors to provide the information required to complete the following table:

Name of Small Business Concerns	Small Business Classification(s)	Description of Services	% of Total Dollars
ABC Co.	SB	Analysis	%
ABC Co.	SB	Recruitment	%
EFG Inc. (Prime Offeror)	SB, WOSB, VOSB	Management	%

Id.⁵

The solicitation provided that proposals would be evaluated under the small business factor to determine the extent to which they identified participation by the various classes of small businesses; in the foregoing connection, the RFP advised that “[t]he participation subcategory percentages [should] be calculated based upon the total value of the task orders awarded over the life of the contract with the focus of meeting or exceeding . . . the Government goal of 15% for the UP [unrestricted pool].” Id. at 461. The RFP also provided for an assessment of the probability that the offeror would achieve the levels of small business participation identified in its proposal.

The RFP advised that offerors’ small business participation plans would be rated as outstanding, good, acceptable, marginal, or unacceptable. Of relevance to this protest, ratings of marginal and unacceptable were defined as follows:

Marginal: Proposal does not clearly meet requirements**** and has not demonstrated an adequate approach and understanding of the requirements. The proposal has one or more weaknesses which are not offset by strengths. Risk of unsuccessful performance is high.

Unacceptable: Proposal does not meet requirements***** and contains one or more deficiencies and is unawardable.

Id. at 462. The solicitation further explained that the asterisks in the above definitions signified the following:

⁴ The abbreviations in the table stand for the following: SB--small business; SDB--small disadvantaged business; WOSB--women-owned SB; VOSB--veteran-owned SB; SDVOSB--service-disabled-veteran-owned SB, and HUBZone SB--Historically Underutilized Business Zone SB.

⁵ The RFP also instructed offerors to furnish detailed information regarding their past compliance with small business subcontracting plans.

**** For the purpose of this evaluation, “does not clearly meet requirements” means the offeror’s proposed Small Business Participation levels only remotely approached the RFP’s small business participation Objectives/goals.

***** For the purpose of this evaluation, “does not meet requirements and contains one or more deficiencies” means the offeror’s proposed Small Business Participation levels failed to remotely approach the RFP’s small business participation Objectives/goals.

Id.

MEP was one of 17 offerors to submit an unrestricted pool proposal prior to the June 24, 2013 closing date. Of relevance to this protest, MEP included in its proposal the following table of small business participation goals:

Business Category	Percentage of Small Business Participation
SB	[deleted]
SDB	[deleted]
WOSB	[deleted]
VOSB	[deleted]
SDVOSB	[deleted]
HUBZone SB	[deleted]
Additional SB Types	

Agency Report (AR), Tab 10, MEP Proposal, Vol. VI (Small Business Participation), at 8. As instructed by the RFP, the proposal also included a table identifying the small business classification, type of service, and percent of total dollars for MEP’s proposed small business subcontractors. MEP’s table listed 17 small business concerns; for one of the firms, the percent of total dollars was identified as [deleted], and for another, the percent was identified as [deleted], while for the remaining 15 firms, the percent was identified as [deleted]. Id. at 9.

On August 19, the contracting officer sent each of the offerors an identical request for clarification of its small business participation plan. The clarification notice asked each offeror to provide the following information for each member of its team: prime/subcontractor name, Cage Code, DUNS Number, the scope of the work to be completed (identified by proposed task order(s)), and the dollar value of the work, broken out by task order. AR, Tab 23. The notice explained that the exchange was a clarification under Federal Acquisition Regulation (FAR) § 15.306(a), as opposed to a communication under FAR § 15.306(b), and that proposal revisions were not

permitted in response to the notice. The protester responded by the specified date of August 21.

The agency evaluated the proposals and assigned the following ratings:

Offeror	Technical	Small Bus. Participation	Past Performance	Most Probable Cost (\$M)
Offeror A	Good	Marginal	Satisfactory	\$727.27
Offeror B	Acceptable	Marginal	Satisfactory	\$813.34
Offeror C	Acceptable	Marginal	Satisfactory	\$813.46
Offeror D	Acceptable	Marginal	Unknown	\$777.70
Offeror E	Acceptable	Marginal	Limited	\$771.20
Offeror F	Marginal	Marginal	Satisfactory	\$674.36
Offeror G	Marginal	Marginal	Satisfactory	\$798.45
Offeror H	Marginal	Marginal	Satisfactory	\$828.16
Offeror I	Marginal	Marginal	Satisfactory	\$731.61
Offeror J	Marginal	Marginal	Satisfactory	\$791.23
Offeror K	Marginal	Marginal	Satisfactory	\$869.90
Offeror L	Marginal	Marginal	Satisfactory	\$827.43
Offeror M	Marginal	Marginal	Satisfactory	\$875.31
Offeror N	Marginal	Marginal	Satisfactory	\$753.17
MEP	Marginal	Unacceptable	Unknown	\$844.82
Offeror O	Unacceptable	Good	Satisfactory	\$867.41
Offeror P	Unacceptable	Marginal	Limited	\$765.46

AR, Tab 35, Source Selection Decision (SSD), at 5.

The protester's small business participation plan was rated as unacceptable because in its first table above, MEP proposed overall small business participation of [deleted], which was beneath the agency's stated goal of 15%. The evaluators assessed the protester's failure to meet the agency's stated goal as a deficiency.⁶ AR, Tab 31, Unrestricted Pool Small Business Evaluation Report at 124.

After reviewing the evaluation results, a Source Selection Advisory Council (SSAC) recommended that award be made without discussions to the five offerors with ratings of acceptable or better under the technical approach factor. AR, Tab 33,

⁶ In addition to the above deficiency, the evaluators found that MEP's small business participation plan contained a significant weakness and a weakness. (We do not discuss these findings in this decision because the record indicates that it was the above deficiency that made the proposal unawardable. Supplemental COSOF at 2.)

Comparative Assessment of Proposals, at 37. The Source Selection Authority (SSA) did not follow the SSAC's recommendation; instead, he decided to make awards to all offerors, with the exception of those rated unacceptable under either the technical approach or small business participation factor (i.e., Offeror O, Offeror P, and the protester) and those found to have significant Cost Accounting Standards (CAS) noncompliance issues (i.e., Offerors L, M, and N). AR, Tab 35, SSD, at 9.

By letter of September 12, 2014, the contracting officer notified the protester that the following firms had been selected for award: BAE Systems Information Solutions, Inc., of McLean, VA; Booz Allen Hamilton, Inc., of McLean, VA; CACI Technologies, Inc., of Manassas, VA; DynCorp International, LLC, of McLean, VA; Invertix Corporation, of McLean, VA; Lockheed Martin Integrated Systems, Inc., of Bethesda, MD; ManTech Mission, Cyber and Technology Solutions, Inc., of Falls Church, VA; Northrop Grumman Systems Corporation Cyber Solutions Division, Inc., of Chantilly, VA; Six3 Intelligence Solutions, Inc., of McLean, VA; Sotera Defense Solutions, Inc., of Herndon, VA; and SRA International, Inc., of Fairfax, VA.

MEP filed a protest with our Office on September 19. By letter of October 22, the agency advised us that it intended to take corrective action in response to the protest by reevaluating MEP's proposal under the small business participation factor and making a new award decision with regard to the protester. Upon receipt of the agency's letter, we dismissed MEP's protest as academic. Mission Essential Personnel, LLC, B-410431, Oct. 27, 2014.

By letter of December 12, the contracting officer notified MEP that the agency had completed its reevaluation of the protester's proposal under the small business participation factor, and that MEP had again not been selected to receive an award. The letter explained that MEP had proposed a small business participation percentage of [deleted], which resulted in an assessed deficiency and raised the risk of unsuccessful contract performance to an unacceptable level. AR, Tab 38, Notice of Unsuccessful Offer at 1. In an attached summary of the reevaluation, the agency explained as follows:

. . . [MEP] proposed small business participation percentages of [deleted] in [its percentage goal by business category table]. The proposed total small business percentage ([deleted]) is assessed as a material failure of the proposal to meet a Government requirement of 15% as required by [the RFP]. For the purposes of this evaluation, small business participation percentages were rounded to two decimal places. Percentages below 13.00% were evaluated as a deficiency, small business participation percentages ranging from 13.00% to 14.00% were evaluated as a significant weakness, and small business participation percentages ranging from 14.01% to any percentage less than 14.99% were evaluated as a weakness. Proposed small

business participation percentages that were between 15.0% and 15.10% were considered as meeting the requirement. Small business participation plan percentages that ranged from above 15.11%-16.10% were considered as a strength and small business participation percentages above 16.10% were considered a significant strength. This assessed deficiency increases the risk of unsuccessful execution of the SBPP, and therefore the risk of unsuccessful contract performance, to an unacceptable level.

AR, Tab 38, Reevaluation Summary at 5. MEP filed the instant protest with our Office on December 17.

DISCUSSION

The protester challenges the agency's evaluation of its proposal as unacceptable under the small business participation factor. MEP also argues that the SSA failed to perform a proper cost/technical tradeoff in selecting the awardees and that the agency created a de facto competitive range where the agency intends to conduct discussions with the awardees after award. As discussed below, we find these arguments to be without merit.⁷

Small Business Participation factor

The evaluation of an offeror's proposal under a small business participation factor is a matter within the agency's discretion. Cajun Constructors, Inc., B-409685, July 15, 2014, 2014 CPD ¶ 212 at 7. In reviewing an agency's evaluation, our Office will not reevaluate proposals; instead, we will examine the record to ensure

⁷ In its initial protest, MEP raised allegations pertaining to the evaluation of its proposal under the technical approach and past performance factors that it subsequently withdrew. Protester's Comments, Jan. 26, 2015, at 6-7. In addition, it raised arguments pertaining to the evaluation of other offerors' proposals that we dismissed as legally insufficient. Further, MEP initially argued that the agency had "opened the door to discussions" by asking offerors to resubmit their small business subcontractor breakdown tables, Protest at 81, and that once it opened discussions, the agency was obligated to conduct meaningful discussions with it regarding shortcomings in its small business participation plan. Because the agency provided a reasonable response to this argument in its report, which the protester did not take issue with or seek to rebut in its comments, we consider it to have abandoned this argument. TPMC-Energy Solutions Envt'l Servs. 2009, LLC, B-408343.2 et al., Aug. 23, 2013, 2013 CPD ¶ 215 at 8. To the extent that we do not address every remaining argument raised by the protester in this decision, we considered all of them, and find that none provides a basis for sustaining the protest.

that the evaluation was reasonable and consistent with stated evaluation criteria and applicable procurement statutes and regulations. Id.

The protester argues that in its reevaluation, the agency created new evaluation criteria (i.e., the above percentage ranges) that were “designed to target and eliminate MEP’s proposal, even though previously it had [been] found to be in the [deleted] range . . . and, therefore, acceptable.” Protest at 76. MEP further contends that these “new criteria” constituted unstated evaluation factors. MEP also argues that the agency’s evaluation of proposals under the small business participation factor was unequal.

The protester’s first argument incorporates several misstatements of fact. MEP errs in asserting that in its initial evaluation, the agency found MEP’s proposed small business participation (SBP) rate to be an acceptable [deleted]. In the initial evaluation, the evaluators noted that when SBP rates were calculated using the percentages provided in MEP’s second table (i.e., the table broken down by subcontractor), the figure derived was [deleted]. Specifically, this second table showed that one of MEP’s subcontractors would provide [deleted] of the total dollars, and another would provide [deleted]. The evaluators did not evaluate MEP’s SBP rate to be an acceptable [deleted] based on this calculation, however. Rather, the evaluators assessed MEP a deficiency based on the [deleted] percent small business participation identified by MEP in its Percentage of Small Business Participation table.⁸ AR, Tab 31, Unrestricted Pool Small Business Evaluation Report at 124.

In addition, the record fails to support the protester’s assertion that the agency devised the above rating scale as part of its reevaluation with a view toward eliminating MEP’s proposal. As a general matter, government officials are presumed to act in good faith and a protester’s contention that procurement officials were motivated by bias or bad faith must be supported by clear and convincing evidence. Career Innovations, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-9. In this case, the contracting officer’s signed statement indicates that while the evaluators did not document the scale and its application to the protester’s proposal until they performed the reevaluation, the agency developed the percentage-based scale prior to conducting the evaluations and applied it consistently during the

⁸ To the extent MEP is arguing that it was improper for the agency not to consider the figure derived by adding together the percentages for individual subcontractors in its second table (i.e., [deleted]), consideration of that figure would at best have rendered the protester’s planned level of small business participation ambiguous (since the protester proposed a SBP level of [deleted] in its first table). An agency may properly reject as unacceptable a proposal that contains an ambiguity as to whether the offeror will comply with a material solicitation requirement. Kirti Int’l, B-407612, Jan. 16, 2013, 2013 CPD ¶ 36 at 4.

evaluation process. COSOF at 17. We have no basis to question the contracting officer's representations in this regard, nor, based on the record here, do we see any evidence that the agency was seeking a basis upon which to eliminate the protester's proposal from consideration for award.

With regard to the protester's argument that the percentage-based scale was an unstated evaluation factor, we have previously distinguished between undisclosed evaluation methodologies and unstated evaluation criteria, finding that the two are not equivalent, and that it is not improper for an agency to rely upon an undisclosed evaluation methodology, so long as the methodology provides a rational basis for source selection and is consistent with the evaluation criteria set forth in the solicitation. Bonner Analytical Testing Co., B-409586.2, Aug. 7, 2014, 2014 CPD ¶ 258 at 4. The scale here provided the evaluators with guidance as to how varying levels of proposed small business participation would be rated; as such, it constituted an evaluation methodology, not an undisclosed evaluation factor. See ABB Power Generation, Inc., B-272681, B-272681.2, Oct. 25, 1996, 96-2 CPD ¶ 183 at 4. Moreover, the scale was consistent with the evaluation scheme disclosed in the RFP, which placed offerors on notice that a proposal would be deemed deficient and rated as unacceptable if the proposed small business participation rate was significantly beneath the agency's small business participation goal of 15%.

MEP also argues that it was unequal for the evaluators to rate its small business participation plan as unacceptable, while rating other offerors' plans that contained inconsistent information as marginal. In the foregoing connection, the protester notes that in its reevaluation summary, the agency acknowledged inconsistencies in other offerors' proposals with regard to small business participation percentages. AR, Tab 38, Reevaluation Summary at 5.

The agency responds that it evaluated proposals on an equal basis, and that while there were inconsistencies in other offerors' SBPPs (as well as additional inconsistencies in the protester's plan), these inconsistencies did not rise to the level of deficiencies because they did not involve failures to propose SB participation levels remotely approaching the agency's objective. Based on the record before us, we see no evidence of unequal treatment.

Source Selection Decision

MEP asserts that the SSA improperly failed to consider cost in his source selection decision. The record fails to support the protester's allegation. That is, it shows that the SSA did consider cost in his decision. See SSD at 9. The mere fact that the SSA selected for award all technically acceptable proposals from responsible offerors (i.e., offerors without significant CAS noncompliance issues) does not show that cost was not considered.

Finally, the protester alleges that the agency created a “de facto competitive range” and improperly intends to conduct discussions with the awardees after award. In support of its argument, MEP cites the following excerpt from the SSD:

The SSEB highlighted a variety of issues that will require clarification before performance of task orders commences. For example, prices proposed in direct submissions by subcontractors were sometimes inconsistent with the prices included in the prime contractor’s proposal for these subcontractors.

SSD at 9. This allegation has no basis. First, even assuming the agency established what the protester calls a de facto competitive range for the purpose of conducting discussions with the awardees, we fail to see how the protester was prejudiced in this regard. The protester was reasonably excluded from such a competitive range where, as discussed above, the protester was properly found “unacceptable” under the small business participation factor--the agency rejected all offerors found to be unacceptable--and the protester had the fourth-highest price of 17 offerors. Second, the intended communications specifically cited in the selection decision are consistent with post-award management of a cost-reimbursement contract. At the time an agency performs a cost-realism evaluation, as the agency did in this case, it calculates a most probable cost estimate considering the information set forth in an offeror’s proposal and other relevant information. FAR § 15.404-1(d). This cost is, by its terms, an estimate and solely for the purpose of evaluation; it does not create a binding fixed contractual price on the parties. Accordingly, an agency may properly engage with contractors after award in order to precisely ascertain actual cost information in connection with their performance of a cost-reimbursable contract since the government is only obligated to pay a contractor’s actual costs. Given this context, there is no basis to conclude that the contemplated post-award communications, which, on their face, appear to be intended to ascertain the actual cost the government will be paying during performance, can be considered discussions as contemplated by the FAR.

The protest is denied.

Susan A. Poling
General Counsel