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Decision

Matter of: SSI

File: B-413486; B-413486.2

Date: November 3, 2016

Richard B. Oliver, Esq., J. Matthew Carter, Esq., and Selena Brady, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.

Jon D. Levin, Esq., J. Andrew Watson, III, Esq., and W. Brad English, Esq., Maynard Cooper & Gale PC, for Yorktown Systems Group, Inc., the intervenor.

Jason R. Smith, Esq., Department of the Air Force, for the agency.

Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency unreasonably failed to request written final proposal revisions after conducting discussions is denied where the record shows that the agency received oral revisions to proposals during discussions; the submission of written final proposal revisions was not required by the terms of the solicitation or the underlying contract; and the procurement was conducted under the regulations prescribed in Federal Acquisition Regulation (FAR) part 16, not part 15.
 2. Protest that the agency engaged in unequal discussions by accepting submissions from offerors after conducting oral discussions is denied, where the record shows the agency set a common date for accepting submissions in follow up to oral discussions, and the protester has not shown that it was prejudiced by the agency's conduct.
 3. Protest that the agency unreasonably evaluated the protester's and awardee's proposals is denied where the record shows that the evaluation was reasonable and in accordance with the stated evaluation criteria.
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DECISION

Mid Atlantic Professionals, Inc., d/b/a SSI, of Germantown, Maryland, protests the issuance of a task order to Yorktown Systems Group, Inc. (YSG), of Huntsville, Alabama, by the Department of the Air Force under request for proposals (RFP) No. SWMS-B005 for language services. SSI argues that the agency unreasonably

failed to request written final proposal revisions after conducting discussions, engaged in unequal discussions, and improperly evaluated both its and the awardee's proposals.

We deny the protest.

BACKGROUND

The RFP, issued on January 14, 2016, sought proposals from U.S. Special Operations Command (SOCOM) Wide Mission Support Group B multiple-award, task order contract-holders to provide enterprise language, regional expertise, and cultural instruction (LREC) and support services to the 1st Special Forces Command and Special Operations Forces Language Office (SOFLO).¹ RFP, Statement of Work (SOW), at 1. Two task orders were to be issued to a single vendor after an evaluation of proposals on a best-value basis, considering price and the following non-price factors: LREC program management, task order proposal, and past performance. RFP, Section M, at 1.

Under the LREC program management factor, proposals were to be assigned adjectival and risk ratings. Under the task order proposal and past performance factors, proposals were to be evaluated on an acceptable/unacceptable basis. Id. at 1-2. Only proposals with a marginal or greater rating in the LREC program management factor, and an acceptable rating for the task order proposal factor, would be evaluated for past performance and price. Proposals rated unacceptable for either of the first two factors would not be further evaluated. Id. at 1.

The task order management factor required the submission and evaluation of resumes for key personnel under both task orders. For instance, under the SOFLO requirement, offerors were required to submit resumes for five positions, including LREC program management and academic specialists (LMAS) for Program Management and Academic Management. RFP, Section L, at 4. As relevant here, the LMAS for Academic Management included various minimum qualifications, including a requirement that the individual have at least five years' language teaching experience in an online venue. RFP, SOFLO SOW, at 8.

Proposals were received from 12 offerors, including SSI and YSG. Agency Report (AR), exh. 23, Technical Evaluation Results, at 2. After an initial evaluation, SSI's proposal received unacceptable ratings under both the program management and task order proposal factors. Id. at 45-47. YSG's proposal received a good rating

¹ The awarded value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award indefinite-delivery, indefinite-quantity (ID/IQ) contracts. 10 U.S.C. § 2304c(e)(1)(B).

under the program management factor and an unacceptable rating under the task order proposal factor. Id. at 77-78.

The agency decided to enter into discussions. Both SSI and YSG were sent the results of their technical evaluations and meetings were scheduled on July 6 and 7, respectively, for each firm to provide oral responses to the technical evaluation and to discuss the government's concerns. AR, exh. 16, SSI Discussion Email, at 1; exh. 17, YSG Discussion Email, at 1. Both offerors were instructed that "[i]ssues with regard to resume submissions require that new resumes be provided at this meeting that fully meet the requirements as listed in the solicitation." Id.

After the conclusion of discussions, the agency reevaluated SSI's proposal, decided that the firm had adequately addressed the 11 issues identified in its proposal, and assigned the firm's proposal a good rating under the program management factor and an acceptable rating under the task order proposal factor. AR, exh. 23, Technical Evaluation Results, at 95. The record shows that the agency identified five concerns with YSG's proposal, all under the task order proposal factor. AR, exh. 17, YSG Discussion Email, at 2-3. YSG provided five new resumes during its oral discussions session. AR, exh. 20, YSG Resumes, at 1-6. However, the agency did not find acceptable the awardee's proposed LMAS for Program Management, and gave YSG until July 12 to submit a new resume for that position. AR, exh. 21, Email dated July 7, 2016, at 1. YSG responded to the agency's email on July 11, proposing a new individual for the LMAS for Program Management position. The agency evaluated this new information and ultimately found the proposal to be acceptable. AR, exh. 22, Email dated July 11, 2016, at 1; exh. 23, Technical Evaluation Results, at 100-101.

The results of the evaluation after discussions were as follows:

	SSI	YSG
LREC Program Management	Good/Purple	Good/Purple
Technical Risk	Low	Low
Task Order Proposals	Acceptable	Acceptable
Past Performance	Acceptable	Acceptable
Price	\$56,511,040	\$56,440,311

AR, exh. 23, Technical Evaluation Results, at 104.

The source selection evaluation board (SSEB) conducted a comparison among offerors, including between SSI and YSG. The SSEB noted that SSI's proposal received three strengths and no weaknesses under the LREC program management factor and an overall good/purple rating, whereas YSG received a good/purple rating based on an assessment of five strengths and no weaknesses. Id. at 104. The comparison included a detailed discussion of the relative benefits of

each proposal. Ultimately, the SSEB concluded that SSI's strengths in comparison to YSG's did not justify paying a price premium, noting that "YSG provides more value in robust management processes and methods, providing pre-service and professional development to all labor categories, and stronger [program of instruction (POI)] development." Id. However, the SSEB determined that YSG, SSI and a third offeror's proposals were essentially equal as a matter of technical merit and based its best-value recommendation on YSG's lower price. Id. at 107.

The source selection authority (SSA) conducted an independent assessment of the submitted proposals and concurred with the SSEB's evaluation. Specifically, the SSA concurred that YSG's proposal was the best value as the lowest priced of the equally-technically rated proposals. After SSI received a debriefing, it filed this protest.

DISCUSSION

SSI argues that the agency improperly failed to conduct discussions in accordance with the standards set forth in FAR part 15, which the protester asserts were applicable to this procurement. Consolidated Protest at 14-20. SSI also argues that the agency unreasonably evaluated YSG's proposal under the task order proposal factor, and failed to adequately document its evaluation. Id. at 20-23. Finally, SSI argues that the agency unreasonably evaluated various aspects of its own proposal under the LREC program management factor. Id. at 23-27. We have reviewed each of the protester's allegations and find no basis to sustain the protest.

Discussions with Offerors

SSI argues that the agency violated applicable procurement regulations by failing to request final proposal revisions (FPR), to provide offerors an opportunity to submit written FPRs and revise their prices, and to provide a common cutoff date for offerors to address alleged deficiencies and significant weaknesses. Consolidated Protest at 14.

The protester points to FAR § 15.307, which states, in pertinent part:

At the conclusion of discussions, each offeror still in the competitive range shall be given an opportunity to submit a final proposal revision. The contracting officer is required to establish a common cutoff date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions shall be in writing and that the Government intends to make award without obtaining further revisions.

FAR § 15.307(b).

The protester argues that the requirements of FAR § 15.307(b) are mandatory, and, as such, the agency “was not permitted to conduct discussions orally in lieu of offering the offerors an opportunity to submit a written FPR.” Consolidated Protest at 17-18. Had it been permitted to do so, SSI asserts that it would have lowered its price in its FPR submission due to salary revisions, and because the firm typically reduces its price in submitting a FPR. *Id.* at 17; Protester’s Comments at 9-11, enclosure 1. SSI also asserts that the agency’s failure to establish a common cutoff date for receipt of proposal revisions resulted in prejudicial disparate treatment, because YSG’s proposal was not fully compliant after oral discussions, and should have been found to be ineligible for award. Protester’s Comments at 12-14.

In reviewing protests challenging an agency’s evaluation of proposals in a task order competition, our Office does not reevaluate proposals, but examines the record to determine whether the agency’s judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Trandes Corp., B-411742 *et al.*, Oct. 13, 2015, 2015 CPD ¶ 317 at 6. Task order competitions are subject to the provisions of FAR § 16.505, which does not establish specific requirements for conducting discussions. See Companion Data Servs., LLC, B-410022, B-410022.2, Oct. 9, 2014, 2014 CPD ¶ 300 at 12. However, where an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness will, in large part, reflect the standards applicable to negotiated procurements. See, e.g., Technatomy Corp., B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 5. For instance, in conducting exchanges with offerors, agencies may not engage in what amounts to disparate treatment of the competing offerors. Front Line Apparel Grp., B-295989, June 1, 2005, 2005 CPD ¶ 116 at 3-4.

Section 16.505 of the FAR requires agencies to provide awardees of a multiple-award contract a fair opportunity to be considered for each order, but specifically states that “the policies in [FAR] Subpart 15.3 do not apply to the ordering process.” FAR § 16.505(b)(1)(ii). Thus, FAR § 16.505 explicitly holds inapplicable the requirements of FAR § 15.307(b). FAR § 16.505 does require agencies to develop placement procedures tailored to each acquisition that will provide each awardee a fair opportunity to be considered for each order, and to include such procedures in the solicitation and the contract. *Id.* However, SSI has not identified any language in the solicitation or SSI’s contract, and our review discloses none, that would mandate the agency to solicit written FPRs after conducting discussions, or any language regarding procedures for the receipt of FPRs.

On the issue of discussions and proposal revisions, the RFP only states, “[t]he Government intends to award without discussions. The Government reserves the right to enter into discussions. Offerors shall provide their best terms from a cost or price and technical standpoint as the Government does not anticipate an opportunity to revise proposals.” RFP, Section M, at 5. The ordering provisions of SSI’s contract provide only that the firm be given a fair opportunity to compete,

which includes that, upon receipt of proposals the contracting officer may open discussions or negotiate with all or some contractors providing proposals, issue a task order based upon the original proposal furnished, reject the proposal, or cancel the requirement. AR, exh. 27, SSI Contract, at 11-12. There is no requirement in the contract that the agency solicit and accept written FPRs after conducting discussions.

Finally, there is no indication in the record that the agency conveyed or suggested through its course of dealings with offerors that it intended to solicit written FPRs after the close of discussions. In this regard, the record shows that the agency notified offerors in writing of its concerns with each firm's proposal and gave each an opportunity to provide oral responses and discuss the government's concerns at established meetings. AR, exh. 16, SSI Discussion Email, at 1; exh. 17, YSG Discussion Email, at 1. The record also shows that the agency held meetings with each offeror, received oral proposal revisions, and evaluated these revisions prior to making an award decision.

We are not persuaded that, as a matter of fairness, the agency was required to solicit and accept written FPRs after conducting discussions with, and receiving oral proposal revisions from offerors, as the protester alleges. As our Office has held, the fundamental purpose of discussions is to afford offerors the opportunity to improve their proposals to maximize the government's ability to obtain the best value, based on the requirement and the evaluation factors set forth in the solicitation. AT&T Gov't Solutions, Inc., B-406926 et al., Oct. 2, 2012, 2013 CPD ¶ 88 at 17. We can discern no requirement fundamental to the conduct of fair discussions that would necessitate giving offerors the opportunity to submit written FPRs after accepting oral proposal revisions. We see nothing unreasonable or unfair about the agency's decision not to request written FPR's, as would be the case in the context of a negotiated procurement conducted under FAR part 15.

Likewise, we are provided no basis to object to the agency's decision to accept written information from certain offerors after conducting oral discussions, including accepting an additional key personnel resume from YSG. As mentioned, in the context of a task order competition, as here, we look to whether the agency's actions were reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Task order competitions are subject to the provisions of FAR § 16.505, which does not establish specific requirements for conducting discussions. This includes any specific requirement for establishing a common cutoff date for receipt of proposals, as would be required under FAR § 15.307(b) for negotiated procurements. Moreover, as there are no specific requirements on this subject in SSI's contract or the solicitation, we are left to determine whether offerors were treated fairly. We conclude they were.

SSI argues that it was prejudiced by the agency's failure to establish a common cutoff date, because permitting YSG additional time to submit its proposal allowed

the firm a further opportunity to identify qualified resumes for its proposal. Protester's Comments at 15. According to SSI, this additional time conferred upon YSG a competitive advantage, and thus prejudiced SSI. Id. SSI concludes that if a common cutoff date was applied, YSG's proposal would have been ineligible for award, resulting in SSI being selected for award of the task orders. Id. Our review of the record does not demonstrate that SSI was treated unfairly.

The record shows that offerors were treated equally in that each offeror was given the opportunity to address the agency's concerns with their proposals. In this regard, the record shows that SSI, like other offerors, was permitted to address the agency's concerns with its proposal through oral discussions. The record also shows that after oral discussions, the agency determined that all of its concerns with SSI's proposal had been resolved, and it upgraded the firm's rating to good/purple under the program management factor, and acceptable under the task order proposal factor. AR, exh. 23, Technical Evaluation Results, at 95. Thus, after conducting oral discussions there were no further concerns to be addressed with SSI. In contrast, the agency had residual concerns with other offerors' proposals, including YSG's, and elected to permit them to be addressed with later, limited written submissions.

While SSI argues for a cutoff date following oral discussions, the protester has not shown, and we have not found, anything in the record that would prohibit the agency from continuing discussions with offerors as the agency did here.² SSI has also not shown how it was competitively disadvantaged by not being afforded the opportunity to address the agency's concerns through continued discussions, given that the protester had already addressed those concerns during oral discussions. In sum, SSI has not shown that it was treated unfairly by the agency's decision to accept and evaluate a key personnel resume submitted by YSG after conducting oral discussions, as the protester alleges.

Evaluation of YSG's Proposal

SSI next challenges the evaluation of YSG's proposal under the task order proposal factor, arguing that at least two of YSG's proposed key personnel did not meet the minimum requirements for their positions even after discussions. Protester's Comments at 19. First, the protester argues that YSG's proposed LMAS for Program Management does not meet the requirement for two or more years as a language instructor. Id. at 19-20. However, a review of the individual's resume

² While the email sent to both YSG and SSI opening discussions did state that "[i]ssues with regard to resume submissions require that new resumes be provided at this meeting that fully meet the requirements as listed in the solicitation," nothing in this language precluded successive discussions. AR, exh. 16, SSI Discussion Email, at 1; exh. 17, YSG Discussion Email, at 1.

clearly shows at least seven and a half years as a language instructor of Arabic, English and French while employed at the Department of Defense's Defense Language Institute. AR, exh. 22, Email dated July 11, 2016, at 5. Thus, this allegation is without merit.

The protester next challenges the agency's determination that YSG's proposed LMAS for Academic Management met the minimum requirement of the solicitation. In this regard, SSI argues that the proposed individual does not meet the solicitation's requirement for five years' experience teaching language online and that, at best, the resume indicates he has two and a half years' experience teaching language online. Protester's Comments at 20-21. The agency responds to this allegation, apparently acknowledging that the submitted resume did not show five years of experience teaching language online. However, the agency states that during oral discussions, YSG clarified that the individual met the requirement because his service as a "Language Course Coordinator and Instructional Supervisor from February 2010 to November 2013 all involved him providing online language instruction." Supp. Legal Memorandum at 6. When combined with his other experience, the agency asserts YSG showed that the proposed LMAS for Academic Management met the five-year requirement.

We are provided no basis to question the evaluation in this regard. Based on the agency's explanation, we conclude that the agency reasonably evaluated this individual's experience and that he met the RFP's minimum requirements for the position. The protester nevertheless urges us to sustain the protest, primarily arguing that the assertions by the agency are not documented in the contemporaneous record, conflict with the submitted resume and with prior statements made by the agency during the course of the protest. We have reviewed the record and are provided no basis to sustain the protest.

The FAR requires the contracting officer to document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. FAR § 16.505(b)(7)(i). Additionally, we have held that agencies are required to adequately document the final evaluation conclusions on which their source selection decision was based. Booz Allen Hamilton, Inc., B-409355, B-409355.2, Mar. 19, 2014, 2014 CPD ¶ 100 at 7. However, where the agency offers post-protest explanations that provide a detailed rationale for contemporaneous conclusions and simply fills in previously unrecorded details, such explanations will generally be considered in our review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record. Management Sys. Int'l, Inc., B-409415, B-409415.2, Apr. 2, 2014, 2014 CPD ¶ 117 at 6. We conclude that the record is adequately documented, and the agency's post-protest statement is credible and consistent with the record.

In this regard, the contemporaneous evaluation record adequately documents the agency's final evaluation conclusions, and the post-protest statement serves to fill in previously unrecorded details. Moreover, contrary to the protester's arguments, the post-protest statement is not inconsistent with the contemporaneous record. In essence, the protester argues that since the relevant resume lists many other duties, the individual could not have meaningful experience teaching language online, and the agency unreasonably gave the individual credit for full-time language instruction. Protester's Supp. Comments at 14-16. However, a review of the record shows that the requirement in question is for at least five years' language teaching experience in an online venue; there is no requirement in the RFP that the experience be full-time. RFP, SOFLO SOW, at 7. On the issue of whether the resume cannot show meaningful experience given all the other duties the individual listed, we defer to the agency's reasonable technical judgment.

Evaluation of SSI's Proposal

Finally, SSI challenges its own evaluation arguing that the firm's proposal warranted an outstanding rating under the LREC program management factor. Consolidated Protest at 23. Specifically, the protester primarily argues that the agency unreasonably failed to assign the firm six additional strengths. Consolidated Protest at 23-26; Protester's Comments at 26-36. We have reviewed the protester's allegations and find them to be without merit.

As discussed, in reviewing protests challenging an agency's evaluation of proposals in a task order competition, our Office does not reevaluate proposals, but examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Trandes Corp., supra, at 6.

For example, SSI argues that it should have received strengths for its "unsurpassed knowledge of all of the agency components, locations, standard operating procedures, and agency personnel" and the firm's "excellent program management organization." Protester's Comments at 26-27. SSI also argues that it should have received a strength for its "excellent and highly experienced and qualified task lead." Id. at 27. Our review of the record shows that these arguments amount to nothing more than disagreement with the agency's considered technical judgments regarding the specific elements of an offeror's proposal. ITT Indus. Space Sys., LLC, B-309964, B-309964.2, Nov. 9, 2007, 2007 CPD ¶ 217 at 12-13.

SSI also argues that it should have received a strength for its POI development, as YSG and two other offerors received strengths for their proposed POI development. Protester's Comments at 31. To support its argument, SSI cites to the portions of the firm's proposal that purportedly relate to POI development and then states, "[s]imply put, like the other offerors, [SSI's] proposal demonstrated 'POI

development that will provide benefit to the Government' and should have received a finding of Strength." Id. at 34.

SSI makes no effort to supplement that which was already found in the firm's proposal and was evaluated by the agency. Simply reciting the firm's proposal and stating that it should have received a strength is an insufficient legal and factual basis to cause us to question the agency's reasoned technical judgment. Moreover, the protester does not address the fact that the evaluators apparently recognized a strength in the firm's proposal for POI development, specifically recognizing SSI's "strengths including sound pre-service, in-service, and professional development training plans and POI development." AR, exh. 23, Technical Evaluation Report, at 104-105. Finally, the protester does not substantively challenge the fact that the agency did not simply assign YSG's proposal a strength for POI development, which was a requirement of the solicitation, but assigned a strength for the specific POI development processes the firm proposed that the agency found would likely exceed government requirements. Id. at 105. We have reviewed this and SSI's other allegations and are provided no basis to question the agency's judgment in this regard.

The protest is denied.

Susan A. Poling
General Counsel