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Decision

Matter of: Information Experts, Inc.

File: B-413887; B-413887.2

Date: December 30, 2016

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DIGEST

1. GAO has bid protest jurisdiction of procurement by Consumer Financial Protection Board (CFPB) because CFPB is a federal agency, even though it is funded by nonappropriated funds and that funding was used in the procurement being protested.

2. Protest that agency misevaluated quotations for Federal Supply Schedule order and made an unreasonable source selection decision is denied where the record shows that the agency's evaluation was reasonable and treated offerors equally, and that the source selection decision was adequately documented and provided a rationale for selection of the higher-rated and higher-priced quotation.

DECISION

Information Experts, Inc. (IE), of Ashburn, Virginia, a small business, protests the issuance of a Federal Supply Schedule (FSS) order to ICF International L.L.C., of Fairfax, Virginia, under request for quotations (RFQ) No. CFP-16-Q-00041, issued by the Consumer Financial Protection Bureau (CFPB) for services to support its tax time saving initiative. IE argues that both vendors' quotations were misevaluated, and that the CFPB made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

On July 18, 2016, the CFPB issued the RFQ to four vendors¹ holding contracts issued by the General Services Administration under FSS Schedule 874, part of the professional services schedule. Contracting Officer's Statement at 1. The RFQ sought quotations for services to implement a demonstration project to assist community volunteer income tax assistance (VITA) providers in promoting the saving of annual income tax refunds by VITA clients. RFQ at 7-8. The RFQ anticipated the issuance of an FSS order to a single vendor for a base year and up to two option years. Id. at 8.

The contracting officer explains, the RFQ is "intended to expand the programmatic efforts underlying the [agency's Tax Time Savings] Initiative to effectuate an even greater impact on American consumers given the import of the Initiative." Contracting Officer's Statement at 1. The RFQ's statement of work described 20 tasks, grouped into three phases. RFQ at 9-17. The RFQ also stated that, over the prior four years, CFPB had conducted other small-scale pilot projects connected to volunteer income tax preparation programs to promote saving. RFQ at 8. In response to a vendor question, CFPB identified IE as the firm that conducted those pilot projects. RFQ amend. 1 at 57² (Answer to Question 10).

The RFQ directed vendors to submit a technical quotation, a price quotation, and a copy of all applicable FSS contracts. RFQ at 37. As part of its technical quotation, each vendor was required to submit resumes for each of its key personnel that included "sufficient information to demonstrate that the proposed key personnel, collectively, has the expertise/knowledge and experience to perform the work." Id.

Quotations were to be evaluated under two non-price factors, listed in descending order of importance: key personnel and technical approach. RFQ at 39. When combined, the non-price factors were to be significantly more important than price, but price would be determinative if quotations were evaluated as substantially technically equal. Id.

¹ CFPB conducted the procurement under section 8.405-2 of the Federal Acquisition Regulation (FAR) and did not synopsis or publicize the RFQ generally. Instead, the agency provided the RFQ to four selected vendors. See FAR § 8.405-2(c)(3)(iii)(B); Technical Prof'l. Servs., Inc., B-410640, Jan. 20, 2015, 2015 CPD ¶ 48 at 3 (FSS competition was proper even though agency did not provide solicitation to incumbent), recon. denied, B-410640.2, June 15, 2015, 2015 CPD ¶ 182.

² Our citations to the amendment use the page numbers from the copy provided with the agency report (AR). Page numbering in the document appears to be off by 2 pages; for example, the first page is numbered as page 3.

Under the key personnel factor, the CFPB was to evaluate the extent of “experience and knowledge/expertise” and the proposed roles to assess whether the vendor’s key personnel were likely to successfully manage and perform the work. Id. The key personnel evaluation criteria also stated that the proposed personnel “collectively, must have significant subject matter knowledge/expertise and relevant experience.” Id. Under the technical approach factor, the CFPB was to assess the effectiveness of the vendor’s proposed approach at properly and timely completing all tasks and deliverables. Id.

CFPB received quotations from three vendors, including IE and ICF.³ Contracting Officer’s Statement at 2. As noted above, IE has been the incumbent provider for the tax time savings program since 2013. Protest at 7. ICF has provided support for other CFPB programs. AR Tab 6A, ICF Technical Proposal, at 1.

A price evaluation panel assessed and compared each offeror’s pricing against a government estimate. ICF’s evaluated price was \$1.0 million,⁴ and IE’s was \$860,000. AR Tab 9, Price Evaluation Panel Report, at 4. A technical evaluation panel (TEP) evaluated each proposal under the non-price factors. The TEP assigned narrative strengths and weaknesses, as well as an adjectival rating under each factor and overall.⁵

Under the key personnel factor, the TEP recognized the experience of IE’s personnel in providing support for past and current tax time savings initiative contracts, but determined that they had limited expertise and working experience needed to adequately perform the work at issue here and, as a result, posed a moderate performance risk. AR Tab 10, TEP Report, at 9. The evaluators also explained that IE’s personnel had expertise in marketing, communication, and instructional design, which the panel considered to be merely sufficient. Id. at 10. The evaluators identified as a weakness that IE’s personnel had no demonstrated background in VITA or tax preparation, while their background in financial empowerment was limited to projects with CFPB. Id.

Under the technical approach factor, the TEP found that IE’s proposal provided insufficient explanation about providing technical assistance to project sites, included few details on how it would monitor implementation of the project at the sites, and lacked an explanation of how IE would develop and deliver new materials. Id. at 11. In contrast, the TEP found that ICF’s quotation provided

³ The evaluation of the third vendor’s quotation is not relevant here.

⁴ Prices have been rounded to two significant digits in this paragraph of the decision.

⁵ The potential adjectival ratings were outstanding, good, acceptable, marginal, and unacceptable. AR at 4.

multiple strengths and no weaknesses under both the key personnel and technical approach factors, which reflected significant experience in all areas and a detailed approach with specific strategies for implementing the project. Id. at 8-9.

The TEP and price evaluations resulted in the following ratings:

	IE	ICF
Key Personnel	Acceptable	Outstanding
Technical Approach	Acceptable	Good
Overall Rating	Acceptable	Outstanding
Evaluated Price	\$860,000	\$1 million

AR Tab 2, Source Selection Decision, at 4, 6.

The contracting officer considered the results of the technical evaluation, assessed the evaluated prices, and determined that the superiority of ICF's quotation justified paying its higher price as it provided a higher confidence of successful performance. AR Tab 2, Source Selection Decision Document, at 8. The source selection decision emphasized that ICF's proposed personnel included current tax practitioners; that the firm proposed to use an independent consultant as its training and technical assistance team leader because of his longstanding experience with VITA; and that two of ICF's key personnel had connections to the VITA community that would enhance the firm's ability to successfully perform the statement of work. Id. The contracting officer considered the vendors' prices and concluded that the advantages of ICF's quotation provided personnel with significantly deeper and broader experience, and that its technical approach provided specific means to ensure consistent communication and coordination with demonstration sites that would benefit the agency's program. Id. The contracting officer viewed the value of these advantages as sufficient to justify paying a premium of approximately 16 percent and selected ICF's quotation for award. This protest followed.

ANALYSIS

Protest Jurisdiction over CFPB Procurement

Shortly after the protest was filed, CFPB stated that our Office's protest jurisdiction over this procurement was "unclear" because of unique aspects of the agency's statutory origin and its use of nonappropriated funds. At the same time, however, the agency submitted an AR while maintaining that it did not intend to waive jurisdictional arguments by doing so. AR at 1 n.1. Since our Office is charged by statute to decide protests involving procurements by federal agencies, 31 U.S.C. § 3551-52, we asked the parties to address the agency's jurisdictional questions in subsequent filings. Email from GAO to Parties, Nov. 8, 2016, at 1 (summarizing conference call with parties).

In a supplemental (Supp.) AR, CFPB argued that our Office lacks jurisdiction here because the CFPB is an independent agency within the Federal Reserve System, and is funded by nonappropriated funds. Supp. AR at 2 (citing 12 U.S.C. § 5497). CFPB also notes that our Office’s Bid Protest Regulations state that our jurisdiction does not include procurement by nonappropriated fund activities. *Id.* (citing 4 C.F.R. § 21.5(g)). Our Office asked the parties to consider decisions in which we noted that, even though the regulatory provision appears to exclude “nonappropriated fund activities” from our jurisdiction, in fact not all procurements that are conducted using nonappropriated funds are outside our jurisdiction.⁶ USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 3. CFPB argued that USA Fabrics should be distinguished because the procurement there appears not to have used nonappropriated funds.

We conclude that we have jurisdiction to hear protests of CFPB procurements. Our Bid Protest Regulations state that we lack jurisdiction over nonappropriated fund activities and, accordingly, we have dismissed protests against a procurement by a nonappropriated fund activity where that entity is not a federal agency. *E.g.*, Americable Int’l, Inc., B-251614; B-251615, Apr. 20, 1993, 93-1 CPD ¶ 336 at 2-3. Since the passage of the Competition in Contracting Act of 1984 (CICA), our jurisdiction has not been based on the expenditure of appropriated funds; instead we look to our statutory charge to decide procurement protests involving federal agencies. A federal agency for purposes of our jurisdiction is defined as an executive department or independent establishment in the executive branch of the government, a wholly-owned government corporation, or an establishment in the legislative or judicial branch of the government (with certain exceptions not relevant here). 40 U.S.C. § 102. We conclude that CFPB fits within that definition because the agency’s statutory authority expressly provides that “[t]he Bureau shall be considered an Executive agency, as defined in section 105 of title 5,” and goes on to provide:

Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts . . . shall apply to the exercise of the powers of the Bureau.

12 U.S.C. § 5491.⁷

⁶ Indeed, 4 C.F.R. § 21.5(g) cites as authority an obsolete codification of the Federal Property and Administrative Services Act of 1949. Since the recodification of Title 40 on August 21, 2002, the corresponding provision of the statute defines a federal agency for purposes of our jurisdiction as including “an executive department or independent establishment in the executive branch.” 40 U.S.C. § 102(4)-(5).

⁷ CFPB does not address or cite § 5491 in its argument. However, financial statements issued by CFPB state that it is an “Executive agency.” *E.g.*, CFPB, (continued...)

Taken together, we conclude that CFPB's organic statute places the agency's procurements within this Office's bid protest jurisdiction over federal agencies.

Evaluation of Quotations

IE challenges the evaluation of both its and ICF's quotations under the key personnel factor. The firm argues that its key personnel have direct experience supporting the tax time saving program, while ICF's do not, and that the evaluation of ICF's key personnel as outstanding, and of IE's key personnel as merely acceptable, was unreasonable. Protest at 8. IE also contends that the evaluators utilized unstated evaluation criteria in considering the key personnel of the vendors. Specifically, the firm argues that the RFQ did not state that experience with VITA and tax preparation would be considered, and that those considerations were not reasonably encompassed within the criteria in the RFQ. Id.

CFPB counters that its evaluation of the vendors' key personnel was reasonable and consistent with the evaluation criteria. CFPB notes that the RFQ differs from the agency's previous tax time saving program support for pilot projects (for which IE held the contract) and that, as a result, IE's experience with the program was helpful but not entirely sufficient. AR at 11. In particular, the statement of work required the implementation of a more complex demonstration project for which a vendor's experience with financial empowerment work, particularly in the context of VITA and tax preparation, would be helpful. Id. Thus, the absence of such experience was reasonably viewed as a weakness for IE while, correspondingly, having such experience was a strength for ICF's key personnel. Id. CFPB also argues that the RFQ provided that the evaluators would assess whether key personnel had experience, knowledge, and expertise that would aid in successful performance, and that the RFQ emphasized the agency's desire for key personnel with significant subject matter knowledge and expertise. RFQ at 38. CFPB argues that assessing whether key personnel had direct experience with tax preparation and VITA programs was consistent with the RFQ evaluation criteria, and that the evaluation of ICF as superior to IE in that respect was reasonable. Supp. AR at 4.

Where an agency issues a solicitation to vendors holding FSS contracts, and conducts a competition among FSS vendors, we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation. Spectrum Comm, Inc., B-412395.2, Mar. 4, 2016, 2016 CPD ¶ 82 at 8. When the procurement is conducted pursuant to FAR subpart 8.4 and requires

(...continued)

Financial Report of the Consumer Financial Protection Bureau for Fiscal Year 2016, at 7 (available online at www.consumerfinance.gov/documents/1495/112016_cfpb_Final_Financial_Report_FY_2016.pdf (last visited Dec. 23, 2016)).

vendors to respond to a statement of work, the record must document the evaluation and selection as provided in FAR § 8.405-2(f), including the rationale for any tradeoffs made in the selection. Id. Where a protester challenges the evaluation as unfairly utilizing unstated evaluation criteria, our Office will assess whether the solicitation reasonably informs vendors of the basis for the evaluation. Raytheon Co., B-403110.3, Apr. 26, 2011, 2011 CPD ¶ 96 at 5. In that regard, procuring agencies are not required to list as stated evaluation criteria every area that may be taken into account; rather, it is sufficient that the areas considered in the evaluation be reasonably related to or encompassed by the stated criteria. Id.

The record supports the reasonableness of the CFPB's evaluation under the key personnel factor. Although the RFQ did not specifically identify VITA or tax preparation work as useful experience that would be considered in the evaluation, we agree with CFPB that the evaluation criteria allowed the evaluators discretion to make an assessment of the types of knowledge and experience that would meet the RFQ criteria of being suited to performance of the statement of work. The RFQ did identify subject matter knowledge and expertise as important, and at the heart of the statement of work is a requirement to provide assistance to VITA and tax preparation programs in preparation for the tax filing season. As a result, CFPB could reasonably conclude that a vendor with direct experience in those areas would have better insight in designing the tax time saving materials, training, and technical assistance. In the case at hand, CFPB reasonably found that a vendor without that experience--IE--could still meet the RFQ requirements but was likely to be less successful. The evaluators recognized as strengths for IE the experience of its key personnel in tax time saving pilot projects justifying an acceptable rating, but also concluded that the experience was not sufficient to merit a higher rating. In short, we think the CFPB reasonably considered the experience and knowledge of each vendor's key personnel in VITA and tax preparation in the evaluation of the key personnel factor.

Next, IE argues that given the limited information that vendors could provide in their technical narratives, the evaluation of ICF as superior to IE under the technical approach factor was unreasonable. IE argues that ICF's brief technical approach narratives could not have been significantly different from its own. Protest at 8. IE also argues that its proposal was superior to ICF's in the areas of VITA site recruitment, in describing an approach to designing and delivering technical assistance materials, and in providing webinars to train tax preparers and VITA staff. As such, IE argues that it was unreasonable for the CFPB evaluators to find that IE's approach lacked details, while finding that ICF's approach was more detailed and provided a better technical approach.

CFPB counters that IE's protest merely disagrees with evaluation judgments, and that the evaluators reasonably concluded that aspects of ICF's quotation were superior to IE's under the technical approach factor. The agency argues that the evaluators identified specific strengths for both firms, and a specific weakness for IE

that provide reasonable support for their evaluation ratings. In particular, the evaluators noted ICF's plan to use facilitated peer learning discussions, and to assign a specific liaison to each demonstration site, which the evaluators considered to be significant strengths that would increase the effectiveness of the project. AR Tab 10, TEP Report, at 8. The evaluators also identified six strengths related to ICF's site assessment plan, its approach to providing effective client-centered assistance, and its plan to conduct four webinars that would also be recorded for later viewing.⁸ Id. at 8-9. At the same time, the evaluators identified three strengths in IE's proposal relating to [DELETED] at VITA sites, the use of a [DELETED] to allow VITA sites to request assistance, and its [DELETED] reports on the project. Id. at 11. However, they also identified four weaknesses in IE's technical approach, all of which reflected a lack of a detailed approach to specific aspects of the statement of work. Id. Our review of the record provides us no basis to question the reasonableness of the evaluation.

With respect to one weakness that identified a lack of detail in IE's quotation regarding requirements to develop new materials and to deliver printed materials, the protester argues that the record shows unequal treatment. IE argues that its quotation did provide a specific approach, and was more detailed on those points than ICF's quotation (which was not assigned a weakness). Supp. Protest at 4-5. The TEP chair disputes IE's argument, and maintains that while IE's quotation relied on materials identified in the RFQ and paraphrased the statement of work significantly, ICF's quotation described an approach to preparing new materials based on a [DELETED] the materials that the evaluators felt would be more likely to achieve program goals. Supp. AR at 9 & exh. 1, Declaration of TEP Chair, at 5. Our review of the relevant portion of both quotations shows that CFPB's explanation is supported by the content of the quotations and reflects a reasonable evaluation judgment. AR Tab 6A, ICF Technical Quotation, at 14 (project implementation approach); AR Tab 7A, IE Technical Quotation, at 7. We have no basis to conclude that CFPB treated the vendor's unequally here.

⁸ In response to IE's argument that its proposal was treated unequally because it also proposed to use four webinars, but did not receive a similar strength, the TEP chair explains that the strength was assigned to ICF's quotation because the firm planned to record all four webinars, and to permit later viewing of any webinar, was viewed as materially better than IE's plan to record only one webinar as the RFQ required. Supp. AR, exh. 1, Declaration of TEP Chair, at 5. IE argues that the contemporaneous record shows that the evaluators identified the number of webinars--not specifically the recording of all four--as the basis for assignment of the technical approach strength to ICF's quotation. Although the more detailed explanation of the strength was provided during the protest, we view that explanation as consistent with the contemporaneous record, and so, we agree with CFPB that IE was not treated unequally during the evaluation.

Source Selection Decision

Finally, IE argues that the source selection decision was unreasonable and inadequately documented. In part, IE argues that errors in the evaluation under the key personnel and technical approach factors rendered unreasonable any tradeoff that attempted to justify paying ICF's higher evaluated price.

Where an agency holds a competition for an FSS task order on a best-value tradeoff basis, it is the function of the source selection authority to perform a price/technical tradeoff, that is, to determine whether one quotation's technical superiority is worth its higher price. VariQ Corp., B-409114 et al., Jan. 27, 2014, 2014 CPD ¶ 58 at 8. The extent to which technical superiority is traded for a lower price is governed only by the test of rationality and consistency with the stated evaluation criteria. Id. Documentation of the source selection rationale may be limited, but it must be sufficient to show a reasonable basis for any tradeoffs. FAR § 8.405-2(f).

On the first point, as discussed above, the evaluation under both non-price factors was, in fact, reasonable and treated the vendors equally. Furthermore, our review of the contemporaneous record shows that CFPB's source selection decision does document the source selection rationale. The decision discusses the merits of each vendor's quotation, and their prices in comparison to a government estimate, the extent of discounts offered from FSS pricing, and their prices in comparison to the other vendors. AR Tab 10, Source Selection Decision, at 4-7. After noting the general differences in adjectival ratings and prices between ICF and IE, the source selection decision discusses the substance and importance of the advantages offered by ICF's quotation both generally and specifically under the key personnel and technical approach factors, and concludes that those advantages justify ICF's higher price. Id. at 8. Accordingly, contrary to IE's argument, we find that the source selection decision was both reasonable and well documented.

The protest is denied.

Susan A. Poling
General Counsel