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Decision

Matter of: YWCA of Greater Los Angeles

File: B-414596; B-414596.2; B-414596.3

Date: July 24, 2017

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DIGEST

Protest that agency held unequal discussions in a best-value procurement is sustained where the record shows that prior to the source selection decision, the agency engaged in a second round of discussions with only the awardee and allowed only the awardee to submit a final proposal modification.

DECISION

YWCA of Greater Los Angeles, of Los Angeles, California, challenges the award of a contract to Management and Training Corporation (MTC), of Centerville, Utah, under request for proposals (RFP) No. DOL-ETA-16-R-00007, issued by the Department of Labor (DOL) for the operation of a Job Corps center in Los Angeles. YWCA contends that the agency engaged in unequal discussions, and challenges the evaluation of proposals.

We sustain the protest.

BACKGROUND

Job Corps is a national residential training and employment program administered by DOL to address barriers to employment faced by disadvantaged youth throughout the United States. RFP at 7. The program provides “comprehensive career development services to students including academic, career technical, career success and

independent living skills, career readiness training, and support services,” intended to “prepare youth to obtain and hold gainful employment, pursue further education or training, or satisfy entrance requirements for careers in the [a]rmed [f]orces.” Id.

DOL issued the RFP on October 19, 2015, seeking a contractor to operate the Los Angeles Job Corps center. The RFP contemplated the issuance of a cost-reimbursement-plus-incentive-fee type contract for a 2-year base period and three 1-year option periods. RFP at 24. The solicitation provided for award on a best-value basis considering the following factors: (1) technical approach; (2) relevant experience; (3) staff resources; (4) past performance; and (5) business management proposal evaluation.¹ RFP at 98-104.

As relevant here, under the staff resources factor, the RFP designated the center director position as a key personnel position, and required offerors to submit a resume and letter of commitment for the proposed center director. RFP at 88. The RFP advised offerors that they must notify the contracting officer (CO) in writing of any change in the availability of the proposed center director “when the change in status occurs, at any point in the procurement process.” RFP at 88. The RFP also contained a section addressing the late submission, modification, and withdrawal of offers, which explained that “[a]ny offer, modification, or withdrawal received at the [DOL] office designated in the solicitation after the exact time specified for receipt of offers is ‘late’ and will not be considered.”² RFP at 96-97.

The agency received two proposals in response to the RFP. One of the proposals was submitted by YWCA, the 52-year incumbent for this effort. Agency Report (AR) at 2. The technical evaluation panel (TEP) evaluated initial proposals, and then conducted discussions with each offeror. Id. Subsequently, offerors submitted final proposal revisions (FPRs), which were evaluated as follows:

¹ The RFP provided that technical approach was the most important factor, but that, when combined, relevant experience and past performance were equal in importance to technical approach. RFP at 98. Additionally, the RFP provided that the non-cost factors were significantly more important than the evaluated cost, which would be determined by the evaluation of an offeror’s business management proposal. Id.

² This provision contains some exceptions, which deal with electronic transmission problems, situations in which the submission was under DOL’s control by the designated time, or instances in which DOL’s processes were disrupted such that offers could not be received by DOL at the specified time. RFP at 97. None of the exceptions are relevant here.

	YWCA	MTC
Technical Approach	Marginal	Good
Relevant Experience	Very Relevant	Very Relevant
Staff Resources	Marginal	Outstanding
Past Performance	Acceptable	Good
Business Management Proposal-Evaluated Cost	\$98,999,976	\$99,977,480

AR at 3.³

The agency selected MTC for award, finding that the 1 percent price premium was justified based on MTC's technically superior proposal. AR, Tab 12, Award Memorandum, at 33. DOL provided YWCA with a debriefing on April 12, 2017. AR at 3. This protest followed.

DISCUSSION

YWCA contends that the agency engaged in unequal and improper discussions when it permitted MTC to amend its proposal after the submission of FPRs. Specifically, YWCA challenges the agency's decision to allow MTC to substitute a new proposed center director after the submission of FPRs, without also reopening discussions with YWCA.⁴ Here, the record supports a finding that the agency engaged in unequal discussions, and we sustain the protest on that basis.⁵

The TEP rated MTC's initial proposal unacceptable under the staff resources factor because MTC's proposed center director (candidate A) "did not meet the minimum qualifications for the position." AR, Tab 9, TEP Report at 39. Following discussions, MTC proposed a different candidate (candidate B) for center director in its FPR. Supp.

³Potential ratings for the technical approach and staff resources factors were: outstanding, good, acceptable, marginal, and unacceptable. AR, Tab 12, Award Memorandum at 5.

⁴ While YWCA has also alleged that MTC participated in a bait-and-switch regarding its proposed center director, we find that YWCA's arguments in this regard are speculative.

⁵ YWCA also challenged the agency's evaluation of its proposal under the technical approach, staff resources, and past performance factors, as well as the evaluation of MTC's proposal under the relevant experience, past performance and staff resources factors. Since we are sustaining the protest against the agency's conduct of discussions with only one offeror, which will necessarily lead to conducting discussions with the other offeror and a request for revised proposals, followed by a new evaluation and tradeoff decision, we need not address the remainder of YWCA's protest allegations. See SRA Int'l, Inc., B-410973, B-410973.2, April 8, 2015, 2016 CPD ¶ 32 at 5.

AR at 8. Twenty-six days after the submission of FPRs, and before the agency began evaluating revised proposals, MTC notified DOL that candidate B had become unavailable. Id. In conjunction with its notification, MTC proposed a substitute, candidate C. Id. Subsequently, the agency evaluated MTC's proposal, including candidate C, and assigned an outstanding rating to MTC's proposal under the staff resources factor. AR, Tab 9, TEP Report at 39.

Our Office has explained that offerors are obligated to advise agencies of material changes in proposed key staffing, even after submission of proposals. General Revenue Corp., et al., B-414220.2 et al., March 27, 2017, 2017 CPD ¶ 106 at 22. Additionally, when a solicitation (such as this one) requires resumes for key personnel, the resumes form a material requirement of the solicitation. Pioneering Evolution, LLC, B-412016, B-412016.2, Dec. 8, 2015, 2015 CPD ¶ 385 at 8. When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal. General Revenue Corp., supra. According to the agency, however, the language in the RFP afforded it a third option in this case. We disagree.

Specifically, the agency argues that the terms of the instant RFP permitted offerors to substitute key personnel, including the center director, at any time. The agency further maintains that allowing offerors to do so does not constitute discussions. DOL argues that this situation differs from prior situations considered by our Office because the RFP for this procurement contained an explicit requirement that offerors notify the agency if any of their proposed key personnel become unavailable. The agency's argument is based on the following language:

Offerors must notify the [c]ontracting [o]fficer in writing of any change in the availability of proposed key personnel when the change in status occurs, at any point in the procurement process.

RFP at 88. The agency contends that the notification requirement contains an implicit requirement for offerors to substitute key personnel when making their notification. Supp. AR at 9. Specifically, the agency explains:

When a proposed person becomes unavailable, the offeror must notify the [a]gency. But the obligation does not end there. For the notice to have any meaning, the offeror must also offer up a substitute person for that position. That person will then be evaluated for suitability against the RFP's requirements for that position, even if it is late in the procurement.

Supp. AR at 8. Thus, according to the agency, it did not conduct improper discussions, but simply allowed MTC to make a late key personnel substitution as permitted by the RFP. Supp. AR at 8.

In response, YWCA argues that the plain language of the requirement does not support DOL's interpretation because it is silent with regard to the submission of a proposal revision substituting a new key person for one that has become unavailable. Supp. Comments at 5. YWCA also contends that DOL's interpretation would create a conflict between the key personnel notification provision and the provision dealing with late modifications because the late modifications provision does not contain an exception for the type of proposal modifications necessary to propose new key personnel after the time specified for the receipt of offers. Supp. Comments at 5. We agree.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. Intelsat General Corporation, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. Where a protester and an agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Id.

The plain language at issue here, on its face, creates nothing more than an obligation for an offeror to provide notification if proposed key personnel become unavailable. Moreover, if we were to adopt DOL's interpretation of the notification provision, the notification requirement would be in conflict with the provision prohibiting late modifications, which does not include an exception for the receipt of late modifications when a key person becomes unavailable. See RFP at 96-97. In sum, we do not find the agency's interpretation to be reasonable, and we conclude that the notification requirement in the solicitation did not implicitly grant special permission for offerors to make late modifications regarding key personnel.

Further, even assuming for the sake of argument that the solicitation could reasonably be read to permit offerors to make late substitutions of key personnel, the agency's decision to allow MTC to submit a late modification to its proposal would still have been tantamount to the conduct of discussions. Submission of key personnel resumes after receipt of final proposals constitutes discussions, not clarifications, because without the resumes, the proposal would omit material information required by the RFP. Pioneering Evolution, LLC, supra. When an agency conducts discussions with one offeror, it must conduct discussions with all offerors in the competitive range.⁶ SRA Int'l, Inc., supra. at 5. Here, we find the agency's conduct of discussions with only one offeror constituted unequal and therefore improper discussions.

The agency further argues that, even if we conclude it conducted unequal discussions, YWCA was not prejudiced. YWCA, however, contends that another round of discussions would afford it the opportunity to address weaknesses identified for the first

⁶ The competitive range for this procurement consisted of YWCA and MTC. AR, Tab 9, TEP Report, at 1.

time in its FPR, and to otherwise find ways to improve the clarity of its lower-priced proposal. Supp. Comments at 10.

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Id. at 7. Moreover, in the case of unequal discussions, the focus of our inquiry is on whether the protester, had it been afforded meaningful discussions, could have revised its proposal in a manner that would result in a substantial chance of the protester receiving the award. Id. Where, as here, an agency fails to properly conduct discussions and argues that the protester was not prejudiced as a result of that failure, we will not substitute speculation for discussions, and we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester. See Delfasco, LLC, B-409514.3, March 2, 2015, 2016 CPD ¶ 192 at 7. A reasonable possibility of prejudice is a sufficient basis for sustaining the protest.

RECOMMENDATION

We recommend that DOL reopen discussions with the offerors, and afford them an opportunity to submit revised proposals; DOL should then perform a new evaluation consistent with the terms of the RFP and make a new selection decision. In the event that the proposal submitted by MTC no longer represents the best value, its contract should be terminated for the convenience of the government and a new award should be made consistent with the new evaluation.

We also recommend that the agency reimburse YWCA its costs associated with filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. Id. at § 21.8(f).

The protest is sustained.

Susan A. Poling
General Counsel