U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Department of Defense--Reconsideration

File: B-415155.3

Date: March 6, 2018

Hattie Russell DuBois, Esq., and William C. Moorhouse, Esq., Department of Defense, for the agency.
Alexander B. Ginsberg, Esq., J. Matthew Carter, Esq., and Meghan D. Doherty, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's request for reconsideration of a prior decision is denied where request does not show the decision contains errors of fact or law that warrant reversal or modification.

DECISION

The Department of Defense, Defense Human Resources Activity (DHRA), requests reconsideration of our decision, Immersion Consulting, LLC, B-415155, B-415155.2, Dec. 4, 2017, 2017 CPD ¶ 373, in which we sustained a protest by Immersion Consulting, LLC, of Annapolis, Maryland, challenging the issuance of a Federal Supply Schedule (FSS) order to NetImpact Strategies, Inc., of Chantilly, Virginia, under request for proposals[1] (RFP) No. 1186423, issued by DHRA for program management support services. DHRA argues that our decision contains errors of law and fact that merit reconsideration.

We deny the request.

The solicitation, issued as a small business set-aside competition under FSS No. 874-4, anticipated the issuance of a fixed-price task order. Quotations were to be evaluated

[1] As noted in our original decision, although the procurement at issue was a competition among FSS contractors, we refer to the solicitation as an RFP to maintain consistency with that designation in the contemporaneous record.

under three factors: technical, past performance, and price. RFP at 1 & attach. 3, Evaluation Factors, Criteria, and Rating Methods, at 23-27. The technical factor had three subfactors: technical approach and methodology, project management plan, and staffing plan. Id. at 24-25. Under the technical approach and methodology subfactor, the RFP directed vendors to demonstrate understanding of the requirement, explain the offeror's assessment of the objectives to be accomplished, and present a methodology for "accomplishing the required contract performance," including how to "satisfy the performance requirements" and "solutions for any assessed performance challenges." Id. at 24. Under the program management plan subfactor, vendors were to describe an "approach for providing complete program management support that w[ould] fully integrate, manage, control, and document all phases" of the requirements, describe project management and quality control, demonstrate an approach for providing necessary corporate resources, and set forth a detailed plan for transition including personnel, schedule, and communication strategy. Id. at 25. Under the staffing plan subfactor, the RFP instructed vendors to provide a staffing plan to support the technical approach through identifying labor categories, experienced and skilled personnel, labor hours, and a crosswalk to the requirements. Id.

In response to Immersion's protest, our review of the record showed that the source selection authority's (SSA) selection of NetImpact's lower-priced quotation was based on the SSA's view that the two quotations were technically equal. Our decision concluded that the SSA's judgment was not supported by the underlying record and was thus unreasonable. In particular, the SSA's rationale for removing the weaknesses assessed by the source selection evaluation board (SSEB) in evaluating NetImpact's quotation was not meaningfully explained in the record. Immersion Consulting, LLC, supra, at 5. Accordingly, we sustained the protest and recommended that DHRA reevaluate the quotations under the technical factor reasonably, document an evaluation that was consistent with the solicitation and our decision, prepare a new source selection decision, and reimburse the protester's costs associated with filing and pursuing the protest, including reasonable attorneys' fees.[2] Id. at 7.

Under our Bid Protest Regulations, to prevail on a request for reconsideration, the requesting party must show either that our decision contains errors of fact or law, or that information not previously considered warrants the decision's reversal or modification. 4 C.F.R. § 21.14(a); Department of the Navy--Recon., B-405664.3, May 17, 2012, 2013 CPD ¶ 49 at 1.

---

[2] Immersion recently filed another protest challenging the result of the reevaluation and new source selection decision, which again resulted in DHRA selecting NetImpact's quotation. Our Office expects to issue a decision regarding that protest consistent with the statutory requirements. One element of our recommendation, that DHRA reimburse the costs incurred by Immersion in filing and pursuing the earlier protest, remains incomplete at this time.

DHRA's request for reconsideration raises three arguments. First, the agency argues that the decision erroneously faulted the SSA for failing to provide information beyond the SSEB report in deciding to depart from its conclusion. Reconsideration Request at 2. Second, DHRA argues that the decision erroneously stated that the evaluation record was silent regarding whether the awardee proposed a sufficient level of effort when, DHRA argues, the record did address the awardee's level of effort. Id. Third, DHRA argues that our decision erroneously sustained Immersion's challenge to the SSA's deletion of one strength from the evaluation of Immersion's quotation (and both a strength and a weakness from NetImpact's quotation), because our decision failed to identify how the SSA's action was a violation of law, regulation, or policy, or was arbitrary and capricious. Id. at 3. We address each issue in turn, and find that DHRA has not provided a basis for reconsideration of the decision.

As explained in our decision, the contemporaneous record showed that the SSEB technical evaluation report informed the SSA that the panel identified three strengths under the technical factor for Immersion's quotation and provided a narrative explanation of each. Immersion Consulting, LLC, supra, at 3. For NetImpact, the SSEB identified two strengths and one weakness, and similarly provided a narrative explanation for each. Id. The SSA disagreed with the SSEB evaluation with regard to one strength assessed for each vendor's quotation. Specifically, the SSA stated that the SSEB's supporting narrative was too general and did not show that the identified basis actually exceeded the solicitation requirements or provided a significant benefit to DHRA. Id. (citing Agency Report (AR) Tab 9, Source Selection Decision Document (SSDD) at 327, 329). The SSA also disagreed with the weakness assessed to NetImpact for proposing staff whose roles and responsibilities were inconsistent with the corresponding tasks, and for the resulting risk that NetImpact would provide insufficient staffing. The SSA stated that the SSEB had failed to provide "underlying or convincing detail on how this negatively impacts the [g]overnment." Id. (quoting AR, Tab 9, SSDD, at 330). For those reasons, the SSA removed the two strengths (one for each vendor) and the one weakness (for NetImpact) from the evaluation.[3]

DHRA argues that Federal Acquisition Regulation (FAR) § 15.308 expressly provides that an SSA "may use reports and analyses prepared by others," so the SSA's actions were proper. Reconsideration Request at 2. DHRA reasons that the SSEB findings were not adequately supported by information in the SSEB memorandum itself, so the SSA therefore had a sufficient reason to vacate each of those conclusions based only on the SSEB report itself. Id. DHRA argues that our decision relied on an erroneous legal standard that improperly requires an SSA to obtain information outside a report or analysis with which the SSA disagrees, in order to justify departing from the conclusions in the report or analysis. Id.

[3] As noted in our decision, the SSA also revised one of Immersion's two remaining technical factor strengths and revised technical rating summaries for both firms. Id.

Source selection officials are not bound by the judgments of lower-level evaluators and may impose their own evaluation judgment so long as the judgment is rational and consistent with the evaluation criteria. PRC, Inc.--Recon., B-274698.4, July 10, 1997, 97-2 CPD ¶ 10 at 4 (citing Loral Aeronutronic, B-259857.2, B-259858.2, July 5, 1995, 95-2 CPD ¶ 213 at 7-9). As noted in our decision, in an FSS competition under FAR subpart 8.4, the relevant requirement is that the record adequately document that source selection judgments are reasonable. Thus, when a source selection official disagrees with the judgments of lower-level evaluators, even in an FSS procurement, the fundamental requirement remains that the official's independent judgment must be reasonable, consistent with the solicitation, and adequately documented. Immersion Consulting, LLC, supra, at 5 (citing cases).

DHRA argues that our decision faulted the SSA for not "look[ing] beyond the SSEB report." Reconsideration Request at 2. We disagree. Our decision was based on the absence of a reasonable and documented rationale to justify the SSA making an evaluation judgment contrary to the SSEB's documented evaluation that assigned the weakness to NetImpact's quotation. While DHRA argues that the SSA properly removed the weakness because the SSEB had not adequately shown how NetImpact's approach would negatively impact the government, this argument fails to rebut, through any reasoned analysis, the SSEB's conclusion that the approach to staffing described in NetImpact's quotation posed a risk that its staff would be unable to successfully perform the specified services. The decision noted, as examples, two potential sources of information that might have been documented as providing reasonable support for an SSA's contrary judgment (that is, specific information in the quotation, or a record of a discussion between the SSA and SSEB). Notwithstanding DHRA's contentions, our decision did not restrict an SSA to only those examples and DHRA has not shown that the contemporaneous record documented a reasonable basis for the SSA to void the SSEB's conclusions. In short, DHRA has not shown that our Office's decision relied on an erroneous legal standard.

DHRA next argues that the protester did not challenge the evaluation of NetImpact's level of effort, and our decision then erroneously stated that the evaluation was silent on whether the firm's proposed labor hours were sufficient to perform the agency's requirement. Id. In this regard, the contemporaneous evaluation record identified the full-time equivalent (FTE) level proposed by NetImpact, stated that it was lower than the agency estimate (in terms both of the number and percentage), and further explained that the firm's definition of an FTE year was lower than the agency's estimate had used. AR Tab 29, NetImpact Price Proposal Review Memorandum, at 1. Therefore, DHRA argues that the record was not actually silent. Reconsideration Request at 2. Additionally, DHRA argues that our decision failed to recognize that in the SSDD the SSA specifically referred to an "assessment of the offeror's labor hours." Id. (citing AR, Tab 9, SSDD, at 344).

We disagree with DHRA's claim that the protester did not challenge the evaluation of NetImpact's level of effort. The supplemental protest expressly raised that challenge. See Supplemental Protest at 20 (alleging that DHRA failed to evaluate whether "NetImpact will be able to perform the contract with significantly fewer personnel" than

Immersion's incumbent team). Further, with respect to the merits of that challenge, the elements of the record cited by DHRA in its reconsideration request do not support its argument; rather, they show only that the agency listed the number of FTEs and hours proposed by NetImpact, and appeared to recognize that the firm's approach provided considerably lower staffing than the agency's estimate. DHRA has not shown that the record provided any contemporaneous evaluation of whether NetImpact's proposed labor hours were sufficient to perform the agency's requirement as the RFP provided. Cf. RFP attach. 3, Evaluation Factors, Criteria, and Rating Methods, at 25. Instead, the record shows only that the agency recognized that NetImpact's proposed level of effort was lower than the agency estimate. An agency is not required to explain every area where a quotation meets the requirements, but we do not agree with DHRA that, even under the minimal documentation required in an FSS competition, the omission of any reasoned assessment of whether NetImpact's quotation of a considerably lower level of effort could meet the requirements of the solicitation.[4] Accordingly, we conclude that our decision accurately described the contemporaneous record as silent, and as lacking an assessment of whether NetImpact's proposed level of effort would be adequate to perform the requirement. In short, DHRA has not provided a valid basis to reconsider our decision in this regard.

Finally, DHRA argues that our decision made an erroneous factual assumption and "did not apply any legal standard" in determining that the SSA lacked a reasonable basis to remove one strength from the SSEB's evaluation of Immersion's quotation. Reconsideration Request at 3. DHRA argues that the SSA's action did not violate law or regulation and did not reflect arbitrary and capricious action. Instead, DHRA argues that the SSA determined that the basis for the strength was that Immersion had institutional knowledge of how to perform the agency's requirement, but that the SSEB's consideration of Immersion's knowledge of the agency's requirement was "not part of the Solicitation," and did not show that Immersion "exceeded the PWS [performance work statement] requirements." Id. The contemporaneous record shows that the SSA rejected the SSEB's assessment of a strength because the SSA viewed it as too general and as identifying benefits that were not called for in the PWS. AR, Tab 9, SSDD, at 4-5.

We disagree with DHRA's argument that the RFP precluded consideration of institutional knowledge of proposed employees as an element of the evaluation under the staffing plan subfactor, or that the SSEB failed to provide a reasonable basis to conclude that that Immersion's personnel would provide a benefit to DHRA. Based on our review of the contemporaneous record, the SSEB's evaluation reasonably

---

[4] Contrary to DHRA's argument, we see no relevance to a conclusory statement in the price evaluation document that "[t]he labor categories are sufficient for this effort." See Reconsideration Request at 3 (quoting AR, Tab 29, NetImpact Price Proposal Review Memorandum, at 1). That NetImpact's quotation had identified appropriate labor categories nevertheless does not demonstrate that DHRA reasonably evaluated whether its level of effort (or labor hours) under those labor categories was sufficient.

considered the vendor's understanding of the agency's requirements, the vendor's methodology for performing them, and its assessment of the hurdles to performance and techniques to overcoming them, so the SSEB's rationale for assessing a strength for Immersion was consistent with the RFP. See RFP, attach. 3, Evaluation Factors, Criteria, and Rating Methods, at 24. As a result, the SSA's stated rationale for rejecting that aspect of the evaluation was not reasonable. Accordingly, we see no error of law or fact in our conclusion that the SSA had failed to provide a valid basis for rejecting the SSEB's assessment of the strength.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel