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# Decision

**Matter of:** EFS Ebrex SARL

**File:** B-416076

**Date:** June 4, 2018

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Michael J. Gardner, Esq., Greenberg Traurig, LLP, for Coastal Pacific Food Distributors, Inc.; and Robert E. Korroch, Esq., William A. Wozniak, Esq., and Shayn A. Fernandez, Esq., Williams Mullen, for Food Services, Inc., the intervenors.  
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest that agency applied unstated evaluation factors is sustained where agency's source selection plan established undisclosed benchmarks that a proposal must meet in order to receive a rating of acceptable or higher under the experience evaluation factor, and the agency's discussions were less than meaningful regarding those undisclosed requirements.

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## DECISION

EFS EBrex Sarl (Ebrex), of Geneva, Switzerland, protests the Defense Logistics Agency's award of a contract to Coastal Pacific Food Distributors, Inc., of Stockton, California, pursuant to request for proposals (RFP) No. SPE300-16-R-0003 to provide subsistence prime vendor support for the military and other federally-funded customers in Japan, Singapore, Diego Garcia, and the Philippines (referred to as "zone 1").<sup>1</sup> Ebrex asserts that the agency's evaluation and source selection decision were based on unstated evaluation factors, and that the agency failed to conduct meaningful discussions.

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<sup>1</sup> The solicitation sought separate proposals, and contemplated separate awards, for two areas--"zone 1" and "zone 2." Ebrex initially protested the award in both zones, but subsequently withdrew its protest challenging the award in zone 2. Accordingly, our discussion below relates only to the zone 1 procurement.

We sustain the protest.

## BACKGROUND

On October 18, 2016, the agency issued RFP No. SPE300-16-R-0003, seeking proposals to provide subsistence prime vendor support for a 60-month period. Agency Report (AR), Tab 3, RFP at 3. The solicitation contemplated the award of a single fixed-price indefinite-delivery, indefinite-quantity (IDIQ) contract under which the awardee will deliver food and non-food items to various military customers and other authorized users. Id. at 18. The solicitation provided for award on a best-value tradeoff basis, and established the following evaluation factors: (1) warehouse location and capacity; (2) experience; (3) quality control, assurance, and warehouse management system/procedures; (4) resource availability; (5) implementation and management plan; (6) past performance; and (7) price.<sup>2</sup> Id. at 200-07. Regarding this protest, the solicitation provided that, in evaluating proposals under factor 2, experience, the agency would consider the relevance of an offeror's prior experience, stating:

In establishing what is relevant for experience, consideration shall be given to those aspects of an offeror's contract history which provide the most confidence that the offeror will satisfy the current procurement. Those aspects of relevancy include experience performing deliveries as a full line food service distributor, dollar value, and number of customers.

Id. at 202.

Separate and apart from the solicitation, the agency created a source selection plan (SSP) which was not disclosed to the offerors. In the SSP, the agency established an adjectival rating system,<sup>3</sup> and also established what the agency itself describes as "specific criteria that supplemented the evaluation language of the Solicitation" to assist in assigning the ratings. AR, Mar. 25, 2018, at 9. For example, with regard to evaluation under the experience factor, the SSP stated that, in order for a proposal to receive a rating of acceptable or higher, the offeror must:

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<sup>2</sup> The solicitation provided that each of the non-price factors were of equal importance and that, combined, the non-price factors were significantly more important than price. Id. at 201.

<sup>3</sup> With regard to the non-price factors, other than past performance, the agency assigned adjectival ratings of: outstanding, good, acceptable, marginal, or unacceptable. AR, Tab 5, Amended SSP, at 7.

provide[] evidence of experience as a full line food service distributor on contracts that collectively (if concurrently performed) meet at least 80% of the annual dollar value as required by the instant solicitation.

AR, Tab 5, Amended SSP, at 18.<sup>4</sup>

On December 19, 2016, proposals were submitted by two offerors--Coastal and Ebrex; Coastal is the incumbent contractor. Thereafter, the agency evaluated the proposals and conducted discussions with the two offerors.

On November 7, 2017, the agency requested submission of final revised proposals, which the offerors submitted on November 13. Thereafter, the agency advised the offerors that it would conduct a reverse auction. Pursuant to the reverse auction, both offerors decreased their proposed prices. Thereafter, the proposals were evaluated as follows:<sup>5</sup>

	<b>Coastal</b>	<b>Ebrex</b>
<b>Warehouse</b>	Good	Good
<b>Experience</b>	Outstanding	Marginal
<b>Quality Control</b>	Outstanding	Outstanding
<b>Resource Availability</b>	Good	Acceptable
<b>Implementation/Mgmt Plan</b>	Outstanding	Good
<b>Past Performance</b>	Satisfactory Confidence	Satisfactory Confidence
<b>Price</b>	\$69,856,017	\$63,702,008

AR, Tab 16, Source Selection Decision Document (SSDD), at 6.

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<sup>4</sup> The solicitation stated that the estimated annual dollar value of the protested procurement was \$61,552,730. See RFP at 202.

<sup>5</sup> Of relevance to this protest, the undisclosed SSP's definition of an acceptable rating under the experience factor included the following: "The primary offeror (or team member if applicable) provided evidence of experience as a full line food service distributor on contracts that collectively (if concurrently performed) meet at least 80% of the annual dollar value as required by the instant solicitation." AR, Tab 5, Amended SSP at 18. The undisclosed SSP's definition of a marginal rating was as follows: "Proposal has not demonstrated an adequate approach and understanding of the requirements, and/or risk of unsuccessful performance is high. Collectively, if concurrently performed, the contracts do not meet at least 80% of the dollar value requirement of the instant solicitation." Id.

In assigning Ebrex's proposal an experience rating below acceptable, the source selection authority (SSA) acknowledged that Ebrex's experience as a "full line food service distributor" amounted to "[redacted] of the annual dollar value" of the competed procurement, but concluded: "EFS did not provide full line food service contracts that collectively, if concurrently performed, meet[] at least 80% of the annual dollar value requirement of the instant solicitation."<sup>6</sup> Id. at 8. Based on the determination that Ebrex's prior experience fell slightly below the undisclosed 80% threshold, the SSA determined that Ebrex's proposal did not warrant a rating of acceptable. Id.

On February 7, 2018, the SSA selected Coastal for award, stating that Coastal's higher-rated proposal "justif[ied] paying the 9.66% total evaluated price premium." Id. at 15. Thereafter, Ebrex was notified of the award. This protest followed.

## DISCUSSION

Ebrex protests that the agency made award on the basis of unstated evaluation factors, specifically including the agency's undisclosed determination that only experience performing "full line food service" contracts would be considered relevant, and that an offeror's proposal must demonstrate 80% of the estimated annual dollar value of the competed procurement in order to obtain an experience rating of acceptable or higher.<sup>7</sup> Additionally, Ebrex protests that the agency failed to conduct meaningful discussions regarding the undisclosed evaluation factors. Accordingly, Ebrex asserts that the agency's evaluation and source selection decision were flawed. We agree.

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<sup>6</sup> The solicitation authorized consideration of a proposed subcontractor's experience, see RFP at 181-82, and the SSA acknowledged that Ebrex had submitted for evaluation contracts performed by its proposed subcontractor which, together with Ebrex's experience, "would have exceeded 80% of the annual dollar value as required by the solicitation." SSDD at 8. Nonetheless, the SSA stated that, because the subcontractor's prior contracts were not "full line food distributor" contracts, none of its experience would be considered for purposes of meeting the 80% threshold. Id.

<sup>7</sup> In addition to the agency's application of the undisclosed 80% threshold, Ebrex notes that the agency required that all key personnel have experience in the specific geographical area being serviced, and that the specific trucks that will be used for distribution be identified in a memorandum of understanding between the offeror and its vehicle supplier. Neither of these requirements was disclosed in the solicitation, see RFP at 183-83, 203, and each was the basis for an assessed weakness in Ebrex's proposal. See SSDD at 10, 11. In light of our conclusion, discussed below, regarding the agency's improper application of the undisclosed requirement that an offeror must have performed "full food service distribution contracts" valued at 80% of the estimated annual dollar value for this procurement, and our recommendation that the agency revise the solicitation to reflect its actual requirements and permit the offerors to compete against such requirements, we do not further address Ebrex's additional allegations regarding unstated evaluation factors.

Agencies are required to evaluate proposals based solely on the factors identified in the solicitation, and must adequately document the bases for their evaluation conclusions. Intercon Assocs., Inc., B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 at 5. While agencies properly may apply evaluation considerations that are not expressly outlined in the RFP if those considerations are reasonably and logically encompassed within the stated criteria, an agency may not give importance to specific factors, subfactors, or criteria beyond that which would reasonably be expected by offerors. See Risk Analysis and Mitigation Partners, B-409687, B-409687.2, July 15, 2014, 2014 CPD ¶ 214 at 6-13; Raytheon Co., B-404998, July 25, 2011, 2011 CPD ¶ 232 at 15-16; Consolidated Eng'g Servs., Inc., B-311313, June 10, 2008, 2008 CPD ¶ 146 at 6-11; Lloyd H. Kessler, Inc., B-284693, May 24, 2000, 2000 CPD ¶ 96 at 3. While we will not substitute our judgment for that of the agency, we will question the agency's conclusions where they are inconsistent with the solicitation criteria and applicable procurement statutes and regulations, undocumented, or unreasonable. Public Comms. Servs., Inc., B-400058, B-400058.3, July 18, 2008, 2009 CPD ¶ 154 at 17.

Further, consistent with the requirement that a solicitation identify the factors on which the source selection decision will be based, an agency's discussions must be meaningful, *i.e.*, discussions may not misinform or mislead offerors. Federal Acquisition Regulation (FAR) § 15.306(d); Metro Mach. Corp., B-281872 *et al.*, Apr. 22, 1999, 99-1 CPD ¶ 101 at 6-7. That is, an agency may not, through its questions or silence, lead an offeror into responding in a manner that fails to address the agency's actual concerns or misinforms the offeror about the government's requirements. Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168 at 9-11; DTH Mgmt. Group, B-252879.2, B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227 at 4.

Here, as discussed above, the solicitation advised offerors that, in evaluating experience, the agency would consider the relevance of an offeror's experience, taking into consideration various aspects of that performance, including "experience performing deliveries as a full line food service distributor, dollar value, and number of customers." RFP at 202. However, nothing in the solicitation either stated, or could be reasonably construed as: (1) precluding a rating of acceptable under the experience factor if the level of relevant experience fell below 80% of the estimated dollar value of the competed contract; or (2) limiting the experience considered relevant to only experience as a "full line food service distributor." As noted above, although agencies properly may apply evaluation considerations that are reasonably encompassed within the solicitation's stated criteria, an agency may not give importance to specific criteria beyond that which would reasonably be expected by offerors. In our view, based on the language of the solicitation, the offerors could not have reasonably understood that a level of experience below 80% of the competed contract's estimated dollar value would preclude a rating of acceptable or that only experience as a "full line food service distributor" would be considered relevant for purposes of applying the unstated 80% factor.

Further, the agency's discussion questions did not reasonably lead Ebrex to understand that such requirements would be applied. To the contrary, we view the agency's discussions as misleading regarding the relevance of Ebrex's proposed subcontractor's experience. Specifically, the agency's discussion questions noted that the proposed subcontractor's contracts were not "full line food service distribution" contracts--but, rather than advising Ebrex that only such contracts would be considered relevant, the agency complained that Ebrex's proposal "failed to clearly demonstrate how [the subcontractor] would have meaningful involvement in the performance of the resultant contract." AR, Tab 14.1, Discussion Questions/Ebrex Responses, at 11. Since the agency's evaluation and source selection decision concluded that none of the subcontractor's experience was relevant, it was misleading for the agency to, in the context of evaluating experience, effectively direct Ebrex to "clearly demonstrate" the subcontractor's "meaningful involvement" in contract performance.

On this record, we conclude that the agency's evaluation and source selection decision reflect material, undisclosed evaluation factors, and that the agency failed to conduct meaningful discussions.<sup>8</sup>

## RECOMMENDATION

Based on our review of the record, it appears the agency views its needs as encompassing various requirements that are unstated in the solicitation as currently written. To the extent the unstated requirements reflect the agency's actual minimum needs, we recommend that the agency amend the solicitation to advise offerors of such requirements; provide all offerors a meaningful opportunity to submit revised proposals against such requirements; reevaluate proposals in a manner that is reasonable and consistent with the solicitation's evaluation criteria; and make a new source selection decision. We also recommend that Ebrex be reimbursed its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong  
General Counsel

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<sup>8</sup> Our decision here does not express any opinion with regard to whether the agency's perception of its requirements may constitute overly restrictive specifications.