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Decision

Matter of: Bio-Rad Laboratories, Inc.

File: B-297553

Date: February 15, 2006

John E. Jensen, Esq., and Daniel S. Herzfeld, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.

John G. Horan, Esq., and Jason A. Carey, Esq., McKenna Long & Aldridge LLP, for IDEXX Laboratories, Inc., the intervenor.

Mark G. Garrett, Esq., and Elin M. Dugan, Esq., Department of Agriculture, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a solicitation failed to disclose the relative weight of the listed subfactors of the primary technical factor, the subfactors should have been considered approximately equal in weight, even though the procurement was intended to be conducted using Federal Acquisition Regulation (FAR) Part 13 simplified acquisition procedures and FAR § 13.106-1(a)(2) states that the relative importance of evaluation factors and subfactors need not be disclosed in a solicitation, because the solicitation did not indicate that the acquisition was being conducted under FAR Part 13 and the acquisition was conducted in a manner that was not distinguishable from a negotiated acquisition conducted under FAR Part 15, which requires that the relative weights of the evaluation factors and subfactors be stated in the solicitation.
2. Agency's selection of a proposal for award was unreasonable where the solicitation was silent as to the relative weights of the subfactors of the primary technical evaluation factor, and the agency, rather than treating the subfactors as equal in weight in evaluating the relative merits of the competing proposals, considered the subfactors as listed in descending order of importance.
3. Agency failed to evaluate proposals reasonably or in accordance with the terms of the solicitation's past performance and organizational experience evaluation factor where the undocumented and conclusory evaluation evidences that the agency did not meaningfully evaluate the organizational experience component of this factor.

4. Agency's evaluation of the large business awardee's proposal as "neutral" or "satisfactory" under the solicitation's evaluation factor considering the participation of small disadvantaged businesses and other types of small businesses was unreasonable and inconsistent with the solicitation, where the proposal stated that there would not be any such participation in contract performance.

DECISION

Bio-Rad Laboratories, Inc. protests the award of a contract to IDEXX Laboratories, Inc., under request for proposals (RFP) No. 061-M-APHIS-04, issued by the Animal and Plant Health Inspection Service (APHIS), Department of Agriculture, for bovine spongiform encephalopathy (BSE) testing systems and test kits.¹ Bio-Rad argues that the agency's evaluation of proposals and selection of IDEXX's proposal for award were unreasonable.

We sustain the protest.

BACKGROUND

Since the BSE testing system was considered to be a commercial item, the RFP was issued as an acquisition for a commercial item incorporating the special requirements applicable to the acquisition of commercial items. See Federal Acquisition Regulation (FAR) Part 12. The RFP provided for the award of a fixed-price contract with both definite-quantity and indefinite-quantity line items to the offeror submitting the proposal determined to represent the best value to the government, based upon the following evaluation factors, listed in descending order of importance: technical capability of the item offered to meet the Government requirement, past performance and organizational experience, small disadvantaged business participation, and price.² RFP at 18, 35, 51.

Offerors were referred to the RFP's proposal preparation instructions for information regarding the specifics of the agency's intended evaluation under each of the evaluation factors. RFP at 35. In this regard, the solicitation included detailed instructions for the preparation of proposals, and requested that offerors submit separate technical and business proposals. The RFP advised offerors that their

¹ BSE is commonly known as "mad cow disease."

² The small disadvantaged business participation factor was to consider not only small disadvantaged business participation, but also "specific large business, small business, HUBZone [historically underutilized business zone] small business, small disadvantaged business, woman-owned small business (WOSB), veteran-owned small business (VOSB), and HBCU/MI [historically black colleges and universities and minority institutions] and Service Disabled Veteran-owned small business subcontract participation in contract performance." RFP at 57.

technical proposals “must present sufficient information to reflect a thorough understanding of the requirements and a detailed[] description of the techniques, procedures and a program for achieving the objectives of the specifications.” RFP at 53. The solicitation further requested that technical proposals be comprised of three sections, with section I addressing technical capability, section II addressing past performance and organizational experience, and section III addressing the participation of small disadvantaged businesses and other types of small businesses. RFP at 54-57.

The agency received proposals from four offerors, including Bio-Rad and IDEXX, by the RFP’s closing date. Contracting Officer’s Statement at 2; Agency Report (AR), Tab 5, Technical Evaluation Board (TEB) Consensus Memorandum, at 1. The proposals were evaluated, two rounds of discussions were conducted with each offeror, and final revised proposals were requested and received. Contracting Officer’s Statement at 2.

Bio-Rad’s proposal was evaluated as “good+” under the technical capability factor, “good” under the past performance and organizational experience factor, “excellent” under the small disadvantaged business participation factor, and “good+” overall, at an evaluated price of \$3,181,556.³ AR, Tab 7, Business Clearance Memorandum (BCM), at 25. IDEXX’s proposal was evaluated as “good+” under the technical capability factor, “satisfactory” under the past performance and organizational experience and the small disadvantaged business participation factors, and “good” overall, at an evaluated price of \$2,063,260. Contracting Officer’s Statement, attach. IV; AR, Tab 7, BCM, at 25.

The agency, consistent with the terms of the RFP, notified IDEXX “of its leading status in the evaluation process,” and directed IDEXX to “coordinate logistics” with agency personnel to have an IDEXX testing system delivered to the agency for “confirmation testing.” AR, Tab 7, BCM, at 27; see RFP at 54. The record reflects that as a result of what the agency characterizes as “minor difficulties” encountered during the confirmation tests, the agency “lowered” the rating of IDEXX’s proposal under the technical capability factor from “good+” to “satisfactory.” Contracting Officer’s Statement at 5; attach. IV; AR, Tab 6, TEB Consensus Memorandum, at 2. The source selection authority (SSA) determined that IDEXX’s proposal, which was now evaluated as “satisfactory” under the technical capability, past performance and organizational experience, and small disadvantaged business participation factors, and “satisfactory” overall, with an evaluated price of \$2,063,260, represented the best

³ The Source Selection Plan (SSP) provided that proposals could receive overall ratings of excellent, good, satisfactory, or poor under the technical capability, past performance and organizational experience, and small disadvantaged business participation factors. AR, Tab 3, SSP, at 5-6, 10.

value to the government, and award was made to that firm. AR, Tab 8, Source Selection Memorandum, at 4.

Bio-Rad protests that the agency's evaluation of its and IDEXX's proposals under the technical capability, past performance and organizational experience, and small disadvantaged business participation factors was unreasonable and inconsistent with the terms of the solicitation.

TECHNICAL CAPABILITY FACTOR

With regard to the technical capability factor, the solicitation requested that offerors respond to 12 specific subparagraphs set forth in the RFP that each described a desired or important feature or characteristic of the items to be supplied. RFP at 54-56; see AR at 6-7. The agency's SSP (not provided to the offerors) stated that proposals would be evaluated under the listed "standards" set forth in the 12 subparagraphs, and provided for specific ratings or a range of ratings to be assigned under each of the 12 subparagraphs.⁴ AR, Tab 3, SSP, at 2-5. The specific ratings assigned to Bio-Rad's and IDEXX's proposals under each of the 12 subparagraphs of the technical capability factor and the rating ranges established by the SSP were as set out in the following chart:

⁴ For example, the RFP provided that proposals would be evaluated under the "test turnaround" subparagraph "on an adjectival range of 'Excellent' to 'Unsatisfactory,'" and that "[a]ny firm evaluated as 'Unsatisfactory' will not be further evaluated and will not be considered for award." AR, Tab 3, SSP, at 2. As indicated on the following chart, the SSP assigned different ranges of possible ratings for different subparagraphs.

	Bio-Rad	IDEXX	Possible Rating Range
Test Turnaround	Satisfactory	Satisfactory	Excellent to Unsatisfactory
Retest ⁵	Excellent	Excellent	Satisfactory to Poor
Expediency	Satisfactory	Satisfactory	Excellent to Poor
Inconclusiveness	Excellent	Satisfactory	Excellent to Unsatisfactory
Ease of Use	Good	Good	Excellent to Poor
Service/Support	Excellent	Satisfactory -	Excellent to Poor
Complete Kit	Excellent	Satisfactory	Excellent to Poor
Versatility	Excellent	Excellent	Excellent to Acceptable
Multi Testing	Satisfactory+	Satisfactory+	Satisfactory or Poor
Data Integrity	Satisfactory	Satisfactory -	Excellent to Poor
Throughput	Excellent	Excellent	Excellent to Poor
Warranty	Excellent	Good+	Excellent to Poor
OVERALL	GOOD+	SATISFACTORY	

AR, Tab 3, SSP, at 2-5; Tab 7, BCM, at 21, 25.

The protester argues that the agency failed to properly consider the results of the evaluation under the technical capability factor in selecting IDEXX's proposal for award. Specifically, Bio-Rad contends that although the solicitation was silent as to the relative weight of the 12 subparagraphs or subfactors comprising the technical capability factor, and that these subfactors should thus have received equal weight, the agency improperly considered the subfactors as listed in descending order of importance. Protester's Comments at 12-13 n.5 and 6; Protester's Supplemental Comments at 2-3.

In considering this aspect of Bio-Rad's protest, we note as an initial matter that both the SSP and BCM provided that the procurement was conducted under simplified acquisition procedures. AR, Tab 3, SSP, at 1; Tab 6, BCM, at 5. Simplified acquisition procedures are designed to, among other things, reduce administrative expenses, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors. FAR § 13.002; American Artisan Prods., Inc., B-293801.2, June 7, 2004, 2004 CPD ¶ 127 at 3. These procedures provide discretion to contracting officers to use one or more of the evaluation procedures in FAR Parts 14 and 15. See FAR § 13.106-2(b); American Artisan Prods., Inc., supra. Although

⁵ The proposals of Bio-Rad and IDEXX received ratings for "retest" that exceeded the applicable adjectival rating scale set forth in the SSP. We also note that in the SSP and the solicitation, the "retest" subparagraph is actually listed just below the "expediency" subparagraph, but the evaluation documentation lists "retest" just above "expediency."

simplified acquisition procedures require that offerors be notified of the basis on which award will be made, they do not as a general matter require that solicitations “state the relative importance assigned to each evaluation factor and subfactor.” FAR §13.106-1(a)(2); cf. Finlen Complex, Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167 at 8-10 (notwithstanding the statement in the solicitation that simplified acquisition procedures were being used, an agency’s failure to disclose the relative weight of evaluation factors was unreasonable because basic fairness dictated disclosure of the relative weights where the agency required offerors to prepare detailed written proposals addressing unique government requirements and the solicitation otherwise indicated that one factor would be important but in the evaluation the agency treated that factor as the least important one).

In contrast, where an acquisition utilizes FAR Part 15 negotiated procedures, FAR § 15.304(d) provides that “[a]ll factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation.” We have recognized where a solicitation does not disclose the relative weight of evaluation factors or subfactors in a FAR Part 15 procurement, they should be considered approximately equal in importance or weight. See Foundation Health Fed. Servs., Inc.; Humana Military Healthcare Servs., Inc., B-278189.3; B-278189.4, Feb. 4, 1998, 98-2 CPD ¶ 51 at 6.

Here, nothing in the solicitation provided or otherwise informed offerors that FAR Part 13 simplified acquisition procedures applied,⁶ and as indicated above, this procurement was conducted in a manner that was not distinguishable from a negotiated acquisition conducted under the rules set forth in FAR Part 15.⁷ That is, detailed proposals were requested, received, and evaluated, discussions were conducted and revised proposals were received and evaluated, followed by a second round of discussions, the submission and evaluation of final proposal revisions, and a best value determination. Contracting Officer’s Statement at 1-4. Given that the RFP on its face did not notify offerors that FAR Part 13 simplified acquisition

⁶ Similarly, there is no evidence in the record outside of the solicitation that the offerors were otherwise informed (for example, in a synopsis) that this procurement was to be conducted under FAR Part 13 simplified acquisition procedures.

⁷ The fact that the procurement was for a commercial item does not mean the simplified acquisition procedures apply. While FAR Subpart 12.6 provides for the “optional” use of the streamlined procedures of FAR Part 13 in the acquisition of commercial items, commercial items can also be acquired under FAR Part 14 or Part 15. In fact, FAR § 12.602(a) provides that while disclosure of the relative importance of evaluation factors is not required where commercial items are acquired under FAR Part 13, the disclosure of the relative importance of evaluation factors is required for the acquisition of commercial items under other than FAR Part 13 simplified acquisition procedures.

procedures were being used and otherwise reasonably indicated that the procurement was for a commercial item using FAR Part 15 negotiated procedures, offerors could presume that the Part 13 provisions, which gave the agency the authority not to assign weight to the evaluation subfactors, were not applicable to this procurement, and that the ordinary rules that require the disclosure of the relative weight of factors and subfactors were applicable. See Finlen Complex, Inc., supra. Because of this and because the solicitation was silent as to the relative importance or weight of the 12 subparagraphs constituting the subfactors of the technical capability factor, offerors could reasonably presume that the 12 subfactors were approximately equal in importance or weight. Foundation Health Fed. Servs., Inc.; Humana Military Healthcare Servs., Inc., supra.

As conceded by the agency, it is clear from the record that the SSA did in fact consider the 12 subparagraphs to be subfactors of the technical capability factor that were listed in descending order of importance. See Agency Supplemental Report at 4 (agency concedes that the subparagraphs “were not accorded equal weight during the . . . evaluation of Technical Capability,” but “[i]nstead were weighted in descending order of importance”). For example, with regard to Bio-Rad’s proposal, the SSA noted in determining which proposal represented the best value to the government that Bio-Rad’s proposal “offered a licensed product that was satisfactory in the primary technical areas of consideration, test turnaround and expediency,” and that “[t]he firm was excellent in retest and inconclusiveness, other primary areas of technical consideration.” The SSA also commented here that “[t]he majority of Bio-Rad’s technical assessments were excellent as well,” but concluded that “given [the proposal’s] assessment of satisfactory in some of the primary areas of technical consideration, I did not assess the overall technical proposal as excellent.” AR, Tab 8, Source Selection Memorandum, at 2. The SSA noted with regard to IDEXX’s proposal as evaluated under the technical capability factor that “[t]he firm offered a licensed product that was satisfactory in the primary technical areas of test turnaround, retest, expediency and inconclusiveness.” The SSA went on to state that, even though IDEXX’s proposal had been assigned a rating of “poor in the sixth area of technical consideration, service, I did not find reason to lower IDEXX’s summary assessment below satisfactory given the technical order of significance.”⁸ Id. at 4.

Thus, the record shows that the SSA focused on the fact that Bio-Rad’s proposal was rated “satisfactory” under some of what the SSA inaccurately viewed as the most heavily weighted subfactors to justify assigning Bio-Rad’s proposal less than an

⁸ In fact, the record shows that that the SSEB rated IDEXX’s proposal “satisfactory -” for service/support. AR, Tab 7, BCM, at 15, 21. The referenced quote from the source selection statement was to illustrate that the SSA did not give great weight to IDEXX’s rating and weaknesses under this subfactor because he regarded it as the sixth most important subfactor.

excellent rating under the technical capability factor, while apparently discounting its strengths under the evaluation subfactors that the SSA believed to be less important. Additionally, in discussing IDEXX's proposal, the SSA focused on the similarity of IDEXX's ratings to Bio-Rad's under what the SSA considered to be the three most important subfactors while attaching less importance to IDEXX's lower ratings under other subfactors. An agency's evaluation of proposals and source selection cannot be determined reasonable and consistent with the stated evaluation criteria where the weight applied to the evaluation subfactors differs from that in the solicitation. See ProTech Corp., B-294818, Dec. 30, 2004, 2005 CPD ¶ 73 at 8; see also Foundation Health Fed. Servs., Inc.; Humana Military Healthcare Servs., Inc., *supra*.

On this record, we find that the fact that the SSA weighted the subfactors of the technical capability factor in descending order of importance in making and justifying the award selection, rather than weighting them equally, as implicitly indicated by the solicitation, has undermined the reasonableness of the agency's conclusions as to the relative merits of the proposals under this factor, including the conclusion that Bio-Rad's proposal merited an overall rating of "good+" and IDEXX's proposal merited a rating a "satisfactory." Given this misevaluation, we cannot conclude that the award selection based upon this skewed weighting of the subfactors of the technical capability factor was reasonable.⁹

PAST PERFORMANCE AND ORGANIZATIONAL EXPERIENCE FACTOR

Bio-Rad next argues that the agency's evaluation of proposals under the past performance and organizational experience factor evidences that the agency, at best, only evaluated proposals with regard to the past performance component of this evaluation factor, and failed to evaluate or otherwise consider the proposals with regard to the factor's organizational experience component. Protest at 9-10; Protester's Comments at 19-21. Bio-Rad contends that it was prejudiced by the agency's error here, arguing that "Bio-Rad's test is used to screen 70% of all animals tested for BSE throughout the world" and that it therefore has significant organizational experience with its BSE testing kits and systems, whereas in contrast

⁹ Bio-Rad also protests that the agency unjustifiably rated Bio-Rad's proposal less than excellent under some of the technical capability subfactors and that its proposal should have received a higher overall rating than "good+" under the factor. Bio-Rad also protests that the agency should have assigned lower ratings to IDEXX's proposal under certain of the subfactors. We need not consider these issues, given our conclusion that the agency failed to evaluate proposals in accordance with the terms of the solicitation under the technical capability factor, and as explained below, under the past performance and organizational experience and small disadvantaged business participation factors, and our recommendation that the agency reopen discussions, request and evaluate revised proposals, and make a new source selection.

“IDEXX ha[s] little experience installing a BSE testing system and performing contracts.” Protester’s Comments at 20.

In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency’s judgment was reasonable and in accord with the RFP’s stated evaluation criteria. In order for us to review an agency’s selection determination, an agency must have adequate documentation to support that decision. While adjectival ratings and/or point scores are useful as guides to decision-making, they generally are not controlling, but, rather, must be supported by documentation of the relative differences between proposals, their weaknesses and risks, and the basis for the selection decision. Biospherics Inc., B-278504.4 et al., Oct. 6, 1998, 98-2 CPD ¶ 96 at 4.

The RFP’s proposal preparation instructions for the past performance and organizational experience factor stated with regard to the past performance component of the factor that “[t]he Government’s assessment of past performance will be subjective, and based mainly on offeror reputations with customers and others,” and that “[t]he Government will evaluate the performance data obtained from multiple sources.” The RFP specified that “[o]fferors should submit references for recent and relevant contracts,” and that “[t]he Government will contact these references for past performance information on the offeror.” The solicitation explained with regard to the organizational experience component of the factor that “[o]rganizational experience is the opportunity to learn by doing,” and that [a]n offeror’s experience is relevant when they have been confronted with the kinds of challenges that will confront them under the contract contemplated by this RFP.” Offerors were informed with regard to the organizational experience component of the factor that “[t]his evaluation will consider the breadth, depth and relevance of offeror work performed since 2001 in the BSE testing arena,” and stated that to facilitate this evaluation “[f]irms shall provide a written narrative detailing organizational experience with BSE on a domestic and international basis.” RFP at 56-57.

The proposals of both Bio-Rad and IDEXX included detailed descriptions of their past performance and organizational experience. For example, both proposals included lengthy customer/client lists and descriptions of contracts performed, with Bio-Rad’s proposal including a section expressly addressing its organizational experience with its BSE testing systems and kits. AR, Tab 13, IDEXX’s Technical Proposal, at 12-17; Tab 17, Bio-Rad’s Technical Proposal, at 423-33.

The contemporaneous record, however, includes completed scoring sheets for this factor for IDEXX’s and Bio-Rad’s proposals from only a single evaluator, with the scoring sheets for both IDEXX and Bio-Rad stating “no background” under the two

criteria relevant to the past performance component of this factor,¹⁰ and “excellent based on documentation” in the area of “[b]readth of relevant experience in several related projects.” AR, Tab 24, Evaluator Scoring Sheets, at 1,074, 1,085. The only other indications in the contemporaneous record of the evaluation of Bio-Rad’s proposal under this factor are statements set forth in the TEB Consensus Memorandum and BCM that essentially parrot back the definitional language from the past performance and organizational experience scoring sheets that were to be completed by the evaluators. Specifically, the scoring sheets defined the rating of “good” for this factor as follows:

Record of performance more favorable than unfavorable and/or the offeror has a breadth of relevant experience in several related projects. Offeror has generally satisfied previous customers and not violated laws and regulations.

AR, Tab 3, SSP, at 11. The TEB Consensus Memorandum and BCM contain the following statement with regard to the agency’s evaluation of Bio-Rad’s proposal under this factor:

The firm has a “Good” record of performance that’s more favorable than unfavorable and the offeror has breadth of relevant experience in several related projects. Previous customers are generally satisfied and the firm has followed applicable regulations.

AR, Tab 6, TEB Consensus Memorandum, at 10; Tab 7, BCM, at 21. This latter comment (which was also made verbatim with regard to the two other proposals that received “good” ratings under the past performance and organizational experience factor) and the scoring sheet entries detailed above represent the totality of the contemporaneous record of the agency’s evaluation of Bio-Rad’s proposal under this evaluation factor.¹¹

¹⁰ The two criteria not evaluated by this (or apparently any other) evaluator concerned the offeror’s record of conforming to the specifications and adherence to contract schedules.

¹¹ In responding to Bio-Rad’s challenge to the propriety of the agency’s evaluation of proposals under the past performance and organizational experience factor, including the protester’s assertion that the agency failed to consider “organizational experience” as provided for by the RFP, the agency points only to the above-quoted language from the TEB Consensus Memorandum and BCM as evidence that the agency’s evaluation of proposals under this evaluation was reasonable and complete. AR at 11.

Additionally, the contracting officer's statement submitted in response to the protest includes the following additional explanation with regard to the evaluation of Bio-Rad's proposal under the past performance and organizational experience factor:

In reviewing Past Performance I searched online federal past performance databases and questioned Agency contracting personnel with knowledge of Bio-Rad from previous contracts. The review of online past performance systems did not identify any information, positive or negative. However, individuals within the Agency with Bio-Rad acquisition familiarity were available for comment.

In addition, Past Performance data on Bio-Rad was available from the Technical Evaluators['] personal knowledge of previous federal work with Bio-Rad. Given the Agency's knowledge of Bio-Rad from previous awards and business interactions, Bio-Rad was rated "Good" in the area of Past Performance. The firm had recent and relevant experience in similar projects in size and scope. The firm did not receive the highest possible rating of "Excellent" since the Agency had experienced difficulties with Bio-Rad in the past concerning administrative issues on previous awards such as correctly submitting quotation prices in accordance with shipping instructions and supplying subcontracting plan data.

Contracting Officer's Statement at 3-4.¹²

As set forth above, the contemporaneous record is devoid of any meaningful documentation of the agency's evaluation of Bio-Rad's proposal under the past performance and organizational experience factor. The unsupported and unexplained conclusion by one evaluator that both offerors' "breadth of experience" was "excellent," and the paraphrasing of the SSP's definition of "good" by the TEB Consensus Memorandum and the BCM, are insufficient to support the reasonableness of the agency's evaluation of the proposals under this factor. See Biospherics Inc., supra, at 4-5. The contracting officer's statement evidences that at best the agency gave some consideration to Bio-Rad's past performance, but no meaningful consideration to the offerors' organizational experience "in the BSE testing arena."¹³ See RFP at 56. On this record, we agree with the protester that the

¹² There is no contemporaneous documentation of this evaluation by the contracting officer.

¹³ The contracting officer's statement also does not indicate, and the record does not evidence, that he performed any similar evaluation of IDEXX's past performance, which was rated satisfactory. The record also contains no details, but only conclusory comments, regarding why this rating was assigned. See AR, Tab 6, TEB Consensus Memorandum, at 10; Tab 7, BCM, at 21.

agency failed to evaluate proposals in accordance with the terms of the RFP, in that the agency failed to meaningfully consider the merits of the competing proposals under the organizational experience component of the past performance and organizational experience factor. In sum, based on our review, we cannot find that the agency's evaluation of this factor was reasonable or in accordance with the RFP.¹⁴

SMALL DISADVANTAGED BUSINESS PARTICIPATION FACTOR

Bio-Rad finally argues that the agency's evaluation of IDEXX's proposal as "satisfactory" under the small disadvantaged business participation factor was unreasonable.

The proposal preparation instructions stated with regard to the small disadvantaged business participation factor that offerors "[s]hall identify in this section of the technical proposal specific large business, small business, HUBZone small business, small disadvantaged business, [WOSB], [VOSB], and HBCU/MI and Service Disabled Veteran-owned small business subcontract participation in contract performance." RFP at 56. The RFP concluded here that "[t]he proposed participation of subcontractors will be evaluated based on the information submitted in the Subcontractor Information Sheet," a copy of which was provided as an attachment to the solicitation. RFP at 57.

The section of IDEXX's technical proposal addressing the small disadvantaged business participation factor consists of one sentence, which states that "[t]here is no subcontract participation in the contract performance."¹⁵ AR, Tab 13, IDEXX's Technical Proposal, at 18. The Subcontractor Information Sheet attached to IDEXX's proposal contained a single notation of "-NA-." *Id.* at 19.

The agency evaluated IDEXX's proposal under the small disadvantaged business participation factor as follows:

¹⁴ Bio-Rad also argues here that the agency failed to conduct discussions with it regarding the adverse past performance described in the contracting officer's statement. Again, we need not consider this additional basis of protest given our conclusion that the agency failed to evaluate proposals in accordance with the terms of the solicitation, and our recommendation that the agency reopen discussions and request and evaluate revised proposals.

¹⁵ Both IDEXX and Bio-Rad are large businesses. AR, Tab 12, IDEXX's Business/Cost Proposal, at 163; Tab 16, Bio-Rad's Business Proposal, at 366.

[IDEXX] does not propose any subcontracting under this contract and did not submit a subcontracting plan. Therefore, the firm is technically neutral in this area and will receive a “Satisfactory” rating.

AR, Tab 6, TEB Consensus Memorandum, at 11; Tab 7, BCM, at 23. The Source Selection Memorandum provides some explanation as to the reasoning behind this aspect of the agency’s evaluation, stating:

The firm did not intend to subcontract any portion of the subject contractor to large or small business entities if it received award. Therefore, in accordance with the [FAR] and the [SSP] I found the firm satisfactory in the area of small business subcontracting.

AR, Tab 8, Source Selection Memorandum, at 4.

In responding to Bio-Rad’s protest, the agency does not defend the propriety of its evaluation of IDEXX’s proposal under the small disadvantaged business participation factor as “satisfactory.” With that said, we note that contrary to the apparent belief of the SSA, there is no provision in the FAR that either requires or allows an agency, under the circumstances here, to evaluate a proposal as “neutral” and thus “satisfactory” under a factor designed to evaluate the participation of small disadvantaged businesses and the other types of small businesses, where the proposal expressly provides that there will be no participation by such businesses if the offeror is awarded the contract. Additionally, and contrary to the view of the SSA, there is nothing in the SSP or RFP providing or otherwise indicating that the evaluation of IDEXX’s proposal as “satisfactory” under the circumstances here was appropriate, particularly given that firm’s large business status.¹⁶ Accordingly, the agency’s evaluation of IDEXX’s proposal under the small disadvantaged business participation factor as “satisfactory” was not reasonably based.

The agency does argue with regard to its evaluation of proposals under the small disadvantaged business participation factor that Bio-Rad’s proposal, which received a rating of “excellent,” should have in fact received a lower rating. Agency Supplemental Report at 11. The agency points out here that Bio-Rad’s proposal “failed to identify specific subcontractors for this evaluation factor.” *Id.* at 9. The agency thus argues that the protester was not prejudiced by any alleged error in its evaluation of IDEXX’s proposal as “satisfactory” under the small disadvantaged business participation factor because “Bio-Rad should have received a lower score—the same score for this factor as IDEXX.” *Id.* at 11.

¹⁶ As noted above, the SSP contemplated an adjectival range of excellent to poor for this factor. AR, Tab 3, SSP, at 6.

We are not persuaded by the agency's argument that there was no reasonable possibility of prejudice. While we consider the entire record, including statements and arguments in response to a protest in determining whether an agency's selection decision is supportable, we accord greater weight to contemporaneous evaluation and source selection materials rather than judgments, such as the agency's argument here, made in response to protest contentions. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Here, the agency does not acknowledge that it erred with regard to its evaluation of IDEXX's proposal under the small disadvantaged business participation factor. Rather, we are faced with an agency's efforts to defend, in the face of a bid protest, its prior source selection through submission of new analysis regarding the relative merits of competing proposals under an evaluation factor and its effect on the source selection.¹⁷ The lesser weight we accord the agency's post-protest reevaluation of only Bio-Rad's proposal reflects the concern that, because it was prepared in the heat of the adversarial process, it may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Here, not only does the protester dispute the merits of the agency's after-the-fact evaluation, but that post-protest evaluation also conflicts with the initial evaluation of Bio-Rad's proposal.

CONCLUSION

We sustain the protest. We recommend that the agency amend the solicitation to state the relative weights of the 12 subfactors of the technical capability evaluation factor. The agency should reopen discussions in any event, request and evaluate revised proposals in a manner consistent with the terms of the solicitation.¹⁸ If upon reevaluation the agency determines that Bio-Rad or another offeror's proposal represents the best value to the government, the agency should terminate IDEXX's contract for convenience and award a contract to the appropriate offeror. We also recommend that Bio-Rad be reimbursed the costs of filing and pursuing its protest, including reasonable attorney's fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1)

¹⁷ We note that there is no supporting documentation for the agency's new analysis, and nothing in the record reflecting that it was either made or reviewed by any of the evaluators, the contracting officer, or the SSA. Rather, the record explicitly associates only agency counsel with the agency's reevaluation of Bio-Rad's proposal during the course of this protest under the small disadvantaged business participation factor as well as its resultant conclusion that Bio-Rad was not prejudiced by any allegedly improper evaluation of IDEXX's proposal.

¹⁸ Given our recommendation that the agency reopen discussions, we need not consider the protester's argument that because the agency was aware after its receipt of final revised proposals that the protester had lowered its prices for BSE test kits, the agency was required to reopen discussions. Protest at 11.

(2005). Bio-Rad's certified claim for costs, detailing the time and costs incurred, should be submitted within 60 days after receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel