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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Stateside Associates, Inc.

File: B-400670.2; B-400670.3

Date: May 28, 2009

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DIGEST

1. In solicitation for monitoring developing legislation, where performance objectives clearly encompassed awardee's proposed use of case law data holdings, agency reasonably assigned evaluated strength for that aspect of awardee's proposal, even though solicitation did not specify that type of research.
 2. Agency reasonably assessed evaluated weakness in protester's proposal where experience under protester's incumbent contract reflected users' need to access [deleted] protester's proposed websites--rather than a single website--in order to obtain full benefit of features such as search capabilities.
 3. Where protester was provided opportunity to explain past performance issue during performance of ongoing task order, agency was not required to provide protester with another opportunity to address the matter in discussions.
 4. Protest that agency improperly assigned single, overall adjectival rating, which allegedly gave undue weight to only factor where awardee's proposal had more strengths than protester's, is denied, since record shows that award decision was based not on adjectival ratings, but on relative strengths and weaknesses of protester's and awardee's proposals.
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DECISION

Stateside Associates, Inc. (SAI), of Arlington, Virginia, protests the award of a contract to LexisNexis, of Miamisburg, Ohio, under request for proposals (RFP)

No. N62583-08-R-0025, issued by the Department of the Navy for environmental legislative and regulatory monitoring services. SAI challenges the technical and price evaluation.

We deny the protest.

The RFP sought support in monitoring developing state-level legislation and regulations, laws, rules, and similar state regulatory actions that could impact Department of Defense (DoD) operations. The work covers all 50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, and includes the Army, Navy, Air Force, Marine Corps, and other federal agencies and departments as client organizations. The requirement is performance-based and the RFP included a performance work statement (PWS) outlining five tasks—legislative and regulatory monitoring and reporting; follow-up assistance; regulatory/legislative profile reports; training, planning, and support, including real time gathering of information related to critical issues; and additional research reporting services. The RFP contemplated the award, on a “best value” basis, of an indefinite-delivery/indefinite-quantity fixed-price contract for a 1-year base period, with four 1-year options.

Proposals were to be evaluated under four technical factors (and related subfactors)—technical approach and capability (with subfactors for legislative monitoring process and information access/retrieval); corporate experience (technical experience and key personnel); past performance; and small business utilization (past use of small businesses and small business commitment on this effort). The technical factors were of equal weight, as were the subfactors, and the technical factors combined were approximately equal in weight to price. Price was to be evaluated on the basis of completeness, reasonableness, and realism of “seed” task pricing.

SAI and LexisNexis submitted proposals, which were evaluated by a source selection board (SSB). The SSB evaluated both proposals under each of the evaluation factors, assigning strengths and weaknesses as applicable under each. The agency conducted discussions with both offerors, obtained final proposal revisions (FPR), and arrived at a single, overall adjectival rating for each proposal—LexisNexis’s was rated good, and SAI’s acceptable. In evaluating price, the agency considered various scenarios to account for overlap in some contract line items (CLIN) and used maximum possible ordering amounts for those CLINs to be awarded under future delivery orders. Under most scenarios, LexisNexis’s price was higher than SAI’s.

Based on a tradeoff between the technical factors and price, the source selection authority (SSA) concluded that LexisNexis’s proposal was the best value and made award to that firm. SAI challenged the award in a protest filed with our Office; the agency took corrective action, and we dismissed the protest as academic (B-400670, Nov. 24, 2008). The agency reevaluated the proposals and prepared a new business clearance memorandum (BCM) to document the evaluation and the SSB’s award

recommendation. A new SSA reviewed the SSB's evaluation report and recommendation in the BCM. The SSA found that SAI's proposal warranted an additional evaluated strength under the small business factor, but also found that this change did not materially affect the overall technical value of the proposal. The SSA recognized that SAI's price was lower than LexisNexis's, but agreed with the SSB's award recommendation and concluded that LexisNexis's proposal's technical superiority outweighed SAI's lower price. Following a debriefing, SAI filed this protest.

SAI challenges the evaluation on numerous grounds. In SAI's view, had the agency properly evaluated the technical proposals, its proposal would have been rated technically superior to LexisNexis's; similarly, had the agency properly evaluated prices, SAI's price advantage would have been greater, thus leading to a different tradeoff conclusion and award decision.

In considering a protest of an agency's proposal evaluation, our review is confined to determining whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11. We have considered all of SAI's arguments and find that they provide no basis to object to the award. We address SAI's most significant arguments below.

EVALUATION OF LEXISNEXIS PROPOSAL

SAI asserts that the agency improperly assigned an evaluated strength to LexisNexis's proposal under the technical approach factor based on the firm's ability to access case law research in support of the contract requirements. SAI maintains that, since the RFP was limited to legislative and regulatory monitoring of state environmental issues, providing case law research is outside the scope of the RFP, and it thus was improper for the agency to assign evaluation credit on this basis.

This argument is without merit. In making distinctions between proposals, the agency may consider specific matters, albeit not expressly identified, that logically relate to the stated evaluation criteria. ManTech Sec. Techs. Corp., B-297133.3, Apr. 24, 2006, 2006 CPD ¶ 77 at 7. As the protester concedes, the RFP was "drafted in a performance based format." SAI Comments at 20. The RFP thus did not specify all possible methods of performance; instead it set forth objectives, leaving it to offerors to propose the methods each believed would achieve success as defined in the RFP. In this regard, the PWS states that DoD has a need to monitor developing state-level legislation and regulations and to identify laws and rules that could impact DoD operations. RFP at 36. The RFP also incorporated performance objectives and standards, including providing client organizations with timely reports on contemplated or proposed state and limited local environmental legislation and regulations; obtaining follow-up information and issue tracking to assist clients with legislative and regulatory analysis programs; providing detailed reports on specific

legislation or regulatory issues; and providing a means for the government to obtain support related to legislative and regulatory issues when needed. RFP at 36-37.

LexisNexis's proposed approach for monitoring and capturing environmental legislative and regulatory information included research of more than [deleted] sources, including [deleted] decisions, as well as [deleted]. LexisNexis FPR at 10; app. B. In our view, the stated performance objectives clearly encompassed LexisNexis's proposal to use its significant data holdings in performing the legislative monitoring and research tasks in the RFP. Because [deleted] decisions often can and do impact the interpretation of federal and state environmental statutes and regulations, we think that researching these databases, while not required by the PWS, is plainly consistent with the stated objectives and beneficial to the government. For example, as noted by the SSB, a [deleted] decision that vacated an EPA regulation essentially invalidated all state regulations that had been based on that regulation; thus, the SSB considered inclusion of information from [deleted] to be a significant strength. BCM at 9. An agency properly may rate one proposal higher than another for exceeding the RFP requirements where, as here, it seeks detailed technical proposals and includes weighted evaluation criteria to enable the agency to make comparative judgments about the relative merits of competing proposals. ManTech Sec. Techs. Corp., supra. We conclude that the agency reasonably assigned a strength to LexisNexis's proposal for this capability under the technical approach factor.¹

In a related argument, SAI asserts that the agency was required to amend the RFP to reflect the "new requirement" for case law research. Protest at 14. Since LexisNexis's proposed use of case law research was merely an enhancement that was within the scope of the solicitation's PWS, there was no new requirement for case law research; thus, there was no need to amend the solicitation.

¹ SAI also asserts that the agency improperly assigned LexisNexis's proposal credit for certain [deleted]; SAI claims that, while these [deleted] were included in the initial proposal, they appear to have been eliminated in the FPR, because they were not mentioned in a section that was identified as a replacement. SAI Comments at 25. This argument is without merit because it is clear from LexisNexis's proposal that it did not intend to delete its proposed [deleted]. BCM at 7; Navy E-Mail, Apr. 23, 2009. In this regard, use of the [deleted] was proposed in an introductory section of the awardee's proposal (LexisNexis Initial Proposal at 3) that clearly preceded, and was not replaced by, the FPR change pages (which began at FPR page 5). Similarly, it is clear from the context of the replacement section (which ends mid-sentence), that it was not intended to replace all ensuing pages, including the pages with the list of [deleted]. LexisNexis FPR at 15; Initial Proposal at 19-23. The SSB therefore reasonably considered the proposed [deleted] in the final evaluation.

EVALUATION OF SAI's PROPOSAL

SAI challenges the assessment of a weakness against its proposal based on a finding that DoD users would have to use [deleted] websites for complete access to SAI's environmental information. According to SAI, the agency ignored the clear explanation in its proposal that SAI's [deleted] database can be accessed through [deleted]. SAI Proposal at 39.

The evaluation in this area was unobjectionable. The PWS required the contractor to have a website with search and retrieval functionality for the state legislative and regulatory information to facilitate client access to the information, and required it to meet standards such as user registration and handling of forgotten passwords by sending an e-mail to the user. RFP at 40. Under the heading of schedule metrics, the PWS called for the website to have the ability to search and retrieve contractor provided information and stated that additional functionality, including user recognition on login and ability to save queries or default conditions relevant to the user, would be "a plus." *Id.* Under the information access and retrieval subfactor of the technical approach/capability factor, the RFP provided that the agency would evaluate the comprehensiveness of the proposed strategy for meeting the government's information access related needs in accordance with the PWS. RFP § M.2.a.

In evaluating SAI's proposal, the evaluators found a weakness under this subfactor, noting that the [deleted] website (SAI's apparent principal user interface) had very limited information search and retrieval capabilities. BCM at 22. In finding that DoD users had to access [deleted] websites, the evaluators found that, although [deleted] this reduced the utility of [deleted] sites. *Id.* The SSB considered this to be a significant weakness because of the extra time that would be entailed in users constantly switching [deleted] sites, or because users would simply avail themselves of [deleted] website, tolerating its limited capabilities. *Id.* In this regard, while SAI asserts that its [deleted] site captures all of the [deleted] features and more (SAI Proposal at 39), the agency explains that, in practice, most DoD users have gravitated to the [deleted] site, despite its lack of [deleted] capabilities, because of its easier [deleted] compared to the [deleted], which does not allow for [deleted]. SSB Declaration, ¶ 7. SAI does not dispute that [deleted] lacks such features as [deleted]; rather, it asserts that the PWS did not make these features mandatory minimums and that its proposal met the PWS goals. SAI Supp. Comments at 15-16. However, whether these features were identified as "mandatory minimums" is not the issue. The SSB did not find SAI's proposal unacceptable for lack of mandatory features; it simply assigned a weakness based on the lack of access to all features on [deleted] sites. As noted by the SSB, even with non-mandatory features, it was reasonable to expect access to all features through [deleted] sites. SSB Declaration, ¶ 2. Since SAI proposed the availability of [deleted] sites, yet they do not offer equal features, the agency could reasonably assess a weakness in SAI's technical approach—in evaluating the comprehensiveness of its proposed strategy for meeting the

government's information access related needs--based on its experience that more DoD personnel used the [deleted] site with its fewer features, or used [deleted] sites consuming more time.²

DISCUSSIONS

SAI asserts that the agency failed to provide adequate discussions. Specifically, the SSB assigned a weakness under the past performance factor based on the appearance that the government had [deleted] under delivery orders with two different agencies. SAI asserts that, had the agency asked about the matter in discussions, "it would have been laid to rest immediately." SAI Comments at 29.

This argument is without merit. Discussions with offerors must include proposal deficiencies and significant weaknesses, and adverse past adverse past performance information to which an offeror has not had an opportunity to respond. Federal Acquisition Regulation (FAR) § 15.306(d)(3). On the other hand, where an offeror was provided an opportunity to respond to adverse performance information during its performance of the contract, the agency need not provide an additional opportunity to respond during discussions. PharmChem, Inc., B-292408.2, B-292408.3 Jan. 30, 2004, 2004 CPD ¶ 60 at 12-13.

The record shows that SAI was given an opportunity to respond to the performance issue during performance of the other delivery orders, and that it provided its explanation. SAR, encl. 4. The record further shows that, in assessing this weakness

² SAI also asserts that its proposal should have received an evaluated strength under the technical approach factor based on its proposed [deleted], because the agency assigned LexisNexis a "significant" strength for its proposal of [deleted]. SAI Comments at 25. Contrary to SAI's assertion, however, the record shows that the SSB did not assign a specific or significant strength to LexisNexis's proposal for its proposed [deleted]. BCM at 8-11. Although the SSB mentioned [deleted] in a narrative discussion of LexisNexis's proposal, this was not rated as a separate strength; rather, it was identified in conjunction with [deleted], strengths not found in SAI's proposal. See BCM at 46. Moreover, the agency states that it was well aware of SAI's offer of [deleted] (Supp. Agency Report (SAR) at 20), and the record shows that the SSB assigned SAI's proposal a strength in a related area for its significant [deleted] information for review. SAI Proposal at 10; BCM at 20. In any case, it does not appear that the lack of this single strength could have significantly impacted the evaluation or source selection. In this regard, LexisNexis's proposal was assigned seven strengths and no weaknesses under the technical approach factor, BCM at 8-11, while SAI's proposal was assigned only four strengths, which the SSB specifically found "were largely offset" by the "remaining [two], significant weaknesses." BCM at 20-23, 49. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (GAO will not sustain a protest absent prejudice).

under the past performance factor, the SSB took SAI's explanation into account. BCM at 27-28. Further, it does not appear that this weakness had any significant impact on the evaluation; the SSB assigned SAI two strengths under this factor, specifically identified the weakness as "minor," and did not even mention the weakness when it later praised SAI's past performance references as "impressive" and "directly relate[d] to the work at hand." BCM at 49. We conclude that there was no requirement that the matter be raised during discussions.

PRICE EVALUATION

In conducting the price evaluation, the contracting officer examined multiple scenarios involving the different CLINs. One of the scenarios compared the offerors' prices for all base and option year CLINs, including some that represented overlapping contingencies. Based on this scenario, the SSB found that LexisNexis's total price was approximately \$465,000, or 5.12% higher than SAI's. SAI asserts that this aspect of the price evaluation improperly "double counted" the offerors' pricing for CLIN Nos. 0002 and 0007 and related option years, since that work was necessarily included under CLIN Nos. 0001 and 0006 and related options. In addition, SAI notes that the RFP's pricing template (RFP attach. 1, completed by each offeror), included "0" estimated quantities for work under CLIN Nos. 0002 and 0007, and related options; if the prices for those CLINs were excluded from the total prices for each offeror, SAI asserts, LexisNexis's total price would exceed SAI's by approximately [deleted] more. SAI Comments at 14.

Under our Bid Protest Regulations, protests of alleged solicitation improprieties must be raised no later than the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2009). SAI's argument does not meet this requirement.

The RFP incorporated by reference FAR § 217-5, "Evaluation of Options," which provides that the government will evaluate offers for award purposes by adding the total price for all options to the basic requirement. Section B of the RFP included a description of each basic and option CLIN, clearly showing the overlap between basic CLIN Nos. 0001 and 0002, and 0006 and 0007 and their related options. Section B also required offerors to include unit prices and maximum proposed amounts based on maximum quantities included for each CLIN, and SAI included these amounts in its proposal. Since SAI was on notice that the agency intended to include all of these CLINs in the price evaluation, to the extent that it believed the agency should not consider any pricing for them, it was required to protest on this ground prior to the closing time; its failure to do so renders its protest untimely and not for consideration. Our conclusion is not changed by the fact that the pricing template included "0" as the estimated quantity for each of the challenged CLINs and, above that column, stated "Also serves for Award Evaluation Purposes." RFP, attach. 1. To the extent the pricing template worksheet is inconsistent with the requirements of RFP section B, it created a patent ambiguity in the solicitation. In situations where solicitations contain patent ambiguities, an offeror has an affirmative obligation to

seek clarification prior to the first due date for submission of proposals following introduction of the ambiguity into the solicitation. 4 C.F.R. § 21.2(a)(1); Kellogg Brown & Root, Inc., B-291769, B-291769.2, Mar. 24, 2003, 2003 CPD ¶ 96 at 8. In our view, the agency's price evaluation in this regard was not inconsistent with the RFP language.

SAI also argues that the agency improperly "normalized" the offerors' pricing for CLIN No. 0011 and its related options by including the maximum possible ordering amount (approximately \$635,000 per year) instead of calculating individual pricing from each offeror's proposed labor rates and estimated hours for each labor category, as reflected in the pricing template. SAI Comments at 15-16. Because LexisNexis proposed [deleted] rates than SAI, its resulting prices for these CLINS would have increased SAI's price advantage by an additional (approximately) [deleted].

As with SAI's argument concerning the "double-counted" CLINs, this argument concerns a patent ambiguity in the RFP. Section B of the RFP, as well as the pricing template, included the maximum potential amount for each CLIN and specifically advised offerors "not to include a total price for this CLIN, as each future . . . requirement [would] be unique and [would] be independently negotiated as a future delivery order." RFP at 8. In compliance with these instructions, SAI did not include any price for these CLINs.³ However, SAI points to its completion of the pricing template, which provided a place for offerors to include their proposed rates for each labor category, included hours for each category representing projected annual usage and included language that these estimated values would "[a]lso serve[] for [a]ward [e]valuation [p]urposes." RFP, attach. 1. In relying on the pricing template's requirements as the sole basis for calculating an evaluated price for CLIN No. 0011, SAI ignored the fact that RFP section B instructed offerors to include no price for these CLINs. The combination of the template and RFP § B instructions, at best, created a patent ambiguity that SAI was required to challenge prior to the closing time. Because SAI did not do so, this aspect of its protest also is untimely. 4 C.F.R. § 21.2(a)(1). Again, the agency's actions were not inconsistent with the RFP language.

EVALUATION SCHEME

The RFP provided that each of the four non-price factors was of equal importance. RFP at 87. SAI asserts that, by arriving at a single, overall adjectival rating for each proposal, the agency violated and obscured the impact of this scheme. In this

³ In evaluating these CLINs, the agency's use of the maximum possible annual amount, as opposed to "no pricing," was unobjectionable; since the same amounts were applied to both proposals, there was no practical effect on the offerors' relative price standing.

regard, it notes that its proposal was rated acceptable overall, even though it was assigned multiple strengths under the experience, past performance, and small business factors, compared to no strengths for LexisNexis's proposal. In SAI's view, the agency gave undue weight to the technical approach/capability factor by rating LexisNexis's proposal as good overall, based on its strengths under that factor.

SAI attaches unwarranted weight to the agency's use of adjectival ratings. Whether assigned to each factor or to a proposal overall, adjectival ratings are not binding on the source selection official but, rather, serve only as a guide to intelligent decision making. Chapman Law Firm, LPA, B-293105.6 et al., Nov. 15, 2004, 2004 CPD ¶ 233 at 5. The essence of the evaluation is reflected in the evaluation record itself, not the adjectival ratings. The record here shows that the SSB evaluated each factor individually, included a detailed discussion of each strength and weakness, and based its tradeoff recommendation on the relative strengths and weaknesses of the proposals, not the overall adjectival ratings. BCM at 7-33, 44-53. While SAI's proposal was assigned strengths under factors where LexisNexis's proposal was not, the SSB's focus on LexisNexis's strengths under the first evaluation factor does not evidence a change in the relative weights of the remaining factors; it merely shows that the first factor became the discriminator between the competing proposals. Calspan Corp., B-258441, Jan. 19, 1995, 95-1 CPD ¶ 28 at 14. In this regard, the SSB specifically noted that SAI's proposal's strengths under the other factors, including its impressive past performance and experience performing identical or directly-related work, were largely offset by SAI's significant weaknesses regarding its [deleted] websites and subcontracted [deleted] services. BCM at 49-50. Likewise, although the SSA recognized an additional strength for SAI under the small business factor, she specifically found that this strength did not materially alter the relative technical value of the proposals, and made her source selection based on the totality of the offerors' proposals. BCM at 56. Since the evaluation was detailed and consistent with the RFP's evaluation scheme, and the source selection was based on the relative strengths and weaknesses of the proposals, there is no basis to find the evaluation unreasonable based on the adjectival ratings.

The protest is denied.

Daniel I. Gordon
Acting General Counsel