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Decision

Matter of: Arctic Slope Mission Services, LLC

File: B-412851; B-412851.2

Date: June 21, 2016

Kevin P. Mullen, Esq. and Ethan E. Marsh, Esq., Morrison & Foerster LLP, for the protester.

William A. Wozniak, Esq., and Anthony H. Anikeeff, Esq., Williams Mullen, for Bennett Aerospace, Inc., the intervenor.

James E. Hicks, Esq., Department of Justice, Drug Enforcement Administration, for the agency.

Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency unreasonably evaluated the awardee's past performance and failed to evaluate the realism of awardee's proposed price is denied where the record shows that the evaluation was reasonable and consistent with the terms of the solicitation and the solicitation did not contemplate a price realism evaluation.
 2. Allegation that the agency did not identify, evaluate and mitigate an alleged unequal access to information organizational conflict of interest is denied where the record does not support the allegation that any potential conflict existed.
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DECISION

Arctic Slope Mission Services, LLC, of Beltsville, Maryland, protests the award of a contract to Bennett Aerospace, Inc., of Cary, North Carolina, by the Department of Justice, Drug Enforcement Administration (DEA), under request for proposals (RFP) No. DJD-15-R-0023 for administrative, professional and technical support services. Arctic Slope argues that the agency unreasonably evaluated the awardee's past performance, failed to perform a price realism analysis, and failed to identify and address the awardee's unequal access to information organizational conflict of interest (OCI).

We deny the protest.

BACKGROUND

The RFP, issued on September 17, 2015, sought proposals from participants in the Small Business Administration's (SBA) 8(a) Business Development Program for a single-award, indefinite-delivery, indefinite-quantity (ID/IQ) contract to provide administrative, professional and technical support services to the agency's Office of Diversion Control (ODC).¹ RFP at 3-8/9, 5-10. The contract was to be awarded on a best-value basis considering price and five non-price factors, listed in descending order of importance: (1) understanding of the requirement, (2) technical approach, (3) staffing qualifications and experience/key personnel, (4) recruitment and retention/security procedures, and (5) past performance. Id. at 9-1.

The non-price factors, when combined, were to be significantly more important than price. However, as technical became more equal, price was to become more important. Id. at 9-1/2. The technical factors (excluding past performance) were to be evaluated to determine their relative merits, and assigned one of the following adjectival ratings: outstanding, good, acceptable, or unacceptable. Id. at 9-1. Past performance was to receive an overall confidence rating of substantial confidence, satisfactory confidence, limited confidence, no confidence or unknown confidence (neutral). Id. Each factor was to also be assigned a risk rating of low, medium, or high risk. Id.

Under the past performance factor, the agency was to evaluate how the contractor's relevant past performance and any relevant past performance for proposed subcontractors related to the probability of successful accomplishment of the contract requirements. Id. at 9-5. The RFP defined relevant past performance to include consideration of depth, breadth, currency, similarity, and quality of the past performance. Id. The agency's evaluation was to emphasize information that demonstrates relevancy and quality of past performance relative to the size and complexity of this acquisition. Id.

Price was not to receive an adjectival or risk rating, but was to be evaluated using proposal analysis techniques prescribed by Federal Acquisition Regulation (FAR) subpart 15.4 to include, but not limited to, consideration of price reasonableness. Id. at 9-1, 9-6. Fixed unit prices for each contract line item within the base year and all option periods were to be evaluated along with the total evaluated price for all five years proposed. Id. at 9-6. Finally, as relevant to Arctic's protest allegation, the agency responded to a question of whether additional information would be required

¹ The RFP identifies the ODC's mission as, "to prevent, detect and investigate the diversion of controlled pharmaceuticals and listed chemicals from legitimate sources while ensuring an adequate and uninterrupted supply for legitimate medical, commercial, and scientific needs." RFP at 3-1.

to evaluate cost/price, “[t]he Government will review the offeror’s cost breakout of the loaded rate.” RFP, Amendment 2, at Q&A No. 61.

Nine proposals were received, including those from Arctic and Bennett. Agency Report (AR), exh. 9, Source Selection Evaluation Board (SSEB) Report, at 10. After an initial evaluation of proposals, the relevant results were as follows:

	Arctic	Bennett
Understanding of the Requirement	Outstanding/Low Risk	Outstanding/Low Risk
Technical Approach	Outstanding/Low Risk	Good/Low Risk
Staffing Qualifications	Good/Low Risk	Good/Low Risk
Recruitment and Retention	Outstanding/Low Risk	Outstanding/Low Risk
Past Performance	Substantial Confidence/ Low Risk	Substantial Confidence/ Low Risk
Overall	Outstanding/Low Risk	Outstanding/Low Risk
Price	\$162,395,449	\$147,992,822

Id. at 10, 33.

Bennett’s past performance confidence rating was supported by the following narrative:

Based on the offeror’s recent/relevant performance record, the Government has a high expectation that the offeror will successfully perform the required effort. The Offeror provided seven samples of past performance, four for their prime and three for their subcontractor with varied size and scopes that included similarly sized scopes/sizes to the RFP. Although past performance has been primarily technical for Bennett, ratings show that customers were satisfied with the high caliber of employees . . . and able to provide employees for highly specialized positions

Id., Attachment G, at 8. The evaluators also noted an example of how Bennett addressed an issue without service disruption and that both Bennett and its subcontractor’s Contractor Performance Assessment Reporting System (CPARS) information showed very good to exceptional ratings “with a wide breadth of scope and size similar to the RFP.” Id.

The agency established a competitive range and entered into discussions with the three most competitive offerors. As a result of discussions, the only change in the

adjectival ratings was to Arctic's evaluation, where the firm's proposal was upgraded to outstanding/low risk under the staffing qualifications and experience/key personnel factor. AR, exh. 17, Source Selection Authority Decision (SSAD), at 2-3. The source selection authority (SSA) then conducted a best-value tradeoff ultimately concluding that Bennett offered the best value to the government. Id. at 4.

In this regard, the SSA conducted a detailed analysis of the relative technical merits of the three proposals, finding that Arctic's proposal was higher-ranked as a matter of technical merit than Bennett's. Id. at 4. The SSA noted that all three offerors demonstrated substantial confidence and low risk for past performance. Id. at 6. However, the SSA determined that "[w]hen reviewing the technical merits of the offers, the outcome of the Government's evaluation consistently indicates that [it] is not warranted to pay \$7,337,094.40 more . . . for services in the base year (sample task) or \$14,504,807.50 over the life of the contract. There simply are no significant technical differences between Bennett and [Arctic] to warrant such an increase in costs." Id. at 7. As a result, the SSA made award to Bennett. This protest followed.

DISCUSSION

Arctic challenges the agency's evaluation of Bennett's past performance, arguing that the agency's assignment of a significant confidence/low risk rating to the firm's proposal was contrary to the terms of the solicitation. Protest at 5-9. The protester also argues that the agency improperly failed to evaluate the realism of Bennett's price, which Arctic asserts was required by the terms of the solicitation. Id. at 14-15. Finally, Arctic argues that the agency failed to identify, investigate, and resolve an unequal access to information OCI related to Bennett's proposed program manager, who is a current employee of the agency. Supplemental Protest at 3-7. We have reviewed each of Arctic's allegations and find no basis to sustain the protest.²

Past Performance

² Arctic raised in its initial protest various challenges to the agency's evaluation of proposals under the technical factor. Protest at 9-13. However, the protester later withdrew these protest allegations so we do not consider them any further. Protester's Comments at 2 n.2. Arctic also raised a challenge to the acceptability of Bennett's proposal arguing that the firm's proposed project manager could not carry out his proposed duties because of alleged post-government ethics restrictions. Id. at 6-7. While we do not address this issue any further, we have considered the allegation and find no basis to sustain the protest.

Arctic argues that the agency failed to properly evaluate the relevance of Bennett's past performance references in assigning a substantial confidence/low risk rating. Protester's Comments at 9-10. The protester argues that none of Bennett's own past performance references were of a size "anywhere near" that required by the RFP and both Bennett's and its proposed subcontractor's references were not relevant, or were only marginally relevant, to the scope of work. Id. Contrasting the agency's evaluation of its own past performance, Arctic argues that there is no comparison between its own "highly relevant" past performance and Bennett's "barely relevant" past performance. Id. at 13.

Our Office examines an agency's evaluation of past performance to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations; however, the necessary determinations regarding the relative merits of offerors' proposals are primarily matters within the contracting agency's discretion. Advanced Env'tl. Solutions, Inc., B-401654, Oct. 27, 2009, 2010 CPD ¶ 7 at 5. Our Office will not question an agency's determinations absent evidence that those determinations are unreasonable or contrary to the stated evaluation criteria. Id.

The agency responds that its evaluation of Bennett's past performance was reasonable, and that Arctic's arguments amount to nothing more than mere disagreement with the agency's evaluation. Legal Memorandum at 4. According to the agency, the record clearly shows that Bennett's past performance record, as a whole, supports the reasonableness of the assigned rating. Id. Specifically, the agency asserts that Bennett's rating was due, in large part, to customer satisfaction and successful performance of the complexities of its own prior contracts, as well as the performance of its proposed subcontractor, whose prior contracts were valued in excess of \$200 million and relevant to the instant requirements. Id.

The record shows that Bennett submitted seven past performance references: four of its own and three for its proposed subcontractor. The agency observed that these references were varied in size and scope, but found that they did include similarity in scope and size to the work required by the RFP here. AR, exh. 9, SSEB Report, Attachment G. A review of Bennett's proposal shows that the four past performance references submitted by Bennett were all significantly smaller than the current requirement in terms of dollar amount, but the three references submitted by Bennett's subcontractor were substantially larger, and while somewhat less than the dollar value for this procurement, they were similar in size to those past performance references submitted by Arctic. Compare AR, exh. 19, Arctic Proposal, § 5.0; exh. 20, Bennett Proposal, § 5.0.

A review of the relevancy descriptions for all of the past performance references in Bennett's proposal appear to show substantial overlap with the current requirements, supporting the agency's conclusion that the references included similar scope to the current requirements. AR, exh. 20, Bennett Proposal, § 5.0.

Finally, as observed by the agency in its evaluation, Bennett's proposal appears to show uniformly high ratings for each of the past performance references, supporting the agency's qualitative assessment of the firm's past performance. In sum, our review of Bennett's proposal confirms the substance of the agency's past performance evaluation. Id.

Turning to the question of whether the agency reasonably assigned a substantial confidence/low risk rating to Bennett's proposal, we are provided no basis to question the agency's judgment. The RFP provided for consideration of both the prime contractor and its proposed subcontractors' past performance as part of the evaluation. RFP at 9-5. While Arctic seems to focus on the dollar magnitude of Bennett's contracts, the references provided for Bennett's proposed subcontractor were significantly larger, and comparable in size to the references submitted by Arctic. Moreover, the past performance factor's definition of relevance included a broad range of considerations, including depth, breadth, currency, similarity and quality of the past performance. Id. The factor also specifically emphasized an assessment of the quality of the services provided, including such performance-related considerations as a history of commitment to customer satisfaction. Thus, the inquiry under the past performance factor was much broader than simply the size of the references, but was also to examine such considerations as the quality of performance. Finally, while the past performance factor did emphasize information that demonstrates relevancy and quality of past performance relative to the size and complexity of this acquisition, RFP at 9-5, the record supports the agency's assignment of a substantial confidence/low risk rating, given the totality of Bennett's past performance record.

Finally, Arctic argues that the agency's evaluation was unreasonable because Bennett's past performance did not compare to its own past performance. Protester's Comments at 13. The record shows that the agency assigned both Arctic's and Bennett's past performance a rating of substantial confidence/low risk. AR, exh. 17, SSAD, at 6. Both Arctic's and Bennett's past performance evaluations adequately support the ratings assigned by the agency. AR, Tab 9, SSEB Report, Attachments C & G. The record also shows that the agency considered the relative technical merits of each proposal, past performance, and price in deciding that Bennett was the best-value offeror. AR, exh. 17, SSAD, at 5-7. Such consideration is commended to the broad discretion given to the agency, and we are provided no basis to object to the exercise of this discretion here.

Price Evaluation

Arctic next argues that the agency unreasonably failed to perform a price realism analysis, which it asserts was required by the terms of the RFP. Protest at 14. In this regard, the protester asserts that a response provided by the agency as part of the Q&A, namely, the agency "will review the offeror's cost breakout of the loaded rate," required the agency to conduct a price realism evaluation. Id. According to

the protester, there was no other purpose “for requiring this cost breakdown other than to make a price realism analysis possible.” Protester’s Comments at 17. This allegation is without merit.

Where a solicitation contemplates the award of a fixed-price contract, an agency may provide in the solicitation for the use of a price realism analysis for the purpose of measuring an offeror’s understanding of the requirements or to assess price risk in its proposal. IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 at 10-11. In the absence of an express price realism provision, we will only conclude that a solicitation contemplates a price realism evaluation where the RFP expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and the RFP states that a proposal can be rejected for offering low prices. Dyncorp Int’l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9.

We have reviewed the RFP, including the language cited by Arctic, and conclude that a price realism analysis was not required by the terms of the RFP. In this regard, the RFP does not explicitly call for a price realism evaluation. Neither does the RFP include any language that prices would be reviewed to determine whether they are so low that they reflect a lack of technical understanding. Finally, the RFP does not provide that proposals could be rejected for offering low prices. Absent such language, our decisions are clear that agencies cannot conduct a price realism analysis, as the protester alleges should have occurred here. See Dyncorp Int’l LLC, supra at 8-9 (absent solicitation provision providing for price realism evaluation, agencies are neither required nor permitted to conduct one in awarding a fixed-price contract).

Organizational Conflict of Interest

Finally, Arctic argues that the agency failed to identify, investigate, and resolve an unequal access to information OCI related to Bennett’s proposed program manager, who is a current employee of the agency. Supplemental Protest at 3-7. The protester argues that Bennett’s proposed program manager would have had access to non-public information, including proprietary and competitively sensitive information of Arctic’s own subcontractor, from its performance on an incumbent contract with the Office of Diversion Control. Id. at 3-4. Arctic further argues that “[i]t also is apparent from Bennett’s proposal that [Bennett’s proposed program manager] assisted in its preparation.”³ Id. The protester concludes that, “[f]acts

³ To support this contention, Arctic argues:

Bennett has no experience with the Office of Diversion Control specifically or the DEA more generally. . . . Yet Bennett was able to draft a proposal that, [was evaluated favorably by the agency]. Bennett was also able to list the specific tasks that contractor employees would perform to support the Office

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exist here that should have triggered the Contracting Officer's review, investigation, and resolution of Bennett's potential unequal access to information OCI; however, the record shows the Contracting Officer failed to take any action whatsoever in this regard." Protester's Supp. Comments at 3-4.

The FAR requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: (1) unequal access to information; (2) impaired objectivity; and (3) biased ground rules. See FAR § 9.505(b); Smartronix, Inc.; ManTech Advanced Sys Int'l, Inc., B-411970 et al., Nov. 25, 2015, 2015 CPD ¶ 373 at 15-16. An unfair competitive advantage exists, for example, where a contractor competing for award of any federal contract possesses proprietary information that was obtained from a government official without proper authorization and where access to that information may provide the firm a competitive advantage in a competition for a government contract. Id. Our Office will presume the existence of an unfair competitive advantage where an offeror possesses competitively useful, non-public information that would assist that offeror in obtaining a contract, provided the determination of an unfair competitive advantage is based on facts, and not mere innuendo or supposition. Threat Mgmt. Group, B-407766.6, Jul. 3, 2103, 2013 CPD ¶ 167 at 5. However, where the record shows that an individual has only indicated an intention to work for a contractor in the future, without more, does not support a conclusion that an unfair competitive advantage exists. Id. at 6.

In response to this allegation, the agency submitted declarations that refuted the allegation that Bennett's proposed program manager had access to any competitively useful information as a government employee. See Declaration of Chief, Diversion Planning and Resources Section; Declaration of Bennett's Proposed Program Manager.⁴ Moreover, both the agency and the intervenor

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of Diversion Control's mission even though it has never performed those tasks itself. . . . Bennett could not have obtained such a deep level of knowledge on its own. Instead, it appears to have obtained that information from [Bennett's proposed program manager].

Supplemental Protest at 4-5.

⁴ With respect to the first declaration, the agency official was responsible for developing and implementing an OCI plan for the procurement. In that capacity, she restricted access to the RFP and evaluation material to those with need-to-know access. Declaration of Chief, Diversion Planning and Resources Section at 2-3. She also states that Bennett's proposed program manager did not receive

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submitted declarations denying the allegation that the proposed program manager assisted with the preparation of Bennett's proposal. See Declaration of Bennett's Proposed Program Manager; Declaration of Bennett's Program Manager; Declaration of Bennett's Chief Executive Officer. All three individuals categorically deny any involvement by this individual in the preparation of Bennett's proposal. Our review of the record does not support Arctic's view that Bennett's proposed program manager had access to any information that would provide Bennett an advantage in the procurement or that this individual took part in the preparation of Bennett's proposal.

Finally, with respect to Arctic's allegation that the facts should have triggered an investigation into a potential OCI, we disagree. As discussed, the FAR requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage including where a contractor competing for award of any federal contract possesses proprietary information that was obtained from a government official without proper authorization. FAR §§ 9.504(a), 9.505.

The record shows that at all times relevant to Arctic's allegation of OCI, Bennett's proposed program manager was an employee of the agency. The record also shows that prior to being identified as a proposed Bennett employee, the individual obtained post-government ethics advice regarding his post-government employment. See Post-Government Ethics Letter dated October 30, 2015. This information was considered by agency officials prior to award of the protested contract. See E-mails dated February 12, 2016. In short, we see no support in the record for Arctic's contention that the agency impermissibly ignored a potential OCI.

The protest is denied.

Susan A. Poling
General Counsel

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information regarding the RFP, and that no one from his office received procurement sensitive information about this procurement. *Id.* at 3. Bennett's proposed program manager also categorically denied having access to procurement sensitive information related to this procurement or prior procurements relevant to the scope of work. See Declaration of Bennett's Proposed Program Manager at 1-2.