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Decision

Matter of: The Emergence Group

File: B-404844.5; B-404844.6

Date: September 26, 2011

Daniel R. Forman, Esq., Puja Satiani, Esq., and James G. Peyster, Esq., Crowell & Moring LLP, for the protester.

Richard J. Conway, Esq., Michael J. Slattery, Esq., and Pablo A. Nichols, Esq., Dickstein Shapiro LLP for FedSys, Inc.; John Tolle, Esq., and Bryan King, Esq., Barton, Baker, Thomas & Tolle, LLP for Global Criminal Justice Solutions, LLC; and William K. Walker, Walker Reausaw, for Bering Straits and Orion Management Joint Venture, the intervenors.

Kathleen D. Martin, Esq., Department of State, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's evaluation of past performance was unreasonable and inconsistent with the solicitation, where the record shows that the agency did not meaningfully assess the relevance of the offerors' prior contracts.
 2. Protest sustained where agency evaluated the protester's proposal under several factors unreasonably and in a manner unequal to how the awardees' proposals were evaluated.
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DECISION

The Emergence Group Advisors, LLC (TEG), of Washington, D.C., protests the award of contracts to BlueLaw International, LLC, of Alexandria, Virginia; Bering Straits and Orion Management Joint Venture (BSOM), of Springfield, Virginia; Team Crucible, of Fredericksburg, Virginia; FedSys, Inc., of Arlington, Virginia; and Global Criminal Justice Solutions, LLC (GCJS), of McLean, Virginia, under request for proposals (RFP) No. SAQMMA10R0079, issued by the Department of State (DOS), for criminal justice program support (CJPS). TEG challenges the adequacy of discussions and the propriety of the DOS's technical and past performance evaluations.

We sustain the protest.

BACKGROUND

According to DOS, because many nations around the world lack capable police forces and transparent criminal justice systems, and because weak law enforcement can serve as the breeding ground for crime, extremism, political instability, and human rights violations, the United States has a national security and foreign policy interest in developing fair and effective criminal justice systems around the world to counter these threats. RFP § C.2 at 19. To achieve the goals of developing these systems, the DOS Bureau of International Narcotics and Law Enforcement Affairs (INL) provides assistance to countries and international organizations for the control of narcotic drugs, controlled substances, and other anti-crime purposes, including strengthening foreign police and criminal justice systems. Id.

The RFP, issued on April 13, 2010, sought to procure criminal justice program support services to implement civilian police and criminal justice assistance programs overseas. Among other things, the contract required support with INL's requirements for advisor staffing, advisor deployment, life and mission support, program management, and security. See RFP § C.3 at 21.

The RFP anticipated two groups of awards: one unrestricted and the other set aside for small businesses. The small business awards are the subject of this protest. The RFP contemplated "multiple" small business awards of indefinite-delivery/indefinite-quantity contracts for a base year with 4 option years. RFP amend. 4 § M.2 at 262. It was contemplated that the contract awardees would compete for either fixed-price, cost-reimbursement, labor-hour and/or time-and-materials task orders under the contract.

The RFP provided for awards on a best-value basis considering five evaluation factors, listed in descending order of importance: (1) technical, (2) management, (3) past performance, (4) subcontract management plan, and (5) price. The combined weight of the non-price factors was said to be significantly more important than price.

Under the technical factor, the RFP identified four equally-weighted subfactors: (1) advisor staffing, (2) advisor deployment, (3) life and mission support, and (4) security. The RFP listed considerations to be taken into account in the evaluation of each subfactor. The life and mission support subfactor listed four considerations, including, as relevant here, "(b) [t]he offeror demonstrates an understanding of the requirements for ensuring that arrangements are [in] place to stabilize and evacuate U.S. personnel." RFP amend. 4 § M.9.1.3.b at 266.

Under the management factor, the RFP identified seven equally-weighted subfactors: (1) program management, (2) home office, (3) in-country office, (4) program manager, (5) program management systems, (6) invoices, and (7) reporting. RFP

amend. 4 § M.9.2.1 at 266-68. The program management subfactor listed seven considerations, including “c) [t]he offeror proposes a sound approach for developing and implementing effective quality control and continuous improvement processes.” RFP amend. 4 § M.9.2.1 at 266.

Under the past performance factor, the RFP provided that the “offeror and its major subcontractors will be evaluated with respect to their past performance and experience.” RFP § M.9.3 at 268. This factor had three subfactors: (1) technical, (2) price, and (3) contractual. The technical subfactor required offerors to demonstrate their “relevant experience” as follows: “[t]he offeror and major subcontractors demonstrate relevant corporate experience providing criminal justice related support services and associated support systems required under Section C, Descriptions/Specifications/Work Statement.” RFP § M.9.3.1.a at 268. The contractual subfactor evaluated the offeror’s history of fulfilling all technical and non-technical requirements. RFP § M.9.3.3.b at 268.

To facilitate the evaluation of past performance, section L.26.2.4 of the RFP stated that “[t]he offeror(s) shall provide references capable of documenting the offerors’ performance on similar contracts – similar to the complexity and scope of services under the solicited contract.” This section further provided that “offeror(s) shall provide . . . at least three and no more than five references [of present or past clients within the last five years] documenting the offerors’ ability as a prime contractor to hire and deploy advisors and to provide life and mission support.” This section further stated that “offerors shall provide . . . at least three and no more than five references for each proposed subcontractor expected to perform at least 20 percent of the contracts workload or receive at least 20 percent of the contract revenue.” RFP § L.26.2.4 at 252-53.

Eleven offerors, including TEG, BlueLaw, BSOM, Crucible, FedSys and GCJS, submitted proposals in response to the RFP by the closing date on June 8. A technical evaluation panel (TEP) evaluated proposals under the non-price factors. Following discussions and final evaluations of the proposals, DOS made awards on February 15, 2011, to BlueLaw, BSOM, Crucible, and Navigator Development Group.

On February 28, TEG, GCJS, and FedSys filed protests at our Office challenging the awards. On March 10, DOS advised our Office that it would take corrective action by re-evaluating the proposals of the awardees and the protesters; engage in discussions, if necessary; and call for revised final proposals. On March 11, our Office dismissed the protests.

After reevaluating the proposals, the TEP concluded that discussions were appropriate. A competitive range of seven proposals was established, which included TEG, BlueLaw, BSOM, GCJS, Crucible, FedSys, and Navigator. Starting on April 5, written discussions were conducted with each offeror concerning the weaknesses/deficiencies found in their proposals. The discussions with TEG focused on the advisor staffing, advisor deployment, and life and mission subfactors

of the technical factor; the program management and reporting subfactors of the management factor; and price. AR, Tab 21, Agency's Negotiation Letter with TEG.

DOS received final revised proposals on April 14. The final evaluation results were as follows:¹

Offeror	Technical Factor	Management Factor	Past Performance	Sub-contracting Plan	Evaluated Price
BlueLaw	Exceptional	Exceptional	Confidence	Pass	\$287M
BSOM	Exceptional	Exceptional	Confidence	Pass	\$261M
Crucible	Acceptable	Exceptional	Confidence	Pass	\$287M
FedSys	Exceptional	Acceptable	Confidence	Pass	\$284M
GCJS	Acceptable	Exceptional	Confidence	Pass	\$254M
Navigator	Acceptable	Acceptable	Confidence	Pass	\$293M
TEG	Acceptable	Acceptable	Confidence	Pass	\$309M

See Agency Report (AR), Tab 22, Contracting Officer's (CO) Award Recommendation, at 13.

In assessing proposals, the TEP decided that a proposal that received at least one exceptional rating for a subfactor under either the technical or management factor, along with acceptable ratings under the other subfactors, should receive an overall exceptional rating for the factor.² *Id.* at 14. Navigator's proposal received acceptable ratings for each subfactor. TEG's proposal received acceptable ratings for all of the subfactors, except the program management subfactor of the management factor for which it received a marginal rating. *Id.* In addition, while TEG's proposal was rated

¹ The possible technical and management ratings were exceptional, acceptable, marginal, and unacceptable. The possible past performance ratings were confidence, unknown confidence, and no confidence. See RFP § M.8 at 264.

² As noted, the RFP provided that the subfactors under both the technical and management factors were equally weighted. Based on our review, it is not clear from the record that the evaluation of these subfactors was consistent with this weighting. For example, proposals which received only a single exceptional subfactor rating were rated exceptional for the factor, even though the other subfactors were only rated acceptable. The record did not otherwise explain why the overall rating of the factor was exceptional rather than acceptable. This is a matter that the agency should consider during the corrective action we recommend below.

acceptable for the life and mission support subfactor of the technical factor, it was assigned a significant weakness under this subfactor.³ Id. at 14, 23.

After considering the contracting officer's award recommendation and the underlying documentation, the source selection authority (SSA) determined that limiting the number of awards to the five offerors that represented the best value was in the government's best interest. The SSA further determined that BlueLaw, BSOM, Crucible, FedSys and GCJS submitted the five most highly rated proposals. The SSA noted that these five offerors had at least one factor with an exceptional rating together with past performance ratings of confidence, as well as the lowest prices of those proposals included in the competitive range. As a result, no cost/technical trade-off was required. In contrast, the SSA noted that TEG's and Navigator's proposals received acceptable ratings, but offered "slightly higher" evaluated prices. See AR, Tab 23, Award Determination at 2-4. DOS awarded contracts to BlueLaw, BSOM, Crucible, FedSys, and GCJS on June 7. After a debriefing, this protest followed.

PAST PERFORMANCE EVALUATION

TEG contends that DOS's past performance evaluation of BlueLaw, BSOM, Crucible, FedSys, and GCJS was unreasonable. Specifically, TEG contends that the agency did not determine whether the submitted past performance references of these offerors were relevant and permitted these offerors to provide less than the required number of references.

As a general matter, the evaluation of an offeror's past performance, including the agency's determination of the relevance and scope of an offeror's performance history to be considered, is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10; Yang Enters., Inc., Santa Barbara Applied Research, Inc., B-294605.4 et al., April 1, 2005, 2005 CPD ¶ 65 at 5. However, we will question an agency's evaluation conclusions where they are unreasonable or undocumented. Clean Harbors Env'tl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror's past performance. DRS C3 Sys., LLC, B-310825, B-310825.2, Feb. 26, 2008, 2008 CPD ¶ 103 at 22.

TEG argues that the agency failed to consider the relevance of the prior contracts of the awardees in accordance with the RFP and the Federal Acquisition Regulation

³ This was the only significant weakness assigned TEG's proposal in the final evaluation.

(FAR). An agency is required to consider, determine and document the similarity and relevance of an offeror's past performance information as part of its past performance evaluation. See FAR § 15.305(a)(2); Clean Harbors Env'tl. Servs., Inc., supra.

While DOS in its report on the protest states that it determined that the past performance of the awardees was relevant and gave examples of why this was the case, there is no contemporaneous documentation evidencing that the TEP meaningfully considered whether these offerors' references represented "relevant corporate experience providing criminal justice related support services and associated support systems required under Section C." See RFP § M.9.3.1.a at 268. Instead, the contemporaneous documentation reflects that the TEP merely presumed that each offerors' identified contracts were relevant. For example, as to the relevance of BlueLaw's past performance, the evaluation documentation only states:

BlueLaw identified their relevant past performance and was rated Exceptional by two, Excellent by six, and Good by one of their Past Performance Surveys submitted by Contracting Officers that have worked directly with them.

AR, Tab 10b, Post Discussion Consensus Report, at 15. The past performance evaluations for the other offerors included essentially identical language regarding the presumed relevance of their past performance, and showed that the TEP past performance evaluation focused primarily on the quality of the offeror's past performance records.

As set forth above, the RFP here required the agency to consider whether an offeror and its major subcontractors demonstrated relevant corporate experience providing criminal justice related support services and associated support systems required under the work statement in section C.⁴ A review of BlueLaw's past performance is illustrative of the problems in DOS's evaluation. BlueLaw identified five prior contracts to demonstrate relevant experience as a prime contractor: (1) "INL Program and Outreach Support;" (2) "Enabling Human Rights For All;" (3) "Towards the Full Inclusion of People with Disabilities: Examining the Accessibility of Overseas Facilities and Programs Funded by the United States;" (4) "Paraguay Threshold Country Plan—Formalization of Economic Activities;" and (5) "Iraq Civil Civilian Advisory Support –Justice & Law Enforcement Assistance." See AR, Tab 4, vol. 4, Past Performance Client References, at 1. There is no contemporaneous

⁴ Among other things, the RFP required experience with advisor staffing, advisor deployment, life and mission support, program management, and security. The advisors were to have skills in the areas described as policing, corrections, and criminal justice. See RFP § C.3 at 20-24.

documentation in the record that reasonably explains why this past performance meets the evaluation standards required by the RFP. In addition, as the protester has pointed out, it is not readily apparent that the identified efforts meet this requirement.

Based on the foregoing, we cannot conclude on this record that the agency's past performance evaluation of the proposals was reasonable. Accordingly, we sustain the protest on this basis.

UNREASONABLE EVALUATION OF THE TECHNICAL AND MANAGEMENT FACTORS

The protester also asserts that the agency unreasonably evaluated its proposal under the technical and management factors. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. CRA Assocs., Inc., B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63 at 5. The evaluation of proposals is a matter within the discretion of the contracting agency, and 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, in accord with the evaluation factors set forth in the RFP, and treated offerors equally, *i.e.*, did not disparately evaluate proposals with respect to the same requirements. Brican, Inc., B-402602, Jun. 17, 2010, 2010 CPD ¶ 141 at 4; Hanford Envntl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 4. As discussed below, we find that the record does not show that the agency reasonably and fairly evaluated TEG's proposal.

Contingency Planning

TEG contends that DOS improperly assigned a significant weakness to its proposal under consideration (c) of the life and mission support subfactor. As noted above, this consideration required the offeror to demonstrate an "understanding of the requirements for ensuring that arrangements are in place to stabilize and evacuate U.S. personnel." See RFP amend. 4 § M.9.1.3.b. TEG argues that DOS improperly downgraded its proposal for not including an existing plan to demonstrate that it understood the requirement. In addition, TEG asserts that DOS evaluated its and the awardees' proposals unequally with regard to this consideration.

Section L.26.1.4.3 of the RFP required the offerors to "describe their approach for ensuring that arrangements are in place to stabilize and evacuate U.S. personnel under emergency medical or other emergency conditions." RFP at 248. In addressing this requirement in its initial proposal, TEG, among other things, advised that it [DELETED]. See AR, Tab 9, TEG Initial Proposal, at 60.

The TEP assessed this response as a weakness in the proposal, which was identified in DOS's discussion letter to TEG as follows:

Weakness: The offeror demonstrates an understanding by restating the requirement. They focus [DELETED]. This indicates that they may not appreciate the complexity of potential contingencies: their contingencies approach is reactive. They have no existing plans and [DELETED]. Their approach seems to be built around a more traditional commercial approach and fails to acknowledge the likelihood of a hostile environment.

AR, Tab 21, Agency's Discussion Letter to TEG (Apr. 5, 2011), at 2.

In response to this concern, TEG explained that it operates INL projects around the world, including in Afghanistan, that its proposal did not depend on, or place the burden on INL for medical emergencies or evacuations, and that it would not do so under future projects. See AR, Tab 9, TEG Revision Memorandum, at 7. TEG also modified its proposal to address what it believed were the agency's concerns. The proposal as revised included a detailed response describing TEG's approach to the requirement, including that it would [DELETED]. See AR, Tab 9, TEG Revised Proposal, at 60-63A.

In reviewing TEG's response to the discussion question, the TEP assigned a significant weakness in the final evaluation of the revised proposal as follows:

Their contingencies approach is reactive. They have no existing plans and although after discussion, they attempted to clarify through their statement [DELETED], there is no demonstration that they understand the requirement.

AR, Tab 15b, Post Discussion Consensus Report at 5. Also, the CO advised the SSA that TEG [DELETED], which he believed demonstrated a lack of comprehension of the requirement. The SSA relied on this statement in making the source selection decision. See Tab 23, SSA Award Recommendation, at 3.

In our view, TEG's approach to this requirement in its revised proposal cannot reasonably be read to be based on a [DELETED]. In this regard, the revised proposal specifically states that [DELETED]⁵, [DELETED]. AR, Tab 9, TEG Revised Proposal, at 60-63A. We think the proposal can only be fairly read to reflect that [DELETED] was one of several methods it would rely on for emergency medical services and evacuation, where available for this purpose.

⁵ [DELETED]

As indicated, DOS found TEG's contingency approach to be "reactive."⁶ In its report on the protest, DOS explains that since TEG did not submit contingency plans with its proposal,⁷ the TEP could not assume that TEG would be successful without demonstration of its plans. See AR at 19.

In reviewing DOS's rationale for this rating, we note first that the RFP does not require the submission of contingency plans in the proposals. In addition, our review of the record shows that none of the awardees provided such a plan, nor were they asked to provide them, despite proposing contingency approaches [DELETED].⁸ Because the agency's concern here is apparently founded in part on TEG's failure to provide a contingency plan, the agency's evaluation here appears to represent unequal treatment of TEG compared to the treatment of the awardees. Accordingly, we sustain the protest on this basis. See Brican, Inc., supra.

Program Management

As indicated above, TEG's proposal received a marginal rating for the program management subfactor of the management factor. To support this rating, the TEP identified three weaknesses in TEG's proposal. One of these weaknesses concerned one of the considerations under this subfactor: "c) [t]he offeror proposes a sound approach for developing and implementing effective quality control and continuous improvement processes." RFP amend. 4 § 9.2.1 at 266.

After the initial evaluation the following weakness with regard to this consideration was brought to TEG's attention during discussions:

Weakness: The offeror proposes a sound approach for developing and implementing effective quality control and continuous improvement

⁶ While it is not entirely explained what DOS meant by "reactive" here, it appears that DOS's concern was that TEG's proposal indicated that its approach was primarily to react to contingencies rather than plan for them.

⁷ As indicated, TEG's proposal stated in some detail that it would develop contingency plans [DELETED].

⁸ For example, FedSys's proposal stated with regard to contingency planning:

[DELETED]

AR, Tab 7, FedSys Proposal, at 51. Based on our review, it appears that Fed Sys' proposal provided less detail on this matter than TEG's proposal and provided no existing or sample contingency plans, yet no weakness was assigned to FedSys with regard to this consideration. See AR, Tab 13b, Post Discussion Consensus Evaluation, at 5.

processes, [DELETED]. However, their approach seems to focus on process rather than product improvements.

AR, Tab 21, Agency's Discussion Letter to TEG (Apr. 5, 2011), at 2. TEG responded by stating, among other things, that its quality control plan focused on continuous improvements to the process, not products. See AR, Tab 9, TEG Revision Memorandum at 8. After evaluating TEG's response, the agency determined:

The contractor explains the importance of process; however, in doing so they fail to appreciate the importance of quality improvements related to end-state objective for INL missions.

AR, Tab 15b, Post Discussions Consensus Evaluation, at 7-8. This weakness was repeated by the SSA in his award determination.

Based on our review of the record, we do not find this evaluation supported or reasonable. We first note that the record is unclear as to why the agency initially had a concern with whether TEG had focused on product improvements, since the evaluation was to consider whether the offeror proposed a sound approach for developing and implementing effective quality control and continuous improvement processes, not product improvements. We also note that the agency's final evaluation downgraded TEG's proposal, not because it failed to focus on product improvements, but because it failed to "appreciate the importance of quality improvements related to end-state objectives for INL missions."⁹ The record is unclear as to the significance and/or meaning of this weakness. In its report on the protest, the agency now explains that the weakness assigned to the proposal related to TEG's lack of focus on continuous "improvements" to quality processes. See AR at 25. However, the TEP specifically found that TEG had proposed a sound approach to continuous improvement processes, and our review confirms that the proposal included a detailed response to quality control and process improvement. See AR, Tab 9, Initial Proposal, at 77-81. Thus, we find the agency's evaluation of, and this assessment of the weakness under, the program management subfactor to be unreasonable, and we sustain the protest on this basis.¹⁰

⁹ Our review of the responses to this requirement in the proposals of BlueLaw, BSOM, Crucible, FedSys, and GCJS does not show that any of the offerors discussed quality control from the standpoint of product improvements or quality improvements related to end-state-objectives for INL missions.

¹⁰ TEG has made numerous other contentions challenging the reasonableness of the evaluation and conduct of discussions. We have considered all of these contentions, and, except as discussed above, find that none provide a basis to sustain the protest.

RECOMMENDATION

We recommend that the agency reevaluate the proposals consistent with this decision, conduct discussions and obtain revised proposals if appropriate, and make a new source selection decision. If any of the current awardees are not selected, the agency should terminate the awards already made; if any of the previously unsuccessful offerors are selected the agency should make awards to them. We also recommend that TEG be reimbursed the reasonable costs of filing and pursuing the protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2011). The protester should submit its certified claim for such costs incurred, directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Lynn H. Gibson
General Counsel