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Decision

Matter of: The Emergence Group

File: B-404844.7

Date: February 29, 2012

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 R. Tolle, Esq., and Bryan R. King, Esq., Barton, Baker, Thomas & Tolle, LLP for Global Criminal Justice Solutions, LLC; and William K. Walker, Esq., 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

Protest of past performance evaluation is sustained where the agency's past performance evaluation was unreasonable and not conducted in accordance with the solicitation's evaluation scheme.

DECISION

Emergence Group Advisors, LLC d/b/a The Emergence Group (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 DOS's past performance evaluation.

We sustain the protest.

BACKGROUND

To help develop fair and effective criminal justice systems around the world, the DOS Bureau of International Narcotics and Law Enforcement Affairs (INL) provides assistance to countries and international organizations to strengthen foreign police and criminal justice systems. See RFP § C.2 at 19. Accordingly, 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 for 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 § 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.

With regard to past performance, section L.26.2.4 of the RFP stated that “[t]he offeror(s) shall provide client references capable of documenting the offerors’ performance on similar contracts – similar to the complexity and scope of services of this procurement.” 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 . . . [a]t least three and no more than five references for each proposed subcontractor expected to perform at least 20 percent of the contract workload or receive at least 20 percent of the contract revenue.” RFP § L.26.2.4 at 252-53.

Section M.4 of the RFP stated that “[p]roposals shall be prepared in accordance with the instructions set out in Section L.” The RFP further advised here that “[t]he Government will review proposals submitted to determine conformance with the proposal preparation instructions” and “[i]f it is determined that the proposal is substantially not in conformance with the instructions in Section L, the Government may deem that proposal to be unacceptable and it will not be evaluated further.” RFP § M.4 at 263.

Under the past performance evaluation 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 history. 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 price subfactor considered an offeror’s history of maintaining competitive pricing and cost controls. RFP § M.9.3.3.b at 268. The contractual history subfactor evaluated the offeror’s history of fulfilling all technical and non-technical requirements. RFP § M.9.3.3.c at 268-69.

Eleven offerors, including TEG, BlueLaw, BSOM, Crucible, FedSys and GCJS, submitted proposals in response to the RFP by the closing date on June 8, 2010. A technical evaluation panel (TEP) evaluated proposals under the non-price factors. Following discussions and final evaluations of the proposals, the 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, the DOS advised our Office that it would take corrective action by re-evaluating the proposals of the awardees and the protesters; engaging in discussions, if necessary; and calling for revised final proposals. On March 11, our Office dismissed the protests.

After conducting discussions with offerors whose proposals were in the competitive range, obtaining revised proposals, and reevaluating proposals, the DOS made awards to BlueLaw, BSOM, GCJS, FedSys, and Crucible on June 7. TEG filed a protest, challenging the awards on the bases of the adequacy of discussions and the propriety of the DOS’s technical and past performance evaluations.

This Office sustained TEG’s protest after concluding that the DOS’s past performance, technical, and management evaluations were unreasonable and inconsistent with the solicitation. As relevant here, we found that the past performance evaluation was unreasonable and inconsistent with the solicitation because there was no contemporaneous documentation that reasonably explained why the awardees’ past performance met the standards required by the RFP. The Emergence Group, B-404844.5, B-404844.6, Sept. 26, 2011, 2012 CPD ¶ ___ at 5-7.¹ We recommended that the agency reevaluate the proposals consistent with

¹ This decision was issued under a protective order issued by our Office. At the request of the parties, and in light of the agency’s corrective action, we have not yet
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our decision, conduct discussions and obtain revised proposals if appropriate, and make a new source selection decision. Id. at 11.

In implementing our recommendation, the DOS reevaluated the proposals of the competitive range offerors, but did not elect to obtain revised proposals. The result of the agency’s reevaluation are set forth below.²

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

See Agency Report (AR), Tab 48, Contracting Officer’s (CO) Revised Award Recommendation, at 9.

After considering the underlying documentation, including the CO’s revised award recommendation, the source selection authority (SSA) again awarded contracts to BlueLaw, BSOM, Crucible, FedSys, and GCJS. The SSA noted that there was no basis to pay a price premium for TEG’s highest-priced proposal because “[a]ll of the offerors selected for award, offered a lower price and had better or equivalent ratings” and as a result no cost/technical tradeoff was required. See AR, Tab 49, Revised Award Decision, at 3. The awards were made to BlueLaw, BSOM, Crucible, FedSys, and GCJS on November 9. This protest followed.

PAST PERFORMANCE EVALUATION

TEG again protests that the DOS’s past performance evaluation of the awardees’ proposals was unreasonable and not consistent with the RFP’s evaluation scheme. Specifically, TEG contends that none of the awardees had the required number of relevant prior projects--acting as prime contractors, as defined in the RFP--to justify

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published this decision. We expect to issue a redacted version of the previous Emergence decision in conjunction with a redacted version of this decision.

² 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.

the agency's confidence ratings, and that only TEG's proposal included the requisite number of relevant projects.

As stated in our prior decision, the critical question in our review of an agency's past performance evaluation "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." The Emergence Group, *supra*, at 5. The DOS's past performance reevaluation was not consistent with the terms of the RFP.

As noted previously, to facilitate the evaluation of past performance, section L.26.2.4 of the RFP required offerors to demonstrate their relevant experience by providing a specific number of references "documenting the offerors ability as a prime contractor to hire and deploy advisors and to provide life and mission support," and requiring each proposed subcontractor to furnish the same information, if performing at least 20 percent of the work. In addition, section M.4 provided that offerors were required to comply with the instructions in section L, such as section L.26.2.4.

Our Office held a hearing to clarify how the agency determined that the awardees' past performance was relevant. According to the TEP Chair, who presided over the DOS's past performance reevaluation, the TEP did not consider section L in reevaluating proposals, nor did the evaluators review offerors' proposals to determine compliance with the section L requirements, such as whether or not offerors had furnished the required minimum number of contracts reflecting their ability to hire and deploy advisors and to provide life and mission support. See Hearing Transcript (Tr.) at 31, 33, 97-102, 103-04. Moreover, the TEP Chair did not know if any agency official performed this review.³ Tr. at 97-98.

This is problematic because neither the record nor the Chair's testimony establishes that the awardees' past performance satisfied the section L.26.2.4 requirements. For example, the Chair testified that, of the three contracts that Crucible submitted to demonstrate the relevance of its past performance, Crucible was a prime contractor on only one of these contracts, even though section L.26.2.4 required at least three references for the offeror itself. See Tr. at 103-07. The Chair further testified that Crucible did not have experience deploying advisors or providing life and mission support under any of its referenced contracts, as required by section L.26.2.4. See Tr. at 130-33. The Chair also admitted that the compliance matrix included in Crucible's proposal was inaccurate where it stated that the proposal complied with section L.26.2.4. Tr. at 107-08; AR, Tab 9, Crucible Proposal, vol. 2, Past Performance Conformance Cross Reference Table, at 3.

³ There is no indication otherwise in the record that indicates that DOS reviewed the proposals for compliance with section L.26.2.4.

Another example pertains to the evaluation of GCJS's past performance, which relied upon subcontracts performed by some of GCJS's individual joint venture members. The Chair conceded that these subcontracts relied upon in the past performance evaluation did not demonstrate experience in deploying advisors or providing life and mission support. See Tr. at 153-60.

On the other hand, TEG asserts, and our review confirms, that its proposal complied with section L.26.2.4. AR, Tab 9, TEG Proposal, vol. 2, Past Performance at 20-43.

The DOS argues, in its post-hearing comments, that section L.26.2.4 of the RFP is not relevant to the actual evaluation of past performance because section M, which does not expressly incorporate the requirements stated in section L.26.2.4, governs the evaluation of past performance.⁴ In this regard, the DOS asserts that section M.9.3.1.(a) does not distinguish between the past performance of an offeror as a prime or as a subcontractor, so that all of this past performance can be attributed to the offeror as a whole. The agency also argues that the TEP reasonably assigned confidence ratings to the awardees, given that it reasonably found that the awardees' past performance references reflected their experience in "providing criminal justice related support services and associated support systems required under Section C." See e.g., Tr. at 42-43; Agency Post-Hearing Comments at 30; RFP § M.9.3.1.a.

A solicitation generally must be read as a whole and in a reasonable manner, giving effect to all its provisions. See CourtSmart Digital Sys., Inc., B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79 at 12.

As noted by the DOS, our decisions have recognized that section L provisions do not have to correspond to the evaluation criteria set forth in section M because section L generally only provides guidance to assist offerors in preparing and organizing their proposals. See e.g. University Research Co., LLC, B-294358.6, B-294358.7, Apr. 20, 2005, 2005 CPD ¶ 83 at 18. Here, however, not only are the requirements contained in section L.26.2.4 stated in mandatory terms, i.e., "shall," but section M.4 provides that offerors "shall" provide the information required by section L.

⁴ The agency argues in its post-hearing comments that the protester's argument regarding whether proposals complied with section L is untimely. However, the application of section L to the past performance evaluation was expressly raised by the protester in this protest as well as in TEG's previous protest of the past performance evaluation, which our Office sustained.

The agency's interpretation that the solicitation did not require the past performance evaluation to consider the information required by section L.26.2.4--that is, separate past performance references for the prime contractor and the principal subcontractors--nullifies and renders meaningless the unambiguous and mandatory language of section L.26.2.4, and is thus unreasonable. See Wackenhut Int'l, Inc., B-286193, Dec. 11, 2000, 2001 CPD ¶ 8 at 6-7 (offeror must comply with mandatory requirements stated in section L of an RFP, particularly where section M makes clear that compliance with section L requirements is part of the evaluation). Section M.9.3.1.a of the solicitation provides that the experience of both the offeror and its major subcontractors would be considered in the evaluation. Nothing in section M.9.3.1.a contradicts the instructions in section L.26.2.4 that require the offeror and the subcontractors provide separate references, which will be separately evaluated; and nothing in section M.9.3.1.a negates the section L.26.2.4 threshold requirement that the offeror provide experience that shows its ability as a prime contractor to hire and deploy advisors and to provide life and mission support.

Contracting agencies do not have the discretion to announce in the solicitation that they will use one evaluation plan, and then follow another. Once offerors are informed of the criteria against which the proposals will be evaluated, the agency must adhere to those criteria in evaluating proposals and making its award decision, or inform all offerors of any significant changes made in the evaluation scheme. Wackenhut Int'l, Inc., supra, at 8. Because the record evidences that the agency did not adhere to the announced evaluation scheme in evaluating past performance, we conclude that the agency's past performance evaluation of the proposals was unreasonable and improper.

The DOS nevertheless argues, in its post-hearing comments, that TEG has not been prejudiced by the agency's actions, even if the agency's evaluation of section M.9.3.1.a, the technical subfactor of the past performance factor, was unreasonable. The DOS contends here that the ratings of confidence assigned to the awardees' proposals would remain unchanged under the other two past performance subfactors, price and contractual history, and thus the overall confidence ratings for past performance would be unchanged. See Agency's Post-Hearing Comments at 17-22.

We disagree. DOS's argument is predicated on the assumption that even contracts that are not relevant under the solicitation's evaluation scheme could nevertheless be considered under the price and contractual history subfactors of the past performance factor. However, only relevant past performance should be considered in a past performance evaluation. See Federal Acquisition Regulation § 15.305(a)(2). We think a contractor's successful price and contractual history on irrelevant contracts is not material or pertinent to whether an offeror could successfully perform the agency's requirements here. Thus, the DOS has advanced no plausible basis to find that TEG was not prejudiced here. Under the circumstances, given that the DOS did not consider the mandatory section L

requirements in evaluating past performance, we find that there was a reasonable possibility that TEG was prejudiced by the past performance evaluation. See Multimax, Inc. et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 at 14.

We sustain the protest.

RECOMMENDATION

If the terms of the RFP's evaluation scheme overstate the agency's actual requirements--and the actions of the agency here, and in the prior case, suggest they may--we recommend that the agency amend the RFP, obtain revised proposals, and make a new source selection decision.⁵ If the agency's evaluation scheme accurately reflects its requirements, then the agency should reevaluate the proposals consistent with the RFP, 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 award to them. We also recommend that TEG be reimbursed the reasonable cost of filing

⁵ The protester also has challenged the propriety of the agency's decision to not obtain revised price proposals as part of the corrective action taken in response to our prior decision sustaining TEG's protest. TEG explains that because of the passage of time, the pricing was stale and updated prices should have been obtained. In this regard, TEG notes that it would have offered a lower price had revised pricing been solicited. TEG also notes that the DOS allowed revised price proposals as part of the corrective action it took in response to the protests filed in February 2011. We conclude that the DOS's determination to not again request revised proposals from any of the competitive range offerors was within the range of the agency's discretion in this area, even as we recognize that the DOS may have erroneously believed that requesting revised price proposals as part of its corrective action would have been improper, given that our prior decision did not find the price evaluation to be unreasonable. See AR at 32-33. We think that in exercising its broad discretion in implementing corrective action DOS could have reasonably chosen to obtain updated pricing, and that this is something the agency may want to consider in implementing its corrective action.

and pursuing the protest, 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