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Decision

Matter of: Delfasco, LLC

File: B-409514.3

Date: March 2, 2015

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DIGEST

1. Protest challenging the agency's evaluation of the relevancy of the awardee's past performance is sustained, where the agency's assessment of the past performance was inconsistent with the definitions in the solicitation and otherwise unsupported.
 2. Protest challenging the agency's conduct of discussions is sustained, where the agency misled the protester as to the weaknesses that remained in its proposal, so as to deprive it of an opportunity to address and resolve in its final proposal revision six remaining evaluated weaknesses.
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DECISION

Delfasco, LLC, of Greeneville, Tennessee, protests the award of a contract to GTI Systems, Inc., of Auburndale, Florida, under request for proposals (RFP) No. W52P1J-12-R-0147, issued by the Department of the Army, Army Contracting Command, for two types of practice bombs and a suspension lug (used for attaching bombs to fixed-wing and rotary aircraft). The protester challenges the agency's evaluation of the offerors' past performance and conduct of discussions.

We sustain the protest.

BACKGROUND

The RFP, set aside for small businesses, provided for award of a fixed-price, 5-year, indefinite-delivery/indefinite-quantity requirements contract for production of MK-76 Mod 5 25-pound Practice Bombs, BDU-33 D/B 25-pound Practice Bombs, and 25-pound suspension lugs. RFP at 1-2. Award was to be made to the offeror whose proposal represented the best value to the government considering the following evaluation factors: technical ability, including subfactors (of equal weight) for critical skills, processes and procedures, quality system, and testing and inspection; past performance, including subfactors (in descending order of importance) for quality program problems and on-time delivery; and price. RFP at 64. Technical ability was significantly more important than past performance and price, while past performance and price were equal. All non-price factors when combined were significantly more important than price. RFP at 65.

Delfasco (a previous producer of the two bombs and the lug), GTI, and a third offeror submitted timely proposals. Contracting Officer's Statement of Facts at 1. When the agency subsequently made award to GTI, Delfasco protested to this Office; we dismissed the protest after the agency indicated it would take corrective action. B-409514, B-409514.2, Mar. 20, 2014. As part of its corrective action, the agency conducted discussions with all three offerors. After the offerors submitted revised proposals, the Army conducted a further round of discussions, followed by a request for final proposal revisions (FPR).

FPRs were evaluated as follows:

Evaluation Factor/Subfactor	Delfasco	GTI
Overall Technical Ability	Acceptable	Good
Critical Skills, Processes	Acceptable	Good
Quality System	Acceptable	Good
Testing & Inspection	Acceptable	Good
Overall Past Performance	Somewhat Relevant/ No Confidence	Relevant/ Satisfactory Confidence
Quality Program Problems	Somewhat Relevant/ No Confidence	Relevant/ Satisfactory Confidence
On-Time Delivery	Relevant/ Limited Confidence	Relevant/ Satisfactory Confidence
Total Evaluated Price	\$(DELETED)	\$(DELETED)

Agency Report (AR), Tab 58, Source Selection Decision Document (SSDD) at 2-3. The source selection authority (SSA) concluded that GTI's proposal represented the best value, finding that GTI's superior past performance and "solidly outstanding" technical proposal warranted payment of the [DELETED] price premium. SSDD at 16-17. Award was made to GTI, and this protest followed.

DISCUSSION

We discuss below several shortcomings in the agency's conduct of this procurement.¹ As an initial matter, in a post-protest reevaluation, the agency conceded that several of the evaluation results considered by the source selection authority in selecting GTI were erroneous, and accordingly corrected them to the benefit of Delfasco. In addition, we find that the agency's evaluation of the relevance of GTI's past performance was inconsistent with the solicitation's ratings definitions. Finally, we find that discussions with the protester were not meaningful, where the agency misled Delfasco as to the weaknesses remaining in its proposal. On these grounds we sustain the protest against the award to GTI.

Reevaluation During Protest

In response to Delfasco's allegations that the agency conducted flawed past performance and technical evaluations, and as part of its final brief to this Office, the agency reevaluated the protester's proposal under the past performance factor and conducted a further review of GTI's and Delfasco's technical proposals. In this regard, under the past performance subfactor for quality program problems, and under the overall past performance factor, the agency increased Delfasco's relevancy rating from "somewhat relevant" to "relevant" and increased its confidence rating from "no confidence" to "limited confidence." Final Agency Comments, Exh. D, Decl. of Agency Product Quality Manager, at 1. After further review, the agency "removed" three strengths that it had assessed in GTI's proposal under the critical skills, processes and procedures subfactor of the technical ability factor. Final Agency Comments, Exh. C, Decl. of Agency Materials Engineer, at 3-5. The agency, however, argues that the above evaluation changes would not have altered the award decision. Final Agency Comments at 21.

Ordinarily, we give little weight to revised evaluations made during the heat of litigation. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. However, to the extent that this reevaluation is, effectively, a concession on the agency's part that the evaluation of Delfasco's past performance and GTI's technical proposal was not reasonable, we will recognize the agency's decision not to dispute protester's arguments. We address the issue of prejudice below, after first considering the reasonableness of the agency's evaluation of GTI's past performance and the conduct of discussions.

¹ Delfasco raised numerous challenges to the agency's evaluation and conduct of discussions; we have considered them all and address only those we find to have merit.

Past Performance

Delfasco challenges the agency's evaluation of the awardee's past performance as "relevant." According to the protester, given the several types of work required under the contemplated contract for which GTI lacks relevant experience, no more than a "somewhat relevant" past performance rating was warranted.

An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. SIMMEC Training Solutions, B-406819, Aug. 20, 2012, 2012 CPD ¶ 238 at 4. Where a protester challenges an agency's past performance evaluation, we will review the evaluation to determine if it was reasonable and consistent with the solicitation's evaluation criteria and with the procurement statutes and regulations, and to ensure that it is adequately documented. Falcon Envtl. Servs., Inc., B-402670, B-402670.2, July 6, 2010, 2010 CPD ¶ 160 at 7.

Here, the solicitation provided that:

The Past Performance information will be evaluated to determine the relevancy of the like or similar items in accordance with the descriptions below:

* * * * *

Relevant - Present/past performance effort involved similar scope and magnitude of effort and complexities this solicitation requires.

Somewhat Relevant - Present/past performance effort involved some of the scope and magnitude of effort and complexities this solicitation requires.

RFP § M.3.3. The solicitation further defined relevant past performance as follows:

Relevant is defined as having previously produced like or similar items. Like or similar items are defined as items that have been produced using similar manufacturing processes, including experience with casting, machining, forging, metal forming, welding, essential skills and unique techniques required to produce the MK-76 with MK-14, BDU-33 and the 25lb Suspension Lug.

RFP § L.3(f).

As indicated in its proposal, Delfasco has been a previous producer of the BDU-33 Practice Bomb, MK-76 Practice Bomb, and 25-pound suspension lug under both single and multi-year contacts. AR, Tab 20-02, Delfasco Proposal, Technical Subfactor 1, at 1; Tab 21-03; Delfasco Proposal, Past Performance Subfactor 2.2, at 10-11. Delfasco proposed using existing practices, technology, personnel, and equipment, all of which it has utilized to produce “millions of BDU-33 and MK-76 Practice bombs as well as thousands of the 25lb Suspension Lug.” AR, Tab 20-02, Delfasco Proposal, Technical Subfactor 1, at 1, 9. Based on its extensive prior experience, Delfasco’s proposal as reevaluated by the agency during the protest received a “relevant” rating under both past performance subfactors and also the overall past performance factor.

In contrast with Delfasco’s extensive experience producing BDU-33 Practice Bombs, MK-76 Practice Bombs, and 25-pound suspension lugs, the agency’s evaluation indicated that GTI had much more limited experience relevant to these items. As discussed below, the agency found the awardee lacked relevant past performance with respect to two necessary skills identified in the RFP, and only somewhat relevant experience with respect to another skill. Thus, the agency evaluated the relevance of GTI’s experience under the quality program problems subfactor of the past performance factor as follows:

The offeror submitted three parts for their relevant items, the Leaf Sight Rail Grabber Assembly, M385A1, and the BDU-48. The 76/33 Bomb Bodies are cast and the respective Lugs are forged. The offeror has not demonstrated they have any relevance [sic] with castings and forgings requirements including inspection and machining of castings and forgings. They did provide a matrix which demonstrates some of the scope of work relevant to the 76/33. This includes plating, MPI, hardness testing, and weld testing. They demonstrated somewhat relevant requirements to machining threads but not specific to class three threads which have a tighter tolerance. There are forming processes for the BDU-48 practice bomb fin which are relevant and welding which is very relevant to the 76/33. There are machining processes for turning which are relevant to the 76/33. Though the offeror does not appear to have relevant experience i[n] all aspects that will be required on this solicitation, their past performance does involve a similar scope and magnitude of effort and complexities this solicitation requires giving the offeror an overall relevancy rating of “Relevant[.]”

AR, Tab 53-01, GTI Past Performance Evaluation, Subfactor 1, at 5.

Delfasco asserts that given the evaluated limits on GTI’s experience as indicated in the agency’s evaluation, it was unreasonable for the agency to assign the same

“relevant” rating assigned Delfasco, which had extensive experience producing the BDU-33 Practice Bomb, MK-76 Practice Bomb, and 25-pound suspension lug being procured here. We agree.

Again, the solicitation defined “like or similar items,” for purposes of establishing that experience as relevant, as “including experience with casting, machining, forging, metal forming, welding, essential skills and unique techniques required to produce the MK-76 with MK-14, BDU-33 and the 25lb Suspension Lug.” RFP § L.3(f). Of those necessary skills, the agency noted that GTI had not demonstrated “any” relevant experience in two (casting and forging) and only “somewhat relevant” experience in the third (machining), such that GTI had only demonstrated “some” of the skills necessary to produce the bomb bodies. AR, Tab 53-01, GTI Past Performance Evaluation, Subfactor 1, at 5. In our view, the agency has not adequately explained, nor is it otherwise apparent, why GTI’s limited relevant experience warranted a “relevant” rating (“similar scope and magnitude of effort and complexities this solicitation requires”) rather than a lower rating. For these reasons, we sustain the protest.

Discussions

Delfasco also challenges the Army’s conduct of discussions, asserting that the agency either failed to advise it of evaluated weaknesses or misled it into believing that previously raised weaknesses had been satisfactorily resolved.

It is a fundamental principle of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in an offeror’s proposal that could reasonably be addressed so as to materially enhance the offeror’s potential for receiving award. Federal Acquisition Regulation § 15.306(d)(3); MT & Assocs., LLC, B-410066, Oct. 17, 2014, 2014 CPD ¶ 326 at 4; PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8; Spherix, Inc., B-294572, B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3 at 13. Here, we find that the discussions conducted with Delfasco were not meaningful.

As part of the initial round of discussions the agency conducted with offerors during the corrective action, the agency issued Delfasco 18 evaluation notices (ENs) identifying deficiencies and weaknesses, or requesting clarifications, with respect to its proposal. See AR, Tab 41-01b, Letter from Army to Delfasco, April 1, 2014, and Tab 41-01c, Attachment Containing Numbered ENs. The offerors, including Delfasco, then submitted revised proposals. In the ensuing round of discussions, the agency notified Delfasco that “[t]he following assessed weaknesses to your proposal remain: [ENs 1, 4, 5, 10, & 18],” and requested submission of FPRs. AR, Tab 45-01c, Letter from Agency to Delfasco, June 20, 2014. In its subsequent FPR, Delfasco addressed each of the five enumerated remaining weaknesses as identified by the agency.

As noted by the protester, the agency assessed five weaknesses in Delfasco's FPR under the quality system subfactor of the technical ability factor; the agency's call for FPRs, however, did not advise the protester that there were any weaknesses remaining under that subfactor. AR, Tab 57, Source Selection Evaluation Board Report at 12-14; see Tab 45-01c, Letter from Agency to Delfasco, June 20, 2014 (noting no remaining weaknesses under technical subfactor 2). In addition, the agency assessed a further weakness in Delfasco's FPR under the critical skills, processes and procedures subfactor of the technical ability factor notwithstanding the fact that it also was not included in the agency's list of remaining weaknesses. See AR, Tab 45-01c, Letter from Agency to Delfasco, June 20, 2014.

The Army asserts that several of these weaknesses had been previously identified in prior rounds of discussions. See AR at 5-9. As noted by the Army, an agency is not required to afford an offeror multiple opportunities to cure a weakness remaining in a proposal that was previously the subject of discussions. Portfolio Disposition Mgmt. Grp., LLC, B-293105.7, Nov. 12, 2004, 2004 CPD ¶ 232 at 2. It is axiomatic, however, that an agency's conduct of discussions must not be misleading. See, e.g., Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6. Where, as here, an agency provides an apparently exhaustive list of issues for an offeror to address in discussions, we will consider the conduct of discussions to be misleading and unreasonable where that list is incomplete. See Multimax, Inc., et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 at 13. Additionally, if an agency identifies concerns during a reevaluation of proposals that should have been raised had they been identified before discussions were held, the agency is required to reopen discussions in order to permit the offeror to address those concerns. Sentrillion Corp., B-406843.3 et al., Apr. 22, 2013, 2013 CPD ¶ 207 at 6. The agency's failure here to mention any of these six weaknesses in its list of remaining outstanding weaknesses effectively deprived the protester of the opportunity to address and resolve the weaknesses in its FPR.

The agency argues that Delfasco was not prejudiced by any inadequacies in discussions because there has been no showing that the protester would have furnished sufficient information to resolve the evaluated weaknesses. Where, as in this case, an agency fails in its duty to hold meaningful discussions and argues that the protester was not prejudiced as a result of that failure, we will not substitute speculation for discussions, and we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester; a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. Creative Info. Tech., Inc., B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 at 9. Here, Delfasco, as part of this protest, has proffered in general terms the information it would have furnished had it known of the agency's concerns. While there may be, as noted by the agency, less detail than the agency would expect in a full discussions response, we find the protester's response to be sufficient to show prejudice. In other words, resolving doubts in favor of the protester, we conclude that there was a reasonable

possibility that the protester could have resolved the weaknesses and improved its evaluation had discussions not been misleading. For these reasons, we sustain the protest.

Conclusion

Our Office will not sustain a protest absent a showing of competitive prejudice, *i.e.*, where the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award. Hi-Way Paving, Inc., B-410662, Jan. 21, 2015, 2015 CPD ¶ 50 at 9; Fintrac, Inc., B-311462.2, B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191 at 12. Here, as discussed, during its post-protest reevaluation, the agency increased Delfasco's past performance relevancy rating from "somewhat relevant" to "relevant" and increased its confidence rating from "no confidence" to "limited confidence," and also removed three strengths that it had assessed in GTI's proposal under the critical skills, processes and procedures subfactor of the technical ability factor. Although we do not generally give weight to such post-hoc reevaluations, we consider the agency's reevaluation here to effectively concede that its prior evaluation concerning these issues was erroneous. In addition, our Office has found that the agency's assessment of the relevancy of GTI's past performance as "relevant" was inconsistent with the definitions in the solicitation and otherwise unsupported, and that the agency also misled Delfasco during discussions so as to deprive it of an opportunity to address and resolve in its FPR six evaluated weaknesses in its technical ability proposal.

In light of the significant errors in the evaluation, as well the possibility for Delfasco to improve its evaluation through addressing the above six evaluated weaknesses through discussions in a new FPR, we think that the record shows that the protester was prejudiced by the agency's errors in conducting the procurement. While the agency continues to maintain that none of these errors prejudiced the protester because the agency would still find that GTI's proposal provides the best value, we give little weight to this assessment made in the heat of litigation. See Global Computer Enters., Inc.; Savantage Fin. Servs., Inc., B-404597 *et al.*, Mar. 9, 2011, 2011 CPD ¶ 69 at 18; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

RECOMMENDATION

We recommend that the Army conduct further, meaningful discussions with the offerors, and then afford them an opportunity to submit a revised proposal; the agency should then perform a new evaluation consistent with the terms of the RFP and this decision. In the event that the proposal submitted by GTI no longer represents the best value, its contract should be terminated for convenience and award made consistent with the new evaluation.

We also recommend that the agency reimburse Delfasco its costs associated with filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d) (2014). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. Id. at § 21.8(f).

The protest is sustained.

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General Counsel