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Decision

Matter of: Mission Essential Personnel, LLC

File: B-407474; B-407493

Date: January 7, 2013

Michael D. McGill, Esq., Michael F. Mason, Esq., and Brendan Lill, Esq., Hogan Lovells US LLP, for the protester.

W. Jay DeVecchio, Esq., Kevin C. Dwyer, Esq., and Charles L. Capito, Esq., Jenner & Block LLP, for L-3 STRATIS, an intervenor.

Debra J. Talley, Esq., and Leslie A. Nepper, Esq., Department of the Army, for the agency.

Scott H. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to engage in adequate discussions and misevaluated proposals under a task order competition is sustained where the record shows that (1) agency identified two concerns with protester's proposal which led to its "No Go" rating but these concerns were not brought to the protester's attention during discussions; and (2) that agency evaluated the current contract performance evaluation factor in a manner that was inconsistent with the terms of the underlying contracts' stated evaluation scheme.

DECISION

Mission Essential Personnel, LLC (MEP), of Columbus, Ohio, protests the issuance of two task orders to L-3 STRATIS, of Tampa, Florida, under task order request for proposals (RFP) Nos. 12-04 and 12-05, issued by the Department of the Army, to acquire intelligence support services in Afghanistan. MEP maintains that the agency unreasonably evaluated its proposals and failed to engage in adequate discussions.

We sustain the protests.

BACKGROUND

MEP, L-3, and a third concern, Six3 Systems, are holders of multiple award, indefinite-delivery, indefinite-quantity contracts for the agency's ongoing requirements for intelligence support services in Afghanistan under which the task orders in question were issued. The task order solicitations provided that they were governed by section 3.2 of the underlying contracts, and contemplate the issuance of task orders on a low-price, technically-acceptable basis, considering price and current contract performance. Agency Report (AR) (B-407474), exh. 03-01, at 1.¹ In terms of evaluating current contract performance, section 3.2 of the contracts provides for the assignment of ratings to the proposals of either "Go" (technically acceptable) or "No Go" (technically unacceptable). AR (B-407474), Tab 04-06, at 3.

For these acquisitions, the agency solicited proposals from all three of the contract holders to provide various labor categories of intelligence analysts for a base year and one option year. Under RFP 12-04, the agency received proposals from all three concerns, while under RFP 12-05, the agency received proposals from only the protester and L-3. In both acquisitions, the agency evaluated proposals, engaged in one round of discussions, and solicited and obtained revised proposals. After receiving and evaluating the revised proposals, the agency made a competitive range determination followed by a source selection decision.²

Under RFP 12-04, Six3 submitted the lowest price, followed by L-3 and MEP, respectively. Agency Request for Dismissal, B-407474 (Oct. 1, 2012), at 2. Under RFP 12-05, MEP submitted the lowest price followed by L-3. AR (B-407493), exhs. 04-05 and 05-06. The record shows that in both acquisitions³, the agency's competitive range consisted of only L-3, which was the only firm whose proposal received a "Go" rating under the current contract performance factor and which therefore was issued the delivery orders. In assigning MEP's proposal a "No Go"

¹ The agency submitted separate reports for each protest. The basic information in the reports is largely duplicative and we will cite to the documents in only one of the reports where it is duplicative.

² The record includes no explanation regarding why the agency made a competitive range determination before making its source selection decision because, after establishing the competitive range in each acquisition, the agency did not engage in further discussions, but simply made its award decision.

³ Under RFP 12-04, prices ranged from approximately \$24 million to approximately \$38 million. Agency Request for Dismissal, B-407474, exh. 1, at 2. Under RFP 12-05, prices ranged from approximately \$47 million to approximately \$50 million. AR (B-407493), exhs. 04-05 and 05-06. As a result, both of these procurements fall within our jurisdiction to hear protests related to the issuance of task orders valued in excess of \$10 million. 10 U.S.C. § 2304c (e)(1)(B).

rating, the agency identified three concerns: (1) turnover in the firm's program manager position, (2) delays in submitting invoices and (3) the adequacy of the firm's "fill rate" in providing personnel.⁴ AR (B-407474), exhs. 7, 11; AR (B-407493), exhs. 9, 10.

DISCUSSION

MEP takes issue with each of the agency's three evaluation concerns. At the outset we note that, as a general rule, our Office does not independently evaluate proposals; rather, we examine the record to ensure that the agency's evaluation was reasonable and in accordance with the terms of the solicitation evaluation criteria. Yang Enters., Inc.; Santa Barbara Applied Research, Inc., B-294605.4 et al., Apr. 1, 2005, 2005 CPD ¶ 65 at 5; Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 3, 5.

Program Manager Turnover and Invoicing Delays

MEP maintains that the agency unreasonably assigned weaknesses to its proposals for having turnover in its program manager position, and for delaying the submission of its invoices. According to the protester, these problems were the result of agency actions rather than its own deficient performance. For example, the protester maintains that the only reason there was turnover with its program manager was because the agency hired its original program manager and, thus, MEP had to engage in various interim and remedial actions to put another permanent hire in place. MEP also maintains that its delays in submitting invoices were caused by the inconsistent directions of the Army's contracting officers concerning how the invoices should be prepared. The protester also argues that, to the extent the agency had concerns in these two areas, the agency never discussed these concerns with the protester.

Despite the fact that these concerns are reflected in the contemporaneous record, the agency responds that these two areas were not the cause for its assignment of a "No Go" ratings to the protester's proposals. According to the agency, it assigned the "No Go" ratings to MEP's proposals solely because of MEP's allegedly low fill rates. The agency therefore maintains that, even if the protester is correct that these two concerns were improperly identified in the evaluation of MEP's proposals, this did not prejudice the protester because they were not the underlying reason for rating its proposals "No Go." The agency also contends that, since these concerns

⁴ Fill rate refers to the rate at which the contractor fills the positions that the agency has contracted for under other task orders. For example, if the agency issued a task order for 100 positions and the contractor only filled 90 of those positions, the contractor's "fill rate" would be 90 percent.

were not the underlying cause for the assignment of the “No Go” ratings, it was not required to discuss them with MEP.

As stated above, the record shows that, in fact, the agency identified three concerns during its evaluation--turnover in the program manager position, delays in submitting invoicing and MEP’s fill rate--and these three concerns together appear to have formed the underlying basis for the agency’s “No Go” rating. For both acquisitions, the agency’s competitive range determinations and source selection decision documents provided as follows:

MEP – Most categories were rated Above Average with performance in accordance with the PWS, with the exception of Program and staff management. The rating for this category for June was Average with a notation that the incumbent PM [program manager] resigned without notice. The rating for July was Below Average with a notation that MEP was now on its fourth in-country PM within a 3-month period which was impacting continuity. The ratings for August were mostly Average with the exception of promptness in submission of required deliverables, which was give[n] a rating of Unsatisfactory with the notation that MEP is six months late in submitting invoices and submitted Feb[.] through July 2012 invoices in one batch. The PWS, para[.] 3.0.8 requires submission of invoices within seven days of the end of a billing cycle. MEP has experienced difficulty with achieving the required 90% fill rate. MEP’s overall average fill rate for June was [deleted]%, July was [deleted]%, and August was [deleted]%. The latest report submitted by MEP shows that for Task Order 0002 and 0003, it has a [deletetd]% fill rate. For the remaining Task Orders the fill rates are: 0004 – [deleted]%, 0005 – [deleted]%, and 0006 – [deleted]%. Therefore, the current overall average fill rate for MEP is [deleted]%. While monthly rates continue to improve, MEP has not yet achieved the required 90% rate. MEP received a “No Go” on Current Contract Performance.

AR (B-407493), exh. 10, at 2.⁵

⁵ The narrative statements in both of the competitive range determinations and both of the source selection decision documents are identical, with the exception of the source selection decision document executed for RFP 12-05, which included the additional sentences stating: “The latest report submitted by MEP shows that for Task Order 0002 and 0003, it has a [deleted]% fill rate. For the remaining Task Orders the fill rates are: 0004 – [deleted]%, 0005 – [deleted]%, and 0006 – [deleted]%. Therefore, the current overall average fill rate for MEP is [deleted]%. ” See AR (B-407493), exh. 10, at 2. We quote the more fulsome statement above.

Thus, contrary to the agency's current position, the record shows that there were three concerns (rather than just one) that it identified in its "No Go" rating of MEP's proposals. Of the three concerns identified by the agency, turnover in the program manager position and delays in submitting invoices were the first and second reasons, respectively, that the agency identified as concerns, ahead of its concern relating to MEP's fill rate. Additionally, in concluding that the MEP proposals merited "No Go" ratings, the contemporaneous evaluation materials do not differentiate among the three reasons identified as the basis for the agency's assignment of the "No Go" rating, except to the extent that one of them--delays in invoicing--was assigned a rating of unsatisfactory. In our view, a fair reading of the contemporaneous evaluation was that it was a combination of the three concerns that resulted in the "No Go" ratings.

Where, as here, an agency proffers an explanation of its evaluation during the heat of litigation that is not borne out by the contemporaneous record, we give little weight to the later explanation. CIGNA Gov't Serv's., LLC, B-401062.2, B-401062.3, May 6, 2009, 2010 CPD ¶ 283 at 6; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. We therefore find that, contrary to the agency's current explanation, the contemporaneous record appears to show that the agency identified three apparently equal concerns that provided the underlying basis for rating the MEP proposal "No Go."

In light of our conclusion above, we also find that, to the extent that the agency identified program manager turnover and delays in invoicing as weaknesses or deficiencies in MEP's performance on previous task orders, it was required to raise those concerns during the discussions the agency chose to conduct. In this connection, although the regulations concerning discussions under Federal Acquisition Regulation (FAR) part 15 do not, as a general rule, govern task and delivery order competitions conducted under FAR part 16, Hurricane Consulting, Inc., B-404619 et al., Mar. 17, 2011, 2011 CPD ¶ 70 at 6, our Office nonetheless will review task order competitions to ensure that the competition is conducted in accordance with the solicitation and applicable procurement laws and regulations. Imagine One Tech. & Mgmt., Ltd., B-401503.4, Aug. 13, 2010, 2010 CPD ¶ 227 at 7. While FAR § 16.505 does not establish specific requirements for discussions in task order competitions, exchanges in that context, like other aspects of such a procurement, must be fair and not misleading. CGI Fed. Inc., B-403570 et al., Nov. 5, 2010, 2011 CPD ¶ 32 at 9. Here, we do not regard the discussions as fair because the record shows that the agency identified two weaknesses or deficiencies that appear to have formed the underlying basis for its assignment of a "No Go" rating to the MEP proposal, but those weaknesses or deficiencies were never brought to MEP's attention.

In view of the foregoing considerations, we sustain this aspect of MEP's protests.

Fill Rate Evaluation

With respect to the agency's finding that MEP's "fill rate" did not meet the "required 90-percent fill rate,"⁶ the protester maintains that the agency's evaluation is not in accordance with the solicitations or the terms of the underlying contract. In this connection, the record shows that the agency only looked at MEP's (and the other contractors') fill rates during June, July, and August, 2012, for both solicitations (and during September, as well, for RFP 12-05).⁷ The protester maintains that this was inconsistent with the terms of the contracts' task order evaluation scheme, which the protester contends requires that the agency look at the contractors' performance over the entire contract performance period to date. MEP contends that, although L-3's fill rate for the later part of the period considered was slightly higher than its fill rate during this same time ([deleted] percent for L-3 versus [deleted] percent for MEP), had the agency examined the contractors' fill rates for the entire contract period of performance, it would have found that MEP's fill rate was better overall than L-3's. Thus, MEP contends that the assignment of a "No Go" rating was unreasonable and inconsistent with the contracts' task order evaluation scheme.

The agency maintains that it is not required under the terms of the underlying contracts to consider any particular period of performance. The agency argues that, inasmuch as the evaluation factor is "current contract performance," it was reasonable for the agency to focus on the contractors' most recent performance. The agency further maintains that, although the difference between L-3's and MEP's fill rates for this period is not large, nonetheless, it provides a reasonable basis to differentiate between the two proposals.

We agree with the protester's interpretation of the terms of the underlying contracts. The definitions used for the "Go" and "No Go" ratings included in the contracts' task order evaluation scheme clearly contemplate assignment of the ratings based on an examination of the contractors' performance over the life of the contract, and not

⁶ The 90-percent fill rate "requirement" is not stated in the contract, but was specifically mentioned during discussions during the task order competitions. See e.g., AR, (B-407493), exh. 04-03, Discussions Letter to MEP. The agency reports that the contract actually requires a 100-percent fill rate, which the agency relaxed to 90 percent. AR (B-407493) at 3.

⁷ As noted, the record shows that the agency expressly considered MEP's and L-3's fill rates for September 2012 as well as June, July, and August 2012 in its competitive range determination and source selection decision document for RFP 12-05. AR (B-407493), exhs. 9 and 10.

simply during some unspecified recent interval of contract performance. Specifically, the definitions provide as follows:

GO: Very little or no doubt exists that the Contractor will successfully perform the required effort and meet or exceed the PWS requirements. Since the base contract award, the Contractor has been able to mobilize personnel into the theater of operations or handle surge and simultaneous operations. Current customers and contract officials have found the Contractor to have no slips in schedules, for both performance and deliverables. Current customers and contract officials have found the Contractor consistently responsive and extremely easy to work with and have, in the past, responded proactively to problems and their resolutions.

NO GO: There is significant doubt that the Contractor will successfully perform the required effort in accordance with the PWS. Since the base contract award, the Contractor has been unable to mobilize personnel into the theater of operations or handle surge and simultaneous operations. Current customers and contract officials found the Contractor to have numerous slips in schedules, for both performance and deliverables. Current customers and contract officials found the Contractor to be non-responsive and difficult to work with regarding problems and their resolutions.

AR (B-407474) Tab 04-06, at 3 (emphasis supplied).

We find that the contracts' use of the phrase "since the base contract award" requires that the agency's evaluation of current performance consider the contractors' performance during that interval, and not simply during some unspecified shorter interval (for example, 3 months), as claimed by the agency. Since the agency's evaluation here considered the contractors' performance during only the 3-month interval immediately preceding the issuance of the task orders, that evaluation was improper because it was not consistent with the terms of the underlying contracts. We therefore sustain this aspect of MEP's protests.

RECOMMENDATION

We recommend that the agency reevaluate proposals, conduct discussions and obtain revised proposals if deemed appropriate, and make a new source selection decision to the extent practicable.⁸ We also recommend that the agency reimburse MEP the costs associated with filing and pursuing its protest, including reasonable

⁸ Under RFP 12-05, the agency overrode the Competition in Contracting Act (CICA) automatic stay of contract performance during the protest for "urgent and
(continued...)

attorneys' fees. 4 C.F.R. § 21.8(d) (2012). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protests are sustained.

Susan A. Poling
General Counsel

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compelling" reasons. For that solicitation, the agency should only take corrective action to the extent practicable. In this connection when an agency overrides the CICA stay based upon a written finding of urgent and compelling circumstances, CICA permits our Office to consider all circumstances--including cost and disruption to the government--in fashioning the appropriate remedy under a sustained protest. See 31 U.S.C. §§ 3554(b)(1), (2); see also Dept. of the Navy--Modification of Remedy, B-274944.4, July 15, 1997, 97-2 CPD ¶ 16 at 3 n.2.