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Decision

Matter of: BAE Systems Technology Solutions and Services, Inc.

File: B-405664; B-405664.2

Date: December 12, 2011

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DIGEST

Agency's evaluation and selection of the awardee's higher-rated, higher-priced proposal for award was not reasonably based where the agency failed to adequately consider the terms of a key feature of the awardee's proposal and the effect that the terms of the key feature may have on the extent of the awardee's commitment to perform the tasks described, and failed to reasonably evaluate the protester's proposal under the solicitation's experience factor.

DECISION

BAE Systems Technology Solutions and Services, Inc., of Rockville, Maryland, protests the award of a contract to L-3 Communications Vertex Aerospace, LLC, of Madison, Mississippi, under request for proposals (RFP) No. N00019-10-R-0069, issued by the Department of the Navy, Naval Air Systems Command, for contractor logistics support (CLS) of certain trainer aircraft at multiple locations. BAE argues that the agency's evaluation of proposals and selection of L-3's proposal for award were unreasonable.

We sustain the protest.

BACKGROUND

The RFP provided for the award of a hybrid fixed-price, cost-plus-fixed-fee, and cost-reimbursement contract, for a base period of 60 days with 18 three-month option periods. RFP at 17, 112. The contractor will be required to provide maintenance and logistics support for Navy T-34, T-44, and T-6 trainer aircraft assigned to the Chief of Naval Air Training Command (CNATRA). RFP, Attach. 1, Performance Work Statement (PWS), at 3. The solicitation specified that award would be made to the offeror whose proposal was determined to represent the best value to the government, considering the following four evaluation factors: (1) management and maintenance approach, (2) past performance, (3) experience, and (4) price. RFP at 116. The solicitation informed offerors that, in determining which proposal represented the best value, the management and maintenance approach and past performance factors would be considered equal in importance, and that each of those factors was more important than the experience factor. The solicitation added that the results of the evaluation under the experience factor would be considered more important than price, and that the non-price factors combined would be considered significantly more important than price. RFP at 116.

The agency received proposals from three offerors by the solicitation's closing date. Agency Report (AR), Tab 9, Source Selection Evaluation Board (SSEB) Final Proposal Evaluation Report, at 7. The proposals were evaluated, and the three proposals received were included in the competitive range. Discussions were conducted, and final proposal revisions were received and evaluated. The proposals of BAE and L-3 were evaluated as follows:¹

	BAE	L-3
Management and Maintenance Approach	Satisfactory/ Low Risk	Highly Satisfactory/ Low Risk
Past Performance	Low Risk	Very Low Risk
Experience	Moderate Risk	Very Low Risk
Price	\$397,385,618	\$452,021,399

¹ The solicitation informed offerors that under the management and maintenance approach factor, their proposals would receive adjectival ratings of "outstanding," "highly satisfactory," "satisfactory," "marginal," or "unsatisfactory," and proposal risk ratings of "low," "medium," or "high." RFP at 117, 119. The solicitation added that under the past performance and experience evaluation factors, proposals would receive performance risk ratings of "very low," "low," "moderate," "high," "very high," or "unknown," with the "unknown" rating applying to only the past performance factor. Id. at 117, 120.

AR, Tab 9, SSEB Final Report, at 108. The source selection authority (SSA) determined that L-3's proposal represented the best value to the government, and selected L-3's proposal for award. AR, Tab 13, Source Selection Memorandum, at 1.

Specifically, the SSA identified two factors that merited selection of L-3's higher-priced, higher-rated proposal over BAE's lower-priced, lower-rated proposal: (1) L-3's offer to provide, at no cost to the government, a specific feature referred to in L-3's proposal as a [DELETED]; and (2) a combination of L-3's evaluated advantage over BAE under the past performance and experience factors, and L-3's proposed access to [DELETED] for the aircraft. AR, Tab 13, Source Selection Memorandum, at 2-3. The SSA stated that the first factor was "in and of itself worth more than" L-3's \$55 million higher price; the SSA also stated that the second factor was "in and of itself a predictor of future performance that more than merits" the higher price of L-3's proposal. *Id.*

After requesting and receiving a debriefing, BAE filed this protest.

DISCUSSION

The protester raises a number of arguments challenging the propriety of the agency's evaluation of proposals under the management and maintenance approach, past performance, and experience evaluation factors. The protester first asserts that the agency's evaluation of L-3's proposal under the management and maintenance approach factor was unreasonable because the agency erred with regard to its evaluation and consideration of L-3's proposed [DELETED]. BAE contends here that L-3's proposal is, at best, uncertain with regard to what is actually being offered regarding the [DELETED]. Protester's Comments at 4-6, 12-17; Protester's Supp. Comments at 1-3, 6-8; AR, Tab 13, Source Selection Memorandum, at 2. The protester also argues that the agency's evaluation of BAE's proposal under the experience factor was unreasonable, in that the agency failed to consider the experience of BAE's personnel.

Where a protester challenges an agency's evaluation of proposals and the award decision, we will review the evaluation and award decision to determine whether they were reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. *Carothers Construction, Inc.*, B-403382, Oct. 28, 2010, 2010 CPD ¶ 268 at 6.

Evaluation of L-3's [DELETED] Clause

As mentioned generally above, BAE argues that the Navy's evaluation of L-3's proposal under the management and maintenance approach factor was unreasonable because the agency failed to "recognize or consider the inherent uncertainty embodied by the language in [DELETED] clause," and because of this, failed "to reasonably assess the nature of precisely what L-3 was proposing."

Protester's Comments at 14 (emphasis deleted); Protester's Supp. Comments at 6. The protester argues that the agency's errors here are particularly troublesome given the SSA's specific determination that L-3's [DELETED] feature, which the SSA believed would provide the agency with [DELETED], was "in and of itself worth more than the additional cost" of \$55 million as compared to BAE's proposed cost/price. Protester's Comments at 14; Protester's Supp. Comments at 6. We agree with BAE.

Before turning to the resolution of BAE's complaints, additional background on the evolution and evaluation of L-3's [DELETED] clause is necessary. L-3's initial proposal included a section describing L-3's [DELETED] approach. AR, L-3 Proposal, Vol. II, at 1-2. L-3's proposal explained the approach as follows:

[DELETED]

Id. L-3's proposal added that "[t]he manpower cost associated with this activity is our investment in program success, funded entirely by L-3, and is not included in our Total Evaluated Price." Id. at 2. L-3's proposal further specified that the [DELETED] "will consist of [DELETED]," and included a staffing matrix providing job titles, skill levels, and shift distribution for the [DELETED] personnel. Id. at 11, 114; L-3 Proposal, Annex B, Attach. 1.

During discussions, the agency asked that L-3 provide further explanation regarding its proposed [DELETED] approach, requesting, among other things, that L-3 clarify what it meant by its reference to the [DELETED] performance of "[DELETED]." AR, Tab 8, Evaluation Notice L3-M-001 (Apr. 21, 2011), at 1. The agency further requested that L-3 provide a clause for inclusion in its contract, should L-3 receive the award, that "incorporates the Offeror's proposed [DELETED] initiative." Id.

L-3 responded by first explaining that its [DELETED] would include its "[DELETED] at zero cost to the Government." AR, Tab 8, Evaluation Notice L3-M-001 (Apr. 21, 2011), at 1. L-3 added that it would use the "[DELETED]." Id. L-3 further explained that "[t]he staffing and [DELETED]" was based upon its experience, and that its "[DELETED]." Id. at 2. With regard to a clause to be included in any eventual contract, L-3 noted that its initial proposal had included such a clause. Id. at 3. L-3's response, however, restated the terms of the clause, as follows:

The Aircraft CLS contractor shall provide, at no additional cost to the Government, a [DELETED] as presented in Proposal Volume 1: Executive Summary, Volume 2: Management and Maintenance Approach, and Annex B. This [DELETED] shall consist of [DELETED].

Id. In a subsequent written discussion question, the agency advised L-3 that it did "not intend to incorporate the successful Offeror's proposal into the contract award," and requested that L-3 revise its [DELETED] clause to "state the effort to be

performed by the [DELETED].” AR, Tab 8, Evaluation Notice L3-M-001 R1 (June 30, 2011), at 1.

L-3 responded to this request by providing the following revised [DELETED] clause, which states, in relevant part, that:

The Aircraft CLS contractor shall provide, at no additional cost to the Government, a [DELETED].² The objective of the [DELETED] will be to [DELETED]. The Aircraft CLS contractor’s exclusive judgment shall apply in the determination of the completion of this objective. Upon significant progress toward or completion of the [DELETED] objective, the Aircraft CLS contract may reduce or dismantle the [DELETED].

AR, Tab 8, Evaluation Notice L3-M-001 R1 (June 30, 2011), at 2, 4.

The source selection evaluation board (SSEB), in evaluating L-3’s proposal as “highly satisfactory” with “low” proposal risk under the management and maintenance approach factor, specifically pointed to L-3’s [DELETED] as a “key element” of L-3’s approach and a “significant strength.” AR, Tab 9, SSEB Report, at 14, 16. In doing so, the SSEB noted that “[t]he [DELETED] will perform work within the [DELETED] of the contract that is separate and distinct from the work to be performed to meet the solicitation requirements,” and identified and discussed the “many significant benefits to the Government that stem from this work.” *Id.* at 17. The SSEB also pointed out that L-3 had “further demonstrated their commitment” by providing a clause to be included in the contract “identifying the work to be performed at no additional cost to the Government.” *Id.*

The SSEB’s views regarding the benefits associated with L-3’s proposed [DELETED], in addition to being set forth in its report, were briefed to the source selection advisory council (SSAC). In this regard, the SSAC briefing noted, among other things, that the [DELETED]. AR, Tab 10, SSEB Final Proposal Briefing to the SSAC, at 18.

The SSAC’s proposal analysis report (PAR) was consistent with the SSEB’s findings, noting that L-3’s “distinct advantage over BAE” as evaluated under the management and maintenance approach factor “stems from providing a [DELETED] at no additional cost to the Government, which in and of itself provides a significant advantage over the combination of any of the other Offerors’ significant strengths.” AR, Tab 11, SSAC PAR, at 6; *see* Tab 12, SSAC Final Proposal Evaluation Briefing to the SSA, at 8. The SSAC repeated many of the findings set forth in the SSEB report

² L-3’s referenced figure H-4-1 is a manning chart depicting the locations at which the [DELETED] services will be provided (for example, Naval Air Station Corpus Christi), the [DELETED], and the [DELETED]. The manning chart [DELETED].

regarding L-3's [DELETED], commenting for example that "[t]he [DELETED] will perform work within the [DELETED] of the contract that is separate and distinct from the work to be performed to meet the solicitation requirements," and that "[DELETED] results in significant benefits to the Government." Id. at 6.

In finding that L-3's proposal represented the best value to the government, the SSA, in his two and one-half page source selection statement, noted that L-3's proposal was higher rated than BAE's under every factor except price, where L-3's proposal was "approximately 13.7% higher than BAE." AR, Tab 13, Source Selection Memorandum, at 2. The SSA next discussed the "key points" that, in his view, "merit[ed] the additional cost" associated with L-3's proposal. First among these was L-3's offer to provide the [DELETED] at no cost to the agency. The SSA found the [DELETED] "to be an exceptional feature" of L-3's proposal that was "in and of itself worth more than the additional cost." Id.

As an initial matter, we agree with BAE that the [DELETED] clause contained a significant amount of uncertainty. First, the clause ultimately proposed for inclusion in the contract appears to permit L-3 to unilaterally decide when the [DELETED] objective is complete, and thus, how much effort the awardee must provide. In this regard, L-3's final [DELETED] clause, submitted in response to the agency's request that the clause "state the effort to be performed by the [DELETED]," provided in part as follows:

The objective of the [DELETED]. The Aircraft CLS contractor's exclusive judgment shall apply in the determination of the completion of this objective. Upon significant progress toward or completion of the [DELETED] objective, the Aircraft CLS contract may reduce or dismantle the [DELETED].

AR, Tab 8, Evaluation Notice L3-M-001 R1 (June 30, 2011), at 2, 4.

Although the first sentence sets forth generally the [DELETED] objective, that is, to [DELETED], the second sentence vests in L-3 the exclusive right to determine whether the [DELETED] has in fact completed its objective. Additionally, the last sentence of the above-quoted passage gives L-3 the exclusive right to reduce its effort and/or completely dismantle the [DELETED] at any time the awardee concludes that the [DELETED] has accomplished--or made "significant progress toward"--its "objective." In sum, the [DELETED] clause, as provided by L-3 in its proposal, appears to allow L-3 to exclusively determine how long the [DELETED] will exist based upon the L-3's exclusive judgment as to whether the [DELETED] objective has been accomplished.

Second, we agree with BAE that the record suggests that the agency may not have recognized the significant uncertainty in the clause. In this regard, neither the evaluation record nor the source selection decision includes any recognition, discussion, or consideration, of the risk that L-3's [DELETED] may be reduced or

dismantled based solely on a determination made by L-3. Moreover, under the terms of the clause, L-3 retains for itself “exclusive judgment” about whether it has accomplished—or made significant progress toward—its objective; the clause appears to provide no recourse for the Navy should it disagree. Given this failure to acknowledge that there was any risk that the [DELETED] may not accomplish the agency’s understanding of the [DELETED] objective to the agency’s satisfaction, and that the agency may have no recourse should this occur, we cannot find this aspect of the agency’s evaluation to be reasonable.

Third, we agree with BAE that the clause ultimately proffered by L-3 does not commit the company to provide any specific level of staffing to support the [DELETED] objective. In this regard, the record reflects that, initially, L-3’s proposal was relatively definitive as to the number of personnel that would comprise its [DELETED], stating in the management and maintenance approach volume of its proposal, and in response to a discussion question, that its [DELETED] would be comprised of “[DELETED] personnel.” AR, L-3 Proposal, Vol. II, at 1-2; AR, Tab 8, Evaluation Notice L3-M-001 (Apr. 21, 2011). However, L-3 was less definitive in both the initial and final versions of its proposed [DELETED] clause regarding the number of personnel that would comprise its [DELETED]. Specifically, L-3 stated that the [DELETED] will consist of “a maximum of [DELETED],” but states no minimum. AR, Tab 8, Evaluation Notice L3-M-001 (Apr. 21, 2011) at 1; Tab 8, Evaluation Notice L3-M-001 R1 (June 30, 2011) at 2, 4.

In evaluating L-3’s proposal, the agency apparently recognized the different verbiage used by L-3 in describing the number of [DELETED] that would comprise its [DELETED], but never reconciled the differences. For example, the SSEB Report notes in one section that L-3’s [DELETED] will be comprised of “up to [DELETED],” and in another section comments that L-3’s [DELETED] will be comprised of “an additional [DELETED] personnel.” AR, Tab 9, SSEB Report, at 14, 93. However, there is no discussion of L-3’s differing representations in the agency’s evaluation or source selection documentation. Nor does the record show any meaningful recognition that, as argued by the protester, the qualification by L-3 in its [DELETED] clause that the [DELETED] would be comprised of “a maximum” of [DELETED] (with no minimum) may result in a [DELETED] comprised of less or substantially less [DELETED].

Finally, we note that despite the fact that BAE pursued these issues in great detail during this protest, the agency has largely ignored this aspect of BAE’s protest. That is, the agency has not meaningfully responded to the protester’s argument that L-3’s [DELETED] clause poses risk given that it will be within L-3’s “exclusive judgment” to determine when the [DELETED] “objective” has been completed and when the [DELETED] will be dismantled. Nor has the agency meaningfully responded to the protester’s argument that the clause renders uncertain the number of [DELETED] that will be associated with the [DELETED]. Rather, the agency argues in response that the second paragraph of the clause clearly sets forth the tasks the [DELETED]

will perform, and that because of this, the clause “is enforceable and is not illusory.”³ Agency Supp. Report at 3.

Although we agree with the agency that the second paragraph of L-3’s final [DELETED] clause clearly describes the tasks the [DELETED] is proposed to perform, the agency has not explained why this paragraph of the clause resolves the concerns raised by the protester. That is, the agency has not meaningfully responded to the protester’s argument that, regardless of how clearly stated the objective may be, the language in the [DELETED] clause grants L-3 the exclusive right to determine the [DELETED], and to determine whether the [DELETED] has accomplished, or made substantial progress towards accomplishing, the objective. Given these concerns, and the agency’s failure during the course of this protest to meaningfully respond to the protester’s arguments in this regard or provide any reasonable explanation regarding the L-3’s [DELETED] clause, we cannot find this aspect of the agency’s evaluation of L-3’s proposal to be reasonable.

Evaluation of BAE’s proposal under the Experience Factor

The protester also challenges the propriety of the agency’s evaluation of BAE’s proposal under the experience factor as posing “moderate risk.” The protester specifically argues that the agency’s assessment of BAE’s proposal as having a “significant weakness” based upon the agency’s determination that BAE lacked experience with the Naval Aviation Maintenance Program (NAMP) process was not reasonably based. We agree.

In this regard, the SSEB specifically found that BAE’s “lack of experience with NAMP processes poses significant risk to successful contract performance.” AR, Tab 9, SSEB Report, at 66; Tab 10, SSEB Final Proposal Briefing to SSAC, at 74. This “significant weakness” was also noted by the SSAC as its “main concern” with BAE’s proposal as evaluated under the experience factor, and was specifically referenced by the SSA in determining that L-3’s proposal represented the best value to the agency. AR, Tab 11, SSAC PAR, at 8; Tab 13, Source Selection Memorandum, at 2. In challenging the agency’s determination here, the protester points out that its final proposal revision (FPR) included, among other things, a table depicting certain of its personnel by title, location during performance of the contract, years of NAMP experience, and years of experience with the specific aircraft that are the subject of

³ The second paragraph of L-3’s final [DELETED] clause provides as follows:

The [DELETED] will perform necessary [DELETED]. The [DELETED] will accomplish all work in accordance with established Government and Original Equipment Manufacturer (OEM) practices, guidelines, and instructions. The [DELETED] focus will be on [DELETED].

AR, Tab 8, Evaluation Notice L3-M-001 R1 (June 30, 2011) at 2, 4.

this RFP. Protest at 33; Protester's Comments at 29; Protester's Supp. Comments at 20; AR, Tab 20, BAE FPR, at 4-25f. The protester points out, and the table included in BAE's final proposal reflects, that BAE's personnel have a total of [DELETED] years of NAMP experience. Id.

The agency responds by pointing out that "[t]he solicitation does not have any reference to the evaluation of personnel for the Experience factor," and concludes without further explanation that "personnel experience is not part of the Experience factor evaluation and therefore cannot be considered." Agency Supp. Report at 17; AR at 43.

As an initial matter, we cannot find, nor has the agency identified, any discussion or mention of the NAMP experience of BAE personnel in the contemporaneous record. As such, it is unclear whether the agency was aware of the NAMP experience of BAE's personnel but elected not to consider it, or whether the section of BAE's FPR setting forth the NAMP experience of its personnel was simply overlooked.

Additionally, while the agency is correct that the solicitation does not expressly provide that "personnel experience" will be considered under the experience factor, the solicitation does not expressly prohibit the consideration of personnel experience under the experience factor. Contrary to the agency's position, it is generally proper for an agency to consider the experience of the offeror's personnel in evaluating a firm's experience. See Divakar Technologies, Inc., B-402026, Dec. 2, 2009, 2009 CPD ¶ 247 at 5. As such, we fail to see why the agency did not consider, in any manner at all, that BAE's personnel had a total of [DELETED] years of experience with NAMP processes. Accordingly, we think the agency's evaluation of BAE's proposal under the experience factor was unreasonable.

CONCLUSION AND RECOMMENDATION

As set forth above, it is clear from the record that the [DELETED] feature of L-3's proposal was held in very high regard by the agency. L-3's [DELETED] feature played a pivotal role in the SSA's determination that L-3's proposal represented the best value to the agency, as evidenced by the SSA's conclusion that the "benefit from the [DELETED] offer is in and of itself worth more than the additional cost" of \$55 million as compared to BAE's proposal. AR, Tab 13, Source Selection Memorandum, at 2. It is also clear from the record that BAE's perceived lack of NAMP experience led in significant part to the agency's evaluation of BAE's proposal as posing "moderate risk" under the experience factor. This perceived lack of experience was specifically mentioned by the SSA in his determination that L-3's higher-rated, higher-priced proposal represented the best value to the agency. On this record, we sustain the protest.

Accordingly, we recommend that the Navy reopen discussions⁴ and request and review revised proposals, evaluate those submissions consistent with the terms of the solicitation, and make a new source selection decision.⁵ In the event a proposal other than L-3's is found to represent the best value to the government, L-3's contract should be terminated and the contract awarded to the successful offeror in accordance with the terms of the RFP. We also recommend that the agency reimburse BAE for its costs of filing and pursuing its protest challenging the award to L-3, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2011). BAE's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the Navy within 60 days of receiving this decision. 4 C.F.R § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel

⁴ Although discussions were held with all of the offerors that had submitted proposals, including L-3, the matters addressed in this decision regarding the uncertainties associated with L-3's [DELETED] clause were not raised with L-3 during discussions because of the agency's apparent failure to consider them. In light of this, and the importance of the [DELETED] feature of L-3's proposal in the agency's source selection decision, the record suggests that it would not be appropriate to simply reevaluate proposals, because L-3 was effectively deprived of meaningful discussions regarding the uncertainties raised by its [DELETED] clause. See Federal Acquisition Regulation § 15.306(d)(3); Powersolv, Inc., B-402534, B-402534.2, June 1, 2010, 2010 CPD ¶ 206 at 8 (discussions must be meaningful, that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror's potential for receiving the award).

⁵ Because we sustain BAE's protest and recommend the reopening of discussions, we need not resolve BAE's other allegations regarding the evaluation of its and L-3's proposal and the selection of L-3's proposal for award.