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Decision

Matter of: Orion Technology, Inc.; Chenega Integrated Mission Support, LLC

File: B-406769; B-406769.2; B-406769.5

Date: August 22, 2012

Douglas L. Patin, Esq., and Aron Beezley, Esq., Bradley Arant Boult Cummings LLP, for Orion Technology, Inc.; and, Kenneth A. Martin, Esq., The Martin Law Firm, P.L.L.C., and Kevin P. Connelly, Esq., and Kelly E. Buroker, Esq., Vedder Price P.C., for Chenega Integrated Mission Systems, LLC, the protesters.

J. Dale Gipson, Esq., Lanier Ford Shaver & Payne PC, for Advanced Technology Logistics, Inc., an intervenor.

Debra J. Talley, Esq., and David C. Sabine, 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 is sustained where record shows that agency mechanically and unequally applied undisclosed staffing estimates in evaluating the offerors' proposed staffing plans to determine whether proposals were acceptable or unacceptable.

DECISION

Orion Technology, Inc., of Huntsville, Alabama, and Chenega Integrated Mission Support, LLC, of Alexandria, Virginia, protest the award of a contract to Advanced Technology Logistics, Inc. (ATL), of Newnan, Georgia, under request for proposals (RFP) No. W9124P-12-R-A001, issued by the Department of the Army for installation support services at the U.S. Army Garrison—Redstone, Alabama.

We sustain the protests.

BACKGROUND

The RFP contemplates the award of a combination fixed-price, time and materials contract for a base year with four 1-year options to provide a wide variety of installation support services grouped into broad categories to be managed by three of the installation's directorates: the directorate of public works (DPW), the

directorate of logistics (DOL) and the directorate of human resources (DHR). The issues in these protests principally involve the requirements relating to the DPW area of contract performance.

Offerors were advised that the agency would award a contract to the firm submitting the lowest-priced technically-acceptable proposal, and that technical acceptability would be evaluated considering technical/management factors and past performance. The technical suitability factor had two subfactors: technical approach and resources. The management capability factor had four subfactors: management structure and plan, experience, and quality control plan; transition phase-in and property control; human resources management; and contract administration. RFP at 382.

The RFP advised that the agency would rate each subfactor as either acceptable or unacceptable. In so doing the proposals would be evaluated for “adequacy of response” and “feasibility of approach” with regard to each subfactor. In order to be acceptable for a particular factor or subfactor, a proposal had to clearly meet the minimum requirements of the solicitation. Proposals which did not clearly meet these minimum requirements would be deemed unacceptable. RFP at 383.

For price evaluation purposes, the RFP advised that, for the fixed-price line items, the agency would calculate the sum of the offerors’ proposed prices. For the time and materials line items, firms were instructed to provide fully-loaded hourly labor rates for all proposed labor categories; the RFP advised that the agency would multiply the loaded labor rates by an estimated number of hours for each labor category. The RFP also advised that the agency would multiply any material handling charges by the estimated direct cost for materials. The total fixed-price amount would then be added to the estimated time and materials amount to arrive at a total estimated price for evaluation purposes. Id.

The agency received seven proposals, including those of the protesters and the awardee, in response to the RFP. The agency evaluated proposals, engaged in discussions, and solicited and obtained final proposal revisions (FPR). After evaluating FPRs, the agency found the Orion and Chenega proposals technically unacceptable. Specifically, the agency assigned both proposals a rating of unacceptable under the resources subfactor of the technical suitability factor for failing to offer adequate staffing, largely in the [deleted] area of performance.¹

¹ The agency also noted a deficiency in the Orion proposal for failing to include a comprehensive list of the supplies that would be used in connection with performance of the contract in each functional area. Orion Agency Report (OAR), exh. P, encl. 2, Technical Approach, Resources, at 1. Orion has protested this evaluation and claims that it did not receive meaningful discussions in this area. We do not address this area since we otherwise sustain Orion’s protest and

(continued...)

Thus, although both protesters had evaluated prices that were lower than the awardee's, the agency nonetheless made award to ATL because it had the lowest-priced, technically acceptable proposal. After being advised of the agency's source selection decision and requesting and receiving debriefings, the protesters filed the instant protests with our Office.

DISCUSSION

Both protesters allege that the agency, in evaluating proposals, improperly used an undisclosed government staffing estimate to determine whether their respective proposed staffing was adequate. According to the protesters whenever any of the proposals included less than the number of full time equivalents (FTE) used to prepare the undisclosed staffing estimate, the agency automatically assigned a deficiency, which caused their proposals to be rejected as unacceptable.

While an agency properly may rely on its own estimates of the manning levels necessary for satisfactory performance, absolute reliance on estimates can have the effect of arbitrarily and unfairly penalizing an innovative or unusually efficient offeror. KCA Corp., B-255115, Feb. 9, 1994, 94-1 CPD ¶ 94 at 6-7; The Jonathan Corp.; Metro Machine Corp., B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶ 174 at 11. Thus, it is inappropriate to determine the acceptability of proposals by the mechanical application of undisclosed government estimates, since doing so fails to assess whether a firm's proposed workforce is particularly skilled and efficient, or whether, because of a unique approach, a firm could satisfactorily perform the work with different staffing than estimated by the agency. KCA Corp., supra.

The record here shows that in every instance where the agency identified a deficiency or weakness in any offeror's proposed staffing, it was because the proposed staffing was less than the level identified by the agency as necessary to perform the requirement in its undisclosed government estimate, even where the variation was seemingly de minimus in comparison to the overall requirement. For example, with respect to Orion's proposal, among the deficiencies identified by the evaluators were:

[deleted]

High Voltage Electrician/Lineman shows a maximum of [deleted] FTE's when 11 FTE's are needed. They then reduce to [deleted] FTE's after year 1.

(...continued)

recommend reopening discussions during which Orion could be accorded further discussions.

They show [deleted] FTE for Lead Maintenance Electrician when 2 FTE's are needed.

They show [deleted] FTE's for Maintenance Electrician when 14 FTE's are needed.

They show [deleted] FTE for Line Locator/Meter Reader when 3 FTE's are needed for Line Locator.

OAR, exh. P, Source Selection Evaluation Board (SSEB) Report, encl. 2, Technical Approach Factor Resources Subfactor Report for Orion's Proposal, at 2. The agency found similar deficiencies in three other broad areas of the requirement with respect to Orion's proposed staffing by comparing it to the undisclosed government staffing estimate. Id. at 1-2.

The agency made similar findings regarding the adequacy of Chenega's proposed staffing. For example, the agency found deficiencies in Chenega proposed resources as follows:

[deleted], they do not show sufficient personnel for several areas which together precludes an acceptable level of contract performance:

1. Only [deleted] FTE's are shown for Lineman High Voltage Electrician when 11 FTE's are needed.
2. [deleted] FTE for dispatchers are shown but 5 are needed.
3. They show [deleted] FTE for Lead Maintenance Electrician but 2 FTE's are needed.
4. They only show [deleted] FTE's for Maintenance Electrician but 14 FTE's are needed.
5. [deleted] line locators are shown but 3 FTE's are needed.

This failure constitutes a deficiency because an acceptable level of contract performance cannot be achieved given the lack of acceptable levels of manpower, equipment and material in the above listed RFP areas.

Chenega Agency Report (CAR), exh. P, SSEB Report, encl. 2, Technical Approach Factor Resources Subfactor Report for Chenega's Proposal, at 1. As with Orion, the agency made similar findings of deficiencies with respect to the adequacy of Chenega's proposed staffing as compared to the undisclosed government estimate in numerous other broad areas of the requirement. Id. at 1-2.

In evaluating the awardee's proposal under the resources subfactor, the agency used the same approach as above, albeit the agencies' criticisms in this area were couched in terms of proposal weaknesses rather than deficiencies. For example, the agency's evaluators found a weakness in CLS's proposal under the resources subfactor as follows: "Per proposal by offeror, Figure ES-5 Page 6, they do not show enough manpower. They show [deleted] FTE's for Maintenance Electrician when 14 FTE's are needed in Buildings & Structures (C.13, CLS 31)." OAR, exh. Q, SSEB Report, encl. 2, Technical Approach Factor Resources Subfactor Report for CLS's Proposal, at 1.

Our review of the record shows that, consistent with these examples, the agency used the same undisclosed staffing estimate to assess the adequacy of all of the offerors' proposed staffing. These staffing figures originate in two documents in the record provided our Office: (1) the agency's independent government cost and labor estimate, OAR, exh. J; and (2) a derivative document referred to as the SSEB Manpower Guide. OAR, exh. K. A comparison of the staffing estimates included in the SSEB Manpower Guide to the staffing references included in the agency's technical evaluation materials shows that, in every instance, the agency mechanically applied its undisclosed staffing estimates to the offerors' proposed staffing to evaluate and determine the acceptability or unacceptability of the proposals.²

The agency contends that it only used the undisclosed staffing estimate as a tool to assess the reasonableness of the staffing proposed by the offerors. See CAR, exh. V, Decl. of SSEB Chairman (June 15, 2012), at 1. However, the SSEB evaluation documents quoted above indicate that this estimate was more than just a tool to assess reasonableness of the proposed staffing; instead, it was used as a benchmark of the resources the agency had concluded were required to perform this effort.³ Contrary to the agency's arguments, there is no evidence in the

² For example, as noted above, the record shows that all proposals were compared to the SSEB Manpower Guide's estimate of staffing to determine whether or not the firms had proposed 14 maintenance electricians and 11 Lineman High Voltage Electricians.

³ We note that the agency determined, in evaluating the offerors' responses under the resources subfactor, that both protesters demonstrated a "good understanding" of the requirements. See OAR, exh. P, SSEB Report, encl. 2, Technical Approach Factor Resources Subfactor Report for Orion's Proposal, at 2; CAR, exh. P, SSEB Report, encl. 2, Technical Approach Factor Resources Subfactor Report for Chenega's Proposal, at 2. Despite these conclusions, the agency nonetheless found that neither of these offerors proposed the staffing levels the agency found were required.

contemporaneous record that the agency considered whether any approach to staffing other than that reflected in its undisclosed government estimate might be adequate.⁴ Instead, the evaluation documentation reflects that the agency stated what staffing it “needed” or “required” for each labor area, and that this staffing number was that reflected in the undisclosed government estimate.

In its defense, the agency asserts that it advised the protesters during discussions of the areas where their staffing was considered inadequate and that these discussions should have been sufficient to lead the offerors into the areas where the staffing levels were considered unacceptable. However, where the agency believed that the undisclosed government estimate reflected its minimum requirements, as is shown by this record, it was required to disclose this to the offerors during discussions rather than leaving the offerors to guess what staffing would satisfy the government’s requirements. See OneSource Energy Servs., B-283445, Nov. 19, 1999, 2000 CPD ¶ 109 at 12.

Our review of the record also indicates that the agency subjected the protesters’ proposed staffing to a stricter level of scrutiny in its evaluation as compared to its evaluation of the awardee’s proposal. As noted above, the agency found deficiencies with the protesters’ proposals where even minor deviations from the undisclosed staffing estimates were found, but found weaknesses when similar issues were identified in the awardee’s proposal.

For example, the agency assigned the Orion proposal a deficiency for proposing [deleted] plumber/pipefitter FTEs where the agency found that seven would be needed. OAR, exh. P, SSEB Report, encl. 2, Technical Approach Factor Resources Subfactor Report for Orion’s Proposal, at 1. Similarly, the agency assigned the Chenega proposal a deficiency for offering [deleted] FTEs for elevator mechanics where agency found that three would be needed. CAR, exh. P, SSEB Report, encl. 2, Technical Approach Factor Resources Subfactor Report for Chenega’s Proposal, at 2. In contrast, the agency only assigned the awardee’s proposal a weakness rather than a deficiency when it found that ATL proposed only [deleted] maintenance electrician FTEs where the agency thought 14 would be required. CAR, exh.Q, SSEB Report, encl. 2, Technical Approach Factor Resources Subfactor Report for ATL’s Proposal, at 1. The evaluation record contains no explanation regarding why the agency reached apparently inconsistent conclusions regarding the adequacy of the protesters’ proposed staffing on the one hand, and the awardee’s proposed staffing on the other, even though this

⁴ Consistent with this view, we note that the undisclosed staffing estimate was also used to calculate the offerors’ evaluated prices. OAR, exh. R, Source Selection Document, at 8; RFP at 383.

evaluation resulted in unacceptable ratings for the protesters' proposals and an acceptable rating for the awardee. We sustain the protests on these bases.

The protesters have raised a number of other issues that based on our review do not provide a basis to sustain the protest.⁵ For example, while Chenega asserts that the awardee failed to provide required information pertaining to key personnel in its proposal, we find that Chenega was not prejudiced, even if ATL did not provide all of the requested information. The solicitation provision in question here provided that offerors were to provide the following information in their technical proposal:

Key Personnel. The offeror shall identify the Program Manager and Alternate, Logistic Program Manager and Facility Maintenance Program Manager. The offeror shall provide a job description indicating minimal qualifications required, levels of specific experience; education requirements; necessary certifications; registration and licensing requirements for these key employees.

RFP at 371 (emphasis in original). ATL's proposal provided resumes for individuals to fill each of these positions. In addition, ATL's proposal indicated that its staffing plan was to retain the incumbent personnel in these positions and to provide these employees the right of first refusal. CAR, exh. O, ATL Final Proposal Revision, Technical Proposal, at 47-48. The agency found a weakness in ATL's proposal as follows:

[ATL] has identified the Program Manager and Alternate, Logistic Program Manager and Facility Program Manager as key personnel, however the offeror has not provided job descriptions for the positions indicating minimal qualifications required, levels of specific experience; education requirements; necessary certifications; or necessary registration/licensing as required by [the] RFP. . . . However, the Offeror has proposed the retention of key personnel filling the Program Manager, Alternate Program Manager, Facilities Program Manager, and Logistics Program Manager.

CAR, exh. Q, SSEB Report, encl. 2, Management Capability Factor, Management Structure and Plan, Experience, Quality Control Plan Report, at 1. Chenega argues

⁵ Chenega raises various issues about the evaluation of price, pointing out various possible discrepancies and inconsistencies. Because the protesters' proposals were found unacceptable, the agency did not provide with its agency report relevant documentation regarding the evaluation of price. The agency may wish to review the protesters' contentions regarding the price evaluation in implementing our recommended corrective action.

that this clear noncompliance should have been regarded as a deficiency and that ATL's proposal should have been rejected as unacceptable.

In admitting that it did not require ATL's strict adherence to the requirement that the proposal provide certain information pertaining to the proposed key personnel--in part, because the agency claimed it received other assurances of compliance from the proposal--we think that the agency has essentially waived this requirement. In cases where an agency waives a requirement, we will sustain a protest only if the protester is prejudiced. In such circumstances, prejudice does not mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful. Geonex Corp., B-274390.2, June 13, 1997, 97-1 CPD ¶ 225 at 5. Rather, the pertinent question is whether the protester would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived. Brown & Root, Inc. and Perini Corp., a joint venture, B-270505.2, B-270505.3, Sept. 12, 1996, 96-2 CPD ¶ 143 at 11. Chenega does not argue that this waiver affected the submission of its offer, and we are not prepared to conclude that it was prejudiced by the waiver. Thus, we have no basis to sustain this aspect of its protest.

RECOMMENDATION

We recommend that the agency reopen discussions, as appropriate. If, in reopening discussions, the agency concludes that the undisclosed staffing estimates are an accurate reflection of its actual minimum requirements, these estimates should be disclosed to the offerors. The agency should then solicit and evaluate revised proposals, and make a new source selection decision. We also recommend that the agency reimburse the protesters the costs of filing and pursuing their respective protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2012). The protesters' 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)(1).

The protests are sustained.

Lynn H. Gibson
General Counsel