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Decision

Matter of: Total Solutions, Inc.
File: B-408371.2; B-408371.3
Date: August 30, 2013

Jerome S. Gabig, Esq., Andrew D. Dill, Esq., and Richard J.R. Raleigh Jr., Esq., Wilmer & Lee, P.A., for the protester.

Jon D. Levin, Esq., and Gary L. Rigney, Esq., Maynard Cooper & Gale, PC, for PeopleTec, Inc., the intervenor.

Maj. John R. Longley, Capt. Michael E. Barnicle, and Scott N. Flesch, Esq., Department of the Army, for the agency.

Paula J. Haurilesko, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency erroneously assessed a strength instead of a weakness in awardee's proposal for proposing personnel other than the contract program manager to lead the transition team is denied, where the solicitation did not require offerors to propose the contract program manager to perform that role.
 2. Agency properly did not consider a firm's financial capability under a technical evaluation factor where the solicitation did not provide for such consideration.
 3. Allegation that an agency did not comply with section 808 of the National Defense Authorization Act for Fiscal Year 2012 does not state a valid basis of protest where the requirements of the Act address management of the department and do not convey rights upon bidders or offerors.
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DECISION

Total Solutions, Inc., of Madison, Alabama, protests the issuance of a task order to PeopleTec, Inc., of Huntsville, Alabama, by the Department of Defense, Missile Defense Agency (MDA), under request for task order proposals (RTOP) No. DS-02-13 for executive administrative and action officer support. Total Solutions challenges the agency's evaluation of proposals, conduct of discussions, and selection decision.

We deny the protest.

BACKGROUND

The RTOP was issued pursuant to Federal Acquisition Regulation (FAR) § 16.505 to small business vendors holding MDA Engineering and Support Services (MiDAESS) contracts. The solicitation provided for the issuance of a cost-plus fixed-fee, level-of-effort task order for executive administration and action officer support services for MDA's senior leadership for a 2-year base period with 2 option periods. Vendors were informed that the task order would be issued on a best value basis, considering technical, past performance, small business utilization past performance, small business utilization, and cost. RTOP amend. 2, at 10. The solicitation provided that the technical factor was significantly more important than all other factors, and that the past performance and small business utilization past performance factors were of equal importance and more important than the cost and small business utilization factors. Id. As relevant here, the technical factor included the following equally weighted subfactors: program management, labor hour and mix, key personnel, task order transition, and vacancy fill rate. Id. at 11-12.

MDA received proposals from Total Solutions, PeopleTec, and one other vendor. Following evaluation of the proposals, MDA conducted written and oral communications with these firms, and requested revised proposals.¹ As relevant here, Total Solutions and the contracting officer exchanged the following e-mails:

Total Solutions:

During our DOH and PA debriefings,² the reviewers indicated that TSI [Total Solutions] did not demonstrate that we had the fidelity/capability to fill vacancies left by incumbents who declined to transition. This is also a weakness identified during the course of the RFI [request for information] for the DS-02-13 RTOP.

The DS-02-13 RTOP states that resumes for personnel required at the time of proposal submission should include only [contract program manager] and [task order lead]. We

¹ Although MDA characterizes these communications as requests for information, the record shows that these exchanges were discussions.

² The contracting officer states that the DOH and PA debriefings are debriefings from two previous task order competitions not related to this procurement. Contracting Officer's Statement at 16.

are including in our final proposal response a detailed plan describing our methodology for filling vacancies by non-transitioning incumbents, but the question becomes, how can you “prove” that you have the personnel without including contingent resumes as part of our submission?

Contracting Officer:

We are not looking for the resumes at this time. We only require the resumes of the [contract program manager] and the [task order lead]. What we are asking is that you show a “Plan B” in your hiring process.

Agency Report (AR), Tab 15, E-mail Exchange, Feb. 27, 2013.

PeopleTec’s and Total Solutions’ revised proposals were evaluated as follows:

		PeopleTec	Total Solutions
Technical		Excellent	Satisfactory
	Program Management	Exceptional	Exceptional
	Labor Hours and Mix	Excellent	Excellent
	Key Personnel	Satisfactory	Satisfactory
	Task Order Transition	Exceptional	Satisfactory
	Vacancy Fill Rate	Excellent	Satisfactory
Past Performance		Satisfactory Confidence	Satisfactory Confidence
Small Business Utilization Past Performance		Satisfactory	Neutral
Small Business Utilization		2 nd (78%)	1 st (88%)
Evaluated Cost		\$35,012,607	\$34,293,310

AR, Tab 19, Final Evaluation Results, at 2. The agency’s adjectival ratings were supported by narratives identifying the vendors’ respective strengths, weaknesses, and deficiencies.³ PeopleTec’s proposal was found to be superior to Total

³ The agency evaluated proposals under the technical factor and subfactors as exceptional, excellent, satisfactory, or unacceptable. As relevant here, an exceptional rating reflected a proposal demonstrating that the PWS requirements were very well understood, and that the offeror would likely provide a very high performance capability at virtually no risk to the government; an exceptional

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Solutions' proposal under the task order transition and vacancy fill rate subfactors, and overall under the technical factor.

As relevant here, PeopleTec's proposal was rated as exceptional under the task order transition subfactor and found to have two strengths and no weaknesses or deficiencies. The evaluators noted as a strength PeopleTec's proactive recruitment of the incumbent workforce, where PeopleTec indicated that the firm had already contacted "a significant number of the incumbent workforce" and determined that over 67 percent of those contacted were receptive to joining PeopleTec, while the remaining 33 percent wanted to be contacted after award. AR, Tab 19, Final Evaluation Results, at 7. The evaluators also noted as a strength PeopleTec's detailed and proactive approach to transition planning and experienced transition team. In this regard, the evaluators found that PeopleTec's proposal to include the contract program manager on the transition team but assign the role of transition team lead to another individual was advantageous to the government because it allowed the contract program manager to focus on executing the task order requirements, communicating with the government, and handling immediate issues during the transition. The evaluators also favorably cited PeopleTec's three-phase transition approach, which consisted of [Deleted]. Id.

Total Solutions' proposal was rated as satisfactory under the task order transition subfactor and found to have one strength and no weaknesses or deficiencies. The evaluators noted as a strength four elements to Total Solutions' proposed transition approach: (1) Total Solutions' expectation that it would transition 90 percent of the incumbent workforce; (2) an established database of qualified candidates; (3) a recruiting process that placed a priority on rapidly recruiting, screening, and hiring experienced and qualified candidates who possess the required skills at the start of the task order; and (4) the ability to assign a qualified team employee, consultant, or subcontractor to fill a position until a permanent individual can be identified. The

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proposal offered exceptional features that met or exceeded the highest expectations of the government with either no weaknesses or weaknesses that were so minor as to be inconsequential. An excellent rating reflected a proposal demonstrating that the PWS requirements are well understood and that the offeror would likely provide a high performance capability at low risk to the government; an excellent proposal may have some minor weaknesses but offered excellent features that would likely produce very beneficial results to the government. A satisfactory rating reflected a proposal demonstrating acceptable understanding of the PWS requirements and that the offeror would likely provide an adequate performance capability at no higher than a moderate level of risk to the government; a satisfactory proposal provided sufficient confidence that a fully compliant level of performance would be achieved, and any weaknesses would not preclude adequate performance. RTOP amend. 2, at 10-11.

evaluators concluded that this approach would allow for a smooth and successful transition and ensure continuity of services. AR, Tab 19, Final Evaluation Results, at 17-18.

PeopleTec's proposal was rated as excellent under the vacancy fill rate subfactor and found to have two strengths and one minor weakness. The evaluated strengths were that PeopleTec offered [Deleted]. AR, Tab 19, Final Evaluation Results, at 8-9. The evaluators concluded with respect to the first strength that PeopleTec's [Deleted]. Id. at 8. The evaluators identified as a minor weakness PeopleTec's proposed use of temporary hires to support senior leadership. The evaluators noted, however, that this weakness had little potential to cause schedule disruption, increased cost or degradation of performance and would require only normal contractor effort and normal government monitoring to overcome any ensuing difficulties. Id. at 9. The evaluators concluded that PeopleTec's proposal under this subfactor demonstrated that the offeror understood the requirements and would likely provide a high capability of performance which represented a low risk to the government. Id. at 8.

Total Solutions' proposal was rated satisfactory under the vacancy fill rate subfactor and found to have one strength and no weaknesses. The evaluators recognized as a strength that Total Solutions and its subcontractors had pre-existing databases of pre-qualified candidate resumes that Total Solutions could use to backfill key personnel positions. The evaluators concluded that Total Solutions' proposal demonstrated that it understood the requirements under this subfactor and would likely provide adequate capability of performance which represented a low risk to the government. Id. at 18.

The technical evaluation results were provided to the agency's selection official, who reviewed and adopted them. AR, Tab 21, Task Order Award Decision, at 1. The selection official recognized that PeopleTec's proposal was superior to Total Solutions' proposal under the task order transition and vacancy fill rate subfactors and under the small business utilization past performance factor.⁴ The selection official also recognized Total Solutions' higher small business utilization factor rating and slight cost advantage (\$34,293,310 to PeopleTec's \$35,012,607). The selection official found that PeopleTec's superiority under the task order transition and vacancy fill rate subfactors was a discriminator in finding that PeopleTec's proposal offered the best value. Id. at 6-8.

⁴ The selection official noted that PeopleTec's positive record of small business utilization past performance was more meaningful than Total Solutions' neutral rating. AR, Tab 21, Task Order Award Decision, at 8.

This protest followed a debriefing.⁵

DISCUSSION

Total Solutions challenges MDA's evaluation of proposals under the technical factor, conduct of discussions, and selection decision. Additionally, Total Solutions complains that MDA failed to comply with section 808 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012. We have considered all of Total Solutions' arguments, although we only address the more significant arguments, and find no basis upon which to sustain the protest.

Technical Factor Evaluation

Total Solutions complains that MDA unreasonably rated PeopleTec's proposal under the task order transition subfactor and the technical factor generally.

With respect to the task order transition factor, Total Solutions contends that PeopleTec's proposal should not have received an exceptional rating where PeopleTec did not propose that its contract program manager lead the transition team. Supp. Protest at 12-14. Total Solutions contends that PeopleTec's failure to assign the contract program manager as transition team lead created significant transition risk, which should have been assessed as a weakness under this subfactor. Id. at 14.

The agency responds that it viewed PeopleTec's designation of a separate transition team lead to be a strength because it allows the contract program manager to focus on his or her broad range of responsibility, while having the transition team lead focus on staffing. See Supp. AR at 13, 16. In this regard, PeopleTec's proposal indicated that its proposed contract program manager would be part of the transition team, but would concentrate on the overall performance of the contract, while designating another individual as transition lead to focus on staffing during the transition. See AR, Tab 17, PeopleTec's Proposal, at 3.

In reviewing protests challenging the evaluation of proposals, we do not conduct a new evaluation or substitute our judgment for that of the agency but examine the record to determine whether the agency's judgment was reasonable and in accord with the RFP evaluation criteria. General Dynamics C4 Systems, Inc., B-406965, B-406965.2, Oct. 9, 2012, 2012 CPD ¶ 285 at 6. A protester's mere disagreement with an agency's judgment is not sufficient to establish that an agency acted

⁵ As the value of this task order is in excess of \$10 million, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery/indefinite-quantity contracts. 10 U.S.C. § 2304c(e)(1)(B).

unreasonably. JSR, Inc., B-405463, Nov. 8, 2011, 2011 CPD ¶ 265 at 4. Moreover, it is an offeror's responsibility to submit an adequately written proposal that demonstrates the merits of its approach; an offeror runs the risk of having its proposal downgraded or rejected if the proposal is inadequately written. Id.

Total Solutions' complaints with respect to PeopleTec's designation of a separate transition team lead amount to nothing more than disagreement with the agency's judgment concerning the merits of PeopleTec's technical approach to this subfactor. The RTOP did not require that the contract program manager serve as the transition lead. Rather, the PWS stated that "[t]he [contract program manager] and/or [task order lead] shall meet with the Functional Government customer within 5 working days of award" as a part of the transition and that they "shall report the status of its efforts to recruit, hire, and fill all positions" See PWS at 20. Although the PWS recognized that the contract program manager would have a role in the transition, it did not specify that the contract program manager and the transition team lead must be the same individual.

Total Solutions also objects to MDA's assignment of an overall excellent rating to PeopleTec's proposal under the technical factor, arguing that the agency failed to evaluate PeopleTec's significant financial capability risk under the factor. Total Solutions contends that PeopleTec lacks the financial resources necessary to perform the contract and thus its proposal cannot be considered to be low risk within the solicitation's excellent rating definition. Protest at 3, 6; see RTOP amend. 2, at 10 (an excellent rating reflects, among other things, a proposal that represents low risk).⁶

MDA responds that the RTOP did not provide for consideration of financial risk as part of the agency's evaluation of proposals under the technical factor. MDA contends that a firm's financial risk relates to the contracting officer's responsibility determination. AR at 20.

We agree with MDA that the solicitation did not provide for the evaluation of a firm's financial capability as part of the evaluation of proposals under the technical factor. Apart from the reference to risk in the solicitation's definitions of the various adjectival ratings, no part of the RTOP indicates that the agency's consideration of risk in the technical evaluation would include considering the firm's financial

⁶ Total Solutions relies in part on data it obtained from the web site www.USAspending.gov, which it contends shows that PeopleTec had revenue of only \$1,853,494 in 2012. The protester does not explain how it generated this data, which on its face does not appear to be reasonable. In response to Total Solutions' complaint, PeopleTec provided an auditor's report that states that the firm's contract revenue for calendar year 2012 was over \$[Deleted]. See PeopleTec's Comments, exhib. A, Independent Auditor's Report, at 4.

capability. In this regard, the RTOP did not request or require the submission of financial capability information with proposals. Unless a solicitation specifically provides for consideration of firm's financial capability as part of the agency's evaluation of proposals, a prospective contractor's financial capability to perform the contract is a matter of responsibility. See FAR §§ 9.103(b), 9.104-1(a). Total Solutions' complaint that PeopleTec has inadequate financial resources concerns the agency's affirmative determination of PeopleTec's responsibility, which we generally will not consider. See 4 C.F.R. § 21.5(c) (2013).

Unequal Treatment

Total Solutions also contends that MDA evaluated its and PeopleTec's proposals unequally. For example, Total Solutions argues that MDA should have found Total Solutions' proposal to provide a lower risk--and thus be rated higher--than PeopleTec's proposal under the vacancy fill rate subfactor, because Total Solutions proposed to fill vacancies within 5 business days, compared to PeopleTec's proposal to fill vacancies within 15 business days. Supp. Protest at 18.

The agency explains that both offerors met the subfactor requirement to propose an approach and processes to fill vacancies within 15 business days to ensure there is minimal risk to the MDA mission. Supp. Contracting Officer's Statement at 11. The agency states that the solicitation did not indicate that it would view a vacancy fill rate of less than 15 business days as better or less risky than meeting the 15-day requirement. Therefore, by meeting the 15-day requirement, both offerors' proposals presented minimal risk to MDA's mission. The agency further explains that neither offeror was assigned a strength with respect to meeting the 15-day vacancy fill requirement. Supp. AR at 27.

We agree with the agency that nothing in the solicitation required MDA to conclude that a proposal to fill vacancies within 5 business days constituted lower risk to the government, and thus a higher rating. The fact that Total Solutions apparently believes that this feature of its proposal should merit a strength where the agency has not identified one is simply a matter of disagreement with the agency's judgment.

Misleading Discussions

Total Solutions also argues that it was misled by the agency in an e-mail exchange as to whether the firm should have provided contingency offers to the incumbent employees. Protest at 10-11. In this regard, Total Solutions asserts that "contingency offers" and "contingent resumes" are "essentially synonymous." Id. at 11.

The agency states that the concern raised during discussions and addressed in the e-mail exchange did not involve contingency offers to incumbent employees, but

rather, Total Solutions' methodology for filling vacancies left by incumbent employees who declined to transition to the new task order. AR at 37.

The protester appears to have conflated two separate issues. In the e-mail exchange with the contracting officer, Total Solutions identifies the issue raised in discussions as pertaining to whether the offeror's proposal demonstrated that Total Solutions had the fidelity/capability to fill vacancies left by incumbents who declined to transition. The contracting officer stated that resumes were not needed to show that the firm had a plan to fill vacancies. See AR, Tab 15, E-mail Exchange, Feb. 27, 2013. The record shows that the evaluators recognized that Total Solutions' final proposal fully addressed all weaknesses and deficiencies. AR, Tab 19, Final Evaluation Results, at 13. As the issue raised in the e-mail pertains to hiring non-incumbent staff and not to the provision of contingency offers to incumbent staff, the protester's argument has no merit.

Tradeoff Decision

Total Solutions argues that the selection official relied on inaccurate information in its source selection decision. Total Solutions contends that, under the vacancy fill rate subfactor, the selection official erroneously relied on PeopleTec's proposed use of cross-training and extended time as discriminators where the protester had also proposed those features. Supp. Protest at 16.

The agency contends that Total Solutions mischaracterized the selection official's tradeoff analysis with respect to the vacancy fill rate subfactor. The tradeoff decision focused on PeopleTec's approach to filling vacancies, which proposed a combination of [Deleted], which had been identified as a strength for PeopleTec's proposal, rather than simply PeopleTec's inclusion of cross-training and extended time in its proposal. Supp. AR at 21-22. The agency also states that the selection official was aware of Total Solutions' proposal for cross-training as the evaluators had discussed it in the evaluation report but had not identified it as a strength for the protester. With respect to extended time, the agency states that Total Solutions' proposal identified the use of extended time in the context of surge support and not to fill vacancies. Id. at 23.

The record shows that the selection official reasonably considered the identified strengths in PeopleTec's proposal to be discriminators under the vacancy fill rate subfactor. We agree with the agency that PeopleTec was given a strength not, as the protester suggests, for proposing the use of [Deleted], but rather for [Deleted] as well as [Deleted]. See AR, Tab 17, PeopleTec's Final Proposal, Technical Volume, at 5-6.

In comparison, the record shows that Total Solutions' proposed vacancy fill approach focused primarily on maintaining a pool of pre-qualified candidates who can quickly be brought on board to support new requirements as well as planned

and unplanned absences. AR, Tab 16, Total Solutions' Final Proposal, Technical Volume, at 10; Resources Volume, at 12-13. While Total Solutions proposed cross-utilization of personnel to ensure coverage due to absences, staff turnover, and surge support needs, the record shows that the protester did not propose the type of prioritization that the evaluators recognized in PeopleTec's proposal. See AR, Tab 16, Total Solutions' Final Proposal, Technical Volume, at 11. Moreover, Total Solutions proposed extended time in the context of meeting surge requirements, not filling vacancies. See AR, Tab 16, Total Solutions' Final Proposal, Technical Volume, at 26. To the extent that Total Solutions argues that the selection official should have acknowledged that the protester also had proposed cross-training and extended time, selection officials, in documenting a source selection decision, are not required to address each and every feature of a proposal, but must show only that the evaluation conclusions are reasonably based. Houston Air, Inc., B-292382, Aug. 25, 2003, 2003 CPD ¶ 144 at 6.

Section 808

Total Solutions contends that MDA failed to comply with section 808 of the NDAA for FY 2012, Pub. Law No. 112-81. More specifically, Total Solutions asserts that the contracting officer's failure to obtain written approval from the head of MDA before awarding the task order violated section 808 and competitively prejudiced the protester because the agency head would have recognized the errors in the award decision and selected Total Solutions, the lowest-priced offeror, as providing the best value to the government. Protest at 8; Protester Comments at 12.

Section 808 of this Act imposed limits on the Defense Department's obligations for contract services for fiscal years 2012 and 2013. As relevant here, section 808 provided that the total amount obligated by the Department for contract services in fiscal years 2012 and 2013 may not exceed the total amount requested for the Department for contract services in the President's budget request for fiscal year 2010.⁷ In furtherance of this objective, Section 808(c) requires the Secretary of Defense to issue guidance requiring the secretaries of the military services and the heads of defense agencies to approve in writing the award of contracts or task orders in fiscal years 2012 or 2013 for continuing services, where the estimated value of the contract or task order exceeds \$10 million and provides for continuing services at an annual cost that exceeds the annual cost paid by the military department or defense agency for the same or similar services in fiscal year 2010. Pub. Law No. 112-81 § 808(c)(2).

It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory

⁷ The statute exempted obligations for contract services related to research and development, and another category not relevant here.

scheme. See Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989); United States v. Morton, 467 U.S. 822, 828 (1984) (“We do not . . . construe statutory phrases in isolation; we read statutes as a whole . . . [W]ords . . . must be read in light of the immediately following phrase.”). Reading section 808 as a whole, its purpose is to set a limit on the Department of Defense with respect to aggregate obligations for contract services.

The language upon which the protester relies constitutes a directive to the agency concerning the implementation of the aggregate obligation limit, and does not convey any rights upon bidders or offerors. See AT&T v. United States, 307 F.3d 1374, 1377-79 (Fed. Cir. 2003) (appropriation act requirement for written determination of realistic prices prior to using a fixed-price contract did not create a cause of action for contractor). In this regard, this section does not address or provide for review of an agency’s best value analysis. Total Solutions’ contentions regarding section 808 do not establish a valid basis of protest. See Gary Johnson-Designated Employee Agent, B-310910.3, Jan. 21, 2009, 2009 CPD ¶ 22 at 4 (allegation that agency’s failure to comply with statutory timeframes to complete A-76 cost comparison does not constitute a challenge to agency’s final source selection decision).

The protest is denied.

Susan A. Poling
General Counsel