U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Chenega Healthcare Services, LLC

File: B-416158

Date: June 4, 2018

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John L. Bowles, Esq., and James J. Jurich, Esq., Department of Energy, for the agency.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency was required to consider proposed substitute key person for a follow-on procurement based on the agency's prior approval of the proposed substitute on the incumbent contract is denied where the agency elected to proceed without discussions and the initial proposal was technically unacceptable due to the unavailability of the initially proposed key person.

2. Protest that the agency was required to engage in discussions before rejecting the protester's proposal as technically unacceptable is denied where the agency was under no obligation to conduct discussions regarding the protester's technically unacceptable proposal.

DECISION

Chenega Healthcare Services, LLC (CHS), a small business, of San Antonio, Texas, protests the award of a contract to Kūpono Government Services, LLC (KGS), a small business, of Honolulu, Hawaii, under request for proposals (RFP) No. DE-SOL-0010843, which was issued by the Department of Energy (DOE), for an indefinite-delivery, indefinite quantity (IDIQ) contract to support the National Training Center at Kirtland Air Force Base in Albuquerque, New Mexico. CHS, the incumbent contractor for the services at issue, challenges its exclusion from the competition because one of its proposed key personnel subsequently became unavailable after the submission of proposals, but prior to award. The protester alleges that the agency unreasonably failed

to consider the DOE-approved substitute key person currently performing on CHS' incumbent contract, or otherwise unreasonably failed to engage in discussions to allow the protester to provide a substitute for the subsequently unavailable key person.

We deny the protest.

BACKGROUND

The RFP, which was issued on June 23, 2017, and subsequently amended three times, sought proposals from offerors eligible under the Small Business Administration's 8(a) business development program for an IDIQ contract to support the National Training Center at Kirtland Air Force Base in Albuquerque, New Mexico. RFP at 1-2.[1] Specifically, the contractor may be required to provide training, training certification, cyber security, information technology planning and management, facilities, safety, security, business operation, custodial, and ground maintenance services. RFP, attach. No. A, Statement of Objectives, at 4-5, 7-10, 12. The RFP contemplated the award of a single IDIQ contract, with the potential for fixed-price or time-and-materials type orders, and an ordering period of 5 years. RFP at 2, 59.

The RFP contemplated a best-value tradeoff basis for award, where the technical and past performance factors were significantly more important than price. Id. at 61. The non-price factors, in descending order of importance, were: (1) technical approach; (2) business management approach; (3) relevant corporate experience; and (4) past performance. Id. Relevant to the issues in this protest, offerors were required under the technical approach factor to submit a resume and letter of commitment for a general manager, which was the RFP's only designated key position. Id. at 42, 64. The offeror was required to demonstrate that its proposed general manager's education, technical expertise, security clearance, and relevant experience met or exceeded the position qualifications included in the RFP. Id. at 64. The RFP provided that "failure to submit a letter of commitment may result in the offeror's proposal being eliminated from further consideration for award for failure to submit a responsive, complete and acceptable proposal." Id. The RFP further provided as a global instruction that: "The Government will evaluate proposals on the basis of the information provided in the proposal. The Government will not assume that an offeror possesses any capability unless set forth in the proposal. This applies even if the offeror has existing contracts with the Federal government, including the [DOE]." Id. at 55. The RFP further provided that the agency intended to evaluate offers and award a contract without discussions. Id. at 61.

Prior to the August 16, 2017, RFP closing deadline, DOE received five proposals, including a proposal from CHS. Protest, exh. No. 9, Unsuccessful Proposal Notice, at 1. CHS is the current incumbent providing the services contemplated by the RFP. CHS proposed for the procurement at issue its then general manager on its incumbent contract, including providing the requisite resume and commitment letter. Protest, exh.

[1] References herein are to the RFP as amended.

No. 7, Chenega Corp. Sr. Corporate Contract Manager's Decl., ¶ 5. In January 2018, CHS' general manager notified CHS that he would not be able to continue in his position due to medical and personal reasons. Id., ¶ 6. As required under the terms of the incumbent contract, CHS notified DOE of the need to substitute the departed general manager with another candidate; the agency accepted CHS' proposed substitution. Id., ¶¶ 6-7. Additionally, the protester contacted two contracting officials with the agency to notify them of CHS' intent to propose the substitute manager for the follow-on procurement at issue here. Id., ¶¶ 8(1)(b), (2)(b).

On January 31, 2018, the contract specialist for the agency's procurement, emailed CHS a clarification question regarding the commitment letter for the general manager included in its July 19 proposal. Specifically, the agency asked the protester to clarify "whether [the commitment letter] does or does not remain valid." Agency exh. No. D.1, Email from DOE to CHS (Jan. 31, 2018), at 1. The protester confirmed by reply email that the letter included in the proposal was no longer valid. Id., Email from CHS to DOE (Feb. 1, 2018), at 1.

The technical evaluators favorably evaluated CHS' technical proposal, identifying three significant strengths, ten strengths, and two weaknesses. Agency exh. No. C.1, Consensus Eval. Rep., at 25. The agency, however, determined that CHS' technical proposal warranted an "unsatisfactory" rating because, "[n]otwithstanding the strength of this offeror's proposal, the failure to propose a General Manager results in a deficiency and establishes the inadequacy of their approach to perform the work." Id. Specifically, the evaluators concluded that "[t]he result of this person no longer being available to perform as [general manager] on this contract is that the Chenega proposal no longer provides a valid proposed General Manager (which is the only Key Person required by this solicitation) or a valid letter of commitment. This constitutes a material failure to meet a Government requirement." Id. at 32. The Source Selection Official (SSO) agreed with the technical evaluators' assessment, and, notwithstanding CHS' approximate 4 percent price advantage over KGS, excluded CHS' proposal from further consideration. Agency exh. No. C.2, Source Selection Decision, at 28-29. The SSO selected KGS's proposal, with a total proposed price of $107,367,360, for award as representing the best-value to the government. Id. at 29. Following a debriefing, this timely protest to our Office followed.

DISCUSSION

CHS raises two primary arguments challenging the agency's decision to exclude its proposal from the competition due to the unavailability of its initially proposed general manager.[2] First, the protester contends that the agency unreasonably failed to consider

[2] Our Office has recognized that offerors are obligated to advise agencies of changes in proposed staffing and resources, even after submission of proposals. See, e.g., Pioneering Evolution, LLC, B-412016, B-412016.2, Dec. 8, 2015, 2015 CPD ¶ 385 at 8; Greenleaf Constr. Co., Inc., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 (continued...)

its proposed substitute general manager, who is the same individual that the agency previously approved as the substitution on CHS' incumbent contract. Second, the protester alleges that the agency abused its discretion by not entering into discussions to allow CHS to propose a substitute general manager. For the reasons that follow, we find no basis on which to sustain the protest.

Failure to Consider Approved Substitution On Incumbent Contract

CHS first argues that DOE unreasonably failed to consider its proposed substitute general manager. The protester contends that the agency was obligated to consider the individual, who had previously been approved by the agency as the substitute on the CHS' incumbent contract. CHS contends that prior decisions of our Office require the agency to consider such information that was personally known by the evaluators.

The protester is correct that we have recognized that in certain limited circumstances, an agency has an obligation (as opposed to the discretion) to consider "outside information" bearing on the offeror's past performance when it is "too close at hand" to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. See, e.g., SNAP, Inc., B-409609, B-409609.3, June 20, 2014, 2014 CPD ¶ 187 at 8. Relying on decisions interpreting this limited line of decisions, the protester contends that our decisions have not limited this line of decisions to past performance matters, and that extension of this line to the circumstances here is appropriate. We disagree. CHS' attempts to stretch this limited line of decisions to the facts of this protest are unpersuasive and would undermine the basis for the rule.

CHS misreads our decisions addressing the appropriateness of the extension of this limited line of decisions beyond matters involving past performance. For example, the protester relies on our decision in Nuclear Production Partners, LLC; Integrated Nuclear Production Solutions LLC, B-407948 et al., Apr. 29, 2013, 2013 CPD ¶ 112, for the proposition that we have at least extended the line of decisions to questions of corporate experience. See CHS Br. at 3-4. As our Office clarified in SNAP, Inc., however, the Nuclear Production Partners decision "stands for the proposition that an agency may consider close at hand experience information known to the agency," but

(...continued)
at 10; Dual, Inc., B-280719, Nov. 12, 1998, 98-2 CPD ¶ 133 at 3-6. Additionally, when a solicitation (such as the one here) requires resumes for key personnel, the resumes form a material requirement of the solicitation. YWCA of Greater Los Angeles, B-414596 et al., July 24, 2017, 2017 CPD ¶ 245 at 4. When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal. General Revenue Corp., et al., B-414220.2 et al., Mar. 27, 2017, 2017 CPD ¶ 106 at 22.

we expressly declined to obligate an agency to do so. SNAP, Inc., supra. Subsequent decisions have made clear that we decline to apply the "too close at hand" line of decisions to situations where the information in question relates to technical requirements of a solicitation, including the qualifications of proposed key personnel. See, e.g., Valkyrie Enters., LLC, B-414516, June 30, 2017, 2017 CPD ¶ 212 at 6; Consummate Computer Consultants Sys., LLC, B-410566.2, June 8, 2015, 2015 CPD ¶ 176 at 6 n.6; Enterprise Solutions Realized, Inc.; Unissant, Inc., B-409642, B-409642.2, June 23, 2014, 2014 CPD ¶ 201 at 9.

CHS' argument for further extension of the limited past performance related decisions would actually go well beyond the bounds of what our Office already has declined to do in Valkyrie, Consummate, and Enterprise Solutions Realized. Indeed, the protester argues for no less a principle than that we should extend this limited line of decisions to obligate the agency to allow CHS to amend its proposal by recognizing a substitute key person. This is fundamentally inconsistent with the purpose of the "too close at hand" line of decisions, which seeks to limit the consequences of the agency's failure to consider specific past performance information in its possession about an offeror. We have recognized that the line of decisions is not intended to remedy an offeror's failure to submit an adequate and acceptable proposal. See, e.g., SNAP, Inc., supra, at 9. We decline to make such a sweeping change in the applicability of this line of decisions to effectively obligate an agency to allow a protester to amend a technically deficient proposal.

Failure to Engage in Discussions

CHS also protests that DOE abused its discretion by failing to hold discussions with the offerors. The solicitation, however, expressly advised that the agency contemplated making award without discussions. RFP at 61. Additionally, a contracting officer's discretion in deciding not to hold discussions is quite broad. Trace Sys., Inc., B-404811.4, B-404811.7, June 2, 2011, 2011 CPD ¶ 116 at 5. There are no statutory or regulatory criteria specifying when an agency should or should not initiate discussions. Id. As a result, an agency's decision not to initiate discussions is a matter we generally will not review. See, e.g., SOC, LLC, B-415460.2, B-415460.3, Jan. 8, 2018, 2018 CPD ¶ 20 at 8; United Airlines, Inc., B-411987, B-411987.3, Nov. 30, 2015, 2015 CPD ¶ 376 at 11; Six3 Sys., Inc., B-405942.4, B-405942.8, Nov. 2, 2012, 2012 CPD ¶ 312 at 8; Booz Allen Hamilton, B-405993, B-405993.2, Jan. 19, 2012, 2012 CPD ¶ 30 at 13.

Furthermore, an agency need not conduct discussions with a technically unacceptable offeror. SOC, LLC, supra. As addressed above in note two, the unavailability of a key person identified in a proposal renders the proposal technically unacceptable, and the agency has the discretion whether to evaluate the technically unacceptable proposal or to conduct discussions under such circumstances. See, e.g., General Revenue Corp.,

et al., supra. Therefore, we have no basis to question the reasonableness of the agency's exercise of its discretion not to conduct discussions.

The protest is denied.

Thomas H. Armstrong
General Counsel