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Decision

Matter of: Department of the Air Force--Reconsideration

File: B-416654.4

Date: March 5, 2019

Colonel C. Taylor Smith, Jason R. Smith, Esq., and Captain Jacquelyn Fiorello, Department of the Air Force, for the agency. Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is dismissed where it repeats arguments made during the protest, or raises arguments that could have been, but were not raised, during the protest.

DECISION

The Department of the Air Force requests reconsideration of our decision in MCR Federal, LLC, B-416654.2, B-416654.3, Dec. 18, 2018, 2018 CPD ¶ 335, sustaining MCR's protests under Fair Opportunity Proposal Request (FOPR) No. FA8802-18-F-0002, issued for support services.

We dismiss the request for reconsideration.

BACKGROUND

The FOPR was issued on April 10, 2018, pursuant to Federal Acquisition Regulation (FAR) subpart 16.5, to offerors holding indefinite-delivery, indefinite-quantity (IDIQ) contracts under the General Services Administration's One Acquisition Solution for Integrated Services small business Pool 5B. Agency Report, (AR), Tab 13, FOPR, at 1. The FOPR contemplated the award of a task order to provide acquisition, financial, and administrative support services for the Space and Missile Systems Center, Launch Enterprise Directorate. Id. at 61.

Award was to be made on a best-value tradeoff basis, considering the following factors: personnel management, technical expertise, and cost/price. Id. at 162. As relevant to the request for reconsideration, under the technical expertise factor the agency was to

evaluate offerors' staffing solutions to fulfill the requirements delineated in the Performance Work Statement (PWS) in a relevant National Security Space (NSS) launch environment. Id. at 165. The FOPR provided that the agency would evaluate the offeror's approach and understanding of the PWS by analyzing the proposed contractor staffing matrix (including their proposed labor and skill mix), key personnel, experience level, education, certification, technical experience, and expertise. Id.

Following the evaluation of initial proposals, "interchanges",¹ and the submission and evaluation of final proposal revisions, the agency awarded the contract to Tecolote, which was rated acceptable for personnel management, outstanding for technical expertise, and offered to perform for \$72,684,74. AR, Tab 22, Fair Opportunity Decision Document, at 4-5, 7-9; AR, Tab 23, Task Order Award. MCR was rated acceptable for personnel management and technical expertise and offered to perform for \$46,332,177. Tab 22, Fair Opportunity Decision Document, at 4, 7-9. MCR protested the award, arguing, among other things, that the agency held misleading discussions as the interchange notices did not fairly alert MCR that the relative lack of experience of the firm's proposed workforce would be a discriminator that justified payment of a substantial price premium to Tecolote.² In response, the agency advised that it would take corrective action, by issuing interchange notices to the offerors, allowing the submission of final proposal revisions (FPR), re-evaluating the FPRs, and making a new best-value tradeoff decision. AR, Tab 4, Notice of Corrective Action. Our Office dismissed MCR's protest as academic.

On September 10, in implementing its corrective action, the agency issued two interchange notices to MCR. Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 10. The first notice advised MCR that the agency had concluded that [DELETED] out of MCR's proposed [DELETED] full-time equivalents (FTEs) failed to provide the desired level of experience in a relevant NSS launch environment. AR, Tab 27, MCR Second Round of Interchanges, at 4. The notice requested that MCR "revise or confirm that [its] staffing matrix aligns" with the objectives delineated in the PWS. Id. The second notice advised MCR that the agency was concerned that [DELETED] of the [DELETED] of its proposed FTEs were contingent hires, which, in the agency's view, presented a performance risk. Id. at 5-6. Final proposal revisions were due on September 12, at 5:00 p.m., two days later. Id. at 1.

¹ The FOPR defined "interchanges" as "fluid interaction[s] between the [contracting officer] and the Offerors that may address any aspect of the proposal and may or may not be documented in real time." FOPR at 162.

² The protests were within our jurisdiction to hear protests against task orders placed under civilian agency IDIQ contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(1)(B).

On September 12, MCR protested to our Office that the agency's two-day time period to respond to the interchanges was insufficient.³ MCR argued that it required 30 days to adequately respond to the agency's concerns. On September 13, the agency extended the response deadline until September 18 at 5:00 p.m. AR, Tab 31, Notice to MCR Extending Interchange Response Time, at 2. MCR, however, continued to argue that the agency should be required to provide no fewer than 30 days to submit an FPR in response to the interchanges. AR, Tab 34, MCR Objection to Agency Request for Dismissal, at 4.

On December 18, GAO issued a decision in which we sustained MCR's protest. MCR Federal, LLC, supra. We noted that when conducting a task order competition under FAR § 16.505, agencies are required to provide contract holders with a "fair opportunity" to be considered for a task order. Id. at 5 (citing FAR § 16.505(b)(1)). Further, FAR § 16.505 specifies that a "fair opportunity" to be considered, includes a reasonable response period. Id. (citing FAR § 16.505(b)(1)(iv)). In this regard, while FAR § 16.505 does not establish specific requirements for discussions in a task order competition, when exchanges with the agency occur in task order competitions, they must be fair and not misleading. Id. (citing Vencore Servs. and Sols., Inc., B-412949, B-412949.2, July 18, 2016, 2016 CPD ¶ 346 at 5; MicroTechs., LLC, B-413091, B-413091.2, 2016 CPD ¶ 219 at 14).

We also noted that our Office has recognized, in analogous decisions regarding FAR part 15 procurements, that the fundamental purpose of discussions is to afford offerors the opportunity to improve their proposals and to maximize the government's ability to obtain the best value, based on the requirement and the evaluation factors set forth in the solicitation. Id. (citing Gulf Copper Ship Repair Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6).

We concluded that based on the unique circumstances presented, and the nature of what the interchanges required of MCR, the response time provided was not sufficient to provide the firm with a fair opportunity to improve its proposal, or to maximize the agency's ability to obtain the best value. Id. at 9. More specifically, we noted that the notices provided to MCR advised it that [DELETED] out of [DELETED] of its proposed FTE's did not have the desired level of experience, and that over half of MCR's proposed personnel were deemed to present a risk due to their contingent-hire status. Id. The notice requested that MCR revise or confirm its staffing matrix. Id. In order to be responsive to the agency's concerns, and to remain competitive in the procurement, MCR would have had to successfully recruit and negotiate employment agreements in roughly a week's time with a substantial number of highly-skilled personnel that have

³ MCR also responded to the notices by saying that, given the short timeframe to respond, the firm would stand by its previous submission. AR, Tab 29, MCR Round 2 Interchange Responses, at 1. According to MCR, if it were provided more time, it could propose candidates with more experience, increasing the portion of proposed staff that demonstrated experience in an NSS Launch environment. Id.

senior-level experience in an NSS launch environment. Id. To address the agency's concern about contingent-hire personnel, MCR would need to propose non-contingent-hire personnel, which could affect the firm's pricing, or require substantial revisions to its transition plan. Id. (citing Protest at 10). In our view, the amount of time provided by the agency to respond did not appear sufficient to allow MCR to submit a proposal responsive to these concerns. While MCR argued that a 30-day response time was needed for it to submit an FPR, Comments at 6, we did not recommend a specific time period for the FPR responses. MCR Fed. LLC, supra, at 8 n.8. The Air Force then filed this request for reconsideration.

DISCUSSION

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.—Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

The Air Force argues that our decision contains several errors of fact and law. Request for Reconsideration at 4-22. We do not list all the arguments that the Air Force raises in its request for reconsideration. They include that MCR was seeking the same amount of time to respond to the interchanges (30 days) as the agency allowed for initial proposals, and that MCR should have known the agency's concerns with its proposal from the document it received in its debriefing. The agency also asserts that MCR's proposal was acceptable, and the agency did not expect MCR to, in effect, prepare a completely new proposal. Id. at 5-6, 9, 13, 17-18. These arguments, and the others raised by the Air Force in the request for reconsideration, are arguments that the Air Force made during the initial protest. See COS/MOL at 18, 20-24. Accordingly, they do not provide a basis for us to reconsider our decision. Veda, Inc.—Recon., supra.

The Air Force also asserts that in considering the reasonableness of the time allowed for proposal submission, GAO has relied on FAR § 5.203(b). Request for Reconsideration at 7-8. This provision requires the contracting officer to establish a solicitation response time that affords offerors a reasonable opportunity to respond to each proposed contract action for the acquisition of commercial items, in an amount estimated to be greater than \$25,000. FAR § 5.203(b). In determining the response time, this section instructs contracting officers to consider the circumstances of the individual acquisition, such as complexity, commerciality, availability, and urgency. Id. According to the Air Force, GAO did not consider whether the response time it established was reasonable in accordance with the guidance set forth in FAR § 5.203(b).

In its report responding to the protest, the Air Force noted that GAO has applied this section to proposal submissions in response to solicitations and solicitation

amendments, but had not applied FAR § 5.203(b) to discussion response times under FAR subpart 15.3 (source selection in negotiated procurements) or interchange responses under FAR subpart 16.5 (delivery and task orders under multiple award contracts). COS/MOL at 15. The agency, however did not argue that we should have considered FAR § 5.203(b) in determining whether the agency permitted sufficient time to respond to interchanges here. See id. (“There are no regulatory requirements for time to be afforded for interchange responses in FAR Subpart 16.5.”).

Since the Air Force could have, but did not raise this argument in response to the protest, it does not provide a basis for reconsideration. In this regard, failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum—to produce fair and equitable decisions based on consideration of all parties’ arguments on a fully developed record—and cannot justify reconsideration of our prior decision. Timberline Helicopters, Inc.-Recon., B-414507.2, Aug. 1, 2017, 2017 CPD ¶ 251. In any case, in our decision we relied on FAR § 16.505 which concerns task order competitions. MCR Federal, LLC, supra, at 5. The fact that we did not rely on FAR § 5.203(b), does not demonstrate that our decision was legally or factually incorrect.⁴

Finally, the Air Force requests that we amend the decision to provide guidance with respect to how much time the agency should provide for responses to interchanges. Request for Reconsideration at 20-22. As noted above, in its protest MCR asserted that the agency should provide 30 days for responses to the interchanges. In our decision, we noted that our finding was limited to the conclusion that the response time provided was insufficient in light of the unique circumstances of this case. We stated that our Office would not recommend a specific time period for final proposal revision responses. Given the multiple fact patterns that are presented during interchanges, it is up to the agency to look at the facts that it is dealing with, and determine a reasonable response time under the circumstances.

The request for reconsideration is dismissed.

Thomas H. Armstrong
General Counsel

⁴ For example, FAR § 5.203(b) concerns procurements in which the agency is required to synopsise. Procurements conducted under FAR § 16.505, are not required to be synopsized. FAR § 5.202(a)(6).