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Decision

Matter of: Xenith Group, LLC

File: B-420706

Date: July 14, 2022

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DIGEST

1. Protest challenging the agency's evaluation of the protester's technical proposal fails to state a valid basis for protest where the protester misunderstood the solicitation criteria, and where the agency's evaluation was consistent with the terms of the solicitation.
 2. Protest arguing that the agency disregarded information that was "too close at hand" to ignore fails to state a valid basis for protest where the too close at hand line of decisions does not apply to technical evaluations.
 3. Protest alleging that the awardee engaged in an impermissible bait and switch fails to state a valid basis for protest where the protester's allegations are based only on speculation.
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DECISION

Xenith Group, LLC, a small business of McLean, Virginia, protests the issuance of a task order to Digital Consultants, LLC, under task order proposal request (TOPR) No. W911S021R0008. The Department of the Army, Mission and Installation Contracting Command-Fort Eustis, issued the TOPR for video teleconferencing and audiovisual support services. The protester argues that the agency rejected its proposal for reasons that are inconsistent with the terms of the solicitation. Protest at 8. Xenith also alleges that the Army unreasonably failed to credit its subcontractors for work that was "too close at hand for the [a]gency to ignore." *Id.* at 9. Finally, the

protester alleges that the awardee took steps to hire Xenith's key personnel, arguing that Digital's actions constituted an "impermissible bait and switch." *Id.*

We dismiss the protest.

BACKGROUND

The Army issued the TOPR on December 16, 2021, pursuant to the procedures in Federal Acquisition Regulation subpart 16.5, to firms holding General Services Administration 8(a) STARS III governmentwide acquisition contracts, seeking video teleconferencing, internet protocol television, and audiovisual services at Fort Eustis, Virginia, in support of the Army's Training and Doctrine Command. TOPR at 1, 39. The solicitation provided for award on a lowest-priced, technically acceptable basis considering two factors: technical capability and price. *Id.* at 43-44.

As relevant here, the solicitation provided for an initial check of compliance with the TOPR's instructions and advised that a task order proposal "may be rejected when [it] fails to meaningfully respond to the instructions specified in this [task order request] TOR." TOPR at 45. The TOPR provided that proposals "not otherwise rejected will be evaluated by the Government providing careful, full, and impartial consideration." *Id.* at 44. For proposals not otherwise rejected, the solicitation advised that evaluators would consider two elements under the technical capability factor: technical approach, and management/staffing approach. *Id.* at 44. Proposals would be scored as acceptable or unacceptable under this factor, where an acceptable proposal "clearly meets the minimum requirements of the TOR" and an unacceptable proposal "does not clearly meet the minimum requirements of the TOR." *Id.*

Xenith submitted its proposal on January 27, 2022. Req. for Dismissal at 8. The Army did not immediately reject Xenith's proposal, but did find it unacceptable under the technical capability factor after evaluating it in accordance with the solicitation criteria. *Id.*; Protest exh. 3, Consensus Technical Evaluation at 1. On April 8, the agency awarded the contract to Digital. Req. for Dismissal at 8. The Army provided the protester with a written debrief, as well as responses to additional questions filed by Xenith. Protest exh. 6, Enhanced Debrief at 1-7. On April 25, this protest followed. ¹

DISCUSSION

The protester alleges that the agency unreasonably rated its proposal as unacceptable; unreasonably failed to consider information concerning its subcontractors' performance that was too close at hand to ignore; and improperly made award to Digital where the awardee's proposal was based on a bait and switch tactic as evidenced by the

¹ Because the value of the task order is in excess of \$10 million, this protest is within our jurisdiction to consider protests regarding civilian agency IDIQ task order contracts. See 41 U.S.C. § 4106(f)(1)(B); *Alliant Sols., LLC*, B-415994, B-415994.2, May 13, 2018, 2018 CPD ¶ 173 at 4 n.8.

awardee's post-award attempts to hire Xenith's key personnel. As discussed below, Xenith's allegations fail to state any valid bases for protest.

Reasonableness

The protester first argues that the agency unreasonably evaluated its proposal because the Army failed to follow the solicitation's evaluation criteria. Protest at 10. Xenith asserts that because it was not initially rejected as part of the agency's compliance check, its proposal must have been fully compliant and could not later be rated technically unacceptable for failing to meet the solicitation's minimum requirements. *Id.* at 10-12. In support of this argument, the protester cites to the solicitation, which provides examples of why a proposal may be rejected, such as failing to be "in full compliance with the terms and conditions of the TOR." TOPR at 46. The protester contends that because its proposal was not initially rejected on this basis, or on any of the other bases listed in this section, the agency was barred from rating its proposal as unacceptable in the subsequent evaluation.

The agency responds that the protester's argument is based on a misunderstanding of the TOPR evaluation criteria. Req. for Dismissal at 10. Specifically, the Army asserts that the solicitation stated that proposals not initially rejected for noncompliance with the TOPR instructions would then be evaluated under the technical capability and price factors. *Id.* at 11. The agency contends that Xenith's proposal was not rejected under this initial compliance check, but was rated technically unacceptable during the technical capability evaluation--consistent with the terms of the TOPR. *Id.* at 11-12.

Our Bid Protest Regulations require protesters to present protest grounds that are factually and legally sufficient. 4 C.F.R. § 21.1(c)(4) and (f); see also *System Dynamics Int'l, Inc.--Recon.*, B-253957.4, Apr. 12, 1994, 94-1 CPD ¶ 251 at 4. More specifically, where a protester's allegations are based on speculation, factual inaccuracies, or flawed legal assumptions, we will summarily dismiss a protest without requiring the agency to submit a report. *Id.* In this regard, our bid protest procedures do not permit a protester to embark on a fishing expedition for protest grounds merely because it is dissatisfied with the agency's source selection decision. See, e.g., *Alascom, Inc. – Second Recon.*, B-250407.4, May 26, 1993, 93-1 CPD ¶ 411 at 4.

Here, the solicitation placed offerors on notice that proposals could be rejected for failing to meaningfully respond to the TOPR instructions and provided examples thereof, such as repeating the requirements without further elaboration or failing to provide any of the data required by the TOR. TOPR at 45. The solicitation also placed offerors on notice that proposals not otherwise rejected would be evaluated for technical capability to determine whether or not they met the solicitation's minimum requirements under that factor. *Id.* at 44. Xenith's assertion that its proposal could not be rated technically unacceptable because it was not initially rejected under the initial check for compliance is based on a fundamental misunderstanding of the solicitation's two-step process. Req. for Dismissal at 12. The TOPR clearly advised offerors that the agency could evaluate proposals after reviewing proposals for compliance with the TOPR's

instructions. TOPR at 11. In addition, nothing in the terms of the TOPR required the agency to find acceptable a proposal that passed the compliance check simply because the proposal passed the compliance check. In short, Xenith fails to state a valid basis for protest, as its allegation relies on a facially erroneous interpretation of the requirements of the TORP.² As such, this protest ground is dismissed.

Too Close at Hand

Next, Xenith asserts that the agency disregarded information that was too close at hand to ignore. Protest at 12. Specifically, the protester argues that the Army was aware of Xenith's key personnel and their "high level of technical expertise,"³ as these personnel had been vetted and approved by the Army for previous work and had received excellent reviews.⁴ *Id.* at 13-14.

The agency responds that this ground fails to state a sufficient legal or factual basis for protest. Req. for Dismissal at 14. The agency asserts that the close at hand principle is recognized only in limited circumstances and does not apply to technical evaluations. *Id.* at 15.

We have stated that in certain limited circumstances, an agency has an obligation (as opposed to the discretion) to consider "outside information" bearing on a vendor's or offeror's past performance because such information is "too close at hand" to ignore or to require the vendors or offerors to shoulder the inequities that spring from an agency's

² The protester also asserts that the agency unreasonably rated its technical proposal as unacceptable based on Xenith's failure to identify three mission-essential individuals in its proposal. Xenith argues that it fulfilled the TOPR requirement by referencing two positions specified in the solicitation and stating it would provide "other personnel 'based on mission requirements.'" Protest at 11. The record shows that the TOPR clearly requires offerors to identify three mission-essential personnel to fill three specific positions, contrary to Xenith's assertions. Protest exh. 2, Performance Work Statement at 19. This allegation also misconstrues the TOPR evaluation criteria and is dismissed.

³ The solicitation directed offerors to provide the resumes of their key personnel and advised that the agency would evaluate these resumes under the management and staffing approach element of the technical capability factor. TOPR at 44. In the post-award debriefing, the agency informed Xenith that its proposal had been found technically unacceptable and stated that, with respect to the management and staffing approach element, Xenith's proposed key personnel did not satisfy the solicitation "requirement and qualifications." Protest exh. 5, Debrief at 1, 13.

⁴ The protester also argues that, in evaluating Xenith's proposed key personnel for the requisite experience and certifications, the agency should have looked beyond the submitted resumes and searched the protester's entire proposal. Protest at 12-13. We agree with the agency that this assertion has no factual or legal basis, as the solicitation specified only that the agency would evaluate the resumes of key personnel to ensure they possessed the necessary skills and certifications. TOPR at 44.

failure to obtain and consider the information. *Strategi Consulting LLC; Signature Consulting Group, LLC*, B-416867, B-416867.4, Dec. 21, 2018, 2019 CPD ¶ 10 at 13. We have stated that an agency's obligation to consider information that is "too close at hand" is limited to information concerning past performance rather than information concerning a firm's technical proposal. See *Enterprise Solutions Realized, Inc.; Unissant, Inc.*, B-409642, B-409642.2, June 23, 2014, 2014 CPD ¶ 201 at 9. An agency's evaluation of an offeror's technical proposal is dependent on the information furnished in the proposal, and an offeror that fails to submit an adequately written proposal runs the risk of having its proposal rejected as unacceptable. *Id.*

Xenith's protest allegation is based on an incorrect legal theory that the close at hand line of decisions applies to an agency's technical evaluation. As noted above, this principle is limited to past performance evaluations. As a result, Xenith's argument relies on an incorrect legal predicate, and as such, fails to state a valid basis for protest. This protest ground is dismissed.

Bait and Switch

Last, the protester alleges that Digital has been attempting to hire Xenith's key personnel, to support its allegation that Digital was engaging in a bait and switch that "had a prejudicial impact on the source selection process." Protest at 15. Xenith asserts that after the agency announced its award decision, Digital made "specific overtures" to Xenith's proposed key personnel and conducted a job fair aimed at obtaining the qualified personnel required by the TOPR. *Id.* The protester acknowledges that it has not reviewed the resumes that the awardee submitted, but contends that Digital's proposal "may have contained a material misrepresentation regarding the true nature of its staff." *Id.* at 16.

The agency responds that the protester's allegation is speculative. Req. for Dismissal at 17. The Army contends that the protester's only evidence of an impermissible bait and switch is the "awardee's reaching out to the incumbent contract personnel about employment with the awardee and a job fair." *Id.* at 18. The agency argues that Xenith has failed to provide evidence that the awardee either knowingly or negligently believed the key personnel included in its proposal would not work for the Army after award. *Id.* at 19.

As noted above, a protester must present protest grounds that are factually and legally sufficient, and where a protester's allegations are based on speculation, factual inaccuracies, or flawed legal assumptions, we will summarily dismiss the protest. 4 C.F.R. § 21.1(c)(4) and (f); *Systems Dynamics Int'l., Inc.--Recon., supra*. Further, to establish an impermissible bait and switch, a protester must show that a firm either knowingly or negligently represented that it would rely on specific personnel that it did not expect to furnish during contract performance, and that the misrepresentation was relied on by the agency and had a material effect on the evaluation results. *Data Mgmt. Servs. Joint Venture*, B-299702, B-299702.2, July 24, 2007, 2007 CPD ¶ 139 at 10.

Here, the protester's only evidence of an impermissible bait and switch is the allegation that the awardee sought out some of Xenith's proposed key personnel after award through a job fair. Protest at 15. While this is one explanation for the alleged behavior, another is that certain key personnel found, after award, that they could not work for the awardee, and so Digital sought to replace these personnel. We agree with the agency that the protester has not shown that Digital knowingly or negligently represented that it would rely on specific personnel that it did not expect to furnish during contract performance. We conclude that the protester has not provided sufficient information to support its basis for protest; instead, it bases this allegation on speculation. See *ICF Inc., L.L.C.*, B-419049.3, B-419049.4, Mar. 9, 2021, 2021 CPD ¶ 117 at 8-9 (stating that evidence of recruitment efforts does not, by itself, establish a bait and switch claim). Accordingly, we conclude that Xenith has failed to provide a valid basis for protest.

The protest is dismissed.

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General Counsel