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Decision

Matter of: Global Analytic Information Technology Services, Inc.

File: B-298840.2

Date: February 6, 2007

William T. Welch, Esq., Barton, Baker, McMahon & Tolle, LLP, for the protester.
James H. Roberts, III, Esq., and Carrol H. Kinsey, Jr., Esq., Van Skoyoc Kelly, PLLC,
for Information Technology Experts, Inc., an intervenor.
Elin M. Dugan, Esq., Department of Agriculture, for the agency.
Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Agency improperly downgraded protester's proposal for failing to include information showing methods for achieving cost or time savings, where such a consideration was not a stated basis for evaluation.
2. Protest that agency improperly engaged in discussions solely with awardee is sustained where awardee was permitted to submit required price escalation rate after conclusion of its oral presentation, notwithstanding agency's specific instructions that such pricing information be furnished at outset of oral presentation.

DECISION

Global Analytic Information Technology Services, Inc. (GAITS), the incumbent contractor, protests the award of a contract to Information Technology Experts, Inc. (ITE) under request for proposals (RFP) No. AG-3142-S-06-0039, issued by the Department of Agriculture for end-user information technology support services. GAITS asserts that the agency applied an undisclosed factor in evaluating its proposal and improperly engaged in discussions with only the awardee.

We sustain the protest.

The RFP contemplated the award of an indefinite-delivery, indefinite-quantity contract to perform information technology support services for a base year, with four 1-year options. Offerors were advised that the agency would make award to the firm submitting the proposal deemed to be the "best value" to the government, considering price and non-price evaluation factors. Agency Report (AR)

at BATES 345.¹ The evaluation factors, listed in descending order of importance, were past performance, methodology, and price. Offerors were to provide pricing in the form of “bare rates” (unburdened hourly labor rates), as well as “overhead rates” (expressed as a percentage of the bare rates) and “capped rates” (burdened rates that could not be exceeded during applicable periods of performance) for various labor categories. Id. at 344. The RFP further provided that the offerors’ price structure would be evaluated for completeness, realism, and reasonableness. Id. at 345. Initial proposals were to include pricing information for the base year only. Id. at 344.

The RFP provided that initial proposals would be evaluated to establish a competitive range. Offerors whose proposals were in the competitive range would be invited to make oral presentations. The RFP advised that the oral presentations would not constitute discussions, but offerors were advised in the agency’s letters inviting them to make oral presentations that certain additional information was required to be provided at the oral presentations—including option-year pricing—and that this information had to be submitted in writing at the start of each firm’s presentation. AR at 241-43. Thus, as relevant here, the RFP provided a common cut-off time—the start of oral presentations—for the submission of option year pricing.

The agency received and evaluated numerous initial proposals. Based on the initial evaluation, it established a competitive range of 10 proposals, including the protester’s and awardee’s; both proposals received overall adjectival ratings of exceptional.² The agency then afforded the competitive range firms an opportunity to make oral presentations; thereafter, the agency evaluated the presentations and arrived at composite adjectival ratings that considered both the initial proposals and the oral presentations.

GAITS included only base year prices in its initial proposal, as the RFP instructed, and then included a pricing sheet covering all contract years in its oral presentation materials. In contrast, ITE included base year pricing in its initial proposal and a representation that its option year prices would be established by applying an annual escalation rate of [deleted] percent to its direct labor rates. ITE did not include a spreadsheet or other information regarding its option year pricing at any time before or during its oral presentation, and was queried by the agency during the presentation regarding the absence of a pricing spreadsheet. In response, ITE sent the agency an e-mail message following its oral presentation that included as an attachment a spreadsheet of its proposed pricing for the option years. That

¹ The agency report uses a BATES numbering system beginning with exhibit C. All of our cites to the agency report reflect this BATES numbering system.

² Both the proposals and oral presentations could be assigned consensus adjectival ratings of exceptional, very good, satisfactory, marginal, or unsatisfactory.

spreadsheet, and the accompanying e-mail, reflected that ITE had used a [deleted] percent escalation rate to calculate its option year prices, not the [deleted] percent rate included in its initial proposal.

The agency rated ITE's presentation as exceptional and GAITS's presentation as very good, and assigned composite ratings to the proposals of exceptional for ITE and very good+ for GAITS. The evaluated prices were calculated in two ways. First, the agency multiplied the capped hourly price for each of several selected labor categories by 1,880 hours per year for the duration of the contract. AR at 12-17. This resulted in a finding that ITE's evaluated price was \$[deleted] and that GAITS's evaluated price was \$[deleted]. The agency also calculated total estimated contract prices by multiplying the government's estimated annual hours for various labor categories by the firms' proposed burdened rates; using this method, the agency found that ITE's total evaluated price was \$[deleted] and that GAITS's total evaluated price was \$[deleted]. Id. On the basis of these evaluation results, the agency made award to ITE as having submitted the proposal that represented the best value to the government.

UNDISCLOSED EVALUATION FACTOR

GAITS asserts that the agency improperly applied an undisclosed evaluation factor in evaluating its oral presentation, namely, the degree to which its presentation reflected methods that it would use to achieve cost or time savings during performance, and that this led to its proposal being rated very good+, rather than exceptional. (The agency's evaluation materials repeatedly identified GAITS's proposal as weak in this area. AR at 36, 39, 46, 49, 51.)

The agency defends its evaluation, asserting that, while the RFP did not expressly provide for consideration of the degree to which an offeror's presentation reflected methods that would achieve cost or time savings during performance, it was implicit—since GAITS was the incumbent contractor—that the agency would evaluate its proposal in light of such considerations. Specifically, the contracting officer states:

GAITS, as an incumbent contractor, was in an excellent position to be able to suggest ways of improving the current performance under the existing contract. However, the GAITS proposal did not describe any such manner or detail of cost or time saving improvements that could be achieved via innovative practices. This was deemed a significant weakness by the [technical evaluation board] which, in addition to the weaknesses raised [in GAITS's initial, but subsequently withdrawn, protest] was a factor in GAITS receiving a lower rating from "Exceptional."

Contracting Officer's Statement, Oct. 16, 2006, at ii. The agency concludes that only incumbents (apparently there were additional incumbents besides GAITS) were in a unique position to propose innovations specific to improving the existing contract, and that it would have been unfair to non-incumbents for the agency to require such proposals from them. Agency Report, Nov. 14, 2006, at 6.

Agencies are required to evaluate proposals based solely on the factors identified in the solicitation, and must adequately document the bases for their evaluation conclusions. Intercon Assocs., Inc., B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 at 5. While agencies properly may apply evaluation considerations that are not expressly outlined in the RFP, where those considerations are reasonably and logically encompassed within the stated evaluation criteria, Independence Constr., Inc., B-292052, May 19, 2003, 2003 CPD ¶ 105 at 4, there must be a clear nexus between the stated criteria and the unstated consideration.

The RFP here included a firm's proposed methodology as one of the evaluation factors, and we generally might view a factor considering proposed methodology as broad enough to encompass proposals' proposed methods for achieving cost or time savings.³ However, even if this is the case, nothing in the solicitation's description of the methodology factor, or elsewhere in the solicitation, advised offerors--GAITS in particular--that the agency would evaluate the degree to which the incumbent contractor's proposal reflected methods for achieving cost or time savings over its historical performance of the requirement. That is, nothing indicated that an incumbent-specific factor would be applied. The required nexus between the stated evaluation factor and the unstated consideration, therefore, was absent and, as a result, GAITS was not on notice that it was the agency's intent to evaluate savings in this manner.

Moreover, notwithstanding that GAITS was the incumbent contractor, the agency could not properly evaluate only its proposal under this criterion. Doing so amounted to disparate treatment of proposals, and was inconsistent with the overriding requirement that agencies evaluate proposals on a common basis. See Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 13.

LATE PROPOSAL REVISION

GAITS maintains that the agency's acceptance of ITE's option year prices after the conclusion of ITE's oral presentation constituted discussions. GAITS maintains that this was improper because it was not afforded the same opportunity to engage in

³ We note that the agency does not appear to have downgraded GAITS's proposal under the methodology factor; the evaluation documents identify GAITS's failure to propose cost or time savings as a weakness under the oral presentation evaluation, not under the methodology factor evaluation. AR at 36, 39, 46, 49, 51.

discussions. The agency asserts that its actions did not amount to discussions because it did not solicit ITE's price reduction during the firm's oral presentation, but merely pointed out that its presentation materials did not include the required pricing spreadsheet.

Where agency personnel comment on, or raise substantive questions or concerns about, an offeror's proposal in the course of an oral presentation, and either simultaneously or subsequently afford the offeror an opportunity to make revisions in light of the agency's comments or concerns, discussions have occurred. TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6. As we have long held, the acid test for whether discussions have occurred is whether the agency has afforded an offeror an opportunity to revise or modify its proposal. Id.

Here, during the oral exchange between ITE and the agency, the agency remarked on the absence of a pricing spreadsheet from ITE's oral presentation materials; the agency wanted offerors to perform their own calculations in this regard. Contracting Officer's (CO) Statement, Nov. 14, 2006, at 1. ITE's e-mail to the agency stated that the pricing sheet was being submitted in response to the agency's request. AR at 238. However, ITE did not merely confirm its option year pricing from its initial proposal. Rather, it reduced the escalation rate it initially proposed, and since the option year pricing was evaluated for award purposes, this constituted a material change in its proposal. Providing an offeror an opportunity to make a material change in its proposal constitutes discussions. Moreover, it is clear from the record that ITE's revised pricing was tendered after the point in time when it was required to be submitted, see Lockheed Martin Simulation, Training & Support, B-292836.8 et al., Nov. 24, 2004, 2005 CPD ¶ 27 at 8, and that this resulted in the agency improperly engaging in discussions with only one offeror after the deadline for submitting proposals. Id.; TDS, Inc., supra.

The agency maintains that all firms—including the protester—were free to propose pricing changes during their oral presentations; thus, the fact that ITE reduced its pricing in its post-oral presentation e-mail was not improper because all offerors were treated equally. This argument is without merit. There is nothing in the record indicating that GAITS (or other offerors) was advised that pricing or other material aspects of its proposal could be revised after the conclusion of its oral presentation. Rather, the agency's letter to GAITS inviting it to make an oral presentation simply requested a pricing sheet that presented the firm's prices for all contract years, and GAITS complied with those specific instructions. AR at 150. Thus, we do not agree that all offerors were provided the same opportunity to submit revised proposals after the conclusion of oral presentations.

Finally, the agency asserts that, in any case, ITE's subsequent submission of its reduced option year escalation rate amounted to a late modification of an otherwise successful proposal—which was permissible under the solicitation—because the agency already had determined that it would make award to ITE prior to evaluating

the pricing in its e-mail. This argument is unsupported by the record. An otherwise successful proposal is one that would result in the award of a contract to the offeror regardless of the late modification; this generally means that the government may accept a favorable late modification only from the offeror already in line for award. Omega Sys., Inc., B-298767, Nov. 6, 2006, 2006 CPD ¶ 170 at 2. The contemporaneous record includes no information showing either that the agency calculated ITE's extended pricing based on its initial proposal submission, or that such a calculation was used to make a source selection decision; rather, the record shows that the agency's deliberations and source selection decision were based solely on ITE's revised pricing after oral presentations and a further evaluation based on the oral presentations. AR at 10-17. The contracting officer's unsupported statement, made in the heat of litigation, that ITE's proposal already had been determined to be the best value prior to ITE's reducing its escalation rate, is not sufficient by itself to establish that the best value determination, in fact, had been made. In any case, since as discussed above, the agency's source selection relied on an erroneous technical evaluation, there would be no basis for our Office to find that the agency had already made a rational source selection based on ITE's earlier, higher, escalation rate.

PREJUDICE

For the reasons outlined above, we find that the the agency's downgrading of GAITS's proposal for failing to offer methods that would achieve time or cost savings over its historical performance amounted to the improper application of an unstated evaluation criterion. We also find that this error in the agency's evaluation was prejudicial to GAITS because it apparently led to its proposal receiving an overall rating of very good+ rather than exceptional (its initial proposal was rated exceptional, and the agency's identification of this weakness apparently led to GAITS's oral presentation being rated very good rather than exceptional); a correct evaluation of the GAITS proposal could have resulted in the firm being considered to have submitted the proposal deemed technically superior overall. In this latter respect, the record shows that, as between the two proposals receiving exceptional ratings, the agency distinguished between them, finding that the awardee's proposal was the "better" of the two exceptionally-rated proposals. AR, at 10-11. We cannot say whether or not, in the absence of the agency's evaluation error, the GAITS proposal would have been found to be the "best" among the exceptionally-rated proposals. Nonetheless, there is a reasonable possibility that the agency's evaluation error resulted in GAITS being deprived of the award, especially in view of the RFP's emphasis on technical merit over price, coupled with the relative closeness of GAITS's and ITS's evaluated prices. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Additionally, we conclude that the agency engaged in improper discussions with ITE, but not the other offerors, and that this also was prejudicial to GAITS. It is possible that GAITS would have reduced its pricing had it been given an opportunity to do so, just as ITE was given.

RECOMMENDATION

We recommend that, to the extent the agency desires to evaluate proposed methods for achieving cost or time savings, it amend the RFP to reflect such considerations and then solicit and evaluate revised proposals in an equitable manner. In any case, we recommend that the agency afford all competitive range offerors an opportunity to engage in discussions and to submit revised proposals; the agency should then perform a new evaluation consistent with the terms of the RFP. Should the agency determine that a proposal other than ITE's represents the best value, we recommend that it terminate ITE's contract for the convenience of the government and make award to the successful offeror, if otherwise proper. Finally, we recommend that the agency reimburse GAITS's costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2006). GAITS's certified cost claim, detailing the time expended and costs incurred must be submitted to the agency within 60 days of receiving our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel