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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Council for Adult & Experiential Learning

File: B-299798.2

Date: August 28, 2007

John R. Zappa for the protester.

Thomas P. Humphrey, Esq., Amy Laderberg O'Sullivan, Esq., and Adelia Cliffe Taylor, Esq., Crowell & Moring LLP, for IBM Global Business Services, an intervenor. Maj. Geraldine R. Chanel, Department of the Army, for the agency.

Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Post-award challenges to solicitation terms are dismissed as untimely and challenges to agency's evaluation of proposals are denied because they are based on untimely allegations and fail to specifically identify flaws with the agency's evaluation.

DECISION

The Council for Adult & Experiential Learning (CAEL) protests the award of a contract to IBM Global Business Services under request for proposals (RFP) No. W74V8H-06-R-0007, issued by the Department of the Army, Army Continuing Education System (ACES), for integration and other technical services for the GoArmyEd program. The protester contends that the terms of the solicitation created a competition that was biased in favor of IBM, the award to IBM was tainted by organizational conflicts of interest (OCI), and the agency unreasonably evaluated the offerors' proposals.

We dismiss in part and deny in part the protest.

BACKGROUND

The GoArmyEd program offers active duty soldiers "anytime, anywhere" access to educational opportunities from accredited postsecondary education institutions through an online web-based portal. The program allows soldiers to select a degree program, enroll in and access courses, obtain education counseling, and access financial aid and other support services. The program also provides infrastructure

and logistical support for schools and education service providers. GoArmyEd is intended to fully replace the existing eArmyU program, under which soldier education services have been previously provided, and which now provides certain limited services. IBM is the incumbent contractor for eArmyU.

The agency issued the RFP on September 29, 2006, seeking proposals to provide lead integration and other technical services required to ensure continuous availability and reliability of the GoArmyEd web portal and associated infrastructure. The performance work statement (PWS) included requirements to complete the transition from the eArmyU program to GoArmyEd, maintain the GoArmyEd web portal, provide technical, management and logistic support for the education service providers, and provide support for future expansion of the GoArmyEd program.¹

The RFP anticipated award of an indefinite-delivery/indefinite-quantity (ID/IQ) contract with a 1-year base term, and nine 1-year options. The work under the contract will be performed through the issuance of firm fixed-price and time-and-materials task orders.

The RFP identified five non-cost/price evaluation factors, listed here in descending order of importance: technical approach, management capabilities and approach, corporate recent and relevant experience, small business participation plan, and past performance. RFP § M-2. The RFP stated that “[t]he non-Price Factors, when combined, are significantly more important than the Price/Cost factor.” Id. § M.1. Offerors were informed that their proposals must receive a rating of at least “acceptable” under the first three evaluation factors in order to be eligible for award. Id. The RFP also stated that offerors’ proposed prices would be evaluated for price realism and reasonableness. Id.

Three offerors submitted proposals in response to the solicitation: IBM, Savantage Solutions, and CAEL.² CAEL’s proposal included the participation of a

¹ The actual provision of educational, counseling, and financial aid services is separate from the requirements sought under this solicitation. RFP, PWS, at 14.

² Our office did not issue a protective order in connection with this protest because CAEL elected not to retain counsel. A redacted version of the agency report was furnished to CAEL regarding the agency’s evaluation of its proposal, and a redacted evaluation was provided to counsel for IBM regarding the evaluation of its proposal. Certain portions of the source selection decision, including the offerors’ overall evaluation scores, were provided to both parties. Consequently, our discussion regarding the agency’s evaluation of offerors’ proposals is general in nature because information in those evaluations and the source selection decision reference materials in the vendors’ quotations that may be proprietary to the offerors. Additionally, our decision does not further discuss the proposal submitted by Savantage, which was not a party to the protest (Savantage filed its own protest, (continued...))

subcontractor, AutoDP, Inc. The RFP stated that the Army intended to make an award based on offerors' initial proposals, without conducting discussions, RFP § L.2.a; consistent with this provision, the agency did not conduct discussions with offerors. As relevant to the protest, the agency evaluated the offerors' proposals as follows:

	IBM	CAEL
1. Technical Approach ³	Excellent	Unacceptable
2. Management Capabilities and Approach	Excellent	Unacceptable
3. Corporate Recent and Relevant Experience	Excellent	Unacceptable
4. Small Business Participation Plan	Acceptable	Not applicable ⁴
5. Past Performance	Low Risk	Unknown
Overall Rating	Excellent	Unacceptable

AR, Tab 14, Source Selection Decision (SSD), at 6.

The Army determined that CAEL's proposal, which received ratings of "unacceptable" for the first three evaluation factors, was not eligible for award. Id. at 48-49. The agency concluded that IBM's proposal "offered a superior technical proposal that contained merit significantly greater than either Savantage Solutions or [CAEL]," and that it "provides the best solution for completing the requirement and there is very low risk of unsuccessful completion of the contract." Id. at 49. The agency advised CAEL of the award to IBM on May 10, 2007, and provided a debriefing regarding the source selection on May 16. This protest followed.

DISCUSSION

CAEL raises numerous challenges to the agency's award to IBM. An overarching theme of CAEL's protest is that the competition was skewed to favor IBM as a result of a flawed RFP and OCIs. However, as discussed in detail below, the bulk of these challenges are untimely because they relate to the terms of the solicitation or terms of the competition that were known to offerors prior to the time proposals were due.

(...continued)

which we denied on August 22, 2007). We have reviewed the entire unredacted record in camera, including all of the agency's evaluation materials and the proposals submitted by CAEL and IBM.

³ For the first four evaluation factors, the agency used an evaluation scheme of excellent, good, acceptable, marginal, and unacceptable. Past performance was evaluated on the basis of low, moderate, high or unknown risk.

⁴ CAEL is a small business, and was therefore not evaluated under this factor.

The balance of CAEL's arguments relate to the evaluation of offerors' proposals and miscellaneous collateral issues; many of these challenges are also untimely. We conclude that none of CAEL's allegations warrant sustaining the protest.

Untimely Solicitation Challenges

CAEL argues that the Army refused to provide information regarding IBM's performance of the eArmyU contract, which the protester argues was required to permit non-incumbent offerors a reasonable opportunity to compete. This challenge is untimely because it relates to the terms of the solicitation.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based on alleged improprieties in a solicitation that are apparent prior to bid opening be filed before that time. 4 C.F.R. § 21.2(a)(1) (2007). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.—Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

Here, CAEL argues that the Army unreasonably refused to provide technical specifications and legacy information regarding the eArmyU contract, and did not provide adequate details regarding the performance work statement (PWS) and statement of work (SOW). The protester argues that the lack of information regarding the existing ACES systems and requirements left an offeror with insufficient information to address the RFP's requirement to submit a detailed proposal outlining its approach to the requirements. CAEL argues that offerors were placed "in the awkward position of having to make their best guess" as to how to respond to the solicitation. Protest at 55.

All of CAEL's allegations regarding the Army's failure to provide information are untimely because they constitute challenges to the terms of the solicitation. Additionally, with regard to the various types of technical data sought by the protester, the Army specifically advised offerors that this information would not be provided. As the Army notes, amendment 2 to the solicitation addressed numerous questions submitted by offerors. With regard to much of the information now sought by the protester, the Army stated in amendment 2 that the agency either could not release the requested information because it was IBM proprietary data or that the information would be provided to the successful contractor after award. See, e.g., RFP amend. 2, Question and Answer Nos. 41, 46, 47, 48a, 49a, 57, 60. The protester was therefore on notice that the information would not be provided; consequently, the protester's post-award challenges are untimely.

The protester also contends that the agency improperly refused to provide information regarding training and informational meetings between IBM and ACES officials during the performance of the incumbent contract. CAEL requested to participate in those meetings, which took place both before and after the solicitation

was issued, but was not allowed to attend. Protest at 49. CAEL also requested minutes, notes and other data, from those meetings, but was not provided this information. Protest at 49. CAEL argues that the meetings may have discussed ACES's current and future requirements, and therefore the agency was obligated to provide offerors any information that would have been relevant to the competition. These allegations are also untimely because they relate to the terms of the solicitation--information not furnished with the RFP--and CAEL did not raise them prior to the time for receipt of proposals.

Organizational Conflicts of Interest

CAEL next argues that the competition was tainted by OCIs. As discussed below, we conclude that the record does not support CAEL's allegations.

The Federal Acquisition Regulation (FAR) generally requires contracting officers to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504, 9.505; Snell Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115 at 3. The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. Contracting officers must exercise "common sense, good judgment, and sound discretion" in assessing whether a potential conflict exists and in developing appropriate ways to resolve it; the primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.505; Science Applications Int'l Corp., B-293601.5, Sept. 21, 2004, 2004 CPD ¶ 201 at 4.

CAEL argues that the award to IBM was tainted as a result of two instances of unequal access to information.⁵ The protester argues that IBM had exclusive access to information that was required for offerors to submit competitive proposals as a result of IBM's performance of the incumbent eArmyU contract. The protester also contends that IBM's participation in the training and informational meetings with the ACES officials cited above gave rise to an OCI because other offerors were not allowed to participate in the meetings or receive information from those meetings.

⁵ In its initial protest, CAEL also argued that the participation of Army contractors and other entities in the evaluation of proposals gave rise to an OCI. Although the Army responded to this allegation in its agency report, CAEL did not address this response in its comments. Accordingly, we consider this issue abandoned. See Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4. In any event, as the agency notes, the participation of the parties alleged to have an OCI was disclosed in the solicitation, RFP § L.11, PWS § J.4, and the protester raised no objection to their participation until CAEL lost the competition.

It is well-settled that a particular offeror may possess unique advantages and capabilities due to its prior experience under a government contract or otherwise and the government is not required to attempt to equalize competition to compensate for it, unless there is evidence of preferential treatment or other improper action. Gonzales Consulting Servs., Inc., B-291642.2, July 16, 2003, 2003 CPD ¶ 128 at 7. The existence of this advantage, as alleged here, does not by itself constitute preferential treatment by the agency, nor does it otherwise represent an unfair competitive advantage. Government Bus. Servs. Group, B-287052 et al., Mar. 27, 2001, 2001 CPD ¶ 58 at 10.

Further, both of CAEL's OCI allegations pertain to the same types of information that the protester argues should have been made available to offerors in the solicitation. Thus, to the extent that CAEL's arguments posit an OCI based on unequal access to information that was not disclosed in the RFP, these arguments are untimely. Dominion Aviation, Inc.-Recon., supra. Specifically, the protester knew that the agency refused to disclose the information and was not otherwise taking actions to address what CAEL now argues was IBM's unequal access to information.

Technical Proposal Evaluation

CAEL next argues that the agency unreasonably evaluated the offerors' technical proposals. The protester fails to specifically challenge the Army's evaluations, however, and instead relies on generalizations and thus provides no basis to sustain the protest.

As discussed above, the Army determined that CAEL's proposal was unacceptable with regard to the following three evaluation factors: technical approach, management capabilities and approach, and corporate recent and relevant experience. AR, Tab 14, SSD, at 6. These evaluations were based on numerous material deficiencies in CAEL's proposal under each of the evaluation factors. For example, our review of the record shows that CAEL failed to submit required elements of the proposal, such as a draft transition order and letters of commitment for its proposed key personnel, and also failed to demonstrate the requisite corporate experience as to the full range of PWS requirements. AR, Tab 14, SSD, at 13, 22, 32. Based on the protester's failure to receive ratings of at least acceptable for these three evaluation factors, the agency reasonably determined that its proposal was ineligible for award. Id. at 48-49.

The protester contends that CAEL and AutoDP are the most experienced contractors in certain of the areas of the solicitation requirements, and argues that CAEL's proposal would have been beneficial to the GoArmyEd program. Protest at 52-54; Protest's Comments on AR at 16-17. CAEL's arguments regarding its and AutoDP's capabilities are general, however, and the protester does not challenge any of the specific areas in which the Army found its proposal technically unacceptable. In

sum, the protest does not meaningfully challenge the agency's evaluation of CAEL's proposal or the agency's determination that the proposal was ineligible for award.

CAEL also argues that the agency unreasonably evaluated the offerors' proposals because CAEL would have required less research and development effort as compared to IBM. The protester argues that it currently possesses the capability to provide functions that the RFP anticipated would be developed by the contractor during contract performance. Protest at 54-55. The protester does not argue, and the RFP does not state, however, that the functionalities that CAEL claims that IBM lacks were requirements that an offeror needed to demonstrate in its proposal in order to be technically acceptable. Stated differently, even if the protester were correct that IBM will need to develop additional capabilities during contract performance that it does not currently possess, this allegation does not demonstrate that IBM's proposal was technically unacceptable. Thus, this allegation provides no basis to challenge the award to IBM.

Other issues

In addition to the protest grounds discussed above, CAEL has raised various other arguments. Although we discuss three additional issues below, we have reviewed all of the issues raised by CAEL in its protest, and find no merit in them.

CAEL argues that the agency's decision to award the contract without discussions was improper, and that discussions would have allowed CAEL to address the agency's concerns regarding its proposal. The RFP, however, stated that the agency intended to award without discussions, and further advised that "Offerors are cautioned to examine this solicitation in its entirety and to ensure that their proposal contains all necessary information, provides all required documentation, and is complete in all respects." RFP § L.2.a. The agency's decision not to conduct discussions was consistent with the RFP language, and, on this record, the protester provides no basis to challenge the agency's decision.

CAEL next contends that a donation of software by IBM to the government may have created a conflict of interest that affected the competition. The protester claims that an "announcement was heard on the national news media by CAEL staff" in early April 2007, prior to award, that IBM would "donat[e] \$45 million worth of software to the Army for GoArmyEd." Protest at 58. The agency notes, however, that the protester incorrectly characterized the donation: a news article on April 3 stated that IBM intended to donate "10,000 copies of its speech translation software to the U.S. government for use in humanitarian settings in Iraq." AR, Tab 18, "IBM Donates Translation Software to US Military," IDG News Service, Apr. 3, 2007. Because CAEL's allegations regarding the nature of the donation are inaccurate, and because the protester presents only a vague inference of impropriety regarding the donation, we conclude that this protest issue does not have merit. In this regard, government officials are presumed to act in good faith, and our Office will not attribute unfair or

prejudicial motives to them on the basis of inference or supposition. PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 2-3.

Finally, the protester argues that certain patents owned by its subcontractor AutoDP will be violated by IBM and the Army in the performance of the contract and the GoArmyEd program, generally. A potential claim for patent infringement does not provide a basis for sustaining a protest. Odetics, Inc., B-246008, Feb. 13, 1992, 92-1 CPD ¶ 185 at 3-4. The exclusive remedy for a patent holder who claims patent infringement by the government or by a government contractor who acts with the authorization or consent of the government is a suit against the government in the United States Court of Federal Claims. Lab Prods., Inc., B-252452, Mar. 19, 1993, 93-1 CPD ¶ 250 at 4. Therefore, our Office will not consider this issue.

The protest is dismissed in part and denied in part.

Gary L. Kepplinger
General Counsel