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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Career Training Concepts, Inc.--Advisory Opinion

File: B-311429; B-311429.2

Date: June 27, 2008

Bryant S. Banes, Esq., Neel, Hooper & Banes, PC, for the protester.
Mandy McCary, Esq., McCary & McCary PC, for the intervenor.
William J. Nelson, Department of the Army, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Evaluation of protester's proposal is unobjectionable where record shows evaluation was reasonable and consistent with solicitation's evaluation criteria as well as applicable statutes and regulations.

2. Assertion that agency improperly failed to provide meaningful discussions is without merit where record shows that agency made award on basis of initial proposals, without conducting discussions; while agency raised questions with protester relating to its price proposal, those questions constituted clarifications, not discussions.

DECISION

Career Training Concepts, Inc. (CTC) protests the issuance of a delivery order to Management and Training Consultants, Inc. (MTCI) under request for proposals (RFP) No. W9133L-08-R-0014, issued by the Department of the Army, National Guard Bureau, to obtain services for the Army National Guard Educational Liaison Program, which assists in recruiting at high schools and colleges. CTC argues that it's proposal was misevaluated, that the agency failed to engage in meaningful discussions and that the awardee should be excluded from consideration for award.

CTC filed its protest in our Office on March 27, 2008. Thereafter, on June 17, CTC filed an action in the United States Court of Federal Claims that was substantially similar to its protest in our Office. We dismissed CTC's protest on June 18 in light of its filing with the court. Subsequently, by order dated June 20, the court asked our Office to issue an advisory opinion addressing CTC's protest. See 4 C.F.R. § 21.11(b) (2008). Our opinion here is issued in response to the court's request, and is

presented in the same general format that we normally employ to issue decisions responding to bid protests. As explained below, we find no merit to the protest.

The RFP contemplated the issuance of a delivery order to perform various services in connection with the agency's recruitment efforts for a base year, with 1 option year, under the successful vendor's Federal Supply Schedule (FSS) contract.[1] A "best value" evaluation was to be conducted based on three factors (in descending order of importance): technical/management, past performance, and price. RFP at 27-29. The technical/management proposals were to be assigned adjectival ratings of excellent, very good, good, or unsatisfactory, RFP at 27-28, and past performance was to be rated low risk, moderate risk, high risk, or neutral. RFP at 29.

The agency received two proposals--CTC's and MTCI's--by the closing time.[2] After evaluating the proposals the agency assigned MTCI's technical/management proposal an overall rating of very good and CTC's a rating of good. Agency Report (AR) exh. 14 at 2. Both proposals received past performance ratings of low risk. Id. MTCI's total price was $9,135,714.00 and CTC's was $7,391,185.03. AR, exh. 17 at 3. On the basis of these evaluation results, the agency issued a task order to MTCI, finding that its proposal's technical superiority outweighed its higher price. Id. at 3-4.

After being advised of the award, CTC requested a debriefing from the agency, which it also asked the agency to consider as an agency-level protest. The agency provided

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[1] CTC asserts that the agency conducted this acquisition using Federal Acquisition Regulation (FAR) part 15 procedures, and that the requirements of that part thus apply. In support of this assertion, CTC notes, for example, that the agency established a competitive range in connection with its evaluation of proposals, a feature of part 15 procurements. However, while the agency incorrectly refers to a competitive range in its source selection decision, it is clear from the RFP that the acquisition was conducted under the General Services Administration's FSS program. RFP at 14. As such, the acquisition was governed by the streamlined procedures in FAR subpart 8.4.

[2] CTC asserts that MTCI's proposal was late--and should not have been considered--because it was submitted on February 12, after the original February 8, 2008 closing date. The record shows, however, that the agency issued two amendments to the RFP, the second of which was in the form of an e-mail sent to all offerors on February 7 that extended the closing time to February 12. CTC suggests that this e-mail had no effect because it was not issued as a formal amendment. However, in light of the fact that all firms received the e-mail, it served to effectively amend the RFP. Phenix Research Prods., B-292184.2, Aug. 8, 2003, 2003 CPD ¶ 151 at 5.

CTC with a written debriefing by letter dated March 26. AR, exh. 17. By letter dated March 27, CTC filed this protest with our Office. [3]

CTC challenges numerous aspects of the evaluation and the procurement. We have reviewed all of CTC's allegations and find that they are without merit. We discuss CTC's most significant arguments below.

EVALUATION OF CTC'S PROPOSAL

CTC challenges the agency's evaluation of its proposal, maintaining that every one of the weaknesses identified by the agency was unwarranted because its proposal adequately addressed the matter. CTC also asserts that, regardless of the contents of its proposal, the agency was aware of how it would perform the contract (since CTC was the incumbent contractor for the requirement) and should have taken this knowledge into consideration. [4]

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[3] CTC submitted a debriefing request by e-mail dated March 21, which posed several questions to the agency relating to the award decision. AR, exh. 16. In a subsequent e-mail that same day, CTC advised the agency that the debriefing request should also be considered an agency-level protest. Id. By e-mail dated March 25, the agency advised CTC that it was dismissing its agency-level protest for failing to comply with the requirements of FAR § 33.103(d)(1). In a subsequent e-mail that same day, the protester again advised the agency that it should consider the debriefing request to be an agency-level protest, and paraphrased five questions it considered to have been included as protest bases in its request for a debriefing. Id. The agency responded to the questions in its March 26 written debriefing. AR, exh. 17.

[4] In a supplemental protest filed with our Office on May 6, CTC asserted that that its initial protest to our Office included all of the assertions raised in its debriefing request/agency-level protest, including what it describes as arguments concerning the evaluation of MTCI's proposal. Since the agency responded to the questions raised in CTC's debriefing request/agency-level protest by letter dated March 16, CTC was required to raise these assertions with our Office within 10 days of receiving the agency's March 16 correspondence. Since CTC did not raise the questions posed in its debriefing request/agency-level-protest with our Office until May 6, more than 10 days after receiving the agency's March 16 letter, those arguments are untimely, and not for consideration. 4 C.F.R. § 21.2(a)(2) (2008). We note in any case that the questions included in CTC's debriefing request/agency-level protest were broad, unsupported statements that did not raise substantive challenges to the agency's evaluation of MTCI's proposal and, as such, failed to state a basis for protest. For example, one of the questions stated: "It is improper to select a higher cost less technically experienced offeror for award." AR, exh. 16, at 2.

In reviewing protests concerning the propriety of an agency's evaluation, it is not our role to reevaluate proposals; rather, we will examine the record to determine whether the agency's evaluation conclusions are reasonable and consistent with the terms of the solicitation, as well as applicable procurement laws and regulations. L-3 Communications Corp., BT Fuze Prods. Div., B-299227, B-299227.2, Mar. 14, 2007, 2007 CPD ¶ 83 at 6.

We find that CTC's arguments are without merit; the evaluation was reasonable. We discuss two of CTC's arguments for illustrative purposes.

Presentations

The RFP required vendors to provide education liaison program (ELP) representatives who would perform various tasks, including conducting school program presentations on a twice weekly basis. RFP at 10. The agency found that CTC failed to establish in its proposal that it would meet the RFP's minimum requirement for conducting the presentations. AR, exh. 11, at 3. CTC argues that the evaluation was unreasonable because its proposal shows that it obligated the firm to meet this requirement.

We disagree. CTC's proposal states as follows regarding the requirement:

> The standard established in conjunction with [the agency under CTC"s predecessor contract] has been 6 presentations per month by the ELP representative or the recruiter he or she is working with. As a team, the ELP exceeded that mission by 580 [percent] during the 1st quarter of [fiscal year] 2008.

AR, exh. 7, at A-10. This language makes no representation whatsoever that CTC will meet the minimum requirements of the RFP--two presentations per week--in performing the contract. Rather, the proposal merely recited the performance standard established under CTC's predecessor contract, and represented that CTC had exceeded that standard during the first quarter of fiscal year 2008. We conclude that the agency reasonably identified this as a weakness in CTC's proposal.

Educational and Experience Requirements

The RFP included detailed educational and experience requirements that the vendors' proposed ELP representatives had to possess; specifically, the ELP representatives were required to have either a bachelors degree in certain specified disciplines or, in lieu thereof, an associates degree, or equivalent, with documented experience. RFP at 8-9. The agency assigned CTC's proposal a weakness in this area because, while the proposal mentioned verifying prospective employees' background, educational experience and absence of illegal drug use, it did not present or outline a plan or a set of established procedures for vetting an applicant's

background or qualifications. CTC maintains that its proposal, in fact, reflects an adequate plan in this area.

Again, we disagree. CTC references various portions of its proposal in support of its allegation. However, we have read the cited portions of the proposal and find no mention of a plan for systematically verifying the qualifications of its prospective employees. For example, section A.8 of the proposal states that CTC's representatives are professional in every aspect of the word and are held accountable to the highest standards, and section A.9.1 refers to a database of more than 200,000 personnel who have participated in various Army National Guard training programs, as well as initial or sustainment training conducted by individuals employed by CTC. However, nothing in CTC's proposal indicated that the firm has a systematic program for evaluating the qualifications of prospective ELP representatives to ensure that these individuals meet the RFP's specific qualification requirements, or even that its current representatives meet those requirements. We conclude that the agency reasonably identified this as a significant weakness in the proposal.

We also conclude that the agency was under no obligation to consider extraneous information relating to CTC's performance under its predecessor contract in its evaluation of CTC's technical/management proposal. In this regard, a vendor is responsible for preparing an adequately written proposal, and it is the substance of the proposal--rather than any extraneous information--that establishes the vendor's understanding of the terms of the RFP. Savantage Fin. Servs., Inc., B-299798, B-299798.2, Aug. 22, 2007, 2007 CPD ¶ 214 at 8. We have recognized a limited exception that requires agencies to give consideration to extraneous information that is "simply too close at hand" in connection with the evaluation of a firm's past performance. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. Similarly, where a solicitation's technical evaluation criteria encompass traditional responsibility considerations, we have found it unobjectionable for agencies, for example, to give consideration to extraneous information obtained in connection with a responsibility determination in assessing the firm's technical proposal. Pearl Properties; DNL Properties, Inc., B-253614.6, B-253614.7, May 23, 1994, 94-1 CPD ¶ 357 at 7. Here, CTC's objections relate only to the agency's evaluation of its technical/management proposal--as opposed to its past performance proposal--and nothing in the solicitation's description of the technical/management evaluation factor related to traditional responsibility considerations. Under these circumstances, the agency was not required to give consideration to extraneous information relating to CTC's performance of its predecessor contract; in the final analysis, CTC failed in its obligation to adequately address in its technical proposal its technical approach to meeting the solicitation requirements.

DISCUSSIONS

CTC asserts that the agency improperly failed to engage in meaningful discussions because it failed to bring to CTC's attention the evaluated weaknesses in its proposal. CTC maintains that the agency was required to bring these matters to its attention because the RFP did not contemplate award without discussions

As a general rule, in a negotiated procurement, agencies properly may make award without engaging in discussions, provided the RFP states that this is the agency's intent. Bannum, Inc., B-298291.2, Oct. 16, 2006, 2006 CPD ¶ 163 at 7. However, where a procurement is an FSS purchase conducted pursuant to FAR part 8.4, as was the case here, an agency properly may make award without conducting discussions, even if the solicitation does not expressly advise vendors of that possibility. Avalon Integrated Servs., Corp., B-290185, July 1, 2002, 2002 CPD ¶ 118 at 4. We conclude that the agency was under no obligation to engage in discussions.

CTS maintains that, whether or not the agency was required to do so, it in fact initiated discussions with CTC, and that those discussions were not meaningful because they were not comprehensive. Once an agency initiates discussions, those discussions must be meaningful. Stone & Webster Eng'g. Corp., B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306 at 10-11. In order for discussions to be meaningful, the agency must advise offerors of deficiencies in their proposals and afford them an opportunity to revise their proposals to satisfy the government's requirements. Id.; see FAR §§ 15.610(c)(2), (5).

The premise of CTC's argument--that the agency initiated discussions with CTC--is incorrect. While the agency communicated with CTC, its communication constituted clarifications rather than discussions. In this regard, a clarification is a limited exchange intended to clarify aspects of a vendor's proposal or to resolve minor or clerical mistakes. See FAR § 15.306(a). Discussions, in contrast, provide a firm the opportunity to make substantive revisions to its proposal. TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6. Here, the agency sent CTC two requests seeking a narrative description of the components included in CTC's price for travel, and a narrative rationale for its proposed escalation rate. In response, CTC provided the agency the requested narratives. We think it is clear that the requests were intended to facilitate the agency's understanding of the underlying cost components included in CTC's price proposal, but did not provide CTC an opportunity to submit a revised price. Such a clarification request does not trigger the obligation to initiate discussions, since CTC's responses clarified, but did not modify, its proposal. See AHNTACH, Inc., B-293582, Apr. 13, 2004, 2004 CPD ¶ 113 at 2-3.

DISQUALIFICATION OF MTCI

CTC asserts that MTCI's proposed program manager attended a class taught by CTC in the past, that she obtained CTC's proprietary information during that class, and

that MTCI subsequently included the information in its proposal. CTC maintains that this constitutes a violation of the Procurement Integrity Act, 41 U.S.C. § 423 (2000), the Trade Secrets Act, 18 U.S.C. § 1905, and provisions of the FAR relating to organizational conflicts of interest. See FAR part 9.5. In response to this assertion, the agency advised our Office that it has initiated a formal investigation into CTC's allegations. Given the agency's investigation, we consider this aspect of CTC's protest to be premature, and thus will not consider it. See SRS Tech., B-277366, July 30, 1997, 97-2 CPD ¶ 42 at 2 (the Procurement Integrity Act contemplates providing the agency notice of a possible violation so that the agency may conduct an investigation and engage in remedial action should it be appropriate).[5]

In sum, our review of the record in this case identified no basis to question the agency's evaluation or source selection decision for the reasons advanced by the protester. Accordingly, if our Office were resolving the protest, we would deny or dismiss the issues raised for the reasons discussed above.

Gary L. Kepplinger
General Counsel

[5] Notwithstanding the agency's investigation, we make the following observation regarding this issue. Under the terms of a protective order issued by our Office, CTC was provided with the portion of MTCI's proposal that presumably would contain the allegedly misappropriated proprietary information. AR, exh. 22. After reviewing that information, CTC did not point to portions of the proposal that allegedly were derived from its proprietary information; rather, it stated that this portion of the proposal merely "parroted back" the contents of the RFP. CTC Supplemental Protest, May 6, 2008, at 5. Since a mere parroting of RFP language, by definition, would not appear to include CTC's proprietary information, on this record there would appear to be no basis for us to find that MTCI improperly included CTC's information in its proposal.