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Decision

Matter of: Rosemary Livingston--Agency Tender Official

File: B-401102.2

Date: July 6, 2009

David Turner, Esq., Navy Supply Systems Command, for Rosemary Livingston--Agency Tender Official, the protester.

Hilary S. Cairnie, Esq., Vorys, Sater, Seymour & Pease LLP, for Fidelity Technologies Corp., an intervenor.

Sean McBride, Esq., Naval Facilities Engineering Command, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging evaluation of agency tender in public-private competition under Office of Management and Budget Circular A-76 is sustained where the record contains inconsistent statements by the agency in its contemporaneous evaluation and inadequate documentation of the agency's findings regarding the tender's shortcomings.

DECISION

Rosemary Livingston, the agency tender official for the Naval Hospital--Beaufort's tender in a public-private competition under Office of Management and Budget (OMB) Circular A-76 (the Circular), protests various aspects of the competition conducted by the Naval Facilities Engineering Command, Department of the Navy, for public works functions at the Bureau of Medicine (BUMED) Naval Hospital, Beaufort, South Carolina. The agency tender official principally argues that the agency improperly conducted a final round of discussions after rating its proposal "acceptable."

We sustain the protest.

BACKGROUND

On June 5, 2006, following preliminary planning, the Navy's Competitive Sourcing Acquisition Center of Excellence announced the BUMED Surgeon General's decision

to conduct a standard multi-function competition¹ to compare the cost of continued in-house performance of the requirements at issue, involving 28 full-time equivalents (FTE)—all civilian positions at the hospital—with the cost of obtaining those services by contract. The work required to support these facilities, which all date from the 1940's and 1950's, includes maintenance, repair, alteration, demolition, and construction services for the building, building systems, and roads and paved surfaces.

On January 16, 2007, the Navy issued request for proposals (RFP) No. N62467-06-R-0127 to determine the lowest-priced technically acceptable offer/tender. Among the many requirements of the performance work statement (PWS) was that the service provider, whether a contractor or the in-house workforce, “provide operators in sufficient quantities of staffing per shift to efficiently and safely operate Heating Boilers at all times of operation, 24 hours per day, seven days per week, throughout the contract period.” PWS at 59. The PWS went on to state that “[a]ttendance visits for operating boilers shall be of sufficient duration to observe a complete operational cycle and perform operational checks,” *id.*, suggesting that an around-the-clock physical presence was not required.² There was no similar requirement that chillers be attended to continuously; the PWS required that the service provider operate the “Chiller and HVAC/Refrigeration Systems to efficiently and safely produce chilled media to meet all air conditioning/refrigeration requirements.” *Id.* at 51. That requirement was to be met by a “sufficient staff,” *id.*, and the PWS indicated that around-the-clock monitoring was not required. *Id.* at 52 (“The [service provider] shall provide operators in sufficient quantities of staffing on day shift to efficiently and safely operate chiller/HVAC/refrigeration systems.”).

The RFP included the following evaluation factors: past performance, corporate experience, small business subcontracting effort, technical and management approach, and price. The five technical and management approach subfactors were: 4.1, resources to accomplish the work; 4.2, key project personnel; 4.3, corporate management support; 4.4, technical understanding and approach; and 4.5, phase-in and phase-out plan. Only the last two factors, technical and management approach and price, were applicable to the agency tender. In order to be found eligible for

¹ Single-function cost studies involve one activity, such as a laundry, while multi-function cost studies involve a combination of services, any one of which could be studied separately. For example, all activities that are components of an installation maintenance function could be combined in one multi-function cost study. OMB Circular A-76: Legislation Has Curbed Many Cost Studies in the Military Services, GAO/GGD-91-100, July 30, 1991 at 2, ns. 1 and 2.

² The agency tender official notes that, with the type of boilers in use at the hospital facilities, Navy instructions do not require continuous attendance at the boilers. Agency Tender Official's Comments, May 7, 2009 at 24.

award, an offer/tender had to receive an “acceptable” technical evaluation rating for each of the applicable technical evaluation factors and subfactors.

As relevant to the protest here, the RFP provided the following adjectival scoring scheme as a guide in determining the overall technical acceptability of each proposal:

ACCEPTABLE (A): The proposal meets or exceeds the stated solicitation requirements and demonstrates an approach that fully meets all performance objectives and standards. The response is considered complete in terms of the basic content and level of information the Government seeks for evaluation. There is a reasonable probability of success and little risk that this prospective provider would fail to meet the quantity, quality, and schedule requirements. There are no deficiencies, but there may be weaknesses that present some risk of unsuccessful contract or [most efficient organization (MEO)] performance. Weaknesses need not be corrected to make award or implement the MEO.

MARGINAL (M): The proposal fails to meet the stated solicitation requirements and demonstrates an approach that does not fully meet all performance objectives and standards. The response is considered incomplete or inadequate in terms of the basic content and level of information the Government seeks for evaluation. There is a low probability of success based on the present information. There are deficiencies or a combination of significant weaknesses that constitute a deficiency that may increase the risk of unsuccessful contract or MEO performance to an unacceptable level. Noted deficiencies and significant weaknesses are susceptible of correction through discussions.

RFP at 73.³

The RFP defined the terms “deficiency” and “weakness” as follows:

DEFICIENCY: A material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract/MEO performance to an unacceptable level.

³Another rating, “neutral,” applied only to past performance history, which, as noted above, was not a factor under which the agency tender would be evaluated.

WEAKNESS: A flaw in the proposal that increases the risk of unsuccessful contract/MEO performance. A significant weakness in the proposal is a flaw that appreciably increases the risk of unsuccessful contract or MEO performance.

Id. at 72.

Price proposals were to be evaluated for realism, completeness, and reasonableness.

The agency received three private-sector proposals, including one from the awardee, as well as the agency tender, by the May 11, 2007 closing date. The agency appointed a technical evaluation board (TEB) and price evaluation board to evaluate the proposals.

The TEB evaluated the initial agency tender and rated it “poor” overall under the technical and management approach factor, and “poor” for all of the subfactors except key project personnel, which it rated “marginal.” The TEB identified many weaknesses and deficiencies throughout the tender, including that the staffing did not provide sufficient depth to respond to fluctuations in workload, tasking, and manpower, noting specifically that the boiler plant would not be staffed around-the-clock. The agency tender proposed [DELETED], significantly fewer than the independent government estimate (IGE) of [DELETED].

The agency decided to conduct discussions, for which the Circular provides the following procedures:

b. Negotiated Acquisition

(1) Lowest Price Technically Acceptable Source Selection. An agency shall conduct a lowest price technically acceptable source selection in accordance with [Federal Acquisition Regulation (FAR) §] 15.101-2 and this attachment. During the source selection process, the [contracting officer (CO)] shall open and evaluate all offers and tenders (including the agency tender) to determine technical acceptability. The performance decision shall be based on the lowest cost of all offers and tenders determined to be technically acceptable. The CO shall conduct price analysis and cost realism as required by this attachment. The CO may conduct exchanges, in accordance with FAR Subpart 15.306 and this attachment, to determine the technical acceptability of each offer and tender.

Circular, Attach. B, ¶ D.5.b(1) (emphasis added).

The agency conducted five rounds of discussions. The table below summarizes the FTEs, evaluated price, and overall rating of the initial tender and five revised tenders.

	Total FTEs	Total Evaluated Price	Overall Rating⁴
Initial Tender May 11, 2007	[DELETED]	[DELETED]	Poor
1st Revised Tender October 5, 2007	[DELETED]	[DELETED]	Poor
2nd Revised Tender January 11, 2008	[DELETED]	[DELETED]	Poor
3rd Revised Tender April 18, 2008	[DELETED]	[DELETED]	Poor
4th Revised Tender July 25, 2008	[DELETED]	[DELETED]	Acceptable
5th Revised Tender August 15, 2008	[DELETED]	[DELETED]	Acceptable

After the first round of discussions, the agency tender’s overall rating and subfactor ratings remained nearly unchanged—with only the rating for subfactor 4.5 increasing, from marginal to acceptable—despite the increase of [DELETED] FTEs and [DELETED] in evaluated price, a 10 percent increase. Again, the agency identified multiple deficiencies in the agency tender, including [DELETED] that would not meet the requirements of the PWS. Despite the increase in FTEs, the TEB still found that the staffing shortfall presented a risk to accomplishing the requirements of the RFP. Specifically, the TEB stated that [DELETED], concluding that the “[agency tender official] did not adequately address this issue in their revised proposal.” Agency Report (AR), Exh. 14, TEB Report of Nov. 8, 2007 at 3.

After the second round of discussions, the number of FTEs proposed in the agency tender decreased by a negligible amount while, again, the evaluated price increased, this time by [DELETED], or 6 percent. The increase in the evaluated price was due to the tender’s adjustment for non-government-furnished equipment that would be the service provider’s responsibility. Although the ratings for subfactors 4.3 and 4.4 increased from poor to marginal, the overall rating again remained poor. The TEB report identified many weaknesses and deficiencies in the “unacceptable” tender; specifically, the TEB report stated that the “staffing does not provide sufficient depth to respond to fluctuations in workload, tasking, and manpower. . . . The TEB finds this to be unacceptable and a significant deficiency.” AR, Exh. 20, TEB Report of Mar. 13, 2008 at 2. The TEB did note, however, that it thought it was possible to [DELETED]. *Id.*

⁴ This is the adjectival rating assigned to the tender by the contemporaneous TEB reports.

Following the third round of discussions, the agency tender increased by more than two FTEs, and the evaluated price increased by nearly 10 percent, or [DELETED], while the overall evaluation rating remained “poor.” The ratings under subfactors 4.2, 4.3, and 4.4 improved from marginal to acceptable. Because the rating under factor 4.1 (resources to accomplish the work) remained “poor,” the overall proposal could not be rated “acceptable.” In this regard, the agency tender contained [DELETED]. The TEB report noted that [DELETED],

[t]he TEB finds this response unacceptable. The [agency tender] does not have enough staffing hours in [DELETED] to account for the work load [DELETED].

AR, Exh. 26, TEB Report of Apr. 24, 2008 at 3. The TEB Report identified two specific weaknesses in the agency tender under subfactor 4.1:

- 1) The [agency tender]’s organizational chart ([DELETED] FTEs) and [Staffing Matrix] ([DELETED] FTEs) do not match, as required by the RFP. The [DELETED] FTE difference is due to the overtime hour being included in the [Staffing Matrix] and not in their organizational chart.
- 2) The [agency tender] stated that they are adding [DELETED]. The TEB would like clarification on whether or not the staffing hours [have] been accounted for this additional worker in the [agency tender]’s revised [Staffing Matrix] . The [agency tender] refused to give a description of a typical weekend work schedule, so the TEB still has concerns about the [DELETED], as required by the Navy Energy Policy Standards.

Id. at 7 (emphasis added).

The interpretation of the next TEB report, dated July 29, 2008, is critical to the resolution of the protest. In this report, issued at the conclusion of the fourth round of discussions,⁵ the agency tender’s rating under subfactor 4.1 improved from “poor” to “acceptable,” and for the first time the tender was rated “acceptable” overall. The tender achieved this rating even though it offered no more FTEs and its evaluated price increased less than during any previous round of discussions, by [DELETED], or 2 percent. The TEB summary finding stated:

Agency Tender (AT): The 5th [sic] revised proposal of the [agency tender official] has received a Summary Rating of **ACCEPTABLE**.

⁵ The TEB report is incorrectly labeled “5th Round of Revised Proposals”; in fact, the report addresses the fourth revised tender.

Factors 1 through 3 of the Agency Tender are not rated, per the Source Selection Plan. Factor 4 is rated **ACCEPTABLE**; the [agency tender official] was able to adequately address each technical discussion question, with only one weakness in regards to their [DELETED]. This weakness will need to be corrected before implementing the MEO can be considered.

AR, Exh. 31, TEB Report of July 29, 2008 at unnumbered page 2 (emphasis added).

Recalling that it had found the agency tender's approach to staffing [DELETED] "unacceptable" in its earlier report, the TEB stated as follows about the approach offered by the agency tender in the fourth revised tender:

In the [agency tender] revised proposal, they did break out their staffing hours from [DELETED] and allocated some of those hours to [DELETED]. Using their subject matter expert (SME) consultations and advisement, the [agency tender] believes they have validated their staffing approach by conducting internal research to identify similar plant operations. Additional research revealed that their [DELETED] staffing approach is consistent with other similar Navy public works operations that also have [DELETED] coverage requirements. The [agency tender] believes the [DELETED] spec item has the proper coverage through the use of [DELETED]. [DELETED] the schedule per scheduling requirements. Based on the [agency tender] response, the TEB feels that the [agency tender] has the appropriate amount [DELETED]; however, the TEB is still concerned that the [DELETED] will not be able to handle [DELETED].

Id. at 25. The TEB then made a series of calculations that show that "each [DELETED] has to work [DELETED] hours to [DELETED]; the agency tender is only showing each [DELETED] working [DELETED] hours [DELETED]." Id.

Under subfactor 4.1, the agency identified the following one issue:

The TEB has a concern that the [agency tender] staffing hours for the [DELETED] in their staffing matrix does not coincide with the required [DELETED] work schedule. It should take [DELETED], if you take that and multiply [DELETED]; it takes [DELETED] man-hours/year [DELETED]. Then take [DELETED] man-hours/year and divide by the AT proposed [DELETED] and you get each [DELETED] FTE has to work [DELETED] hours [DELETED]; the [agency tender] is only showing each [DELETED] FTE working [DELETED] hours for the [DELETED], along with each [DELETED].

Id. at 27. In contrast to the language in the TEB report from the third round of discussions, quoted above, nowhere did the report state that the agency tender failed to meet a requirement of the RFP.⁶

To begin the final round of discussions, the agency sent the agency tender official a discussion letter stating: “We have evaluated your revised technical and price tender dated 25 July 2008. Although your tender remains within the competitive range, it continues to contain deficiencies.”⁷ AR, Exh. 33, Letter from CO to Agency Tender Official, Aug. 4, 2008 at 1. That letter asks the agency tender official to explain how she can provide the [DELETED] hours required to [DELETED] with the proposed [DELETED] hours per year, and whether [DELETED]. Id. at Encl. 2.

In response to the discussion letter, the agency tender increased the FTEs offered by one and its evaluated price by [DELETED], or over 4 percent. In its final report, the TEB noted that “[p]revious concerns with labor hours that were missing for some services and which appeared to be low for other services have been resolved.” AR, Exh. 35, TEB Report of Aug. 19, 2008 at 19 (emphasis added). This is a departure from the language in prior TEB reports—with the notable exception of the July 28

⁶ The TEB report also summarized the changes made to the agency tender in response to the specific weakness identified in its prior report, quoted above, regarding the inconsistency between FTEs in the agency tender’s organizational chart and the staffing matrix. The TEB report concluded by stating that it “finds [the agency tender official’s] response to be acceptable.” Id. at 24. The July 20 TEB report also addressed an issue that was not explicitly identified as a weakness in the prior report, namely, the fact that that agency tender had proposed FTEs that were “still significantly lower” than the IGE for various areas of the PWS. See AR, Exh. 26, TEB Report of Apr. 24, 2008 at 3. The July 20 TEB Report discussed specifically how the agency tender addressed the perceived lack of FTEs [DELETED], stating that a subcontractor would “simultaneously [DELETED]. . . . The TEB finds the [agency tender] response to be acceptable.” AR, Exh. 31, TEB Report of July 29, 2008 at 24-25. Similarly, to supply FTEs to two other portions of the PWS, the agency tender explained that it was reallocating staffing hours. The TEB report stated that the “[agency tender’s] proposed staffing hours for these [two areas of work] are found by the TEB to be acceptable.” Id. at 26.

⁷ This language mirrors almost precisely the language of the prior discussion letter. That letter began: “We have evaluated your revised technical and price tender dated 18 April 2008 and submitted in response to the subject solicitation. Although your tender remains within the competitive range, it continues to contain deficiencies.” AR, Exh. 29, Letter from CO to Agency Tender Official, July 2, 2008 at 1. Except for the phrase underlined above, and changes in dates—of the letters, the revised tenders, and the deadlines—the first page of the discussion letters from the fourth and fifth rounds are identical.

Report--where the pattern (and the language used) were consistently as follows: in its prior report, the TEB found certain aspects of the agency tender to be “unacceptable,” but based on the following revisions, the TEB now finds the agency tender “acceptable.”

The chart below summarizes the changes in the agency tender through the course of discussions--both FTEs offered and evaluated price, compared to the change in the evaluated ratings--overall, and for the technical understanding and approach subfactors.

Time Period	Change in FTEs Offered	Change in Evaluated Price, \$ and %	Change in Overall Rating	Change in Subfactor Ratings
From Initial Tender to 1st Revision	1.19	[DELETED] 10.0%	Remained Poor	4.5: Marginal to Acceptable
From 1st to 2nd Revisions	(0.1)	[DELETED] 6.0%	Remained Poor	4.3 & 4.4: Poor to Marginal
From 2nd to 3rd Revisions	2.12	[DELETED] 9.5%	Remained Poor	4.2, 4.3, & 4.4: Marginal to Acceptable
From 3rd to 4th Revisions	0	[DELETED] 2.0%	Poor to Acceptable	4.1: Poor to Acceptable
From 4th to 5th Revisions	1	[DELETED] 4.2%	Unchanged	Unchanged

At the conclusion of this final, contested round of discussions, the CO performed the lowest price calculation and, on December 4, 2008, certified the standard competition form making contract award to Fidelity Technology Corporation (FTC).

DISCUSSION

The agency tender official asserts that, after finding the agency tender “acceptable” after several rounds of discussions, the agency improperly conducted yet another round of discussions, as a result of which the agency tender no longer was the lowest-priced tender/offer received. In response, the agency argues that the TEB in fact did not find the agency tender acceptable until after the final round of discussions, despite having described the agency tender as “acceptable” in the TEB report prepared after the prior round of discussions. The key question in resolving the protest thus is whether the agency’s evaluation record adequately shows that the agency did--or did not--find the agency tender acceptable before the final round of discussions. As discussed below, we think the record is inconclusive in this regard.

Although the FAR does not specify what is required to be documented in the contract file in support of an agency’s evaluation of proposals, see FAR § 15.305(a), the fundamental principle of government accountability dictates that an agency maintain

a record adequate to allow for the meaningful review of the merits of a protest. This principle applies equally in the context of a public-private competition under the Circular.⁸ See Rhonda Podojil–Agency Tender Official, B-311310, May 9, 2008, 2008 CPD ¶ 94 at 4. An agency that fails to adequately document its evaluation of proposals bears the risk that its determinations will be considered unsupported, and absent such support, our Office may be unable to determine whether the agency had a reasonable basis for its determinations. Matrix Int’l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 5. That is not to say that our Office, in determining the reasonableness of an agency’s evaluation and award decision, limits its review to the contemporaneous evaluation and source selection documentation. Rather, we will consider, in addition to the contemporaneous documentation, all information provided to our Office for consideration during the protest, including the parties’ arguments and explanations, so long as the information is credible and consistent with the contemporaneous record. Id.; NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

In considering the entire record, we accord greater weight to contemporaneous evaluation and source selection material than to the parties’ later explanations, arguments, and testimony. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Where the record before us is inconsistent or incomplete to such an extent that we cannot find the agency’s evaluation of proposals to be reasonable, we will sustain the protest. Carahsoft Tech. Corp.; Allied Tech. Group, B-311241, B-311241.2, May 16, 2008, 2008 CPD ¶ 119 at 8-9 (sustaining protest where the record contained inadequate documentation to show the reasonableness of the agency’s evaluation, and the agency’s arguments appeared inconsistent with the contemporaneous record); Honeywell Tech. Solutions, Inc.; Wyle Labs., Inc., B-292354, B-292388, Sept. 2, 2003, 2005 CPD ¶ 107 at 7 (sustaining protest where “we simply cannot determine from [the] record which aspect of the agency’s evaluation was reasonable and which was unreasonable”).

In this case, as explained above, the agency held a total of five rounds of discussions with the agency tender official; at the conclusion of the fourth round, the agency tender was lower-priced than the eventual awardee’s offer. Thus, if (as the agency tender official argues) the agency tender in fact was found acceptable after the fourth round of discussions, holding the fifth and final round of discussions was improper.⁹

⁸ Throughout, the Circular directs agencies to follow the procedures established under FAR Part 15. See, e.g., OMB Cir. A-76, Attach. B, ¶¶ A.8.e, D.2.c, D.3.a(2), D.4.a(3), D.5.b(1), D.5.b(2), D.5.b(3), D.5.c(2), D.5.c(4), D.6.c, D.6.d, and Attach. D, at D-7.

⁹ No party here disputes that, unlike in best value competitions, in a lowest-priced technically acceptable A-76 competition, an agency may not conduct discussions past the point at which an offer/tender is rated acceptable. In such a procurement,
(continued...)

Further, those discussions resulted in prejudice to the agency tender because the agency tender's price increased as a result, to a price greater than the eventual awardee's, thus displacing the agency tender as the lowest-priced technically acceptable offer/tender. In response, the agency argues that the record clearly shows that, despite having described the agency tender as "acceptable" before initiating the fifth round of discussions, the TEB in fact found the agency tender "unacceptable," and thus properly conducted another round of discussions.

As discussed below, we think that the evaluation record is inconsistent and inconclusive with respect to the TEB's findings regarding the agency tender after the fourth round of discussions. As a result, we conclude that the record here is inadequate to support a conclusion that the decision to hold the final round of discussions was proper. Accordingly, we sustain the protest on this basis.

The dispute regarding the TEB's findings derives principally from the conflicting language in the July TEB report, specifically, the repeated description of the agency tender as "acceptable" alongside this sentence: "This weakness will need to be corrected before implementing the MEO can be considered." The agency does not assert that these statements are reconcilable; rather, the agency argues that the TEB made an error in describing the agency tender as "acceptable" and that the quoted sentence from the TEB report is contemporaneous evidence that the TEB in fact considered the fourth revised agency tender "unacceptable." In support of its position, the agency, pointing to the RFP definitions of "acceptable" and "marginal" proposals, asserts that the agency tender could not be regarded as "acceptable" because it contained a weakness that had to be corrected before implementation of the MEO.¹⁰

Even accepting the agency's interpretation of the RFP definitions of "acceptable" and "marginal," the agency's argument still does not resolve the conflict between the TEB report's description of the agency tender as "acceptable" and the finding in the same report that the agency tender had a weakness needing correction before the MEO could be considered. Those two statements cannot both be accurate, and we see no basis to conclude that the "mistake" was in the characterization of the agency tender as "acceptable," rather than in the finding that the agency tender contained a deficiency, as evidenced by the statement that the agency tender contained a weakness requiring correction. On the contrary, the record strongly suggests that the

(...continued)

acceptability is sufficient, and the agency may not negotiate for a "more acceptable" offer/tender at a potentially higher price.

¹⁰ As noted above, the RFP stated that in an "acceptable" offer/tender, "[w]eaknesses need not be corrected to make award or implement the MEO," whereas in a "marginal" offer/tender, "[n]oted deficiencies and significant weaknesses are susceptible of correction through discussions."

description of the agency tender as “acceptable” reflects a deliberate choice by the TEB, given that, in the prior three rounds of discussions and evaluations, the agency characterized the agency tender as “poor” before making the significant change--to repeatedly describing the agency tender as “acceptable,” sometimes in bold capital letters--in the July report.

The agency also argues that the discussions letter to the agency tender official identifying deficiencies in the tender, which stated that, “[a]lthough your tender remains in the competitive range, it continues to contain deficiencies,”¹¹ is contemporaneous evidence that the TEB had found the then-most recent tender to be unacceptable. We are not persuaded that this letter reasonably can be regarded as reflecting a determination by the agency that the agency tender was “unacceptable.” As noted above, the language of that letter is essentially identical to the language used in the prior discussions letter, suggesting that the agency may have copied the “boilerplate” portion of the prior letter rather than made a deliberate language choice. Similarly, the letter uses the plural term--“deficiencies”--to describe the agency tender, while the TEB Report at most identified a single deficiency in the agency tender, further suggesting that the letter does not warrant the dispositive weight urged by the agency.

Finally, the agency argues that, notwithstanding that the agency tender was mistakenly labeled “acceptable” in the July 29, 2008 TEB report, it is otherwise clear from the record that the fourth revised agency tender failed to meet a material term of the RFP and therefore was not acceptable. As noted above, that TEB report stated that the agency tender had the “appropriate amount of [DELETED] FTEs to handle [DELETED]; however, the TEB is still concerned that the [DELETED] FTEs will not be able to handle [DELETED],” AR, Exh. 31, TEB Report of July 29, 2008 at 25, and it was not until its response to the agency tender official’s comments on the agency report that the agency first alleged that the revised agency tender failed to meet a government requirement. The TEB found that the agency tender had met the

¹¹ A “deficiency” is defined as a “material failure of a proposal to meet a Government requirement.” RFP at 72. The first assertion by the agency that the fourth revised agency tender materially failed to meet a government requirement is found in declarations from the chairperson of the TEB, the program manager for the Navy--who served as the chairperson of the SSB--and a member of the TEB, all prepared and first submitted in response to the protester’s comments on the agency report. Agency Comments, May 26, 2009. All three of these individuals state that the SSB, either alone or in conjunction with the TEB--the declarants’ statements are not entirely consistent on this point--concluded that the agency tender did not comply with the requirements of the RFP. As discussed below, we see no such explicit statement in the contemporaneous evaluation documents and therefore accord little weight to these documents produced in the course of litigation. Boeing Sikorsky Aircraft Support, supra.

more time-intensive requirement of the RFP with respect to [DELETED], that is, it had staffed [DELETED]. Now the TEB was left to determine whether the agency tender had allotted sufficient hours [DELETED]. The TEB report recounted in some detail the rationale that the agency tender advanced in support of its assertion that it had allotted sufficient hours, without concluding that the agency tender was inadequate in any way. A full reading of the TEB report suggests that the TEB was identifying a concern about the hours allocated [DELETED], but that, given the approach to the requirement proposed in the agency tender, the agency tender was no longer unacceptable or deficient. Absent a clear statement that the fourth revised tender failed to meet a material requirement of the RFP—statements that the agency previously had made repeatedly throughout the competition—on this record we do not think it is reasonable to infer such a finding, particularly where doing so would contradict the agency’s own explicit statement that the tender was “acceptable.”

On the record before us, with inconsistent statements by the agency in its evaluation of the fourth revised tender and inadequate documentation of a finding that the tender was unacceptable, we sustain the protest.¹²

RECOMMENDATION

Ordinarily, in sustaining a protest challenging an agency’s evaluation of proposals, we recommend that the agency review the procurement and take appropriate actions to rectify any improprieties. Under the specific circumstances here, our recommendation would be for the agency to reevaluate the fourth revised agency tender, explain and document its conclusion regarding whether or not the fourth revised agency tender is acceptable, and then take appropriate action based on its findings. If the fourth revised agency tender were found acceptable, the agency would select that tender as the lowest-priced technically acceptable offer/tender, or, if the agency tender were found unacceptable, the agency would allow the award to FTC to remain in place.

In this protest, however, implementation of such a recommendation appears to be barred by the plain language of section 8023 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, which states as follows:

None of the funds appropriated by this Act shall be available to perform any cost study pursuant to the provisions of OMB Circular A-76 if the study being performed exceeds a period of 24 months after initiation of

¹² The agency tender official raised several other grounds of protest, some of which we dismissed as failing to state a valid basis of protest. See Bid Protest Regulations 4 C.F.R. § 21.1(c)(4) (2009). Because we sustain the protest, we need not consider the remaining additional grounds.

such study with respect to a single function activity or 30 months after initiation of such study for a multi-function activity.

Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, div. C, title VIII, 122 Stat. 3619, 3626 (Sept. 30, 2008). As relevant here, the effect of the provision is to bar the Navy from using funds appropriated under the statute to perform any multi-function study more than 30 months after the study was initiated. It is undisputed that the 30-month deadline has passed for this competition.¹³ Accordingly, because any recommendation by our Office to rectify the inconsistency in the evaluation record would result in the Navy expending funds to continue to perform the study at issue, we will not make such a recommendation. Nevertheless, it would be improper to leave in place an award for which we cannot find adequate support in the record. We therefore recommend that the agency terminate the contract award to FTC.

The protest is sustained.

Daniel I. Gordon
Acting General Counsel

¹³ For standard competitions, as in this case, the start date is the day that the agency makes a formal public announcement, and the end date is the day that all standard competition form certifications are complete, signifying a performance decision. OMB Circular A-76, Attach. B, B.1, B.2. The agency announced the competition on June 5, 2006, and the SSA completed the certifications on December 4, 2008.