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Decision

Matter of: Deloitte Consulting, LLP

File: B-412125.6

Date: November 28, 2016

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DIGEST

Protest is sustained where, in response to a prior protest, agency took corrective action by engaging in discussions, but imposed unreasonably restrictive limitations on the scope of proposal revisions, which prohibit revision of proposal information materially impacted by the corrective action.

DECISION

Deloitte Consulting, LLP, of Arlington, Virginia, protests the actions of the Department of Defense, Defense Health Agency (DHA) in its implementation of corrective action in response to Deloitte's prior protest of the award of a contract to Data Networks Corporation (DNC), of Reston, Virginia, under request for proposals (RFP) No. HT0011-15-R-0010, for the agency's governance, requirements, and architecture management support (GRAMS) requirement. Deloitte alleges that the agency has imposed unreasonable limitations on the scope of final proposal revisions (FPRs), by prohibiting revisions in areas of proposals that are materially impacted by the corrective action.

We sustain the protest.

BACKGROUND

The agency issued the RFP on February 26, 2015, for the purpose of awarding a contract for the GRAMS requirement, which provides program management support to requirement managers in DHA's Health Information Technology Directorate. The RFP provided that the GRAMS contract was to be awarded on a best-value basis, for a one-year base period and four one-year option periods. The best-value decision was to be based on four evaluation factors and subfactors, as follows:

1. Factor 1--Technical
 - Subfactor 1A--Technical Approach
 - Subfactor 1B--Staffing Approach
 - Subfactor 1C--Transition In and Out
 - Subfactor 1D--Quality Control Approach
2. Factor 2--Past Performance
3. Factor 3--Small Business Participation Plan
(acceptable/unacceptable)
4. Factor 4--Price

RFP Amendment 004, at 61. As relevant, the RFP performance work statement identified nine key personnel positions and the minimum requirements for those positions. Id. at 130-131. The RFP provided that the key personnel resumes and commitment letters would be evaluated under "Subfactor 1B--Staffing Approach," in order to determine the "[r]elevant qualifications and experience of proposed Key Personnel." Id. at 62.

Six offerors submitted proposals in response to the RFP. Following an initial evaluation, discussions, and evaluation of FPRs, the agency made an initial award to DNC on September 17, 2015. Deloitte protested that award decision with our Office, alleging in part that DNC had unmitigable impaired objectivity organizational conflicts of interest (OCIs) due to two other contracts held by DNC. In response to Deloitte's protest, the agency informed our Office that it would take corrective action and conduct a new OCI analysis concerning DNC's contracts. Our Office then dismissed Deloitte's protest as academic on October 26. Deloitte Consulting, LLP, B-412125, Oct. 26, 2015 (unpublished decision).

The agency completed a new OCI analysis memorandum dated December 14, which concluded that the connections between DNC's contracts did not present an OCI. OCI Analysis Memo, at 6. The agency reaffirmed the prior award to DNC on December 31. Deloitte then filed its second protest of the award decision on January 6, 2016, alleging that the agency's new OCI analysis was unreasonable. Deloitte also alleged that the agency's evaluations of the staffing approach

subfactor and the past performance factor were unreasonable, and that the agency conducted unequal discussions with respect to past performance.

On April 15, 2016, we sustained the protest in part, finding that the agency conducted an unreasonable evaluation of the key personnel resumes under the staffing approach subfactor. Deloitte Consulting, LLP, B-412125.2, B-412125.3, Apr. 15, 2016, 2016 CPD ¶ 119. Specifically, we concluded that the resumes of multiple key personnel did not demonstrate that the individuals met the minimum requirements of the positions for which they were proposed, and that to the extent certain minimum requirements had been waived by the agency, we could not conclude that the waiver was equally applied to both offerors' proposed personnel. Id.

We also sustained the protest on the basis that the agency's evaluation of past performance was unreasonable and unsupported, and that the agency's discussions with the offerors in this area were unequal. Id. We denied the protest with respect to Deloitte's challenge to the agency's OCI analysis. Id. We recommended that the agency reopen discussions with the offerors, request new FPRs, and conduct and document a new evaluation in accordance with the evaluation criteria of the RFP. Id. We also specifically noted that the agency's discussions should include evaluation notices concerning any proposed key personnel whose resume did not meet the minimum requirements of the RFP. Id.

On April 29, the agency advised Deloitte of its planned corrective action in the following notice:

Please be advised that the Defense Health Agency intends to take corrective action in this case, consistent with the GAO's recommendations following the sustained protest. The Agency corrective action will include conducting discussions regarding past performance and key personnel with offerors in the competitive range, permitting offerors to submit final proposal revisions (FPRs) limited to past performance and key personnel information, reevaluating the offerors' past performance and key personnel information, and making a new source selection decision. The Agency expects to execute this corrective action within the next several days.

Request to Dismiss Protest B-412125.4, May 24, 2016, at 1-2. On May 4 and May 5, the agency and protester exchanged further correspondence, in which the agency indicated that the "description of the scope of the Agency's intended corrective action is accurate--we will limit FPR updates to past performance and key personnel information," and that "[t]he agency will only be reevaluating past performance and key personnel information and does not intend to request revised price proposals from the offerors in the competitive range." Id. at 2.

By email on May 16, the agency sent Deloitte evaluation notices and a cover letter that further explained the discussions process and final FPR limitations. The evaluation notices (ENs) concerning Deloitte's key personnel advised that on reevaluation, the agency was unable to confirm that [DELETED] of Deloitte's nine key personnel met the minimum requirements of the positions for which they were proposed. In the cover letter, the agency advised that it was reopening discussions "ONLY in the areas specifically related to Sub-factor 1B Key Personnel and Past Performance," and that FPRs could update proposals "ONLY in the areas addressed in the enclosed EN." Protest B-412125.4, May 20, 2016, at 9.

In response to the cover letter, Deloitte again contacted the agency to clarify the restrictions on FPRs. Specifically, Deloitte advised the agency that changes to its "key personnel information" in response to the agency's ENs would require replacement of [DELETED] previously-proposed key personnel, and would necessitate key personnel-related revisions to all technical subfactors--not simply the key personnel area of subfactor 1B. Deloitte explained that this was because the key personnel to be replaced had also been specifically identified in other areas of Deloitte's technical proposal, and because the replacement of these personnel otherwise impacted Deloitte's proposed approach such that it will cause a ripple effect throughout the technical proposal. Accordingly, Deloitte requested that the agency confirm its intention to evaluate updated key personnel-related information throughout the revised technical proposal.

By email on May 17, the agency advised that "the process will remain as stated in the letter . . . dated May 16, 2016." Protest B-412125.4, May 20, 2016, at 10. Deloitte then filed its first protest of the agency's conduct of the corrective action on May 20.¹

On August 11, the GAO attorney handling the protest conducted an alternative dispute resolution, negotiation assistance, conference call with the parties. The GAO attorney attempted to clarify the scope of Deloitte's request to revise "key personnel information" throughout its technical proposal, as well as the basis for the agency's opposition to those revisions, to assess the possibility of a mutually satisfactory resolution of the protest. During that call, the GAO attorney expressed concern with the agency's restrictions on revisions to FPRs to the extent that the restrictions would prevent an offeror from revising all references to specific key

¹ The agency requested that our Office dismiss Deloitte's protest as untimely, arguing that Deloitte knew or should have known the basis of its protest no later than May 5. We disagreed, concluding that while Deloitte had been advised that revisions would be limited to "key personnel information," the protester first learned that revisions to key personnel information would be limited to subfactor 1B in the May 16 cover letter. GAO Email on Request for Dismissal, June 15, 2016.

personnel to be replaced, thereby creating potentially material inconsistencies within the offeror's revised proposal. Following this conference call, on August 12, the agency advised our Office that it would take corrective action consisting of revising the FPR instructions. Our Office then dismissed Deloitte's protest on August 16. Deloitte Consulting LLP, B-412125.4, Aug. 16, 2016 (unpublished decision).

As a result of this corrective action, the agency updated its restrictions on FPRs as follows:

(1) You may make written changes to Volume 1, Key Personnel, under Technical Subfactor 1B, and (2) you may make written changes to other aspects of your Technical Proposal (under Subfactors 1A, 1C, and 1D), but only to the extent that your initial proposal referenced your key personnel and/or the qualifications of said key personnel relative to their ability to execute your proposed technical approach. More specifically, the scope of changes to your Technical Proposal outside of Technical Subfactor 1B is limited to updating the names of key personnel (as necessary) and updating any accompanying qualification descriptions for such new key personnel. You may not update your technical approach under Subfactors 1A, 1C, or 1D.

Corrective Action Letter, August 12, 2016, at 1 (emphasis original).

On August 22, Deloitte filed the instant protest.

DISCUSSION

Deloitte argues that the agency's updated FPR instructions continue to exclude proposal revisions "inextricably linked" to the key personnel substitutions permitted in response to discussions.² Deloitte specifically asserts that the limitations, for example, improperly prohibit necessary revisions to its transition plan and unreasonably restrict the specific content of proposal updates in areas where revisions are permitted.

The agency responds that its limitations on the scope of FPR revisions are reasonable and tailored to remedy the identified procurement improprieties in our

² Deloitte also alleges that the corrective action letter is ambiguous with respect to the "qualifications" of key personnel that may be revised. Based on our conclusion, below, that the restriction on revisions to only the "qualifications" of key personnel is unreasonably restrictive and our recommendation that the FPR instructions be revised, we conclude that this basis of Deloitte's protest is academic.

Office's April 15, 2016 decision sustaining Deloitte's prior protest in part, and are consistent with GAO precedent regarding agency discretion to limit proposal revisions in the context of corrective actions. The agency contends that Deloitte aims to update multiple aspects of its technical approach by using new key personnel to introduce new tools and techniques not presented in its prior proposal, and to alter its transition approach. According to the agency, Deloitte should not be "allowed to augment its technical approach at this late stage, thereby disregarding a reasonable corrective action tailored to correct a procurement impropriety." Agency Report (AR) at 7.

An agency's discretion when taking corrective action extends to the scope of proposal revisions. See, e.g., Computer Assocs. Int'l., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 5; Rel-Tek Sys. & Design, Inc.--Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. As a general matter, offerors in response to discussions may revise any aspect of their proposals as they see fit, including portions of their proposals which were not subject to discussions; an agency, in conducting discussions to implement corrective action, may, however, reasonably limit the scope of revisions. System Planning Corp., B-244697.4, June 15, 1992, 92-1 CPD ¶ 516 at 3-4. Where the corrective action does not also include amending the solicitation, we will not question an agency's decision to restrict proposal revisions when taking corrective action so long as it is reasonable in nature and remedies the established or suspected procurement impropriety. See, Consolidated Eng'g Servs., Inc., B-293864.2, Oct. 25, 2004, 2004 CPD ¶ 214 at 3-4; Computer Assocs. Int'l., supra. In reviewing the reasonableness of an agency's restrictions on proposal revisions in the context of discussions to implement corrective action, we will consider whether the discussions, and permitted revisions in response to discussions, are expected to have a material impact on other areas of the offeror's proposal. Evergreen Helicopters of Alaska, Inc., B-409327.3, Apr. 14, 2014, 2014 CPD ¶ 128 at 8; Honeywell Technology Solutions, Inc., B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4; see also Rel-Tek Sys. & Design, Inc.--Modification of Remedy, supra.; ST Aerospace Engines Pte. Ltd., B-275725.3 Oct. 17, 1997, 97-2 CPD ¶ 106 at 4.

We have reviewed the record here and, as a general matter, do not object to the agency's decision to limit proposal revisions to areas in which our Office identified improprieties in the prior award decision. However, even where an agency is justified in restricting discussions responses in corrective action, the agency may not prohibit offerors from revising related areas of their proposals which are materially impacted. Whether these associated revisions may allow an offeror to further "augment its technical approach,"--as the agency asserts is Deloitte's intention--is not the appropriate test of whether such revisions must be permitted. Rather, as set forth above, when assessing the reasonableness of an agency's restrictions on proposal revisions, we consider the extent to which the discussions, and the permitted changes in response to discussions, materially impact or are

“inextricably linked” with other aspects of an offeror’s proposal. Honeywell Technology Solutions, Inc., supra.

In multiple prior protests concerning agency decisions to limit the scope of proposal revisions as part of corrective action, our Office has concluded that the limitations imposed were reasonable. In each of these cases, we concluded that the permitted revisions in response to discussions would not impact other areas of the proposals in which revisions were prohibited. For instance, in Evergreen Helicopters, our Office did not object to corrective action that limited FPR revisions to the addition of “performance data charts for the aircraft type and tail numbers proposed,” and prohibited any other revisions. Evergreen Helicopters of Alaska, Inc., supra. at 3. We concluded that the limited revisions were reasonable to correct informational deficiencies in the proposals, that other aspects of the proposals such as pricing would not be impacted by discussions limited to additional performance data, and that correction of informational deficiencies with respect to previously-proposed aircraft, therefore, need not open the door for offerors to substitute entirely new aircraft.

Similarly, in Honeywell Technology Solutions, Inc., supra, our Office did not object to corrective action where the agency allowed offerors to revise their past performance proposals only. In that case, we found that the limited revisions were reasonable to correct evaluation errors associated with two prior past performance evaluations. Concerning the protester’s argument that the FPR limitations were unreasonably restrictive where other aspects of its proposal were “inextricably linked” to its past performance information, we disagreed, concluding that “Honeywell has failed to establish that NASA’s decision permitting offerors to update their past performance information is expected to have a material impact on their cost or technical proposals.”³ Id. at 3, 5.

³ We reached a different result in the protest of Power Connector, Inc., B-404916.2, Aug. 15, 2011, 2011 CPD ¶ 186, in which we concluded that offerors should be permitted to make revisions to all aspects of their proposals in response to corrective action concerning an impropriety in the evaluation of past performance. However, the corrective action in that case included the issuance of an amendment to the solicitation. Where an agency amends the solicitation and permits offerors to revise their proposals, our Office has held that offerors should be permitted to revise any aspect of their proposals—including those that were not the subject of the amendment—unless the agency demonstrates that the amendment could not reasonably have an effect on the other aspects of the proposals, or that allowing such revisions would have a detrimental impact on the competitive process. Power Connector, Inc., supra; Cooperativa Muratori Riuniti, B-294980.5, July 27, 2005, 2005 CPD ¶ 144 at 7; Lockheed Martin Sys. Integration-Owego; Sikorsky Aircraft Co., B-299145.5, B-299145.6, Aug. 30, 2007, 2007 CPD ¶ 155 at 5.

Finally, in Rel-Tek Sys. & Design, Inc.--Modification of Remedy, supra, we did not object to corrective action which limited proposal revisions to three specific solicitation requirements, concerning “acceptance, warranty and software performance provisions” of the solicitation. Id. at 2. In that protest, Rel-Tek argued that the corrective action was improper because it precluded Rel-Tek from changing areas of its proposal that the firm desired to change in order to be more competitive. Our Office concluded that the procurement improprieties and the corrective action involved separate aspects of the firm’s proposal and did not affect other portions of the proposal or requirements. We also specifically noted, however, that the limitations imposed by the agency did not prohibit the protester from revising other aspects of its proposal to the extent they related to the acceptance, warranty, and software performance provisions. Our decision indicated as follows:

To the extent Rel-Tek contends that the limited [best and final offer (BAFO)] request prejudices its chances for award, since the firm cannot alter its cost proposal in other areas that may have included costs related to these three [solicitation] requirements, we are not persuaded by this argument-- Rel-Tek has not shown that the terms of the BAFO request are unnecessarily restrictive. The agency’s BAFO request, limited to the offerors’ technical and cost-related proposal revisions for acceptance, warranty, and system performance, did not prohibit revision to other areas of the offerors’ proposals to the extent that those proposal areas contained terms and related costs for the three requirements at issue

Id., at 4 n.5 (emphasis added).⁴

In contrast, in the present protest, we conclude that the corrective action, to include discussions regarding key personnel, does materially impact the protester’s technical proposal beyond the limited revisions permitted in the agency’s updated FPR instructions letter. On the record here, the protester has established that the permitted key personnel substitutions broadly impact its proposal due to the differing qualifications, capabilities, and experience of the key personnel substitutions, and their relative ability to perform the proposal as initially proposed. Where the agency’s limitations on proposal revision prohibit such changes, they are unreasonable.

⁴ We conclude that this fact alone--that the agency in Rel-Tek expressed a limitation on the topical “areas” of proposals which could be revised, without limitation to where in the proposals the revisions could reach--significantly distinguishes the reasonable limitations described in Rel-Tek, from the unreasonable limitations at issue in this protest.

For example, we agree with the protester that the FPR instructions, as written, unreasonably prohibit the protester from revising its transition plan, which is materially impacted by the permitted key personnel substitutions. Specifically, the FPR instructions permit revisions to proposal sections beyond those of subfactor 1B “only to the extent that your initial proposal referenced your key personnel.” Corrective Action Letter, August 12, 2016, at 1. While Deloitte’s transition plan, as proposed, did not directly address the transition of key personnel, Deloitte explains that its transition must nonetheless be revised because while its previously-proposed key personnel were all [DELETED] its substitute key personnel are [DELETED]. As a consequence, these new key personnel [DELETED]. Given that the agency’s proposal revision instructions preclude this change to a section of Deloitte’s proposal that would be materially impacted by the permitted key personnel substitutions, we conclude that the instruction’s limitations are unreasonably restrictive.

We also agree with the protester that the instruction limiting the contents of revisions to “updating the names of key personnel (as necessary) and updating any accompanying qualification descriptions for such new key personnel” unreasonably restricts the protester from conforming areas of its technical proposal that directly reference key personnel who will be removed. For example, Deloitte explains, and the record reflects, that its prior proposal identified two key personnel--its program manager and senior information architect (architecture)--as also performing in non-key roles as [DELETED] in its transition approach. Deloitte argues that these two individuals were selected based on prior experience [DELETED]. Both individuals are now to be replaced in Deloitte’s FPR. Because Deloitte’s new senior information architect (architecture) does not have experience [DELETED], Deloitte proposes to replace its [DELETED] with an individual who will not be designated as a key person--a substitution which would be prohibited under a plain reading of the agency’s limitations on revisions since the new individual is not one of the “key personnel.”⁵

Finally, we agree with the protester that the agency’s decision to limit proposal updates to “accompanying qualification descriptions” is unreasonably restrictive with respect to other skills and attributes of the key personnel that Deloitte highlighted throughout its technical proposal. Specifically, Deloitte explains that because the substitute key personnel do not share the same skills and experience which led Deloitte to feature the prior key personnel in the other areas of its technical approach, those aspects of the approach also require revision. In essence, Deloitte maintains that the required substitutions necessitate changes to its technical

⁵ In briefing, the agency expressed that it had no objection to the protester’s proposed revision of its [DELETED] to include a new non-key individual. However, where a plain reading of the agency’s updated FPR instruction would prohibit such a revision, we conclude that we must sustain the protest in this respect.

proposal beyond merely changing the qualification descriptions of the new key personnel.

For example, Deloitte's prior proposal presented multiple descriptions of its key personnel's knowledge of various management practices and techniques, which were presented as enhancements to, and impact its approach to performance of, technical subfactors outside of subfactor 1B. Because Deloitte's substitute key personnel have different skills and experience--with different [DELETED], for instance⁶--we agree that the permitted revisions should extend to revising references to substituted key personnel in Deloitte's technical approach as necessary to reflect the skills of its new personnel, or to otherwise address the proposal content impacted by the removal of the prior key personnel.

In conclusion, we find that the restrictions on proposal revisions imposed by the agency in connection with key personnel substitutions, as part of the agency's implementation of corrective action, are unreasonably restrictive. The protester has demonstrated that due to the inherently different qualifications, capabilities, and experience of key personnel, substitutions with respect to these individuals materially impact the protester's proposal in a broad manner, in ways that need to be revised beyond merely substituting names and resumes for the individuals to be replaced.

RECOMMENDATION

We find that the agency's limitations on the scope of revisions in response to corrective action are unreasonably restrictive, where the limitations prohibit the protester from revising all aspects of its technical approach that are materially impacted by the corrective action. We recommend that DHA, at a minimum, amend its FPR instruction to permit offerors to revise all aspects of their technical proposals to the extent that the revisions relate to the permitted substitutions of key personnel, and thereafter reevaluate the offerors' revised technical proposals.⁷ We also

⁶ Deloitte explains that its replacements for [DELETED] bring new skills and experience that redefine the prior approach to multiple aspects of performance. For example, Deloitte highlights the new [DELETED] experience with Deloitte's [DELETED] as new and different skills versus the prior key personnel, which impact various areas of the technical approach in which the skills of the prior key personnel were discussed. Protest at 14-15.

⁷ Concerning the agency's disagreements with the protester over what aspects of the proposal "relate" to the permitted key personnel substitutions--previewed in the agency's report here--we conclude that a ruling on specific proposal revisions is premature at this time. To the extent that the agency declines to review certain revisions undertaken by the protester as "related" to the substitution of key

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recommend that Deloitte be reimbursed the costs of filing and pursuing its protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel

(...continued)

personnel, such a dispute concerns an evaluation challenge that would potentially form the basis of a subsequent protest with this Office.