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Decision

Matter of: Marcola Meadows VA LLC

File: B-407078.2; B-407078.3; B-407078.4

Date: June 4, 2013

Lori Ann Lange, Esq., and Nick R. Hoogstraten, Esq., Peckar & Abramson, P.C., for the protester.

Thomas J. Mitchell, Esq., and Cameron V. Gore, Esq., Department of Veterans Affairs, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably determined that construction and lease of outpatient medical clinic met solicitation requirement to be an operating lease--which requires the building to be a general purpose asset and a private market to exist for the building--is denied where protester has not shown the agency's determination that awardee's proposed building met those standards was unreasonable, even though local zoning rules would preclude operation of a private medical clinic in that location.

2. Protest that agency improperly failed to assign protester's proposal points for being a small business is denied where, even if the agency's evaluation was unreasonable, the protester has not shown that it was prejudiced by any error on the agency's part.

3. Protest that agency unreasonably made a mechanical source selection decision is denied where the record shows that the contracting officer, acting as the source selection authority, was aware of the relative merits and costs of the competing proposals and reasonably determined that the protester's technical advantages did not warrant its higher price.

DECISION

Marcola Meadows VA LLC, of Mandan, North Dakota, protests the award of a lease to Moreland Corporation, doing business as VA Oregon 1, LLC, of Bakersfield, California, by the Department of Veterans Affairs (VA) under solicitation for offers (SFO) No. VA-101-11-RP-0136, for the construction and lease of a VA outpatient

medical clinic in Eugene or Springfield, Oregon. Marcola Meadows primarily argues that the VA unreasonably found that Moreland's proposed lease was an "operating lease," improperly evaluated Moreland's proposal, and made a mechanical source selection decision.

We deny the protest.

BACKGROUND

The VA issued the SFO on November 30, 2011 seeking offers to "design and construct a building to suit the [VA]'s requirements" under a 20-year lease for a community-based outpatient clinic for the Eugene, Oregon area. SFO at 2-4. The SFO required that the building had to provide between 94,000 and 100,000 net usable square feet (NUSF) of space, configured as specified in the VA's design documents, and equipped for all required specialties, such as a dental clinic, radiological facilities, surgical suites, and laboratories. SFO at 2.

Award was to be made on a best value basis. SFO § 2.7.1. Offers were to be evaluated under four factors: the annual price per NUSF, technical quality, offeror qualifications, and operations and maintenance plans. Id. at § 2.2. When combined, the non-price factors were approximately equal in importance to price. Id. Although not included under any of the preceding evaluation factors, the SFO also stated that eligible small businesses were to receive partial credit for their socio-economic status.¹ Id. at § 2.2.5.

As amended, the SFO also specified that the proposed lease had to score² as an operating lease, rather than a capital lease, pursuant to the guidance in Office of Management and Budget (OMB) Circular No. A-11, Appendix B, "Budgetary Treatment of Lease-Purchases and Leases of Capital Assets." Specifically, only a proposed lease that was "compliant with Operating Lease limitations" would be eligible for award. SFO amend. 4 at 1. Appendix B of the OMB Circular provides that an operating lease means a lease that meets six specified criteria.³ This protest focuses on two of the criteria:

¹ Eligible service-disabled veteran-owned small businesses were to receive full credit for their socio-economic status, and veteran-owned small businesses were to receive partial credit greater than the partial credit for which all other small businesses were eligible. Id. at § 2.2.5.

² The term "score" refers to the measurement of budgetary effects.

³ The Circular describes two general types of leases, operating and capital; a lease that fails to score as an operating lease is considered a capital lease. OMB Circ. A-11, appx. B, at 6. The budgetary scorekeeping guidelines were developed
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- The asset is a general purpose asset rather than being for a special purpose of the Government and is not built to the unique specifications of the Government as lessee; and
- There is a private sector market for the asset.

OMB Circ. A-11, appx. B, at 6.

The VA received initial offers from five firms, including Moreland and Marcola Meadows. The VA evaluated those offers and established a competitive range which did not include Moreland's proposal. In July 2012, Moreland filed a protest of its exclusion from the competitive range. After the VA advised our Office that it planned to reopen discussions and reevaluate proposals, we dismissed the protest as academic. The VA conducted discussions, and received revised offers on November 30, 2012. AR, Tab 9, Revised Technical Evaluation Board Report, at 1.

Moreland's final offer was to lease to the VA a clinic of 99,896 NUSF to be constructed on property in Eugene, which local zoning law designated as zoning category I-1, which is called "campus industrial." AR, Tab 7, Price Negotiation Memorandum (PNM), at 19. Due to questions over the legality of constructing the VA clinic in an I-1 campus industrial zone, the City of Eugene passed a resolution to clarify its zoning law by providing that an outpatient medical clinic operated by the VA would be permitted in zone I-1 campus industrial as government services, although the zoning would not permit the operation of a private medical clinic.⁴ AR, Tab 18, E-mails Between VA Real Estate Specialist and City Land Use Planning Manager, Feb. 27, 2013, at 1-2.

The final offer by Marcola Meadows proposed to construct and lease to the VA a 94,966 NUSF clinic at a different location. AR, Tab 7, PNM, at 19. Marcola Meadows's site is zoned "mixed-use commercial," and the parties appear to agree that both government and private medical clinics are permitted there. Protest at 5. The protester's offer included the required small business program representations provision, Federal Acquisition Regulation (FAR) § 52.219-1, in which the offeror represented that it was a small business. Protester's Response to GAO Question, May 15, 2013, exh. 1 (excerpt of Protester's offer).

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by the executive and legislative branches to assure compliance with budget laws. See OMB Circ. A-11, appx. A, at 1.

⁴ A subsequent appeal of that resolution confirmed that the city could authorize government services in the I-1 campus industrial zone that were otherwise prohibited if provided by a private operator. AR, Tab 17, Oregon Land Use Board of Appeals Decision No. 2012-004, at 13.

On February 6, 2013, the VA finalized a memorandum to document the results of the evaluation of proposals and the source selection decision. The contracting officer first considered the evaluations of each of the revised offers, as reflected by their weighted point scores⁵ under each non-price factor:

	Technical Quality	Operations/Maintenance	Offeror Qualifications	Socio-economic	Total
Offeror A	13.41	6.69	7.12	3.00	30.22
Marcola Meadows	17.12	6.82	7.40	0	31.33
Offeror B	17.00	7.30	6.51	0	30.82
Offeror C	13.11	5.04	5.02	4.00	27.17
Moreland	18.34	4.97	4.57	3.00	30.88

AR, Tab 7, PNM, at 19-20.

The contracting officer then calculated a price score by assigning the maximum price score of 50 points to the lowest-priced offer (Moreland), and proportionally lower scores to each of the other offers.⁶ Id. at 20. The contracting officer then added the price score to each offeror's total non-price score:

	Non-Price Score	Price Score	Total Score	Ranking
Offeror A	30.22	43.24	73.46	3
Marcola Meadows	31.33	36.33	67.66	4
Offeror B	30.82	34.92	65.74	5
Offeror C	27.17	46.74	73.91	2
Moreland	30.88	50.00	80.88	1

Id. at 20.

⁵ There were up to 25 points possible for technical quality, 10.005 for operations and maintenance plan, 9.995 points for offeror qualifications, and 5 points for socio-economic status. AR, Tab 9, Technical Evaluation Board Report, at 2-3.

⁶ For example, to determine Marcola Meadows's price score, the contracting officer indicates that she divided Moreland's evaluated NUSF price (\$30.84) by Marcola Meadows's evaluated NUSF price (\$39.27). The contracting officer calculated this quotient as 0.7267, which she then multiplied by the maximum price score of 50, which produced Marcola Meadows's price score of 36.33. Id. at 20; cf. AR, Tab 9, Technical Evaluation Board Report, attach. 2, at 1 (award factor calculation chart). Marcola Meadows has not specifically challenged the calculation of the evaluated NUSF prices or the agency's math, so we express no view on them.

Next, the contracting officer considered the technical merits of each offer. For Moreland, she stated that the firm's offer was consistently ranked at the high end of the acceptable range for technical quality, and at the lower end of the range for its operations and maintenance plan and qualifications performance. She found that the offer was "very detailed and included meaningful technical information within the narratives, particularly related to the Technical Quality criteria." Id. at 21. She also stated that the offeror's "team was solid," although it had limited recent experience with the VA. Id. The PNM elsewhere listed in detail the areas where Moreland had been given positive feedback, including its many unique design characteristics, built-in efficiencies, and enhancements. Id. at 17. The contracting officer noted that the firm qualified for partial credit--three points--as a small business. Id. at 21. She also stated that Moreland's price was the most competitive, and was significantly less expensive when compared to other offerors with similar technical scores.

For Marcola Meadows, the contracting officer stated that the firm's offer was consistently ranked at the high end of the acceptable range for technical quality, operations and maintenance plan, and qualifications performance. As with Moreland, she also stated that the firm's offer was "very detailed and included meaningful technical information within the narratives," and that its "team was solid." Id. The PNM elsewhere listed in detail the areas where Marcola Meadows had been given positive feedback, including safety, security, flexibility, adaptability, sustainable features and energy reduction; good design aspects; its operations and maintenance plan; its substantial experience with large and similar projects; and its projects timely completed and within budget. Id. at 17. The contracting officer noted that the offeror did not receive partial credit as a small business because one of the joint venture partners was a large business entity. Id. at 21. She also stated that Marcola Meadows's price was more than 25 percent higher than the lowest-priced offer (that of Moreland), and that this price difference was "too great to be offset by the technical score." Id.

Considering the strengths and weaknesses of the proposals, as well as the respective prices, the contracting officer concluded that Moreland's proposal offered the best value to the government. She identified additional strengths and attributes in the firm's proposal that included a team with extensive experience in the development of healthcare projects and medical office facilities, as well as a site that was convenient to a freeway and other roads. Id. at 22.

On February 22, the VA's real property service project manager completed an operating lease requirement form that listed each of the six operating lease criteria, to document her conclusion that Moreland's offer was compliant with the operating lease requirement. AR, Tab 10, Capital Lease Checklist, at 1.⁷

⁷ The VA produced two different versions of this exhibit. Our citation is to the version prepared on February 22, and submitted to our Office and the parties on

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On February 27, the VA realty specialist sent an e-mail to the land use planning manager for the City of Eugene, expressing the view that a building in zone I-1 campus industrial, such as the outpatient clinic, “allows for a host of other (private sector) uses beyond Government usage,” and asking for the land use planning manager’s interpretation. The city’s land use planning manager replied that the zoning allowed reuse of the building for another form of government service, information technology services, manufacturing, medical or dental labs, certain “retail and wholesale trade,” among other things. AR, Tab 18, E-mails Between VA Real Estate Specialist and City Land Use Planning Manager, Feb. 27, 2013, at 1-2.

On March 4, 2013, the VA announced that, on February 28, the agency had entered into a lease with Moreland for an initial “lump sum” payment of \$4.6 million, and first-year rent of \$4.0 million.⁸ AR, Tab 12, Letter from Contracting Officer to Protester, Mar. 4, 2013, at 1. Marcola Meadows then filed this protest, which it supplemented twice after receiving additional information during the course of the protest.

ANALYSIS

Marcola Meadows argues that Moreland’s proposal is ineligible for award because the applicable zoning restriction prevents the lease from scoring as an operating lease as required by the SFO. The protester also argues that the fact that its point score prior to the agency’s corrective action was 6.33 points higher than its final point score after the corrective action is evidence of an unreasonable evaluation, and that the agency also improperly failed to assign its proposal three points for being a small business. Finally, Marcola Meadows argues that the contracting officer’s price/technical tradeoff rationale was mechanical. We consider each issue and find no basis to sustain the protest.

First, Marcola Meadows asserts that the proposed building, which is to be designed to the VA’s specifications as an outpatient medical clinic, will have no use other than as an outpatient medical clinic because its design will include such things as an ambulance entrance, patient intake areas, a laboratory/pharmacy, and a dental clinic. The protester argues that the fact that the zoning restriction applicable to Moreland’s proposed site precludes privately-run outpatient medical clinics means that the resulting building cannot be a general purpose asset and that there is no private sector market for the asset.

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April 8, which the VA stated was the operative version. VA Response to GAO Questions, at 2 (Answer No. 1).

⁸ The SFO specified that this lump-sum payment was for items listed in Schedule B to the SFO, “Special Requirements,” discussed further below. SFO at 7.

The VA counters that the fact that the proposed building must meet the agency's specifications for an outpatient medical clinic does not mean it cannot be considered a general purpose asset. The VA states that its specifications for the building do not preclude another use for the space, as the subsequent lessee will have the space refurbished to meet its own specifications. As evidence, the VA cites three clinics previously used by the agency in other locations that have subsequently been occupied by other users for a social service non-profit agency, a communications company's business offices, and a medical office building, respectively. Contracting Officer's Statement at 6-7. The VA also explains that, at the end of its lease, there will be a private sector market for the building because, while the applicable zoning may preclude continued use of the building as a private sector outpatient clinic,⁹ it permits a multitude of other uses. As the city's land use planning manager advised the VA, the zoning allows reuse of the building for, among other things, information technology services, manufacturing, and medical or dental labs. AR, Tab 18, E-mails Between VA Real Estate Specialist and City Land Use Planning Manager, supra. Therefore, the VA argues, it reasonably concluded that Moreland's offer met the SFO's requirement to score as an operating lease.

Our Office does not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. A protester's disagreement with the agency's evaluation conclusions does not provide a basis for our Office to object to the evaluation. GHG Corp., B-407949, Apr. 12, 2013, 2013 CPD ¶ 102 at 2.

Marcola Meadows's argument is premised on its view that the building proposed for Moreland's site can only ever be used as an outpatient medical clinic. That premise drives its arguments that the asset will be built to the "unique" specifications of the government and that there is no private sector market for the asset. After reviewing the pleadings, the record, and the applicable guidance, we find that the protester has given us no basis to agree with either its premise or its overall argument.

Marcola Meadows cites to no requirement in the Circular or anywhere else to support its assertion that Moreland's proposed building can only ever be used as an outpatient medical clinic. The firm argues only that using the building for another purpose would require substantial redevelopment. Even if this is true, Marcola Meadows has not shown that the Circular or any other guidance precludes a building requiring redevelopment from being considered a general purpose asset. Indeed, one of the Circular's guidelines for distinguishing between operating leases and capital leases contemplates that general purpose assets may include special features or enhancements to meet the government's unique needs or

⁹ There appears to be no restriction on the building's continued use as an outpatient medical clinic operated by the state or local government.

specifications.¹⁰ Circular A-11, appx. B, at 7. In addition, Marcola Meadows has not shown that various other design features are sufficiently “unique” that the building can serve no purpose other than as an outpatient medical clinic. There is no evidence that a future private lessor for a permissible use will object to these features, and certain of the permissible uses—such as medical and dental labs—may find the features desirable. In the case at hand, where an array of private sector use is permissible under the applicable zoning restriction, Marcola Meadows has given us no reason to conclude that the VA improperly found that there was a private sector market for the asset at the conclusion of the VA’s lease term, even if redevelopment is required. Accordingly, we deny this ground of protest.

Marcola Meadows next argues that the fact that its final overall point score was “reduced” by 6.33 points from the score it was assigned prior to the agency’s corrective action is evidence of an unreasonable evaluation. We do not agree.

The mere fact that a reevaluation of proposals after corrective action varies from the original evaluation does not constitute evidence that the reevaluation was unreasonable. Rather, it is implicit that a reevaluation can result in different findings and conclusions. IAP World Servs., Inc., B-406339.2, Oct. 9, 2012, 2012 CPD ¶ 287 at 3-4; QinetiQ North Am., Inc., B-405163.2 et al., Jan. 25, 2012, 2012 CPD ¶ 53 at 13. The overriding concern for our Office’s review is not whether the point scores are consistent with an earlier set of point scores, but whether they reasonably reflect the relative merit of the offers. See Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 11. The mere change in point scores does not show that the final evaluation was unreasonable.¹¹

However, Marcola Meadows also objects that the VA improperly failed to credit the firm’s proposal with three points for being a small business. As noted above, the protester’s proposal included its self-certification as a small business. It is not clear whether the contracting officer reviewed this self-certification; she states that her Internet research on one of the joint venture partners led her to believe that the partner was a large business. Supplemental AR at 2. Our review of the record

¹⁰ In such cases, as a general rule, such features or enhancements should be financed up-front, separate from the lease. Id. The lump-sum payment here paid for such items listed in Schedule B, which identified 16 building-wide communication and alarm systems and a 49-page list of room-specific equipment, which ranged from ordinary fixtures (shelves, mirrors, telecommunications outlets) to specialized items (steam sterilizer chamber, dental vacuum system, dental operator consoles). See generally, SFO, Sched. B, at 1-59.

¹¹ Similarly, the mere “reduction” in its point score does not, as the protester argues, necessarily mean that the VA failed to engage in meaningful discussions with the firm.

shows that, even if the VA incorrectly failed to give the protester's proposal credit for being a small business, the firm was not prejudiced by the agency's error.

The Small Business Administration (SBA), not the procuring agency, has conclusive authority to determine size status matters for federal procurements. 15 U.S.C. § 637(b)(6). Accordingly, under FAR § 19.301, an offeror may self-certify that it is a small business concern in connection for a specific solicitation if it meets the definition of a small business concern applicable to the solicitation, and it has not been determined by SBA to be other than small. In those circumstances, the contracting officer must either accept the firm's self-certification or (if the self-certification is challenged, or if the contracting officer has some other reason to question the representation) refer the matter to the SBA. AMI Constr., B-286351, Dec. 27, 2000, 2000 CPD ¶ 211 at 3-4. Even where a contracting officer's research gives reason to question the representation by firm that it is a small business, that research is not an adequate substitute for referral to the SBA. See id. at 4.

Nevertheless, even if the VA improperly failed to assign Marcola Meadows's proposal three points for being a small business, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Marcola Meadows has not shown that the additional three points would have given the firm a substantial chance of receiving the award. Marcola Meadows had the highest-scoring offer under the non-price evaluation with or without the addition of these points, so any error did not affect its technical ranking. Nor would the addition of the points to Marcola Meadows's proposal have displaced Moreland as the highest-score offeror overall. Finally, the protester's status as a small business would not have served to differentiate its proposal from that of Moreland, also a small business. Accordingly, we see no basis to conclude that Marcola Meadows would have been prejudiced by the VA's improper evaluation under the socio-economic factor.

Finally, Marcola Meadows argues that the record fails to demonstrate that the contracting officer made a reasoned source selection decision, and instead made generic comments about the evaluation and based the source selection decision on a mechanical application of point scores. Second Supplemental Protest at 12.

Source selection judgments must be documented, and must include the rationale for any business judgments and cost/technical tradeoffs made or relied upon by the agency. General Dynamics Info. Tech., Inc., B-406059.2, Mar. 30, 2012, 2012 CPD ¶ 138 at 4; see FAR § 15.308. Ratings--be they numerical, adjectival, or color--are merely guides for intelligent decisionmaking in the procurement process. Burchick Constr. Co., B-400342.3, Apr. 20, 2009, 2009 CPD ¶ 102 at 4-5. The real issue is whether the competing proposals offer differing levels of technical merit, a question

that is essentially a matter for the judgment of the agency evaluators. The rationale for this judgment must be documented in sufficient detail to show that it is not arbitrary. R&D Dynamics Corp., B-285979.3, Dec. 11, 2000, 2000 CPD ¶ 201 at 4-5. However, there is no need for extensive documentation of every consideration factored into a tradeoff decision. See Terex Gov't Programs, B-404946.3, Sept. 7, 2011, 2011 CPD ¶ 176 at 3. Rather, the documentation need only be sufficient to establish that the agency was aware of the relative merits of and costs of the competing proposals and that the source selection decision was reasonably based. Wyle Labs., Inc., B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 11.

The record here reflects a reasonable best value tradeoff. In particular, as described above, the PNM, which also served as the source selection decision, summarized the strengths and weaknesses of all offers, and elsewhere included additional details concerning the features of the respective proposals.

We find the agency's source selection decision, although brief, adequately documented the basis of the award determination. Although the contracting officer did not specifically restate the strengths and weaknesses of the offerors when comparing proposals, there is no requirement to do so. See TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 13 n.12; EER Sys., Inc., B-290971.3, B-290971.6, Oct. 23, 2002, 2002 CPD ¶ 186 at 17. A lack of detail in a source selection decision does not, alone, affect the validity of the award decision where, as here, the source selection authority considered the underlying evaluation results in concluding that the protester's technical advantages did not warrant its higher price, and where there is no basis in the record to question the reasonableness of that judgment. See EER Sys., Inc., supra. The solicitation here provided that non-price factors, when combined, were approximately equal to price. SFO § 2.2. We have no basis to object to the contracting officer's conclusion that the superior technical aspects of Marcola Meadows's proposal were insufficient to overcome its more than 25 percent price premium. See Government Acquisitions, Inc.; PCI Tec, Inc., B-407877.2 et al., Mar. 25, 2013, 2013 CPD ¶ 82 at 6.

The protest is denied.

Susan A. Poling
General Counsel