



GAO

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Loyal Source Government Services, LLC

File: B-407791.5

Date: April 9, 2014

Isaias Alba IV, Esq., Alexander O. Levine, Esq., Patrick T. Rothwell, Esq., Pamela J. Mazza, Esq., and Peter B. Ford, Esq., PiliroMazza PLLC, for the protester. Craig A. Holman, Esq., and Lauren J. Schlanger, Esq., Arnold & Porter LLP, for Aliron International, Inc.; and Bill Rivard for Matrix Providers, the intervenors. Capt. Anthony F. Schiavetti, Department of the Army, for the agency. Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's failure to evaluate offerors' compensation plans is dismissed as untimely where the protester could have and should have raised the protest grounds during a prior protest.
 2. Protest of an agency's selection decision is denied where the decision documents the selection official's recognition of the relative weight of the evaluation criteria and consideration of the offerors' respective technical merit and price.
-

DECISION

Loyal Source Government Services, LLC, of Orlando, Florida, protests the award of contracts to five firms under request for proposals (RFP) No. W81K04-11-R-0018, issued by the Department of the Army for physician services.¹ Loyal Source challenges the agency's evaluation of proposals and the selection decision.

We deny the protest.

¹ The awardees are Aliron International; Franklin Government Services, JV; Matrix Providers, LLC; Professional Management Enterprises (PME); and Professional Services of N.A., JV (PSNA).

BACKGROUND

The RFP, which was issued on September 15, 2011, provided for the award of a maximum of five indefinite-delivery, indefinite-quantity contracts for physician services in various medical specialties at military treatment facilities within the U.S. Army Medical Command in the Southern Region of the United States.²

Offerors were informed that the awards would be made on a best-value basis, considering price and the following two evaluation factors: technical quality and performance risk (past and present performance). The technical quality factor included three subfactors: contractor quality control plan; management capabilities; and, recruitment and retention. RFP at 70. The technical quality factor was equal in weight to the performance risk factor, and the two factors combined were significantly more important than price. Id. at 69. Offerors were informed that proposals must receive a rating of no less than “acceptable” under all technical evaluation factors and subfactors to be considered for award.³ Id.

With respect to price, offerors were informed that their total evaluated price would be calculated from a pricing matrix provided in the RFP.⁴ Id. at 64. Offerors were to provide their rates in the pricing matrix for various physician services at different locations, and the RFP provided that these would be ceiling rates in subsequent task order pricing. RFP, attach. 2, Price Matrix. Offerors were also instructed to complete a compensation plan matrix for the medical specialties. RFP at 64. The RFP provided that the compensation plan would be evaluated

² The RFP was amended 10 times. Our citations are to the conformed copy of the RFP.

³ The possible technical ratings were outstanding, good, acceptable, marginal, and unacceptable. RFP at 70-71. An outstanding (O) rating was defined as a proposal that meets the requirements, has an exceptional approach and understanding of the requirements, has strengths that far outweigh any weaknesses, and has a risk of unsuccessful performance that is very low. Id. at 70. A good (G) rating was defined as a proposal that meets the requirements, has a thorough approach and understanding of the requirements, has strengths that outweigh any weaknesses, and has a low risk of unsuccessful performance. Id. An acceptable (A) rating was defined as proposal that meets the requirements, has an adequate approach and understanding of the requirements, has strengths and weaknesses that are offsetting or will have little or no impact on contract performance, and has a risk of unsuccessful performance that is no worse than moderate. Id. at 71.

⁴ The total evaluated price would also include amounts for travel, accounting, and the price for contractor attendance at a post-award conference. RFP at 4-6, 73.

to ensure the proposed compensation packages are sufficient to attract and retain quality professional HCPs [health care providers]. Compensation plans that include compensation to HCPs that reflect an inappropriate risk of being able to recruit and retain quality HCPs will be adversely evaluated and may constitute sufficient cause to justify rejection of the proposal.

Id. at 73.

The Army received 27 proposals in response to the RFP. Following the evaluation of proposals, the agency decided to include eight proposals, including Loyal Source's and the awardees', in the competitive range. Discussions were conducted, and revised proposals received and evaluated as follows:

	OVERALL	Technical Quality			Performance Risk ⁵	Price
		Quality Control Plan	Management Capability	Recruitment/Retention		
Aliron	Good	A	G	G	Satisfactory	\$498.1M
Franklin	Good	A	G	O	Satisfactory	\$506.1M
PSNA	Outstanding	O	O	O	Satisfactory	\$563.0M
PME	Good	G	G	O	Satisfactory	\$563.2M
Matrix	Outstanding	O	O	O	Satisfactory	\$566.7M
A	Outstanding	O	O	G	Satisfactory	\$570.8M
B	Outstanding	O	O	O	Substantial	\$590.7M
Loyal Source	Outstanding	G	O	O	Substantial	\$596.7M

Agency Report (AR), Tab 103, Source Selection Decision (SSD), at 5-6.

The proposals of Aliron, Franklin, PSNA, PME, and Matrix were determined to offer the best value. Contracts were awarded to these five firms, and on May 16, 2013, Loyal Source protested to our Office.

In its initial protest, Loyal Source complained that the Army misevaluated its proposal under the quality control plan subfactor, and gave undue weight to price in its selection decision. In response to the protest, the Army submitted a documented

⁵ Under the performance risk factor, proposals were evaluated as either substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence.

agency report defending the evaluation and selection decision. In reply, Loyal Source provided comments, in which the protester argued, as a supplemental protest ground, that the agency did not consider the performance and cost risks associated with Aliron's significant price reduction. The agency submitted a supplemental report responding to the supplemental protest, and Loyal Source provided supplemental comments.

In response to the Army's request for alternative dispute resolution (ADR), the cognizant GAO attorney conducted a "litigation risk" ADR conference, in which he informed the parties that the Army bore significant litigation risk with respect to the adequacy of the agency's selection decision, because the decision failed to provide a sufficient rationale for the agency's trade-off determination. The following day, the Army informed our Office and the parties that it would take corrective action. Specifically, the Army stated that it would perform and document a new selection decision. We dismissed Loyal Source's protest as academic. Loyal Source Gov't Servs., LLC, B-407791, B-407791.2, July 25, 2013.

In accordance with its proposed corrective action, the Army prepared a new selection decision that weighed the evaluated merits of the parties' proposals. See AR at 16; Tab 103, SSD, at 30-33. The Army did not re-evaluate the proposals. On December 23, the Army's source selection authority (SSA) again chose the same five proposals for award. Id. at 30.

This protest followed.

DISCUSSION

Loyal Source raises a number of challenges to the agency's evaluation and selection decision. Loyal Source contends that the Army's price evaluation was unreasonable because the agency did not evaluate the firms' compensation plans. Protest at 8-11. Loyal Source also contends that the agency miscalculated its proposal under the quality control plan subfactor, and provided undue weight to price in its selection decision, such that the awards were made on a lowest-priced, technically-acceptable basis, rather than a best-value basis. Protest at 11-17.

We have considered all of Loyal Source's arguments, although we only address its primary ones. As explained below, we find Loyal Source's challenge to the agency's evaluation of the offerors' compensation plans to be untimely. We also find that the agency's evaluation of Loyal Source's proposal under the quality control plan subfactor and its selection decision were reasonable and consistent with the stated evaluation criteria.

Compensation Plan Evaluation

Loyal Source contends that the agency's price evaluation was flawed because the Army did not evaluate the offerors' compensation plans to determine whether the firms' compensation rates "reflect an inappropriate risk of being able to recruit and retain quality [health care providers]." Protest at 8, citing RFP at 73.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, protests generally must be filed no later than 10 calendar days after the protester knew, or should have known, the basis of its protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2014). Moreover, where a protester initially files a timely protest, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. International Code Council, B-409146, Jan. 8, 2014, 2014 CPD ¶ 26 at 3 n.3; Cedar Elec., Inc., B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 4.

Here, Loyal Source's arguments concerning the agency's evaluation of compensation plans are based on information that was known or should have been known to the protester from the agency record provided in response to the firm's earlier protest. Specifically, the protester was provided with the awardees' price proposals and agency's price evaluation as part of the report. The protester, however, did not challenge the agency's failure to evaluate the offerors' compensation rates or otherwise challenge this aspect of the agency's price evaluation in its prior protest. Given this, we will not now consider arguments that could have and should have been raised in prior protests. Savvee Consulting, Inc., B-408416.3, Mar. 5, 2014, 2014 CPD ¶ ___ at 5; Waterfront Techs., Inc.--Protest & Costs, B-401948.16, B-401948.18, June 24, 2011, 2011 CPD ¶ 123 at 11 n.12; Tony Western--Recon., B-241169.3, May 21, 1991, 91-1 CPD ¶ 489 at 3; see also HK Sys., Inc.--Protest & Recon., B-291647.6, B-291647.7, Aug. 29, 2003, 2003 CPD ¶ 159 at 6.

Loyal Source does not dispute that it knew or should have known the facts on which it bases its challenges to the price evaluation from the prior protest. Rather, Loyal Source points to its earlier challenge to the agency's evaluation of Aliron's price, arguing that this ground of protest "shares a common factual and legal nexus" with its challenge to the agency's evaluation of the awardees' compensation plans. Protester's Comments, Feb. 27, 2014, at 7. We disagree. Loyal Source's prior protest was grounded upon its argument that the agency failed to reasonably assess Aliron's price reduction; this argument necessarily was focused upon the proposed

prices provided in a pricing matrix.⁶ In contrast, with respect to its protest here, Loyal Source does not assert that the agency unreasonably evaluated Aliron's low price, but rather challenges a different aspect of the price evaluation: that the agency failed to evaluate the compensation rates provided by all offerors, including Aliron, in their compensation plan matrices.⁷ As there is no apparent reason why Loyal Source could not have raised its challenges to the agency's evaluation of compensation rates set forth in this protest when Loyal Source filed its previous supplemental protest, we consider these protest grounds to be raised in an unwarranted piecemeal manner and will not consider them. Savvee Consulting, Inc., supra, at 6.

Loyal Source also argues that we should consider its challenge to the agency's evaluation of compensation rates to be timely because this new ground of protest was raised within 10 days of Loyal Source's required debriefing. Protester's Comments, Feb. 27, 2014, at 8. In support, Loyal Source cites our Bid Protest Regulations, which provides that

with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held. (emphasis added).

4 C.F.R. § 21.2(a)(2) (2014). According to Loyal Source, the plain language of the regulation allows the firm to file this challenge to the agency's evaluation of compensation rates, even where Loyal Source should have raised (but did not raise) this argument in its prior protest.

⁶ For the record, we recognize that Loyal Source, in its prior protest, alleged that a consequence of Aliron's price reduction would be the risk that the awardee could not recruit or retain staff. Loyal Source did not, however, tie this argument to Aliron's compensation plan, for example by referencing rates it believed to be unrealistic or otherwise challenging the evaluation of Aliron's compensation plan matrix.

⁷ To the extent that the protester is again challenging the agency's evaluation of Aliron's low price, we find the protester is not an interested party to raise this protest ground. Under our Bid Protest Regulations, a party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. 4 C.F.R. § 21.0(a). Here, the record shows that there is an intervening, higher-rated and lower-priced offeror, which would be in line for award, even if we sustained Loyal Source's protest of Aliron's award. See e.g., McDonald Construction Servs., Inc., B-285980, B-285980.2, Oct. 25, 2000, 2000 CPD ¶ 183 at 11; U.S. Constructors, Inc., B-282776, July 21, 1999, 99-2 CPD ¶ 14 at 5.

We disagree with the premise that a debriefing can revive an untimely protest ground under these circumstances. The fact that the agency made a new source selection decision (and provided the offeror with a required debriefing concerning that decision) does not provide a basis for reviving an otherwise untimely protest ground where, as in this case, the basis of the otherwise untimely protest allegation concerns an aspect of the agency's evaluation that was not subsequently affected by the agency's corrective action. See DRS ICAS, LLC, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21. Such unwarranted piecemeal presentation or development of protest issues undermines our goal of affording parties the opportunity to present their cases with the least disruption possible to the orderly and expeditious conduct of government procurements. Labat-Anderson Inc., B-246071.4, Oct. 9, 1992, 92-2 CPD ¶ 244 at 5. Accordingly, we see no reason to provide the protester here with a "second bite at the apple," nor condone a situation where an agency takes corrective action in response to a protest, and the protester then advances issues that could have and should have been raised in the previous protest.

Quality Control Plan Subfactor

As it did in its original protest, Loyal Source again asserts that its proposal should have received a higher rating under the quality control plan subfactor. Specifically, the protester argues that, because the firm's proposal was evaluated as having three strengths and no weaknesses, its proposal should have received an outstanding, rather than good, rating. Protester's Comments at 16. Loyal Source contends that the Army should have considered whether its combined strengths added up to an approach that "far outweighed" any weaknesses. Protest at 17.

The evaluation of proposals and assignment of adjectival ratings, however, should generally not be based upon a simple count of strengths and weaknesses, but on a qualitative assessment of the proposals consistent with the evaluation scheme. See Clark/Foulger-Pratt JV, B-406627, B-406627.2, July 23, 2012, 2012 CPD ¶ 213 at 14. In this regard, it is well-established that ratings, be they numerical, adjectival, or color, are merely guides for intelligent decision making in the procurement process. Environmental Restoration, LLC, B-406917, Sept. 28, 2012, 2012 CPD ¶ 266 at 5. Moreover, there is no legal requirement that an agency must award the highest possible rating, or the maximum point score, under an evaluation factor simply because the proposal contains strengths and/or is not evaluated as having any weaknesses. See Applied Tech. Sys., Inc., B-404267, B-404267.2, Jan. 25, 2011, 2011 CPD ¶ 36 at 9.

Here, the Army in its evaluation and selection decision recognized that Loyal Source's proposal had three strengths under the quality control plan factor. The agency found that the significance of these strengths warranted a good rating, and did not warrant a higher rating. Legal Memorandum at 28. Although Loyal Source believes that its proposal offered sufficient beneficial strengths to warrant a higher

rating under this subfactor, this disagreement with the agency's judgment does not show it to be unreasonable.

Source Selection Decision

Loyal Source also challenges the agency's selection decision, arguing that the Army gave undue weight to price, such that the agency changed the procurement from one conducted on a best-value basis, to a lowest-priced, technically-acceptable basis. In this regard, Loyal Source maintains that its highest-priced proposal should have been selected for one of the five awards, given its superior technical rating and the "small" price difference between its proposal and the highest-priced awardee's proposal. Protester's Comments, Feb. 14, 2014, at 11.

Source selection officials in negotiated best-value procurements have broad discretion in making price/technical tradeoffs, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the solicitation's evaluation criteria. World Airways, Inc., B-402674, June 25, 2010, 2010 CPD ¶ 284 at 12. Even where, as here, price is stated to be of less importance than technical merit, an agency may properly select a lower-rated, lower-priced proposal if the agency reasonably concludes that the price premium involved in selecting the higher-rated proposal is not justified. Aegis Def. Servs., Ltd., B-403226 et al., Oct. 1, 2010, 2010 CPD ¶ 238 at 10. A protester's mere disagreement with the agency's determinations as to the relative merits of competing proposals, or disagreement with its judgment as to which proposal offers the best value to the agency does not establish that the source selection decision was unreasonable. General Dynamics-Ordnance & Tactical Sys., B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 8.

We find the Army's source selection decision to be reasonable and consistent with the stated evaluation criteria. Read as a whole, the 33-page selection decision documents the SSA's recognition that the non-price factors, combined, were significantly more important than price, and his consideration of the offerors' respective technical merit and price--including Loyal Source's. With respect to Loyal Source's technical merit, the SSA recognized that Loyal Source's proposal was evaluated as offering a number of benefits under the technical quality subfactors. See, e.g., AR, Tab 103, SSD, at 7, 11, and 16-17. Considering these benefits, the SSA found that Loyal Source's proposal was technically superior to some of the awardees' proposals (including Aliron's). Id. The SSA also accepted Loyal Source's substantial confidence rating, which was higher than that of any of the awardees'. Id. at 25. The SSA also noted, however, that the benefits associated with Loyal Source's proposal, which had the highest price of any proposal in the competitive range, did not reflect instances where Loyal Source was offering to exceed what was required by the performance work statement--other than one benefit recognized in Loyal Source's offer to [DELETED]. Id. at 31. Specifically, the SSA concluded that the technical merit generally (including its evaluated benefits) did not warrant the

payment of a premium of \$30 million to nearly \$99 million (as compared to the awardees' evaluated prices). Id. at 32. Although Loyal Source disagrees with the SSA's judgment, it has not shown that this judgment was unreasonable.⁸

The protest is denied.

Susan A. Poling
General Counsel

⁸ The protester also argues that the prices here were simply ceiling prices to be used in subsequent task orders, and thus should not have been viewed by the SSA in the same light as a fixed price on a single-award competition. We disagree. The Competition in Contracting Act of 1984 (CICA) requires contracting agencies to give meaningful consideration to cost or price in making all awards. The MIL Corp. B-294836, Dec. 30, 2004, 2005 CPD ¶ 29 at 9. Thus, it was appropriate for the Army to consider these prices in determining which proposals reflected the best value to the agency.