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**Comptroller General
of the United States**

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

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Decision

Matter of: Command Management Services, Inc

File: B-292893.2

Date: June 30, 2004

Ira E. Hoffman, Esq., Mark R. Mann, Esq., and James A. McMillan, Esq., Grayson, Kubli & Hoffman, for the protester.

Capt. Richard M. Sudder II, Department of the Army, for the agency.

Katherine I. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against evaluation of revised proposals, undertaken after negotiations were opened as part of corrective action following initial award to protester, is denied where agency reasonably determined that as a result of changes in the current awardee's revised proposal, the proposal warranted a higher rating than it received in the first evaluation.

DECISION

Command Management Services, Inc. (CMS) protests the Department of the Army's award of a contract to the Hilton Garden Inn (HGI), under request for proposals (RFP) No. DABK21-03-R-0036, for meals, lodging, and transportation for applicants arriving for processing at the Military Entrance Processing Station (MEPS) in New York City, New York. CMS primarily argues that the agency improperly evaluated the awardee's proposal in a number of areas.

We deny the protest.

The RFP, a "commercial acquisition using a combination of [Federal Acquisition Regulation parts] 12 & 15," provided for award of a fixed-price requirements contract, for a base period with four 1-year option periods, to the offeror whose proposal was most advantageous to the government. Amend. 2. Determination of the most advantageous proposal was to be based on five evaluation factors: (1) facility quality, including subfactors for sanitation and cleanliness, room condition, meals, security, special features, and facility location; (2) transportation; (3) quality control; (4) past performance; and (5) price. Among the non-cost factors, facility quality was more important than transportation, which was more important

than past performance, which was as important as quality control. The RFP further provided that the “[n]on-cost factors are more important than cost or price.” RFP at 16-18.

The Army received 15 proposals in response to the solicitation, including those of CMS for the Wyndham Newark Airport Hotel (CMS/Wyndham) and HGI.¹ These proposals were evaluated by a three-member team, which then conducted a videotaped, on-site inspection of each offeror’s lodging and dining facilities to verify the information in the offeror’s proposal. Based on the results of the inspection and the evaluation of the proposals, CMS/Wyndham’s proposal received an overall rating of excellent, with an excellent rating for each of the non-cost factors, while HGI’s received an overall rating of satisfactory, with satisfactory ratings for facility quality and quality control and excellent ratings for transportation and past performance. Although the evaluated price of CMS/Wyndham’s proposal (\$10,971,689) was higher than HGI’s [DELETED], the agency determined that given its overall advantage under the non-cost factors, the CMS/Wyndham proposal represented the best value. First Contracting Officer’s Determination, Jan. 27, 2004.

Shortly after award to CMS on its CMS/Wyndham proposal, another firm filed an agency-level protest contesting the award. During the course of this protest it came to light that the agency-level protester possessed the independent government estimate (IGE), having been inadvertently given the IGE by a local MEPS employee. In addition, the agency concluded after a review of the past performance evaluation that the rating given the agency-level protester in this regard was unjustified. In response, the agency reopened discussions, furnishing each offeror with the IGE and an opportunity to submit revised technical and cost proposals. The agency also assigned a new contracting officer to this procurement.

CMS/Wyndham submitted price and technical changes, and was again rated excellent, at a revised price of [DELETED]. HGI furnished additional technical information, including a videotape that highlighted the features and qualities of its 22-acre property on Staten Island, 10 miles from the MEPS. In this regard, the second contracting officer noted that “the facilities and grounds of the hotel,” which were only approximately 2 years old, were “extremely attractive and should make [an] excellent impression on arriving applicants,” and that the “hotel grounds are park-like.” Second Contracting Officer’s Determination, Mar. 24, 2004, at 2. In addition, the second contracting officer noted that a shortfall in dining room capacity cited in the original evaluation had been alleviated by the conversion of conference space. *Id.* As a result, HGI’s rating for facility quality was raised from

¹ CMS is a management company that subcontracts with local hotels to perform MEPS contracts throughout the country. CMS teams with multiple hotels for a given competition, and submits multiple proposals, each for a different hotel with CMS’s management services. Using various hotels, CMS submitted 12 of the offers here.

satisfactory to good, while its rating for transportation was lowered from excellent to good,² and its ratings for past performance and quality control remained excellent and satisfactory respectively. HGI's overall technical rating was raised to good, at a revised, reduced price of \$8,277,725. Based on his review of the revised proposals, the second contracting officer concluded that the CMS/Wyndham proposal did not offer "significant quality of value" sufficient to warrant payment of its nearly [DELETED] higher price, and that HGI's proposal, with a significantly lower price and "significant quality advantages," instead represented the best value. *Id.* Upon learning of the resulting award to HGI, CMS/Wyndham filed this protest.

CMS/Wyndham challenges the agency's rating methodology and the evaluation of the awardee's technical proposal.³ We review challenges to an agency's evaluation only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. *PharmChem, Inc.*, B-291725.3 *et al.*, July 22, 2003, 2003 CPD ¶ 148 at 3. A protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. *Entz Aerodyne, Inc.*, B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3. Based on our review of the record, we find the selection of HGI's proposal as the best value proposal to be reasonable.

CMS/Wyndham asserts that the agency in its evaluation of proposals gave price more weight than was stated in the RFP. The protester notes that the RFP provided that the "[n]on-cost factors are more important than cost or price." RFP at 19. According to the protester, this means that each non-cost factor is more important than price. The agency, on the other hand, maintains that this language in the RFP meant that the non-cost factors when combined are more important than price.

To be reasonable an interpretation must be consistent with the solicitation, read as a whole and in a reasonable manner. *Fox Dev. Corp.*, B-287118.2, Aug. 3, 2001, 2001 CPD ¶ 140 at 2. Here we find that the language of the RFP indicates by the use of the plural of "non-cost factors" contrasted with the singular of "cost" that the RFP was referring to the non-cost factors collectively. In any case, to the extent that this

² HGI's transportation rating was lowered by the second contracting officer because HGI had not yet purchased the additional vans needed to transport the applicants. Contracting Officer's Supplemental Statement, May 14, 2004.

³ CMS also initially challenged the evaluation of the awardee's proposal in a number of additional areas. The agency responded to each of these additional arguments in its administrative report, explaining why the evaluation in each case was reasonable. Since the protester did not respond to the agency's explanation in its comments on the report, we view the additional raised arguments as abandoned and will not consider them. *United Janitorial Servs.; Olympus Bldg. Servs., Inc.*, B-286769.3; B-286769.4, June 5, 2001, 2001 CPD ¶ 3, n.1.

language was also susceptible to the interpretation advanced by the protester, that is, that each non-cost factor was more important than price, the solicitation was ambiguous on its face. Where a solicitation contains such a patent ambiguity, an offeror has an affirmative obligation to seek clarification prior to the first due date for submission of proposals following introduction of the ambiguity into the solicitation. 4 C.F.R. § 21.2(a)(1) (2004); American Connecting Source d/b/a/ Connections, B-276889, July 1, 1997, 97-2 CPD ¶ 1 at 3. The purpose of our timeliness rule in this regard is to afford the parties an opportunity to resolve ambiguities prior to the submission of offers, so that such provisions can be remedied before offerors formulate their proposals. Gordon R. A. Fishman, B-257634, Oct. 11, 1994, 94-2 CPD ¶ 133 at 3. Where a patent ambiguity is not challenged prior to submission of proposals, we will dismiss as untimely any subsequent protest assertion that is based on one of the alternative interpretations as the only permissible interpretation. U.S. Facilities, Inc., B-293029; B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10.

CMS/Wyndham asserts that the agency improperly raised HGI's proposal rating in the reevaluation based on its consideration of the grounds of HGI's facility. According to the protester, grounds was not a stated evaluation factor or subfactor, and even if it was, the agency exaggerated its importance by improperly considering it under more than one evaluation subfactor.

CMS/Wyndham's arguments furnish no basis on which to question the overall evaluation. As an initial matter, we disagree with CMS/Wyndham's contention that consideration of HGI's grounds represents use of an undisclosed evaluation criterion. While agencies are required to identify the major evaluation factors, they are not required to identify all areas of each factor which might be taken into account, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. Bioqual, Inc., B-259732.2; B-259732.3, May 15, 1995, 95-1 CPD ¶ 243 at 4.

Here, the contracting officer states that HGI's grounds were considered under the facility quality factor, including the special features and location subfactors, two of the six subfactors of that factor. Contracting Officer's Supplemental Statement, May 14, 2004. We view the consideration of the grounds at HGI's facility as reasonably related to, and encompassed by, the facility quality factor, the most heavily weighted evaluation factor. See Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16. Likewise, consideration of HGI's grounds clearly was reasonably related to, and encompassed by, the special features subfactor, under which the agency was to evaluate the special features of the hotel, "including any amenities such as recreational areas, dining facilities and non-smoking rooms." RFP at 17.

It does not appear that the agency's consideration of the quality of the facility's grounds was reasonably related to, or encompassed by, the facility location

subfactor, under which the agency was to evaluate “the distance of the proposed lodging facility from the MEPS and the distance of the proposed dining and food preparation facilities from the lodging facility.” RFP at 17. However, there is no basis for finding that the agency’s consideration of the facility grounds under the facility location subfactor resulted in competitive prejudice to CMS/Wyndham. In this regard, 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 v. Christopher, 102 F. 3d 1577, 1581 (Fed. Cir. 1996). Here, the second contracting officer has explained the increase in HGI’s rating for facility quality from satisfactory to good on the basis of his consideration not only of the grounds at HGI’s facility, but also of the quality of the “facilities,” the alleviation of a shortfall in dining room capacity noted in the original evaluation, and HGI’s submission of information on traffic volume in the area (apparently relevant to facility location). Second Contracting Officer’s Determination, Mar. 24, 2004, at 2; Contracting Officer’s Statement, Apr. 8, 2004. According to the second contracting officer, consideration of the facility’s grounds was “just one component of [his] high quality impression” of the HGI facility. Contracting Officer’s Supplemental Statement, May 14, 2004. In these circumstances, and since consideration of HGI’s superior grounds was properly considered at least under the special features subfactor of the facility quality factor, HGI’s argument here furnishes no basis for questioning the overall rating of good under the facility quality factor.

CMS/Wyndham contends that it was improper for the agency to consider a videotape that HGI submitted with its revised proposal which featured the grounds and the facility; according to the protester, the agency was limited by the solicitation to only considering written materials. The protester also asserts that raising HGI’s rating due to its grounds ignores the concern of the previous contracting officer that HGI’s extensive grounds and the lack of security cameras in such a large area caused significant concern for applicant safety. First Contracting Officer’s Determination at 10.

These arguments are without merit. While the protester bases its objection to the agency’s consideration of HGI’s videotape on the fact that the solicitation generally referred, in the descriptions of the adjectival evaluation ratings, to evaluating a “written proposal,” we agree with the agency that neither these references, nor any other provision in the RFP, precluded the submission by offerors, and the agency’s consideration in the evaluation, of videotapes. Indeed, as noted by the agency, HGI’s submission of a videotape was not materially different from CMS/Wyndham’s own submission of photographs of its facilities. Nor are we persuaded by CMS/Wyndham’s argument that the second contracting officer, in raising HGI’s rating for facility quality from satisfactory to good, necessarily ignored the security concerns perceived by the first contracting officer. We have long recognized that different evaluation panels could reasonably reach different conclusions regarding

the quality of an offeror's proposal, given the subjective judgment necessarily exercised by evaluators. Warvel Prods., Inc., B-281051.5, July 7, 1999, 99-2 CPD ¶ 13 at 10-11. Here, the second contracting officer determined that the grounds of HGI's facility did not represent a security risk, but instead were one of several advantages offered by HGI. CMS has furnished no evidence to the contrary.

CMS/Wyndham asserts that the agency's cost-technical tradeoff here was improper. Agencies enjoy a relatively broad discretion in making tradeoffs, which is limited only by the test of rationality and consistency with the stated evaluation factors. Information Sys. Tech. Corp., B-289313, Feb. 5, 2002, 2002 CPD ¶ 36 at 6. As explained above, the contemporaneous evaluation record shows that the second contracting officer concluded that the CMS/Wyndham proposal did not offer significantly higher quality as to warrant payment of its [DELETED] higher price, and that HGI's proposal, with a significantly lower price and significant quality advantages, instead represented the best value. We find this cost-technical tradeoff and the resulting source selection to be reasonable and consistent with the terms of the solicitation.⁴

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ CMS/Wyndham also asserts that HGI does not have a sufficient number of double rooms to meet the maximum requirement set out in the RFP. In this regard, the solicitation stated that the maximum number of MEPS applicants that the hotel could expect on a daily basis was 104, and that fewer than 10 percent of the applicants would require single room accommodations. In its proposal, HGI stated that it had 53 double rooms and 95 single rooms, more than sufficient to meet the maximum number of MEPS applicants. HGI Technical Proposal, Proposal Summation. (The agency confirmed these figures upon receipt of this protest.) In these circumstances, we find no basis to question agency's determination during the evaluation that HGI had a sufficient number of rooms to accommodate the expected number of applicants.