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Decision

Matter of: OK Produce; Coast Citrus Distributors

File: B-299058; B-299058.2

Date: February 2, 2007

Mark A. McAndrew, Esq., and Philip J. Truax, Esq., Dinsmore & Shohl LLP, for the protesters.

Christopher Kim, Esq., and Lorinda D. Franco, Esq., Lim, Ruger & Kim, LLP, and Richard B. Oliver, Esq., McKenna, Long & Aldridge LLP, for Coast Produce Company, an intervenor.

Jay P. Manning, Esq., and Elliot J. Clark, Jr., Esq., Defense Commissary Agency, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests of evaluation of proposals and source selection are denied where record shows agency's evaluation and awards were reasonable and consistent with the solicitation's terms; protesters' mere disagreement with the agency's evaluation and selection does not show they are unreasonable.

2. Protests that awardee obtained an unfair competitive advantage by hiring as a consultant a former government employee who had served as a technical evaluator for a previous procurement are denied where record shows the individual did not assist in the preparation of the solicitation and that there is no reason to believe inside information was shared with the awardee.

DECISION

OK Produce and Coast Citrus Distributors protest the award of two (of three) contracts to Coast Produce Company under request for proposals (RFP) No. HDECO2-06-R-0009, issued by the Defense Commissary Agency (DeCA) for fresh fruits and vegetables (produce) for resale at commissaries located in DeCA's west region. (The Area 6, Group 1 award covers 8 commissaries in California and Nevada; the Group 2 award covers 22 commissaries in California, Arizona and Nevada; and the Group 3 award, not challenged here, covers 5 commissaries in Hawaii.) OK Produce and Coast Citrus contend that the agency's evaluation of the proposals and the award decisions are unreasonable. The protesters also contend that the awardee

benefited from an improper competitive advantage by hiring a former DeCA commissary produce manager as a consultant.

We deny the protests.

The RFP, issued as a small business set-aside on June 16, 2006, contemplated the award of a requirements-type, indefinite-delivery contract by regional group of commissaries; each group's contract was to have a 2-year base period with two 12-month option periods. RFP at 28, 45. Award was to be made to the firm that submitted the proposal deemed to offer the best value to the agency considering technical capability, past performance, and price. Technical capability (including subfactors for experience, quality program, production capability/distribution plan, and additional support/promotion plan) was significantly more important than past performance (including subfactors for product delivery, quality history/customer satisfaction, and business relations); technical capability and past performance combined were significantly more important than price. RFP amend. 2, at 13. The RFP provided technical specifications and performance requirements, and emphasized that offerors' technical proposals were to detail the firms' capabilities to perform in accordance with the solicitation's terms.

For the evaluation of price, offerors were to propose a minimum percentage of patron savings, defined in the RFP as:

the average amount the contractor will save the commissary patron on all core items over the selling price of the same or similar items from comparable commercial operations within the local commuting area and/or geographical area within a 20-mile radius of the commissary location (excluding membership clubs and convenience type stores), called Market Basket Pricing.

RFP amend. 2, at 8.

Each offeror also was to propose unit prices for core and non-core produce items reflecting application of its proposed minimum percentage of patron savings. Unit prices were to be reviewed for reasonableness and realism, and to assess the offeror's understanding of the use of the minimum percentage of patron savings percentage. RFP amend. 2, at 14.

Nine offers were received; eight were included in the competitive range. Discussions were conducted, and revised proposals were received and evaluated. The Coast Produce proposal was rated highest technically, receiving the highest evaluation ratings of all proposals under every technical capability subfactor and two of the

three past performance subfactors.¹ For Group 1, OK Produce's proposal was rated next highest technically, and Coast Citrus' proposal was ranked third highest technically. For Group 2, Coast Citrus' proposal was rated second highest technically behind Coast Produce's proposal. (OK Produce did not submit a proposal for Group 2.)

OK Produce offered the highest patron savings percentage of the offerors for Group 1 (at [deleted] percent), Coast Produce offered the third highest patron savings percentage (at [deleted] percent for the base period and [deleted] percent for the option periods), and Coast Citrus offered the lowest patron savings percentage of all offerors (at [deleted] percent). For Group 2, Coast Produce offered the second highest patron savings percentage of all offerors (at [deleted] percent for the base period and [deleted] percent for the option periods), and Coast Citrus proposed the lowest percentage of patron savings (at [deleted] percent).

While the protesters' proposals were noted as having technical strengths, they were not found to have as many strengths as the Coast Produce proposal. Despite OK Produce's slightly higher proposed patron savings percentage for Group 1, the contracting officer determined that, in light of the RFP's evaluation terms, where technical and past performance factors combined were significantly more important than price, and the agency's finding that the strengths of the proposal warranted the price premium associated with it, Coast Produce's higher technically rated, slightly higher-priced proposal offered the best value. For Group 2, the Coast Produce proposal, with a higher technical rating and higher proposed patron savings than the Coast Citrus proposal, was determined to offer the best value. Awards were made to Coast Produce for Group 1 and Group 2 (as well as Group 3). Debriefings were held with the protesters and these protests followed.

OK Produce and Coast Citrus contend that the agency's evaluation of their proposals was unreasonable. The protesters mainly contend that, since the agency's debriefings reported only strengths and no weaknesses in their final revised proposals, their proposals should have received higher evaluation point scores. OK Produce contends that, had its proposal received a higher technical evaluation point score, it would have received the Group 1 contract in light of its slightly higher proposed patron savings percentage. Coast Citrus generally contends that if its

¹ Coast Produce submitted two proposals, one for separate group awards, and an alternate proposal of higher patron savings percentages for the award of all three contracts in Area 6. It is the alternate proposal that was selected for award and is discussed in this decision. The protesters' and the awardee's proposals were all highly rated; out of a total of 190 available evaluation points (for the technical capability and past performance factors combined), the Coast Produce proposal received 176 points, OK Produce's proposal received 173 points, and Coast Citrus' proposal received 159 points.

proposal had received a higher technical evaluation rating, the agency would have determined that it presented the best value offer despite its substantially lower proposed patron savings percentage.

In reviewing protests of alleged improper evaluations and source selection decisions, it is not our role to reevaluate proposals. Rather, we will examine the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. See Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. It is an offeror's obligation to submit an adequately written proposal for the agency to evaluate, United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 19, and a protester's mere disagreement with the evaluation is not sufficient to render it unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7.

Our review of the record shows a lack of support for the protesters' challenges, which, though numerous, provide no basis to question the reasonableness of the agency's evaluation. For instance, while OK Produce generally contends that the agency should have found a weakness in Coast Produce's proposal of multiple subcontractors, the protester provides no support for its assertion that the coordination of the firm's team of highly experienced firms should have been of concern to the agency. On the contrary, the agency evaluators found that the awardee's use of current commissary vendors as subcontractors provided valuable strengths, not only in terms of the particular subcontractors' directly relevant experience at the commissaries to be served, but also in terms of their knowledge about the commissary procedures, their relationships with staff and customers, and the anticipation of reduced travel time by local vendors which may better ensure delivery of a fresher product. The protester does not provide, and our review of the record does not show, any basis to question the reasonableness of the agency's favorable evaluation of the awardee's team effort.²

OK Produce also contends that its ordering system and contingency plan deserve more credit than the awardee's system under the experience subfactor, since, according to OK Produce, its established automated ordering system has more

² The protesters' allegation that the awardee failed to identify which subcontractors would service which commissaries is factually incorrect. Attachment D of the alternate proposal, for instance, identifies with specificity which firm will service its neighboring commissaries. Further, to the extent the protesters contend the awardee was given credit in its Group 1 evaluation for a subcontractor the awardee plans to use only in the performance of the Group 3 award, the record shows that although an evaluation summary lists all of the firms' subcontractors, the final source selection documentation shows, contrary to the protesters' contention, that the Group 3 subcontractor was considered only for the evaluation of that geographical area.

protections for continuous service during a power outage. Our review of the record, however, supports the reasonableness of the agency's evaluation of both firms' automated systems and contingency plans as sufficient to meet the agency's needs and provide adequate safeguards for outages, and that OK Produce's proposal was not superior to Coast Produce's proposal. Specifically, while OK Produce argues that operation of its ordering system is protected by a back-up generator at its offices that provides for a longer period of back-up power than the Coast Produce proposal provided, the record shows that the agency reasonably considered both offerors' back-up plans sufficient, since, for instance, although the Coast Produce system would switch to battery power in the case of a shorter-term electrical outage, there is also longer-term protection available through the use of back-up servers at other facilities which would permit continuous service. Similarly, while the protester believes its generator-based contingency plan is superior in terms of ensuring product quality in the event of an outage, we see no basis in the record to find unreasonable the agency's satisfaction with the awardee's back-up plan providing for hours of battery support, followed by, if necessary, movement of produce to refrigerated trucks for storage or transport to the firms' additional facilities. In addition, since Coast Produce's ordering system is already in use in numerous DeCA commissaries, the agency cited as an added benefit—unchallenged by the protester—that there would be a decreased need for work interruptions to provide training and orientations for a new automated system at the commissaries. In sum, the protester simply has not shown that the evaluation in this area was flawed in any way; the firm's disagreement with the evaluation does not make it unreasonable. See Ben-Mar Enters., Inc., supra.

Coast Citrus questions the reasonableness of the agency's assignment of the same evaluation ratings to the firm's Group 1 and Group 2 proposals, arguing that the agency failed to evaluate the differences in its proposed performance of the Group 1 work from its approach to perform the Group 2 work. In this respect, the firm states that it plans to use different warehouses for each geographical group of commissaries, and proposed to use a subcontractor for a small group of the Group 2 commissaries. In response, the agency reports, and the record confirms, that the protester submitted a single proposal for both groups of commissaries, and that the proposal does not specify unique capabilities for each warehouse or vendor for consideration. Rather, the qualifications of the offeror and its subcontractor are instead generally presented as shared capabilities with similar strengths and approaches. Under these circumstances, we do not find unreasonable the agency's determination that the firm's proposal reasonably warrants the same evaluation rating for each of the regional groups to be awarded.³

³ The protesters also generally contend that the agency failed to conduct meaningful discussions with them. The protesters essentially contend that the agency should have had further discussions with them in any areas where their proposals received fewer than the maximum evaluation points available. As the agency points out,
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Coast Citrus next contends that its proposal's point score for the quality history/customer satisfaction subfactor of the past performance factor is unreasonably low given the favorable reference surveys received for the firm. In particular, the protester alleges that it received past performance reference ratings similar to those received for the Coast Produce team of contractors, yet the Coast Produce proposal received a higher point score rating for the criterion. The record shows, however, that even if the Coast Citrus proposal received the maximum points available under this past performance subfactor (which would add an additional 10 points to its rating under the past performance subfactor), the Coast Citrus proposal still would not displace the Coast Produce proposal for award. First, the Coast Citrus proposal is higher-priced than the Coast Produce proposal. Second, since the Coast Produce proposal received a higher overall technical score including a score 10 points higher than Coast Citrus under the more important technical capability factor, even adding 10 points for past performance simply would not make the Coast Citrus proposal higher-rated in technical merit than the awardee's. Under the RFP's evaluation terms, the awardee's lower-priced, technically superior proposal would remain in line for the award. Since competitive prejudice is a necessary element of any viable basis of protest, we have no basis to review the allegation further. See CRAssociates, Inc., B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63 at 10.

The protesters next generally challenge the price evaluation, contending that the agency failed to adequately assess the reasonableness and realism of the proposed patron savings percentages and unit prices as required by the RFP. We disagree. First, to the extent the protesters contend that the agency's review of offerors' proposed patron savings was improperly based on commissary prices rather than commercial supermarket prices, the protesters are mistaken. The record demonstrates that the prices provided by the commissaries for the market basket price analysis were obtained from local commercial supermarkets, in accordance with the solicitation's provisions.⁴ See Agency Decision Summary, Oct. 4, 2006, at 4.

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however, unlike an offeror that has remaining weaknesses warranting further discussions with that firm, all of the initial weaknesses cited in the protesters' proposals were cured during the initial round of discussions. Contrary to the protester's argument, there simply is no requirement that the contracting officer, either initially or through successive rounds of discussions, discuss every area where a proposal could be improved. See Federal Acquisition Regulation (FAR) § 15.306(d).

⁴ The protesters allege that it is unreasonable that although the agency initially questioned the awardee's calculation of its proposed patron savings percentage (having initially evaluated the firm's offered savings as less favorable than proposed), it then accepted the offeror's savings percentage without question. The protesters are mistaken. As the agency explained in its supplemental reports, its

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Second, to the extent the protesters allege that the agency failed to perform the price analysis required by the RFP to assess the reasonableness and realism of the proposed prices, our review of the record supports the sufficiency of the agency's review. In accordance with generally accepted price analysis procedures, the agency compared the prices received to each other and to the government estimate. See FAR § 15.404-1(b). The RFP did not specify any further price review, except to generally assess the offerors' understanding of the application of the patron savings percentage and to confirm that like items were priced by the offerors.⁵ For the latter review, the agency compared each offeror's proposed patron savings percentage to the proposed prices to confirm the use of a similar base of items, as well as the offeror's understanding of the savings percentage. Variation among the offerors' overall pricing was expected, since produce pricing can vary substantially not only due to seasonal factors, but also the level of supply and demand for the item in a region or at a store location, even on a daily basis. Accordingly, while there were differences in the firms' prices, this was considered simply to reflect a spread of reasonable prices among the offerors. Similarly, while the protesters generally assert that the agency failed to perform a price realism review, again, the solicitation required only an assessment of realism in terms of the offeror's understanding of the application of the patron savings percentage and that like items were offered by the different firms. Neither protester provides any evidence to suggest that the agency's review of the firms' application of the patron savings percentage was flawed in any

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initial review of the awardee's proposed patron savings percentage was flawed because the price evaluator mistakenly averaged the comparative market basket prices received as if obtained from four stores instead of the three actually used, which made the average price much lower than the corrected average reflecting only three stores. The protester provides no reason to question the validity of the agency's explanation.

⁵ The RFP provided as follows:

The Government will evaluate each offeror's proposed minimum percentage of patron savings, in addition to evaluating the proposed unit prices for price reasonableness in relation to the total requirements of the solicitation. The proposed unit prices should reflect the application of the proposed minimum percentage of patron savings for the specified week and will indicate an understanding of the percentage of patron savings application, in addition to providing the government with the opportunity to perform a price realism assessment. . . . The contracting officer will conduct price analysis to determine price reasonableness.

RFP amend. 2, at 14.

way, or that the variance in prices indicates use of dissimilar items for pricing purposes.

OK Produce also generally challenges the agency's determination that the technical superiority of the Coast Produce proposal was worth the price premium associated with it.⁶ The agency's source selection decision includes a list of technical advantages in the awardee's proposal that were found to warrant the slight price premium associated with the proposal in terms of its slightly lower patron savings percentage. The protesters have not persuasively challenged the reasonableness of the agency's findings in this regard. For example, the Coast Produce team currently provides produce to 32 of the 35 commissaries listed in the RFP, and the agency reasonably regarded this as an advantage in the firm's proposal, in terms of the commissaries' familiarity with the firm's automated ordering system and the firm's familiarity with commissary security and delivery procedures, staff, and the needs of its customers. Given the reasonableness of the agency's conclusion that the awardee's proposal offered additional value, we see no basis to question the trade-off determination, especially since the awardee's technically superior proposal offers only a slightly lower patron savings percentage.

Lastly, the protesters contend that the awardee obtained an unfair competitive advantage by hiring a consultant who is a former DeCA employee. Prior to his December 2005 retirement, the consultant served as the produce category manager responsible for store support and merchandising produce, he was a spokesperson for the agency at two industry roundtables held to solicit industry suggestions on the use of commercial business practices at the commissaries, and he served as an evaluator reviewing two technical proposals (but not price proposals) submitted for a follow-on contract to a short-term test contract awarded for the provision of produce to the Area 1 commissaries.⁷

OK Produce and Coast Citrus contend that the consultant had a conflict of interest, that he may have violated post-employment rules for former government employees,

⁶ The protesters also generally allege that the agency's trade-off analysis for the source selection was improper because, according to the protesters, the underlying evaluation of proposals was improper. This allegation warrants no further consideration, since, as discussed above, the record squarely supports the reasonableness of the evaluation of the proposals.

⁷ In December 2004, a joint test program was held with DSC-P and DeCA personnel to validate the use of a new business model at 20 commissaries (Area 1) and to confirm the produce industry's capability to meet the commissaries' produce service needs. In May 2005, DeCA announced its satisfaction with the test program and subsequently issued the follow-on procurement for Area 1.

and that he may have shared inside information with the awardee, giving the firm an unfair competitive advantage in the procurement.

We reviewed essentially the same allegations involving the same consultant in our recent decision in Philadelphia Produce Mkt. Wholesalers, LLC, B-298751, Dec. 8, 2006, 2006 CPD ¶ 193, concerning the agency's procurement of produce for commissaries in the eastern region in Areas 3 and 5. In that decision, as applicable here, we noted that the interpretation and enforcement of post-employment conflict of interest restrictions are primarily matters for the procuring agency and the Department of Justice, not our Office. See Medical Dev. Int'l, B-281484.2, Mar. 29, 1999, 99-1 CPD ¶ 68 at 7-8; Physician Corp. of Am., B-270698 *et al.*, Apr. 10, 1996, 96-1 CPD ¶ 198 at 5 n.1. Our role, within the confines of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee during the award selection process. See Creative Mgmt. Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 at 7. Specifically, we review whether an offeror may have prepared its proposal with knowledge of inside information sufficient to establish a strong likelihood that the offeror gained an unfair competitive advantage in the procurement. PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 19-20. Our review includes consideration of whether the former government employee had access to competitively useful information, as well as whether the individual's activities with the firm likely resulted in disclosure of such information. *Id.* An individual's familiarity with the type of work required under a solicitation from prior government employment is not, by itself, evidence of an unfair competitive advantage. *Id.*

Consistent with our finding in the Philadelphia case, we conclude here that, even if this individual's prior employment with DeCA had given him access to inside information regarding the agency's initial produce procurements, it appears much, if not all, of the alleged inside information has in fact been shared with the produce industry through the agency's informational roundtables, and thus cannot be characterized as inside information. The agency reports that the current solicitation was issued without this individual's assistance and that material differences exist in each of its Area produce procurements; here, for instance, the contractor faces additional challenges in terms of warm climate conditions and, in some locations, harsh terrain, as well as ensuring produce delivery to the commissaries in Hawaii. As we noted in the Philadelphia decision, the consultant signed a non-disclosure agreement certifying that he would not disclose contractor or source-selection information that he may have learned as an evaluator. Moreover, as in that case, there is no indication in this record that the awardee's proposal was prepared based on any inside information.

Both the consultant and the awardee deny that any communication involving inside information took place. The awardee is an experienced federal government contractor that prepared its own proposal for additional work at numerous commissaries that it already successfully serves. The awardee reports that the

consultant did not write the proposal, but was asked to review it prior to its submission. The awardee and the consultant affirm that the consultant's suggestions were editorial in nature, including general suggestions to provide additional detail, to identify the proposal as containing proprietary information, to describe workforce and activities, and to make assorted style/format changes for consistency. This advice does not suggest the use of inside information, or, for that matter, any information that could reasonably be found to have provided an unfair competitive advantage to this experienced firm.⁸ Rather, the record here shows that the awardee's favorable evaluation was based on the strength of the firm's established business operations and experience, described in its comprehensive technical proposal. Accordingly, we have no reason to question the propriety of the awards.⁹

The protest is denied.

Gary L. Kepplinger
General Counsel

⁸ The awardee reports that many of these suggestions were not adopted by the firm due to time constraints. Intervenor's Supplemental Comments, Dec. 27, 2006, at 7.

⁹ The protester also infers that the consultant acted improperly by serving as a messenger, delivering the awardee's proposal to the agency when the awardee's personnel were delayed in travel. We cannot agree with the protester's speculation that performance of this administrative task may have conveyed an unfair competitive advantage to the firm. See PRC, Inc., supra.