



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

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Matter of: Octo Consulting Group, Inc.

File: B-413116.53; B-413116.55

Date: May 9, 2017

David B. Dixon, Esq., Alexander B. Ginsberg, Esq., and Meghan D. Doherty, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.

James H. Roberts III, Esq., Van Scoyoc Roberts PLLC, for SGT, Inc., an intervenor.

Douglas Kornreich, Esq., Department of Health and Human Services, Centers for Medicare and Medicaid Services, for the agency.

Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's best-value tradeoff decision is denied where the award decision was adequately documented, reasonable, and consistent with the solicitation's best-value award criteria.
 2. Protest alleging errors in the agency's technical evaluation panel report is denied where that report was superseded by the source selection authority's independent analysis, which was reasonable and consistent with the solicitation criteria
 3. Protest that the evaluation of proposals was disparate with respect to a specific awardee is denied where there is no reasonable possibility that the protester would be in line for an award, even if the protester's allegations were meritorious.
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DECISION

Octo Consulting Group, Inc., of McLean, Virginia, protests the decision of the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), not to award it a contract under request for proposals (RFP) No. CMS-2016-SPARC, for multiple indefinite-delivery indefinite-quantity contracts in support of the agency's Strategic Partners Acquisition Readiness Contract (SPARC) program. Octo alleges that the agency's best-value tradeoff decision failed to meaningfully consider Octo's lower price versus multiple awardees, and overlooked a weakness in its tradeoff between Octo and one higher-priced offeror selected for award. Octo also alleges that the agency misevaluated or disparately evaluated its proposal.

We deny the protest.

CMS issued the RFP on August 3, 2015, for the purpose of establishing multiple indefinite-delivery, indefinite-quantity contracts to provide support services to develop and maintain CMS information technology (IT) systems. The RFP advised that the competition, and the resulting contracts, would be divided into two pools--a small business pool and an unrestricted pool. The contract awards in each pool were to be made on a best-value basis considering four non-price technical evaluation factors and price. The technical evaluation factors, in descending order of importance, were: (1) corporate experience; (2) past performance; (3) process maturity; and (4) small business participation. Agency Report (AR), Tab 3D, Amended RFP, at 108.

Between the non-price factors and price, the RFP provided that the “[n]on-price factors are significantly more important than price.” Id. at 107. The RFP also provided that “[o]fferors are advised that primary consideration will be given to the technical quality of the proposals in the evaluation process,” but that “total cost of labor rates could be a determining factor if two or more proposals are determined to be otherwise substantially equal.” Id.

CMS awarded 27 large business contracts under the RFP in June, 2016. Octo was not among the firms selected for award. On June 15, Octo received a debriefing concerning the award decision. As relevant, Octo was advised that its proposal was rated satisfactory overall--very good for corporate experience, good for past performance, satisfactory for process maturity, and poor for small business participation--and was ranked 37th technically out of 42 large business offerors. Octo also learned that its proposal was lower-priced than 30 of the large business offerors--including 17 of the awardees--and that several awardees' proposals were significantly higher priced.

In June and July 2016, multiple unsuccessful offerors challenged the awards, contesting the agency's evaluation of proposals under the corporate experience, past performance, process maturity, and price factors, and the resulting best-value determination. Octo was among the unsuccessful firms that filed a protest, and principally alleged that the agency had unreasonably evaluated its proposal under the process maturity and small business participation factors, and failed to conduct a proper best-value award decision. With respect to Octo's challenge under the small business participation factor, Octo disputed a material deficiency the evaluators assigned its proposal for failure to provide required small business subcontracting reports from recent contracts to demonstrate past experience in meeting proposed small business subcontracting goals. Due to its status as a newly-large business entity, Octo did not yet have subcontracting reports and asked the agency if an explanation of its situation would be acceptable. In questions and answers (Q&A) subsequently incorporated in the RFP, the agency responded that “CMS would like for you to explain your situation and provide any relevant data from past performance (if available),” and that such an explanation would be sufficient. AR, Tab 3B, Q&A, Question 371. Octo asserted that it explained the

reasons why it did not yet have subcontracting reports in its proposal, consistent with the agency's Q&A response, and that the agency's assignment of a deficiency was improper.

On September 6, after development of the protest record, the cognizant Government Accountability Office (GAO) attorney conducted an "outcome prediction" alternative dispute resolution (ADR) conference. In the course of that ADR, the GAO attorney advised the agency that GAO would likely sustain the protests with respect to challenges to the agency's best-value tradeoff on the basis that the agency had failed to reasonably consider the relative merits of the proposals across all of the applicable evaluation criteria. The GAO attorney also advised that GAO would likely sustain Octo's challenge of the agency's evaluation under the small business participation evaluation factor. With respect to the process maturity factor, the GAO attorney advised that the record showed an apparent disagreement between the source selection authority (SSA) and technical evaluation panel (TEP) with respect to the relative merits of proposals; where the TEP report was superseded by the SSA's own conclusions, however, the GAO attorney could not conclude that the protesters had been harmed by alleged errors committed by the TEP.

In response to the ADR, the agency informed our Office that it intended to take corrective action consisting of, at a minimum, reviewing the evaluation record and making and documenting a new source selection decision. Based on the agency's proposed corrective action, GAO dismissed the protests as academic. Technatomy Corp., et. al., B 413116.4 et al., Sept. 7, 2016 (unpublished decision).¹

Following the completion of the agency's corrective action, on January 19, 2017, the agency informed Octo that it was again an unsuccessful offeror in the procurement. The agency also advised that the original 27 awardees in the procurement had again been selected for award, and that three previously-unsuccessful large business firms had been added to the list of awardees: Leidos, Inc.; SGT, Inc.; and Technatomy Corporation.

Octo received a debriefing concerning the January 19 award decision on January 25. Pursuant to the award notice and debriefing, Octo learned that its proposal had been

¹ The protests of the June 2016 contract awards were primarily divided into two separate groups: the protests concerning the large business (unrestricted) award pool, and the protests concerning the small business set-aside pools. Octo, a large business, competed in the large business (unrestricted) award pool. The decision in Technatomy Corp., et. al., concerned the consolidated protests challenging the awards in the large business pool. Another bid protest decision, Next Phase Solutions and Servs., Inc., et. al., B-413116.3 et. al., Sept. 13, 2016 (unpublished decision), dismissed as academic the protests concerning the small business award pools, on the basis of agency corrective action following a separate ADR conference concerning the small business contract awards.

revaluated under the small business participation subfactor. The reevalauation removed the deficiency from Octo's evaluation, which improved Octo's small business participation rating from poor to satisfactory, improved its overall technical rating from satisfactory to very good, and improved its technical ranking from 37th to 35th. Octo also learned that the three new awardees were also rated "very good" overall, and were ranked 28th, 29th, and 30th technically. In comparison to those firms' proposals, Octo's proposal was lower-priced, as follows:

	28. Leidos	29. SGT	30. Technatomy	35. Octo
Overall Technical	Very Good	Very Good	Very Good	Very Good
Corporate Experience	Very Good	Very Good	Very Good	Very Good
Past Performance	Good	Good	Good	Good
Process Maturity	Satisfactory	Satisfactory	Satisfactory	Satisfactory
Small Business	Very Good	Excellent	Very Good	Satisfactory
Evaluated Price	\$31,031.14	\$29,751.08	\$27,604.38	\$23,776.08

AR, Tab 12, Revised Source Selection Decision Document (SSDD), at 10. Octo filed this protest of the awards with our Office on January 31.

DISCUSSION

Octo alleges that the agency's corrective action failed to correct errors in the initial best-value tradeoff decision. According to Octo, the revised tradeoff still did not meaningfully compare Octo's low price against the higher prices of the awardees, among other flaws. Octo also alleges that the agency misevaluated its proposal under the process maturity factor, and that the agency's reevaluation of its proposal under the small business participation factor remains unreasonable and reflects disparate treatment.²

Revised Tradeoff Decision

Octo asserts that the agency's revised tradeoff failed to meaningfully consider Octo's low price, or to explain why technical advantages associated with the selected proposals warranted payment of those proposals' higher prices. Octo alleges that the agency relied on a ranking of proposals that did not adjust for the value of lower prices--even among substantially equal proposals, as was anticipated by the RFP award

² We have reviewed Octo's protest and supplemental protest, and we discuss Octo's principal protest challenges in this decision. To the extent that allegations or portions of allegations presented by the protester are not discussed in this decision, we consider them to be without merit.

criteria--and essentially made an improper “class division” in awarding to each higher-ranked proposal without respect to price.

Where solicitations provide for award on a “best-value” tradeoff basis, it is the function of the SSA to perform a price/technical tradeoff, that is, to determine whether one proposal’s technical superiority is worth any associated higher price; the extent to which one is sacrificed for the other is governed only by the test of rationality and consistency with the stated evaluation criteria. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 15; Chenega Technical Prods., LLC, B-295451.5, June 22, 2005, 2005 CPD ¶ 123 at 8. Where a price/technical tradeoff is to be made, the source selection decision must be documented, and the documentation must include the rationale for any tradeoffs, including the benefits associated with additional costs. Federal Acquisition Regulation (FAR) § 15.308; The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 13. However, there is no need for extensive documentation of every consideration factored into a tradeoff decision, nor is there a requirement to quantify the specific cost or price value difference when selecting a higher-priced, higher-rated proposal for award. FAR § 15.308; Advanced Fed. Servs. Corp., B-298662, Nov. 15, 2006, 2006 CPD ¶ 174 at 5.

On our review of the record, we see nothing unreasonable with the challenged best-value tradeoff decision. Rather, the record reveals that Octo’s arguments are narrowly focused on the agency’s technical ranking of the proposals, which contributed to, but was separate from the agency’s tradeoff analysis.

The revised SSDD in this case was organized in six sections, including a section titled “technical and business evaluation overview,” and a section titled “trade-off.” The agency’s ranking of the proposals was explained in the “technical and business evaluation overview,” and provided an initial ranking concerning overall technical merit. The overview’s discussion was followed by the separately titled “trade-off” section, in which the SSA recorded head-to-head comparisons of Octo’s proposal against each higher-rated, higher-priced proposal--21 head-to-head comparisons in total. These head-to-head comparisons included both identification of the technical benefits of the awardee’s proposals warranting payment of price premiums over Octo’s lower-rated and lower-priced proposal, and recognition of the specific price premiums involved in each tradeoff.

For example, although the record shows that Octo and the three new awardees were equally rated as “very good” overall, and “very good” under the corporate experience evaluation factor, the tradeoff analyses show that the SSA, in fact, perceived notable distinguishing advantages of the selected proposals under the most-important factor, corporate experience. Specifically, the SSA noted that Leidos, SGT, and Technatomy each had broad corporate experience across the federal government and significant experience with CMS and with the “CMS Technical Reference Architecture”—identified in the RFP as highly relevant. AR, Tab 12, Revised SSDD at 343-344 (Leidos), 346 (SGT), 349 (Technatomy). In comparison, the SSA found that Octo demonstrated experience across the federal government, but only “some direct experience with CMS,

HHS, and with an environment similar to CMS.” Id. While Octo was credited with a strength for that experience, the SSA concluded that the selected firms’ experience with the federal government was of “more merit,” and their experience with CMS and CMS Technical Reference Architecture was “considered of higher technical merit than that of Octo by the TEP and the contracting officer.” Id. The SSA considered the unique technical merits of the selected firms in comparison to Octo, such as SGT’s “Contractor Team Arrangement” with highly experienced firms that the SSA concluded would “provide complementary and proven experience” that “will reduce the learning curve” versus Octo; Leidos’s understanding of Medicaid and Medicare data, and data collection experience that gives insight into the CMS environment; and Technatomy’s work in supporting Health IT business environments inside and outside CMS, which should “decrease risk and increase the likelihood of successful IT projects.” Id. at 345, 347, 350.

The SSA also reviewed the proposed prices, as well as the difference between the prices in both total dollars and percentage terms, in each head-to-head tradeoff comparison. Id. at 345, 348, 350. While Octo is correct that in the case of each tradeoff the agency concluded that the advantages of the higher ranked proposal warranted the payment of the associated price premium, there is nothing per se irrational about an agency’s selection of each of the higher-rated, higher-priced proposals where the advantages of those proposals are explained. Nor is that result particularly surprising in this case, where the RFP advised offerors both that “[n]on-price factors are significantly more important than price,” and that “primary consideration will be given to the technical quality of the proposals in the evaluation process.” AR, Tab 3D, Revised RFP, at 107.

Octo next alleges that the agency’s tradeoff analysis concerning Leidos was flawed because the analysis ignored a weakness in Leidos’s proposal under the corporate experience factor that should have caused it to be lower rated than Octo’s proposal, which did not contain a weakness under that factor. Specifically, Octo notes that Leidos’s weakness, identified by the technical caucus panel, was omitted from the final TEP report. While Octo is correct that the weakness was not listed in the TEP report, we see no evidence that the agency ignored the weakness in the best-value tradeoff analysis. Rather the SSDD shows that the SSA noted the weakness, but nonetheless considered Leidos’s overall corporate experience to be superior to that demonstrated by Octo. AR, Tab 12, Revised SSDD, at 345. We see nothing unreasonable in the SSA’s conclusion where, although Octo’s proposal did not contain a weakness, the underlying evaluation record shows that Leidos’s proposal was credited with substantially more strengths than Octo’s proposal under the corporate experience factor, and the SSDD documents the SSA’s conclusion that Leidos’s proposal was superior to Octo’s proposal under the corporate experience factor. AR, Tab 6, TEP Report, at 139 (Leidos), 179 (Octo).

Octo also alleges that the agency failed to follow the RFP award criteria providing that “total cost of labor rates could be a determining factor if two or more proposals are determined to be otherwise substantially equal.” AR, Tab 3D, Amended RFP, at 107. Octo asserts that its proposal was “substantially equal” to the other “very good” rated

proposals, and that the RFP required the agency to consider its proposal's lower price the determining factor in tradeoffs against equally-rated, higher-priced proposals. We disagree.

First, we note that the cited award criteria provide only that price "could" be a determining factor--the RFP did not mandate that price be determinative under any circumstances. Id. Second, and more importantly here, as described above, the SSA did not consider the selected firms with overall ratings equal to Octo to be "substantially equal," but concluded that those firm's proposals contained notable advantages under corporate experience, the most important evaluation factor. Nor do equal adjectival ratings require such a result. In this regard, our Office has consistently recognized that ratings, be they numerical, adjectival, or color, are merely guides for intelligent decision-making in the procurement process. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 11. Where the agency perceived and recorded distinguishing advantages associated with the overall equally adjectivally-rated proposals, the record supports the reasonableness of the SSA's decision to accept a price premium to select the more advantageous proposals, a decision which was consistent with the award terms of the RFP.³

Process Maturity Evaluation

Octo alleges that the agency conducted an unreasonable and disparate evaluation under the process maturity factor by rating Octo's process maturity as only satisfactory, despite its possession of certifications equal to, or superior to, other firms that were rated "very good" under the evaluation factor. Specifically, the caucus evaluation and TEP show that Octo's proposal demonstrated CMMI level 3 and relevant ISO certifications, while multiple "very good" rated proposals had only CMMI 3 without ISO certifications. AR, Tab 6, TEP Report, at 182.

As explained during the ADR in the prior protests, we agree with Octo that the adjectival ratings assigned by the TEP were flawed; however, the record reflects that these errors were contemporaneously addressed by the SSA in his own independent review of the proposals. The SSDD shows that the SSA's analysis of the offerors under the process maturity factor (as shown in the SSDD Relative Technical Merit Charts) appropriately grouped the offerors accordingly to a logical, objective methodology considering CMMI

³ Octo also alleges that the best-value analysis essentially constituted an improper "class division." We disagree. An improper class division exists where an agency selects all offerors of a certain evaluation rating or ranking as a group, without consideration of the comparative strengths and weaknesses and the relative price differences between the each selected firm and the lower-rated, lower-priced unsuccessful offerors. Here, however, the record reflects that the SSA conducted head-to-head comparisons between Octo and each higher-priced awardee, and provided rationales for concluding that the technical merit of the selected firm warranted the payment of the associated price premium.

levels and ISO certifications, which placed Octo’s proposal ahead of competing firms that did not possess ISO certifications, without respect to the TEP’s adjectival ratings. AR, Tab 12, Revised SSDD, at 12-13. Where the SSDD shows that the process maturity ranking from the SSA’s own analysis was utilized in the best-value tradeoff analysis, we conclude that errors committed by the TEP in assigning adjectival ratings did not impact the award decisions and provide no basis on which to sustain the protest.

Small Business Participation Evaluation

As reviewed above, the agency’s corrective action included a reevaluation of Octo’s proposal under the small business participation factor, which removed the single deficiency from Octo’s evaluation and improved its rating under the factor from poor to satisfactory. Octo now alleges that the reevaluation erred by ignoring a strength previously credited to its proposal for its approach to subcontracting, and its proposal of \$660,000 in subcontracting opportunities to small business subcontractors (representing 100 percent of total subcontracting opportunities). Octo argues that if this strength had been properly noted, its proposal would have received a “very good” versus a “satisfactory” rating for small business participation.

We conclude that the agency properly credited Octo with the referenced strength in the revised SSDD. Octo’s allegation is based on an exchange during Octo’s debriefing, in which the agency advised Octo that its proposal did not receive any strengths under the small business participation factor. The record, however, shows that the information provided to Octo in its debriefing was incorrect. In this regard, in the summary of “distinguishing features” of Octo’s proposal, the SSDD noted:

The proposed approach to subcontracting, including the provision of subcontracting opportunities for small, small disadvantaged, women-owned, service-disabled veteran-owned, veteran-owned, and HUBZone small businesses, including the degree the subcontracting approach includes meaningful goals to provide significant and appropriate opportunities for the above noted small business categories \$660,000 and 100% exceeds the requirements for small business. This ensures CMS goals are exceeded.

AR, Tab 12, Revised SSDD, at 153. Accordingly, despite the incorrect information in Octo’s debriefing, we see no evidence that the strength was overlooked.

Octo next alleges that if its proposal was properly credited with one strength and no weaknesses, then its satisfactory rating under the small business participation factor was the result of disparate treatment, specifically in comparison to the evaluation of Technatomy. In this regard, Octo notes that Technatomy’s proposal, which also had one strength and no weaknesses under the factor, and which proposed only 40 percent of subcontracting opportunities for small businesses--versus Octo’s 100 percent--was rated “very good” under the factor. Further, in the SSDD’s direct comparison between

the two proposals under this factor, Technatomy was considered “technically superior,” to Octo, with a “significant advantage in the least important factor.” According to Octo, since Technatomy’s proposal had the same number of strengths and weaknesses in comparison to its own proposal, the agency’s conclusions were unsupported, and evidence disparate treatment.

The agency responds, in an affidavit submitted by the SSA, that Octo’s arguments are preoccupied with simple counting of strengths and weaknesses, when in fact Octo’s lower rating and Technatomy’s superiority were due to Octo’s failure to specify subcontracting dollar values and percentages for all small business programs, as required by the small business subcontracting plan. In this regard, the record shows that the subcontracting plan advised offerors as follows:

PLEASE NOTE: Zero dollars is not an acceptable goal for the [small business, small disadvantaged business, woman-owned small business, HUBZone small business, veteran-owned small business, or service-disabled veteran-owned small business] categories since this does not demonstrate a good faith effort.

AR, Tab 5B, Octo Technical Proposal, at 74-75. Although Octo proposed to utilize small businesses for 100 percent of its subcontracting dollars, Octo failed to identify any subcontracting goal for small disadvantaged businesses or service-disabled veteran-owned small businesses in its small business subcontracting plan, as required by the solicitation. Id. at 75-76.

Octo does not deny that its subcontracting plan was incomplete, but asserts that the agency’s post-hoc rationale for its “satisfactory” rating is inconsistent with the contemporaneous record of the evaluation, does not support the agency’s conclusions and should be ignored.⁴ Octo also asserts that the agency’s post-hoc rationale itself evidences disparate treatment because Technatomy’s small business subcontracting plan was also non-compliant. In this respect, due an apparent error in Technatomy’s small business plan, read literally, Technatomy proposed to subcontract 100 percent of the cost of work under the contract. Technatomy, however, did not provide information required under the limitations on pass-through charges clauses incorporated in the RFP

⁴ In certain circumstances, our office will accord lesser weight to post hoc arguments or analyses because we are concerned that judgments made “in the heat of an adversarial process” may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Here, we need not determine the weight that should be accorded to the SSA’s post-hoc affidavit because, as explained below, we conclude that Octo fails to demonstrate that, but for the agency’s alleged errors, it stood a substantial chance of being selected for award.

by reference, which apply where an offeror proposes to subcontract more than 70 percent of the total cost of work. AR, Tab 3D, Revised RFP, at 52; FAR 52.215-22, 52.215-23.

We have reviewed the record in this case and under these circumstances, we cannot conclude that there is a reasonable possibility that Octo was prejudiced by the alleged errors in the agency's evaluation of Octo's proposal under the small business participation factor, or in the consideration of this evaluation factor in the tradeoff analysis between Octo and Technatomy. Prejudice is an essential element of every viable protest; we 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 a substantial chance of receiving an award. Armorworks Enters., LLC, B-400394.3, Mar. 31, 2009, 2009 CPD ¶ 79 at 3; MCR Fed., LLC, B-411977, B-411977.2, Nov. 23, 2015, 2016 CPD ¶ 3 at 5-6.

In this case, we cannot conclude that Octo has demonstrated a substantial chance of receiving an award, but for the agency's alleged disparate treatment of its proposal versus Technatomy's proposal under the small business participation factor--the least important technical factor for award. Without respect to whether the SSA's post-hoc affidavit reflects his contemporaneous basis for Octo's satisfactory rating and competitive position, the record here reflects, and Octo does not deny, that its small business subcontracting plan was incomplete. Accordingly, we see no basis on which to conclude that Octo's proposal would have been higher-rated but for the agency's alleged error. Further, to the extent that Technatomy's small business subcontracting plan was equally non-compliant, such that Technatomy would have been lower-rated or even ineligible for award but for the agency's errors; in the absence of the award to Technatomy there is nothing to suggest that the agency would choose to make an award to any other unsuccessful firm, much less to Octo, where there was no requirement for CMS to make another award, or to make award to any specific number of awardees under this RFP. AR, Tab 3D, Amended RFP, at 108; see USmax Corp., B-407273.20, B-407273.44, Feb. 6, 2014, 2014 CPD ¶ 81 at 8; see also, Octo Consulting Grp., Inc. v. United States, 124 Fed. Cl. 462, 468 (2015). Finally, in the absence of any expectation that Octo's small business participation rating would have improved but for the alleged error, we note that the offeror ranked immediately ahead of Octo technically, 34th overall, was also lower-priced than Octo, at \$23,653.23, and thus ahead of Octo in line for award were the agency to choose to maintain 30 large business awards. AR, Tab 12, Revised SSDD, at 10.

The protest is denied.

Susan A. Poling
General Counsel