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## Decision

**Matter of:** Acuity-Exemplar, JV

**File:** B-418428

**Date:** April 7, 2020

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### DIGEST

Protest that agency conducted misleading discussions is denied where, although the protester increased its price in response, it was not competitively prejudiced because the awardee's proposal was higher-rated and lower-priced, even before the discussions.

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### DECISION

Acuity-Exemplar, JV, of Oxnard, California, a small business<sup>1</sup>, protests the award of a contract to The Severson Group, of San Marcos, California, also a small business, under request for proposals (RFP) No. 47PF0019R0115, issued by the General Services Administration (GSA), Public Buildings Service, for janitorial services and supplies for the Ralph H. Metcalfe Federal Building in Chicago, Illinois. Acuity argues that GSA conducted misleading discussions and made an unreasonable source selection decision.<sup>2</sup>

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<sup>1</sup> The solicitation was set aside for participants in the Small Business Administration's 8(a) business development program. The protester explains that it is a joint venture between Acuity Total Solutions, Inc. and the incumbent contractor, Exemplar Enterprises, Inc. Protest at 2.

<sup>2</sup> GSA argues that a third offeror had the same past performance score as Acuity and a lower price, and therefore our Office should not consider Acuity an interested party. The contemporaneous record provided to our Office documents only the evaluations and pricing submitted by Acuity and Severson. As a result, GSA has not provided a factual basis to support its challenge to Acuity's status as an interested party.

We deny the protest.

## BACKGROUND

The solicitation, issued on September 13, 2019, sought proposals from eligible offerors to provide services under a fixed-priced, indefinite-quantity contract for a base year and 4 option years. Agency Report (AR), Tab 1, RFP, at 8, 152 (¶ L.9).<sup>3</sup> A contract would be awarded to the offeror whose proposal was evaluated as the best value under two factors: past performance and price, where past performance was more important than price. Id. at 156 (¶ M.1).

The RFP stated that the incumbent workforce was covered by a collective bargaining agreement (CBA) that ran through August 2020, and advised offerors to take it into account when preparing a proposal. Id. at 3; AR, Tab 2, RFP amend. 1, at 13. Among other things, the CBA provided that while it would not be possible to place all workers on a 35-hour workweek due to inconsistent tasks and scheduling by GSA, nevertheless “the Employer agrees to place as many employees as possible on a thirty-five (35) hour, five (5) day per week schedule.”<sup>4</sup> Protest at 3 (quoting CBA at 8). The CBA also specified a monthly health and welfare contribution of \$960 for each worker.

In addition to requesting past performance information, the RFP provided both a 4-page pricing matrix and a separate 1-page document labeled “CONTRACTOR’S COST PROPOSAL FORMAT.” RFP at 148. That second document provided blanks for the offeror to enter discrete cost elements including vacation, paid sick leave, holidays, “health and welfare,” and “Other Fringe Benefits (pension, education, etc.).” The form provided lines for the offeror to fill in the number of hours, the hourly rate, and the product of those two (i.e., hours × rate) for each of the cost elements.<sup>5</sup> Id.

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<sup>3</sup> The RFP in the record began with 9 unnumbered pages, then a 7-page index (also unnumbered), 1 page of standard form (SF) 33, an otherwise-blank page stating “See Attached SF 33,” and a 4-page pricing matrix with inconsistent numbering. We refer to the first 9 pages as pages 1 through 9, after which we resume numbering at the first two pricing matrix pages--as pages 10 and 11 respectively.

<sup>4</sup> Both Acuity and GSA appear to have considered the CBA to establish 35-hour workweeks as a minimum goal. Acuity argues that it properly based its proposal on workweeks over 35 hours; an alleged ongoing practice between the union and the incumbent. The contracting officer’s contemporaneous record of the debriefing, on the other hand, states that the agency took the position that “the CBA . . . states a minimum of 7.5 hour work days.” AR, Tab 14, Post-Award Debriefing Record, at 1.

<sup>5</sup> Other cost elements were calculated differently. The costs of “Workman’s Compensation,” social security tax, federal unemployment tax, and state unemployment tax were to be shown both as a percentage of another cost (the table specified the total labor cost line in many cases, and the “direct & other costs” line in others), and as a dollar amount.

GSA received proposals from 15 offerors, including Severson and Acuity. In its initial proposal, Acuity offered an evaluated price of \$7.7 million, while Severson's price was \$5.9 million.<sup>6</sup> *Id.* at 6. The past performance evaluation summarized the comments of multiple past performance references for each offeror and, for Acuity, concluded that its performance record merited a score of 4,<sup>7</sup> while Severson's past performance received a score of 4.5. After the initial evaluation, GSA eliminated one offeror's proposal for failing to "meet the 8(a) requirements," and opened discussions with the remaining offerors. AR, Tab 11, Price Negotiation Memorandum (Jan. 6, 2020) at 1-2.

For both Severson and Acuity, discussions were held on November 26 to resolve "Contractor Cost Worksheet errors and Schedule B pricing pages corrections." AR, Tab 9, Pre-Negotiations Objectives Memorandum (Dec. 19, 2019), at 1, 3. The discussion items sent to Acuity stated that the firm should "refer to the Collective Bargaining Agreement (CBA), including wage sheet, in the RFP[.] Also, refer to Article XIII 'Shift Scheduling, Basic Workweek & Hours of Work'" and then review and resubmit the cost worksheet. AR, Tab 7A, Discussions Letter to Acuity (Nov. 26, 2019), at 1.

Acuity submitted a revised proposal by the December 3 due date. The firm explained:

Our calculation for H&W [health and welfare] was derived from using the number of staff x monthly h/w [health and welfare] cost x 12 months / total annual labor hours. The actual hourly rate was only adjusted a fraction of a cent so it appears to be unchanged, however, the final amount for the year was ultimately affected.

AR, Tab 7B, Email String, at 5 (Transmittal Email from President of Acuity to Contracting Officer (Dec. 3, 2019)).

After evaluating the revised proposals, GSA evaluated the offerors' revised prices as \$7.0 million for Acuity, and \$6.6 million for Severson. AR, Tab 11, Price Negotiation Memorandum (Jan. 6, 2020) at 7. GSA elected to hold a second round of discussions. The agency identified the issues to be raised with each offeror, which were the same two issues for both Severson and Acuity: "Contractor Cost Worksheet--Correct health & welfare rate per the CBA" and "Review Snow Removal Cost--Verify yearly price versus monthly." AR, Tab 10, Pre-Negotiations Objectives Memorandum (Dec. 20, 2019), at 1-2. The second round of discussion items sent to Acuity stated those issues as follows:

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<sup>6</sup> We have generally rounded most pricing figures to two significant digits.

<sup>7</sup> In addition to a narrative summary of each performance reference's comments, past performance was assigned a point score: 5=Exceptional, 4=Very Good, 3=Satisfactory, 2=Marginal, 1=Unsatisfactory. AR, Tab 11, Price Negotiation Memorandum (Jan. 6, 2020) at 1.

1. The health and welfare benefits per the Collective Bargaining Agreement (CBA); you listed \$5.365 per hour but it should be \$6.33 per hour. This was brought to your attention via the letter dated November 26, 2019 opening negotiations . . . .

2. Please review your snow removal cost . . . .

AR, Tab 7C, Discussions Letter to Acuity (Dec. 16, 2019), at 1.

Acuity submitted a final proposal revision by the December 18 due date, and noted that it had complied with the instruction to increase its health and welfare rate to \$6.33. AR, Tab 7D, Email String, at 2 (Transmittal Email from President of Acuity to Contracting Officer (Dec. 18, 2019)). Severson responded to the final round of discussions by explaining that no revisions to its proposal were required because its calculation of a lower hourly health and welfare cost was based on the CBA-required health and welfare requirement divided by 2,080 hours annually, so its pricing remained correct. Severson indicated that its previous submission should be considered to be its final proposal revision. AR, Tab 8C, Email String, at 3-4 (Email from Severson Proposal Manager to Contracting Officer (Dec. 17, 2019)).

GSA evaluated the final proposal revisions and determined that they were both acceptable. With respect to the pricing factor, Acuity's revised evaluated price was \$7.2 million, while Severson's remained \$6.6 million.<sup>8</sup> AR, Tab 11, Price Negotiation Memorandum (Jan. 6, 2020) at 8. GSA selected Severson's proposal for award based on its higher past performance evaluation and lower price. After receiving notice of the award and a debriefing, Acuity filed this protest.

## DISCUSSION

Acuity argues that GSA conducted misleading discussions, misevaluated its past performance, and made an unreasonable source selection decision. As explained below, the record supports GSA's past performance evaluation. Although the record supports Acuity's argument that GSA conducted misleading discussions, since we conclude that Acuity was not competitively prejudiced, we deny the protest.

### Past Performance Evaluation

Acuity argues that its proposal should have been evaluated as superior to Severson's under the past performance factor. The protester contends that its past performance

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<sup>8</sup> Our decision is based on GSA's total evaluated prices. Although Acuity asserts that its price was approximately \$6.8 million after the first round of discussions, and increased to approximately \$7.0 million after the second, the protester does not rebut GSA's explanation that its figures are merely its base prices and its figures also fail to include additional line items that were to be included in the evaluated prices. Agency Report, Memorandum of Law (MOL) at 5 n.2.

would have exceeded Severson's because its performance record included excellent performance on the incumbent contract and a reasonable evaluation should have justified paying Acuity's higher price. Protest at 10. GSA argues that it reasonably evaluated both offerors' past performance--including performance on the incumbent contract--and determined that Severson's record of performance was more highly rated and thus merited a higher score than Acuity's. MOL at 6. The agency argues that Acuity's challenge to the past performance evaluation is factually unsupported and simply represents disagreement with GSA's evaluation. Id.

An agency's evaluation of past performance is a matter of discretion which our Office will not disturb unless the agency's assessment is unreasonable or inconsistent with the solicitation criteria. Accordingly, a protester's disagreement with an agency's evaluation judgment, without more, is insufficient to establish that an evaluation was improper. Onsite OHS, Inc., B-415987, B-415987.2, Apr. 27, 2018, 2018 CPD ¶ 164 at 4. Other than pointing to the fact of Exemplar's incumbency and a general claim that its performance was very good, Acuity does not materially challenge the basis for GSA's determination that Severson's past performance was superior.<sup>9</sup> Accordingly, we deny Acuity's challenge to the agency's past performance evaluation.

## Discussions

Acuity argues that GSA held misleading discussions by first indicating that the agency considered Acuity's proposed pricing of health and welfare to be inconsistent with the CBA, and then in the second round of discussions, instructing Acuity to use an hourly health and welfare cost of \$6.33 in preparing its final proposal revision. Those discussions, the protester argues, caused Acuity to increase its price by about \$220,000. Protest at 5.

Acuity contends that but for GSA's repeated direction to increase its hourly health and welfare cost to \$6.33 per hour, Severson's "substantial" price advantage (around \$370,000) would have been reduced by almost half, to under \$190,000. Id. Acuity argues that GSA's discussions caused the firm to raise its price unjustifiably by effectively misinterpreting the RFP to impose a 35-hour workweek that neither the RFP nor the CBA actually required. Id. at 7-9. Acuity argues that its past performance score

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<sup>9</sup> The record included the evaluators' statements summarizing Severson's past performance on five contracts. AR, Tab 11, Price Negotiation Memorandum (Jan. 6, 2020), at 5. Although Acuity argued that GSA improperly failed to include additional documentation that would have furnished details of Severson's past performance, the protester provided no factual basis to question the evaluation of Severson. A protester must provide a valid factual and legal basis to support a challenge to an agency's evaluation. 4 C.F.R. § 21.1(c)(4). Acuity argued after receiving the agency report that GSA should be required to provide additional detailed documentation of Severson's past performance, but its argument consisted of unsupported assertions that Severson's performance could not be superior to Acuity's. E.g., Comments at 6. Those claims did not provide a factual basis for new grounds of protest or further record development.

of 4 represented very good past performance that, but for the agency's errors, would have justified incurring Acuity's higher price. Id. at 9.

GSA argues that the discussions provided to Acuity were not misleading and that it provided essentially the same directions to both Acuity and Severson regarding pricing. The agency acknowledges that the discussions with both offerors "stat[ed] that the proper health and welfare benefit rate per the CBA should be \$6.33," MOL at 4, but asserts that its discussions allowed both offerors to submit revised pricing "if they wish to do so." Id. at 5 (emphasis in original). GSA asserts that the discussions could not be considered misleading because they left Acuity "free to not submit revisions and stick to its pricing." Id. Additionally, after emphasizing Severson's decision not to change its pricing in response to the second round of discussions, the agency argues that Acuity should have done the same "[i]f Acuity truly believed that the rate it was using was correct." Id.

Discussions, when they are conducted, must be meaningful and must not prejudicially mislead offerors. See Federal Acquisition Regulation (FAR) § 15.306(d); EFS Ebrex SARL, B-416076, June 4, 2018, 2018 CPD ¶ 201 at 5. In considering whether discussions were misleading, we do not require a protester to show either that the agency required compliance with the misleading information or that multiple offerors received similar discussions and were similarly misled. Rather, the issue is whether Acuity reasonably acted upon the agency's discussions in preparing its final proposal revision, and whether it was misled in doing so. For discussions to be meaningful, they must "identify deficiencies and significant weaknesses in an offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award." CFS-KBR Marianas Support Servs., LLC; Fluor Fed. Sols. LLC, B-410486 et al., Jan. 2, 2015, 2015 CPD ¶ 22 at 6; recon. denied, DZSP 21 LLC--Recon., B-410486.4, July 22, 2015, 2015 CPD ¶ 238. The agency may not frame discussions so that the offeror responds in a manner that does not address the agency's actual concerns and the agency may not otherwise misinform the offeror concerning a problem with its proposal. Id.

Our review of the record establishes that GSA's discussions with Acuity were misleading. GSA's multiple inquiries to Acuity during discussions did not simply present an option, but ultimately expressly informed the protester that its rate "should be \$6.33."

Even in its arguments to our Office, the agency appears to take conflicting positions about what the RFP required and what the agency communicated to Acuity. For example, while GSA asserts in its memorandum of law that it merely allowed Acuity an opportunity to increase its health and welfare costs if it "wish[ed] to do so," MOL at 5, its memorandum also describes Acuity's proposal to use 40-hour workweeks (which thereby produced a lower hourly cost for the required monthly health and welfare contribution) as showing "a surprisingly breezy disregard of the CBA's explicit requirements to place workers on a thirty-five hour work week." Id. In contrast, when Severson responded to the second round of discussions by expressly stating that its

approach used a 40-hour workweek, GSA evaluated that same approach as proper, and accepted Severson's proposed hourly health and welfare cost below \$6.33.

Additionally, while not dispositive of the agency's position, the agency advised the protester during its debriefing that the correct rate was \$6.33. Specifically, the contracting officer's own record of Acuity's debriefing states that when the firm questioned being required to use the \$6.33 rate, the contracting officer recorded telling Acuity that "the calculation of the \$6.33 was correct and in accordance with what [the incumbent] Exemplar is currently paying." AR, Tab 14, Acuity Debriefing Record, at 1. The contracting officer then records that Acuity contended that a \$6.33 rate was not proper when applied in the context of 8-hour workdays. Id. The Contracting Officer's notes then reflect that the agency "reiterated the correct H/W [health and welfare] amount is \$6.33." Id. Finally, when Acuity suggested that it had been the only offeror required to increase its hourly health and welfare rate to \$6.33, the contracting officer "assured her this amount was required of each offeror, not just Acuity-Exemplar." Id. at 2.

In short, despite the agency's argument to our Office that its discussions did not direct Acuity to increase its health and welfare rate, the record before our Office contradicts this position. The record here shows that the agency has repeatedly taken the position--during the procurement, at Acuity's debriefing, and in its filings to our Office--that the CBA required an hourly health and welfare cost of \$6.33, and that this requirement was reflected in the RFP. The agency also contends that Severson proposed \$6.33 for this rate. Despite the agency's arguments, however, the record shows that Severson clearly indicated that it was not increasing its hourly health and welfare cost to \$6.33 in its final proposal revision, and that GSA accepted that approach in awarding the contract. As a result, we conclude that GSA's directives during discussions that "you listed \$5.365 per hour but it should be \$6.33 per hour," and the further remark that the agency was raising the issue a second time, were misleading. AR, Tab 7C, Discussions Letter to Acuity (Dec. 16, 2019), at 1.

## Prejudice

Notwithstanding our conclusions above, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was competitively prejudiced by the agency's actions; where a protester fails to demonstrate that, but for the agency's actions, it would have a substantial chance of receiving award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. Smartronix, Inc.; ManTech Advanced Sys. Int'l, Inc., B-411970.9 et al., Dec. 9, 2016, 2016 CPD ¶ 362 at 10. Where a protester's price would still have been higher than the awardee's price, even without the misleading discussions, and the awardee was properly rated better than the protester under the non-price evaluation, we will deny the protest for lack of prejudice. E.g., Odyssey Sys. Consulting Group, Ltd., B-412519, B-412519.2, Mar. 11, 2016, 2016 CPD ¶ 86 at 7.

Acuity's arguments and the contemporaneous record show that even without the increase in Acuity's price, the lowest evaluated price offered by the protester was

higher than any price that Severson offered. The pricing submitted by Acuity after the first round of discussions (before Acuity used the higher hourly health and welfare rate), resulted in a total evaluated price of \$7.0 million, whereas Severson's price was \$6.6 million.

In order to establish competitive prejudice, Acuity must show that if GSA had not misled the firm to increase its price, it would have had a substantial chance of award. However, as noted above, GSA evaluated Severson's past performance as superior to Acuity's--and past performance and price are the only two evaluation factors in this procurement. Further, at every step in this procurement Severson's evaluated price was lower than Acuity's. So, while Acuity argues that it was misled into increasing its price, Severson was the lower-priced higher-rated offeror even before Acuity raised its price further. As a result, Acuity cannot show that there was a substantial chance that it would have received the award but for GSA's misleading discussions.

## CONCLUSION

The protester's challenge to GSA's past performance evaluation lacks merit and, although GSA's discussions were misleading, the protester cannot reasonably claim competitive prejudice from the agency's misleading discussions. Ultimately, the selection of Severson's lower-priced, higher-rated proposal was consistent with the RFP.

The protest is denied.

Thomas H. Armstrong  
General Counsel