



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

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**Matter of:** Arsenault Acquisition Corporation; East Mulberry, LLC

**File:** B-276959; B-276959.2

**Date:** August 12, 1997

Richard L. Moorhouse, Esq., and Michael L. Martinez, Esq., Holland & Knight, for the protester.

Leigh Ann Holt, Esq., General Services Administration, for the agency.

Scott Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## **DIGEST**

1. Protest against agency's elimination of proposal from further award consideration is dismissed as untimely where not filed at General Accounting Office (GAO) within 10 days after protester was advised that proposal would no longer be considered.
2. Protest that agency improperly eliminated offeror's proposal from competitive range is denied where record shows that firm's proposal was properly ranked [deleted] out of [deleted] received and had no reasonable chance of being selected for award.

## **DECISION**

Arsenault Acquisition Corporation (AAC) and East Mulberry, LLC protest the elimination of their proposals from the competitive range under solicitation for offers (SFO) No. 97-07, issued by the General Services Administration (GSA) for the lease of approximately 102,000 occupiable square feet of office and related space in Fort Collins, Colorado.

We deny the protests.

The SFO, issued on February 11, 1997, called for the submission of initial offers by March 21. Among other things, the SFO required that any proposed lease space be in a newly constructed building with a maximum floor plate size of 41,000 square feet. In addition, the building was to be located on a 29-35 acre "government campus"-type site. As the acquisition is a two-step negotiated procurement, the SFO advised that no price proposals were to be submitted initially, and that a competitive range would be established among the initial proposals based on an

evaluation applying three criteria: Development Team Past Performance, Building Site, and Building Location.

GSA received [deleted] offers. GSA reviewed the offers initially for broad compliance with the SFO's technical requirements and, on the basis of this review, eliminated Mulberry's proposal for failure to meet several requirements. Specifically, Mulberry offered a preexisting building (as opposed to the required new structure) that did not meet the 41,000 square foot floor plate requirement and was not located on a 29-35 acre "government campus" site, as required.<sup>1</sup> Mulberry was advised of the elimination of its offer as unacceptable on March 31. Thereafter, on April 21, Mulberry attempted to submit a second proposal; by the terms of this proposal, Mulberry offered to divide its preexisting building in order to meet the 41,000 square foot floor plate limitation, and offered to purchase nearby--but not adjacent--land in an effort to satisfy the 29-35 acre "government campus" site requirement. GSA advised Mulberry on April 26 that its second proposal was rejected as late, because it was submitted beyond the March 21 deadline for submission of offers.

As for AAC, GSA's source selection panel eliminated that firm's proposal from the competitive range. AAC did not request a formal debriefing but was advised informally that the central basis for eliminating the proposal from the competitive range was the agency's conclusion that AAC's proposed development team and construction contractor did not have adequate experience in designing and constructing a facility of the size and type contemplated by the SFO.

#### MULBERRY'S PROTEST

Mulberry maintains that the agency improperly rejected both its initial and second proposals.<sup>2</sup>

Under our Bid Protest Regulations, allegations such as Mulberry's challenge to the rejection of its initial proposal must be raised no later than 10 days after the basis

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<sup>1</sup>Mulberry's proposal explicitly acknowledged that it did not comply with various SFO requirements. The cover letter accompanying the proposal stated that "[w]e recognize that our submission does not meet the full requirement established in your solicitation, we believe, however, this proposal represents a viable alternative to your request, at a greatly reduced cost."

<sup>2</sup>Mulberry also argues that its proposed "alternate" approach is adequate to meet the agency's needs, and that its failure to meet the SFO requirements therefore did not warrant rejecting its offer. This is essentially a challenge to the agency's requirements as stated in the SFO. As such, Mulberry had to raise this issue prior to the deadline for receipt of initial offers. 4 C.F.R. § 21.2(a)(1) (1997).

of protest was, or should have been, known. 4 C.F.R. § 21.2(a)(2). As noted above, GSA advised Mulberry on March 31 that its initial proposal was unacceptable as submitted. This written notice specifically identified the two primary deficiencies in the firm's offer--the lack of enough land to satisfy the agency's 29-35 acre site requirement and the failure of its offered building to meet the 41,000 square foot floor plate limitation--and stated that Mulberry's offer "is considered non-responsive to the SFO and will not be further considered." As this March 31 notice provided Mulberry all the information necessary to raise its protest allegations, it was required to protest within 10 days, or no later than April 10. Since the protest was not received by that date, it is untimely and will not be considered.<sup>3</sup>

We also conclude that the agency properly rejected Mulberry's second proposal. Under the terms of the SFO, offers received after the March 21 due date for initial proposals could not be considered (except in circumstances not relevant here), and the agency therefore properly rejected the second proposal, which was submitted a month after that date.

#### AAC'S PROTEST

AAC contends that its proposal was improperly scored under the Development Team Past Performance criterion. In particular, the protester maintains that one of the evaluators assigned an unreasonably low score to its proposal in this area and caused its overall consensus score to be improperly "skewed."

Where a protester challenges an evaluation, we will review the agency's actions to ensure that they are reasonable and consistent with the solicitation's evaluation scheme and applicable statutes and regulations; we will not independently reevaluate proposals or otherwise substitute our judgment for the agency's. Techniarts Eng'g, B-271509, July 1, 1996, 96-2 CPD ¶ 1 at 3.

The evaluation in this area was reasonable. Under the Development Team Past Performance criterion, proposals were assigned a raw score of [deleted] points. The four evaluators assigned AAC's proposal scores of [deleted] points, [deleted] points, [deleted] points and [deleted] points, and reached a consensus score of [deleted] points. AAC maintains that the score of [deleted] points assigned by one evaluator was unjustified. However, the record shows that the evaluator assigned this reduced score for two primary reasons. First, the evaluator noted as a "major weakness" that AAC's proposed general construction contractor had no experience

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<sup>3</sup>Mulberry requests that our Office consider this issue under the significant issue exception to our timeliness requirements. 4 C.F.R. § 21.2(c). We decline to apply the exception here since we have frequently considered the propriety of an agency's rejection of a technically nonconforming offer. See, e.g., Triple P Servs., Inc., B-271777, July 24, 1996, 96-2 CPD ¶ 39.

performing on a job of the size contemplated by the SFO, and that the contractor's largest "similar" project involved performing only approximately 26 percent of a project requiring the building of an addition and completing renovations on a preexisting structure (as opposed to construction of an entirely new building, as required under the SFO here). Second, the evaluator noted as a "major deficiency" that AAC had provided no references for any of the development team members other than the general construction contractor.

AAC has neither alleged nor shown that the evaluator's conclusions regarding the proposal weaknesses and deficiencies are factually erroneous, and we see no basis for reaching such a conclusion. AAC essentially merely disagrees with the evaluator's judgment as to how many points should have been deducted for the deficiencies. However, we find nothing inherently unreasonable in the evaluator's determination that 4 points reasonably reflects the merits of AAC's proposal under this criterion. In this regard, we have recognized that evaluators may have different judgment as to a proposal's merits, and that one evaluator's scoring is not unreasonable merely because it is based on judgments different from those of other evaluators. See Household Data Servs., Inc., B-259238.2, Apr. 26, 1995, 95-1 CPD ¶ 281 at 4 n.2. We conclude that, given the absence of any substantive rebuttal showing that the evaluator's findings as to the merits of AAC's proposal were unfounded, there is no basis for questioning the scoring of AAC's proposal in this area.

AAC also objects to the agency's establishment of a competitive range using what GSA described as a "natural breakpoint" among the total scores of the [deleted] proposals of [deleted] points. According to the protester, the average overall proposal score was [deleted] points, and since its proposal was found technically acceptable and assigned an above-average score of [deleted] points, it should have been included in the competitive range.

The protester's argument ignores the fundamental principle that agencies are to include in the competitive range only those proposals that have a reasonable chance of receiving award. Techniarts Eng'g, *supra*, at 3-4. A proposal's standing in relation to a mathematical average is immaterial where, as here, the record shows that it has no reasonable chance of being selected for award, relative to the other proposals included in the competitive range. The evaluators recommended inclusion of [deleted] proposals in the competitive range as the proposals with a "high probability of success" and which either met or exceeded the evaluation criteria outlined in the solicitation. AAC's proposal, while rated "good" overall, was ranked only [deleted] out of the [deleted] received, and the agency explains that it did not rise to the quality level of the higher-scored proposals. As discussed above, AAC does not challenge the agency's substantive conclusions regarding the merits of its proposal, and the numeric break point used by the agency does not affect the underlying rationale for the rejection of its proposal, namely, that, given the comparative weakness of its proposal, AAC did not stand a reasonable chance of

receiving award. Id. We therefore have no basis for objecting to GSA's elimination of AAC's proposal from the competitive range.

AAC raises numerous arguments that relate to alleged solicitation improprieties; because they were not raised prior to the deadline for submitting proposals, they are untimely and will not be considered.<sup>4</sup> 4 C.F.R. § 21.2(a)(1). AAC also contends that the SFO's evaluation scheme was "latently" ambiguous because it was unclear that price would not be evaluated in connection with the step-one evaluation. This contention is specious; the fact that AAC did not submit a price proposal belies any assertion that it believed that price would be evaluated during step one.

The protests are denied.

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<sup>4</sup>Thus, AAC challenges the propriety of the SFO provision stating that a competitive range would be established as part of the step-one evaluation, when price proposals had not yet been submitted; AAC also alleges that, under GSA's acquisition regulations, the agency was required to disclose the evaluation weighing scheme it intended to use as well as the maximum number of firms that would be included in the competitive range.