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**Comptroller General
of the United States**

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

Decision

Matter of: Philadelphia Produce Market Wholesalers, LLC

File: B-298751

Date: December 8, 2006

Ellis M. Fleisher for the protester.

David P. Metzger, Esq., and Kristen E. Ittig, Esq., Holland & Knight LLP, for Four Seasons Produce, Inc., 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. Protest challenging proposal evaluation and source selection is denied where record shows evaluation and award decision were reasonable and consistent with solicitation; protester's mere disagreement with agency's determination that a lack of detail in the firm's proposal did not warrant assigning full evaluation credit to the proposal is insufficient to show that the evaluation was unreasonable.
 2. Protest 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 is denied where record shows that the individual did not assist in the preparation of the current solicitation and that there is no reason to believe inside information was shared with awardee.
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DECISION

Philadelphia Produce Market Wholesalers, LLC protests the award of a contract to Four Seasons Produce, Inc. under request for proposals (RFP) No. HDEC02-06-R-0005, issued by the Defense Commissary Agency (DeCA) for fresh fruits and vegetables (produce) for resale at commissaries located in DeCA's East Region (Area 3, Group 2).¹ Philadelphia contends that the agency improperly failed to give

¹ DeCA recently took over procurement responsibility for the provision of produce to its military commissaries from the Defense Supply Center-Philadelphia (DSC-P) and
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its technical proposal additional credit, and unreasonably determined that Four Seasons' higher technically rated, higher-priced proposal offered the best value to the government. Philadelphia also contends that the awardee received an unfair competitive advantage by hiring a former DeCA commissary produce manager as a consultant.²

We deny the protest.

The RFP, issued as a small business set-aside on March 20, 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, 50. 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; technical capability and past performance combined were significantly more important than price. *Id.* at 28.

The RFP provided technical specifications and performance requirements for the provision of produce, and emphasized that offerors' technical proposals were to detail the firms' capabilities, including all quality control procedures and back-up plans (regarding, for example, food safety, product recalls, sanitation, and pest management). *Id.* at 15-27. 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

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generally is seeking to utilize a new business model, considering commercial industry practices, for its commissaries' produce operations in an effort to obtain a good selection of high quality produce offered at a savings to commissary patrons. The agency has organized its commissaries, for produce procurement purposes, by regional area and group. This RFP, for example, serves commissaries in Area 3, Groups 1 and 2, and Area 5, Groups 1 and 2. Since Philadelphia only submitted a proposal in response to the Area 3, Group 2 requirement, this decision is limited to the award of a contract for that group.

² The protester proceeded with its protest *pro se* and therefore did not have an attorney who could obtain access to nonpublic information pursuant to the terms of a protective order. Accordingly, our discussion of the evaluation, source selection, and use of a consultant by a competitor is necessarily general in nature to avoid reference to nonpublic information. Our conclusions, however, are based on our review of the entire record, including nonpublic information.

comparable commercial operations within the local commuting area and/or geographical area within a 25-mile radius of the commissary location (excluding membership clubs and convenience type stores).

Id. amend. 5, at 7.

Each offeror was to propose unit prices for core and non-core produce items reflecting application of its proposed patron savings percentage. Unit prices were to be reviewed for reasonableness, realism, and to assess the offeror's understanding of the use of the minimum patron savings percentage; the evaluated total price of the offer was to serve as the estimated dollar amount of the contract. Id. at 15.

Twelve proposals were received under the RFP for Area 3, Group 2; all but one were included in the competitive range for discussions. Revised proposals were received and evaluated. Four Seasons' proposal was rated "excellent" under both the technical capability and past performance factors, and received the highest overall technical score. The firm offered the third highest patron savings percentage. Philadelphia offered the highest patron savings percentage; the firm's proposal was rated "very good" under the technical capability and past performance factors, and was ranked fourth highest of the 11 proposals for technical merit. Comparing the technical and past performance strengths of the Four Seasons' proposal to the lower number of strengths identified in the Philadelphia proposal, and considering that the technical and past performance factors, combined, were significantly more important than price under the RFP's evaluation terms, the contracting officer determined that Four Seasons' higher technically rated, higher-priced proposal offered the best value. Award was made to Four Seasons, and this protest followed.

Philadelphia contends that the agency unreasonably found a lack of detail in the firm's proposal regarding its quality control program procedures. The protester also generally challenges the decision to award the contract to a higher technically rated, higher-priced offeror.

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 confirms the reasonableness of the agency's evaluation. Specifically, while Philadelphia's proposal was rated "very good" and was ranked fourth highest of the 11 proposals for technical merit, in light of its relative lack of detail and the associated increase in performance risk, the record provides no

support for the protester's general contention that its proposal warrants a higher evaluation rating. In addition to the lack of detail regarding the firm's quality control program, the evaluation record reveals other areas of the proposal that similarly failed to receive higher evaluation credit due to a lack of detail regarding specific approaches to be used. While both firms' proposals had noted technical strengths, Four Seasons' proposal was cited as having additional strengths; some of those strengths were attributed to the proposal's substantial detail regarding the firm's established business operations and practices, successes achieved from those practices, and how its proposed approaches would benefit the commissary patrons.

While the protester does not challenge the evaluators' findings that its proposal lacked detail in several other areas, Philadelphia does challenge the lack of detail noted for its quality control program. The protester argues that the agency must have failed to consider the documentation it provided during discussions in response to the agency's request for additional information regarding its quality control program. Our review of the record shows that the documentation was considered, and while substantial in length, it appears to be in essence an outline of standard procedures used by the company. We cannot find unreasonable the agency's characterization of the submission as general in nature; for example, the submission contains generally worded procedures and checklists which, at times, fail to indicate with specificity who performs the procedures, what tools are used to implement the quality checks, or what use is made of the recorded results of the quality control efforts. Some quality provisions, whether by inadvertence or otherwise, mention only what the firm should do (regarding product display, for instance) rather than what specific actions will be taken during performance of this contract.

Given the RFP's emphasis on the need for each offeror to provide details about its technical capability and approach, and the reasonableness of the ratings assigned to the two firms' proposals for the level of detail provided, we see no basis to question the propriety of the evaluation. The protester's mere disagreement with the evaluation is insufficient to render it unreasonable. See id. With regard to the selection decision, the agency identified various strengths in the Four Seasons proposal, mostly attributable to its detailed methodologies and solid demonstration of its experience, facilities, and distribution capabilities; regarding its quality control program, for instance, the awardee included a detailed discussion of staff responsibilities, training, procedures to be followed, the analysis of recorded findings, and contingency/back-up plans. Given the importance of technical merit under the RFP's evaluation terms, we cannot find unreasonable the agency's determination that the awardee's technically superior, higher-priced proposal presented the best value to the agency.³

³ In its comments, Philadelphia argues that its lower price should have been determinative for award here, since product quality is mandated by USDA grade and inspection requirements. This argument fails to recognize that the RFP specified
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The protester next contends that the awardee obtained an unfair competitive advantage by hiring a consultant who is a former DeCA employee. Prior to his recent retirement, the consultant served as the produce category manager responsible for store support and merchandising produce, and was a spokesperson for the agency at two industry roundtables held to solicit industry views and suggestions regarding the conversion of commissary produce operations, the consideration of commercial business practices, and the appropriate grouping of commissaries. He also 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.⁴ Philadelphia contends that the consultant had a conflict of interest; may have violated post-employment rules for former government employees; and may have shared inside information with the awardee, giving the firm an unfair competitive advantage in the procurement.

As an initial matter, we note 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 17. 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.

Here, the record shows that, while he worked for DeCA, the consultant participated in preliminary market research and strategy planning with his supervisors who were

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that technical considerations, beyond the fact that generally product quality is mandated by USDA requirements, would be reviewed and, together with past performance, were in fact more important than price.

⁴ 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.

coordinating the conversion of operations from DSC-P, and that he was an agency spokesperson for the agency's two industry roundtables. However, it is clear that those roundtables were held for the purpose of releasing to the public for industry comment, at least in summary form, research and planning information gathered by the agency. Specifically, the agency not only discussed its market research and its plan to change its produce business model, but also released to the substantial number of vendors in attendance the terms of its recent test program and follow-on procurement for the provision of produce to Area 1 commissaries. The record thus shows that at least much of the preliminary research known to the consultant was in fact shared with other vendors and thus cannot be characterized as inside information.⁵

As for the current solicitation, the agency reports that the individual did not assist in the preparation or development of the source selection plan or the solicitation, which was issued almost 4 months after his retirement from the government. Additionally, the agency points out that there are differences in the terms of the solicitation compared to the prior procurement the former government employee participated in as an evaluator (where he reviewed two initial technical proposals, but had no access to price proposals). For instance, the previous solicitation included a requirement for port delivery of produce for commissaries in Keflavik, Iceland and Guantanamo Bay, Cuba (including meeting airlift times and sailing dates); there are no such requirements in the RFP for the Area 3, Group 2 award at issue here. While we recognize that the prior and current solicitations share similar general provisions regarding the basic performance requirement here--delivering quality produce to commissaries at competitive prices--the differences between the two solicitations suggest that the information to which the consultant had access during the prior procurement might be of limited value in the current procurement.

In any event, even assuming that the consultant's participation in the prior procurement gave him access to inside information, 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, and we see no basis in the record here to conclude that the Four Seasons proposal was prepared based on such information. Rather, the record shows that upon his retirement, the consultant was advised by the agency ethics officer that offering his services as a commissary produce consultant would be unobjectionable as long as inside information was not used; that he relayed that information to his client, Four Seasons; that Four Seasons confirmed the accuracy of the restriction with the DeCA ethics officer; and that both the consultant and the awardee deny that any communication involving inside information took place. Our conclusion is further

⁵ The agency also reports that the consultant did not have access to any of the arguably procurement-sensitive industry responses received for consideration by the agency after the roundtables.

supported by the responses received to our inquiries as to the type of assistance rendered by the consultant. The record shows that Four Seasons, a commercial produce vendor with limited experience in contracting with the federal government, specifically hired another consultant (a professional federal government contract proposal writer)--not the consultant at issue in the protest--to work closely with the firm to prepare its proposal. The role of the consultant at issue here was limited to the review of that proposal; the record shows, for instance, that he made suggestions of editorial and style changes to the proposal related to achieving clarity and compliance with the RFP instructions calling for offerors to provide details regarding their capabilities, approaches, and accomplishments; this advice suggests no use of inside information.

Our review of the evaluation record confirms that the awardee's favorable evaluation clearly was based on the strength of the firm's established business operations and experience, described in its well-written, detailed technical proposal. In short, there has been no showing that the consultant's involvement gave the awardee an unfair competitive advantage, and, on this record, we have no reason to question the propriety of the award.

The protest is denied.

Gary L. Kepplinger
General Counsel