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

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Decision

Matter of: Hotel Contracting Services, Inc.

File: B-401807; B-401807.2

Date: November 25, 2009

Terrence M. O'Connor, Esq., and Stephanie D. Wilson, Esq., Albo & Oblon, LLP, for the protester.

Capt. Elisabeth L. Gilman, Department of the Army, for the agency.

Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's evaluation of a proposal for a hotel for use by applicants to a Military Entrance Processing Station as unsatisfactory because the proposed facility was located too far from the airport to meet the solicitation's timeframes for picking up applicants is denied where the record supports the reasonableness of the agency's determination.

2. Protest challenging agency's decision not to set the procurement aside for exclusive small business participation is untimely when first raised after award; in any event, even though this unrestricted competition resulted in offers from more than two small business concerns, the decision not to set aside the procurement is unobjectionable where, at the time the determination was made, the agency had no reasonable expectation that offers from two responsible small business concerns would be received, and where the Small Business Administration concurred with the decision not to set aside the procurement.

DECISION

Hotel Contracting Services, Inc. (HCS) of Carson City, Nevada, protests the award of a contract to Global Events Management of Balston Lake, New York, under request for proposals (RFP) No. W9124D-09-R-0012, issued by the Department of the Army for meals, lodging and transportation for the Harrisburg, Pennsylvania Military Entrance Processing Station (MEPS). The protester challenges the agency's evaluation of its proposal, argues that discussions should have been held, and contends that the procurement should have been set aside for small businesses.

We deny the protest.

BACKGROUND

The RFP was issued on April 3, 2009, and contemplated the award of a fixed-price requirements contract for a base year and four 1-year option periods. The RFP provided for award without discussions to the offeror whose proposal was most advantageous to the government. The RFP advised that proposals would be evaluated using four technical factors, past performance and price.

The technical evaluation factors, listed in descending order of importance, were lodging/dining¹, meals, facility location, and transportation. Past performance was to be separately evaluated and assessed a risk rating. The RFP provided that technical was moderately more important than past performance. All evaluation factors combined were more important than price. The RFP further provided that the written proposal, as well as an on-site visit, would be used in the evaluation. Offerors were also advised that unsupported promises to comply with contractual requirements would not be sufficient. Offerors were warned that a proposal rated “marginal” or “unsatisfactory” in any evaluation factor or subfactor would not be considered for award. RFP at 14.

Of relevance to this protest, the facility location evaluation factor required offerors to identify the distance from the proposed hotel to the MEPS, and identify the hotel’s proximity to transportation routes and hubs.

To address the transportation evaluation factor, offerors were to submit a transportation plan including the following items:

- 4.1. For each vehicle proposed for use under this contract, describe the type(s) of vehicles, the quantity of vehicles available, seating capacity of each, and provide proof of insurance.
- 4.2. Describe how additional vehicles will be made available when applicant numbers exceed the estimates stated in paragraph 1.5 of the PWS; and
- 4.3. A statement certifying the proposed transportation company is DOD approved as of the date the proposal is signed by the offeror (if transportation is to be provided by a non-organic hotel resource).
NOTE: DOD approval status will be verified by the Government.

¹ The lodging/dining evaluation factor was comprised of two subfactors listed in descending order of importance: cleanliness/sanitation/condition/quality control and safety/security. The evaluation of these subfactors is not at issue in this protest; they will not be discussed further.

Proposal of a non-DoD approved carrier will be cause for this evaluation factor to be rated “Unsatisfactory”.

RFP at 12.

One of the specific requirements of this RFP was for the contractor to provide transportation for incoming applicants to the hotel from either the bus terminal or the airport. Applicants were to be picked up within 30 minutes from the time the applicant called. RFP at 51. Additionally, the RFP required the contractor to provide evening transportation from the MEPS to the hotel. The RFP stated that there would be an estimated 2 trips per night between the MEPS and the hotel, with a passenger count between 1 and 35 per trip.

The agency received eight proposals by the closing date. The source selection evaluation board (SSEB) evaluated the proposals, and the SSEB and contracting officer (CO) conducted on-site evaluations.² The evaluation results with regards to the protester and Global were as follows:

	GLOBAL	HCS
Overall Rating	Excellent	Satisfactory
Technical Factors		
-- Lodging/Dining	Good	Excellent
-- Meals	Excellent	Excellent
-- Facility Location	Excellent	Unsatisfactory
-- Transportation	Excellent	Marginal
Past Performance	Low Risk	Low Risk
Price	\$4,274,022	\$3,978,749

Agency Report (AR), Tab 12, Source Selection Decision, at 1 (prices rounded to nearest dollar).

HCS proposed the Sleep Inn in Carlisle, Pennsylvania, and indicated at one place in its proposal that the hotel was 27 miles from the Harrisburg airport. AR, Tab 14, HCS proposal, § II.3. Elsewhere in its proposal the distance between the hotel and airport was stated as being 32.02 miles. *Id.*, § II, at 3.

As part of its assessment under the facility location evaluation factor, the agency checked three separate internet mapping services to verify the distance between the hotel and airport. MapQuest indicated that the distance between the hotel and the

² The purpose of the on-site evaluation was to confirm the contents of the written proposals and to assess the cleanliness, condition, security, and overall adequacy of the facilities proposed. CO Statement at 3.

airport was 31.5 miles with a 32 minute travel time, Google indicated the distance was 31.4 miles with a 35 minute travel time, and Yahoo indicated the distance was 31.82 miles with a 37 minute travel time. AR, Tab 12, Source Selection Decision, at 10. Given that the RFP required the contractor to pick up applicants from the airport within 30 minutes of being notified, the SSEB concluded that it would be nearly impossible for HCS to meet the 30 minute requirement. As a result, HCS received a rating of unsatisfactory under the facility location evaluation factor.

In addition, HCS received a “marginal” rating for the transportation evaluation factor based on the following three weaknesses: (1) the proposal failed to include a contingency plan for meeting transportation requirements when applicant numbers exceeded estimates, as required by the RFP; (2) the proposal did not provide the subcontracting agreement with Capitol Trailways for morning transportation; and, (3) the proposal did not identify how many vehicles would be available to provide the evening and emergency transportation. In this regard, the SSEB also noted that the hotel’s management stated that two 15-passenger vans were available for evening transportation. However, the evening transportation required seating for up to 35 individuals per trip and as many as two trips per evening, consequently the SSEB determined that the two hotel vans were not sufficient to transport 35 individuals.

At the end of its review, the SSEB concluded that all offerors, except HCS, were capable of meeting the RFP requirements. The SSEB noted that while the protester submitted the lowest price and proposed a suitable hotel, the hotel was located too far from the airport to satisfy the requirement for transporting applicants from the airport to the hotel. AR, Tab 10, Consensus Evaluations, at 14. In contrast, Global was rated “excellent” overall and submitted the next lowest price.

The source selection authority (SSA) recognized that HCS submitted the lowest price but noted that HCS was ineligible for award because it was rated “marginal” or “unsatisfactory” in one or more factors/subfactors. AR, Tab 12, Source Selection Decision, at 14. The SSA concluded that Global’s proposal offered a significant likelihood of leaving a favorable impression with applicants, and presented a low risk of adverse incidents involving applicants. Thus, the SSA concluded that Global’s proposal offered the best overall value to the government. *Id.* at 15. Award was made to Global on August 14, 2009. After a debriefing, HCS filed this protest with our Office.

DISCUSSION

HCS argues that the agency’s evaluation of its proposal was unreasonable and contends that it should not have received a disqualifying rating of unsatisfactory for the facility location factor. The protester also argues that it was improperly evaluated under the transportation evaluation factor.

Our Office reviews challenges to an agency's evaluation of proposals only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16 at 5. A protester's mere disagreement with the agency's judgment is not sufficient to establish that an agency acted unreasonably. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

Facility Location Evaluation

As stated above, the protester received an "unsatisfactory" rating for the facility location evaluation factor after the SSEB concluded that--based on the distance of the proposed hotel from the airport--it would be impossible for the protester to satisfy the 30 minute response time for picking up applicants arriving by air.

The protester maintains that its proposed facility is only 27 miles from the airport, and argues that it could take other steps to pick up applicants arriving by air within 30 minutes of their arrival.³ According to the protester, the facility would know in advance when an applicant is arriving by air, and it could send transportation before the applicant's arrival to meet the 30 minutes timeframe for airport pick-ups.

As previously stated, the record shows that the SSEB reviewed three internet mapping sources and all indicated that the protester's facility was more than 30 miles from the airport and all reflected a travel time exceeding 30 minutes. The agency also reports that an agency employee drove the distance between the hotel and the airport on four separate occasions with the shortest driving time measured at 38 minutes driving the posted speed limits. The agency also disagrees with the protester that the normal practice is for the hotel to receive advance notice of airport arrival information for applicants.

We think there is little room for dispute in this case. The RFP specifically required offerors to provide a facility that was close enough to the airport that applicants could be picked up within 30 minutes of the time the applicant calls. Here, the protester simply did not demonstrate to the agency that it satisfied this RFP requirement. In addition, none of the work-around information it argues in its protest--i.e., that it could make advance arrangements for such pick ups--was set out in its proposal (even assuming the work-arounds would have been acceptable under the RFP). Based on this record, we think the agency's evaluation was reasonable.

³ Despite this argument, the protester's proposal indicated in its Hotel Information and Technical Qualifications Data Sheet that the distance from the hotel to the airport was 32.02 miles. AR, Tab 14, HCS Proposal, § II, at 3.

We also disagree with the protester's argument that the RFP did not require the agency to reject an initial "non-conforming" proposal as unacceptable but rather left open the possibility that an offeror could meet the terms of the RFP by the time of contract award.⁴ The RFP here required offerors to provide a narrative and supporting data to demonstrate how the offeror intended to perform the requirements, and directed offerors to pay close attention to the stated evaluation factors and subfactors. Offerors were warned that unsupported promises to comply with requirements were not sufficient. More importantly, the RFP specifically stated that a proposal receiving an "unsatisfactory" rating in any evaluation factor or subfactor would not be considered for award. Consequently, it is clear that in order to be eligible for award, an offeror had to demonstrate in its proposal that it could satisfy the RFP requirements. RFP at 10.

On this record, we think the agency reasonably evaluated the protester's proposal as technically unacceptable, and think the proposal was reasonably excluded from further consideration. Since we conclude that the agency reasonably rated the protester's proposal under the facility location evaluation factor as "unsatisfactory," and since, as a result, the protester was ineligible for award, we need not discuss the agency's evaluation of the transportation evaluation factor.

Failure to Hold Discussions

In a supplemental protest, HCS argues that the agency was required to hold discussions with all competitive range offerors. HCS maintains that because its proposal was included in the competitive range and had deficiencies, the agency was obligated to have discussions. Alternatively, the protester contends that the agency in fact convened discussions when it allowed offerors to revise their proposals in light of a revised wage determination.

The record shows that the agency did not establish a competitive range and made award on the basis of initial proposals. Where, as here, an RFP provides for award on the basis of initial proposals without discussions, an agency may make award without discussions, unless discussions are determined to be necessary. Federal Acquisition Regulations (FAR) § 15.306(a)(e); Synectic Solutions, Inc., B-299086, Feb. 7, 2007, 2007 CPD ¶ 36 at 11.

⁴ The protester also argues that only one percent of MEPS applicants arrive by air and that the agency should have relaxed or waived the requirement. Even assuming the protester is correct in its assertion that this requirement is not applicable to many MEPS applicants, it was nonetheless a requirement of the RFP. As stated above, we think the agency reasonably concluded the protester did not satisfy this requirement.

To the extent HCS argues in the alternative that the agency should not have made award without discussions, in light of the wage determination, we think its protest raises an untimely challenge to the solicitation's ground rules. When the agency amended this solicitation to incorporate the revised Department of Labor wage determination, the amendment advised offerors that they could only revise their pricing if the new wage determination affected their price proposal. The amendment specifically stated that this opportunity to revise did not constitute discussions, and that revisions to technical proposals would not be accepted. AR, Tab 6, amend. 2. As a result, if the protester thought that the wage determination should have triggered the opening of discussions, it was required to raise the matter before the solicitation's closing date. 4 C.F.R. § 21.2(a)(1) (2009).

Small Business Set-aside

In its supplemental protest, HCS also argues for the first time that the agency improperly failed to issue the RFP as small business set-aside. The protester maintains that this basis of protest only became apparent when its review of the agency report disclosed that three small business concerns responded to the solicitation.

As a preliminary matter, we think an argument that a procurement should have been conducted as a small business set-aside is a solicitation challenge that must be raised prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2009). In addition, we will not entertain a post-award challenge to the adequacy of a set-aside decision solely because the competition resulted in responses from two or more small businesses. The determination to set a procurement aside is prospective not retrospective. See Advanced Constr. Inc., B-218554, May 22, 1985, 85-1 CPD ¶ 587 at 2-3.

In any event, the record shows that prior to issuing the RFP, the agency published a sources sought announcement in the FedBizOpps on January 20, 2009 and received only one response from a large business concern. The agency subsequently, with the concurrence from the Small Business Administration district office, issued the RFP for full and open competition. AR, Tab 11, Price Negotiation Memo, at 2. Moreover, the record shows that the awardee here is a woman-owned small business concern, AR, Tab 7, Abstract of Offers, hence the protester can not claim harm from the decision not to set-aside this procurement.

The protest is denied.

Lynn H. Gibson
Acting General Counsel