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## Decision

**Matter of:** Windstream Communications

**File:** B-408258.2

**Date:** May 21, 2014

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### DIGEST

1. Protest challenging agency's determination that protester's proposal was technically unacceptable is denied where record reflects that evaluation was reasonable and consistent with solicitation's evaluation criteria.
  2. Protest alleging agency conducted discussions with protester that were not meaningful is denied where record shows exchanges between agency and protester were clarifications, not discussions.
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### DECISION

Windstream Communications, of Herndon, Virginia, protests the elimination of its proposal from the competition under request for proposals (RFP) No. NIHLM2013681, issued by the Department of Health and Human Services (HHS), National Institutes of Health, National Library of Medicine, for a wide area network (WAN) to connect three HHS sites. Windstream asserts that the agency's evaluation of its proposal was unreasonable and that the agency conducted discussions with the firm that were not meaningful.

We deny the protest.

### BACKGROUND

The solicitation, which was issued on February 19, 2013, contemplated the award of a fixed-price contract with a 5-month base period and four 1-year option periods.

RFP at 3, 6-7, 85.<sup>1</sup> Award was to be made based on the proposal representing the best value to the government, considering the following factors: technical; small disadvantaged business (SDB) participation; and cost/price. Id. at 58. The technical factor included the following three subfactors, listed in descending order of importance: technical and management approach; experience and qualifications of proposed personnel; and corporate capabilities and past performance. Id. at 58-59. Regarding the relative weight of the factors, the solicitation stated that “[a]lthough the technical factors are of paramount consideration in the award of the contract, cost/price and SDB participation [are] also important” and “[a]ll evaluation factors other than cost or price, when combined, are significantly more important than cost [or price].” Id. at 58.

The solicitation incorporated a statement of work (SOW) that called for the establishment of a “new wide area network (WAN) to interconnect three (3) HHS Trusted Internet Connection (TIC) site locations.” RFP at 61. The SOW set forth a number of WAN “connectivity” requirements, including, as relevant here, requirements that an offeror’s proposed solution “must support a minimum 99.995% availability metric” and “must support telecommunications service priority (TSP) to ensure rapid service restoration.”<sup>2</sup> Id. The SOW also specified that each TIC site requires 10 gigabits per second bandwidth between sites. Id. However, offerors were to provide option pricing for an additional 10, 20, 30, 40, and 50 gigabits per second of bandwidth. Id. at 6-7, 61.

The solicitation included evaluation criteria for each of the non-price factors and subfactors. RFP at 58-59. For the technical and management approach subfactor, the solicitation stated that the agency would evaluate, among other things, the extent to which an offeror “describe[s] how it interprets the Requirements of the [SOW] in sufficient detail to demonstrate an understanding of the project.” Id. at 58. Consistent with this evaluation criterion, the instructions to offerors section of the solicitation stated that proposals must include “an explanation of the proposed technical approach in conjunction with the tasks to be performed” and cautioned that “[p]roposals which merely restate the requirements of the Government’s scope of work will not be eligible for award.” Id. at 38.

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<sup>1</sup> Page citations in this decision refer to the sequential numbers that the agency applied to the documents in the agency report (AR), including the RFP.

<sup>2</sup> According to the agency, TSP is “a system furnished by the Federal Communications Commission whereby if a specific governmental or non-governmental site is deemed critical to national security or emergency preparedness, any interruptions in telecommunications service to that site must receive priority attention from the service-provider so that site is restored prior to sites which do not have TSP.” AR, Tab 8, Consensus Technical Evaluation Report (Excerpts), at 39.

The agency received a number of proposals by the solicitation's closing date, including a proposal from Windstream. Contracting Officer's Statement ¶ 7. The agency evaluated the proposals and established a competitive range that did not include Windstream's proposal. Id.; Memorandum of Law at 3. Windstream then filed a protest with our Office challenging the exclusion of its proposal from the competitive range. In response, the agency decided to take corrective action consisting of reevaluating the proposals and making a source selection decision based on the reevaluation. See Memorandum of Law at 3. Accordingly, our Office dismissed the protest as academic. Windstream Commc'ns, B-408258, May 6, 2013.

During the ensuing reevaluation, the contracting officer engaged in e-mail and telephone communications with Windstream representatives regarding Windstream's pricing. Contracting Officer's Statement ¶ 11. Also during the reevaluation, an agency technical evaluation group (TEG) evaluated Windstream's proposal and documented their findings. See AR, Tab 8, Consensus Technical Evaluation Report (Excerpts). For the technical factor, the TEG rated Windstream's proposal unacceptable based on two evaluated deficiencies under the technical and management approach subfactor. See id. at 37, 39; Memorandum of Law at 3.

The first deficiency was a perceived failure to "sufficiently demonstrate that [Windstream] will furnish at least 99.995% service availability." AR, Tab 8, Consensus Technical Evaluation Report (Excerpts), at 39. Regarding this deficiency, the TEG noted that although Windstream's proposal represented that the firm would [DELETED], it did not include adequate detail to substantiate this claim, nor did it show that the firm could meet the solicitation's [DELETED] 99.995 percent threshold. Id. In assessing this deficiency, the TEG noted specific types of information that were absent from Windstream's proposal, as well as a perceived shortcoming regarding Windstream's proposed approach for [DELETED]. Id. The TEG documented its finding that this deficiency reflected a failure to meet a material solicitation requirement. Id.

The second deficiency was a perceived failure to address how Windstream's network would support TSP. AR, Tab 8, Consensus Technical Evaluation Report (Excerpts), at 39. Regarding this deficiency, the TEG noted that although the proposal addressed [DELETED], it did not address TSP. Id. The TEG documented its finding that this deficiency reflected a failure to meet a material solicitation requirement. Id.

The contracting officer concurred with the TEG's rating of unacceptable for Windstream's proposal. Contracting Officer's Statement ¶ 16. She therefore excluded Windstream's proposal from consideration for award. Id. ¶ 17. The contracting officer subsequently performed a best value tradeoff analysis among those proposals deemed acceptable. Id. The agency then awarded a contract

valued at \$21,850,361 to TW Telecom. Contracting Officer's Statement ¶ 18. After receiving a written debriefing, Windstream filed a protest with our Office.

## DISCUSSION

Windstream asserts that both deficiencies assigned to its proposal were unreasonable. More specifically, Windstream argues that the deficiency regarding 99.995 percent service availability was unreasonable because Windstream's proposal included "multiple descriptions of [DELETED]." Protest at 4. The deficiency regarding TSP was unreasonable, Windstream argues, because various sections of its proposal "clearly demonstrate that Windstream [DELETED]." Id. Windstream also claims that the deficiencies were unreasonable because in the initial, pre-corrective action evaluation, the agency apparently found Windstream's proposal to be technically acceptable. Id. at 3.

In reviewing protests of an agency's evaluation, our Office does not reevaluate proposals, rather, we review the evaluation to determine if it was reasonable, consistent with the solicitation's evaluation scheme and procurement statutes and regulations, and adequately documented. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6; Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's disagreement with an agency's judgments does not establish that the agency acted unreasonably. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7; Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5. Further, an offeror bears the burden of submitting an adequately written proposal, and it runs the risk that its proposal will be evaluated unfavorably where it fails to do so. Tetra Tech Tesoro, Inc., B-403797, Dec. 14, 2010, 2011 CPD ¶ 7 at 5; Int'l Med. Corps, B-403688, Dec. 6, 2010, 2010 CPD ¶ 292 at 7.

In response to Windstream's argument regarding the deficiency related to 99.995 percent service availability, the agency acknowledges that Windstream's proposal claimed [DELETED]. Memorandum of Law at 6-7. The agency, however, argues that the deficiency nevertheless was reasonable because the information in Windstream's proposal was general in nature and insufficient for determining whether Windstream could achieve [DELETED] 99.995 percent level of service availability. Id. In support of this position, the agency points to the detailed and technical findings that the TEG contemporaneously documented under the deficiency. Id. at 7 (referencing AR, Tab 8, Consensus Technical Evaluation Report (Excerpts), at 39).

Regarding the deficiency relating to TSP, the agency acknowledges that Windstream's proposal included references to past projects in which the firm [DELETED]. Memorandum of Law at 4. The agency, however, asserts that this deficiency nevertheless was reasonable because "nowhere in Windstream's

proposal does Windstream commit to providing TSP for the HHS WAN.”  
Memorandum of Law at 4-6.

Based on our review of the solicitation, Windstream’s proposal, and the evaluation record, we view both of the evaluated deficiencies as reasonable. Here, the SOW expressly provided that 99.995 percent service availability and TSP were requirements for the WAN. RFP at 61. Additionally, the solicitation required that proposals include “an explanation of the proposed technical approach,” and it stated that the agency would evaluate the degree to which a proposal provided “sufficient detail to demonstrate an understanding of the project.” Id. at 38, 58. Based on the detailed and technical criticism that the TEG documented regarding Windstream’s approach to [DELETED] service availability--together with Windstream’s failure to substantively rebut the assertions made in the agency’s report on this issue--we see no basis to question this evaluated deficiency. Similarly, regarding the TSP-related deficiency, we do not see--and Windstream has not shown--evidence that Windstream’s proposal explicitly committed the firm to providing TSP as part of its technical approach in this procurement. Accordingly, we see no basis to question either of the evaluated deficiencies.

Notably, Windstream’s comments on the agency report offer no substantive response to the agency’s arguments regarding the propriety of the technical evaluation. See Comments at 2-3. Rather, Windstream’s comments primarily argue that the deficiencies were unreasonable because the agency apparently did not identify either one in the initial, pre-corrective action evaluation. Id.

This argument provides no basis on which to sustain the protest. Here, the record shows that the agency’s evaluation was both reasonable and consistent with the terms of the solicitation. Accordingly, we decline to find the evaluation unreasonable solely because the agency may have reached different conclusions regarding Windstream’s proposal in its initial, pre-corrective action evaluation. See Computer Assocs. Int’l, Inc., B-292077.3 et al., Jan. 22, 2004, 2004 CPD ¶ 163 at 8-9; Andrulis Corp., B-281002.2, June 2, 1999, 99-1 CPD ¶ 105 at 3-5. Windstream’s protest claims regarding the agency’s technical evaluation are denied.

Next, Windstream argues that the agency conducted discussions with the firm and that the discussions were not meaningful. Protest at 6; Comments at 3-4. As stated above, during the agency’s reevaluation of proposals, the contracting officer communicated via e-mail and telephone with Windstream representatives regarding Windstream’s pricing. Contracting Officer’s Statement ¶ 11. Windstream argues that these exchanges constituted discussions and that the discussions were not meaningful because the agency did not inform Windstream of the two deficiencies assigned to its proposal. Protest at 6; Comments at 3-4.

In response to Windstream's claim, the agency asserts that the exchanges were clarifications rather than discussions and, therefore, there was no basis to raise the deficiencies with Windstream. Memorandum of Law at 8. In this regard, the contracting officer states that at the time of the exchanges, she informed Windstream that the agency was seeking only clarification and that Windstream would not be permitted to revise any aspect of its proposal. Contracting Officer's Statement ¶ 11. She further states that the purpose of the exchanges was to ensure that the agency was accurately calculating Windstream's total price. Id.

Clarifications are "limited exchanges" between an agency and offerors that may allow offerors to clarify certain aspects of proposals or to resolve minor or clerical errors. Federal Acquisition Regulation § 15.306(a). Discussions, on the other hand, occur when an agency indicates to an offeror significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to materially enhance the proposal's potential for award. Id. § 15.306(d)(3). The "acid test" for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to modify or revise its proposal. ERIE Strayer Co., B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 5; Colson Servs. Corp., B-310971 et al., Mar. 21, 2008, 2008 CPD ¶ 85 at 13. Where exchanges do not permit an offeror to revise or modify its proposal, but rather request that the offeror clarify and confirm what the offeror already has committed to do, the exchanges are clarifications, and not discussions. ERIE Strayer Co., supra; Envtl. Quality Mgmt., Inc., B-402247.2, Mar. 9, 2010, 2010 CPD ¶ 75 at 7.

Windstream argues that the exchanges here constituted discussions because during the exchanges, the firm submitted "new detailed pricing information that, in substance and form, revised Windstream's proposal." Comments at 3. For the reasons discussed below, we find that Windstream's submissions to the agency did not constitute proposal revisions.

In her e-mails to Windstream's representatives, the contracting officer asked Windstream twice to identify its total price. AR, Tab 7, Windstream/Agency Correspondence, at 22, 24. In response, Windstream submitted charts showing the firm's pricing in a format that was different from the format in the firm's proposal. Compare AR, Tab 7, Windstream/Agency Correspondence, at 5-8, 11-13, 15-18, with AR, Tab 5, Windstream Proposal at 101. However, a comparison of the charts to the proposal shows that while the format was different, the pricing elements were the same. Compare AR, Tab 7, Windstream/Agency Correspondence, at 5-8, 11-13, 15-18, with AR, Tab 5, Windstream Proposal at 101. E-mails sent by Windstream representatives to the contracting officer confirm this. Specifically, after an initial submission, one of Windstream's representatives informed the contracting officer that "**We did not change any of our prices.**" Tab 7, Windstream/Agency Correspondence, at 24 (emphasis in original). Additionally, at the conclusion of the exchanges, another Windstream representative wrote:

We appreciate the time and effort expend[ed] by [the agency] in clarifying our pricing proposal. We confirm that the pricing we reviewed [with the agency] is accurate and reflects the pricing we proposed on page 9 of our original proposal response.<sup>[3]</sup>

Tab 7, Windstream/Agency Correspondence, at 5 (emphasis added).

Thus, the record shows that Windstream did not revise its pricing. Further, the record, as discussed above, supports the agency's position that the exchanges were to facilitate the agency's understanding of how Windstream's proposal had presented its pricing so that the agency could ensure that it accurately calculated Windstream's total price. For these reasons, in our view, the exchanges here do not constitute discussions.<sup>4</sup> See Mil-Mar Century Corp., B-407644 et al., Jan. 17, 2013, 2013 CPD ¶ 39 at 13; Colson Servs. Corp., *supra*. Since the agency did not conduct discussions, there is no basis to sustain Windstream's claim that discussions were not meaningful.

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>3</sup> Page nine of Windstream's proposal was the only page of the proposal that included pricing. See AR, Tab 5, Windstream Proposal at 88-160.

<sup>4</sup> In its protest, even Windstream characterizes the exchanges as clarifications, stating: "Subsequent to the [initial] protest and corrective action, [the agency] and Windstream engaged in several clarification communications in which [the agency] asked several questions regarding Windstream's pricing, including asking for confirmation of Windstream's total (i.e. final) prices." Protest at 2.