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Decision

Matter of: Rotech Healthcare, Inc.

File: B-410203; B-410203.3

Date: November 5, 2014

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Jeanne S. Morris, Esq., Department of Veterans Affairs, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the degree of relevance of awardee's past performance information is denied where record demonstrates that the agency reasonably evaluated the awardee as having highly relevant past performance.
 2. Protest arguing that agency failed to conduct proper price realism analysis is denied where contracting officer established realism of awardee's proposed prices by comparing them to other offerors' prices and the government's estimate.
 3. Tradeoff between awardee's and protester's proposals was not required where they were equally rated for non-price evaluation factors and the awardee's proposal was lower-priced.
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DECISION

Rotech Healthcare, Inc., of Orlando, Florida, protests the award of a contract to Community Surgical Supply, of Toms River, New Jersey, under request for proposals (RFP) No. VA241-14-R-0003, issued by the Department of Veterans Affairs (VA) for home respiratory services. The protester challenges the agency's evaluation of proposals.

We deny the protest.

BACKGROUND

The RFP, issued on January 17, 2014, sought a contractor to provide home oxygen/respiratory equipment and related pulmonary-assessment services to VA beneficiaries in Veterans Integrated Service Network (VISN) 1.¹ The solicitation contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for a base and four option years to the offeror whose proposal represented the best value to the government.

Proposals were to be evaluated under technical, past performance, and price factors, with the two non-price factors of equal weight, and, when combined, of significantly greater weight than price. The technical factor was comprised of the following five subfactors: management approach, personnel qualifications, operation and quality assurance, contingency plan and security, and veteran preference.²

The agency received six proposals, evaluated them, and established a competitive range consisting of the protester and Community Surgical. After conducting discussions and giving both offerors the opportunity to revise their proposals, the VA assigned both proposals ratings of blue (excellent) for the technical factor and ratings of low risk for past performance.³ Community Surgical's evaluated price of \$46,311,990 was lower than Rotech's evaluated price of [deleted]. The source selection authority selected Community Surgical's proposal as representing the best value to the government and awarded it a contract on July 31.

By letter dated August 1, the VA notified Rotech of the award to Community Surgical. The protester timely requested a debriefing, which the agency provided on August 7. Rotech protested to our Office on August 11.

DISCUSSION

¹ VISN 1 encompasses the New England states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

² The subfactors are listed in descending order of importance.

³ The RFP defined a rating of blue as follows:

Proposal meets all solicitation requirements, demonstrates an excellent understanding of the requirements and offers approaches that offer significant advantage to the Government. Excellent in all respects. Advantages/strengths not offset by disadvantages/weaknesses. Very good probability of success with overall very low degree of risk in meeting Government requirements.

RFP at 91.

Rotech argues that it was unreasonable for the agency to assign Community Surgical a rating of blue for the technical factor, indicating that it met all solicitation requirements and demonstrated a very good probability of success and an overall very low degree of risk, given that Community Surgical did not, at the time of award, operate facilities or employ qualified personnel within the contract area. In this same vein, the protester asserts that the agency failed to consider the impracticability of Community Surgical's finding and opening the requisite facilities and obtaining the appropriate licenses and approvals within 45 days as prescribed in the solicitation. The protester further argues that a rating of blue was improper because the awardee's proposal failed to identify local management personnel and respiratory therapists to be assigned to the contract, as required by the terms of the RFP. The protester also challenges the agency's evaluation of the awardee's past performance, asserts that the agency failed to evaluate the awardee's price for realism, and argues that the best-value tradeoff decision was flawed.

The evaluation of technical proposals is a matter within the discretion of the contracting agency, since the agency is responsible for defining its needs and the best method for accommodating them. Visual Connections, LLC, B-407625, Dec. 31, 2012, 2013 CPD ¶ 18 at 3. In reviewing an agency's evaluation, we will not reevaluate technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. Id. at 4. A protester's mere disagreement with the agency's conclusions does not render the evaluation unreasonable. Id.

We find the protester's first argument to be without merit. The solicitation did not require a previously established presence in the coverage area, as Rotech's arguments would suggest. In fact, the solicitation did not expressly require offerors to identify their proposed facilities or identify all the personnel that would perform the requirements. Nor did it indicate that such facilities or personnel would be considered in the evaluation. Moreover, the record fails to show that the evaluators acted unreasonably by regarding Community Surgical's proposed management approach as low risk. In this regard, the record reflects that the awardee identified various facilities that it was considering throughout the New England area, that it planned to identify and secure 10 locations as part of its transition process, it identified specific individuals who would be involved with transition, and indicated that Community Surgical had initiated the process of obtaining licensure and insurance certification necessary to provide services in VISN 1. AR, Tab B.1, Community Surgical, Factor 1, Subfactors 1 and 4 files; Community Surgical Discussion Responses at 2. While Rotech contends that Community Surgical's plans are unrealistic, and that the company will not be in a position to begin

performance with 45 days of award,⁴ such disagreement with the agency's evaluation does not demonstrate that it was unreasonable. Ultimately, the question of whether the awardee will be able to perform in accordance with the terms of the solicitation is a matter of contract administration, which is not for consideration by this office. See Castle-Rose, Inc., B-407122, Nov. 13, 2012, 2012 CPD ¶ 317 at 3 n.4; 4 C.F.R. § 21.5(a) (2014).

In any event, as noted by the contracting officer, Community Surgical will have far longer than 45 days to locate and acquire appropriate facilities here because performance on the predecessor VISN 1 respiratory services contract, held by Rotech, has been extended through October 31, meaning that transition would not begin until the end of October. In other words, Rotech's argument that there is risk that Community Surgical will be unable to obtain appropriate facilities within 45 days is beside the point because, given the extension of the incumbent contract, Community Surgical will have longer than 45 days to prepare for the start of performance.

We also find that the record fails to support the protester's argument that Community Surgical failed to identify a local management team and the respiratory therapists to be assigned to the contract, as required by the terms of the RFP. With regard to local management, the RFP instructed offerors to identify the "key personnel/administrative staff (i.e., President, Vice President, Quality Manager, Regional/Area/Local Operations Managers, Customer Service Manager, Billing Manager, etc.)" who would work with VA on day-to-day operational issues, and to "[e]nsure that a qualified project manager and alternate point of contact for day-to-day operations is identified." RFP at 90. In its technical proposal, Community Surgical identified its president, vice president, general manager, operations manager/regional project manager, director of business development/primary point of contact, director of customer service, director of billing, director of quality control, human resources manager, and alternate project manager. The protester has not shown, and we fail to see, why this list did not constitute adequate identification of the awardee's local management team.

With regard to respiratory therapists, the RFP instructed offerors to furnish resumes and copies of certifications for the therapists whom they intended to employ to perform the services under this contract. Rotech contends that while Community Surgical furnished resumes and certifications in its proposal, the individuals identified were prospective hires, as opposed to current employees of the awardee;

⁴ The solicitation requires the selected contractor to provide services for beneficiaries presently using an oxygen delivery system "as soon as possible after award, but not to exceed 45 days." RFP at 6. Failure to perform as specified would result in forfeiture of payment to the current provider until the contractor is able to begin performance. Id.

as a result, the protester maintains, the agency should not have considered the awardee's plan for providing qualified therapists as low risk. In our view, the mere fact that the individuals identified are prospective hires does not demonstrate that the evaluators could not reasonably have viewed Community Surgical's plan for providing qualified therapists as low risk. That is, the level of risk associated with the awardee's plan to hire qualified personnel is a matter of agency judgment, and the mere fact that the protester disagrees with the agency's assessment does not demonstrate that the agency's judgment was unreasonable.

Next, Rotech argues that its proposal demonstrated very relevant past performance, whereas Community Surgical's proposal demonstrated, at best, semi-relevant past performance, and thus its proposal should have received a better past performance rating than Community Surgical's.

The evaluation of past performance, including assessments of relevance and significance of an offeror's performance history, is a matter of agency discretion that we will not disturb unless those assessments are unreasonable. Wisconsin Physicians Serv. Ins. Corp., B-401068.14, B-401068.15, Jan. 16, 2013, 2013 CPD ¶ 34 at 10.

The RFP instructed offerors to identify three or more federal, state, or private sector contracts of similar type, scope, size, and complexity to the effort here that were ongoing or completed within the past five years. Offerors were to identify the contract dates, dollar value, patients served, and scope of services provided; they were also to send a past performance questionnaire to each of the references identified. The solicitation advised that the agency was "especially interested in recent and relevant past performance of similar size and scope that relates to the requirement set forth in the statement of work and the degree of responsiveness to customer requirements." RFP at 92.

The solicitation included the following definitions of relevance:

VERY RELEVANT: Past/present performance effort involved essentially the same magnitude of effort and complexities this solicitation requires.

RELEVANT: Past/present performance effort involved much of the magnitude of effort and complexities this solicitation requires.

SOMEWHAT RELEVANT: Past/present performance contractual effort involved some of the magnitude of effort and complexities that this solicitation requires.

NOT RELEVANT: Past/present performance effort did not involve any of the magnitude of effort and complexities this solicitation requires.

Id. Considering the relevance of the prior contracts and the results of the past performance questionnaires, the agency assigned past performance ratings of very low, low, average, above average, high, or neutral risk.⁵

In its proposal, Community Surgical identified three ongoing contracts for the provision of home oxygen to veterans. The agency received completed past performance questionnaires pertaining to two of the three. The evaluators considered one of the two--a contract to provide home oxygen to approximately 4,000+ patients in VISN 10--to be very relevant, and the reference for that contract rated Community Surgical's performance as exceptional.⁶

More specifically, in evaluating the relevance of Community Surgical's VISN 10 contract, the agency noted the similarity of the contracts in terms of the magnitude of the areas covered and number of home oxygen patients serviced. In this regard,

⁵ As relevant to the protest here, the solicitation defined ratings of very low, low, and average risk as follows:

- Very Low Risk: Performance met all contract requirements and exceeded many to the Government's benefit. Problems, if any, were negligible and were resolved in a timely and highly effective manner. Performance was generally current and very relevant to relevant. Excellent probability of success with overall very low degree of risk in meeting Government's requirements.
- Low Risk: Performance met contract requirements. Good quality. Minor problems may have been identified however; contractor took satisfactory corrective action to resolve where appropriate. Performance was current and generally very relevant to relevant. Good probability of success with overall low degree of risk in meeting Government's requirements.
- Average Risk: Performance met most contract requirements. Adequate quality. Problems may have been identified however; contractor usually took adequate corrective action. Performance was current and generally very relevant to semi-relevant. OR Although performance exceeds expectations and was rated excellent to very good, the projects submitted were generally semi-relevant to the efforts required by this solicitation. Fair probability of success with an average degree or risk in meeting the government's requirements.

Id. at 93.

⁶ The other contract (for the Erie, Pennsylvania VA Medical Center) was far smaller (with less than 1,000 patients served), and the reference for it rated Community Surgical's performance as [deleted].

the agency took into account the fact that both contracts require the provision of home oxygen services across multiple states--VISN 1 covering 6 states and VISN 10 covering all of Ohio, and parts of Kentucky, Indiana and Pennsylvania. The agency further considered that the number of home oxygen patients serviced under the VISN 10 contract (currently more than 4,500 per month) was greater than the number estimated for the VISN 1 contract (approximately 3,275 per month). Contracting Officer's Statement at 5.

Rotech, on the other hand, identified four ongoing contracts, and completed questionnaires were received for three of the four. The evaluators considered one of the contracts--for the provision of home oxygen services to approximately 9,500 patients in VISN 19--to be very relevant, and the reference for that contract rated the protester's performance as [deleted].⁷ Based on the above information, the evaluators assigned both proposals overall past performance ratings of low risk.

Rotech argues that it was unreasonable for the evaluators to identify Community Surgical's VISN 10 contract as very relevant because (1) the dollar value of the VISN contract is much lower than the dollar value of the contract to be awarded here, and (2) the number of patients served under the VISN 10 contract is not comparable to the number of patients to be served under the contract here. In the latter connection, the protester notes that the total number of patients to be served under the contract here exceeds 12,000 since, in addition to approximately 3,200 home oxygen patients, the solicitation provides for services to an estimated 9,000+ CPAP/BiPAP/ASV/APAP care patients.⁸

In response to the first argument, the agency notes that the VISN 1 contract, as initially awarded may have been smaller, however, the requirements grew over the years and for the last several years, the contracts are similar in size, scope and complexity. Supplemental Agency Report at 2. In this regard, the intervenor confirms that the contract initially awarded had a lower estimated dollar value than the contract to be awarded here (i.e., \$13 million vs. \$46 million), however, the value of the contract has grown over the period of performance such that the value of the VISN 10 contract over the past four years is well over \$30 million with annual

⁷ The other two Rotech contracts for which the agency received performance questionnaires were (1) a far smaller contract (i.e., serving less than 500 patients) for the Coatesville, Pennsylvania VA Medical Center, on which Rotech's performance was rated [deleted], and (2) a contract for standard durable medical equipment, home oxygen, and services with [deleted], on which Rotech's performance was rated [deleted].

⁸ CPAP stands for Continuous Positive Airway Pressure; BiPAP, for Bi-Level Positive Airway Pressure; ASV, for Adaptive Servo-Ventilation; and APAP, for Alternating Positive Airway Pressure.

receipts of \$7-8 million which is “on par with VISN 1 from a dollar perspective.” Intervenor’s Comments, Sept. 22, 2014, at 15.

Regarding Rotech’s arguments concerning the relative difference in the number of patients serviced under the two contracts, there is no dispute that VISN 10 requires services to more home oxygen patients than the estimated number of patients under VISN 1. While the protester cites the additional PAP patients under the VISN 1 contract, the intervenor points out that the level of services required for these patients is much lower than that required for home oxygen patients since “[u]nlike the oxygen delivery work, the CPAP work does not require regular equipment servicing and in-person deliveries, and can largely be handled simply through providing periodic replacement supplies by mail after an initial in-home set up appointment.” Id. at 15 n.6. Based on our review of the information in the record, we are not persuaded that the agency acted unreasonably by evaluating Community Surgical’s VISN 10 contract as very relevant.

Even assuming, for the sake of argument, that Rotech had more highly relevant past performance than Community Surgical, this would not dictate the conclusion that Rotech deserved a more favorable past performance rating than the awardee. The rating takes into account not simply the relevance of prior contracts, but also the quality of performance, and Community Surgical’s quality of performance was rated more favorably than the protester’s.⁹

Next, Rotech argues that the VA failed to evaluate the realism of Community Surgical’s proposed prices, as required by the RFP, and that if the agency had performed a proper price realism analysis, it would have concluded that Community Surgical’s pricing was unrealistically low. In response, the VA maintains that the solicitation gave the contracting officer the discretion to perform, but did not require, a price realism analysis, and that, in any event, the contracting officer reviewed Community Surgical’s proposed prices and found them to be realistic.

With regard to the evaluation of price, the RFP provided in relevant part as follows:

Unrealistically low proposed prices may be grounds for eliminating a proposal from competition either on the basis that either the offeror

⁹ Rotech also argues that in evaluating Community Surgical’s past performance, the evaluators should have considered that in 2011, Community Surgical agree to pay approximately \$60,000 to the State of New Jersey to resolve an investigation pertaining to its billing practices. The record fails to establish that the evaluators were aware of this information, or that it pertained to a contract relevant to the contract here. Thus, we fail to see that it was improper for the evaluators to fail to consider the information.

does not understand the requirement or the offeror has made an unrealistic offer.

RFP at 93.¹⁰ We have previously held that where a solicitation advises offerors that unrealistically low prices may serve as a basis for rejection of a proposal, it is implicit that the agency will consider whether offerors' prices are in fact unrealistic. Esegur-Empresa de Segurança, SA, B-407947, B-407947.2, Apr. 26, 2013, 2013 CPD ¶ 109 at 4. Thus, we agree with the protester that the RFP here contemplated a realism analysis of offerors' proposed prices.

We agree with the agency, however, that the analysis performed by the contracting officer was adequate to establish the realism of Community Surgical's price. In this connection, the contracting officer notes that the awardee's overall price was fourth highest among the six offerors (i.e., two of the six offerors proposed prices lower than Community Surgical's). She further notes that Community Surgical's overall price was comparable to the government estimate. Supplement to Contracting Officer's Narrative, Sept. 29, 2014, at 3. Comparison of an offeror's prices to other prices received under the solicitation and to the government estimate are among the price analysis techniques that may be used to establish price realism. AMEC Earth & Envtl., Inc., B-404959.2, July 12, 2011, 2011 CPD ¶ 168 at 8. While the protester argues that the prices of the two lowest-priced proposals should not be considered valid points of comparison since these proposals were "essentially deemed unrealistic" by the agency for failing to display an understanding of the Solicitation's requirements, Protest at 21, there is no evidence in the record that the agency regarded these proposals as unrealistic. Further, while Rotech disputes the contracting officer's assertion that Community Surgical's price was comparable to the government estimate, arguing that the former was more than 10 percent lower than the latter, we have no basis to conclude that it was per se unreasonable for the contracting officer to have regarded the two prices as comparable.

Finally, Rotech argues that the VA failed to document adequately its rationale for selecting Community Surgical's proposal as representing the best value to the government. The protester notes in this connection that we have previously held as follows:

A tradeoff analysis that fails to furnish any explanation as to why a higher-rated proposal does not in fact offer technical advantages or why those technical advantages are not worth a price premium does not satisfy the requirement for a documented tradeoff rationale, particularly where . . . price is secondary to technical considerations under the RFP's evaluation scheme.

¹⁰ Also of relevance, the RFP provided that the source selection evaluation board would evaluate pricing "only as to whether it is realistic to the effort." Id.

Blue Rock Structures, Inc., B-293134, Feb. 6, 2004, 2004 CPD ¶ 63 at 6.

The protester's argument is misdirected. While it is true that where under an RFP providing for award on a best value basis, an agency selects a lower-rated, lower-priced proposal over a higher-rated, higher-priced one, the agency needs to provide an explanation for why any technical advantages associated with the higher-rated proposal are not worth the price premium, a documented tradeoff analysis is not required where, as here, the lower-priced proposal is not lower rated technically. See General Dynamics-Ordnance & Tactical Sys., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 at 12.

The protest is denied.

Susan A. Poling
General Counsel