



# Decision

**Matter of:** MFL Consulting

**File:** B-417939; B-417939.2

**Date:** December 3, 2019

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Luis Munoz-Fernandez for the protester.  
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Sheryl Rakestraw, Esq., and Dana-Marie Akpan, Esq., Department of the Interior, for the agency.  
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest challenging agency's evaluation of proposals and adequacy of discussions is dismissed in part, and denied in part, where several of the protester's allegations are untimely; one of its allegations fails to demonstrate prejudice; and there is nothing in the record to show that the agency misled the protester during discussions, such that it was required to reopen discussions.

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## DECISION

MFL Consulting, of Washington, D.C., protests the award of a contract to Northport Affiliates, LLC, of Alexandria, Virginia, under request for proposals (RFP) No. 140P2119R0012, issued by the Department of the Interior, National Park Service (NPS), for insurance consultation services. MFL argues that the agency misevaluated proposals, and failed to engage in adequate discussions.

We dismiss the protest in part, and deny it in part.

The RFP contemplates the award, on a best-value tradeoff basis, of an indefinite-delivery, indefinite-quantity type contract for a base year and four 1-year options to provide insurance consulting services. Essentially, the successful contractor will be required to provide the agency with expertise that allows the agency to determine its insurance-related needs and the cost associated with those needs. RFP Attach.1, Statement of Work. The RFP contemplates that the agency will negotiate individual task orders on an as-needed basis throughout the contract's period of performance. RFP, Amend. No. 0003, at 10. Proposals would be evaluated considering price and

several non-price considerations. RFP, Amend. No. 0003, at 44-45.<sup>1</sup> The RFP included three non-price evaluation factors, listed in descending order of importance: technical experience, management approach and past performance. RFP Amend. No. 0003, at 44. The RFP further advised that the non-price considerations were collectively approximately equal in importance to price. RFP, Amend. No. 0003, at 45. The agency's evaluation under the non-price factors is not at issue in this protest.

The RFP included several price-related provisions that are the subject of the protest (we discuss the RFP's price-related evaluation considerations in detail below). In preparing their respective price proposals, offerors were required to complete an excel spreadsheet workbook. RFP, Amend. No. 0003, Attach. 1. The workbook included seven spreadsheets that had to be completed. The first spreadsheet was to include each offeror's proposed price to perform a sample task order that was itself comprised of four discrete subtasks. Id., Worksheet 1. This worksheet included spaces for the offeror to provide labor categories, the number of hours for each labor category, and an hourly rate for each labor category, along with spaces to provide extended pricing calculated by multiplying the hourly rates by the number of hours proposed, as well as overall pricing per subtask that included the cost of labor, along with other direct costs.<sup>2</sup> There also was a line on this worksheet for the offerors to insert a grand total, which included the price for each of the four subtasks.

The next five worksheets were to include the offerors' hourly rates for all labor categories proposed, with each of the worksheets representing one of the five years of contract performance. RFP, Amend. No. 0003, Attach. 1, Worksheets 2-6. Firms were required to provide burdened hourly rates for each labor category proposed, but there was no information--either provided by the agency or required of the offerors-- relating to the number of hours that would be performed during any of the contract's periods of performance. Id. Firms were free to propose any labor categories that they wished to include in their proposals and were not limited, either to as to the particular labor categories proposed, or as to the number of labor categories proposed. Id.

Finally, the workbook included a seventh worksheet that required offerors to provide information about the labor categories that had been proposed. RFP, Amend. No.

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<sup>1</sup> The agency amended the evaluation criteria after issuing the original solicitation. All references to the evaluation criteria are to the criteria as stated in amendment No. 0003 to the solicitation.

<sup>2</sup> The sample task order itself (as opposed to the excel worksheet) included an estimated number of hours to perform each of the four tasks. RFP, Amend. No. 0003, Sample Task Order at 5-7; Amend No. 0004, Sample Task Order at 5-7. Firms were advised that they were required to provide their own number of hours for each labor category proposed to perform the sample task, and that the number of hours specified in the sample task document were for reference only. RFP, Amend. No. 0003, Offeror Questions and Answers, Question No. 23; Amend. No. 0004, Question No. 31.

0003, Attach. 1, Worksheet 7. In that worksheet, offerors were required to provide the title of each labor category, the minimum level of education and years of experience associated with each labor category, and a description of the role of each labor category in relation to the solicitation's statement of the scope of services to be provided. Id.

In response to the RFP, the agency received a number of proposals, including those from the protester and the awardee. The agency evaluated proposals; established a competitive range that included the protester and awardee; engaged in discussions with the competitive range offerors; and solicited, obtained and evaluated revised proposals. The agency ultimately concluded that, while the protester had submitted a proposal that was found to be technically superior to that submitted by the awardee, award to the protester was not merited based on the price premium associated with its proposal. Agency Report (AR) exh. 13, Source Selection Decision Document, at 12. In this latter connection, the record shows that, in making its source selection decision, the agency relied on the prices proposed by the offerors for the sample task order that had been included in the RFP. The price proposed by Northport for the sample task order was \$62,073 compared to MFL's proposed price of \$174,622. Id. at 13.

MFL argues that the agency erred in making award based on the prices proposed by the offerors for the sample task order. According to the protester, the RFP required the agency to calculate total proposed price by adding the price proposed for the base year to the prices proposed for each option year. MFL also maintains that it was unreasonable for the agency to use the offerors' proposed sample task order prices as the basis for award because the sample task order is not representative of all of the services that might be required during performance.

We dismiss this aspect of MFL's protest as untimely because we conclude that the RFP as written was patently ambiguous, and MFL therefore was required to protest before the deadline for submitting proposals. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), require that protests based on solicitation improprieties that are apparent prior to the deadline for submission of proposals be filed prior to the time set for submission of proposals. A solicitation impropriety is apparent--that is, it presents a patent ambiguity--where the solicitation contains obvious, gross or glaring errors, for example, where solicitation provisions are inconsistent on their face. AOC Connect, LLC, B-416658, B-416658.2, Nov. 8, 2018, 2018 CPD ¶ 384 at 6, aff'd., AOC Connect, LLC--Recon., B-416658.3, Feb. 12, 2019, 2019 CPD ¶ 79.

The RFP included two provisions relating to the agency's evaluation of prices, one relating to the sample task order price, and a second that referred generically to the agency's evaluation of prices for the base and option periods. The provision relating to the evaluation of the sample task order pricing provided as follows:

Price analysis will be performed on the Sample Task Order price proposal. Price reasonableness will be determined considering other competitive prices received, comparison to the Independent Government Estimate and utilization of other price analysis techniques.

RFP, Amend. No. 0003, at 45.

The second, more generic solicitation clause provided as follows:

*Options.* The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

RFP, Amend. No. 0003, at 45.

MFL relies on the second provision in support of its position that the RFP required price to be evaluated based on the prices for the base and option years. While we agree with MFL that the RFP as written is not a model of clarity, we nonetheless conclude that, when read as a whole, the solicitation is ambiguous.

First, and perhaps most significantly, the RFP does not provide any means for calculating total prices for the base and option years. As discussed above, offerors were required to provide loaded hourly rates for each labor category proposed. However, the RFP did not provide any estimated quantities for each of the labor categories, so there would be no basis for calculating extended prices for purposes of arriving at a total for each of the contract's contemplated years of performance. In the absence of a meaningful way to calculate total price for any given year, there is no reasonable basis for our Office to conclude that the solicitation required the agency to evaluate proposed prices for the base and option years.<sup>3</sup>

The record also shows that, subsequent to the time the agency issued the base and option price evaluation language in amendment No. 0003 relied on by the protester, the agency issued another amendment to the RFP that provided questions and answers to the offerors. That amendment includes the following question and answer:

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<sup>3</sup> The protester argues that the agency should have used estimated quantities generated by the agency--but not disclosed to the offerors--to arrive at the total price for each contract year. In support of its position, MFL claims that the agency has done this in the past. Whether or not the agency may have used such a calculation in the past, there is nothing in the current RFP to suggest that it would perform such a calculation here. Moreover, inasmuch as each acquisition stands on its own, the fact that the agency may have made such a calculation during a prior acquisition has no bearing on the propriety of its conduct here. Tyonek Global Services, LLC; Depot Aviation Solutions, LLC, B-417188.2 et al., Oct 4, 2019, 2019 CPD ¶ 354 at 17-18 n.12.

Q.: A sentence in the first page of the Evaluation Factors, section 1.1 (Importance of Price), tells us to “State if the mock task order pricing will be used for price evaluation purposes.” Can NPS tell us the intent of this instruction?

A.: The evaluation factors in Section M have been updated. The mock task order pricing will be used for price evaluation purposes.

RFP Amend. No. 0004, Question/Answer 24 (emphasis added). The record therefore shows that after issuing the language relied on by the protester, the agency issued a statement that was directly inconsistent with that language, namely, that the agency would use the mock (sample) task order for price evaluation purposes. The record therefore shows that the RFP as issued was patently ambiguous with respect to how the agency would evaluate price. Under the circumstances, MFL was required to protest the terms of the RFP before the deadline for submitting proposals. Since MFL did not raise this aspect of its protest until after the deadline for submitting proposals, we find the allegation untimely and dismiss it without consideration on the merits.

We also dismiss MFL’s allegation that the sample task order was not representative of the services that are to be performed under the contract. The requirements of the sample task order were known to MFL at all times prior to the deadline for submitting proposals, and to the extent that MFL thought that it was not representative of the services to be provided under the contract--and therefore did not represent a reasonable basis for evaluating the offerors’ prices--MFL was required to protest prior to the deadline for submission of proposals. We therefore dismiss this aspect of MFL’s protest as untimely without consideration of the issue on the merits. 4 C.F.R. § 21.2(a)(1).

MFL next argues that the agency erred in finding the price offered by Northport to be reasonable. We dismiss this aspect of MFL’s protest based on a lack of prejudice. Prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even if the agency’s actions are arguably improper. Olympus America, Inc., B-414944, Oct. 19, 2017, 2018 CPD ¶ 151 at 3-4.

The purpose of a price reasonableness evaluation is to determine whether an offered price is too high. SaxmanOne, LLC, B-414748, B-414748.3, Aug. 22, 2017, 2017 CPD ¶ 264 at 6. As noted above, the record shows that Northport’s evaluated price was \$62,073, while MFL’s was \$174,622, nearly three times higher than Northport’s evaluated price. To the extent the agency acted unreasonably in finding the Northport price reasonable, it necessarily follows that MFL was not prejudiced because its price also should have been found unreasonable. We therefore dismiss this aspect of MFL’s protest for failing to demonstrate prejudice.<sup>4</sup>

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<sup>4</sup> Although not entirely evident from its pleadings, to the extent that MFL may be arguing that the agency erred in failing to find the price offered by Northport too low, this also  
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Finally, MFL argues that the agency failed to reopen discussions with it after making changes to the independent government estimate (IGE). We deny this aspect of its protest.

The record shows that, during discussions, the agency asked MFL about its pricing in relation to the IGE, noting only that its proposed prices differed from the IGE. For example, the agency asked MFL the following discussion question: “The prices proposed differ from the Independent Government Estimate (IGE). Additionally, it appears that all labor categories are proposed at the same rate. Please confirm or revise the proposed pricing for all labor categories.” Agency Notification of Inclusion in Competitive Range at 1. The record shows that, after engaging in discussions with the offerors, the agency reconsidered the accuracy of the IGE and revised it after concluding that there was other, more accurate information upon which to base the IGE.

While the agency made changes to the IGE after engaging in discussions, there is no basis for our Office to find that the agency was obliged to reopen discussions with MFL in the area of price. As noted, the agency did not frame its discussion questions to MFL in terms of its prices being either higher--or lower--than the IGE; the government noted only that MFL’s prices “differed” from the IGE. Since the agency provided MFL no information concerning how its prices differed in relation to the IGE, there could be no possibility that MFL was misled by the agency either to raise or lower its prices based on information provided by the agency about the relationship of MFL’s prices to the government estimate. It follows that the agency was under no obligation to reopen discussions with MFL after adjusting the IGE.

The protest is dismissed in part, and denied in part.

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would not provide a basis for our Office to object to the agency’s actions. Questions concerning whether a firm’s proposed price is too low relate to an agency’s evaluation of prices for realism, not reasonableness. In a fixed-price contract setting, agencies are not required to evaluate proposed prices for realism unless expressly called for in the solicitation. SaxmanOne, LLC, supra. Nothing in the solicitation here required the agency to evaluate proposed prices for realism.