



## Decision

**Matter of:** HSV Consulting

**File:** B-422013

**Date:** November 21, 2023

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Henrick Hollesen for the protester.  
Philip Rappmund, Esq., Department of the Navy, for the agency.  
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### DIGEST

Protest arguing that awardee's quotation was noncompliant with a solicitation requirement is denied where the agency reasonably waived the requirement and the protester was not prejudiced as a result of the waiver.

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### DECISION

HSV Consulting, of Rochester, New York, protests the terms of, and the award of a contract under,<sup>1</sup> request for quotations (RFQ) No. N0018923Q0418, issued by the Department of the Navy, Naval Supply Systems Command, for ship piloting and maneuvering consulting services in support of Littoral Combat Ship Squadron Two (LCSRON-2). HSV contends that the solicitation terms are unreasonable and reflect bias, and also that the award was unreasonable as a result of the awardee's lack of understanding of the contract requirements and failure to comply with a mandatory solicitation requirement.

We deny the protest.

### BACKGROUND

The solicitation was issued on July 27, 2023, seeking commercial services required by LCSRON-2 to assist with the navigation of the USS Marinette, a littoral combat ship (LCS), through the Great Lakes. Agency Report (AR), Tab 1, RFQ at 8. The solicitation sought to award a fixed-price contract pursuant to the procedures of Federal Acquisition

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<sup>1</sup> The contract was awarded to Seasmoke Marine, LLC, of Traverse City, Michigan.

Regulation (FAR) part 12, Acquisition of Commercial Products and Commercial Services, and FAR part 13, Simplified Acquisition Procedures. *Id.* at 3. The Navy required these services for two missions to be conducted by the USS Marinette in October of 2023. *Id.* at 8.

The solicitation provided for a two-phase consideration of quotations using the following evaluation factors: technical certifications, past performance, and price. *Id.* at 3-4. In phase 1, vendors’ quotations would be evaluated under the technical certifications factor on an acceptable/unacceptable basis. *Id.* at 5. Quotations that received an unacceptable rating under this factor would “no longer be considered for award and no further evaluation [would] be conducted.” *Id.*

The solicitation stated that price was “not the most important evaluation factor” but would increase in importance “with the degree of equality of the quotes in relation to the other factors on which selection is to be based.” *Id.* at 6. Ultimately, the agency would award a contract to “the vendor whose quote represents the best value to the [g]overnment, considering price and other factors when compared to other vendors.” *Id.* at 7.

As relevant here, the solicitation provided that quotations would be evaluated under the technical certifications factor to assess each vendor’s “ability to demonstrate experience navigating the LCS Freedom Variant, or identical waterjet driven ships, in the Great Lakes while completing at least one transit of the associated locks and canals between Marinette, [Wisconsin] and Quebec City, Quebec within the last five (5) years, and prior completion of the Navy’s sponsored LCS course.” *Id.* at 5. In addition, the solicitation required vendors to “demonstrate that they have completed at least two transits of the associated locks and canals between Marinette, [Wisconsin], Escanaba, [Michigan] and Quebec City, Quebec within the last five (5) years.” *Id.* at 3.

In response to the solicitation, the agency received two timely quotations, from HSV and Seasmoke respectively. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 1. Following the receipt of quotations, the Navy evaluated vendors under the non-price factors as follows:

	<b>HSV</b>	<b>Seasmoke</b>
<b>Technical Certifications</b>	Unacceptable	Acceptable
<b>Past Performance</b>	Not Evaluated	Relevant/Substantial Confidence <sup>2</sup>

<sup>2</sup> In its report responding to the protest, the agency contends that there was a documentation error in the evaluation record with the contracting officer intending to assign Seasmoke a rating of very relevant rather than relevant under the past performance factor. *Id.* at 5 n.2. For purposes of this decision, the precise rating assigned to Seasmoke’s past performance is of no significance since Seasmoke submitted the only awardable quotation.

*Id.* at 4.

As HSV's quotation was found to be technically unacceptable, Seasmoke was the only remaining acceptable vendor. *Id.* at 6. Accordingly, the agency determined that Seasmoke's quotation represented the best value to the government and awarded it the contract. *Id.*

This protest followed.

## DISCUSSION

HSV raises various challenges to the solicitation requirements and to the agency's evaluation and award to Seasmoke. While we do not address every argument raised by the protester, we have reviewed each one, and find no basis to sustain the protest.

With respect to HSV's challenges to the solicitation terms, the protester objects to the requirement for vendors to have completed at least two transits of the associated locks and canals between Marinette, Wisconsin, Escanaba, Michigan, and Quebec City, Quebec within the last five years. See RFQ at 3. In this regard, the protester contends that this is a new requirement which "raises concerns of bias in the evaluation." Comments at 1. The protester also argues that the "inclusion of pilotage or transits requirements is unnecessary for regulatory compliance, especially for a US Navy vessel." Protest at 1.<sup>3</sup>

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of providing parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. *Per Aarsleff A/S et al.*, B-410782 *et al.*, Feb. 18, 2015, 2015 CPD ¶ 86 at 10-11. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of quotations must be filed before that time. Bid Protest Regulation, 4 C.F.R. § 21.2(a)(1).

Here, the deadline for the submission of quotations was August 14, RFQ at 1, yet the protester did not raise these challenges until after the award to Seasmoke on August 24. Since HSV failed to challenge these alleged improprieties prior to the

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<sup>3</sup> The protester further asserts that the Navy should have evaluated HSV's past performance despite the agency's assessment of HSV's quotation as unacceptable under the technical certifications factor. Comments at 1. We find this protest ground to be a challenge to the RFQ evaluation criteria, however, since the solicitation clearly specified that quotations that were rated unacceptable under the technical certifications factor would not be further evaluated. See RFQ at 4. As with HSV's other solicitation challenges, we dismiss this argument as untimely since it was first raised after the closing date for the receipt of quotations. See 4 C.F.R. § 21.2(a)(1).

solicitation's closing date, we find these protest grounds to be untimely under our Bid Protest Regulations and dismiss them. See 4 C.F.R. § 21.2(a)(1).

HSV also challenges what it asserts is Seasmoke's "excessive pricing." Protest at 2. In this regard, the protester contends that Seasmoke "consistently bids significantly over [the agency's] budget (20-150 [percent])," and asserts that HSV has been used to "incentivize" Seasmoke to lower its pricing, which "raises concerns of nepotism and questions the integrity of the bidding process." *Id.* at 2.

Government officials are presumed to act in good faith, and a protester's contention that contracting officials are motivated by bad faith must be supported by convincing proof. *BTAS, Inc.; Innovative Techs., Inc.*, B-415810.4 *et al.*, Oct. 3, 2018, 2018 CPD ¶ 346 at 10 n.11. Here, apart from HSV's unsupported argument, there is no evidence of bad faith. Its claim amounts to nothing more than unsubstantiated allegations and does not meet our standard for demonstrating bad faith or bias by a procuring agency. Consequently, it is dismissed. *MLS-Multinational Logistic Servs., Ltd.; MLSUSA Corp.*, B-418477.3, B-418477.4, Sept. 28, 2020, 2020 CPD ¶ 304 at 6.<sup>4</sup>

The protester also asserts that it has "credible information suggesting that [Seasmoke] lacks a fundamental understanding of waterjet systems, despite their extensive history in this field." Protest at 2. HSV contends that this "deficiency impacts their ability to fulfill the contract's requirement for crew and officer training on these systems." *Id.* The protester does not provide any further explanation for what "credible information" it is referring to.<sup>5</sup>

Our Office generally does not consider challenges to an agency's affirmative responsibility determination because the determination that a vendor is capable of performing a contract is largely committed to the contracting officer's discretion. 4 C.F.R. § 21.5(c); *Veterans Care Med. Equip., LLC*, B-420726, B-420726.2, July 29,

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<sup>4</sup> In its comments on the agency report, the protester raises, for the first time, additional price evaluation challenges, alleging, for example, that the agency's price reasonableness determination was improper since "a pilot service is available around the clock, offering more cost-effective fees than those quoted by [Seasmoke]." Comments at 1. Our Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues, where, as here, the protester raises arguments for the first time in its comments that could have, and should have, been made in its protest. 4 C.F.R. § 21.2(a)(2); *JAVIS Automation & Eng'g, Inc.*, B-290434, B-290434.2, Aug. 5, 2002, 2002 CPD ¶ 140 at 7 n.11 (piecemeal presentation of protest grounds, raised for the first time in comments, are untimely).

<sup>5</sup> The protester generally requests that our Office investigate its protest claims further. Protest at 2. However, our Office does not conduct independent investigations as part of our bid protest function; our decisions are based on our review of the written record which consists of the submissions of the parties. See *MIDDCO, Inc.--Recon.*, B-235587.2, Oct. 31, 1989, 89-2 CPD ¶ 402.

2022, 2022 CPD ¶ 206 at 8. With the exception of certain circumstances not alleged here, we will not second guess the contracting officer's subjective business judgment that a vendor is capable of contract performance. See *Veterans Care Med. Equip., LLC*, *supra* at 9. Accordingly, we see no basis to further consider the protester's challenge of the agency's affirmative responsibility determination.

Last, the protester argues that Seasmoke failed to complete a Navy-sponsored LCS course required by the solicitation. In this regard, the RFQ required vendors to "provide proof of completion of a U.S. Navy sponsored LCS training course," and stated that vendors' technical certifications would be evaluated to determine if this course had been completed. RFQ at 3, 5.

The agency concedes that Seasmoke's quotation does not show compliance with the course requirement, but asserts that the Navy chose to waive this requirement because it was "deemed 'irrelevant' to performing this contract." COS/MOL at 9; AR, Tab 7, Decl. of Commanding Officer at 2. In this regard, the commanding officer of the USS *Marinette* explained that the requirement had not been requested by the USS *Marinette* and instead had been inadvertently included in the solicitation by the contracting office. AR, Tab 7, Decl. of Commanding Officer at 2. The commanding officer further represented that the agency did not intend to evaluate the requirement because "completion of a course is not a substitute for actual LCS experience through the planned transit route and various locks/canals." *Id.* The agency states that neither quotation was therefore evaluated for compliance with the requirement.<sup>6</sup>

An agency may waive or relax a material solicitation requirement when the award will meet the agency's actual needs without prejudice to the other offerors. *Engility Servs., LLC*, B-416588.3, B-416588.4, Mar. 20, 2020, 2020 CPD ¶ 110 at 8. Unfair competitive prejudice from a waiver or relaxation of the terms and conditions of the solicitation for one vendor exists where the protester would have altered its proposal to its competitive advantage, had it been given the opportunity to respond to the altered requirements. *Id.* Prejudice does not simply mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful. *Glem Gas S.p.A.*, B-414179, Feb. 23, 2017, 2017 CPD ¶ 60 at 4.

Here, the Navy contends that HSV was not prejudiced by the waiver of the training course requirement because the protester has not explained how it would have altered its quotation had the solicitation not included the requirement. COS/MOL at 10. In this regard, the agency notes that the protester's quotation "was entirely reliant upon the resume and experience" of its proposed mission consultant, and this proposed

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<sup>6</sup> The agency contends that, arguably, HSV's quotation also failed to comply with the requirement to demonstrate completion of a LCS training course, see AR, Tab 7, Decl. of Commanding Officer at 2, while HSV responds that its personnel have experience instructing LCS courses, Comments at 2. Since we find that the agency reasonably waived the training course requirement and find that HSV was not prejudiced by this waiver, we need not resolve this question.

consultant would not have changed regardless of whether the course requirement was removed. *Id.*

The protester does not respond to this contention or otherwise explain how it would have altered its quotation had the solicitation not included the training course requirement. On this record, we find no basis to conclude that HSV was prejudiced as a result of the agency's waiver of the requirement.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel