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

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## **Decision**

**Matter of:** Medical Staffing Joint Venture, LLC

**File:** B-400705.2; B-400705.3

**Date:** March 13, 2009

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Capt. Pia W. Rogers, 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.

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### **DIGEST**

Protester's challenge to an agency's decision to exclude the protester's acceptable proposal from the competitive range is denied where the contemporaneous record shows that, consistent with the requirements in the Federal Acquisition Regulation, the proposal was evaluated on all of the solicitation's evaluation criteria, including price, and shows that the agency considered the protester's relative price.

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### **DECISION**

Medical Staffing Joint Venture, LLC of Honolulu, Hawaii (a joint venture of Kuhana Associates, LLC and Spectrum Healthcare Resources, Inc.), protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. W81K04-08-R-0013, issued by the United States Army Medical Command, Health Care Acquiring Activity at Fort Sam Houston, Texas, for dental services at various United States Army Treatment Facilities in three separate regions--the North Atlantic Region, the South East Region and the Great Plains & Western Region. The protester also contends that the agency failed to take adequate corrective action in response to a prior protest.

We deny the protest.

## BACKGROUND

The RFP, issued on April 10, 2008 as a small business set-aside, contemplates the award of an indefinite delivery/indefinite quantity (ID/IQ) contract for a base period with four 1-year option periods. The agency anticipates awarding three contracts, one for each region. Offerors were advised to submit a complete proposal for each of the regions for which they would like to be considered.

The RFP provided that award would be made on a best value basis, and identified the following evaluation factors and subfactors:

- Factor 1: Technical Capability
  - Subfactor 1A: Contractor Quality Control Plan
  - Subfactor 1B: Management Capabilities
  - Subfactor 1C: Recruitment
  - Subfactor 1D: Retention
  - Subfactor 1E: Relevant Corporate Experience
  - Subfactor 1F: Key Personnel
- Factor 2: Past and Present Performance
- Factor 3: Financial Capability
- Factor 4: Price/Cost

RFP at 124-25.

The RFP explained that all four factors would be evaluated, but only the first two--technical capability, and past and present performance--would be scored. RFP at 124-26. With respect to weight, the RFP stated that all subfactors within the technical capability factor were of equal importance and that the technical capability factor was significantly more important than the other evaluation factors. RFP at 125. The RFP also stated that the technical capability, past and present performance, and financial capability factors were more important than the price/cost factor. Id.

The RFP advised offerors that the agency contemplated making award without discussions, but that if discussions became necessary; a competitive range would be established based on the evaluated price and other evaluation factors in the RFP. Finally, the RFP stated that the competitive range would be limited to permit an efficient competition among the most highly rated proposals. RFP at 122.

By the closing time for receipt of proposals, 14 proposals were received for Region 1, 13 proposals were received for Region 2, and 12 proposals were received for Region 3; all of them were evaluated by a source selection evaluation board (SSEB). The protester submitted a proposal for each of the three regions. The protester's proposal(s) offered the lowest price for each region, and its proposal(s) were rated acceptable overall for technical capability with a neutral/high risk rating for past and

present performance. Given these results, the SSEB initially concluded that although Medical Staffing's proposal contained the lowest price--and was priced lower than the independent government estimate--the proposal was not one of the most highly rated because: (1) it was only rated acceptable under the technical capability evaluation factor; (2) it was missing key elements in articulating sufficient corporate experience, and in articulating a plan for meeting the proposed mission; and, (3) it was assessed as presenting high performance risk. Therefore the Medical Staffing's proposal was not included in the competitive range for any of the regions. Agency Report (AR) Tab 22, at 13.

The only offerors included in the competitive range were those whose proposal received either an overall technical rating of "excellent" or "good." Six offerors' proposals were included in the competitive range for Region 1, five offerors' proposals were included for Region 2, and four offerors' proposals were included for Region 3. *Id.* at 12-13. By letter dated September 17, 2008, the contracting officer notified Medical Staffing that while its proposal was technically acceptable, it was not among the most highly rated and therefore was excluded from the competitive range. Following a debriefing, Medical Staffing filed an initial protest with our Office on October 7, 2008, challenging the evaluation of its proposal and its proposal's exclusion from the competitive range.

In response, the agency advised our Office, by letter dated November 5, 2008, that it would take corrective action, review its evaluation and competitive range determination, and make a new determination. As a result, we dismissed the protest on November 17, 2008.

During the reevaluation undertaken as corrective action in response to Medical Staffing's initial protest, the agency changed the protester's past performance rating from neutral/high risk to acceptable/low risk. However, the agency again concluded that notwithstanding the protester's acceptable technical rating, low risk past performance rating, and low price, the protester's proposal was not one of the most highly rated proposals. AR, Tab 30, Addendum to Pre-Negotiation Memorandum. By letter dated December 16, 2008, the agency advised the protester that its proposal was, again, excluded from the competitive range. This protest followed.

## DECISION

Medical Staffing challenges the agency's evaluation in several areas, and argues that the competitive range determination was improper because the agency failed to consider each proposal under all evaluation factors before establishing the competitive range, in violation of the requirements of Federal Acquisition Regulation (FAR) § 15.306(c)(1). The protester also contends that the agency ignored its lower price in establishing the range. Finally, the protester argues that the agency failed to take corrective action as promised in its letter of November 5.

As a preliminary matter, we think Medical Staffing's challenges to the agency's technical evaluation of its proposal, and in particular, to the specific areas of identified weaknesses, were abandoned during the course of this protest. Medical Staffing's initial protest of October 7--the protest that resulted in agency corrective action and a reevaluation of the company's proposal--initially identified what it argued were flaws in the agency's evaluation of its proposal with respect to six areas of assessed weaknesses--quality control plan, management capabilities, recruitment, retention, relevant corporate experience, and key personnel. These arguments were incorporated by reference in the protest before us now. Initial Protest, Dec. 17, 2008, at 3-4. The agency responded to each of these challenges in its report explaining why the agency believed its evaluation of the proposal was valid. In its comments, Medical Staffing provided no rebuttal to the agency's technical explanations; instead it focused its comments on its contention that the agency's corrective action was not meaningful, and simply merely "rubber stamped" the original evaluation conclusions. Accordingly, we conclude that Medical Staffing abandoned its specific challenges to the evaluation, and we will not consider them further. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 4 n.4.

#### Competitive Range

With respect to the competitive range determination, Medical Staffing raises two issues--that the determination was made without considering all of the evaluation factors, and that the decision was made without regard to price. Based on our review of the record, we conclude that the decision to exclude Medical Staffing's proposal from further consideration was properly based on an evaluation of all of the evaluation factors, including price.

After evaluating all proposals, agencies may establish a competitive range if discussions are to be conducted. Based on the ratings of each proposal against all evaluation criteria, the contracting officer is to establish a competitive range comprised of the most highly rated proposals, unless the competitive range is further reduced for purposes of efficiency pursuant to FAR § 15.306(c)(2). This provision permits the contracting officer to limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition provided that the solicitation notifies offerors that this may be done. FAR § 15.306(c)(2); RFP at 122. In reviewing an agency's evaluation and its competitive range determination, our Office will not reevaluate the proposals; instead, we will examine the record to ensure that the evaluation was reasonable and in accordance with the solicitation's evaluation criteria and applicable statutes and regulations. Northwest Procurement Inst. Inc., B-286345, Nov. 17, 2000, 2000 CPD ¶ 192 at 5.

In this regard, it is axiomatic that cost or price to the government must be included in every RFP as an evaluation factor, and that agencies must consider cost or price to the government in evaluating competitive proposals. 10 U.S.C. § 2305(a)(3)(A)(ii) (2000); FAR § 15.304(c)(1). This requirement means that an agency cannot

eliminate a technically acceptable proposal from consideration for award without taking into account the relative cost of that proposal to the government. Kathpal Techs., Inc.; Computer & Hi-Tech Mgmt., Inc., B-2883137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6 at 9. Agencies have considerable discretion in determining the appropriate method for taking cost into account, but the method used must provide for a reasonable assessment of the cost of performance of the competing proposals. S.J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73 at 3.

The protester's contention that the agency did not consider all of the evaluation factors, including price, is drawn from both the statement explaining the competitive range decision in the Pre-Negotiation Memorandum, and from the Contracting Officer's (CO) Statement submitted with the agency report prepared in response to this protest. The CO explains the competitive range decision as follows:

The competitive range was comprised of the proposals that received either an Excellent or a Good overall technical rating. There were 6 offerors in the competitive range for Region 1, 5 offerors in the competitive range for Region 2, and 4 offerors in the competitive range for Region 3. Medical Staffing Joint Venture received an overall "Acceptable" technical [rating] and was therefore not included in the competitive range.

CO's Statement at 2. The protester argues that both of these documents show that the agency did not consider all factors, and did not consider price, in establishing the competitive range. We agree with the protester that this statement, on its face, suggests that the competitive range was established based on the overall technical rating, and that price was not considered. On the other hand, we think the underlying contemporaneous documents--prepared before any protest was filed--viewed in their entirety, show that the agency did, in fact, evaluate proposals under all of the evaluation factors, and did consider Medical Staffing's relative price in making its competitive range determination.

With respect to the first evaluation factor, technical capability, there is no dispute that all of the proposals were evaluated under the overall factor, and under its six subfactors. The results of the evaluation under this factor are set forth in the Pre-Negotiation Memorandum (provided with the agency report at tab 22) at pages 5 through 7. Specifically, for each of the three regions, the SSEB rated Medical Staffing's proposal(s) acceptable for quality control, retention, corporate experience, and key personnel. Medical Staffing received a good rating for management capabilities and recruitment, and an overall technical rating of acceptable.

With respect to the second evaluation factor of past and present performance, Medical Staffing's proposal was initially rated neutral/high risk. AR, Tab 22, Pre-Negotiation Memorandum at 5-8. This rating was upgraded during the reevaluation to a rating of acceptable/low risk.

With respect to the third factor, financial capability, we note first that the RFP advised offerors that there would be no scoring of this factor, but that the proposals would be evaluated under this factor and the resulting information would be used to determine risk. RFP at 126. Consistent with this advice, the contemporaneous record shows that the agency reviewed the offerors' financial statements to determine if the offerors had adequate financial resources, and that the review resulted in several financial concerns identified by the evaluators that the agency states will be addressed during discussions with the offerors in the competitive range AR, Tab 22, Pre-Negotiation Memorandum at 8-9.

With respect to price, the RFP again advised that price would not be scored, RFP at 126, but the record shows that the Defense Contract Audit Agency, the contracting officer and the source selection authority reviewed all pricing and compared each offeror's total and unit prices for each contract line item to determine price realism. AR, Tab 22, Pre-Negotiation Memorandum at 9-10. The agency determined that prices were fair and reasonable based on adequate competition. Id.

With this information, the agency established its competitive range, and--as indicated in the CO's statement--the contemporaneous materials indicate that "the competitive range was comprised of the following highly rated proposals (Good and Excellent)," followed by a list of the proposals included in the range. Id. at 12-13. The contemporaneous document does not stop there, however, it continues with more specific findings about individual offerors. Specifically, the agency recognized that Medical Staffing offered the lowest price (and recognized that its price was lower than the government estimate), that its proposal had an overall technical rating of acceptable, and that the proposal received a past performance rating of low risk.<sup>1</sup> AR, Tab 30, Addendum to Pre-Negotiation Memorandum at 1-2. The agency nonetheless concluded that Medical Staffing did not submit one of the most highly rated proposals.

In sum, while we think the contracting officer could have more clearly articulated why, notwithstanding Medical Staffing's low price, she concluded that the proposal was not among the most highly rated, and while we might have reached a different conclusion given these facts, the record shows that she did acknowledge--in the same document that contains her competitive range decision--that Medical Staffing submitted the lowest priced offer, and acknowledged that Medical Staffing's price was lower than the government estimate. The record also shows that she made her decision at the end of a review that considered all of the evaluation criteria. Given

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<sup>1</sup> We note for the record that the CO's consideration of all the evaluation factors, including Medical Staffing's relative price (i.e., the lowest, and lower than the government estimate), is present in both the initial and revised Pre-Negotiation Memoranda.

this record, we cannot conclude that the decision to exclude this proposal from the competitive range did not consider relative price, or otherwise violate the FAR requirement that such decisions must be based on a consideration of all of the evaluation factors, including price.

#### Corrective Action

Finally, the protester argues that the agency failed to take meaningful corrective action as promised in the agency's response to its initial protest. As explained above, in response to the protester's initial protest, the contracting officer stated that she had reviewed the matters in the protest, intended to review the competitive range determination, and would make a new determination. AR, Tab 27, Corrective Action Letter.

During the course of this protest, although the agency reaffirmed its decision to not include Medical Staffing's proposal in the competitive range, the record clearly shows that the agency reevaluated the protester's proposal, and in fact, raised its rating under the past and present performance evaluation factor. Given this change in the protester's rating, we think the facts do not support the protester's contention that the agency's corrective action review was meaningless.

The protest is denied.

Gary L. Kepplinger  
General Counsel