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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: NANA Services, LLC

File: B-401951.5; B-401951.6

Date: September 27, 2012

Jonathan T. Williams, Esq., Patrick T. Rothwell, Esq., and Alexander O. Levine, Esq., PilieroMazza PLLC, for the protester.
Steven K. Forjohn, Esq., and Ralph L. Littlefield, Esq., United States Marine Corps, 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. In a procurement conducted pursuant to the Randolph-Sheppard Act, 20 U.S.C. § 107d-3(e) (2006), the source selection authority (SSA) reasonably determined that the price offered by a state licensing agency (SLA) was fair and reasonable based on comparison to government estimate and price offered by another offeror in the competitive range.

2. SSA reasonably included SLA's proposal in the competitive range where he disagreed with findings of the technical evaluation board pertaining to deficiencies and weaknesses in the SLA's proposed approach and furnished a detailed explanation as to the basis for his disagreement.

DECISION

NANA Services, LLC, of Anchorage, Alaska, protests the award of a contract to the Hawaii Department of Human Services, DBA Ho'opono Rehabilitation Center for the Blind, of Honolulu, Hawaii, a state licensing agency (SLA) for the blind, under request for proposals (RFP) No. M00318-09-R-0002, issued by the United States Marine Corps (USMC) for food services at Marine Corps Base Hawaii, Kaneohe Bay, Hawaii. The protester argues that the agency unreasonably determined that the SLA's price was fair and reasonable and that its technical proposal was acceptable.

We deny the protest.

BACKGROUND

The RFP, issued on September 2, 2009, provided for award of a 5-year (one base plus four option years) contract to the offeror whose proposal represented the best value to the government. The solicitation provided for the evaluation of proposals under past performance, technical, and price factors, with the past performance and technical factors, when combined, of approximately equal weight to price. The technical factor was comprised of the following four equally-weighted subfactors: quality control plan, management plan, food service operations plan, and staffing/transition plan.

The RFP also advised offerors that the Randolph-Sheppard Act (RSA), 20 U.S.C. § 107d-3(e) (2006), applied to the acquisition. RFP at 94. The cited statutory section provides as follows:

> The Secretary [of Education], through the Commissioner [of the Rehabilitation Services Administration], shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees when he determines, on an individual basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.

20 U.S.C. § 107d-3(e).

Regarding the application of the RSA, the solicitation included the following additional guidance:

> In accordance with the revised rules of the Department of Education (34 CFR 395.33 – Vending Facility Program for the Blind on Federal Property, Sec 395.33) and the rules of the Department of Defense (32 CFR 260 – Vending Facility Program for the Blind on Federal Property, Sec 260.3(g)), in addition to the other source selection factors set out in Section M of this solicitation, the contracting officer shall consider and afford the SLA "priority" for award of the contract to the SLA for operation of a military dining facility upon receipt of final proposal revisions (or upon initial proposals if award is made without discussions), if the SLA has submitted a proposal that:
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> > 1) demonstrates the SLA can provide such operation at a fair and reasonable price, with food of a high quality comparable to that available from other providers of cafeteria services and comparable to the quality and price of food currently provided to military service members, and

> 2) is among the highly ranked final proposal revisions (after discussions with all Offerors) with a reasonable chance of being selected for award using the best value method (as determined by the contracting officer after applying its source selection criteria contained in the solicitation), over all performance periods required by the solicitation. . . .

Id. at 100.

The agency received proposals in September 2009, established a competitive range, and held discussions. On March 3, 2010, the USMC notified the protester that it had selected the SLA for award. NANA protested to our Office. The agency subsequently notified our Office that it intended to take corrective action in response to the protest, to include a reevaluation of proposals. On May 24, 2010, we dismissed the protest as academic. NANA Servs., LLC, B-401951.2, May 24, 2010.

After implementing its corrective action, the USMC notified the protester that it had again selected the SLA for award, and on September 20, 2010, NANA filed a second protest with our Office. In late November 2010, after the cognizant GAO attorney conducted an outcome prediction alternative dispute resolution telephone conference, the agency notified our Office that it would take further corrective action in response to the protest. Specifically, the agency advised us that it would reopen discussions with the competitive range offerors, evaluate the new proposal submissions, and make a new source selection decision. We subsequently dismissed the protest as academic. NANA Servs., LLC, B-401951.3, Dec. 2, 2010.

The USMC implemented the corrective action over the course of the next year and a half. During this time, the agency issued several amendments to the RFP and conducted multiple rounds of discussions. In early December 2011, the agency requested final proposal revisions.

On June 8, 2012, the USMC notified NANA that it had once again selected the SLA for award. The protester timely requested a debriefing, which the agency furnished on June 19. During the debriefing, the agency advised the protester that while the protester's and the awardee's proposals had received the same overall rating (of good) under the non-price factors, and the protester's total price was lower than the SLA's ($11,221,762 vs. $14,348,594), resulting in NANA's proposal being the highest ranked, the agency had selected the SLA for award based on application of the Randolph-Sheppard Act priority. On June 25, NANA protested to our Office.

DISCUSSION

First, the protester argues that the agency unreasonably determined the SLA's price to be fair and reasonable.[1] According to the protester, the reasonableness of the SLA's price should have been determined based on a comparison to NANA's significantly lower price.

[1] NANA also argued that the USMC violated Department of Education (DoEd) regulations implementing the RSA by failing to consult with DoEd regarding the reasonableness of the SLA's price. In this connection, 34 C.F.R. § 395.33 (2012) provides as follows:

> (a) Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary [of the Rehabilitation Services Administration] determines, on an individual basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.
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> (b) In order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and of comparable high quality as that available from other providers of cafeteria services, the appropriate State licensing agency shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated by the appropriate property managing department, agency, or instrumentality. . . . If the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section.

By letter of September 16, the USMC advised our Office that it would be taking corrective action with regard to this issue by consulting with DoEd. The agency further represented that after receipt of DoEd's determination, it would take "any other corrective action deemed necessary resulting from subject consultation." USMC Letter to GAO, Sept. 13, 2012, at 1. Because the agency is taking appropriate corrective action to address the alleged impropriety, we dismiss this issue as academic.

In this regard, NANA cites language from a 2006 report issued jointly by the Department of Defense, the Department of Education, and the Committee for Purchase From People Who Are Blind or Severely Disabled.[2] The 2006 Joint Report provides that contracting officers should afford an SLA priority under the RSA for dining facility contracts when the SLA has demonstrated that it can provide such operation at a "fair and reasonable price," and when the SLA's final proposal revision (or initial proposal if award is made without discussions) is among the highly ranked final proposal revisions with a reasonable chance of being selected for award. The Joint Report goes on to define "fair and reasonable price" to mean that the SLA's "final proposal revision does not exceed the offer that represents the best value (as determined by the contracting officer after applying its source selection criteria contained in the solicitation) by more than five percent of that offer, or one million dollars, whichever is less, over all performance periods required by the solicitation." Joint Report at 5.

While the protester recognizes that the policy embodied in the Joint Report is not a binding regulation, citing our decision in Moore's Cafeteria Servs. d/b/a MCS Mgmt., B-299539, June 5, 2007, 2007 CPD ¶ 99, it argues that the policy represents the considered judgment of the agencies tasked with implementing the RSA and should be afforded considerable weight. NANA further argues that when the SLA's price is evaluated in light of the "fair and reasonable price" definition provided for in the Joint Report, it is clearly not reasonable.

In response, the agency, also citing our decision in Moore's Cafeteria, argues that adherence to the guidance set out in the Joint Report is not mandatory because it has not been implemented through the issuance of regulations, and that the source selection authority (SSA) appropriately determined the SLA's price fair and reasonable after comparing it with the government estimate ($14,865,581) and with the price offered by the third offeror in the competitive range ($16,439,143). We agree with the agency with regard to both arguments.

As we noted in our decision in Moore's Cafeteria, until regulations implementing the policy set forth in the Joint Report are issued, which has not yet occurred, we view the policy as the equivalent of internal agency guidance, which does not establish legal rights and responsibilities such that actions taken contrary to it are subject to objection. Id. at 4. Moreover, the Federal Acquisition Regulation (FAR) recognizes both comparison with the government estimate and comparison with other offerors' prices--the methods used by the agency here to establish the reasonableness of the

[2] The report was issued in response to section 848 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-63, which instructed the three entities to issue a joint statement of policy concerning application of the RSA and the Javits-Wagner-O'Day Act to contracts for the operation and management of military dining facilities.

SLA's price--as permissible techniques for determining price reasonableness. FAR §§ 15.404-1(b)(2) (i) and (v); U.S. Dynamics Corp., B-298889, Dec. 19, 2006, 2007 CPD ¶ 21 at 4. Thus, we deny this ground of protest.

Next, NANA argues that the SLA's proposal should have been excluded from the competitive range because the technical evaluation board (TEB) evaluated it as unsatisfactory overall based on two deficiencies and multiple weaknesses. As discussed below, the record shows that the SSA disagreed with the TEB's conclusions, furnished a detailed analysis as to the basis for his disagreement, and reassigned the proposal ratings of good under each of the technical evaluation subfactors. Because we have no basis to conclude that the SSA's findings were unreasonable, we deny this ground of protest as well.

The TEB assigned the SLA's final proposal a rating of unsatisfactory under the management plan and staffing/transition plan subfactors, a rating of marginal under quality control plan subfactor, and a rating of good under the food service operations subfactor. The evaluators identified two weaknesses and a deficiency under each of the first two subfactors. As will be discussed in greater detail below, the deficiency under the management plan subfactor pertained to the SLA's approach to providing coverage for the project manager position, while the deficiency under the staffing/transition plan subfactor pertained to the SLA's proposed staffing schedule.

The SSA disagreed with virtually all of the TEB's findings pertaining to the SLA proposal. Based on his review, he re-rated the SLA's proposal as good under each of the technical evaluation subfactors and assigned it an overall rating of good under the non-price factors.[3] The SSA concluded that while NANA's proposal, which received the same overall rating as the SLA's under the non-price factors and which was lower in price than the SLA's, represented the best value to the government, the SLA proposal demonstrated both that the SLA could provide operation of the dining facility at a fair and reasonable price, and that the SLA proposal was among the highly ranked proposal revisions after discussions with a reasonable chance of being selected for award using the best value method. Accordingly, the SSA concluded that he was required to apply the RSA priority and select the SLA for award. Source Selection Decision (SSD), May 24, 2012, at 17, Agency Report (AR), Tab 113.

The protester and the agency agree that an SSA has the discretion to overturn the findings of a TEB when he documents a reasonable basis for his conclusions. In this connection, we have previously recognized that in making a source selection decision, an SSA has broad discretion in determining the manner and extent to

[3] Under the past performance factor, the evaluator assigned the SLA proposal a rating of very good, with which the SSA concurred.

which technical and cost evaluation results are used, is permitted to make an independent evaluation of offerors' proposals, and may disagree with or expand upon the findings of lower-level evaluators provided the basis for the evaluation is reasonable and documented in the contemporaneous record. CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et seq., May 11, 2010, 2010 CPD ¶ 124 at 12. The protester argues, however, that the SSA lacked a reasonable basis for his findings.

NANA argues, for example, that the SSA unreasonably determined that the SLA's proposed approach to providing coverage for the project manager position did not constitute a deficiency. In this connection, the solicitation required that a lead worker cover for the project manager during required hours of operation when the project manager is off-duty.[4] The SLA proposed to accomplish this by having one of its production chiefs act for the project manager on the weekends and between 4:00 and 5:45 p.m. on weekdays.[5] During the periods when the production chief was acting for the project manager, the SLA in turn proposed to increase the number of cooks by one. In response to a discussion question requesting further explanation of the above approach, the SLA furnished the following explanation of coverage:

> I. Project Manager – Present 40+ hours per week. The Production Chief would have the authority of the Project Manager in the Project Manager's absence.

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[4] More specifically, the RFP provided at § C7.4.2 as follows:

> The Contractor shall provide an on-site Project Manager to be responsible for performance of the work. The Project Manger shall be on-site at least 70% of the operational time. Operational time is the time period beginning when the first contractor employee begins the day's work and concluding when the last contract employee ends the day's work. In the absence of the Project Manager during the minimum 70% operational time period, a lead worker shall be placed in charge and shall have supervision as his primary function during the times he is in charge.

RFP, amend. No. 0006, at 38.

[5] The SLA explained in its proposal that because its weekday operational time would be 15.75 hours per day on weekdays, compliance with the 70% requirement meant that it needed to have someone acting as project manager 10.75 hours per weekday. It proposed to cover the 10.75 hours by having its project manager work a 9-hour shift (7:00 a.m. - 4:00 p.m.), and having a production chief stand in for the project manager from 4:00 to 5:45 p.m. Revised SLA Proposal, June 1, 2011, at 1, AR, Tab 75.

> II. Production Chief – Would only have to assume the responsibilities of the Project Manager some few hours during the weekdays and for weekend coverage. The Project Manager would still be available for contact and could be at the location within a short period of time if his presence is necessary. Knowing that the Production Chief's managerial jobs should not be assumed with a CBA [collective bargaining agreement] position (Cook II), the coverage for the weekends and offhours does not include managerial responsibilities (see Cook II acting as Production Chief job description). We have scheduled the Production Chief managerial duties such as food purchasing, menu development, pricing, planning, hiring, firing, etc. to be accomplished during a normal weekday scheduling. This can be successfully accomplished during the week given the presence and scheduling of the Project Manager and Production Chief at the same times. The non Managerial tasks that are part of the Production Chief's requirements would fall to a qualified Cook II (to be identified).
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> III. Cook II filling in for Production Chief – in our previous submission we increased the hours and times that Cooks were available in order to cover for this requirement to fill the duties of the Production Chief when they step up to cover for the Project Manager. . . . .

SLA Discussion Letter Response, Aug. 18, 2011, at 2-3, AR, Tab 97.

The evaluators identified this approach as a deficiency, noting that tasks such as food purchasing, menu development, and pricing were the responsibility of the government, not the contractor. The evaluators further noted that the statement that the project manager would be available for contact, if needed, implied that the production chief standing in for the project manager was not adequately qualified, and that the statement that the managerial responsibilities associated with the production chief position would be scheduled for weekdays implied that the production chief would not perform any managerial responsibilities, such as planning, while standing in for the project manager. The evaluators also found that the SLA's description of the functions to be performed by the production chief did not correctly reflect that the principal function of the production chief was to be cooking.

The SSA disagreed with these findings in several respects. While acknowledging that the SLA proposal did erroneously refer to tasks such as food purchasing, menu development, and pricing as within the production chief's managerial responsibilities, the SSA found that the error did not demonstrate a lack of understanding of solicitation's minimum requirements and did not support a finding of deficiency. In addition, he found that having the project manager available for contact was "simply reach-back capability" and did not "necessarily mean that the

acting Project Manager [was] not qualified." SSD at 10. He also found that it could not reasonably be inferred from the statement that the managerial responsibilities associated with the production chief position would be scheduled for weekdays that the production chief would not perform any managerial responsibilities while acting for the project manager on weekends. With regard to the TEB's complaint that the SLA's description of the functions to be performed by the production chief was not consistent with the position's principal function of cooking, the SSA noted that he reviewed the PWS, and "no where does it state that the main function of the Production Chief is to perform cooking." Id. at 11. While the protester disagrees with several of the SSA's judgments, it has not persuaded our Office that the SSA acted unreasonably.

The protester also argues that the SSA unreasonably concluded that the SLA's proposed approach to scheduling was not a deficiency. In this connection, the RFP provided as follows with regard to shift changes:

> Shift changes shall not interfere with normal operations of the messhall, to include serving of food and clean up after meals. Shift changes shall not occur during the serving of a meal during designated meal periods.

RFP, amend. 0006, at 4. As noted above, the SLA proposed to shift a production chief to the position of acting project manager and to bring another cook on-board at 4:00 p.m. on weekdays, which is the time at which the main dining facility opens. The TEB found this approach to be deficiency, noting as follows:

> The Offeror's proposed solution increases Cook I at 1600 to meet the [requirement for a minimum of 6 cooks] during the dinner meal hours because the Production Chief who is a Cook becomes the Project Manager. The Offeror is proposing that at 1600 the Production Chief who is a Cook leaves to become the Project Manager. The Cook II is leaving at 1600 to become the Production Chief. Cook I arrives to maintain the number of minimum Cooks. However, the Offeror's solution provides no pass down/turnover period. An hour prior to the opening of the Mess Hall for dinner at 1600 is the busiest time where each Cook is responsible [for] his or her own duties. In addition, food production is a continuous process where a Cook cannot abruptly leave especially during the busiest time. It would be a high risk and detrimental to the overall food service operation for two Cooks to leave at the peak hour and be replaced by a new Cook. The key issue is that Offeror shows an inability to develop an adequate schedule to follow the requirements identified in the PWS.

TEB Consensus Report, SLA, at 12.

The SSA disagreed with the finding of deficiency, observing that while the RFP prohibited shift changes during the serving of a meal, it did not prohibit a shift change at the beginning of a meal period; accordingly, the SSA concluded that the SLA's proposal was "not deficient as [it was] in compliance with the [solicitation's] minimum requirements," and that it did "not indicate [that the SLA was] unable to develop an adequate schedule to follow the requirements of the PWS."[6] SSD at 13. Again, we think that the SSA's conclusion was reasonable.[7]

Finally, in its initial protest, NANA alleged that the SLA's proposal failed to demonstrate that a blind vendor would be involved in operation of the dining facilities. In this connection, the protester alleged that while the SLA proposal identified a blind vendor, it did not discuss his role on the project; indeed, the protester asserts, the SLA proposal, on its face, plainly demonstrated that the SLA's teaming partner, Blackstone Consulting, Inc., would provide all of the operation and management, with no blind vendor involvement.

In its report, the agency demonstrated that the protester's assertion that the SLA proposal failed to discuss the role to be played by the named blind vendor was incorrect. That is, the record showed that the agency had specifically asked the SLA to address the issue of the blind vendor's involvement during discussions, see Discussion Letter to SLA, Jan. 4, 2011, AR, Tab 6, and that in response, the SLA had furnished a description of his primary duties and responsibilities. SLA Revised Proposal, Jan. 18, 2011, AR, Tab 10. Accordingly, we dismiss this argument as lacking a factual basis.

The protest is denied.

Lynn H. Gibson
General Counsel

[6] The SSA did not find that the SLA's approach to scheduling was devoid of risk; rather, he found that the level of risk justified a weakness, as opposed to a deficiency.

[7] The protester also objected to the SSA's finding that several of the weaknesses identified by the TEB were unsubstantiated. While we do not address each objection in this decision, we considered all of them in our review of the protest, and find that none provides a basis for sustaining the protest. The SSA provided a detailed rationale for each instance in which he disagreed with a finding of the TEB, and the protester has not demonstrated that any of the findings were unreasonable.