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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Arcus Properties, LLC

File: B-406189

Date: March 7, 2012

James J. McCullough, Esq., and Michael J. Anstett, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for the protester.
E. Sanderson Hoe, Esq., Jason N. Workmaster, Esq., John W. Sorrenti, Esq., Virginia M. Gomez, Esq., Jason A. Carey, Esq., and Katherine L. Veeder, Esq., McKenna Long & Aldridge LLP, for Balfour Beatty Communities, LLC, an intervenor.
John Pettit, Esq., Department of the Air Force, for the agency.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. On a procurement involving the privatization of military family housing, agency was not required to point out adverse past performance on a prior contract because the issue had been previously brought to the offeror's attention during the performance of that contract.

2. Agency is not required to disclose evaluation standards or guidelines for rating proposal features as more desirable or less desirable, since agencies are not required to inform offerors of their specific rating methodology.

3. Agency evaluation of protester's proposal, which had an evaluated strength, as acceptable rather than exceptional under a subfactor was reasonable and consistent with the solicitation's evaluation scheme.

DECISION

Arcus Properties, LLC, of El Paso, Texas, protests the selection by the Department of the Air Force, under request for proposals (RFP) No. AFCEE-11-0002, of Balfour Beatty Communities LLC, of Newton Square, Pennsylvania, to enter into negotiations for a business arrangement to privatize military family housing at two Air Force installations. Arcus argues that the agency failed to hold meaningful discussions with it and improperly evaluated its proposal.

We deny the protest.

BACKGROUND

In 1996, Congress enacted legislation authorizing the Military Housing Privatization Initiative, with the goal of improving Department of Defense military family housing, as well as transient housing (i.e., temporary lodging), by using an approach considered to be faster and more economical than the traditional military construction processes. This initiative allows private sector financing, ownership, and operation and maintenance of military housing. 10 U.S.C. §§ 2871-85 (Supp. III 2009). According to the Air Force, the use of privatization will "accelerate housing improvements, alleviate housing shortages, and reduce waiting times for adequate housing, ultimately improving morale of Air Force personnel." RFP § 1.2; Agency Report (AR) at 2.

The Air Combat Command (ACC) and the Air Force Center for Engineering and the Environment (AFCEE), Housing Privatization Division, issued the RFP to obtain "proposals from qualified entities interested in entering into a business arrangement with the Government" for military housing privatization at Dyess Air Force Base (DAFB) in Texas and Moody Air Force Base (MAFB) in Georgia. RFP § 1.1; AR at 2. The agency characterizes this procurement as a "non-Federal Acquisition Regulation (FAR) real estate transaction." RFP § 1.3.1.

The RFP contemplates the selection of the proposal from a private sector firm that is most advantageous to the Government to finance, plan, design, construct, manage, and operate a military housing privatization initiative project to provide family housing units for service members and their families at DAFB and MAFB. Proposals were to be evaluated in accordance with the terms of the RFP to determine the "highest ranked offeror," that is, the offeror which submitted the most advantageous proposal in response to the RFP. The highest ranked offeror will then enter into exclusive negotiations with the government resulting in a business arrangement for the privatization of the housing at DAFB and MAFB. The ultimate business arrangement will include the government's conveyance of 674 housing units and certain associated improvements at DAFB and MAFB, and the 50-year lease of certain land tracts located in these facilities to allow for the construction of 357 additional housing units by the selected offeror, who will in turn secure the necessary financing and provide the required equity contributions. This offeror would then become the "project owner" (PO), and would own, develop, renovate, demolish, construct, operate, maintain, and manage the privatized rental housing development.

To determine the most advantageous proposal, the agency considered the following five factors: (1) financial,[1] (2) development,[2] (3) property management,[3] (4) qualifications[4] and (5) past performance. Factor 1 was the most important factor, followed by the equally-weighted factors 2, 3 and 5, followed by the least important factor 4. Subfactors (SF) within each factor were of equal importance.

The agency received three proposals in response to the RFP, including proposals from Arcus and Balfour Beatty.[5] Arcus stated in its proposal that its proposed PO "will be a single-purpose, bankruptcy remote entity to be formed and owned by Hunt ELP, Ltd." Arcus' proposal went on to state that a Hunt affiliate, Hunt Building Group, will serve as the developer on this project, and that another Hunt affiliate, Hunt Building Company, will act as the design-build entity for the purposes of designing and constructing the ACC Group III project. Arcus' proposal stated here, "[w]e have structured Arcus so that Hunt will serve as the sole member of Arcus." AR, Tab 7, Arcus Proposal, Vol. 1-Part B: Development, at 7.

After discussions were conducted with Balfour Beatty and Arcus, the revised proposals were evaluated as follows:[6]

[1] For factor 1, financial, there were two subfactors: project financing and project financial viability and sustainability.

[2] For factor 2, development, there were two subfactors: development management approach and project concept.

[3] For factor 3, property management, there were two subfactors: property management approach, and property operations and maintenance strategy.

[4] For factor 4, qualifications there were two factors: financial capabilities and organizational capabilities.

[5] The third offeror withdrew from the competition.

[6] Each of the subfactors within factors 1, 2 and 3 were be assigned color ratings of blue/exceptional, green/acceptable, yellow/marginal, or red/unacceptable. The subfactors within factor 4 were assigned ratings of highly qualified, qualified or unqualified. For factor 5, confidence assessment ratings of high confidence, significant confidence, confidence, little confidence, no confidence, and unknown confidence were assigned. RFP §§ 5.3, 5.4, 5.5.

	BALFOUR BEATTY	ARCUS
Factor 1		
Subfactor 1.1	Blue	Blue
Subfactor 1.2	Blue	Green
Factor 2		
Subfactor 2.1	Blue	Blue
Subfactor 2.2	Blue	Blue
Factor 3		
Subfactor 3.1	Blue	Blue
Subfactor 3.2	Blue	Blue
Factor 4		
Subfactor 4.1	Highly Qualified	Highly Qualified
Subfactor 4.2	Highly Qualified	Highly Qualified
Factor 5	High Confidence	Confidence

AR, Tab 10, Proposal Analysis Summary, at 5. Balfour Beatty received the highest possible adjectival ratings for all factors and subfactors, whereas Arcus received lesser ratings under the past performance factor and the project financial viability and sustainability subfactor of the financial factor. The record also shows that Balfour Beatty was considered superior to Arcus under seven of the nine factors and subfactors; Arcus was only considered superior to Balfour Beatty under the two subfactors of factor 4, qualifications, the least important factor. Id. at 30.

As documented in a detailed source selection decision, the agency determined that the proposal presented by Balfour Beatty was the most advantageous to the government. As a result, Balfour Beatty was selected by the source selection authority as the highest ranked offeror for this project. AR, Tab 12, Source Selection Decision, at 1. This protest to our Office followed.

PAST PERFORMANCE DISCUSSIONS

Arcus first argues that the agency failed to provide it with meaningful discussions regarding a "marginal" past performance rating that it received for one of its past performance references--the Air Education and Training Command (AETC) Group II housing privatization project, which encompassed family housing at six Air Force bases. The protester asserts that section 4.15.1.5 of the solicitation required the agency to provide Arcus with an opportunity to respond to the negative past performance rating.[7] Arcus claims that the "marginal" rating assigned to Pinnacle Hunt Communities for its performance on the AETC Group II housing project resulted in Arcus receiving a past performance rating of "confidence" rather than high confidence, yet during its discussions with Arcus the Air Force did not mention any past performance concerns regarding the AETC Group II housing project. Protest at 15.

In evaluating Arcus' past performance, the Air Force reviewed a "Project Owner Performance Overall Assessment Summary" for the AETC Group II prepared by the AFCEE. This document is a summary of the past performance information of Pinnacle Hunt Communities on the AETC Group II Project completed by Air Force personnel familiar with the project and the performance for the 4th Quarter 2009. The report detailed the various past performance problems on the AETC Group II Project and described the overall performance assessment of Hunt as follows:

> Overall, the PO's performance was within the satisfactory and marginal range. While the PO's financial and developmental performance was satisfactory, customer satisfaction and property management drove the overall marginal rating.

AR, Tab 9, AFCEE Project Owner Performance Overall Assessment/Summary AETC II Privatized Housing, LLC (Pinnacle Hunt Communities), at 1. The report further stated:

> Information provided in this report may be used by Air Force Acquisition Support Team's . . . to evaluate the Pinnacle Hunt Communities past performance as part of the evaluation process for another Air Force project proposal.

Id.

On or about September 24, 2010, AFCEE sent a letter to Hunt Development Group, with a copy of this report. The letter included the same admonition that this report could be used as part of the evaluation process for other Air Force project proposals

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[7] Section 4.15.1.5 of the RFP stated:

> The Offeror may also submit information on significant achievements or explain past problems with the corrective actions taken, that they consider relevant to the proposed effort. Any adverse past performance information the Offeror has not had a prior opportunity to address will be submitted to the Offeror for its comments, rebutting statement, or additional information.

and advised that Hunt was being provided with the report "so you are aware of the information" that may be shared. AR, Tab 9, Letter from AFCEE to Hunt.

Hunt responded to AFCEE's past performance assessment in a letter dated October 28, 2010, in which it stated that "we felt compelled to provide brief responses to some of the concerns raised." AR, Tab 9, Pinnacle Hunt Letter to AFCEE (Oct. 28, 2010), at 1. In this five-page letter, Hunt addressed the marginal ratings that it received for its performance on the AETC Group II project in the critical areas of operations, customer satisfaction, and property management. Hunt closed its letter by listing, "a number of initiatives to enhance the level of customer service throughout the AETC II portfolio." Id. at 5.

In its proposal here, Arcus referred to its performance of the AETC Group II project as follows:

> The AETC II project has had some significant problems which Hunt has overcome. Issues resolved were that of the timeliness of modifications and problems controlling project costs. The primary sources of funds available to the project and the desires of AETC Command and installation leadership challenge of the AETC Group II project was the disparity between sources of funds available to the project and the desires of AETC Command and installation leadership.

AR, Tab 7, Arcus Proposal, Vol. III, Past Performance, at 14.

Thus, the record shows that Arcus' affiliate, Hunt, was provided the negative past performance report on the AETC II project, that Hunt provided detailed responses to the adverse past performance, and that Arcus addressed the adverse past performance found on the AETC II project in its proposal.[8] Having previously provided Hunt/Arcus the opportunity to respond to the adverse performance on the AETC II project, the agency was not required to mention the marginal rating associated with this project during discussions. In this regard, the RFP only required, "[a]ny adverse past performance information the Offeror has not had a

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[8] The record shows that the Air Force in fact considered Hunt's written response to the AETC II project past performance report:

> There were marginal responses in the (a) Operations, (b) Property Management, (c) Customer Satisfaction, and (d) General Information categories of the PPQ [past performance questionnaire]. **The response by Hunt to this PPQ described the known issues, their causes and the actions Hunt had taken to resolve the issues.**

AR, Tab 10, Proposal Analysis Summary, at 29 (emphasis added).

prior opportunity to address will be submitted to the Offeror for its comments, rebutting statement, or additional information." RFP § 4.15.1.5.

While Arcus claims that FAR § 15.306(d)(3) requires discussions regarding "adverse past performance information to which the offeror has not yet had an opportunity to respond," this procurement was not subject to the FAR.[9] Where the FAR does not apply, we review the actions taken by an agency to determine whether they were reasonable. Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192 at 9 (privatization procurement). Here, we find the agency acted reasonably in not providing Arcus with another opportunity during discussions to address the adverse past performance on the AETC II project.

PROJECT FINANCIAL VIABILITY AND SUSTAINABILITY SUBFACTOR

Arcus also challenges its green/acceptable rating under the project financial viability and sustainability subfactor of the financial factor and argues that its proposal should have instead received a blue/exceptional rating.

The RFP advised that this factor was to evaluate whether the offeror is proposing a project that will be financially viable and sustainable throughout its 50-year term. RFP § 5.6.1. The RFP provided:

> Offerors are encouraged to be innovative and submit other enhancements not specifically identified in this Solicitation. The Government reserves the right to give evaluation credit for (a) Desired Features that are identified in [RFP] Section 3.0 [Project Requirements], included in the proposal and deemed beneficial to the Government; and/or (b) other Offeror proposed features that are neither Requirements or Desired Features which are included in the proposal and are deemed beneficial to the Government. Desired Features and Enhancements will be evaluated within the subfactor to which they apply and for which they have been submitted.

RFP § 5.3. The desired financial features relating to the project financial viability and sustainability subfactor were listed, in descending order of importance, as follows: (1) higher percentage of net operating income (NOI) to fund reinvestment account; (2) fees below industry benchmarks; (3) fees that are more than 50-percent incentive

[9] With regard to acquisitions governed by FAR part 15, we have recognized that where an offeror was provided an opportunity to respond to adverse performance information during its performance of the affected contract, the agency need not provide an additional opportunity to respond during discussions. Statewide Assocs., Inc., B-400670.2, B-400670.3, May 28, 2009, 2009 CPD ¶ 120 at 6.

based; and (4) higher percentage of net proceeds to the Government on any sale or refinancing of the project. RFP § 3.2.1.11.

Arcus first argues that the evaluation of proposals under this subfactor was inconsistent with the terms of the solicitation because it considered unannounced technical evaluation criteria. Specifically, Arcus contends that the agency never disclosed the criteria used by the agency in determining whether to award a "strength" for offerors' responses to the desired financial features. Protester's Comments at 4.

Arcus' protest here is based upon the agency's rating plan concerning evaluation of the desired financial features, whereunder an offeror would only receive a strength for a desired financial feature if it met the following benchmarks: (1) using any percentage of NOI above the minimum 70 percent to fund the Reinvestment Account; (2) proposing fees at or below 3 percent for development fees, 3 percent for construction management fees, 3.5 percent for property management fees, and 0.75 percent for asset management fees; (3) proposing fees that are more than 55 percent incentive-based; and (4) proposing that more than 65 percent of net sales or refinancing proceeds go to the Government. AR, Tab 10, Proposal Analysis Summary, at 7-8. These benchmarks were developed prior to the evaluation of the proposals, and were not disclosed to the offerors.

The agency states that while it credited both proposals for offering the desired financial features in evaluating the subfactor, it only awarded a strength if the proposal exceeded the benchmarks. See AR at 21. In this regard, the RFP defined a strength as "[a] proposal aspect that appreciably decreases the risk of unsuccessful performance, or that represents a significant benefit to the Government." RFP, app. A, at 4. The agency explains that the benchmarks were intended to describe where desired financial features represent a "significant benefit to the Government." See AR at 21.

Here, the Air Force concluded that Arcus' proposal included three of the four desired financial features for this subfactor and gave Arcus credit for them, but determined, based on the benchmarks, that only one was considered to be a strength. AR, Tab 10, Proposal Analysis Summary, at 9. The strength was based on Arcus' offer of a range of [DELETED] percent NOI to fund the Reinvestment Account. Id.

Contrary to Arcus' assertions, the benchmarks here are not unstated evaluation criteria, but are evaluation standards used by the agency to evaluate the proposals. Agencies need not disclose evaluation standards or guidelines for rating proposal features as more desirable or less desirable since agencies are not required to inform offerors of their specific rating methodology. Olympus Bldg. Servs., Inc., B-285351, B-285351.2, Aug. 17, 2000, 2000 CPD ¶ 178 at 5; ABB Power Generation, Inc., B-272681, B-272681.2, Oct. 25, 1996, 96-2 CPD ¶ 183 at 4. However, the particular method of proposal evaluation utilized must provide a rational basis for source selection and be consistent with the evaluation criteria set forth in the solicitation. Brown & Root, Inc. and Perini Corp., a joint venture, B-270505.2, B-270505.3, Sept. 12, 1996, 96-2 CPD ¶ 143 at 9. Here, given that all of the desired financial features were disclosed in the solicitation and were all evaluated, the agency's undisclosed guidelines for when a strength was warranted were consistent with the evaluation criteria stated in the solicitation and have not been shown to be irrational.

Arcus also argues that the agency improperly did not give it credit for satisfying the desired financial feature of proposing "fees" that are more than 50-percent incentive-based. See RFP § 3.2.1.11. The protester claims that it should have received evaluation credit for this desired financial feature because one of its four proposed fees is more than 50-percent incentive based. Protester's Comments at 5.

The Air Force responds that Arcus did not receive credit for proposing the desired financial feature because to have received credit for this desired feature the fees cumulatively proposed by Arcus would have had to have been more than 50 percent incentive-based. The agency notes that the use of the plural for "fees" means that the agency was referencing Arcus' aggregate fees, and not simply one fee. AR at 19. We agree that the word "fees" on its face appears to encompass all of Arcus' fees--and this is the interpretation that the agency states was intended. See AHNTECH, Inc., B-291998, Apr. 29, 2003, 2003 CPD ¶ 90 at 4 (GAO relies on plain meaning of language to interpret a solicitation). We find no basis to question the agency's determination in this regard.

Finally, Arcus argues that its proposal was evaluated with no deficiencies and one strength, and therefore warranted a blue/exceptional rating, rather than a green/acceptable rating, for this subfactor.

The evaluation of technical proposals is generally a matter within the agency's discretion, and our Office will not disturb an agency's judgment regarding the relative merits of competing proposals absent a showing those judgments are unreasonable or inconsistent with the RFP's evaluation criteria. See, e.g., METAG Insaat Ticaret A.S., B-401844, Dec. 4, 2009, 2010 CPD ¶ 86 at 4; Manassas Travel, Inc., B-294867.3, May 3, 2005, 2005 CPD ¶ 113 at 2-3. There is no legal requirement that an agency award the highest possible rating, or the maximum point score, under an evaluation factor simply because the proposal contains strengths and/or is not evaluated as having any weaknesses. See, e.g., Archer Western Contractors, Ltd., B-403227, B-403227.2, Oct. 1, 2010, 2010 CPD ¶ 262 at 5 n.5; Pannesma Co. Ltd., B-251688, Apr. 19, 1993, 93-1 CPD ¶ 333 at 4.

According to the RFP, a blue/exceptional rating reflects a proposal that exceeds the specified minimum project requirements in a manner beneficial to the Government; and the proposal "must have one or more [s]trengths and no [d]eficiencies;" a green/acceptable rating reflects a proposal that meets specified minimum project requirements delineated in the RFP, and has no deficiencies but "may have one or more [s]trengths." RFP § 5.3.

Arcus' proposal received a green/acceptable rating under this subfactor because its proposal met the requirements for this subfactor, offered three of the four desired financial features, and received the one strength discussed above. AR, Tab 10, Proposal Analysis Summary at 9. As pointed out by the agency, this is consistent with the definitions of blue/exceptional and green/acceptable in the solicitation. Based on our review, we find the agency's judgment to be reasonable and consistent with the RFP. In any case, the record shows that Balfour Beatty's proposal, which received multiple strengths and was rated blue/exceptional under this subfactor, was clearly considered to be superior to Arcus for a variety of well documented reasons. AR, Tab 11, Source Selection Document, at 2.[10]

The protest is denied.

Lynn H. Gibson
General Counsel

[10] Arcus did not pursue some of the arguments concerning the evaluation of its proposal in response to the agency report, which addressed in detail each of the protest allegations. We deemed these arguments to be abandoned. Calnet, Inc., B-402558.2 et al., June 3, 2010, 2010 CPD ¶ 130 at 3. In its comments on the agency report, Arcus states that the evaluation documentation that it has been provided does not support the agency's determination that Balfour Beatty's proposal was superior to Arcus' under both subfactors of factor 2, development. Based on our review of the record, we think this documentation reasonably supports the agency's relative assessments of the proposal under this subfactor. While Arcus may disagree, it has not shown the agency's assessment was unreasonable. A protester's mere disagreement with such judgment does not provide a basis to sustain a protest. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.