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Decision

Matter of: Walsh Investors, LLC

File: B-407717; B-407717.2

Date: January 28, 2013

Joseph J. Dyer, Esq., Bennett Greenberg, Esq., and Erica L. Marshall, Esq., Seyfarth Shaw LLP, for the protester.

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James C. Wagner, Esq., Department of Veterans Affairs, for the agency.

Cherie J. Owen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly misled protester to raise the amount of its building and maintenance reserve by advising during discussions that the firm's reserve appeared to be low in relation to other offerors is denied where information provided by agency was accurate, was provided to all offerors, and the record indicates that protester's decision to raise its reserve was a business decision not compelled by the agency.
 2. Protest that agency used unstated evaluation criteria in evaluating awardee's proposal is denied where agency's consideration of protester's offer of additional land adjacent to the development site was reasonably related to the stated evaluation criteria for development of the site.
 3. Protest challenging the agency's conclusion that the advantages in the awardee's non-price proposal merited selection of its higher-priced proposal is denied where the agency's judgments were reasonable, consistent with the stated evaluation scheme, and adequately documented.
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DECISION

Walsh Investors, LLC, of Chicago, Illinois, protests the award of a contract to Fedcar Company Ltd., under solicitation No. VA-101-12-R-0087, issued by the Department of Veterans Affairs (VA) for the lease of a healthcare center in Fayetteville, North Carolina. Walsh contends that the agency engaged in

misleading discussions, considered unstated evaluation criteria, and made an unreasonable tradeoff decision.

We deny the protest.

BACKGROUND

On April 9, 2012, the VA issued the solicitation for offers (SFO) seeking offerors to provide a 20-year lease of approximately 250,000 net usable square feet of space at a pre-determined site located in Fayetteville, North Carolina. The successful offeror will construct a new building on the site that will house a VA healthcare center. Agency Report (AR), Tab F1, SFO, at 11. The solicitation informed offerors of the agency's minimum requirements with regard to the development of the building and land, and the services to be provided.

The SFO set forth the following evaluation factors in descending order of importance: (1) price, measured in annual price per net usable square foot, including any option period; (2) technical quality, including the quality of the building and the design concept; (3) the offeror's qualifications, including past performance; and (4) the adequacy and efficiency of the operations and maintenance plans. Id. at 20. The solicitation explained that the non-price factors, when combined, were approximately equal in importance to the price factor. Id.

With regard to the technical quality evaluation factor, the solicitation listed three sub-factors: (1) quality of building and design concept; (2) quality of site development; and (3) site physical security. Id. at 22-23. Under the first subfactor, quality of building and design concept, the agency stated that it would consider the following: architectural concept; building design; sustainable design and energy efficiency; and quality of construction materials. Id.

Under the second technical subfactor, quality of site development, the solicitation specified that the agency would consider, among other things, the offerors' development of the site to accommodate the VA's conceptual building footprint, including the required setbacks, the ingresses and egresses to and from the entrances, traffic patterns to maximize flow of vehicles to and from the main thoroughfare, and how the landscaping design fits the surrounding areas. Id. at 23.

With regard to the evaluation of price, the solicitation stated that prices would be evaluated on the basis of the annual shell rental rate per net usable square foot. Id. at 21.

The VA received offers from twenty-one firms, including Walsh and Fedcar, by the closing date of June 5, 2012. After initial evaluations, the agency established a competitive range consisting of eleven offerors with which the agency conducted discussions. Contracting Officer's Statement at 1. During discussions, the agency

advised each offeror of how different aspects of its price proposal related to the average prices of all competitive range offerors. Specifically, the agency's notes of its discussions state:

We gave a general review of lines 1-27 vs. the averages of the other offers. We then reviewed the insurance, maintenance and reserve[,] and management lines. Again we compared the offered price to the average of the other offers.

-Then we utilized the abstract of offers to tell each offeror how they related to the mean average of the price elements that we analyzed.

-We told each offeror how the average cost of [certain listed] items related to their offered price.

AR, Tab D1, Negotiation Meeting Notes, at 2 (notes from discussions with Walsh); see also, id. at 6 (notes from discussions with Fedcar).

As relevant here, with regard to Walsh's reserve, the agency stated that Walsh's reserve of \$[deleted] was low compared to the average.¹ Id. at 2. Similarly, the agency advised Fedcar that its reserve of \$[deleted] was low in comparison to the average. Id. at 6; see AR, Tab C1, Abstract of Initial Offers, at 1.

After engaging in discussions, the agency requested that offerors submit their final proposal revisions (FPR). As relevant here, Walsh's FPR included a building maintenance reserve of \$[deleted], which was an increase of \$[deleted] over the amount of the reserve in its initial proposal. Fedcar's FPR included a building maintenance reserve of \$[deleted], which was an increase of \$[deleted] over the amount of the reserve in its initial proposal. AR, Tab C3, Abstract of FPR Offers, at 1.

In evaluating the non-price evaluation factors, the agency assigned weighted point scores and ranked each offeror's proposal. As relevant here, Fedcar's final proposal was ranked first under the non-price factors with a score of 41.21, while Walsh's final proposal was ranked second with a score of 38.27. AR, Tab B4, TEB Score Summary, at 2; Contracting Officer's Statement at 3. With regard to price, Fedcar was ranked fifth with a net present value fully-serviced rental rate of \$29.78 per net usable square foot, while Walsh's proposal was ranked fourth in the price evaluation with a rate of \$28.90.² AR, Tab E, Price Negotiation Memorandum, at 34.

¹ The average reserve proposed by offerors was \$328,916.72. AR, Tab C1, Abstract of Initial Offers, at 1.

² During the pendency of this protest, the agency submitted a revised abstract of FPR prices, which reflects that Fedcar was ranked fourth in the price evaluation and Walsh was ranked fifth. AR, Tab C3, Abstract of FPR Offers, at 1 (dated Nov. 16,
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In the contracting officer's best value analysis, he noted that Fedcar's proposal "presented a building design that featured many well thought out elements that enhanced the building's function, a maintenance plan that showed a full understanding of the health care requirements and the financial ability to perform." AR, Tab E, Price Negotiation Memorandum, at 33. The contracting officer acknowledged that Fedcar's proposal was ranked first in the technical evaluation, fifth in the price evaluation, and first overall. Id.

The contracting officer also noted that Fedcar had proposed to provide an additional five acres of land adjacent to the VA's pre-selected site. The contracting officer described the benefits of the additional land as follows:

- Increased visibility and frontage
- An additional point of ingress/egress at the Old Raeford Rd/Raeford Rd intersection
- A site access point at an existing traffic signal
- Provide significantly improved on-site traffic circulation
- Allow an overall site adjustment to shift planned perimeter parking from under the existing power-line easement

AR, Tab E, Price Negotiation Memorandum, at 34.

In his source selection decision, the contracting officer acknowledged that Fedcar was ranked fifth in price, but also noted that Fedcar's proposal offered the lowest unserviced first-year rental rate. Id. at 34. The contracting officer considered that Walsh ranked second in the technical evaluation and fourth in the price evaluation, but found that the multiple benefits associated with Fedcar's proposal to provide additional acreage outweighed the price difference between Fedcar's and Walsh's proposal. Id. Therefore, the contracting officer determined that Fedcar's proposal

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2012). In an e-mail, the agency explained that, during its review of the file, it made administrative revisions to the abstract of offers. E-mail from VA Attorney, Nov. 21, 2012. In the revised version, Fedcar's net present value fully-serviced rental rate was \$28.83 per net usable square foot. Walsh's rate remained \$28.90. AR, Tab C-3, Abstract of FPR Offers, at 1. The protester states that, according to its calculations, using the original abstract, Walsh's proposal offered a price advantage of approximately \$4.6 million for the twenty-year lease in present value. Protester's Comments on the Supplemental AR at 11. Using the revised abstract, Fedcar's proposal offered a price advantage of approximately \$351,000. Id. The protester does not challenge the price evaluation so we need not resolve the issue of which abstract is accurate. For purposes of this decision, we rely upon the original abstract of prices.

offered the best value to the government and selected that firm's proposal for award. Id. at 33.

This protest followed.

DISCUSSION

Walsh contends that the agency engaged in misleading discussions, considered unstated evaluation criteria, and made an unreasonable tradeoff decision.³

Misleading Discussions

The protester contends that it was misled during discussions into raising its building and maintenance reserve from \$[deleted] to \$[deleted], despite the fact that Fedcar's lower reserve was later evaluated to be acceptable. Protest at 4. Walsh argues that it was misled by the characterization of its reserve as "too low," and misled by the agency's use of the average amount proposed for building and maintenance reserve to provide feedback even though the agency did not rely on this average when evaluating proposals. Comments at 4-5.

The Federal Acquisition Regulation (FAR) requires that when conducting discussions pursuant to FAR part 15, contracting officers must raise with each offeror proposal deficiencies and significant weaknesses; contracting officers are also "encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR § 15.306(d)(3). During discussions, agencies may not consciously mislead or coerce an offeror into raising its prices. Eagle Tech., Inc., B-236255, Nov. 16, 1989, 89-2 CPD ¶ 468 at 3-4. However, we will not find coercion in discussions where an agency in good faith provides accurate information to an offeror, even where the offeror uses that information to its ultimate competitive detriment. XtremeConcepts Syst., B-406804, Aug. 31, 2012, 2012 CPD ¶ 253 at 5; EMR, Inc., B-406625, July 17, 2012, 2012 CPD ¶ 209 at 5.

Here, the record does not support the protester's assertion that it was misled or coerced into raising the amount of its building and maintenance reserve. During discussions, the agency informed each offeror of the relationships between the average prices proposed by all offerors and the prices proposed by that offeror. In this regard, the agency informed both Walsh and Fedcar that their building and

³ In its various protest submissions, Walsh has raised arguments in addition to, or that are variations of, those discussed below. We have considered all of Walsh's various arguments and allegations and find no basis to sustain its protest.

maintenance reserve was low compared to the average proposed by all offerors.⁴ As GAO has long made clear, it will not sustain a protest where, as here, an agency has treated offerors equally by providing them with the same information during discussions, and where the protester responds by increasing its proposed price primarily for reasons within its business judgment. XtremeConcepts Sys., supra; see Robinson's Lawn Servs., Inc., B-299551.5, June 30, 2008, 2009 CPD ¶ 45 at 8. We therefore find nothing unfair or improper about the agency's discussions.

Further, we find no basis to sustain the protest based on the agency's decision to advise offerors of the average amounts proposed by all offerors. We find the decisions cited by the protester, Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 and DTH Mgmt. Group, B-252879.2, B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227, to be distinguishable from the case here. In Ranor, the agency repeatedly advised the protester that its price was "too low" in comparison to the government's cost estimate. After the agency advised the firm to raise its price, the agency made award to an offeror with a price lower than the protester without regard to the government estimate. In DTH Mgmt. Group, the agency advised the protester that its price was so low in comparison to the government estimate that it had been evaluated as unrealistic. The protester raised its price based on the agency's advice, but the agency then awarded to a lower-priced offeror, disregarding the government estimate.

In contrast to those cases, the agency here never advised Walsh that its price was "too low," despite the protester's numerous claims that it did. Rather, the agency advised each offeror of where various portions of their price proposal stood in relation to the averages of all offerors. Both the protester and the awardee were informed that their reserve prices were below the average and both the protester and awardee decided to raise their reserve prices when submitting their FPRs. Further, the agency here made award to the higher-priced offeror. Under these circumstances, we cannot find that the information provided by the agency during discussions was misleading.⁵ This protest ground is denied.

⁴ Although the protester repeatedly quotes the agency as stating that the firm's prices were "too low," Protester's Comments at 3-5, the record shows that the agency simply stated that the amount was "low" in comparison to the average. See AR, Tab D1, Negotiation Meeting Notes, at 2. There is no support in the record for the protester's allegations that the agency informed Walsh that it should raise its reserve amount.

⁵ The protester also argues that the agency's evaluation of Fedcar's proposal was flawed because the agency failed to "discredit" Fedcar's proposal even though its building and maintenance reserve was below the average. Comments at 5. This allegation provides no basis on which to sustain the protest. The protester does not demonstrate how the awardee's building and maintenance reserve amount could be considered unacceptable or flawed; nor does it identify any provisions of the

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Unstated Evaluation Factor

Walsh also contends that the agency's evaluation of the proposals was based upon unstated evaluation criteria. In this regard, the protester alleges that the solicitation did not contemplate the consideration of the adjacent land proposed by Fedcar. The protester also argues that the VA's source selection plan did not provide for the consideration of proposal aspects that exceeded the solicitation's requirements, except with regard to issues of accessibility for handicapped people. Comments on Supplemental Agency Report at 5.

Although a solicitation must identify all major evaluation factors, it need not identify all areas within each factor that might be taken into account in an evaluation, provided such unidentified areas are reasonably related to, or encompassed by, the stated evaluation factors. The Dixon Group, Inc., B-406201, B-406201.2, Mar. 9, 2012, 2012 CPD ¶ 150 at 4; Coley & Assocs., Inc., B-404034 et al., Dec. 7, 2010, 2011 CPD ¶ 6 at 5.

Here, while the solicitation did not expressly provide that the agency would take into consideration an offeror's plan to include adjacent land in the lease, it did provide that the agency was to evaluate the offerors' development of the site to accommodate the VA's conceptual building footprint, including the required setbacks, the ingresses and egresses to and from the entrances, traffic patterns to maximize flow of vehicles to and from the main thoroughfare, and how the landscaping design fits the surrounding areas. Agency Report (AR), Tab F1, SFO, at 23. We find that the agency's consideration of the additional acreage was reasonably related to these evaluation criteria. Specifically, the agency found that Fedcar's additional five acres of land adjacent to the proposed site would allow for increased visibility, an additional point of ingress and egress, a site access point at an existing traffic signal, significantly improved on-site traffic circulation, and the possibility of shifting the planned perimeter parking from under the existing power-line easement. AR, Tab E, Price Negotiation Memorandum, at 34.

Further, with regard to the protester's argument that the agency was not permitted to consider aspects of proposals that exceeded the solicitation's requirements, we have held that where, as here, a solicitation indicates the relative weights of evaluation factors, as opposed to providing for selection of the lowest-priced, technically acceptable proposal, the agency is not limited to determining whether a proposal is merely technically acceptable; rather, proposals may be evaluated to distinguish their relative quality by considering the degree to which they exceed the minimum requirements or will better satisfy the agency's needs. ViroMed

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solicitation that contemplated this type of evaluation. We find the agency's evaluation of Fedcar's reserve amount to be reasonable.

Laboratories, Inc., B-310747.4, Jan. 22, 2009, 2009 CPD ¶ 32 at 5; IAP World Servs., Inc., B-297084, Nov. 1, 2005, 2005 CPD ¶ 199 at 4. An agency can properly consider both the extent to which proposals exceed the RFP requirements and the extent to which offerors used innovative measures to respond to those requirements. ViroMed Laboratories, Inc., *supra*. Accordingly, under the circumstances here, the agency's consideration of Fedcar's proposal to exceed the solicitation's requirements by providing additional land adjacent to the agency's pre-determined site does not amount to reliance on an unstated evaluation criterion. This protest ground is denied.⁶

Tradeoff Decision

Finally, Walsh contends that the agency's tradeoff decision was unreasonable because, according to county tax assessment records, the value of Fedcar's additional land offered by the awardee is \$64,587. Protester's Comments at 11-12. The protester argues that the net present value of Fedcar's 20-year lease is \$4.5 million more than the net present value of Walsh's lease.⁷ Therefore, Walsh concludes that the agency's determination that Fedcar's proposal offered the best value to the government is not reasonable.

Source selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results, and their judgments are governed only by the tests of rationality and consistency with the stated evaluation criteria. Client Network Servs., Inc., B-297994, Apr. 28, 2006, 2006 CPD ¶ 79 at 9. It is not our function to second guess the agency's judgment as to the value of the advantages associated with a higher-rated proposal. CLS Worldwide Support Servs., B-405298.2 *et al.*, Sept. 11, 2012, 2012 CPD ¶ 257 at 17. Rather, in considering the rationality of an agency's tradeoff determination, we look at whether the reasons given for preferring one proposal over another are consistent with the stated evaluation scheme, and not whether we agree with the source selection authority as to the relative value of the advantages. Carothers Constr., Inc., B-405241.4, July 26, 2012, 2012 CPD ¶ 225 at 9.

⁶ Further, we have consistently held that an agency's source selection plan is an internal guide that does not give rights to parties; it is the RFP's evaluation scheme, not internal agency documents such as source selection plans, to which an agency is required to adhere in evaluating proposals. J5 Sys., Inc., B-406800, August 31, 2012, 2012 CPD ¶ 252 at 13 n.14; Meadowgate Techs., LLC, B-405989, B-405989.3, Jan. 17, 2012, 2012 CPD ¶ 27 at 6 n.7.

⁷ Assuming we rely on the original abstract of prices and not the revised abstract, which reflects that Fedcar offered a price lower than the protester.

We find the agency's tradeoff decision to be reasonable. The protester provides no basis for its assumption that the benefits associated with Fedcar's provision of the additional land--including increased visibility, an additional point of ingress and egress, a site access point at an existing traffic signal, significantly improved on-site traffic circulation, and the possibility of shifting the planned perimeter parking--can be calculated simply by multiplying the number of acres by the most recent numbers from the county tax assessment. See Comments at 12. In its tradeoff decision, the contracting officer considered that Fedcar's building design featured many well thought out elements that enhanced the building's function, a maintenance plan that showed a full understanding of the health care requirements, and the financial ability to perform, noting that Fedcar's proposal was ranked first under the non-price factors. AR, Tab E, Price Negotiation Memorandum, at 33. The contracting officer's comparison of the strengths and weaknesses associated with Fedcar's and Walsh's proposals was reasonable, consistent with the solicitation criteria, and treated the offerors equally. Thus, in our view, the agency has adequately justified its selection of Fedcar's higher-rated proposal in accordance with the stated evaluation criteria.⁸

The protest is denied.

Susan A. Poling
General Counsel

⁸ We assume for the sake of this decision that Walsh's proposal offered a price advantage. As set forth above, during the protest the agency produced a revised abstract of offers that shows that Fedcar's price was lower than the price proposed by Walsh. If the revised abstract of prices is accurate, then Fedcar's proposal was both higher-rated and lower-priced; thus no tradeoff between Fedcar and Walsh would have been necessary.