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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** M&N Aviation, Inc.

**File:** B-409048

**Date:** December 27, 2013

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W. Scott LaForge, M&N Aviation, Inc, for the protester.

Eugene Kim, Esq., Department of Justice, United States Marshals Service, for the agency.

Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that the agency improperly made award based on lowest price instead of a price/technical tradeoff is denied where the record shows that the agency did conduct a price/technical tradeoff and the award decision was reasonable.

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### DECISION

M&N Aviation, Inc. (M&N), of San Juan, Puerto Rico, protests the award of a contract to Tradewind Aviation, LLC, of Oxford, Connecticut, by the Department of Justice, U.S. Marshals Service (USMS), under request for quotations (RFQ) No. DJM-13-A37-Q-0008 for air charter services in support of the agency's Justice Prisoner and Alien Transportation System (JPATS). M&N argues that the agency made award based on lowest price, rather than based on best value, as required by the solicitation. M&N asserts that had the agency conducted a proper price/technical tradeoff, it would have received award of the contract, and not Tradewind.

We deny the protest.

### BACKGROUND

The RFQ, issued on June 11, 2013, sought quotations in response to the USMS-JPATS requirement to charter aircraft with "provisions for a minimum of 7-11 passenger seating" to fly routes originating in San Juan, Puerto Rico to various locations in the Caribbean. RFQ, Statement of Work (SOW), at 1. Quotations were to be evaluated based on technical, price and past performance criteria, with a

contract to be awarded to the offeror whose quote, conforming to the RFQ, represents the best overall value to the government. RFQ at 32. When combined, technical and past performance were to be significantly more important than price. Id. at 33. However, the RFQ instructed offers that where quotes were considered substantially technically equal, total evaluated price was to be the determining factor for award.<sup>1</sup> Id.

Quotes were submitted by several offerors, including one from M&N, the incumbent contractor, and Tradewind. After an initial evaluation, M&N's quote was rated good under the technical factor, and satisfactory under the past performance factor. AR, Exh. 4, Consensus Technical Evaluation Report, at 3. The firm's technical rating was based on one identified significant strength, two strengths, and no weaknesses or deficiencies. Id. at 4. With respect to past performance, M&N provided three references, two of which responded to the past performance questionnaire. Id. at 9. Its satisfactory rating recognized past performance that met contractual requirements with minor issues or concerns that were effectively addressed by the contractor. Id.

Tradewind's quote was rated acceptable under the technical factor and was not rated under past performance. Id. at 3. The firm's technical rating was based on one significant strength, one strength and one weakness.<sup>2</sup> Id. The record shows that Tradewind's past performance was not evaluated as the firm did not provide any references. Id. at 9.

The agency set a competitive range consisting of M&N and Tradewind. AR, Exh. 6, Competitive Range Determination. In its discussion letter to Tradewind, USMS identified one weakness and one deficiency. AR, Exh. 7, Discussion Letters, at 1. The discussion letter to M&N did not identify any significant weaknesses, deficiencies or adverse past performance; it simply provided M&N the opportunity to revise its price quote. Id. at 2.

M&N did not submit a revised technical proposal, whereas Tradewind did. AR, Exh. 8, Final Technical Evaluation Report, at 1. A new technical evaluation was conducted of Tradewind's revised proposal, resulting in an upgrade of its technical rating from acceptable to good. Id. at 1-2. A review of Tradewind's past performance information resulted in a rating of satisfactory. Id. at 3. In its final

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<sup>1</sup> The RFQ explains, "where the government determines that the technical factors of each Offeror are NOT significantly different among competing quotes, then the quote with the lowest evaluated price will be selected for award." RFQ at 33.

<sup>2</sup> Technical proposals were to be rated as either outstanding, good, acceptable, marginal or unacceptable. RFP at 32. Past performance proposals were to be rated as either satisfactory, unsatisfactory or neutral. Id.

proposal submission, M&N revised its total price from \$2,278,100.00 to \$2,240,700.00. AR, Exh. 9, Award Decision, at 3. Tradewind's price remained unchanged at \$1,945,022.20. Id.

The contracting officer determined that both M&N and Tradewind's quotes were substantially technically equal. Id. at 4. Based on this finding, she determined that award to Tradewind based on its lower-priced quote was in the best interest of the government. Id. This protest followed.

## DISCUSSION

M&N argues that the agency made award based on lowest price, rather than based on best value, as required by the solicitation. Protest at 2. M&N asserts that had the agency conducted a proper price/technical tradeoff, it would have received award of the contract, instead of Tradewind. Id. While M&N does not specifically challenge the agency's evaluation of its proposal, the firm does challenge the agency's determination that its proposal was technically equal to the proposal submitted by Tradewind. Id.

When a protester challenges an agency's award decision, we will review that decision solely to determine if it was reasonable and consistent with the solicitation's evaluation scheme, procurement statutes and regulations. Great Lakes Towing Co. dba Great Lakes Shipyard, B-408210, June 26, 2013, 2013 CPD ¶ 151 at 3. A review of the record does not support M&N's allegation that award was made based on "best price and NOT by best value criteria." Protest at 2. The award decision clearly reflects the agency's consideration of the relative technical merits and offered prices of both proposals. AR, Exh. 9, Award Decision. The contracting officer ultimately concluded that the proposals submitted by M&N and Tradewind were substantially technically equal and made award based on Tradewind's lower price. Id. at 4. However, it is clear that the contracting officer did consider relative technical merit in reaching this conclusion.<sup>3</sup> In this regard, the contracting officer's award decision comports with the stated evaluation criteria.

We also find no reason to question the agency's evaluation of the offerors' respective proposals. The evaluation of an offeror's proposal is a matter within the agency's discretion. MVM, Inc., B- 407779, B- 407779.2, Feb. 21, 2013, 2013 CPD ¶ 76 at 4. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that

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<sup>3</sup> For example, the contracting officer commented favorably on both offerors' proposals as they both provided an immediate back-up plan in the event of scheduled or unscheduled maintenance. AR, Exh. 9, Award Decision, at 4. Both offerors also had no issues with documentation of aircraft maintenance, and both were located near the place of performance. Id.

the evaluation was unreasonable. Id. In reviewing a protest that challenges an agency's evaluation of proposals, our Office will not reevaluate the proposals, but will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Id.

In its protest, M&N lists various aspects of its proposal, which we infer to be offered as support for M&N's position that its proposal is technically superior to the proposal of Tradewind. Protest at 2. However, the protester did not address in its comments any matters related to its own evaluation, despite being provided with the agency's evaluation documentation.<sup>4</sup> Consequently, we view any challenge to the evaluation of M&N's proposal as abandoned by M&N and will not consider it further. VIRE Consulting, Inc., B-408148.2, Nov. 26, 2013, 2013 CPD ¶ 272 at 3 n.1.

With respect to Tradewind's proposal, the protester primarily argues that the awardee did not offer aircraft that complied with the SOW's requirement of "provisions for a minimum of 7-11 passenger seating" and should have been disqualified from the competition. Comments at 2; see also RFP, SOW, at 1. M&N argues that the aircraft available to Tradewind are certified by the manufacturers to have a maximum of 9 passenger seats, and that such capacity does not meet the solicitation's requirements.<sup>5</sup> Id. M&N appears to contend that the solicitation requires vendors to offer aircraft with capacity to seat the maximum of the range established in the solicitation, i.e., 11 passengers. Comments at 2.

The agency disagrees with the protester, and asserts that the 7-11 passenger seat range more than adequately enables the agency to fulfill its mission. Agency Legal Memorandum at 7. The agency explains that the Caribbean locations for which these air charter services will be provided are in relatively close proximity, and that its flight schedulers can schedule the aircraft to "hop" around the locations and make multiple stops in the same location on any given day. For this reason, the agency states that it did not consider an aircraft having 11 seats to be markedly better than one having seven seats; on the contrary, the agency's view was that an

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<sup>4</sup> No protective order was issued in this matter, and our decision is necessarily general. The agency provided M&N the initial and final consensus technical evaluation reports, competitive range determination and award decision showing the evaluation of M&N's proposal. The agency redacted certain proprietary information from these documents as it relates to the awardee. Unredacted copies of these documents were provided to our Office for "in-camera" review.

<sup>5</sup> The agency redacted from the AR the aircraft proposed by the awardee. The awardee offered aircraft with passenger seat capacity that exceed 7 passenger seats, but was less than 11 passenger seats. AR, Exh. 4, Consensus Technical Evaluation Report, at 4.

aircraft that could hold seven passengers could perform the mission just as well as an aircraft that could hold 11 passengers. Id. at 5 n.3.

We agree with the agency's view of the requirement. The RFQ nowhere stated that only an aircraft that could seat 11 passengers would satisfy the capacity requirement; instead, the RFQ identified a range between 7 and 11 passengers as its minimum requirement. While it appears to be M&N's view that the solicitation requires aircraft that seat a minimum of 11 passengers, the RFQ's statement of the capacity requirement in terms of a range suggests that seating capacity within that range would be considered. As a result, the agency's reading of the requirement is consistent with the solicitation, and we have no basis to question its determination that Tradewind's quote met the requirement. See Crown Eng'g, B-255439.2, Apr. 14, 1994, 94-1 CPD ¶ 276 at 2-3.

M&N also argues that the agency treated the offerors disparately in the conduct of discussions, to its prejudice. Comments at 3. Specifically, M&N asserts that while the agency informed Tradewind of weaknesses and deficiencies found in its proposal, it failed to inform the protester that one of its three past performance references did not return its past performance questionnaire. Second, M&N argues that while Tradewind was given the opportunity to revise its quote and address identified weaknesses and deficiencies, M&N was only given the opportunity to revise its price. Id.

When an agency engages in discussions with an offeror, the discussions must be meaningful. In order to be meaningful, discussions must be sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror's potential for receiving award. AXIS Management Group LLC, B-408575, Nov. 13, 2013, 2013 CPD ¶ 247 at 8. An agency may not, through its questions or silence, lead an offeror into responding in a manner that fails to address the agency's actual concerns; may not misinform the offeror concerning a problem with its proposal; and may not misinform the offeror about the government's requirements. Id. While the precise content of discussions is largely a matter of the contracting officer's judgment, such discussions must, at a minimum, address identified deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. Federal Acquisition Regulation (FAR) §15.306(d)(3); American States Utilities Services, Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 5.

With respect to M&N's first allegation, it is not objectionable to evaluate an offeror's past performance based on fewer than the maximum possible number of references the agency could have received. Harris IT Servs Corp., B-406067, Jan. 27, 2012, 2012 CPD ¶ 57 at 10. Here, the RFQ did not specify a minimum required number of past performance references, nor is there any evidence that the agency treated the absence of a response from one of M&N's three past performance references as adverse information. To the contrary, M&N received the highest past

performance rating of satisfactory. As such, we do not believe that the agency was required to inform M&N of the absence of the questionnaire during discussions.

With respect to M&N's second allegation, there is no evidence that the agency found any deficiencies or significant weaknesses in M&N's proposal. There is also no evidence that the agency identified any adverse past performance information regarding M&N. Finally, the record does not reflect that the agency limited the protester's ability to revise its proposal.<sup>6</sup> Our review of the record leads us to conclude that the agency's discussions with M&N were meaningful and the firm was not treated unequally vis-a-vis Tradewind.

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>6</sup> The agency's discussion letter to M&N informs the firm that the agency is providing it the opportunity to revise its price quote. It is silent on whether M&N is permitted to revise any other aspect of its proposal. AR, Exh. 7, Discussion Letters, at 2.