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**Comptroller General  
of the United States**

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

## **Decision**

**Matter of:** RQ Construction, LLC

**File:** B-409131

**Date:** January 13, 2014

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Reginald M. Jones, Esq., and Nicholas T. Solosky, Esq., Fox Rothschild LLP, for the protester.

Theodore K. Stream, Esq., Gresham Savage Nolan & Tilden, for Stronghold Engineering, Inc., the intervenor.

Scott W. Johansen, Esq., Department of the Navy, for the agency.

Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

1. Protest challenging an agency's affirmative determination of responsibility based on allegations in a civil lawsuit filed in state court is denied where the record demonstrates that the agency had no reason to be aware of that information, and where the information consists only of unproven accusations.

2. An agency's selection of the awardee's lower-rated, lower-priced proposal was consistent with the solicitation's best-value basis for award, where the agency considered the technical merit of respective proposals but concluded that the protester's higher technical merit did not justify the price premium.

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### **DECISION**

RQ Construction, LLC (RQC), of Carlsbad, California, protests the award of a contract to Stronghold Engineering, Inc., of San Diego, California, under request for proposals (RFP) No. N62473-13-R-4204, issued by the Department of the Navy for repair of heating, ventilation, air conditioning, and ductwork systems at the Naval Medical Center in San Diego, California. RQ challenges the agency's affirmative determination of Stronghold's responsibility and the adequacy of the agency's best-value decision.

We deny the protest.

## BACKGROUND

The RFP provided for the award of a fixed-price contract on a best-value basis using a two-phase evaluation process. In the first phase, proposals were evaluated under the following factors: technical approach, experience, and past performance. As a result of this evaluation the agency would select the most highly-qualified proposals for evaluation under phase two. Proposals selected for phase two were evaluated under the following factors: safety, technical solution, energy and sustainable design, small business utilization (including two subfactors), and price. RFP at 15. Offerors were informed that the agency's best-value decision would be based upon the evaluation of proposals under both phases, and that the non-price factors, when combined, were equal in importance to price. Id. at 16.

As relevant here, the RFP also required offerors to confirm whether information in the Federal Awardee Performance and Integrity Information System was current, complete and accurate with respect to Federal Acquisition Regulation (FAR) clause 52.209-7, Information Regarding Responsibility Matters.<sup>1</sup> RFP at 28-29. Offerors were also required to provide a completed financial questionnaire in a sealed envelope from a financial institution. RFP at 7.

The Navy received five proposals, three of which (including RQC's and Stronghold's) were evaluated under phase two. Agency Report (AR) at 7-8. The Navy conducted discussions, and received revised proposals, which were evaluated by the agency's source selection evaluation board (SSEB). The revised proposals of the phase-two offerors were evaluated as follows:<sup>2</sup>

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<sup>1</sup> FAR clause 52.209-7 requires offerors, in pertinent part, to represent whether or not the offeror and/or its principals had within the last five years in connection with a federal contract or grant been the subject of a federal or state proceeding that resulted in a criminal conviction, a civil penalty of \$5,000 or more, an administrative fine of \$5,000 or more, or required administrative restitution in excess of \$100,000.

<sup>2</sup> Proposals were evaluated under each factor (other than past performance) as outstanding, good, acceptable, marginal, or unacceptable. Past performance received confidence ratings of substantial, satisfactory, limited, no confidence, or unknown/neutral. AR, Tab 2, Source Selection Plan, at 20-23.

	<b>Stronghold</b>	<b>Offeror C</b>	<b>RQC</b>
Technical Approach	Acceptable	Acceptable	Acceptable
Experience	Good	Outstanding	Good
Past Performance	Substantial Confidence	Substantial Confidence	Substantial Confidence
Safety	Good	Good	Outstanding
Technical Solution	Good	Acceptable	Good
Energy / Design	Acceptable	Marginal	Good
Small Business Util.	Good	Acceptable	Good
<b>OVERALL RATING</b>	<b>GOOD</b>	<b>ACCEPTABLE</b>	<b>GOOD</b>
Price	\$46,557,217	\$47,372,314	\$52,491,931
<b>OVERALL RANKING</b>	<b>1</b>	<b>2</b>	<b>3</b>

AR, Tab 11, Business Clearance Memorandum, at 4, 7-8; Tab 12, Source Selection Decision, at 1.

The SSEB's ratings were supported by narrative discussion that identified the firms' respective strengths and weaknesses. The SSEB also prepared an award recommendation that compared the relative merits of proposals. In the SSEB's comparison, RQC's proposal was considered the highest technically rated, and Stronghold's proposal the second highest rated. AR, Tab 11, Business Clearance Memorandum, at 17, 20. The SSEB also recognized that RQC's proposal was the highest-priced by a substantial margin. Id. at 20. The SSEB recommended award to Stronghold, noting that although RQC's proposal met or exceeded requirements in many areas, its technical advantages did not overcome its higher price. Id.

The SSEB's report and recommendation were considered by the agency's source selection authority (SSA), who prepared a detailed decision discussing the merits of the firms' respective proposals. See AR, Tab 12, Source Selection Decision, at 1-5. In this regard, the SSA recognized and discussed the basis of RQC's evaluated technical superiority as compared to Stronghold's proposal. She specifically noted the protester's slightly more relevant experience (with one more design-build project than Stronghold), better safety record, slightly higher rate of energy efficiency, and more thorough subcontracting plan. Id. at 4. The SSA concluded, however, that RQC's technical superiority did not outweigh the nearly \$6 million price premium, and selected Stronghold's second highest-rated, lower-priced proposal as the best value to the agency. Id. at 5.

Stronghold's responsibility was considered by the contracting officer, who reviewed Stronghold's financial questionnaire, surety letter, and bid bond, System for Award Management (SAM) registrations and certifications (including compliance with FAR clause 52.209-7). AR at 8. The contracting officer determined that Stronghold was

responsible, noting the firm's strong past performance record and financial resources. Id. at 13. In this regard, the contracting officer also found that Stronghold had affirmed in its FAR clause 52.209-7 certification that it had not been the subject of federal or state criminal, civil, or administrative proceedings in connection with a federal contract in the previous 5 years that resulted in a criminal conviction, civil penalty, or administrative finding of fault or liability. Id.

Award was made to Stronghold on September 26, 2013, and this protest followed a debriefing.

## DISCUSSION

RQC objects to the agency's affirmative determination of Stronghold's responsibility, arguing that the contracting officer failed to consider available, relevant information. Specifically, the protester complains that the contracting officer failed to consider allegations made against Stronghold in a wrongful termination complaint filed on August 13, 2013, by a former employee in a California state court.<sup>3</sup> RQC contends that these allegations, if true, would indicate that Stronghold is not a responsible contractor. Protest at 1; Protester's Comments at 4-5.

As a general matter, our Office does not review an affirmative determination of responsibility by a contracting officer. 4 C.F.R. § 21.5(c) (2013); CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 26; Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 20. We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Compare Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 (contracting officer generally aware of allegations of misconduct by awardee and took no steps to consider the awardee's record of integrity and business ethics) with Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4-5. (contracting officer aware of adverse information concerning the awardee's integrity and considered it).

Here, Navy states that it was not aware of the private state court action, nor any of the allegations involving Stronghold that were included in that complaint. Although the protester asserts that this information was "public knowledge at the time the award of the Contract was made," Protest at 4, it has neither shown any reason why the agency should have had knowledge of a complaint filed in state court, nor

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<sup>3</sup> The state court complaint, in addition to the wrongful termination claim, raises a number claims for relief including age and sex discrimination, failure to pay wages and other benefits, and intentional infliction of emotional distress.

shown any legal obligation on the contracting officer's part to conduct the type of search that might have produced this information. Moreover, RQC's argument is based upon unproven allegations in a complaint that is the subject of litigation, and not upon facts establishing that Stronghold has been convicted of any federal, state, or local crime or subject to civil or administrative penalties.<sup>4</sup> In these circumstances, we find that RQC's challenge to the adequacy and reasonableness of the contracting officer's determination does not present an exception to our rules barring consideration of challenges to an agency's affirmative determination of responsibility. See CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., supra, at 26.

RQC also contends that Stronghold's failure to inform the Navy of the wrongful termination suit, and the allegations contained therein, is a material misrepresentation. Protester's Comments at 7. In this regard, RQC contends that Stronghold was required to inform the Navy of the lawsuit pursuant to FAR clause 52.203-13, Contractor Code of Business Ethics and Conduct, which was incorporated in the RFP. RFP at 32. This clause states in part, and as argued by RQC, that contractors must disclose to the Office of Inspector General and the cognizant contracting officer, "whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed" violations of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations of Title 18 of the United States Code, or a violation of the civil False Claims Act, 31 U.S.C. §§ 3279-3733.

An offeror's material misrepresentation could provide a basis for disqualification of the proposal and cancellation of the contract award based upon the proposal. Universal Technologies Inc.; Spacecraft, Inc., B-248808.2 et al., Sept. 28, 1992, 92-2 CPD ¶ 212 at 13. A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact upon the evaluation. ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 5.

Here, Stronghold's failure to inform the Navy of a state civil suit, which the awardee was contesting, is not a misrepresentation, given that there was no requirement or request to provide this type of information. In this regard, we do not agree with RQC that the unsupported allegations contained in a state civil complaint constitute "credible evidence" of violations of federal law that were required to be reported to the Inspector General or the contracting officer pursuant to FAR clause 52.203-13.

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<sup>4</sup> Stronghold states that it is opposing the suit and has filed a cross-complaint against the plaintiff. Stronghold Letter to GAO, Oct. 30, 2013 (acknowledging receipt of the protest from the Navy).

RQC also challenges the agency's selection decision, complaining that award to Stronghold based upon its lower-rated, lower-priced proposal was inconsistent with the RFP's best-value basis for award.<sup>5</sup> Protester's Comments at 8-9. There is no merit to this argument. It is well-settled that an agency in a procurement based upon best value may properly select a lower-rated, lower-priced proposal, even where price is a less important evaluation factor than technical merit, where the agency reasonably concludes that the cost premium involved in selecting the higher-rated proposal is not justified in light of the acceptable level of technical competence available at a lower cost. See, e.g., Bella Vista Landscaping, Inc., B-291310, Dec. 16, 2002, 2002 CPD ¶ 217 at 4. The extent of such tradeoffs is governed only by the test of rationality and consistency with the evaluation criteria. Best Temporaries, Inc., B-255677.3, May 13, 1994, 94-1 CPD ¶ 308 at 3.

Here, as described above, the agency qualitatively assessed the merits of the firms' proposals, and recognized the technical superiority of RQC's proposal in the cost/technical tradeoff analysis. The SSA found, however, that RQC's higher technical merit did not justify the nearly \$6 million price premium, where technical and price considerations were stated to be of equal importance. Although RQC disagrees with this judgment, this does not demonstrate that the SSA's selection decision was unreasonable. See Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 4 (disagreement with an agency's judgment as to the relative merit of competing proposals and which proposal offers the best value to the agency does not establish that the source selection was unreasonable).

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>5</sup> RQC did not challenge the agency's evaluation of proposals.