441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Maxim Healthcare Services, Inc.

File: B-412967.9; B-412967.11

Date: June 25, 2018

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Tatiana Boza, Esq., and Christopher M. Alwood, Esq., Department of Homeland Security, for the agency.
Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that agency misevaluated proposals and made an unreasonable source selection decision are denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Maxim Healthcare Services, Inc. (Maxim), of Columbia, Maryland, protests the award of a contract to STG International, Inc. (STGi), of Alexandria, Virginia, under request for proposals (RFP) No. HSCEDM-16-R-00002, issued by the Department of Homeland Security (DHS), United States Immigration and Customs Enforcement (ICE), for on-site medical staffing services, including medical, dental, and mental health care to ICE detainees. Maxim challenges the evaluation of proposals and the selection decision.

We deny the protest.

BACKGROUND

The RFP, issued on March 14, 2016, contemplated award of a labor-hour, time-and-materials contract using Federal Acquisition Regulation (FAR) parts 12 and 15 procedures for source selection.[1] Agency Report (AR), Tab 19, RFP at 1. The RFP requires the awardee to provide on-site direct patient care to ICE detainees at 21 facilities located throughout the United States and the South Texas Family Residential Center located in Dilley, Texas. Id. at 1, 6. Award was to be made using a best-value tradeoff approach, based on the evaluation of the following factors, listed in descending order of importance: (1) technical approach; (2) management approach; (3) corporate experience/past performance; (4) administration[2]; and (5) price. Id. at 127-131. All evaluation factors other than price, when combined, were significantly more important than price. Id. at 129.

The technical approach and management approach factors were to be assigned the following ratings: excellent, good, acceptable, marginal, and unacceptable. RFP at 132. The corporate experience/past performance factor utilized the following ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence. Id. at 133. Subfactors within the non-price evaluation factors were not separately rated, except for the administration factor, for which subfactors would be rated on the basis of pass, fail, or not applicable (N/A). Id. at 131.

For the corporate experience/past performance factor, the RFP required "identification of a minimum of three (3) contracts with federal, state, or commercial organizations of at least one (1) year in duration and performed within the past five (5) years for requirements similar in size and scope to this requirement" where the offeror had performed as the prime contractor. RFP at 122. The RFP stated that corporate experience/past performance would be evaluated using the information provided by the offeror, information gathered from past performance references, and relevant information gathered through sources available to the government. Id. at 130. The RFP further stated:

> Corporate Experience/Past Performance must: (1) demonstrate for Government and/or commercial customers, the Contractor's experience in performing medical staffing services of similar size, scope and complexity as described in the Statement of Work; (2) show the Contractor's successful performance of the applicable work; and (3) be recent (within past 5 years).

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[1] The RFP was amended 17 times. Amendment 000016 provided a conformed copy of the RFP, and amendment 000017 provided answers to questions on the conformed RFP. Citations in this decision are to the conformed RFP provided in amendment 000016.

[2] The administration factor included the following subfactors: (1) offer letter; (2) signed solicitation document with all required fill-ins completed; (3) proposed small business subcontracting plan; (4) past performance references; (5) proof of the offeror's participation in the DHS mentor-protégé program, if applicable; and (6) compensation plan for professional employees. RFP at 131.

Id.

For price proposals, the RFP required offerors to populate a spreadsheet, provided as attachment J-13 to the RFP, with fully loaded labor rates for all labor categories to staff the 21 standard facilities, the family residential center, and contract coordinators, as provided for under the RFP. RFP at 124; see also AR, Tab 42, Price Evaluation Spreadsheet, Standard Facilities, Family Residential Center, and Contract Coordinators tabs. Offerors were instructed to propose both the level of effort and fully loaded labor rates for contract coordinators. See AR, Tab 42, Price Evaluation Spreadsheet, Instructions tab. To evaluate price proposals, the RFP stated:

> The price evaluation will utilize a comparative analysis to assess the reasonableness of the proposed prices, including all options. Proposed prices will not be scored, but will be a selection factor and considered in terms of the total proposed amount.
>
> A price realism analysis may be conducted for the purpose of measuring a vendor['s] understanding of the contract requirements.
>
> Any price proposal that includes elements, including individual labor rates, total base or total option prices, which are deemed unreasonable or materially unbalanced may be rejected. An unbalanced proposal is one that incorporates prices that are significantly understated or overstated as indicated by price analysis techniques.

RFP at 131-132.

The agency received and evaluated 18 proposals prior to establishing a competitive range; four offerors in the competitive range, including Maxim and STGi, timely submitted final proposal revisions. Contracting Officer's Statement (COS) at 11. The final evaluation results for Maxim and STGi were as follows:

	Technical Approach	Management Approach	Corporate Experience/Past Performance	Administration	Total Evaluated Price
Maxim	Excellent	Excellent	Satisfactory Confidence	Pass	$503,428,909
STGi	Excellent	Excellent	Substantial Confidence	Pass; N/A	$452,139,917

AR, Tab 43, Award Decision Memorandum, at 27. The contracting officer recommended that the source selection authority (SSA) select STGi for award of the contract. Id. at 30. On March 22, 2018, the SSA selected STGi for award.[3] AR, Tab 44, Source Selection Award Decision Document, at 6.

On March 23, the agency advised Maxim of the award to STGi, and provided a debriefing on March 26. This protest followed.

DISCUSSION

Maxim raises multiple arguments challenging the evaluation of proposals and the source selection decision. Although we do not specifically address all of Maxim's arguments, we have fully considered them all and find that they afford no basis on which to sustain the protest.

Corporate Experience/Past Performance

Maxim challenges the agency's evaluation under the corporate experience/past performance factor. Maxim first argues that the agency should have assigned its proposal a substantial confidence rather than a satisfactory confidence rating because of its contract experience and performance ratings, and in particular, its performance as an ICE incumbent contractor. Protest at 15-16. Maxim also argues that the agency's assignment of a rating of substantial confidence to STGi under the corporate experience/past performance factor is unreasonable. Id. at 16-18. Maxim alleges that, as a subcontractor to the incumbent contractor, STGi has on many occasions failed to fulfill the agency's requirements, and Maxim has been called upon by the agency to fulfill the requirements when the incumbent contractor's and STGi's performance has fallen short. Id. at 16.

The agency argues that it reasonably assigned a rating of satisfactory confidence to Maxim's proposal based on the responses it received from Maxim's references and information in Maxim's Contractor Performance Assessment Reports (CPARs). COS at 8-9; Memorandum of Law (MOL) at 4-5. The agency also argues that it reasonably assigned a rating of substantial confidence to STGi based on the responses it received from STGi's references. COS at 10-11; MOL at 5-6. The agency states that, consistent with the RFP instructions, STGi did not submit its performance as a subcontractor on the incumbent contract for consideration in its proposal. The agency argues that because STGi is not the incumbent contractor, and there are seven subcontractors utilized by the incumbent contractor, the agency has no basis for evaluating STGi's performance as a subcontractor under the incumbent contract. COS at 9-10; MOL at 5-6.

[3] STGi was previously awarded the contract on February 20, 2018. Maxim and two other unsuccessful offerors filed protests challenging the award decision with our Office. The agency advised that it would take corrective action, and our Office dismissed the protests as academic. See Maxim Healthcare Services, Inc., B-412967.8, Mar. 19, 2018 (unpublished decision).

Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations because determining the relative merit of an offeror's past performance is primarily a matter within the agency's discretion. Torres-Advanced Enter. Solutions, LLC, B-412755.2, June 7, 2016, 2016 CPD ¶ 167 at 8. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror's disagreement with an agency's evaluation judgments, by itself, does not demonstrate that those judgments are unreasonable. Cape Envtl. Mgmt., Inc., B-412046.4, B-412046.5, May 9, 2016, 2016 CPD ¶ 128 at 8.

As relevant here, the RFP defined the confidence ratings for corporate experience/past performance as follows:

> Substantial Confidence (Outstanding) - Based on the Offeror's (and proposed subcontractor(s), if applicable) recent/relevant performance record, the Government has a high expectation that the Offeror will successfully perform the required effort.
>
> Satisfactory Confidence (Satisfactory) - Based on the Offeror's (and proposed subcontractor(s), if applicable) recent/relevant performance record, the Government has a reasonable expectation that the Offeror will successfully perform the required effort.

RFP at 133. As noted, the RFP required offerors to submit a minimum of three corporate experience/past performance references for contracts where the offeror had performed as the prime contractor. Id. at 122. The RFP further stated that the referenced contracts must "(1) demonstrate for Government and/or commercial customers, the Contractor's experience in performing medical staffing services of similar size, scope and complexity as described in the Statement of Work; (2) show the Contractor's successful performance of the applicable work; and (3) be recent (within past 5 years)." Id. at 130. Maxim and STGi each provided four contract references. AR, Tab 25, Maxim Final Volume II Proposal, at 17; Tab 32, STGi Final Volume II Proposal, at 70.

For each contract reference submitted, the agency verified performance by sending a survey to the reference and checking CPARs. COS at 7. In the survey, the agency requested information concerning the contractor's performance relating to staffing shortages, quality of services, success in meeting contract schedules, and management of key personnel. See e.g., AR, Tab 39, Maxim's Past Performance Questionnaires, at 3-4.

When evaluating Maxim's corporate experience/past performance, the agency concluded that all four contracts identified in Maxim's proposal were recent and relevant to the current requirement. AR, Tab 36, Final Corporate Experience/Past Performance Evaluation Report, at 28-36. Only two of Maxim's four contract references responded to the customer surveys; both references stated that Maxim had experienced problems with failure to fully staff the requested positions but had taken reasonable action to correct the staffing shortages. Id. at 29, 32; see also AR, Tab 39, Maxim's Past Performance Questionnaires, at 3. With respect to the questions concerning quality of services, success in meeting contract schedules, and management of key personnel, one reference assigned three ratings of very good, and the other assigned two very good ratings and one exceptional rating. AR, Tab 39, Maxim's Past Performance Questionnaires, at 3-4. For another of Maxim's references, and the only contract for which CPARs were available, the agency reviewed CPARs dating from August 2013 to August 2016; in the categories of quality of product/service, schedule, and management, more than half of the ratings were satisfactory, with the remaining ratings either very good, exceptional, or N/A. AR, Tab 36, Final Corporate Experience/Past Performance Evaluation Report, at 34. The narrative comments in the CPARs characterizing Maxim's performance ranged from "marginally satisfactory" to "superb." Id. at 35. Based on this information, the agency assigned a satisfactory confidence rating. Id. at 36.

For STGi's corporate experience/past performance, the agency also concluded that all four contracts identified in STGi's proposal were recent and relevant to the current requirement. AR, Tab 36, Final Corporate Experience/Past Performance Evaluation Report, at 37-44. All four of STGi's customers responded to the customer surveys; none of the references stated that STGi had experienced problems with failure to fully staff the requested positions. Id.; see also AR, Tab 40, STGi's Past Performance Questionnaires, at 3. With respect to questions concerning quality of services, success in meeting contract schedules, and management of key personnel, three references assigned three ratings of exceptional, and the fourth assigned two very good ratings and one satisfactory rating. AR, Tab 40, STGi's Past Performance Questionnaires, at 3-4. All of the narrative comments in the surveys were positive and provided detailed examples of STGi's successful performance. AR, Tab 36, Final Corporate Experience/Past Performance Evaluation Report, at 38-44. No CPARs were available for any of STGi's reference contracts. Id. Based on this information, the agency assigned a substantial confidence rating. Id. at 44.

Based on our review of the record, none of the protester's arguments renders the agency's evaluation unreasonable.[4] In accordance with the RFP, the agency

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[4] Maxim makes other arguments challenging the agency's evaluation of corporate experience/past performance. For example, Maxim argues that its corporate experience/past performance is far more recent than STGi's, and the agency acted unreasonably by viewing STGi's less recent experience as equally meaningful as Maxim's more recent experience. Comments & Supp. Protest at 10-11. Since the RFP did not state that more recent past performance would be more heavily weighted or evaluated more favorably, and Maxim does not cite to, nor are we aware of, any regulation that requires an agency to do so in the absence of such a solicitation provision, we have no basis to find the agency's evaluation unreasonable. See AAR Airlift Grp., Inc., B-414690 et al., Aug. 22, 2017, 2017 CPD ¶ 273 at 11 n.15.

considered offerors' recent corporate experience and successful past performance as a prime contractor performing medical staffing services similar to its current requirement. Based on the information it received, the agency concluded that STGi's corporate experience/past performance was more favorable than Maxim's. As discussed above, both of the references that responded to the customer survey for Maxim indicated that Maxim had experienced problems with failure to fully staff the requested positions while all four of STGI's references indicated that they had not. In general, the narrative comments and ratings assigned in the customer surveys for STGi were more positive and higher than the narrative comments and ratings in the customer surveys and CPARs for Maxim. Accordingly, we find the ratings assigned by the agency for the offerors' corporate experience/past performance to be reasonable.

Price Evaluation

Maxim also argues that the agency improperly failed to perform a price realism analysis. Protest at 19-21. Maxim cites to our decision in InGenesis, Inc., B-412967.3, B-412967.4, Sept. 26, 2017, 2017 CPD ¶ 336, in which our Office denied the protest challenging a protester's exclusion from the competitive range for this same procurement. Maxim points to the fact that InGenesis, the incumbent contractor, proposed a price of $573,815,424 but was not eliminated from the competition on the basis that its price was too high. Maxim argues that this fact should have caused the agency to consider that STGi's price was unrealistically low, that STGi may not fully understand the requirements, and that STGi may have difficulty hiring the incumbent workforce.[5] Id. at 20. Maxim argues that although the RFP did not definitively obligate the agency to perform a price realism analysis, the agency abused its discretion when it concluded a price realism analysis was unnecessary. Id.

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[5] Related to its argument that STGi's price is unrealistically low, Maxim also argues that the agency failed to evaluate STGi's proposal for retention of incumbent staff under several of the evaluation factors, noting that the RFP incorporates by reference FAR clause 52.222-17, Nondisplacement of Qualified Workers. Protest at 21-23. According to Maxim, "[w]hen retention of adequate staffing is an issue, particularly the retention of incumbent contract personnel, agencies have an obligation to determine whether a prospective contractor can retain those incumbent employees." Id. at 22. We find no merit in this argument. FAR clause 52.222-17 requires that incumbent personnel be offered a first right of refusal of employment under the contract but does not mandate that a contractor offer the same level of compensation. See FAR clause 52.222-17(b)(2)(iv) ("An offer of employment will be presumed to be bona fide even if it is not for a position similar to the one the employee previously held, but is one for which the employee is qualified, and even if it is subject to different employment terms and conditions, including changes to pay or benefits."). As discussed infra, the agency recognized that some proposed rates were lower but concluded that the lower rates were the result of competition.

The agency argues that as a result of the number of competitive proposals received in response to the RFP, the agency reasonably concluded that it was not necessary to perform a price realism analysis. COS at 11-13; MOL at 7-9. Specifically, the agency states that 18 proposals were received in response to the RFP, with proposed prices ranging from $371 million to $577 million; the competitive range included the most highly rated proposals, and prior to discussions, the proposed prices ranged from $371 million to $569 million. COS at 11. The agency further indicates that in its final evaluation of the four competitive range offerors, three of the four total evaluated prices were within a four percent range of each other, while Maxim's total evaluated price was between seven and 11 percent higher than the other three total evaluated prices. Id. at 12. The agency argues that its price evaluation was reasonable and in accordance with the terms of the solicitation. MOL at 8-9.

Price realism is an assessment of whether prices are too low, such that there may be a risk of poor performance. See FAR § 15.404-1(d); C.L. Price & Assocs., Inc., B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3. Where a solicitation, as here, anticipates award of fixed-price or time-and-materials contract with fixed-price fully loaded labor rates, the price realism of a proposal is not ordinarily considered, since the risk and responsibility for contract costs is on the contractor. Centerra Grp., LLC, B-414800, B-414800.2, Sept. 21, 2017, 2017 CPD ¶ 307 at 13 (citing Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 8 n.7). An agency may conduct a price realism analysis in awarding a fixed-price or time-and-materials contract for the limited purposes of measuring an offeror's understanding of the requirements or to assess the risk inherent in the offeror's proposal if the solicitation explicitly states that the agency will perform a price realism analysis. See id. In the absence of an express solicitation provision, an agency is not obligated to perform a price realism analysis unless the solicitation states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding and that a proposal can be rejected for offering low prices. DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. The nature and extent of an agency's cost/price analysis is largely a matter of agency discretion, dependent upon the facts of a particular procurement. PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381 at 5.

As noted, the RFP stated that the agency would assess the reasonableness of proposed prices, and that a price realism analysis "may be conducted for the purpose of measuring a vendor['s] understanding of the contract requirements." RFP at 131-132. The RFP also stated that a price proposal that includes elements deemed unreasonable or materially unbalanced may be rejected. Id. at 132. The agency concluded that "price realism was not necessary for the purpose of measuring a vendor's understanding of the contract requirements." AR, Tab 43, Award Decision Memorandum, at 23.

However, the RFP included FAR provision 52.222-46, Evaluation of Compensation for Professional Employees, and stated that offerors' compensation plans would be evaluated on a pass/fail basis under the administration factor. RFP at 115, 131. FAR provision 52.222-46 requires an agency to evaluate whether offerors will obtain and keep the quality of professional services needed for adequate contract performance, and to evaluate whether offerors understand the nature of the work to be performed. MicroTechnologies, LLC, B-413091.4, Feb. 3, 2017, 2017 CPD ¶ 48 at 8. In the context of fixed-price contracts, our Office has explained that this FAR provision anticipates an evaluation of whether an awardee understands the contract requirements, and has proposed a compensation plan appropriate for those requirements--in effect, a price realism evaluation regarding an offeror's proposed compensation. Apptis Inc., B-403249, B-403249.3, Sept. 30, 2010, 2010 CPD ¶ 237 at 9.

The RFP required offerors to submit "fully loaded labor rates for all categories provided under the RFP," and did not, for example, require offerors to submit unloaded labor rates which would have allowed the agency to evaluate compensation. RFP at 124. Accordingly, the record shows that, before establishing the competitive range, the agency compared the offerors' proposed prices to each other and to the independent government cost estimate (IGCE). AR, Tab 42, Price Evaluation Spreadsheet, Initial and Interim Summary tabs. The record further shows that the total evaluated prices of the 18 proposals received by the agency ranged from $371,549,319 to $577,728,179. See AR, Tab 42, Price Evaluation Spreadsheet, Pre-Negotiation Memorandum Charts tab.

After establishing the competitive range, the agency compared the offerors' fully loaded labor rates to each other and to historical prices. Id., Standard Facilities, Family Residential Center, and Contract Coordinators tabs. The agency also reviewed offerors' fully loaded labor rates for compliance with the Service Contract Act (SCA), and the offerors' fully loaded labor rates for professional employees.[6] Id., SCA Determination and Professional Employees tabs. Specifically, the agency explains that pursuant to FAR provision 52.222-46, it considered the offerors' professional compensation plans in terms of impact upon recruiting and retention, realism, and consistency with a total plan for compensation. COS at 14. The agency compared proposed fully loaded rates for every professional position to each offeror in the competitive range and to the historical rate. AR, Tab 42, Price Evaluation Spreadsheet, Professional Employees tab. The agency found that many of the lower rates occurred with three of the remaining four offerors, and concluded that competitive markets reduced the fully loaded rate. COS at 14; see AR, Tab 42, Price Evaluation Spreadsheet, Professional Employees tab.

The contracting officer considered the price evaluation results and observed, among other things, that STGi offered the lowest price for standard facilities, another offeror in the competitive range offered the lowest price for the family residential center, Maxim offered the lowest price for contract coordinators, and STGi offered the lowest overall

[6] The RFP incorporated by reference FAR clauses 52.222-41, Service Contract Labor Standards, and 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards -- Price Adjustment. RFP at 98.

total evaluated price. AR, Tab 43, Award Decision Memorandum, at 23-26. The contracting officer concluded that pricing was fair and reasonable based on adequate price competition and the price evaluation techniques utilized to perform the price evaluation, including comparison of prices to the IGCE. Id. at 26-27.

On this record, we conclude that the agency conducted a reasonable price evaluation that was consistent with the terms of the solicitation. The record shows that the agency evaluated the realism of the labor rates proposed for professional employees pursuant to FAR provision 52.222-46 and reviewed the other proposed labor rates for SCA compliance. Using these price analysis techniques, the agency considered whether offerors' labor rates were too low, and found, in general, that the majority of the remaining four competitive range offerors proposed lower rates as a result of market forces. Thus, we find reasonable the agency's conclusion that no further price realism analysis was required. To the extent that Maxim believes that STGi cannot perform the contract at its proposed price, Maxim's disagreement with the agency's judgment provides no basis to sustain the protest. See Delaware Resource Group of Oklahoma, LLC, B-408962.3, B-408962.4, Mar. 24, 2014, 2014 CPD ¶ 111 at 9.

Tradeoff Analysis

The protester argues that the agency's best-value determination is flawed because the SSA failed to take into account the differences between STGi's and Maxim's proposals.[7] Supp. Protest at 12-13. Here, the SSA stated that he reviewed the final technical evaluation report, final corporate experience/past performance evaluation and all supporting documents, final administration evaluation, final price evaluation, and award decision memorandum and adopted the findings as his own. AR, Tab 44, Source Selection Award Decision Document, at 5. The SSA also stated that he "review[ed] other proposals to determine if any of the other 'Excellent' Technical proposals warranted a tradeoff for a price premium" and concluded that "no other Offeror's relative strengths warranted a tradeoff or a price premium." Id. at 6.

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[7] Maxim specifically argues that the agency's best-value determination is flawed because the SSA failed to account for Maxim's greater strengths under the management approach factor, where the agency identified 15 strengths for Maxim compared to eight strengths for STGi. Supp. Protest at 11-12. The agency argues that it identified seven more strengths for Maxim than it did for STGi because Maxim proposed seven more key personnel, however, both proposals were reasonably rated as excellent, and the SSA concluded that nothing in Maxim's proposal warranted a price premium. Supp. COS at 5-6; Supp. MOL at 6-7. The number of identified strengths is not dispositive; agencies may reasonably distinguish between the strengths assigned to offerors, and may even conclude a single strength is of more value than multiple, lesser strengths. See Walton Constr. - a CORE Company, LLC, B-407621, B-407621.2, Jan. 10, 2013, 2013 CPD ¶ 29 at 6. As discussed above, we find that the SSA considered Maxim's strengths but concluded that its proposal did not warrant payment of a price premium.

Because we have denied the protester's challenges to the agency's evaluation, we conclude that there is no basis to challenge the agency's best-value determination. Where, as here, the highest-rated, lowest-priced offer is selected for award, a tradeoff is not required. Dell Servs. Fed. Gov't., Inc., B-412340 et al., Jan. 20, 2016, 2016 CPD ¶ 43 at 7 n.6. As the record does not support Maxim's challenges to the agency's evaluation, and we have found the agency's evaluation to be reasonable, we find no merit to Maxim's objection to the source selection decision.

The protest is denied.

Thomas H. Armstrong
General Counsel