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Decision

Matter of: The COGAR Group, Ltd.

File: B-413004; B-413004.3; B-413004.4

Date: July 22, 2016

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Timothy Lorenzi, Esq., and Denise A. McLane, Esq., Department of Homeland Security, for the agency.
Paula J. Haurilesko, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency improperly implemented a solicitation provision that permitted the contracting officer to limit the number of proposals that were evaluated is denied, where the agency complied with the terms of the provision and inclusion of the provision was not protested prior to the closing date for receipt of proposals.

DECISION

The COGAR Group, Ltd., of Fairfax, Virginia, protests the award of a contract to Patronus Systems, Inc., of Melbourne, Florida, by the Department of Homeland Security (DHS), Federal Protective Service, under request for proposals (RFP) No. HSHQWA-15-R-00002, for professional security services. COGAR challenges the agency's failure to evaluate the firm's proposal and the agency's evaluation of the awardee's proposal.

We deny the protest.

BACKGROUND

The RFP, issued as a set-aside for small business concerns under Federal Acquisition Regulation Part 12, acquisition of commercial items, provided for the award of an indefinite-delivery/indefinite-quantity contract for professional security services to be performed at various federally-owned, leased, or occupied facilities in

Idaho and eastern Washington. RFP at 14. The RFP contemplated performance over a one-year base period and four option years.

Award was to be made to the offeror whose proposal represented the best value to the government, considering price, past performance, and management approach. The technical factors, when combined, were significantly more important than price. RFP at 453. The RFP included an “efficient competition” provision, as follows:

[O]fferors are advised that the Government may not evaluate the technical proposals of all offerors under this RFP. The government will first review the total evaluated price of all proposals received. The technical proposals of those offerors whose pricing is determined by the Contracting Officer to be most competitive may be reviewed prior to, or instead of, other technical proposals received. Based on the initial review of these technical proposals, the government may not evaluate the technical proposals of other offerors, whose total evaluated pricing was higher than that of one already evaluated and already assigned the highest possible technical rating. This would occur when the Contracting Officer determines that any possible technical superiority of an unevaluated (and higher priced) technical proposal, over (a lower priced) one that was already evaluated and assigned the highest possible technical rating, would not warrant any additional price premium.

RFP at 454-455.

DHS received 19 proposals. To determine which proposals were the most competitive in accordance with the “efficient competition” provision, the contracting officer ranked all proposals by the total evaluated price,¹ then considered the mean (\$40,501,995) and median (\$42,752,035.66) prices, and compared total evaluated prices to the government estimate (\$47,217,000) and to the price of the lowest-priced offeror. The contracting officer concluded that the eight proposals offering a total evaluated price of less than \$40,500,000 were the most competitive and would be evaluated by the technical evaluation team (TET).² Agency Report (AR), Tab 13, Business Memorandum, at 5-6. COGAR’s proposal was the 11th lowest in price, and therefore was not evaluated.

¹ The total evaluated price was the price for the base period, four option years, and a 6-month option to extend services. RFP at 454.

² The price immediately below the \$40,500,000 cutoff was 10.85 percent higher than the lowest price; the price immediately above the cutoff was 11.13 percent higher than the lowest price. AR, Tab 13, Business Memorandum, at 6.

The table below shows the ranking (from lowest to highest price) and adjectival ratings assigned by the TET:³

	Total Evaluated Price	Past Performance	Management Approach
Offeror A	\$36,445,125.00	Acceptable	Acceptable
Offeror B	\$36,938,274.52	Acceptable	Highly Acceptable
Offeror C	\$36,991,150.00	Acceptable	Acceptable
Offeror D	\$38,081,527.50	Acceptable	Acceptable
Offeror E	\$38,632,955.00	Acceptable	Unacceptable
Offeror F	\$40,317,253.50	Highly Acceptable	Acceptable
Offeror G	\$40,364,925.00	Highly Acceptable	Highly Acceptable
Patronus	\$40,399,510.00	Highly Acceptable	Highly Acceptable
Offeror H	\$40,501,972.50	n/a	n/a
Offeror I	\$40,502,017.50	n/a	n/a
COGAR	\$40,531,635.00	n/a	n/a
Offeror J	\$40,860,631.70	n/a	n/a
Offeror K	\$41,167,902.50	n/a	n/a
Offeror L	\$41,483,080.00	n/a	n/a
Offeror M	\$41,649,068.19	n/a	n/a
Offeror N	\$44,480,982.50	n/a	n/a
Offeror O	\$44,913,045.00	n/a	n/a
Offeror P	\$85,275,586.50	n/a	n/a

³ The technical factors were to be rated as highly acceptable, acceptable, unacceptable and, for past performance, neutral. Highly acceptable means that the proposal meets and exceeds the requirements for an acceptable rating: a high probability of success in contract performance is demonstrated through some or all of the following: (1) the proposal exceeds the solicitation requirements; (2) the proposal offers innovations and/or creative approaches that are beneficial to the Government; (3) the proposal demonstrates a superior understanding of the solicitation requirements; and/or (4) the level of performance risk associated with the proposal is substantially less than the level expected from a competent contractor. AR, Tab 8, Source Selection Evaluation Guide, at 13-14.

Id. at 6, 15. The contracting officer reviewed the TET's initial evaluation results and concluded that no additional proposals needed to be evaluated because two proposals (those of Patronus and Offeror G) received the highest adjectival ratings and the technical superiority of any higher-priced proposal would not merit the additional price premium. Id. at 28.

The TET conducted a comparative analysis of all eight proposals that were evaluated under the technical factors. The TET concluded that, under both past performance and management approach, the proposal of Patronus offered greater benefit to the government than Offeror G's proposal and recommended award to Patronus. Id. at 18, 49.

The source selection authority (SSA) reviewed the proposals, the technical evaluation report, the price realism analysis, and pre-award business memorandum, and accepted the analyses. AR, Tab 14, Source Selection Decision, at 1, 10. The SSA concurred with the recommendation to award to Patronus as offering the best value to the government. After notice of the award to Patronus, COGAR protested to our Office.

DISCUSSION

COGAR maintains that the agency's determination to evaluate only proposals offering prices below \$40,500,000 was unreasonable and violated the terms of the efficient competition provision. COGAR states that the prices of six proposals, ranging from the 6th lowest-priced to the 11th lowest-priced,⁴ were "virtually identical" and were substantially below the government's estimates. COGAR argues that given these facts, the agency could not reasonably have determined that only those below the cutoff represented the most competitive proposals. First Supp. Protest at 3-5.

An agency's method for evaluating the relative merits of competing proposals is a matter within the agency's discretion, since the agency is responsible for defining its needs and the best method for accommodating them. Advanced Tech. & Research Corp., B-257451.2, Dec. 9, 1994, 94-2 CPD ¶ 230 at 3. Where an evaluation is challenged, our Office will not reevaluate proposals but instead 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. Lear Siegler Servs., Inc., Inc., B-280834, B-280834.2, Nov. 25, 1998, 98-2 CPD ¶ 136 at 7. The fact that the protester disagrees with the agency's judgment does not

⁴ The prices ranged from \$40,317,253.50 to \$40,531,635.00. First Supp. Protest at 4.

render the evaluation unreasonable. Crofton Diving Corp., B-289271, Jan. 30, 2002, 2002 CPD ¶ 32 at 10.

The record before us provides no basis to sustain the protest on this ground. The RFP's efficient competition provision put offerors on notice that, although non-price factors together would be more important than price, the government might not evaluate all technical proposals. The RFP further advised offerors that this could occur if the contracting officer determined that any possible technical advantage of an unevaluated, higher-priced proposal would not warrant an additional price premium over a lower-priced proposal that had been assigned the highest possible technical rating. RFP at 454-455.

As explained above, the contracting officer established an initial pool of proposals to be evaluated based on consideration of median and mean prices, the government estimate, and the percentage by which each total evaluated price exceeded the lowest evaluated price. After reviewing the evaluation results of the technical proposals, the contracting officer determined that, in accordance with the terms of the efficient competition provision, since two proposals received the highest possible adjectival rating, any higher-priced proposal would not offer a technical advantage that would warrant a price premium, and therefore it was unnecessary to evaluate additional proposals. AR, Tab 13, Business Memorandum, at 28. While the agency's approach might deprive it of receiving a better value at a slightly higher price, we conclude that the agency's actions implementing the efficient competition provision complied with the terms of the solicitation. The fact that the protester might have chosen a larger pool of proposals to evaluate does not render the agency's decision not to evaluate additional proposals inconsistent with the solicitation's terms or unreasonable.⁵

In a related argument, COGAR contends that the adjectival ratings used by DHS to evaluate proposals were vague and did not allow any meaningful comparison of proposals. COGAR argues that having only one rating above acceptable did not permit meaningful differentiation of the relative strengths and weaknesses of proposals. First Supp. Protest at 5. We also deny this protest ground.

It is well-established that ratings, whether numerical, color, or adjectival, are merely guides for intelligent decision making in the procurement process. One Largo Metro LLC; Metroview Dev. Holdings, LLC; King Farm Assocs., LLC, B-404896 et al., June 20, 2011, 2011 CPD ¶ 128 at 14. Here, the contracting officer based its decision not to evaluate additional proposals by looking behind the adjectival ratings and recognizing that Patronus's proposal contained multiple strengths in each of the

⁵ As the inclusion of the efficient competition provision in the RFP was not protested prior to the closing date for receipt of proposals, see 4 C.F.R. § 21.2(a)(1), we do address the question of its use as a means of limiting proposal review.

technical evaluation subfactors, well as a lower performance risk. AR, Tab 13, Business Memorandum, at 28. While the protester argues that the agency could not rule out the technical superiority of an unevaluated technical proposal, the record shows that the contracting officer acknowledged that there could be a technically superior proposal, but concluded that any technical superiority would not be worth the price premium.⁶ Id. COGAR's disagreement with the contracting officer's judgment does not render that judgment unreasonable. Moreover, the RFP's efficient competition provision put offerors on notice that the adjectival rating would play a factor in determining whether additional proposals would be evaluated; therefore, any objection to such usage of adjectival ratings is an untimely challenge to the terms of the solicitation. See 4 C.F.R. § 21.2(a)(1).

COGAR also raises multiple challenges to DHS's evaluation of Patronus's proposal. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Where there is an intervening offeror that would be in line for award if the protester's challenge to the award were sustained, the protester does not have the requisite interest to qualify as an interested party. Recon Optical, Inc., B-310436, B-310436.2, Dec. 27, 2007, 2008 CPD ¶ 10 at 18 n. 22. Because Offeror G, which offered a lower price than the awardee, also received the highest adjectival ratings, Offeror G serves as an intervening offeror. Therefore, COGAR is not an interested party to protest the evaluation of Patronus's proposal.

The protest is denied.

Susan A. Poling
General Counsel

⁶ In this regard, we note that the price difference between COGAR and Patronus is \$132,125; the price difference between COGAR and Offeror G is \$166,710. See AR, Tab 13, Business Memorandum, at 6.