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Decision

Matter of: American Correctional Healthcare, Inc.

File: B-415123.3; B-415123.4; B-415123.5

Date: January 2, 2018

H. Todd Whay, Esq., The Whay Law Firm, for the protester.
Jason A. Carey, Esq., Luke W. Meier, Esq., and Evan R. Sherwood., Esq., Covington & Burling, LLP, for NaphCare, Inc., the intervenor.
William Robinson, Esq., and Oleta Vassilopoulos, Esq., Department of Justice, for the agency.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation and selection decision is denied where the record demonstrates that the evaluation and source selection decision were reasonable and consistent with the solicitation's evaluation criteria.

DECISION

American Correctional Healthcare, Inc. (ACH), of Granbury, Texas, protests the award of a contract to NaphCare, Inc., of Birmingham, Alabama, by the Department of Justice, Federal Bureau of Prisons (BOP), under request for proposals (RFP) No. RFPP03011600001, for comprehensive medical services at the United States Penitentiary Atlanta, Georgia. ACH alleges that the agency erred in its technical evaluation of the proposals and failed to give meaningful consideration to price, which resulted in an unreasonable award decision.

We deny the protest.

BACKGROUND

BOP issued the RFP on September 12, 2016, in order to obtain comprehensive medical services, including necessary professional and facility services for both inpatient admissions and outpatient encounters, for inmates of the United States Penitentiary Atlanta, Georgia. The RFP contemplated the award of a single indefinite-delivery, requirements contract with fixed unit prices, for one base year and four 12-month option

periods. The RFP established that the agency would make the award using a best-value tradeoff process, considering three evaluation factors: technical, past performance, and price. As relevant, the technical evaluation factor was composed of four subfactors: (1) level of diversity of services proposed; (2) driving distance and conditions to and from the proposed contract facility(s); (3) accreditation status of the proposed contract facility(s); and (4) enhancements to the basic contract requirements.¹ When combined, the non-price factors were approximately equal in importance to price.

The RFP described the technical requirements of the contract in terms of five “outputs.” These outputs concerned: (1) provision of inpatient and outpatient hospital services; (2) provision of physician services in both the community setting and onsite at the penitentiary; (3) proper invoicing of prices; (4) proper medical record management; and (5) maintenance of open avenues of communication. As relevant, the RFP advised offerors of the agency’s desire for a comprehensive, diverse healthcare package, and that “[o]fferors who propose less comprehensive approaches will be evaluated accordingly.” RFP at 11.

With respect to price, the RFP explained that pricing would be proposed and evaluated based on benchmarks using Medicare reimbursement methodologies. In this regard, for each medical service offered, the offeror was to propose a percentage premium or discount to the Medicare rates established by the Centers for Medicare and Medicaid Services. The RFP established six categories of services for the price evaluation, in descending order of importance: inpatient facility services, inpatient/outpatient physician services, outpatient facility services, outpatient institution services (optometrist), and outpatient institution services (oral surgeon). *Id.* at 52. The RFP explained that the offeror “providing the highest discount from the Medicare rate will be considered to be offering the lowest price in each category,” and that a “proportionate amount of points will be awarded to each offeror below the highest-ranked offeror in each category.” *Id.* at 51, 52. Based on this methodology, the lowest priced proposal would be assigned the highest point score, with higher priced proposals assigned proportionally lower scores.

The agency received six proposals in response to the RFP, including two proposals submitted by NaphCare. After an initial evaluation, BOP established a competitive range consisting of ACH’s proposal and one of NaphCare’s proposals (“proposal B”). Discussions were conducted with the two offerors, concluding with submission of final proposal revisions (FPR) on March 22, 2017. The two FPRs were rated as follows:

¹ The technical evaluation utilized a color/adjectival rating scale of: blue/exceptional, purple/very good, green/satisfactory, yellow/marginal, and red/unsatisfactory. The source selection plan also advised evaluators that “[i]f a proposal does not fully comply with all of the criteria for a rating category, the evaluator may assign a rating and append either a plus sign (+) or a minus sign (-) to indicate an intermediate rating.” Agency Report (AR), Tab 4, Source Selection Plan, at 4.

	ACH	NaphCare
Technical	Satisfactory	Satisfactory (+)
Past Performance	Very Good	Very Good
Price Score	109.83	106.15

AR, Tab 2, Contracting Officer Statement, at 5.

In the source selection decision document (SSDD), the source selection authority (SSA) concluded that the best value to the government was reflected in the NaphCare proposal, based on the technical advantages of NaphCare’s proposal. In this regard, the SSA explained that NaphCare had proposed a greater diversity of medical services and more beneficial enhancements to the basic contract requirements than ACH.

With respect to diversity of services, the SSA concluded that NaphCare held the advantage because, while ACH and NaphCare proposed three of the same hospitals, ACH had specifically excluded behavioral health services at those locations. ACH proposed in-patient behavioral health services at a fourth hospital, but excluded outpatient behavior health services at that location as well.² As a result, the SSA determined that ACH had not offered behavioral health outpatient or physician specialty services. In contrast, NaphCare did not exclude any medical services or physician specialties at any hospital included in its proposal, and additionally offered [DELETED].

Concerning enhancements to the basic contract requirements, the SSA noted advantages associated with NaphCare’s proposal of [DELETED]. The SSA also reviewed the enhancements offered by ACH, but concluded that its enhancements offered no additional benefits versus the enhancements offered by NaphCare, and that NaphCare’s enhancements offered more benefits to day-to-day medical operations and provided a clear advantage.

In the tradeoff analysis, the SSA noted that the non-price factors (when combined) were approximately equal in importance to price, and that the best-value award criteria permitted selection of the other than the lowest priced proposal if it merited the additional cost. In selecting NaphCare as the best value, the SSA concluded that:

² The SSA noted that ACH’s proposal had included (without exclusions) two affiliate facilities of its fourth hospital. However, because ACH failed to provide information describing the medical services offered at the affiliates, the agency was unable to evaluate those locations. Similarly, the SSA noted that ACH had offered a long term care facility but that, since long term care operates using a different Medicare reimbursement methodology than anticipated in the RFP, and because ACH had failed to explain how pricing at the long term care facility would be managed, the facility could not be fully evaluated.

While NaphCare's proposed prices are slightly higher than ACH, I find the technical benefits of a proposal which does not exclude any medical specialty, offers [DELETED], and includes value-added enhancements merits the payment of a slight price premium and therefore represents the best value.

AR, Tab 25, Initial SSDD at 5.

The agency informed ACH on August 15, 2017, that NaphCare had been selected for award. ACH then filed a protest of that award decision on August 21. In response to the protest, BOP advised our Office that it would take corrective action in the protest by reevaluating the proposals and making a new source selection decision. Our Office then dismissed the protest. American Correctional Healthcare, Inc., B-415123, B-415123.2, Sept. 1, 2017 (unpublished decision).

The agency completed its corrective action SSDD on September 21, and on September 22, advised ACH that the award decision in favor of NaphCare was unchanged. BOP then provided ACH with a debriefing on September 26. This protest followed.

DISCUSSION

ACH alleges that the agency committed multiple errors in its evaluation of the offerors' technical proposals. ACH also alleges that the agency's best-value tradeoff decision failed to meaningfully consider price, and failed to weight the price factor according to the RFP's evaluation criteria.

Technical Evaluation

In reviewing an agency's evaluation, our Office will not reevaluate proposals; instead, we will examine the record to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and applicable procurement statutes and regulations. Metro Mach. Corp., B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132 at 13; Urban-Meridian Joint Venture, B-287168, B-287168.2, May 7, 2001, 2001 CPD ¶ 91 at 2. An offeror's disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7. We have reviewed the record and the protester's challenges in this case, and conclude that ACH's challenges are without merit.³

³ We have reviewed all allegations raised in the protester's initial protest and supplemental protests, and we discuss ACH's principal protest challenges in this decision. To the extent that arguments or elements of arguments advanced by ACH are not discussed in this decision, we have considered them, and conclude that they do not provide a basis to sustain the protest.

As an initial matter, we note that many of ACH's allegations concerning the technical evaluation fail to state a valid basis of protest, and are dismissed.⁴ For example, ACH alleges that the evaluation was inconsistent with the terms of the RFP and unreasonable because the agency failed to properly utilize the technical evaluation panel (TEP) to rate the proposals, as indicated in the solicitation. ACH contends that, contrary to the RFP, the SSA established the ratings for the proposals and that the TEP's input was limited to review of the SSA's conclusions. However, we have long recognized that the selection of individuals to serve as evaluators is a matter within the discretion of the agency, and, accordingly, we do not review allegations, such as these, concerning the evaluators' qualifications or the composition of evaluation panels absent a showing of possible fraud, conflict of interest, or actual bias on the part of evaluation officials, none of which have been alleged here. Truston Techs., B-414617, July 28, 2017, 2017 CPD ¶ 235 at 4-5; Savvee Consulting, Inc., B-408416.3, Mar. 5, 2014, 2014 CPD ¶ 92 at 10 n.9; IMLCORP LLC; Wattle Corp., B-310582 et al., Jan. 9, 2008, 2008 CPD ¶ 15 at 5.

ACH's principal remaining technical challenge is that the agency erred in assigning its proposal a satisfactory rating, instead of a very good or satisfactory (+) rating, under the technical evaluation factor. ACH asserts that based on the rating definitions, "the ACH proposal is a better fit for the Very Good rating, but at minimum the Agency was required to assign a (+) to ACH's Satisfactory rating since the ACH proposal clearly and

⁴ During the development of this protest, we also dismissed ACH's allegation that the agency unreasonably evaluated NaphCare's proposal by giving it credit for proposing in-patient behavioral health at hospitals that do not offer that service to inmates. We dismissed this ground of protest because the protester's allegations were unsupported speculation, and even if assumed to be true, failed to establish a likelihood that the agency erred in accepting NaphCare's representations. Partial Dismissal Email, October 26, 2017, at 1. ACH later attempted to resurrect this protest ground after the record confirmed that NaphCare had proposed to utilize hospitals that ACH knew to prohibit inmate in-patient behavioral healthcare, however, ACH has still failed to explain why the agency should have known that in-patient services of this type were not available to inmates at these hospitals. Furthermore, our review of the record does not indicate that NaphCare was specifically credited for in-patient behavioral services at these hospitals. Rather, the record reflects that NaphCare was evaluated more favorably because it did not exclude any services offered by the hospitals included in its proposal, while ACH specifically excluded all behavioral health services (including outpatient and physician specialty services that are apparently available) at three hospitals included in its proposal. Accordingly, ACH's allegation is again dismissed for failure to state a valid legal and factual basis of protest. 4 C.F.R. § 21.1(c)(4) and (f); Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

substantially exceeded many parts of the Satisfactory definition.”⁵ Comments and Second Supplemental Protest, at 7.

First, ACH’s technical evaluation results were not, in fact, consistent with the definition for a very good rating, which required the proposal of “security-related enhancements that support the BOP’s mission.” AR, Tab 4, Source Selection Plan, at 4. Since neither offeror proposed security-related enhancements, neither proposal was eligible for, or received, a very good rating under the technical factor.

Second, with respect to ACH’s contention that its proposal should have received a satisfactory (+) rating where it “exceeded many parts of the Satisfactory definition;” due to the inherently subjective nature of the technical judgments of evaluators, it is best left to their discretion whether a proposal deserves a given technical rating versus the next higher or lower rating. Comments and Second Supplemental Protest, at 7; see CAS, Inc., B-260934.2, B-260934.3, Sept. 12, 1995, 95-2 CPD ¶ 239 at 6. Stated differently, agency evaluators’ judgments about the slight qualitative differences which render a proposal “satisfactory” as opposed to “satisfactory (+)” are not subject to rational legal objection unless a clear showing of unreasonableness is made. See Applied Tech. Sys., Inc., B-404267, B-404267.2, Jan. 25, 2011, 2011 CPD ¶ 36 at 9-10. ACH has made no such showing here; our review of the record reflects that ACH’s evaluation results were broadly consistent with the definition of the satisfactory rating, and the protester’s disagreement with the evaluation is not sufficient to render it unreasonable. Id.; Ben-Mar Enters., Inc., supra.

Consideration of Price

ACH next alleges that BOP failed to give meaningful consideration and appropriate weight to price in its best-value tradeoff decision. Specifically, the protester first argues that the RFP’s points-based criteria for comparing the offerors’ Medicare discount rates did not provide the agency with insight into the relative difference in pricing required to

⁵ ACH also suggests that it was improper for the agency to assign its proposal a weakness for the exclusion of behavioral health at multiple facilities because the evaluation acknowledged that the agency “did not anticipate any performance risk if ACH is awarded the contract,” and that the agency did not properly credit ACH for the “outpatient” behavioral services it offered onsite at the penitentiary. Comments and Second Supplemental Protest, at 10-11. However, we conclude that the assignment of a weakness was consistent with the RFP’s specific caution that “[o]fferors who propose less comprehensive approaches will be evaluated accordingly,” and that the evaluation did credit ACH for its proposed onsite services, which were part of a separate technical output, distinct from inpatient/outpatient hospital and physician specialty services. RFP at 11; AR, Tab 33, Corrective Action SSDD at 2 (noting that “each offeror includes all requested institution-based physician services,” which included psychiatric services).

support a reasonable tradeoff. In response, the agency argues that ACH's allegation is an untimely challenge to the terms of the RFP and should be dismissed.

We agree that the allegation is untimely. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see AmaTerra Env'tl. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. Here, the RFP specified in detail the agency's intent to use the exact methodology it employed in the price evaluation. If ACH believed this pricing evaluation scheme to be inadequate, it should have protested this alleged solicitation impropriety before the closing time for receipt of proposals. See NaphCare, Inc., B-406695, B-406695.2, Aug. 3, 2012, 2012 CPD ¶ 246 at 8-9.

The protester also generally contends that the agency failed to accord its lower price sufficient weight in the selection decision, and disputes NaphCare's purported technical advantage, which formed the basis for the agency's tradeoff determination. ACH alleges that the technical advantage identified by the agency was based on the fact that NaphCare did not exclude behavioral health services at any of the hospitals in its proposal. ACH contends that this was not a reasonable discriminator, however, since, according to ACH, the agency has no significant history of requiring hospital-based behavioral health services.

To the extent ACH's arguments are focused on the limited issue of behavioral health services, they are misplaced since the record shows that the agency's selection decision was based on advantages in multiple aspects of NaphCare's technical approach. Specifically, in addition to the fact that NaphCare did not exclude behavioral health services at any of the hospitals in its proposal, the tradeoff decision highlighted NaphCare's inclusion of medical care at [DELETED], and various enhancements including [DELETED], which "offered greater administrative support when compared to the enhancements of ACH." AR, Tab 33, Corrective Action SSDD, at 5-6.

Source selection officials in best-value procurements have broad discretion in making price/technical tradeoffs, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the solicitation's evaluation criteria. World Airways, Inc., B-402674, June 25, 2010, 2010 CPD ¶ 284 at 12. Here, the SSDD reflects the SSA's conclusion that the multiple advantages of NaphCare's proposal under the technical factor merited the payment of the price premium associated with its proposal. We see nothing unreasonable about the SSA's source selection decision. ACH's disagreement with the SSA's judgment as to which proposal

offered the best value to the agency, without more, does not establish that the source selection decision was unreasonable. See Loyal Source Gov't Servs., LLC, B-407791.5, Apr. 9, 2014, 2014 CPD ¶ 127 at 8.

The protest is denied.

Thomas H. Armstrong
General Counsel