

# Decision

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**Matter of:** Gemini Tech Services, Inc.

**File:** B-418233.5; B-418233.6

**Date:** March 2, 2021

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**DIGEST**

1. Protest allegation that the agency unreasonably waived material terms and conditions of the solicitation is denied where the protester failed to demonstrate that it suffered any competitive prejudice resulting from the agency's actions.
  2. Protest allegation that the awardee's proposal demonstrated intent to violate the Service Contract Act is denied where the awardee's proposed pricing represented an unobjectionable below-cost offer.
  3. Protest allegation that the agency unreasonably evaluated the firm's technical proposal is denied where the evaluation was consistent with the terms of the solicitation and any applicable procurement statutes and regulations.
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**DECISION**

Gemini Tech Services, Inc., a small business of Willow Park, Texas, protests the award of a contract to Case Healthcare Solutions, Inc. (CHS), a small business of Reston, Virginia, under request for proposals (RFP) No. W9124D19R0031, issued by the Department of the Army for administrative recruiter support services at 268 United States Army Recruiting Command (USAREC) locations. The protester argues that the awardee's proposal failed to comply with the terms of the solicitation and that the agency unreasonably evaluated the awardee's proposal.

The protest is denied.

**BACKGROUND**

On September 24, 2019, the Army issued the RFP to procure administrative recruiter support services at 268 USAREC locations throughout the United States. Agency Report (AR), Tab 3, RFP at 1, 58. Support personnel would prepare correspondence, schedule meetings, receive visitors, and various other administrative tasks. *Id.* at 58. The RFP contemplated the award of a fixed-price contract to be performed over a 1-month phase-in period, an 11-month base period, and four 12-month option periods. *Id.* at 20-24.

Award would be made on a lowest-price, technically acceptable basis considering price and technical capability factors. RFP at 9, 28. The technical capability factor identified three subfactors. *Id.* at 28. Each subfactor would receive a separate rating of acceptable or unacceptable, and only proposals with acceptable ratings for all three subfactors would be considered for award. *Id.* Proposed prices would be evaluated to determine whether they were fair, reasonable, and balanced. *Id.*

CHS, Gemini, and 19 other offerors submitted proposals prior to the close of the solicitation period. Memorandum of Law (MOL) at 5. While both CHS and Gemini were found technically acceptable, CHS's lower-priced proposal was eliminated from the competition for failure to comply with Service Contract Act (SCA) labor standards requirements.<sup>1</sup> *Case HCS; INTEROP-ISHPI JV, LLC*, B-418233.3, B-418233.4, Oct. 5, 2020 (unpublished decision) at 2. On August 11, the agency awarded the contract to Gemini for \$53,533,820. *Id.* at 1.

CHS challenged the award in a protest with our Office, arguing that the agency unreasonably evaluated its price proposal. *Id.* We dismissed the protest as academic because the agency explained that it intended to reevaluate proposals and make a new award decision. *Id.* After reevaluating proposals, the Army made award to CHS on November 25 at a price of \$49,050,282. MOL at 6. This protest followed.

## DISCUSSION

Gemini raises multiple allegations challenging the agency's conduct of the acquisition. Principally, Gemini argues that CHS's price proposal did not conform to the RFP's requirements. The firm also argues that CHS's average wage rate demonstrated intent to violate the SCA. Gemini next argues that the Army unreasonably evaluated CHS's technical proposal under the management/administration subfactor. Finally, Gemini argues that the Army conducted unequal discussions.

We address the principal allegations below, but note, at the outset, that an agency's evaluation of an offeror's proposal is a matter within the agency's discretion. *RIVA*

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<sup>1</sup> Congress renamed the Service Contract Act of 1965 and it is now titled the "Service Contract Labor Standards." See 41 U.S.C. chapter 67; Federal Acquisition Regulations (FAR) 1.110(c), Table 1. To maintain consistent terminology with the solicitation, we will refer to the Act as the Service Contract Act or SCA.

*Solutions, Inc.*, B-418408, Mar. 31, 2020, 2020 CPD ¶ 133 at 3. In reviewing protests of alleged improper evaluations, it is not our role to reevaluate proposals; rather, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement laws and regulations. *Id.*

#### CHS's Price

Gemini contends that CHS's price proposal omitted required information, and therefore should have been evaluated as unawardable. Specifically, the firm argues that CHS did not provide a detailed breakdown of fringe benefit components. Supp. Comments at 3. Gemini also argues that CHS did not provide discrete labor rates for each of the 268 administrative staff personnel. *Id.* at 5-6. The Army responds that CHS's price proposal complied with all solicitation requirements. Supp. MOL at 2.

As relevant here, the RFP required offerors to provide a "detailed breakdown" of pricing information, including the proposed fringe benefits for exempt and non-exempt positions. RFP at 100.<sup>2</sup> The RFP advised that proposed pricing information would be evaluated to determine whether proposed prices are fair, reasonable, and balanced. *Id.* at 28.

CHS's price proposal provides a "breakdown" of its labor compensation structure. AR, Tab 15, CHS Pricing Spreadsheet at 2. The firm provides details on the labor category, the SCA occupation code, the hourly pay rate, the total level of fringe benefit compensation, and the allocated indirect costs for each employee. *Id.* The firm does not provide details on the various components of the fringe benefit compensation (*i.e.*, the unemployment insurance, the workers' compensation, or health benefit contributions), or identify discrete labor rates for each of the 268 administrative staff personnel. *Id.* The agency evaluated CHS's price as complying with the solicitation's requirements. Contracting Officer's Statement (COS) at 5; AR, Tab 25, Source Selection Evaluation Board (SSEB) Report Second Addendum at 1, 4.

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<sup>2</sup> The exact language from the RFP is as follows:

Offerors shall provide a detailed breakdown of how [they] arrived at proposed costs as follows: CLIN (Contract Line Item Number), Description, Service Contract Act (SCA) Occupation Code, Firm Fixed Price (FFP) Direct Labor Categories and Rates, for all proposed exempt and non-exempt positions clearly identify the proposed positions as exempt or non-exempt, full time equivalents for each labor category, productive hours, overtime hours and rate (if applicable based on technical proposal), proposed exempt and non-exempt fringe benefits, to include Federal Unemployment Tax Act (FUTA), State Unemployment Tax Act (SUTA), Workers Compensation, Health & Welfare, Annual Benefit Funds, Burdened Labor Rates, Site and Individual Other Direct costs, Overhead, G&A, and Profit.

RFP at 100.

Gemini complains that CHS's price proposal did not comply with an alleged requirement to provide details for each of the various components comprising the total fringe benefit compensation. Supp. Comments at 2-5. The firm argues that the RFP plainly included this requirement, and the Army should have evaluated CHS's proposal as unawardable since it did not provide details for those components. *Id.* at 2. The Army responds that Gemini's interpretation of the solicitation is unreasonable. Supp. MOL at 2-5. Alternatively, the Army argues that the solicitation contained a patent ambiguity which should have been challenged prior to the close of the solicitation period, or, at most, the solicitation contained a latent ambiguity and Gemini suffered no competitive prejudice. *Id.* at 6-7.

Despite the disagreement, we need not determine whether the omitted information should be considered material under the solicitation's terms because we agree that the Army effectively waived the requirement for fringe benefit components and Gemini did not demonstrate any prejudice from this waiver. An agency may waive compliance with a material solicitation requirement in awarding a contract if the award will meet the agency's actual needs without prejudice to other offerors. *Technology and Telecomms. Consultants, Inc.*, B-413301, B-413301.2, Sept. 28, 2016, 2016 CPD ¶ 276 at 12. Thus, even where an agency waives a material solicitation requirement, our Office will not sustain the protest unless the protester can demonstrate that it was prejudiced by the waiver--that is, the protester would have submitted a different proposal or could have done something else to improve its chances for award had it known the agency would waive the requirement. *Desbuild, Inc.*, B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 7.

Gemini has not alleged that it would have changed its price proposal to its competitive advantage had it known that the agency would have waived compliance with the alleged requirement. See Supp. Comments at 9 (arguing only that the firm suffered prejudice based on the fact that CHS was not excluded from the competition); see also Comments at 12. Significantly, Gemini has not explained how eliminating the need to itemize fringe benefit components would have decreased its total price, such that Gemini's proposal, and not CHS's proposal, would have represented the best value. See Supp. Comments at 9. Thus, we deny this protest allegation because Gemini has failed to demonstrate that it suffered any competitive prejudice. See *Platinum Business Corp.*, B-415584, Jan. 18, 2018, 2018 CPD ¶ 34 at 3-4 (protester did not suffer any competitive prejudice because the protester did not specify how it would have altered its proposal in light of waived solicitation requirements).

Gemini next complains that CHS's price proposal was deficient because it did not propose discrete wage rates for each location. Supp. Comments at 5-6. Gemini argues that, by omitting discrete wage rates, CHS did not provide a "detailed breakdown" as required by the solicitation. The Army responds that the solicitation did not require offerors to propose discrete wage rates, as opposed to an average wage rate. Supp. MOL at 7.

On this record, we do not object to the agency's evaluation. As relevant here, the RFP required bottom-line pricing for labor, and a pricing breakdown delineating "Direct Labor Categories and Rates[.]" RFP at 100. Consistent with the agency's position, we do not interpret this phrase as requiring discrete wages for each location because the phrase simply does not provide for that requirement. See *Anders Constr., Inc.*, B-414261, Apr. 11, 2017, 2017 CPD ¶ 121 at 3 (a posited interpretation of a solicitation is reasonable when it is consistent with the solicitation's provisions when read as a whole). Further, our review confirms that CHS provided both its bottom-line pricing, and its direct labor categories and rates. AR, Tab 15, CHS Pricing Spreadsheet at 2. We also note that the solicitation did not prohibit offerors from using average wage rates as part of their proposals. See RFP at 100; *accord* Supp. MOL at 7-8. Thus, we deny this allegation.

### Compliance with the SCA

Gemini argues that CHS intends to violate the SCA because its proposed average wage rate is lower than some of the applicable SCA rates. Protest at 4. The Army responds that it reasonably evaluated CHS's proposal as demonstrating compliance with the SCA. MOL at 11.

Again, the RFP required the selected contractor to staff administrative personnel at 268 USAREC locations throughout the United States. The RFP required the selected contractor to compensate these employees at the applicable SCA wage determination. RFP at 49, 87 (incorporating by reference FAR clause 52.222-41, Service Contract Labor Standards); see *also* COS at 3-4.

CHS's price proposal included an average wage rate for all 268 administrative staff positions. AR, Tab 15, CHS Pricing Spreadsheet at 2. CHS's proposed rate was lower than some of the applicable SCA rates. *Id.*; RFP at 87. Nevertheless, CHS's proposal also provided that its proposed compensation was in "full compliance with the [SCA] location specific [wage determination] requirements[.]" AR, Tab 14, CHS Price Proposal at 16. Based on this provision, the Army concluded that CHS's proposal did not evidence any intent to violate the SCA, even though the firm's proposed rate was lower than some of the applicable rates. COS at 4.

Where a firm offers hourly rates below those specified in an SCA wage determination, that firm is nonetheless eligible for a contract award provided the proposal does not evidence intent to violate the SCA and the firm is otherwise determined to be responsible. *Nirvana Enterprise, Inc.*, B-414951.2, B-414951.3, Dec. 19, 2017, 2018 CPD ¶ 5 at 3-4. On a fixed-price contract, as here, a proposal that does not take exception to the solicitation's SCA provisions yet offers labor rates that are less than the SCA-specified rates may simply constitute a below-cost offer, and an award to a responsible firm on the basis of such an offer is legally unobjectionable. *Id.* In contrast, where there is an indication that the offeror does not intend to be bound by the terms of the SCA, its offer must be rejected. *Id.*

We do not find the agency's evaluation objectionable. CHS's proposal did not take any exception to the requirement regarding compliance with the SCA; rather, CHS's proposal stated: "Full Compliance with the Service Contract Act (SCA) and Applicable Wage Determination (WD): Our proposed General Clerk II pay rates (Occupation Code 01112) are in full compliance with the location specific WD requirements – as provided with the solicitation[.]" AR, Tab 14, CHS Price Proposal at 16. Thus, we deny this protest allegation because, even if CHS's proposed wage rate represented a below-cost offer, its proposal did not evidence any intent to violate the SCA.<sup>3</sup> See *LATA-Atkins Tech. Servs., LLC*, B-418602, B-418602.4, June 10, 2020, 2020 CPD ¶ 192 at 7, n.3 (awardee's proposal constituted an unobjectionable below-cost offer because, even though the proposed wage rates were below the SCA rates, the awardee's proposal did not evidence any intent to violate the SCA).

### Technical Capability

Gemini contends that CHS's proposal failed to address how it would minimize employee turnover. Protest at 4; Comments at 3. Gemini asserts that this omission constitutes a material failure to meet the solicitation requirements, and as a result, CHS's proposal should have been evaluated as "unacceptable" under the technical capability factor. Comments at 5.

As part of their management/administration approach, the RFP instructed offerors to describe how they would mitigate the impact of employee turnover on successful performance of the contract. RFP at 99. In relevant part, the RFP advised that the agency would evaluate proposals to determine whether they demonstrate an adequate approach to minimizing employee turnover. *Id.* The Army evaluated CHS's proposal as acceptable under this subfactor, and concluded that the proposal demonstrated an adequate approach. AR, Tab 17 SSEB Report at 5. As relevant here, the Army explained that CHS's proactive approach to personnel issues will minimize employee turnover. *Id.* The agency also noted that CHS's management/administration approach included multiple strategies for minimizing employee turnover. Supp. COS at 2.

On this record, we have no basis to object to the agency's evaluation. CHS's proposal outlined a four-step process demonstrating the firm's management/administration approach. AR, Tab 13, CHS Tech. Proposal at 9-10. As part of Step Two, "Early Issue Identification[.]" CHS articulates multiple techniques for minimizing employee turnover. *Id.* For instance, CHS explains that the firm offers staff performance incentives, continuing education, employee training, counseling services, and open-door communication policies in order to mitigate unexpected turnover and unacceptable employee performance. *Id.* Thus, we deny the protest allegation because our review

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<sup>3</sup> The Army computed an average wage rate using applicable SCA rates, and determined that CHS's proposed rate was actually higher than the average SCA rate. COS at 2. Thus, CHS's proposed pricing does not necessarily represent a below-cost offer.

confirms that CHS's management/administration approach addressed techniques to mitigate personnel turnover.

### Unequal Discussions

Finally, Gemini contends that the Army conducted unequal discussions. Supp. Comments at 8. Gemini asserts that the Army effectively conducted discussions through the bid protest process because it originally interpreted CHS's average wage rate for all 268 locations as demonstrating intent to violate the SCA, but revised its interpretation and its evaluation of CHS's proposal in response to information learned during the prior protest. *Id.* The Army responds that the reevaluation was based entirely on the information contained in CHS's proposal. Supp. MOL at 10. The Army explains that while it originally misinterpreted CHS's proposed average wage rate as applying to each of the USAREC locations, it revised its interpretation when reevaluating proposals. *Id.*

Under FAR section 15.306(d), discussions are exchanges with offerors after the establishment of the competitive range. Such exchanges are to be tailored to each offeror's unique proposal, with the intent of obtaining proposal revisions through bargaining, give and take, attempts at persuasion, the alteration of assumptions and positions, and negotiations. FAR 15.306(d). When an agency conducts discussions with competitive range offerors, it is required to address, at a minimum, deficiencies, significant weaknesses, and adverse past performance to which an offeror has not previously had an opportunity to respond. FAR 15.306(d)(3). After an agency advises offerors of deficiencies in their proposals, the agency must allow each offeror to submit a revised proposal satisfying the government's requirements. FAR 15.307(b).

Here, we do not find the agency's conduct objectionable. The record does not show that the Army conducted any type of exchange with CHS following the initial award decision that would qualify as discussions under FAR 15.306(d). COS at 2. The Army neither bargained with CHS to alter the terms of the firm's proposal, nor afforded CHS an opportunity to revise its proposal to cure a deficiency. *Id.* Instead, the record simply shows that, after CHS filed its protest, agency officials internally reviewed the evaluation results, and independently determined that they had misinterpreted CHS's price proposal. *Id.* Accordingly, we deny the protest allegation.

We deny the protest.

Thomas H. Armstrong  
General Counsel