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

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Decision

Matter of: Medical Development International, Inc.

File: B-402198.2

Date: March 29, 2010

Timothy E. Heffernan, Esq., Robert G. Barbour, Esq., and Matthew E. Vinciguerra, Esq., Watt, Teider, Hoffar & Fitzgerald, for the protester.

Thomas C. Papson, Esq., Phillip Carter, Esq., Jayson A. Carey, Esq., and Matthew T. Crosby, Esq., McKenna Long & Aldridge LLP, for NaphCare, Inc., an intervenor.

William Robinson, Esq., and Bradley J. Breslin, Esq., Department of Justice, for the agency.

John L. Formica, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's evaluation of proposals for comprehensive medical services for a federal correctional complex was not reasonable where the agency determined that the awardee's proposal included a "firm commitment" to provide [DELETED], even though the proposal required that the agency inform the awardee in writing by a specified date that the agency wanted the [DELETED] provided, and that date had passed without the requisite action.

2. Agency failed to consider price in accordance with the terms of the solicitation during its source selection where the solicitation advised offerors that their evaluated price would include base and option period pricing, and the agency's source selection decision references only the base period pricing and reflects no recognition of the price advantages of the protester's proposal, which increased from the base period through each of the option periods.

DECISION

Medical Development International, Inc. (MDI), of Ponte Vedra Beach, Florida, protests the award of a contract to NaphCare, Inc., of Birmingham, Alabama, under request for proposals (RFP) No. THA-0198, issued by the Federal Bureau of Prisons (BOP), Department of Justice, for comprehensive medical services for a federal correctional complex in Terra Haute, Indiana. MDI contends that the agency's

evaluation of proposals and selection of NaphCare's proposal for award were unreasonable and inconsistent with the terms of the solicitation.

We sustain the protest.

BACKGROUND

The BOP was established, in part, to provide more progressive and humane care for Federal inmates. In furtherance of this, the BOP provides essential medical, dental, and mental health services to Federal inmates. These services are provided on an inpatient basis by BOP staff or on an outpatient basis through community-based providers. RFP at 2.

The RFP provided for the award of a firm, fixed-price, indefinite-delivery contract, with a base period of 1 year with four 1-year options, to provide physician and facility services for both inpatients and outpatients. Id. at 2; amend. 2 at 1. The RFP stated that award would be made on a best-value basis, considering the evaluation factors of technical, past performance, small disadvantaged business concern participation, and price. RFP at 39. The RFP stated that the technical and past performance factors were equally weighted and were more important than the small disadvantaged business concern factor, and that the non-price factors, when combined, were approximately equal in importance to the price factor. Id. The RFP also advised that if proposals were considered "approximately the same or equal under [the] non-price factors, price could be paramount in the selection decision." Id.

The RFP provided with regard to the technical factor, the evaluation of which is challenged here, that the agency would evaluate each offerors' "demonstrated approach to providing an appropriate mix of resources to deliver quality medical care to the inmates of the [federal corrections complex] while mitigating the Government's cost and security risks," as measured by four equally weighted subfactors: (1) level of diversity of services proposed, (2) driving distance and conditions to and from the community-based providers, (3) enhancements to the basic contract requirements, and (4) accreditation status of the proposed facilities. Id. at 40.

With regard to the price factor, the RFP stated that "[t]he evaluated price will be inclusive of the base year and all option years," and that "price proposals will be calculated from benchmarks utilizing Medicare reimbursement methodologies." Id. at 8, 39. The solicitation further informed offerors that "[f]or each category of service to be provided, offerors will be allowed to propose a variance from the benchmark Medicare rate in the form of a discount from or premium to Medicare rates established by the Centers for Medicare and Medicaid services." Id. at 8.

The agency received proposals from three offerors, including NaphCare and MDI, and included all three proposals in the competitive range. The agency conducted

two rounds of discussions, and requested and received final revised proposals. The agency selected NaphCare's proposal for award on October 22, 2009, and after requesting and receiving a debriefing, MDI, on October 29, protested the award to our Office. On November 25, the agency notified our Office and the parties that it would take corrective action in response to the protest by reevaluating proposals and making a new source selection, and on December 4, our Office dismissed MDI's protest as academic.

During the reevaluation, the agency rated the proposals of MDI and NaphCare as "blue" (very good) under the technical and past performance factors, and "green" (acceptable) under the small disadvantaged business concern participation factor. AR, Tab 28, Source Selection Decision, at 1; Contracting Officer's Statement at 4. With regard to price, the agency assigned point scores to proposals based on a weighted point system that considered, among other things, Medicare discount premiums. MDI's proposal, which included lower premiums over the applicable Medicare rates and was lower in price as compared to NaphCare's proposal, received 97.517 out of 100 available points for its pricing. In contrast, NaphCare's proposal, which included higher premiums over applicable Medicare rates and was higher in price than MDI's proposal, received 89.728 points for its pricing. AR, Tab 28, Source Selection Decision, at 1.

Given the similarities in the non-price ratings, the agency concluded that the two proposals were essentially equal. The agency then determined that NaphCare's equally-rated, higher-priced proposal "clearly offers the better value" when compared to MDI's proposal. *Id.* at 12. While noting that "NaphCare and MDI offer many of the same enhancements in their proposals,"¹ the agency found that NaphCare's proposal offered two distinct "enhancements": (1) [DELETED], and (2) "a firm commitment to [DELETED]." *Id.* The source selection decision concluded that "[DELETED] and [DELETED] proposed by NaphCare justifies the award to the higher priced proposal and is the best value in comparison to the proposal of MDI." *Id.* On December 17, the agency again selected NaphCare for award, and MDI filed this protest.

¹ For example, the agency noted that both offerors' proposals included an on-site coordinator, "hospitalist" program to streamline inpatient care, transcription services, and a web-based tracking system. AR, Tab 28, Source Selection Decision, at 6, 12.

DISCUSSION

MDI argues that the agency's evaluation of proposals and selection of NaphCare's proposal for award were inconsistent with the terms of the solicitation and not reasonably based. Specifically, the protester argues that the agency's evaluation of NaphCare's proposal under the technical factor as offering the enhancement of "a firm commitment to [DELETED]" was in error because the evaluation did not recognize that NaphCare had qualified its offer by including in its proposal a condition to trigger the [DELETED] that had not been met. MDI also argues that the agency failed to properly consider price in its source selection, contending that the agency only considered the base period pricing, and not the option period pricing, in determining which proposal represented the best value to the agency.²

The evaluation of proposals is a matter within the discretion of the contracting agency, and in reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether an agency's judgment is reasonable and consistent with the evaluation factors set forth in the solicitation. Hanford Env'tl. Health Found., B-292858.2; B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 4.

The record here shows that NaphCare offered to [DELETED] at no additional cost to the agency. AR, Vol. II, Tab 6, NaphCare Technical Proposal, at 12-13. However, the proposal qualified the offer by stating,

NaphCare is requiring that the [agency] determine the need for the [DELETED] and communicate to us in writing if they wish to utilize this [DELETED] (or not) by October 2009.

Id. at 13. The protester points out that there is nothing in the contemporaneous record demonstrating that the agency communicated in writing by October 2009 whether it wished to utilize this enhancement. The protester argues that because of this, the agency's subsequent evaluation of NaphCare's proposal, and crediting of NaphCare's proposal during the source selection as "providing a firm commitment to [DELETED]," were unreasonable. Protester's Comments at 11; Protester's Supp. Comments at 6-7.

The agency concedes that it "did not provide the requisite written confirmation to NaphCare" by October 2009, and that the agency wanted NaphCare to [DELETED]. Supp. AR at 5. However, the agency raises a number of arguments in apparent support of its position that its award of the contract to NaphCare was reasonably

² Our Office specifically requested that the agency's supplemental report address the protester's arguments concerning NaphCare's proposed [DELETED], and the agency's consideration of price in its source selection decision.

based. As explained below, we do not find the agency's arguments persuasive, and we agree with the protester that the agency unreasonably determined, during its December 2009 reevaluation of proposals, that NaphCare's proposal provided "a firm commitment to [DELETED]," because the agency was aware at that time that it had not provided "the requisite written confirmation to NaphCare" by October 2009.³ See AR, Tab 28, Source Selection Decision, at 12.

The agency first notes, in defending this aspect of its consideration of NaphCare's proposed [DELETED], that "[w]hether or not NaphCare actually delivers the product as promised in their proposal is a matter of contract administration, and as such is for consideration of the contracting agency, and not properly before the GAO." Supp. AR at 5 n.4.

Although we agree with the agency that whether an offeror actually delivers a product or service during the performance of a contract as set forth in their proposal is a matter of contract administration, we fail to see the applicability of this proposition to this protest. Here, the protest challenges the agency's evaluation of the merits of NaphCare's proposal, and specifically, whether the agency, during its reevaluation of proposals in early December 2009 properly determined that NaphCare's proposal provided "a firm commitment to [DELETED]." See AR, Tab 28, Source Selection Decision, at 12. Given the agency's consideration of this enhancement during its reevaluation of proposals, and the prominent mention of this enhancement in its revised source selection decision of December 17 this matter concerns the propriety of the agency's evaluation and source selection, and therefore is properly for consideration by our Office. Arthur Young & Co., B-216643, May 24, 1985, 85-1 CPD ¶ 598 at 5.

The agency also states that it "did not provide the requisite written confirmation to NaphCare by [October 2009], based primarily upon the stay in contract award and performance triggered by MDI's initial protest." Supp. AR at 5. We again fail to see, and the agency does not explain, why the fact that MDI had previously filed a protest

³ The agency, in conceding that it "did not provide the requisite written confirmation to NaphCare," mentions, without further explanation and in a footnote to its supplemental report, that "[w]hile the BOP is not in possession of any contemporaneous written documentation to support [the following] assertion, the Contracting Officer verbally communicated to NaphCare on October 22, 2009, that the BOP would pursue a termination for default if the [DELETED] was not provided." Supp. AR at 5 n.5. Given the agency's concession that a written confirmation that it wanted NaphCare to provide the [DELETED] was required but was not provided, and the agency's failure to provide any explanation as to the significance of this oral communication concerning termination, or any evidence that this oral communication occurred, we give little weight to this aspect of the agency's arguments. Id.

to which a stay of performance had applied renders reasonable the agency's subsequent determination that NaphCare's proposal provided "a firm commitment" to [DELETED], where the agency did not satisfy the requisite written confirmation requirement. AR, Tab 28, Source Selection Decision, at 12.

Finally, the agency points out that "every aspect of all of the offerors' proposals had expired . . . on November 12, 2009," and thus there was nothing improper in accepting NaphCare's expired offer. Supp. AR at 5. The agency notes that "at no time did NaphCare refuse to extend its offer to [DELETED] at the [agency's] request." Id.

As a general matter, and as noted by the agency, it is not improper for an agency to accept an expired offer without reopening negotiations where acceptance is not prejudicial to the competitive system. Scot, Inc., B-295569; B-295569.2, Mar. 10, 2005, 2005 CPD ¶ 66 at 9. However, the agency's argument here misses the point. NaphCare's proposal, as submitted, expressly required with regard to the [DELETED], that the agency provide written notification of its desire for this [DELETED] by October 2009. The agency did not provide this "requisite written confirmation" by October 2009, and therefore, its acceptance in December 2009 of NaphCare's proposal could not also include NaphCare's offer to [DELETED] because that aspect of the proposal had expired by the proposal's own terms in October 2009. We note here that while a proposal's expiration date may be waived, the agency has not pointed to any authority, and we are aware of none, for the agency's apparent proposition that an agency may also allow a specific term or condition within a proposal that requires agency action to also be waived.

In sum, we find that the agency unreasonably determined during its December 2009 reevaluation of proposals that NaphCare's proposal provided "a firm commitment to [DELETED]," because the agency was aware that it had not provided "the requisite written confirmation to NaphCare" by October 2009. See AR, Tab 29 Source Selection Decision, at 12; Supp. AR at 5. Given this, and the weight placed upon this enhancement in the source selection decision as justification in part for the selection of NaphCare's equally-rated, higher-priced proposal for award, we cannot find the agency's evaluation or selection of NaphCare's proposal to be reasonably based.

The protester also argues that the agency's consideration of price in the source selection decision, and the determination that an award to NaphCare was in the best interest of the government, were inconsistent with the terms of the solicitation. The protester contends that, although the solicitation stated that "[t]he evaluated price will be inclusive of the base and all option years," RFP at 39, the agency only considered base period pricing in the source selection decision. The protester points out that the source selection decision does not discuss or reflect any awareness of the fact that the price advantages of the protester's proposal increases from the base period of the contract through each of the four option years. Protester's Comments at 9-10, attach. A; Protester's Supp. Comments at 3-4.

In response, the agency notes that its price evaluation documentation references the base and option periods, and it argues that the use of the base year pricing “to provide a foundation for the value of [NaphCare’s] [DELETED]” in the tradeoff analysis does not mean that the tradeoff analysis was limited to consideration of only base year pricing. Supp. AR at 3.

Although the source selection decision provides considerable detail with regard to the base year pricing of the evaluated proposals, and some quantification of the value of the NaphCare’s evaluated enhancement of an [DELETED], we agree with the protester that the source selection decision reflects a consideration of the proposals’ base period pricing only. That is, the source selection decision does not provide any discussion of the proposals’ option year pricing, including any recognition that the price advantages of MDI’s proposal appears to increase over each of the proposed option periods. Furthermore, the agency has not provided any documentation or statement from, for example, the source selection authority evidencing the consideration of the proposals’ option year pricing contemporaneous with the source selection. Given this, and based on our review of the record, we cannot find the agency’s source selection to be consistent with the terms of the solicitation. See EEV, Inc., B-261297; B-261297.2, Sep. 11, 1995, 95-1 CPD ¶ 101 at 3 (failure to base award on option items was contrary to the terms of the solicitation and thus objectionable).

We sustain the protest.⁴ Because considering the availability of NaphCare’s proposed [DELETED] requires the reopening of discussions, we recommend that the agency do so, request and review revised proposals, and make a new source selection. In the event that a proposal other than NaphCare’s is selected for award, we recommend that the contract previously awarded to NaphCare be terminated and a contract be awarded to the successful offeror in accordance with the terms of the RFP. We also recommend that the agency reimburse MDI the costs and fees of filing and pursuing its protest, including reasonable attorneys’ fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2009). MDI’s certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the Federal Bureau of Prisons, Department of Justice, within 60 days of receiving the decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
Acting General Counsel

⁴ MDI also protests certain other aspects of the agency’s evaluation and source selection decision. Given our recommended corrective action, we need not resolve these issues.