



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Nu-Way, Inc.

File: B-296435.5; B-296435.10

Date: September 28, 2005

John Lukjanowicz, Esq., Oles Morrison Rinker & Baker LLP, for the protester.
Harold M. Nelson, Big Sky Mobile Catering, an intervenor.
Byron W. Waters, Esq., Department of Agriculture, for the agency.
Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably evaluated the protester's technical proposal as unacceptable under evaluation factor relating to proposed equipment is denied where the protester's proposal was ambiguous regarding whether the offered equipment met one of the material requirements in the solicitation.
2. Protest alleging that, in its evaluation of the protester's proposal, the agency unreasonably ignored information that was "too close at hand" (but not contained in the protester's proposal) is denied where the information in question bears on whether the protester's proposed equipment satisfied the technical requirements of the solicitation, and thus by nature could vary in response to the individual solicitation.
3. Protest that agency should have engaged in clarifications with protester to resolve material ambiguity in its proposal is denied since any such exchange would have constituted discussions, not clarifications, and agency generally has no obligation to hold discussions where, as here, it put offerors on notice of its intent to make award on the basis of initial proposals.

DECISION

Nu-Way, Inc. protests the decision by the National Interagency Fire Center, Forest Service, Department of Agriculture, not to award Nu-Way a contract under request for proposals (RFP) No. 49-05-07 for mobile food services. Nu-Way argues that the agency's evaluation of proposals, including the evaluation of its technical proposal, was improper.

We deny the protest.

BACKGROUND

The RFP, issued on February 9, 2005, contemplated multiple awards of fixed-price requirements contracts for a base year and four 1-year options. The successful contractors under the RFP would be required to provide hot and cold meals and various supplemental items at 27 field locations (referred to as designated dispatch points, or DDPs) during wildland fires and other types of activities throughout the contiguous western United States and Alaska by means of mobile food service units (MFSU). The solicitation permitted offerors to propose for multiple DDPs, but contemplated the award of one contract for each location.

In addition to price, the solicitation identified the following technical evaluation factors in descending order of importance: proposed equipment, past performance, experience, and technical approach. The RFP informed offerors that the technical factors, when combined, were approximately equal in importance to price. Contract awards were to be made to the offerors submitting the proposals determined to meet the minimum requirements of the solicitation and to be the most advantageous (*i.e.*, “best value”) to the government. Relevant to the protest here, the RFP also stated that contract awards might be made without discussions. RFP § M.2, at 105.

The RFP contained detailed instructions for the preparation of proposals, and required that the offerors’ proposals consist of two parts—a technical proposal and a business/price proposal. Offerors were instructed that the technical proposals would be used to determine, among other things, whether the proposals met the requirements of the RFP. In this regard, the RFP required that offerors “clearly and concisely provide” written specifications and drawings of the MFSU offered, “indicating equipment location, traffic flow, layout, size, and capacity of the unit.” RFP § L.6, at 101. The RFP also established minimum equipment requirements for an MFSU, and required offerors to complete an equipment requirements checklist for each unit offered. RFP § C.3, at 21-27; *exh. M.2*, at 112-18. The solicitation stated that the equipment requirements would be evaluated on a pass/fail basis, and that “any unit that fails to meet any of these minimum requirements will be unacceptable and may not be considered any further.” RFP, *exh. M.2*, at 112.

Twenty-five offerors, including Nu-Way, submitted proposals by the March 11 closing date. Nu-Way offered one MFSU for three DDP locations.¹ An agency technical evaluation board (TEB) evaluated the offerors’ technical proposals using an adjectival rating system: exceptional, acceptable, marginal, or unacceptable for

¹ In accordance with the RFP instructions, Nu-Way’s proposal set forth the award location preferences for its MFSU. Agency Report (AR), Tab 6, Nu-Way Proposal, at 16.

those technical factors other than past performance; and exceptional, acceptable, neutral, marginal, or unacceptable for past performance.² The TEB completed its evaluation of the offerors' technical proposals on June 2. The TEB's ratings of Nu-Way's proposal were as follows: unacceptable for proposed equipment; acceptable for past performance; acceptable (+) for experience; excellent for technical approach; the proposal's overall rating was marginal (+). AR, Tab 12, TEB Consensus Report, at 2. The TEB rated Nu-Way's proposal as unacceptable under the proposed equipment factor based on its determination that Nu-Way had failed to demonstrate compliance with all minimum equipment requirements of the solicitation. Id. at 14.

The TEB subsequently considered the offerors' evaluated prices and technical ratings, and made award recommendations for each DDP. AR, Tab 13, TEB Best Value Analysis Report. The contracting officer then concurred with the TEB's recommendations, decided not to conduct discussions with offerors, and forwarded the award recommendations and associated materials to the agency's source selection authority for review and approval. AR, Tab 14, Source Selection Decision; Contracting Officer's Statement, July 19, 2005, at 7. The source selection authority accepted the findings and recommendations of the TEB and made contract award to 12 offerors for 21 DDPs. AR, Tab 14, Source Selection Decision. Nu-Way was not selected to receive any awards. These protests followed. The agency has authorized the offerors who had received awards to begin performance notwithstanding the protests, based on a written determination that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for the decision of our Office. See 31 U.S.C. § 3553(d) (2000).

DISCUSSION

Nu-Way first protests the agency's evaluation of its technical proposal under the proposed equipment factor. Specifically, Nu-Way argues that the Forest Service unreasonably determined that its proposal was unacceptable for failing to meet a minimum equipment requirement, namely, sufficient "gray water" storage capacity.³ The protester contends that its proposal clearly reflected that its MFSU possessed a gray water storage capacity that exceeded the requirements of the RFP, and the

² The TEB rated each offeror's MFSU(s) separately. The TEB also employed the use of "+" and "-" (e.g., "acceptable plus") in its rating system. AR, Tab 12, TEB Consensus Report, at 2-3.

³ Gray water refers to the waste water generated as a result of the contractor's hand-washing and mobile food service operations. While the RFP required the contractor to provide sufficient gray water holding facilities, the solicitation established that the agency would arrange for the actual removal of the gray water.

agency's erroneous conclusion to the contrary improperly resulted in Nu-Way's disqualification from contract award consideration.

Where a protester challenges an agency's evaluation of a proposal's technical acceptability, our review is limited to considering whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Knoll, Inc.; Steelcase, Inc., B-294986.3, B-294986.4, Mar. 18, 2005, 2005 CPD ¶ 63 at 3. Clearly stated RFP technical requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Id.; National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4-5. An offeror is responsible for affirmatively demonstrating the merits of its proposal and risks the rejection of its proposal if it fails to do so. HDL Research Lab, Inc., B-294959, Dec. 21, 2004, 2005 CPD ¶ 8 at 5. As with any evaluation review, our chief concern is whether the record adequately supports the agency's conclusions. Innovative Logistics Techniques, Inc., B-275786.2, Apr. 2, 1997, 97-1 CPD ¶ 144 at 9. A protester's mere disagreement with the agency's judgment does not establish that the evaluation was unreasonable. C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4. Our review of the record provides us no basis to find the agency's evaluation here was unreasonable or otherwise objectionable.

As set forth above, the solicitation informed offerors, with regard to the proposed equipment factor, that the agency would evaluate each offeror's proposed MFSU(s) to determine the extent to which the unit(s) would meet or exceed the solicitation's minimum requirements. RFP § M.3, at 106. Relevant to this protest, the solicitation required that each MFSU proposed have a hand-washing unit with a minimum gray water storage capacity of 400 gallons, and a kitchen unit with a minimum gray water storage capacity of 500 gallons (900 gallons total). RFP § C, at 24-25. In performing its evaluation the TEB found that Nu-Way's proposal planned to pump its hand-washing unit gray water to the kitchen unit, and that Nu-Way's "kitchen unit carries 2 -- 400 gallon gray water bags." See AR, Tab 6, Nu-Way Proposal, at 57; Tab 12, TEB Consensus report, at 14. The TEB concluded that the total gray water storage capacity proposed by Nu-Way (i.e., 800 gallons) did not meet the 900-gallon total gray water storage capacity required by the solicitation. AR, Tab 12, TEB Consensus Report, at 14.

Nu-Way does not dispute that in one instance its proposal represented a gray water storage capacity of 800 gallons. Rather, the protester characterizes this particular representation as inadvertent, and asserts that in three other instances its proposal clearly indicated a gray water storage capacity of 1,600 gallons. Protester's Comments, Aug. 5, 2005, at 6. Nu-Way argues that the agency's decision to "ignore Nu-Way's [multiple] recitations of 1,600 gallons of gray water storage capacity in favor of a one-time assertion of 800 gallons of gray water storage capacity" was unreasonable. Id.

In addition to the reference in Nu-Way's proposal, quoted above, to "2 -- 400 gallon gray water bags," our review of the record indicates a total of four other instances where Nu-Way's proposal discusses its gray water storage capacity, as follows: 1) "In addition to the equipment on the next several pages, we also provide the following: . . . 2 -- 800 gallon gray water storage bags"; 2) "Gray water will be plumbed into kitchen 800 gal. gray water storage bags"; 3) "The gray water will be plumbed into the kitchen 800 gallon gray water storage bags"; and 4) "The gray water will be pumped into the kitchen unit gray water bags (800 gallon)." AR, Tab 6, Nu-Way Proposal, at 24, 31, 36, 55.

As an initial matter, we think that Nu-Way glosses over the fact that three of these excerpts from its proposal are themselves unclear as to whether, as the protester claims, the proposed equipment has a gray water storage capacity of 1,600 gallons: the references to "800 gallon gray water storage bags" and "the kitchen unit gray water storage bags (800 gallon)" could be read to indicate either the total capacity of the bags or the size of individual storage bags. In any event, it is an offeror's obligation to submit a clear and unambiguous proposal, and it must bear the consequences where its proposal does not reflect its intended approach. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 19. Here, the representations in Nu-Way's proposal regarding its gray water storage capacity cannot be reconciled; in one instance the offeror expressly indicated a total storage capacity of 800 gallons (which did not meet the solicitation's minimum requirement), while in another instance the offeror expressly indicated a total storage capacity of 1,600 gallons. In light of the contradictory representations within Nu-Way's proposal regarding its total gray water storage capacity, we cannot find the agency's evaluation here to be unreasonable.

Nu-Way also argues that its proposal should not have been found unacceptable under the proposed equipment factor because the Forest Service failed to consider information known to the agency regarding Nu-Way's equipment. Specifically, the protester argues that the TEB chairman had conducted examinations of Nu-Way's equipment during the prior year, and had personal knowledge that Nu-Way actually possessed a gray water storage capacity that exceeded the solicitation requirement. Nu-Way contends that this information was "too close at hand" for the agency to ignore in the evaluation of Nu-Way's proposal. Therefore, Nu-Way argues, the agency's failure to consider information known to it here was unreasonable.

An offeror has the burden of submitting an adequately written proposal, and an agency may downgrade a proposal for the lack of requested information. Formal Mgmt. Sys., Inc., B-259824, May 3, 1995, 95-1 CPD ¶ 227 at 3. Our Office has recognized that in certain limited circumstances, however, an agency evaluating an offeror's proposal has an obligation (as opposed to the discretion) to consider "outside information" bearing on the offeror's proposal. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5; G. Marine Diesel; Phillyship, B-232619, B-232619.2, Jan. 27, 1989, 89-1 CPD ¶ 90 at 4-5. Where we have charged an agency

with responsibility for considering such outside information, the record has demonstrated that the information in question was “simply too close at hand to require offerors to shoulder the inequities that spring from an agency’s failure to obtain, and consider, this information.” International Bus. Sys., Inc., *supra*; see GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 14.

The facts here are distinguishable from those in our decisions articulating the “too close at hand” principle. In the decisions cited above, we addressed situations where an agency failed to include in its evaluation past performance information that was specifically known to the officials handling the protested procurement. For example, the G. Marine Diesel; Phillyship decision dealt with a contracting officer’s failure to consider information, personally known to the contracting officer, that the awardee’s performance on a predecessor contract had been deficient; the GTS Duratek decision dealt with the agency’s failure to consider the offeror’s performance of a prior contract where the contract was discussed in the offeror’s past performance proposal and the contracting officer’s technical representative for the contract was a member of the technical evaluation team for the subject solicitation.

Here, Nu-Way argues that because the TEB chairman personally knew that Nu-Way had mobile food services equipment which met the RFP’s requirements, the agency was required to take this knowledge into account in performing its evaluation. Even accepting that Nu-Way’s contention is factually accurate, the protester’s argument requires the Forest Service to assume that Nu-Way intended to employ the same equipment as it had in the past. An offeror’s proposed technical capabilities, including equipment, may be varied by the offeror in response to the specifics of each solicitation, and merely because certain equipment may have been proposed or used in the past does not require the offeror to propose it on subsequent occasions. Incident Catering Servs., LLC, B-296435.2 *et al.*, Sept. 7, 2005, 2005 CPD ¶ __ at 8. In sum, we see no basis here to regard the information regarding Nu-Way’s equipment as falling within the category of data that we deem “too close at hand” for the agency to ignore.

Nu-Way also argues that it was unreasonable for the Forest Service not to have allowed the firm to clarify the ambiguity regarding the proposed gray water storage capacity in its proposal. Nu-Way contends that just as the agency contacted the firm to clarify other minor aspects of its proposal, the Forest Service should have sought clarification from Nu-Way regarding its gray water storage capacity.

Federal Acquisition Regulation (FAR) § 15.306 describes a spectrum of exchanges that may take place between an agency and an offeror during negotiated procurements. Where a solicitation notifies offerors that contract award may be made without discussions, an agency may engage in clarifications that provide offerors with the opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. FAR § 15.306(a). Discussions, on the other hand, occur

when an agency indicates to an offeror significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to enhance materially the proposal's potential for award. FAR § 15.306(d)(3). When an agency conducts discussions with one offeror, it must conduct discussions with all other offerors in the competitive range. FAR § 15.305(d)(1). The "acid test" for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. Park Tower Mgmt. Ltd., B-295589, B-295589.2, Mar. 22, 2005, 2005 CPD ¶ 77 at 7; Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

When an offeror is given the opportunity to remove an ambiguity from its proposal, especially where the information to be provided by the offeror is essential for determining the proposal's acceptability, such an exchange constitutes discussions. Integrated Sys. Group., B-272336; B-272336.2, Sept. 27, 1996, 96-2 CPD ¶ 144 at 5. Accordingly, in this case, had the Forest Service communicated with Nu-Way to resolve the ambiguity in the firm's proposal regarding gray water storage capacity, such an exchange would have constituted discussions, not clarifications. As there is generally no obligation that a contracting agency conduct discussions where, as here, the RFP specifically instructs offerors of the agency's intent to award a contract on the basis of initial proposals, Incident Catering Servs., LLC, *supra*, at 9, and the protester has not argued (and we see nothing in the record to suggest) that the agency's decision not to hold discussions with offerors was unreasonable, we find no basis to object to the agency's action.

Lastly, Nu-Way challenges the agency's evaluation of other offerors' proposals. Specifically, the protester contends that the technical proposals submitted by each of the awardees for the locations for which Nu-Way submitted a proposal (*i.e.*, [DELETED], [DELETED], and [DELETED]) failed to meet the minimum equipment requirements of the solicitation. The agency specifically addressed and refuted these contentions in its report, explaining that the proposals submitted by the other offerors here were properly determined to have met all minimum equipment requirements. In its comments, Nu-Way expresses disagreement with the agency report but makes no substantive rebuttal to the agency's position. Protester's Comments, Sept. 6, 2005, at 2. Our review of the record provides no basis to find the agency's evaluation here unreasonable or otherwise objectionable.

The protest is denied.

Anthony H. Gamboa
General Counsel