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**Comptroller General  
of the United States**

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

## Decision

**Matter of:** Empire Veteran Group, Inc.

**File:** B-408866.2; B-408866.3

**Date:** December 17, 2013

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David J.R. Pales, Empire Veteran Group, Inc., for the protester.  
Lorraine Lee, Esq., Department of the Army, Corps of Engineers, for the agency.  
Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

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### DIGEST

Where solicitation for two-phase design-build competition advised offerors not to assume they would have an opportunity to clarify or correct anything in their phase one proposals prior to the down-selection decision, protest assertion that protester should have been permitted to revise its phase one proposal is denied.

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### DECISION

Empire Veteran Group, Inc. (EVG), of New York, New York, protests the exclusion of its proposal from further consideration during phase one of a two-phase design-build competition conducted in accordance with Federal Acquisition Regulation (FAR) § 36.301 by the Department of the Army, Corps of Engineers, under request for proposals (RFP) No. W912DS-13-R-0019 for a photovoltaic power system and support structures to be constructed in Sea Girt, New Jersey. EVG primarily argues that the agency unreasonably evaluated its proposal, unreasonably declined to permit proposal revisions, and conducted its debriefing in bad faith.

We deny the protest in part and dismiss it in part.

### BACKGROUND

The RFP, issued on May 6, 2013, was set aside for service-disabled veteran-owned small business concerns. RFP at 1. The solicitation contemplated a two-phase evaluation approach under which offerors were to submit proposals under the first phase and, after an evaluation of those proposals, up to six of the best qualified firms would be invited to submit phase two proposals. RFP § 002210 ¶ 1.0. Award of a fixed-price contract was to be made to the firm whose proposal was among the

best qualified under phase one, and whose proposal under phase two was the lowest-priced technically acceptable offer. RFP § 002220 ¶¶ 6.0. Under no circumstances would award be made to an offeror with an unacceptable rating in any factor.<sup>1</sup> Id. at ¶ 6.1.

Under phase one, interested firms or joint venture entities<sup>2</sup> were to submit performance capability proposals demonstrating their capability to successfully execute the anticipated design-build construction contract. RFP § 002210 ¶ 1.0. Proposals were to be evaluated under two equally-weighted factors: specialized experience and past performance. Id. at ¶ 3.0. Under the specialized experience factor, each offeror was required to: (1) demonstrate relevant past experience as a prime contractor on at least two projects, and (2) demonstrate the experience of its design firm on two projects. Id. at ¶ 4.0.

The RFP provided a list of criteria that would permit a higher rating, including: (1) the offeror acted as a prime contractor in the majority of the example experiences, and (2) previous teaming experience with current proposal team members. Id. Conversely, the RFP gave the agency the discretion to assess weaknesses if: (1) few or no projects are provided where the offeror acted as prime contractor, (2) example experiences are from proposed subcontractors in lieu of the offeror, and (3) the example experiences do not demonstrate previous teaming experience between team members. Id.

The agency's initial evaluation of EVG's phase one proposal identified two deficiencies under the specialized experience factor: EVG's proposal did not provide any projects where it performed as a prime contractor, and did not identify two projects performed by its design firm. AR, Exh. I, First Exclusion Notice.

By letter of August 15, EVG was notified that its proposal was rated unacceptable based on these two deficiencies. Id. The letter stated that EVG was entitled to receive a debriefing, and that its debriefing request should be received within three days of receipt of this notice. Id. On August 21, EVG sent the agency an email requesting "an opportunity to have a brief telephone conversation regarding the solicitation actions thus far." AR, Exh. N, Miscellaneous E-mail Correspondence. The agency subsequently revised its evaluation of EVG's proposal and sent the firm a new letter on September 5. In that letter, the agency notified EVG that its

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<sup>1</sup> An unacceptable rating was to be assigned where the proposal did not meet requirements and contained one or more deficiencies. RFP § 002210 ¶ 7.4.

<sup>2</sup> A firm wishing to submit a proposal as a joint venture was required to submit a copy of the joint venture agreement with its proposal, along with a statement detailing various specific characteristics of the joint venture. RFP § 002210 ¶¶ 2.4, 6.1.

proposal continued to be rated unacceptable based on one of the previously identified deficiencies, i.e., the failure of the proposal to identify two projects for its design firm. The agency upgraded from a deficiency to a weakness its finding that EVG lacked prime contractor experience. AR, Exh. J, Second Exclusion Notice.

On September 10, EVG filed a protest with our Office arguing that the agency improperly requested phase two proposals without providing EVG a required debriefing. We dismissed the protest for failing to establish a basis for challenging the agency's action, noting that protests involving the adequacy and conduct of a debriefing are procedural matters that do not involve the validity of an award. Healthcare Tech. Solutions Int'l, B-299781, July 19, 2007, 2007 CPD ¶ 132 at 5.

On September 11, EVG filed a second protest with our Office. EVG challenged the agency's finding that its proposal had a weakness because the firm failed to demonstrate prime contractor experience. The protester argued that the agency failed to consider its teaming partner's experience as prime contractor experience. EVG also argued that the agency improperly failed to consider certain design experience identified in its proposal.<sup>3</sup>

On September 13, the agency sent EVG another notice informing the firm that its proposal evaluation had been corrected again. AR, Exh. K, Third Exclusion Notice. The notice stated that EVG's proposal was upgraded to marginal<sup>4</sup> based on four strengths and two weaknesses. The weaknesses were that EVG provided no projects evidencing prime contractor experience, and that EVG had not demonstrated any previous teaming experience with its proposed subcontractors. Id. The agency informed EVG that its proposal was not sufficiently competitive to be selected for phase two. Id. EVG filed its third protest on September 25.

## DISCUSSION

In both its September 11 and September 25 protests, EVG argues that the agency improperly assigned its proposal a weakness (initially viewed as a deficiency) for failing to demonstrate prime contractor experience. EVG contends that the agency

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<sup>3</sup> We need not consider this protest's challenge to the deficiency associated with EVG's design firm experience. During the reevaluation of EVG's proposal the agency discovered that it had overlooked this experience and no longer considered this to be a deficiency. AR, Legal Memorandum, at 5.

<sup>4</sup> The RFP defined "marginal" as, "[p]roposal does not clearly meet requirements and has not demonstrated an adequate approach and understanding of the requirements. The proposal has one or more weaknesses which are not offset by strengths. Risk of unsuccessful performance is high." RFP § 002210 ¶ 7.4.

improperly failed to consider the experience of its teaming partner, Pravco, as prime contractor experience. We dismiss this allegation as untimely.<sup>5</sup>

Our Bid Protest Regulations require that protests of other than alleged solicitation improprieties must be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (2013). EVG learned that the agency considered its failure to demonstrate prime contractor experience a deficiency on August 15, when the agency first notified EVG of the exclusion of its proposal from further consideration. AR, Exh. I, Exclusion Notice. EVG's failure to protest the agency's evaluation until September 11, more than 10 days later, renders the matter untimely. Since EVG did not timely request a debriefing, it cannot avail itself of the later filing date authorized by our Bid Protest Regulations.

In this regard, in situations where a debriefing is requested, and when requested, required, our Bid Protest Regulations require that protest grounds known either before or as a result of the debriefing be filed not later than 10 days after the date on which the debriefing is held. 4 CFR § 21.2(a)(2). In a negotiated procurement, a debriefing is required if the debriefing request is submitted, in writing, to the contracting officer within three days after receipt of the notice of exclusion from the competition. FAR § 15.505(a)(1).

Here, EVG received its notice of exclusion on August 15, but did not request a debriefing until, at the earliest, August 21, when it requested a phone conversation regarding the procurement. Even if we were to conclude the e-mail was a debriefing request, the request was not made within three days after EVG's receipt of the exclusion notice, and as such the debriefing exception to our timeliness rules does not apply here. As a result, the timeliness of this protest ground is not measured by the date EVG received its debriefing, but by the date that it first knew or should have known about this protest ground.<sup>6</sup> In any event, even if the allegation were timely raised, the record shows that it is without merit.

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<sup>5</sup> We also dismiss EVG's challenges to the solicitation's terms as untimely. Among other things, EVG questions whether the two-phase acquisition approach is consistent with statutory and regulatory provisions applicable to small disadvantaged businesses; argues that the use of joint venture agreements is at odds with Small Business Administration rules regarding ownership and control; and challenges the use of lowest-price, technically acceptable evaluation criteria. Third Protest at 3, 10. To be timely, challenges to alleged solicitation improprieties must be raised prior to the date set for receipt of proposals. 4 CFR § 21.2(a)(1). All of EVG's challenges were raised after that date.

<sup>6</sup> It is not relevant that the agency originally considered EVG's lack of prime contractor experience as a deficiency only to upgrade it to a weakness. EVG was on notice of the adverse evaluation concerning its prime contractor experience on  
(continued...)

EVG submitted three projects for consideration, all of which were performed by Pravco. AR, Exh. D, EVG Proposal Volume 1, at 3-10. EVG's proposal contains the first page and the last page of a nine-page document entitled "Teaming Agreement" between "Enterprise Veteran Group" and Pravco. Id. at 42-43. Our review of this submission leads us to conclude that it does not satisfy the RFP's requirements for submission and consideration of joint venture proposals. First, the party listed on the teaming agreement--"Enterprise Veteran Group"--is not the same party who submitted the offer--"Empire Veteran Group, Inc." Id. Second, the teaming agreement, on its face, establishes a prime contractor/subcontractor relationship between Enterprise Veteran Group and Pravco, id., and not a joint venture relationship. Finally, the submission does not define the characteristics of the joint venture as required by the RFP, or meet other requirements set forth in the solicitation.<sup>7</sup> Id. Consequently, we conclude that EVG's proposal includes Pravco as a subcontractor to EVG, and not as a joint venture member as EVG asserts.

The RFP notified offerors that the agency could assess a weakness where, as here, an offeror submitted few or no projects where the offeror acted as prime contractor. RFP § 002210 ¶ 4.0. The RFP also stated that a weakness could be assessed if, as here, the example experiences provided were from proposed subcontractors in lieu of the offeror. Id. Under the circumstances, we have no basis to conclude that the agency's assessment of a weakness here was unreasonable.

EVG next argues that the agency improperly failed to allow the firm to revise its proposal to provide experience it allegedly has with its subcontractors. Third Protest at 7. EVG argues that it has one year of experience working with a subcontractor that it could have provided if allowed to revise its proposal. Id. at 7-8.

Phase one offerors were cautioned to "not assume that they will have an opportunity to clarify or correct anything in their proposal after submitting it in response to Phase I." RFP § 002210 ¶ 7.2.1. Hence, the solicitation specifically advised that the agency intended to make its down-selection decision without engaging in discussions. In such cases, the contracting officer's discretion not to hold discussions is quite broad and is, in general, a matter that we will not review.

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August 15 when the agency sent its first exclusion notice; the timeliness of any subsequent protests pertaining to this factual basis is measured by that date.

<sup>7</sup> For example, the RFP required both joint venture members to sign the SF 1442, unless a written agreement by all members of the joint venture was furnished with the proposal designating one firm with the legal authority to bind all members of the joint venture. RFP § 002210 ¶ 2.4. EVG's proposal does not evidence compliance with this requirement.

See Trace Sys., Inc., B-404811.4, B-404811.7, June 2, 2011, 2011 CPD ¶ 116 at 5; HDT Tactical Systems, Inc., B-403875, Dec. 14, 2010, 2011 CPD ¶ 8 at 5-6. EVG has made no showing that this exercise of discretion was abused, and its argument provides no basis for questioning the decision to exclude EVG's proposal from further consideration.

EVG finally alleges that the contracting officer acted in bad faith by failing to review its proposal, failing to follow established evaluation criteria, and twice cancelling scheduled debriefings "for its own convenience." Protest of September 25, at 2-3. EVG also alleges that the agency's counsel acted in bad faith, arguing that the agency report "ignores ALL the facts as presented in the original solicitation," and is "intentionally" misleading and false. Comments at 4.

Government officials are presumed to act in good faith and when a protester alleges bias, it not only must provide convincing evidence clearly demonstrating a bias against the protester or for the awardee, but also must demonstrate that this bias translated into action that unfairly affected the protester's competitive position. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 17. EVG has not provided one scintilla of evidence supporting its allegations, and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. ACC Constr. Co., Inc., B-289167, Jan. 15, 2002, 2002 CPD ¶ 21 at 4.

Further, as discussed above, the record shows that the evaluation was reasonable and in accordance with the terms of the solicitation. While we do not review the adequacy and conduct of debriefings, Healthcare Tech. Solutions Int'l, supra, the record shows that the agency twice rescheduled the requested debriefing based on its decision to re-evaluate EVG's proposal, actions which hardly evidence bad faith. Finally, we find the agency's report cogent and thorough, not misleading and false as EVG alleges.<sup>8</sup>

The protest is dismissed in part and denied in part.

Susan A. Poling  
General Counsel

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<sup>8</sup> EVG protested various other matters that are not discussed in this decision. We have considered each of its protest grounds and find them equally without merit.