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

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Decision

Matter of: Avar Consulting, Inc.

File: B-410308

Date: December 8, 2014

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Steven J. Koprince, Esq., and Amanda M. Wilwert, Esq., Petefish, Immel, Heeb & Hird, LLP, for 22nd Century Technologies, Inc., an intervenor.

Bonnie Angermann, Esq., and Erva Cockfield, Esq., U.S. Department of Transportation, for the agency.

Peter D. Verchinski, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency may properly eliminate revised proposal from the competitive range where the agency reasonably determines that, due to the proposal's high price, the proposal has no reasonable chance of being selected for award.

DECISION

Avar Consulting, Inc., of Rockville, Maryland, protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. DTRT54-14-R-00300, issued by the U.S. Department of Transportation for transportation data analysis and information technology (IT) support services. Avar argues that the agency failed to conduct its evaluation consistent with the solicitation's stated criteria and that DOT's best-value analysis was improper.

We deny the protest.

BACKGROUND

The agency issued the RFP as a competitive 8(a) small business set-aside under Federal Acquisition Regulation (FAR) Part 15, for support services to help maintain, operate, enhance, and redesign the DOT's Research and Innovative Technology Administration's (RITA) IT systems. The solicitation provided for the award of one or more indefinite-delivery, indefinite-quantity fixed-price contracts for a base year with

four one-year options under which cost-reimbursable, time-and-materials, or labor-hour task orders could be issued. RFP at 18, 77, 85. Offerors were informed that awards would be made on a best-value basis, considering price and the following four technical evaluation factors: technical approach, management approach, past performance, and Section 508 compliance.¹ Id. at 168. The non-price evaluation factors were equal in importance and, when combined, were significantly more important than price. Id.

With regard to past performance, the solicitation required offerors to identify three contracts or subcontracts that the offeror is currently performing or has completed in the past five years, that are valued in excess of \$100,000, and that involve work substantially similar to the proposed effort. Id. at 172. Offerors were to indicate how the contracts and subcontracts are related to the proposed effort, and include a brief description of the contract work and comparability to the proposed effort. Id.

With regard to price, the solicitation established that price would be evaluated by adding the extended price totals for the base year and the option years. Id. at 173. Offerors were required to demonstrate that their prices were fair and reasonable, and that their prices were realistic. Id. at 167.

The agency received sixteen proposals by the February 18, 2014 closing date. The agency evaluated the proposals and established a competitive range of the five most highly-rated offers, which included Avar and the two eventual awardees, Spatial Front, Inc., and 22nd Century Technologies, Inc. Agency Report (AR), Tab 8, Technical Evaluation, at 18; AR, Tab 15, Acquisition Summary, at 6. The agency notified all offerors of its competitive range determination, and invited the offerors in the competitive range to give oral presentations to address their technical and management approaches, section 508 compliance, past performance, and pricing. AR, Tab 11, Avar Discussion Letter, at 1. The DOT's communication also identified, specific to each offeror, areas of concern in which the agency requested further explanation. Id. at 2-5. As relevant here, the agency's letter advised Avar that its "pricing was significantly higher than the Government's Independent Estimate," and gave Avar the opportunity to revise its pricing prior to providing its oral presentation. Id. at 5.

The agency conducted oral presentations with each of the five competitive range offerors between the dates of July 14 and 16. After the presentations were completed, the agency submitted additional questions to the offerors and requested

¹ Section 508 compliance requires federal agencies acquiring electronic and information technology to ensure that federal employees and members of the public with disabilities have access to, and use of, information and data that is comparable to the access and use available to individuals without disabilities. RFP at 97.

final proposals. With regard to Avar, the agency’s communication highlighted the categories where Avar’s labor rates were higher than the government estimate and again advised Avar that its revised overall price remained significantly higher than the government estimate. AR, Tab 12, Follow-On Discussion Questions, at 1-2. Avar was also informed that its final revised proposal was due by July 24, and that the agency did not intend to obtain any further revisions. Id.

All five competitive range offerors submitted final revised proposals, which were evaluated by the technical evaluation panel (TEP) as follows:

	Spatial Front	22nd Century	Avar	Offeror A	Offeror B
Technical Approach	Satisfactory	Satisfactory	Very Good	Very Good	Satisfactory
Management Approach	Very Good	Satisfactory	Very Good	Very Good	Satisfactory
Past Performance	Excellent	Satisfactory	Very Good	Very Good	Satisfactory
Overall Tech. Rating	Very Good	Satisfactory	Very Good	Very Good	Satisfactory
Price (Million)	\$43.9	\$47.3	\$57.3	\$58.5	\$87.2

AR, Tab 15, Acquisition Summary, at 7-8.²

With regard to price, the TEP reviewed the offerors’ final revised prices for reasonableness by comparing them to the independent government estimate of \$47,016,700. Id.; AR, Tab 8, Technical Evaluation, at 21. The TEP concluded that Avar’s price of \$57.3 million was “not competitive” because it was “significantly higher” than the government estimate. AR, Tab 15, Acquisition Summary, at 7. Likewise, the agency concluded that Offeror A’s and Offeror B’s prices were not competitive due to their high pricing. Id. at 7-8. The TEP recommended that the contracting officer, who was the source selection authority, eliminate these three firms from the competition due to their high pricing. Id. at 22-23. The contracting officer concurred. The DOT made award to Spatial Front and 22nd Century as the best-value offerors on August 15.

² The technical approach, management approach, and past performance factors were assigned one of the following adjectival ratings: excellent, very good, satisfactory, or poor. AR, Tab 6, Source Selection Plan, at 7-8. All offerors were determined to be Section 508 compliant.

On August 16, the agency notified Avar that its proposal had been removed from the competitive range because its pricing was “significantly above” the government estimate. Protest, Attach. 1, Notice of Elimination from Competitive Range, at 1. The protester requested a debriefing, which it received on August 19. This protest followed.

DISCUSSION

The gravamen of Avar’s protest is that the agency’s use of a second competitive range decision after submission of final revised proposals--rather than the use of a best-value tradeoff--deprived Avar of the right to have the technical merits of its proposal weighed against its higher price. Thus, Avar argues that the agency failed to properly evaluate proposals in accordance with the terms of the solicitation, because it abandoned the solicitation’s evaluation scheme that non-price factors were, when combined, significantly more important than price. The protester additionally asserts that the agency converted the solicitation’s comparative award scheme to a lowest-priced technically acceptable evaluation scheme.

The agency responds that it acted reasonably when it eliminated Avar’s proposal from the competitive range due to its high price, after concluding that the proposal did not have a reasonable chance of receiving an award. The agency also argues that its best-value analysis was proper and that it did not make award on a lowest-priced technically acceptable basis.

Contracting agencies are not required to retain in the competitive range proposals that are not among the most highly rated or that the agency otherwise reasonably concludes have no realistic prospect of being selected for award. Federal Acquisition Regulation (FAR) § 15.306(c)(1); D&J Enters., Inc., B-310442, Dec. 13, 2007, 2008 CPD ¶ 8 at 2. For the reasons set forth in detail below, we see nothing improper about the decision to eliminate Avar from the competition using a second competitive range decision.

Here, the record shows that the agency initially concluded that Avar’s proposal should be included in the competitive range, even though its price was significantly above the government estimate. During discussions, the agency advised Avar of its high price and permitted Avar an opportunity to revise its price proposal prior to conducting its oral presentation. After the conclusion of Avar’s oral presentation, the agency submitted follow-up questions to Avar and requested its final proposal. In this communication, the agency again informed Avar that its price remained significantly higher than the agency’s estimate, and notified the protester that certain of its labor rates were higher than the agency’s estimate.

The agency’s evaluation of Avar’s final revised proposal concluded that Avar should be eliminated from the competition because its price was significantly higher than the government estimate. In this regard, the record demonstrates that, while Avar’s

proposal received a very good overall technical rating, its final price of \$57.3 million was approximately 20 percent higher than the government estimate. We see nothing unreasonable about the agency's decision to eliminate Avar from the competitive range because it did not have a reasonable chance of being selected for award. Communication Mfg. Co., B-215978, Nov. 5, 1984, 84-2 CPD ¶ 497 (a proposal which was initially in the competitive range may be removed from further consideration for award where the agency determines that the proposal does not have a reasonable chance of being selected for award after the proposal is revised.)

While Avar asserts that it was improper for the agency to eliminate its proposal from the competition because the RFP required the agency to weigh technical merit more heavily than price, our Office has previously concluded that in determining the competitive range, price is a proper factor to consider and may emerge as the dominant factor, even where the solicitation criteria place greater weight on technical factors than on price. See Motorola, Inc., B-247937, B-247937.2, Sept. 9, 1992, 92-2 CPD ¶ 334 at n.2; Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114 at 3-4; Jack Faucett Assocs., B-224414, Sept. 16, 1986, 86-2 CPD ¶ 310 at 2. Thus, we find that the agency's decision to eliminate Avar's proposal from the competitive range did not violate the solicitation's evaluation scheme.

Next, Avar asserts that, rather than conduct a comparative assessment of the relative strengths and weaknesses of the proposals as required by the RFP, the agency improperly excluded all offerors from the competition whose prices were above the government estimate, effectively using an evaluation scheme where award would be made only to those firms that had submitted the lowest-priced, technically acceptable offers.³ Again, we disagree.

The record establishes that the agency found that the technical merit of Avar's initial proposal warranted its inclusion in the initial competitive range. Although Avar was repeatedly advised during discussions that the agency viewed Avar's price as higher than the government estimate, Avar's final revised price again remained significantly higher than the government estimate. Although not styled as a tradeoff decision, the agency expressly concluded that Avar did not have a reasonable chance of

³ Avar's initial protest also alleged bias on the part of the agency officials which resulted in an improper best-value analysis. We need not consider this issue because the protester has not provided convincing proof of its allegations. Government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8; Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. Here, the protester has made no such showing.

receiving an award when compared to the lower-priced proposals remaining in the competitive range. AR, Tab 15, Acquisition Summary, at 8. Although Avar disagrees with this judgment, it has not shown it to be unreasonable. See Sterling Medical Assocs., Inc., B-406729, B-406729.2, Aug. 8, 2012, 2012 CPD ¶ 337 at 4.

Avar also raises other protest allegations, which we have fully considered but do not address; we find that none provides a basis on which to sustain the protest.⁴ For example, the protester alleges that the agency should not have considered a reference provided by one of the awardees, because the work was performed as a subcontractor, and not as a prime contractor. Avar also argues that the agency failed to reasonably evaluate negative past performance of another awardee. We find that the agency's past performance evaluation was reasonable and in accordance with the solicitation's criteria.

The evaluation of an offeror's past performance is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best method for accommodating them, and we will not substitute our judgment for reasonably based past performance ratings. See MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. The evaluation of experience and past performance, by its very nature, is subjective, and an offeror's disagreement with an agency's evaluation judgments does not demonstrate that those judgments are unreasonable. Glenn Def. Marine-Asia PTE, Ltd., B-402687.6, B-402687.7, Oct. 13, 2011, 2012 CPD ¶ 3 at 7.

As discussed above, the solicitation permitted offerors to identify contracts which they had performed as a subcontractor. RFP at 172. The record establishes that the agency reasonably considered the portion of the work performed by each of the offerors, including work performed as a subcontractor, in arriving at its overall past performance rating. Additionally, the record shows that the agency properly considered the other awardee's negative past performance information and concluded that the issues were resolved during discussions. The protester's

⁴ In its initial protest, Avar alleged that the agency could not have conducted a proper analysis of the actual prices the agency will pay because the solicitation did not include the opportunity for offerors to submit prices for any sample task orders. To the extent that the protester attempts to challenge the solicitation's price evaluation scheme, its protest is untimely. Our Bid Protest Regulations require challenges to alleged apparent solicitation improprieties to be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (2014).

disagreement with the agency's evaluation does not demonstrate that the DOT's evaluation was improper.

The protest is denied.

Susan A. Poling
General Counsel