U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Maxmed Healthcare, Inc.

File: B-421623.5

Date: January 25, 2024

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DIGEST

Protest challenging use of "highest technically rated offerors with a fair and reasonable price" source selection method, for failing to properly consider price, is denied where the protester fails to establish that such an approach is prohibited by statute or regulation.

DECISION

Maxmed Healthcare, Inc., a small business of San Antonio, Texas, challenges the terms of request for proposals (RFP) No. HT001523R0003, issued by the Department of Defense, Defense Health Agency (DHA) for medical professional staffing services. Maxmed contends that the solicitation provides for competition without the evaluation of price, and improperly allows for the past performance evaluation of only one partner in a joint venture.

We deny the protest.

BACKGROUND

The Medical Q-Coded Support and Services--Next Generation procurement at issue here was designed by DHA to establish multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts, in two business-size categories, small business and

unrestricted. Agency Report (AR), Tab 10, RFP at 100.[1] Under these contracts, the agency can issue fixed-price task orders for a broad range of medical services such as physician, nursing, dental, and medical support, as well as ancillary services. *Id*. The protester challenges the terms of the small business set-aside RFP.

DHA issued the solicitation on November 15, 2022, under the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15. AR, Tab 3, Original RFP at 1, 65; Contracting Officer's Statement (COS) at 2. The solicitation originally provided that the agency intended to issue up to ten IDIQ contracts, in five geographical areas of responsibility (AOR), "to each and all qualifying [o]fferors."[2] AR, Tab 3, Original RFP at 65, 92 (*citing* the FAR section 2.101 definition of a qualifying offeror, as "an [o]fferor that is determined to be a responsible source, submits a technically acceptable proposal that conforms to the requirements of the solicitation, and [c]ontracting [o]fficer has no reason to believe would be likely to offer other than fair and reasonable pricing."). The RFP also originally instructed that:

> For the purposes of this solicitation, a technically acceptable proposal is an evaluated proposal with:
>
> (1) one of the ten (10) highest self-scored, [g]overnment-validated, [s]elf-[s]coring [t]echnical [c]apabilty [w]orksheets for the AOR in which the [o]fferor has proposed, AND
>
> (2) a satisfactory performance confidence rating.

Id. at 92.

The solicitation established that the agency would use a three-step evaluation process. *Id.* at 93. In step 1, DHA would assess proposal responsiveness, evaluating whether the proposal complied with submission instructions outlined in the addendum to FAR provision 52.212-1 in the solicitation. *Id.* If the proposal was found to be compliant, it would proceed to step 2, technical capability, where the agency would review the self-scoring sheet provided by offerors regarding, among other things, the scope, magnitude, and complexity of their experience in various contracts related to medical services. *Id.* at 93-94. Then, in step 3, the agency would evaluate offerors' past performance. *Id.* at 94-95.

On August 22, 2023, Maxmed filed a protest with our Office, challenging the terms of the solicitation; in particular, the protester contended that the planned competition and

[1] The solicitation has been amended multiple times. Unless indicated otherwise, our citation to the RFP is to the most recent conformed copy, incorporating all 11 amendments, found at tab 10 of the agency report.

[2] Accordingly, the RFP suggested award of up to 50 contracts. *See* AR, Tab 3, Original RFP at 84.

the agency's evaluation method were contrary to applicable procurement laws and regulations.

On September 15, DHA advised our Office that it intended to take corrective action by "review[ing] and revis[ing] its acquisition methodology." Notice of Corrective Action B-421623.3, Sept. 15, 2023, at 1. On the basis of the proposed corrective action, our Office dismissed the protest as academic. *Maxmed Healthcare, Inc.,* B-421623.3, Sept. 22, 2023 (unpublished decision).

Following the corrective action, the agency amended the RFP to provide for "award to the Highest Technically Rated Offeror(s) with Satisfactory or Neutral Performance Confidence and a Fair and Reasonable Price [(HTRO)]." AR, Tab 9, RFP amend. 11 at 17. The revised solicitation anticipated making awards considering the following four evaluation factors: (1) technical capability; (2) past performance; (3) compensation plan; and (4) price. RFP at 113.

As relevant to this protest, the RFP provided that price would be evaluated for reasonableness. *Id.* at 116. The solicitation further instructed that:

> [t]o determine whether the [o]fferor's proposed ceiling prices [are] fair and reasonable the [g]overnment will utilize one or a combination of the price analysis techniques outlined in FAR 15.404-1.

Id. Finally, the RFP stated that "[p]rice will not receive an evaluation rating." *Id.*

Prior to the closing time for receipt of proposals, Maxmed filed this protest with our Office.

DISCUSSION

Maxmed challenges the terms of the amended RFP, arguing that the amendment "did not correct the underlying issues with the [s]olicitation."[3] Protest at 5. Specifically, the protester alleges that DHA again elected to adopt a source selection methodology that provides for a competition without the evaluation of price, in violation of federal statute and regulation. Maxmed also argues that the solicitation impermissibly allows mentor-

[3] Maxmed's August 22, 2023, protest challenged, among other things, the proposed solicitation structure, contending that it improperly provided for making awards to the top ten highest rated offerors, while the intended non-competitive acquisition method required that awards be made to all qualifying offerors. Protest B-421623.3, Aug. 22, 2023, at 4-8. The protester alleged that the proposed approach "goes against the language and intent of FAR 15.304(c)(1)(ii) and 10 U.S.C. § 3206(c)(iii); awards issued under these provisions must go to all responsible offerors who have submitted a proposal that meet the technical requirements of the given solicitation." *Id.* at 4.

protégé joint ventures to rely on the past performance of the mentor alone with no past performance required of the protégé. *Id*. at 6-7.

We have considered each argument and for the reasons discussed below, find no basis to sustain the protest.

Source Selection Methodology and Consideration of Price

First, Maxmed asserts that DHA's corrective action was "illusory in nature" because the revised solicitation, now containing an HTRO source selection method, still fails to evaluate price. In this regard, the protester asserts that the proposed "competitive approach does not actually involve an evaluation of price *as a part of the competition itself*." Protest at 5; Comments at 2. The protester complains that:

> [i]nstead of going back and either (1) adding price as an actual evaluation factor (using a sample task order or something of that nature) or (2) providing that all technically acceptable offers with fair and reasonable pricing will receive award, DHA simply removed the mention of "qualifying offeror" and tried to save face by saying that it will award "approximately" ten awards, as though saying it "might" award all qualifying offerors is acceptable.

Protest at 9-10. Maxmed also asserts that the terms of the solicitation are contrary to FAR section 15.304(c)(1) and 10 U.S.C. § 3206(c)(3), which provide that price or cost must be considered in every source selection decision. *Id.* at 6-8. The protester argues that the only exception to this requirement arises under FAR section 15.304(c)(ii), which states that price or cost need not be an evaluation factor for award where the agency intends to award certain types of contracts to "each and all qualifying offerors," among other requirements.[4] *Id*. at 7-8. Because DHA intends to award contracts only to offerors who are the "highest technically rated with a fair and reasonable price," the protester contends that the proposed acquisition approach runs counter to the applicable statute and regulation. Comments at 6.

The agency responds that the solicitation does, in fact, include consideration of price as a factor in the selection decision because the terms of the solicitation establish that, prior to making award, the agency will evaluate the price of any potential awardee to determine whether it is fair and reasonable. Memorandum of Law (MOL) at 6-8. DHA

[4] Specifically, FAR part 15 was recently amended to include an exception to the general requirement that price be considered as an evaluation factor. *See* 85 Fed. Reg. 40068 (July 2, 2020). Under that exception, title 10 agencies, including the Department of Defense (DOD), are no longer required to consider price as an evaluation factor for the award of certain multiple-award contracts that are for the same or similar services, and if an agency intends to make an award to each and all qualifying offerors. *See FAR* 15.304(c)(1)(ii). If an agency exercises that discretionary authority, it must include price as an evaluation factor in the selection decision for each subsequent task order.

also notes the amended solicitation requires offerors to propose contract ceiling prices, which may be subject to additional negotiation or competition when awarding task or deliver orders. *Id.* at 7. Moreover, the agency adds that the chosen acquisition methodology does not rely on FAR section 15.304(c)(1)(ii) --which applies when a contracting officer elects not to include price or cost as an evaluation factor in a solicitation and thus requires an agency to make award to "each and all qualifying [o]fferors"--because in the revised solicitation, DHA elected to add price as an evaluation factor to the source selection criteria. COS at 18.

The agency elaborates that the HTRO methodology has been expressly authorized under Defense Federal Acquisition Regulation Supplement Procedures, Guidance, and Information (DFARS PGI), specifically the Department of Defense's (DOD) August 20, 2022 source selection procedures. *See* Dec. 1 Req. for Dismissal at 4; COS at 17 (*quoting* AR, Tab 14, DFARS PGI, Subpart 215.3, DOD Source Selection Procedures, ¶ 1.3.1.5., stating that that the "Highest Technically Rated Offeror with a Fair and Reasonable Price . . . [methodology] may be used in competitions for multiple-award IDIQ contracts that establish ceiling rates or prices subject to additional negotiation or competition prior to award of task or delivery orders."). DHA also notes that both our Office and the U.S. Court of Federal Claims (COFC) have concluded that an agency's use of the HTRO methodology is permissible in negotiated procurements conducted pursuant to the Competition in Contracting Act (CICA) and FAR part 15. *See, e.g., Sevatec, Inc. et al.,* B-413559.3 *et al.,* Jan. 11, 2017, 2017 CPD ¶ 3 at 5-9; *Octo Consulting Grp., Inc. v. United States,* 117 Fed. Cl. 334 (2014). We agree with the agency's argument.

In this regard, our Office has recognized that the source selection methodology used here--evaluating proposals based on the highest technical merit with a fair and reasonable price--is a permissible methodology under the FAR. *Sevatec, Inc. et al.*, *supra*; *see also Sumaria Sys., Inc.*, B-418796, Sept. 9, 2020, 2020 CPD ¶ 296 at 5-6; *Cyberdata Tech., LLC,* B-417816, Nov. 5, 2019, 2019 CPD ¶ 379 at 8; *U.S. Electrodynamics, Inc.*, B-414678, Aug. 1, 2017, 2017 CPD ¶ 252 at 9. While still considering price as an evaluation factor, this methodology does not require a tradeoff between price and non-price factors, as would be the case when using a tradeoff selection process. *See Sevatec, Inc. et al.*, *supra.*

Further, as we noted in our prior decisions discussing the propriety of the HTRO methodology, under FAR section 1.102(d), an agency's chosen procurement procedure that is not prohibited by law or regulation is assumed to be permissible. *See, e.g., Sumaria Sys., Inc.*, *supra* at 5. Importantly, the FAR does not prohibit the particular HTRO methodology chosen by the agency for this procurement.

Finally, we find the case law relied on by the protester, including *Serco Inc. v. United States,* 81 Fed. Cl. 463 (2008), to be inapplicable in the current circumstances. *See* Comments at 3-4. Maxmed cites *Serco* for the proposition that the legislative history of CICA "ordains that '[p]rice or cost to the [g]overnment shall be evaluated in every source selection.'" Comments at 3 (quoting *Serco Inc., supra* at 491). As a preliminary

matter, our Office views decisions by COFC as persuasive, but not controlling authority in our forum. *CJW Desbuild JV, LLC*, B-414219, Mar. 17, 2017, 2017 CPD ¶ 94 at 4 n.2. In any event, the protester's reliance on Serco is misplaced.

As observed by another COFC decision, the issue in *Serco* was whether the agency reasonably considered price under a solicitation that provided for making award using a best-value tradeoff selection process with price being one of the factors to be considered in the agency's tradeoff decision. *See Octo Consulting Grp., Inc. v. United States, supra* at 361. In contrast, the solicitation here, like the solicitation in *Octo Consulting Grp.,* does not anticipate a price-technical tradeoff, making the reasoning of *Serco* inapplicable to these facts. Additionally, we reject the protester's continued mischaracterization of the solicitation as not providing for an evaluation of price. As explained above, notwithstanding the lack of a tradeoff between price and non-technical factors, the solicitation expressly requires the agency to evaluate whether a firm's price is fair and reasonable.

Accordingly, we see no basis to depart from our long line of decisions concluding that there is no statutory or regulatory prohibition against the use of HTRO as a basis for making an award under the solicitation here.[5] Maxmed's protest challenging the solicitation's use of the HTRO methodology is denied.

Joint Venture Past Performance

Maxmed also alleges that, for mentor-protégé joint ventures, the RFP does not require the protégé to have relevant past performance experience. Protest at 11. In this regard, the protester argues that the solicitation allows mentor-protégé joint ventures

[5] The protester attempts to bolster its argument about the agency's improper use of the HTRO methodology by arguing that the solicitation should include FAR provision 52.215-1, Instructions to Offerors--Competitive Acquisition. Protest at 10-11. According to Maxmed, inclusion of FAR provision 52.215-1 "has a major effect" on the solicitation because this provision "mandates that DHA make its award determination on a best-value basis," which the protester understands to require something other than a HTRO source selection methodology. *Id.* FAR provision 52.215-1, however, does not prohibit the use of an HTRO source selection method. In this regard, FAR provision 52.215-1(f) provides for award "to the responsible offeror(s) whose proposal(s) represents the best value after evaluation in accordance with the factors and subfactors in the solicitation." FAR 52.215-1(f). As our Office found in *Sevatec*, however, an agency's use of an HTRO methodology conformed with its obligation to consider price under the CICA, 41 U.S.C. § 3306(c)(1)(B) and fell within the best-value source selection continuum established by FAR part 15. *Sevatec, Inc. et al., supra* at 9; *see also Noble Supply & Logistics, Inc.*, B-418141, Jan. 16, 2020, 2020 CPD ¶ 32 at 9. Thus, where FAR provision 52.215-1 requires only that the agency make award on a best-value basis, and as stated above, an HTRO source selection methodology falls within the best-value continuum, the very premise of the protester's objection to the missing FAR provision--that it would preclude an HTRO selection method--is without a legal basis.

to submit proposals where the protégé has no past performance, without any negative evaluation repercussions. *Id.* Specifically, Maxmed complains about the following RFP language:

> A minimum of two (2) past performance references shall reflect work performed by the Prime Offeror, as either a Prime Contractor or subcontractor for each AOR within which the Offeror is competing. If the Prime Offeror is a JV, the partners to the joint venture, in the aggregate, must demonstrate the past performance.

RFP at 111. According to Maxmed, such an approach is improper and violates the Small Business Administration's (SBA) regulation at 13 C.F.R. § 125.8(e), which requires the agency to "consider work done . . . by each partner to the joint venture as well as any work done by the joint venture itself previously." Protest at 12; *see* 13 C.F.R. § 125.8(e).

The agency counters that the challenged language does not preclude the type of evaluation that an agency is required to perform under the applicable SBA regulations. MOL at 14. Specifically, the agency notes that our Office has explained that when evaluating the past performance of a small business joint venture, the agency should consider the experience held by both partners to a joint venture, even where no specific degree of consideration is mandated by the solicitation. *Id.* (*citing MiamiTSPi, LLC--Recon.*, B-421216.3, May 11, 2023, 2023 CPD ¶ 117 at 5-6). As our Office explained in MiamiTSPi, LLC, *supra*, an agency is required to "consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously" regardless of the past performance references that the solicitation did or did not require. *Id.* (*quoting AttainX, Inc.*, B-421216, B-421216.2, Jan. 23, 2023, 2023 CPD ¶ 45 at 9).

We agree with the agency that in line with our prior decisions, and the pertinent SBA regulation, the RFP language here is unobjectionable. In this regard, we note that the applicable SBA regulation, 13 C.F.R. § 125.8(e), incudes language nearly identical to the solicitation provision at issue, providing that:

> The partners to the joint venture in the aggregate must demonstrate the past performance . . . necessary to perform the contract.

13 C.F.R. § 125.8(e).

Additionally, while the RFP permits joint venture offerors to satisfy the past performance requirements using the past performance of both joint venture partners in the aggregate, it does not state that the agency will ignore the past performance (or lack thereof) of either partner. Indeed, the terms of the RFP do not prohibit the agency from considering each member's relevant past performance; as such, the terms of the solicitation do not contradict the applicable regulation. Accordingly, there is no basis to sustain this protest ground.

The protest is denied.

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General Counsel