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

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Decision

Matter of: Radiation Oncology Group of WNY, PC

File: B-310354.2; B-310354.3

Date: September 18, 2008

Todd Whay, Esq., The Whay Law Firm, for the protester.

Jeffrey Weinstein, Esq., Jeffrey Weinstein, PLLC, for Roswell Park Cancer Institute, an intervenor.

Dennis Foley, Esq., Department of Veterans Affairs, for the agency.

Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency permitted awardee to submit additional support for technical proposal after deadline for submission of final proposal revisions; agency's acceptance of information violated solicitation's late proposal clause and constituted improper discussions with a single offeror.

2. Contracting officer's conclusion that protester's and awardee's proposals were technically equal was unreasonable, and protest is sustained, where determination lacks adequate supporting explanation or documentation.

DECISION

Radiation Oncology Group of WNY, PC, (ROG) protests the award of a contract to Roswell Park Cancer Institute (RPCI) under request for proposals (RFP) No. VA528-07-RP-0047, issued by the Department of Veterans Affairs (VA) for radiation therapy services. ROG challenges several aspects of the agency's evaluation of its and RPCI's price and technical proposals.

We sustain the protest.

The RFP was issued on April 1, 2007 for radiation therapy services for the VA Medical Center in Buffalo, New York. Award was to be made on a "best value" basis, as determined under three evaluation factors: technical (including subfactors for quality, geographic location, and management, experience and equipment, and subcriteria under each subfactor), past performance, and cost [price]. The technical

and past performance factors, when combined, were worth 20 percent more than price. RFP at 41. Proposals were due by May 17. AR exhs. 2, 4, 5.

ROG (the incumbent) and RPCI submitted proposals. The technical proposals were evaluated by a three-member panel. AR exh. 9. Each evaluator rated each technical proposal with regard to each of 27 technical subcriteria, as exceed/exceptional, exceeds standard, meets standard, or below standard. Id. Although the rating sheets appear to have contemplated a narrative explanation only under categories where proposals were rated exceed/exceptional or below standard, in practice no proposal received either rating under any subcriterion, and narrative explanations typically were provided for exceeds standard ratings. Id.

Based on the ratings provided by the evaluation panel, the contracting officer (the source selection authority) calculated a numerical percentage score for each proposal. AR exh. 14, Contracting Officer's Memorandum, Oct. 11, 2007, Technical Evaluation Totals. Under the contracting officer's scoring mechanism, proposals received a score of 30 percent for each exceed/exceptional rating (apparently reflecting the fact that technical proposals were worth 30 percent of an offeror's total score under the evaluation scheme), 20 percent for each exceeds standard rating, 10 percent for each meets standard rating, and zero percent for each below standard rating. Id. The contracting officer then calculated a cumulative score by adding the ratings for each offeror: RPCI's proposal received 60 points for 3 exceeds standard ratings and 780 points for 78 meets standard ratings, for a total of 840 points. ROG's proposal received 260 points for 13 exceeds standard ratings and 680 points for 68 meets standard ratings, for a total of 940 points. Id. The contracting officer then derived an average subcriterion score for each proposal by dividing each total score by 81. RPCI's average score was 10.37 and ROG's was 11.6. Id.

Although ROG's average technical score was approximately 12 percent higher than RPCI's, the contracting officer concluded that the proposals were essentially equal technically. AR exh. 14, Contracting Officer's Memorandum, Oct. 11, 2007; AR exh. 15, Price Negotiation Memorandum, Aug. 23, 2007. The contracting officer also found the offerors equal for past performance. Id. RPCI's proposed price (\$7,564,859.30) was higher than ROG's (\$6,575,875.00). AR exh. 14, Estimated Contract Cost. The contracting officer concluded that, since the proposals were equal under the technical and past performance factors, ROG's low price made its proposal the best value. AR exh. 1, Contracting Officer's Narrative, July 7, 2008; AR exh. 15, Price Negotiation Memorandum, Aug. 23, 2007. Award was made to ROG on August 23. AR exh. 16.

RPCI challenged the award in a protest filed in our Office on September 17, 2007, contending that the agency misevaluated the technical and price proposals. Subsequently, the agency advised us that it intended to take corrective action-- by amending the solicitation, obtaining and evaluating revised proposals, and making a

new source selection decision--and we therefore dismissed the protest as academic (B-310354, Oct. 22, 2007).

On January 4, 2008, VA issued amendment No. 3 to the RFP in order to implement the corrective action. AR exh. 22. The amendment only called for revised price proposals, which were received from ROG and RPCI by the February 20 closing date. AR exh. 1, Contracting Officer's Narrative, July 7, 2008, at 1; AR exhs. 26-27. RPCI's revised price (\$3,547,144.00) was lower than either of ROG's two alternative price proposals (\$4,291,368.30, \$4,370,349.50) and, noting that the proposals previously had been determined to be essentially equal under the non-price factors, the contracting officer determined that RPCI's proposal now represented the best value. AR exh. 28, Abstract of Price Proposals, Feb. 20, 2008; AR exh. 30, Price Negotiation Memorandum, June 2, 2008. On May 30, VA notified ROG that it was terminating its contract and making award to RPCI. AR exh. 31. Award was made to RPCI on May 30. AR exh. 32.

ROG challenges the evaluation of proposals and the award to RPCI on several grounds raised in an initial and a supplemental protest. We have considered all of ROG's arguments and sustain the protest on two grounds. Specifically, we find that (1) the agency improperly permitted RPCI to submit additional support for its technical proposal after the date for submission of proposals, and (2) the contracting officer's conclusion that the offerors' proposals were technically equal lacked adequate supporting explanation or documentation and, therefore, was unreasonable. We discuss these issues in detail below.

LATE RPCI TECHNICAL SUBMISSION

ROG contends that a July 2, 2007 e-mail from RPCI to VA forwarding additional supporting material regarding its technical proposal constituted a late proposal modification--since it was received after the deadline for initial proposal submission--that could not be considered in the evaluation. Supp. Protest at 2-4. In this regard, the July 2 e-mail transmitted "additional quality/ performance evaluations" and asked that the information be forwarded "to the committee reviewing the proposals." AR exh. 8. The four pages of attachments included an accreditation certificate from the American College of Radiology (ACR), a statement of satisfactory performance from the Radiation Therapy Oncology Group (RTOG) of the ACR, and two pages of RTOG evaluation data, which the e-mail described as relating to "quality assurance and data management." Id. The information was included in the copy of RPCI's proposal furnished with the agency's report.

The material submitted with the July 2 e-mail appears to support RPCI's technical proposal with regard to the quality subfactor (under the technical factor). Id.; RFP

at 37.¹ The agency does not assert that the information was not material, and we find nothing in the record to indicate that it was not. Further, the record—which, as discussed below, is almost completely lacking in narrative discussion of the source selection decision—does not establish the extent to which the materials submitted by RPCI were considered in the agency’s technical evaluation.² ROG raised this protest ground in its supplemental protest (filed on July 28) and, in its initial response to the supplemental protest, the agency did not address whether it had considered the July 2 material in the evaluation. Supp. AR at 3.³ Subsequently, we specifically requested that the agency address the issue. GAO Memorandum to the Parties, Aug. 20, 2008. In its response to our request, the agency still did not assert that it did not consider the material in the evaluation, and it did not otherwise address the issue

¹ The material submitted by RPCI on July 2 appears to address the quality control/quality improvement subcriterion and the accreditation subcriterion. RPCI’s proposal received an exceeds standard rating from each of the evaluators on the quality control/quality improvement subcriterion. While RPCI’s proposal received only a meets standard rating from each of the evaluators under the accreditation subcriterion, RPCI’s July 2 submission includes an updated ACR accreditation that appears to supplant an expired ACR accreditation included in the original proposal; it is not clear from the record how this expired accreditation may have affected the evaluation.

² RPCI contends that the record shows that the July 2 information was not considered by the evaluators. According to RPCI, the information related to the “quality control/quality improvement” subcriterion (under the quality subfactor), RPCI Comments on Supp. AR, Aug. 19, 2008; RFP at 37, under which RPCI’s proposal received an exceeds standard rating from each of the three evaluators, two of whom provided narrative comments. AR exh. 9. RPCI asserts that the narrative comments do not mention the July 2 material, and that this indicates that VA did not consider the material in the evaluation. RPCI Comments on Supp. AR, Aug. 19, 2008. RPCI concludes that ROG suffered no prejudice as a result of the late submission. We find this argument unpersuasive. While RPCI is correct that the narratives do not mention the additional July 2 information, the narratives are brief and conclusory in nature, and there is no indication in the record that they were intended to be comprehensive explanations of all considerations that went into a particular rating. The evaluators’ failure to discuss the July 2 information thus does not support a conclusion that the information was not considered in the evaluators’ ratings.

³ We note that RPCI submitted updated technical information with its February 19 revised price proposal that was substantially similar to the July 2 information. AR exh. 26. In contrast to the agency’s failure to address whether it considered the July 2 information, the agency specifically states that it did not evaluate the additional information submitted with RPCI’s revised price proposal. AR exh. 1, Contracting Officer’s Narrative, July 7, 2008, at 1; Supp. AR at 3.

on the merits. (Rather, the agency asserted only that the argument should be dismissed as untimely; we find that the argument was timely raised.⁴) VA Letter to GAO, Aug. 25, 2008. Based on this record, we are left to conclude that the agency considered the material in the evaluation of RPCI's proposal.

Under Federal Acquisition Regulation (FAR) clause 52.212-1(f), Instructions to Offerors--Commercial Items, incorporated in the RFP, an offer, modification, or revision of a proposal is not to be considered (unless it is by the otherwise successful offeror, which is not the case here) if it is received after the exact time specified for receipt of offers. See FAR § 15.208. Since RPCI's additional materials were submitted on July 2, after the closing time, they were late and could not properly be considered. See Sunrise Med. HHG, Inc., B-310230, Dec. 12, 2007, 2008 CPD ¶ 7.

The protester also contends, and we agree, that the agency's consideration of the late material essentially constituted improper discussions with only one offeror. Exchanges between a procuring agency and an offeror, including proposal revisions, that permit the offeror to materially modify its proposal generally constitute discussions. Univ. of Dayton Research Inst., B-296946.6, June 15, 2006, 2006 CPD ¶ 102. When an agency permits one offeror to revise its proposal, it must provide all competitive range offerors with the same opportunity. Fritz Cos., Inc., B-246736 et al., May 13, 1992, 92-1 CPD ¶ 443. Here, ROG was not provided an opportunity to revise its technical proposal. Consequently, we sustain the protest on this ground.

⁴ The agency asserts that this argument is untimely because it was based on information provided by the agency in response to allegations in ROG's initial protest that the agency claims failed to state a valid basis of protest regarding the technical evaluation. Supp. AR at 3-4. However, under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2008), a protest argument is timely when raised within 10 days after the basis for the argument was or should have been known. ROG learned of the grounds for this protest argument from the evaluation documents and raised the argument within 10 days after receiving the documents. The fact that the agency believes the documents furnished related to an invalid protest ground in the original protest did not preclude the protester from raising new arguments based on those documents. The agency also argues that the argument should be deemed untimely because ROG could have obtained the underlying information if it had requested a debriefing on the initial award (to itself) or intervened in RPCI's protest. However, the agency could not have furnished RPCI's proposal information to ROG had there been a debriefing, and since the record in RPCI's protest was not developed prior to the agency's taking corrective action, ROG would not have received the relevant information had it intervened in RPCI's protest. Thus, there is no basis to conclude that ROG could have obtained the information earlier.

LACK OF ADEQUATE DOCUMENTATION

ROG contends that the agency's evaluation of technical proposals, including the contracting officer's determination that the proposals were technically equal, lacked adequate documentation.

In reviewing an agency's evaluation of proposals and source selection decision, we examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria and applicable procurement statutes and regulations, and adequately documented. Univ. Research Co., LLC, B-294358 *et al.*, Oct. 28, 2004, 2004 CPD ¶ 217 at 8. Toward this end, independent judgments of source selection officials must be adequately documented. Where an agency fails to adequately document its source selection decision, it bears the risk that we may be unable to determine whether the decision was reasonable and proper. Johnson Controls World Servs., Inc., B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88 at 6; AIU N. Am., Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 at 7-9 (protest sustained because selection official did not document the basis for concluding that proposals were technically equal, after the evaluation panel concluded that one proposal was superior).

Here, the record is inadequate to establish that the contracting officer's finding of technical equality is reasonable and proper. As discussed above, the evaluation record consists of the evaluators' adjectival ratings for each of the subcriteria, their narrative comments under several subcriteria, and the contracting officer's scoring of the proposals based on the adjectival ratings. The evaluators did not provide the contracting officer with a comprehensive assessment or listing of the proposals' strengths and weaknesses, and the record includes no evidence that the contracting officer ever considered the actual merits of the proposals in calculating the scores. Likewise, there is no indication that the contracting officer considered the actual merits of the proposals in ultimately determining that, notwithstanding ROG's proposal's approximately 12 percent higher score, it was equal in technical merit to RPCI's proposal. The record includes no explanation of the contracting officer's rationale for her conclusion that the approximate 12 percent scoring difference did not translate into actual technical superiority for RPG's proposal. Rather, the record includes only the conclusory statement that "After performing the evaluation, it was determined that the offers were equal both technically and in past performance" AR exh. 15, Price Negotiation Memorandum, Aug. 23, 2007. This brief statement is the sole contemporaneous explanation for the contracting officer's determination that the proposals were technically equal, notwithstanding ROG's proposal's higher percentage score.

In reviewing an agency's evaluation, we may also consider documentation prepared after the source selection decision was made, although we will accord greater weight to contemporaneous materials rather than judgments made in response to protest contentions. Beacon Auto Parts, B-287483, June 13, 2001, 2001 CPD ¶ 116 at 6. Here,

the agency submitted no contracting officer's statement in response to the protester's supplemental protest, in which ROG's specific evaluation challenges are raised, and the post-protest record, like the contemporaneous record, contains no other support for the contracting officer's conclusion that the proposals were technically equal. In a memorandum dated October 11, 2007, prepared after the filing of RPCI's prior protest, the contracting officer concluded that "The combined scoring for Technical and Past Performance was found to be equal." AR exh. 14, Contracting Officer Memorandum, Oct. 11, 2007. Similarly, in the narrative submitted in response to ROG's initial protest, the contracting officer merely recites that she "determined that the offerors were essentially technically equal based on the technical and past performance factors set forth in the RFP." AR exh. 1, Contracting Officer's Narrative, July 7, 2008, at 1. These conclusory statements are inadequate to establish the reasonableness of the contracting officer's determination that the proposals were technically equal.

While the agency's report in response to ROG's supplemental protest does not include a statement by the contracting officer, it does respond to each of the protester's specific challenges to the evaluation ratings. However, these responses were provided by the agency's legal counsel, with no indication that the responses reflect the contracting officer's own rationale for her evaluation conclusions. In this regard, the agency's counsel provides explanations for the various challenged ratings but, instead of attributing the asserted rationales to the contracting officer, asserts that the explanations would lead "a reasonable person" to conclude that the scoring was reasonable. Supp. AR at 5-7. These responses do not constitute an adequate evaluation record, *see York Bldg. Servs., Inc., B-296948.2 et al., Nov. 3, 2005, 2005 CPD ¶ 202 at 7* (GAO accords little or no weight to "new rationales, based on a hypothetically correct evaluation, for which there is no support in the contemporaneous record."), and the supplemental report does not otherwise indicate the considerations that factored into the contracting officer's determination that the proposals were technically equal.

We conclude that the contracting officer's determination that ROG's and RPCI's proposals were technically equal lacked adequate supporting explanation or documentation and, therefore, was unreasonable. *See Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81* (protest challenging adequacy of agency's source selection decision sustained where evaluation record was insufficient to establish reasonableness of the selection official's determination that offers were technically equal, notwithstanding protester's proposal's higher technical rating); *Midland Supply, Inc., B-298720, B-298720.2, Nov. 29, 2006, 2007 CPD ¶ 2* (award decision not reasonable where there is no documentation or explanation and agency makes its award decision based strictly on a mechanical comparison of the offerors' total point scores). Accordingly, we sustain the protest on this ground.

RECOMMENDATION

Based on the foregoing, we recommend that the agency reopen the procurement in order to provide both offerors an opportunity to revise their technical and price proposals. We further recommend that the agency reevaluate the revised proposals consistent with this decision, and make a new award decision. The agency should fully document its evaluation and award decision. If, upon reevaluation, ROG's proposal is determined to be the best value, VA should terminate RPCI's contract for the convenience of the government and make award to ROG. We also recommend that ROG be reimbursed the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). ROG should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel