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

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## **Decision**

**Matter of:** Burchick Construction Company

**File:** B-400342.3

**Date:** April 20, 2009

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D. Matthew Jameson III, Esq., Peter H. Schnore, Esq., and Patrick R. Malone, Esq., Babst Calland Clements Zomnir, P.C., for the protester.

Kenneth MacKenzie, Esq., Department of Veterans Affairs, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Selection of higher-rated, higher-priced proposal is unobjectionable where the selection official reasonably determined that awardee's higher technical rating outweighed the protester's lower price.

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### **DECISION**

Burchick Construction Company of Pittsburgh, Pennsylvania, protests the award of a contract to Walsh Construction Company of Chicago, Illinois, under request for proposals (RFP) No. VA-101-07-RP-0043, issued by the Department of Veterans Affairs (VA) for construction services. Burchick challenges VA's evaluation of the firm's technical proposal, conduct of discussions, and source selection decision.

We deny the protest.

The RFP provided for the award of a fixed-price contract for the construction of a new ambulatory care center and associated support systems and for minor demolition work at the VA Pittsburgh Health Care System, H. J. Heinz Division, Pittsburgh, Pennsylvania. Award was to be made on a "best value" basis, considering price and the following four technical evaluation factors (listed in descending order of importance): past performance/experience, construction management, schedule,

and small business participation.<sup>1</sup> Offerors were informed that the technical factors, when combined, were of equal weight to price. RFP § C5, at 7.

Instructions for the preparation of proposals were provided for each evaluation factor. For example, with respect to the past performance/experience factor, offerors were instructed to demonstrate corporate construction experience on a minimum of four projects, consisting of ambulatory clinics, hospitals, or projects of similar size, scope, and complexity. RFP § C4, at 5. As another example, with respect to the construction management factor, offerors were, among other things, instructed to demonstrate the relevant experience of key project personnel, including the construction project manager, superintendent, mechanical superintendent, and electrical superintendent, and to provide a quality assurance and quality control plan. *Id.* at 6.

The agency received five proposals, including Burchick's. After conducting discussions with the offerors, the VA selected the proposal of Massaro Corporation for award. Burchick protested to our Office, and we sustained Burchick's protest, finding that the VA had failed to conduct meaningful discussions with the protester. *Burchick Constr. Co.*, B-400342, Oct. 6, 2008, 2008 CPD ¶ 203. We recommended that the agency conduct discussions with the offerors, obtain and evaluate revised proposals, and make a new source selection decision.

In response to our decision, the agency appointed a new contracting officer (selection official) and members of the technical evaluation board (TEB); the newly-constituted TEB evaluated the firms' original proposals and issued its own evaluation report. The TEB assigned point scores for each offeror's proposal under each of the technical evaluation factors, supported by a narrative discussion that identified the firms' respective strengths and weaknesses.<sup>2</sup> AR, Tab 4, Initial TEB Report, Oct. 23, 2008, and Tab 5, Offerors' Proposal Strengths and Weaknesses, Oct. 22, 2008. Among the weaknesses identified in Burchick's proposal was, under the past performance/experience evaluation factor, that the firm had provided "only limited examples of minor hospital and one clinical projects," and that the firm's "experience only includes one clinic project, the balance of hospital work is limited

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<sup>1</sup> Although the past performance/experience factor was only entitled "Past Performance" by the RFP, this factor provided for the evaluation of offerors' clinic and hospital construction experience. RFP § C5, at 8. The RFP also identified subfactors for the past performance/experience and construction management evaluation factors. For example, the construction management factor consisted of subfactors for personnel experience and management approach.

<sup>2</sup> The VA states that the newly appointed contracting officer and TEB did not have access to, and did not review, the original TEB's evaluation report. Agency Report (AR) at 2.

to equipment replacement within a functioning facility.” Under the management approach factor, the TEB found that Burchick’s quality control plan “for managing the construction project is almost non-existent – it is only a few sentences. The contractor should have provided much better information for [quality control]. A specific individual is not listed to manage [quality control].” AR, Tab 5, Proposal Evaluation Strengths and Weaknesses, at 5-6.

Discussions were conducted with the offerors, and Burchick was provided with the TEB’s evaluated weaknesses. AR, Tab 6, Burchick Discussions, Nov. 10, 2008. Revised proposals were received from the offerors, including Burchick and Walsh, and evaluated as follows:

<b>Evaluation Factor</b>	<b>Burchick</b>	<b>Walsh</b>
Past Performance/experience (40 pts.)	22.0	38.625
Construction management (30 pts.)	13.437	26.0
Schedule (20 pts.)	14.25	19.75
Small business participation (10 pts.)	3.5	6.0
<b>TOTAL (100 pts.)</b>	<b>52.187</b>	<b>90.375</b>
<b>EVALUATED PRICE</b>	<b>\$36.9 Million</b>	<b>\$38.5 Million</b>

AR, Tab 7, Final TEB Report, Dec. 9, 2008, at 2, 4. The TEB’s final point scoring was again supported by narrative discussions that identified the offerors’ respective strengths and weaknesses under each evaluation factor and subfactor.

Burchick’s lower technical point scores reflected the TEB’s judgment that the firm’s final proposal contained a number of weaknesses. Among other things, the TEB stated that “Burchick’s weaknesses stem from their lack of corporate healthcare construction experience with projects of this type, size and complexity. . . . A major concern involves the apparent lack of healthcare experience for the proposed staff.” Additionally, the TEB noted that Burchick had failed to address “potentially critical activities such as commissioning, inspections, testing & balancing” in its preliminary schedule and that the firm had a past problem with on-time delivery. *Id.* at 3-4. The TEB also noted as a weakness that Burchick apparently believed that quality control would be the government’s responsibility. In contrast, the TEB noted that Walsh’s proposal included information regarding “numerous prior projects similar in size and scope to the RFP documents,” that the firm had “an excellent prior health care and medical construction background,” and that Walsh’s “project team was also seen as a strength since most of the team has experience on healthcare and large/complex projects.” *Id.* at 2.

The contracting officer found that Walsh’s higher-rated, higher-priced proposal reflected the best value to the government. AR, Tab 8, Price Negotiation

Memorandum, at 8. With respect to Burchick's proposal, the contracting officer found that Burchick was

the lowest technically rated, representing an unacceptable level of risk to successful performance. A major concern involves the apparent lack of healthcare experience for Burchick's proposed staff. Also, Burchick failed to demonstrate how potentially critical activities such as commissioning, inspections, testing and balancing would have "no adverse affects on the overall project completions schedule." Burchick incorrectly stated that Quality Control will be the government's responsibility, which shows failure to understand a critical element of the RFP requirements. These are considered significant weaknesses.

Id. The contracting officer stated that "I believe that the added cost to the government to accept Walsh Construction technically higher rated proposal is justified because, when compared to Burchick, the low offeror, Walsh is far superior technically." Id. A contract was awarded to Walsh, and this protest followed.

Burchick raises a number of challenges to the agency's evaluation of the firm's technical proposal.<sup>3</sup> Burchick argues that there are several "anomalies" regarding the point scoring and that "despite two protests, [Burchick] still ha[s] absolutely no idea how the VA arrives at the scores that it has assigned to its technical review." Protester's Comments at 3. Burchick essentially disagrees with the points assigned to its proposal.

Ratings, be they numerical, adjectival, or color, are merely guides for intelligent decision-making in the procurement process. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 11. Where the evaluators and the source selection official reasonably consider the underlying bases for the ratings, including advantages and disadvantages associated

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<sup>3</sup> The protester also contends that the agency's reevaluation of its proposal was "tainted" by the original technical evaluation conducted by the prior TEB. In this regard, Burchick asserts that there are "striking similarities" between the evaluation reports issued by the two evaluation boards. Comments at 2. As noted above, however, the agency states that the newly appointed TEB did not have access to, or consider, the prior TEB's evaluation report. Although the protester apparently disputes the agency's statement in this regard, its general speculation does not provide us with any basis to disagree with the agency. Moreover, the similarities would appear to relate to the fact that both evaluation boards evaluated the same Burchick proposal with the same attendant proposal flaws. In any event, as explained below, Burchick fails to show that the VA's reevaluation of its technical proposal was unreasonable.

with the specific content of competing proposals, in a manner that is fair and equitable and consistent with the terms of the solicitation, a protester's disagreement over the actual adjectival, color ratings, or point scores is essentially inconsequential, in that it does not affect the reasonableness of the judgments made in the source selection decision. See Cherry Road Tech.; Elec. Data Sys. Corp., B-296915 et al., Oct. 24, 2005, 2005 CPD ¶ 197 at 12-13.

Here, the contemporaneous evaluation record shows that the agency qualitatively evaluated the firms' technical proposals under the solicitation's evaluation factors, identifying strengths and weaknesses in the firms' respective proposals. The record also shows that the contracting officer's judgment as to the technical merit of the competing proposals was not based upon a mechanical comparison of the offerors' point scores but rather was grounded upon the contracting officer's consideration of the various strengths and weaknesses identified in the agency's technical evaluation. See AR, Tab 8, Price Negotiation Memorandum, at 7-9. Given the contracting officer's discussion and assessment of the relative advantages and disadvantages associated with the specific content of the offerors' proposals, we find that Burchick's disagreement with the point scores assigned to its proposal does not affect the reasonableness of the judgments made in the source selection decision.

Burchick also complains that the VA's assessment of Burchick's "lack of corporate healthcare construction experience with projects of the Ambulatory Care Center's type, size and complexity as well as the lack of experience in that area for the projected staff" is unreasonable because Burchick's proposal identified numerous examples of such construction experience.<sup>4</sup>

Our Office reviews challenges to an agency's evaluation of proposals only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. Cherry Rd. Techs.; Elec. Data Sys. Corp., supra, at 6. A protester's mere disagreement with the

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<sup>4</sup> Burchick originally argued in its protest that the VA applied an unstated evaluation factor, when the agency considered whether Burchick had healthcare construction experience of similar size, scope, and complexity to the project solicited here. The VA responded to these arguments in its report. Because Burchick did not further mention this argument in its comments, we deem it to be abandoned. See Accumark, Inc., B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 at 2 n.1. In any event, we disagree with Burchick that the RFP did not allow the agency to consider the similarity of firms' experience to the work sought here. Furthermore, an agency, under generally worded experience/past performance criteria, properly may consider the extent to which an offeror has experience directly related to the work required by the solicitation. See Systems Integration & Dev., Inc., B-271050, June 7, 1996, 96-1 CPD ¶ 273 at 4.

agency's judgment is not sufficient to establish that an agency acted unreasonably. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

Here, we find from our review of the record no basis to question the VA's determination that Burchick had limited construction experience with projects of the type, size and complexity of the ambulatory care center sought by the RFP. Although Burchick identified six projects in its proposal's discussion of the firm's corporate project experience, only one of these six projects related to hospital and clinical construction, and that was for an "OB/GYN surgery center" with a stated cost of \$16.8 million. The remaining projects identified in the protester's proposal were for the construction of a federal office building, a business park, a U.S. Army training center, a multi-purpose academic complex, and a national cemetery. Burchick Technical Proposal, § A.1. In addition to these projects, Burchick described in its proposal other "Corporate Project Experience Relevant Healthcare Projects," see id., which Burchick states consists of "different types of equipment upgrades and replacements in area hospitals," including one project that was a multi-million dollar operating room suite that was "the most technically advanced suite within [the University of Pittsburgh Medical System]." Protester's Comments at 5. The proposal identifies a number of "types of suites and/or equipment projects" that Burchick states it has completed over the last 5 years, which were collectively worth "in excess of \$40 million." Burchick Technical Proposal, § A.1, Corporate Project Experience Relevant Healthcare Projects, at 2. Although Burchick was informed during discussions that the VA found that the firm had limited clinic and hospital construction experience, Burchick identified no further experience in its revised proposal. See Burchick Response to Discussion Questions, Nov. 17, 2008, § A, at 9.

The record shows that the TEB considered Burchick's identified experience and found that it demonstrated limited construction experience similar to the project solicited here. See AR, Tab 2, Declaration of TEB Chair, at 1-2. Given that Burchick identified only one healthcare construction project of similar size, scope and complexity (and that project was less than half of the value of ambulatory center sought here), and otherwise identified numerous other construction projects that were not of similar size, scope, and complexity, we find reasonable the contracting officer's judgment that Burchick lacked corporate experience building hospital and clinical space that is similar in size, scope and complexity to the proposed facility here.<sup>5</sup>

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<sup>5</sup> Apparently recognizing that Burchick lacked experience with similarly sized hospital work, the proposal explained that "[a]s Burchick Construction is a local contractor,..our corporate portfolio does not included numerous large volume, high square foot projects, [as] the local area is devoid of these projects over the past decade." See Burchick Technical Proposal, § A.1, at 2; see also Burchick Response to Discussion Questions, Nov. 17, 2008, § A, at 4 ("large scale Hospital projects located in this area are limited").

Burchick also disagrees with the VA's assessment under the construction management factor that the firm had failed to recognize that quality control was Burchick's responsibility, and not the government's. This conclusion, according to Burchick, does not take into account the solicitation's statement that the VA would provide a "resident engineer" who would conduct "surveillance of all construction work to assure compliance with the contract documents," which, according to Burchick, is the "very definition of quality control." See Protest at 4; Comments at 5.

We find no merit to Burchick's arguments in this regard. The RFP provided for the evaluation of an offeror's quality assurance and quality control plan under the construction management factor; thus clearly placing responsibility for quality assurance and quality control on the contractor. RFP § C5, at 8. In this regard, the RFP provided that the contractor would be required to furnish all "labor and material, equipment, transportation, supervision, coordination and services" necessary to perform and complete the contract work. Id. § A1, at 1. We find that the RFP informed offerors that quality assurance and quality control would be the contractor's responsibility. Furthermore, we find the protester's reliance on the agency's "resident engineer" to perform quality control to be misplaced. As described by the RFP, the resident engineer is the contracting officer's authorized on-site representative "responsible for protecting the Government's interest in the execution of the construction contract work." RFP § A2, at 2. Reviewing a contractor's work to ensure that it was done in compliance with the contract does not replace the contractor's own obligation to ensure that work is performed in a quality manner.

Burchick also complains that the VA did not acknowledge Burchick's identification in its revised proposal of another person "who would assist Burchick in implementing its quality assurance/quality control plan." Protest at 4. The VA informed Burchick during discussions that the agency had found the firm's quality assurance/quality control plan to be "very generic" and did not address a number of things, such as, for example, the testing and inspections, commissioning, preparatory meetings, and quality control of subcontracts. In fact, as the agency informed Burchick during discussions, the VA found that Burchick's quality control "plan for managing the construction project is almost non-existent -- it is only a few sentences," and that "[a] specific individual is not listed to manage" quality control. AR, Tab 6, Burchick Discussions, at 1.

We have no basis from our review of the record to conclude that the agency unreasonably evaluated Burchick's revised proposal, given that Burchick's responses to the agency's discussions were very general and not specifically responsive to the

agency's concerns.<sup>6</sup> With respect to the agency's concern that Burchick had not identified a person that would manage the firm's quality control efforts, Burchick provided that "[i]f in the opinion of the VA, we were required to provide a [quality control/quality assurance] manager, [a specific individual] would have been included in the project," and concluded by saying that this individual "will be available for consultation and jobsite visitation as required." Burchick Response to Discussion Questions, Nov. 17, 2008, § B.2, at 9. Although Burchick's response identified individuals whose responsibilities would include quality assurance and quality control, we think that the VA could reasonably conclude from these statements that Burchick had not unequivocally committed to providing an individual who would be ultimately responsible for quality control.

Burchick also complains that the agency did not conduct meaningful discussions with the firm, because the VA did not discuss with Burchick the agency's concerns "regarding [Burchick's] ability and past performance for On Time Delivery." Comments at 5. Burchick contends that, not only did the VA not raise this concern with the firm, but that, in any case, Burchick had never been late completing a project.<sup>7</sup>

Burchick's arguments are not supported by the record, which shows that Burchick was informed of two weaknesses concerning the firm's on-time performance. Specifically, the agency brought to Burchick's attention the firm's "delay in completing some punchlist items according to the Owner's Evaluation" at an identified project, and with regard to a different project that the firm's "missing of milestone dates has been a concern on past projects according to past Owner/Architect evaluations." AR, Tab 6, Burchick Discussions at 1-2. Burchick's responses to the agency's discussion questions did not show that the agency was unreasonably concerned with the firm's on-time performance. With respect to late performance of punchlist items, Burchick merely stated that it had performed the punchlist items prior to occupancy and these related to "design conflicts." Burchick Response to Discussion Questions, Nov. 17, 2008, § A, at 8. With respect to the

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<sup>6</sup> The TEB noted that its "perception . . . was that Burchick's proposal re-submittal was confrontational. Instead of using the opportunity to provide information that supported their technical ability and experience, they argued against the VA's critique." AR, Tab 7, Final TEB Report, Dec. 9, 2009, at 4.

<sup>7</sup> Burchick also complains that several statements made by the TEB chair in his declaration of the TEB, see AR, Tab 2, Declaration of TEB Chair, are erroneous and could have been corrected during discussions. None of these statements, however, appear in any of the agency's contemporaneous evaluation and source selection documents. Given that this information was apparently not provided to the contracting officer or relied upon in her selection decision, we see no possible prejudice to the protester, even if the statements are in error.



agency's other concern with missing milestones, Burchick did not unequivocally state that it had not missed milestones but instead complained that the project was a "multi-prime contract delivery system" that was "not an effective contracting method for this project." Id. § C, at 4.

Burchick also complains that the TEB apparently "performed extensive follow-up" regarding Walsh's technical proposal, but did not do the same for Burchick. Comments at 4. Specifically, Burchick notes that the TEB found that "there were some concerns about [Walsh's] ongoing Columbus VAMC project highlighted in the proposal. The evaluation panel looked into this and was generally satisfied that the team composition was changed to reflect those concerns." See AR, Tab 7, Final TEB Report, Dec. 9, 2009, at 2. Burchick apparently believes that it has not been equally treated (although we do not find that the record establishes that this is so); however, Burchick does not specifically state what if anything it would have done differently if the agency had further "followed-up" with the firm.

Finally, the protester contends that the contracting officer mechanically compared point scores in selecting Walsh's proposal for award and did not adequately justify paying the approximately \$1.6 million price premium associated with the Walsh's proposal. We disagree. As described above, the contracting officer did not mechanically evaluate the firms' proposals using point scoring; rather, she considered the firms' evaluated strengths and weaknesses in assessing the proposals' respective technical merit. Where, as here, the RFP allows for a cost/technical tradeoff, the agency retains discretion to select a higher-priced, higher technically rated proposal if doing so is reasonably found to be in the government's best interest and is consistent with the solicitation's stated evaluation scheme. 4-D Neuroimaging, B-286155.2, B-286155.3, Oct. 10, 2001, 2001 CPD ¶ 183 at 10. The contracting officer found the awardee's evaluated technically superior proposal to outweigh Burchick's price advantage, and Burchick has not shown this judgment to be unreasonable.

The protest is denied.

Gary L. Kepplinger  
General Counsel