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**Comptroller General
of the United States**

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

Decision

Matter of: The Staten Island Hotel

File: B-292893.3

Date: August 6, 2004

Louis Biancone, Esq., and Thomas B. Wilinsky, Esq., Biancone & Wilinsky, for the protester.

Capt. Richard M. Sudder, Department of the Army, for the agency.

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DIGEST

Agency reasonably assigned protester's proposal no more than a satisfactory rating under past performance factor where record of protester's recent performance of incumbent contract, for meals, lodging and transportation for military applicants, indicated discrepancies with respect to matters relating to applicants' health and safety, failures to comply with specification requirements concerning the availability and selection of food for applicants, and failures to afford applicants the same level of service and quality of facilities offered to other guests.

DECISION

The Staten Island Hotel (SIH) protests the Department of the Army's award of a contract to the Hilton Garden Inn (HGI), under request for proposals (RFP) No. DABK21-03-R-0036, for meals, lodging, and transportation for applicants arriving for processing at the Military Entrance Processing Station (MEPS) in New York City. SIH challenges the agency's evaluation of proposals.

We deny the protest.

The RFP, a "commercial acquisition using a combination of [Federal Acquisition Regulation parts] 12 & 15," provided for award of a fixed-price requirements contract, for a base period with four 1-year option periods, to the offeror whose proposal was most advantageous to the government. Amend. 2. Determination of the most advantageous proposal was to be based on five evaluation factors: (1) facility quality, including subfactors for sanitation and cleanliness, room condition, meals, security, special features, and facility location; (2) transportation;

(3) quality control; (4) past performance; and (5) price. Among the non-cost factors, facility quality was more important than transportation, which was more important than past performance, which was as important as quality control. The RFP further provided that the “[n]on-cost factors are more important than cost or price.” RFP at 16-18.

The Army received 15 proposals in response to the solicitation, including those of SIH, HGI and Command Management Services (CMS) for the Wyndham Newark Airport Hotel (CMS/Wyndham).¹ These proposals were evaluated by a three-member team, which then conducted a videotaped, on-site inspection of each offeror’s lodging and dining facilities to verify the information in the offeror’s proposal. Based on the results of the inspection and the evaluation of the proposals, SIH’s proposal received an overall rating of marginal, with marginal ratings for quality control, facility quality, and past performance, and a satisfactory rating for transportation; while HGI’s received an overall rating of satisfactory, with satisfactory ratings for facility quality and quality control and excellent ratings for transportation and past performance; and CMS/Wyndham’s proposal received an overall rating of excellent, with an excellent rating for each of the non-cost factors. Even though SIH offered the lowest evaluated price, in accordance with the RFP, SIH’s proposal was not considered for award due to its marginal overall rating.² The agency instead determined that the proposal of CMS/Wyndham represented the best value, given its overall advantage under the non-cost factors, even though its evaluated price was higher than HGI’s. First Contracting Officer’s Determination, Jan. 27, 2004.

Shortly after award to CMS on its CMS/Wyndham proposal, SIH filed an agency-level protest contesting the award. During the course of this protest it came to light that SIH possessed the independent government estimate (IGE), having been inadvertently given the IGE by a local MEPS employee. In response, the agency reopened discussions, furnishing each offeror with the IGE and an opportunity to submit revised technical and cost proposals by March 8, 2004. The agency also assigned a new contracting officer to this procurement.

HGI furnished additional technical information in its revised proposal. As a result, HGI’s rating for facility quality was raised from satisfactory to good, while its rating

¹ CMS is a management company that subcontracts with local hotels to perform MEPS contracts throughout the country. CMS teams with multiple hotels for a given competition, and submits multiple proposals, each for a different hotel with CMS’s management services. Using various hotels, CMS submitted 12 of the offers here.

² The RFP stated that proposals with an overall marginal or unsatisfactory rating would not be considered for award. RFP at 19.

for transportation was lowered from excellent to good,³ and its ratings for past performance and quality control remained excellent and satisfactory respectively. HGI's overall technical rating was raised to good, at a revised, reduced price of \$8,277,725. CMS/Wyndham submitted price and technical changes, and was again rated excellent. SIH provided additional technical information, and, as a result, its marginal ratings for facility quality and past performance were raised from marginal to satisfactory, its rating for transportation remained satisfactory, and its rating for quality control remained marginal. SIH's overall technical rating was raised to satisfactory, and its revised price was \$7,902,146. Based on his review of the revised proposals, the second contracting officer concluded that HGI's proposal, with a significantly lower price than CMS/Wyndham's and "significant quality advantages," represented the best value. Although SIH's price was lower than HGI's, the contracting officer determined that "the mediocrity of its facility quality, quality control, and past performance do not offer significant value to the Government for the cost proposed." Second Contracting Officer's Determination, Mar. 24, 2004. Upon learning of the resulting award to HGI, SIH filed this protest.

SIH challenges the agency's evaluation of technical proposals.⁴ We review challenges to an agency's evaluation only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD ¶ 148 at 3. A protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3. Based on our review of

³ HGI's transportation rating was lowered by the second contracting officer because HGI had not yet purchased the additional vans needed to transport the applicants. Contracting Officer's Supplemental Statement, May 14, 2004.

⁴ SIH, in comments filed on June 21, also contends that the agency incorrectly characterized the document that it received from a local MEPS employee as the initial government estimate when it was only SIH's prices from its prior contract, and therefore improperly decided to cancel the award to CMS, distribute the so-called IGE to the offerors, and reopen negotiations. In the circumstances here, this protest ground is analogous to a challenge to an alleged solicitation impropriety. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the next closing date for receipt of proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (2004); International Corporate Sec., B-249562, Nov. 25, 1992, 92-2 CPD ¶ 382 at 4. If this protest ground is not properly viewed as an alleged solicitation impropriety, it would have to be raised within 10 days of when SIH learned of it (or should have known it). Since SIH knew or should have known the basis of this objection at least by the time that the agency reopened discussions and called for revised proposals, its failure to protest until more than 3 months later renders this ground of protest untimely.

the record, we find the evaluation of proposals, and the resulting selection of HGI's proposal as the best value proposal, to be reasonable.

SIH contends that the agency improperly evaluated its past performance. In this regard, the RFP instructed offerors to describe their past performance on similar contracts that had been performed in the past 2 years. SIH, the incumbent contractor, submitted three letters of commendation from prior MEPS commanders. The protester contends that the agency did not give sufficient weight to these letters of commendation, as evidenced by its having received only a satisfactory rating.

We find no basis upon which to question the past performance evaluation. Although the letters from prior MEPS commanders which Staten furnished with its proposal noted SIH's superior performance on the MEPS contract, the Army reports, and the record confirms, that SIH's performance had deteriorated in the most recent contract year. In this regard, the contracting officer had available monthly inspection reports, prepared by the contracting officer's representative (COR), which documented "discrepancies" in SIH's performance, including matters relating to applicants' health and safety, such as unsafe lighting, garbage strewn around the applicants' entrance, unsanitary food handling, and soiled utensils; failures to comply with specification requirements concerning the availability and selection of food for the applicants; and failures to afford applicants the same level of service and quality of facilities offered to other guests. These evaluation reports (including a report dated January 21, 2003) indicated that some of the discrepancies were "repeat" discrepancies, previously raised with the contractor but not yet resolved. Further, in addition to the monthly inspection reports, the contracting officer also had available negative evaluation sheets--entitled "How Do We Rate?"--that had been completed by MEPS applicants after their stay at the SIH facility (and had been retained so that the criticisms therein could be addressed with the contractor). These applicant evaluation sheets included a number of complaints, such as the fact that there were not sufficient amounts of food, that the food lacked flavor, and that the food was cold. While the applicant evaluation sheets retained by the agency may have represented only a portion of the evaluations returned by the applicants, they appear to confirm the criticisms in the COR's inspection reports and the agency's position that, at least recently, SIH's performance of the MEPS contract had been deficient. On this record, given the current deficiencies in its performance, we find that the agency reasonably concluded that SIH warranted no more than a satisfactory rating for past performance.⁵

⁵ SIH also alleged that one of the evaluators is currently employed by the awardee, and therefore must have had an undisclosed conflict of interest because he presumably was pursuing employment with HGI at the same time as he was evaluating proposals. There appears to be no basis for SIH's speculation in this regard; according to the agency, the evaluator in question is still an active member of the United States Army. Army Comments, June 25, 2004, at 2.

SIH argues that HGI's facility failed to comply with the specification requirement that "[t]he contractor's facility shall comply with applicable fire and safety codes and regulations." Statement of Work, § 5.1.2. According to the protester, HGI has only a temporary certificate of occupancy, which means that HGI's facility does not meet the applicable fire and safety codes and regulations, as required by the solicitation.

SIH's argument furnishes no basis upon which to question the award. While the solicitation did not require offerors to submit documents relating to compliance with fire and safety codes, HGI in fact included in its proposal documents concerning its compliance with fire and safety codes and regulations.⁶ Nothing in these documents indicated that HGI's facility would not comply with applicable fire and safety codes and regulations. Specifically, HGI submitted with its proposal: (1) a letter signed by the Public Safety Manager of the City of New York Fire Department stating that HGI's Fire Safety Plan was conditionally accepted, with final acceptance depending on provision of a permanent certificate of occupancy and HGI's deputy fire safety director attending fire safety director school; and (2) a letter of approval from the City of New York Fire Department, signed by the Chief of Fire Prevention, stating that HGI's fire alarm system and central office connection were approved. As for HGI's temporary certificate of occupancy, which was not furnished with its proposal, the certificate indicated that HGI's facility possessed a fire alarm and signal system, smoke detectors, and automatic sprinkler system. In these circumstances, given the information available to the Army, we find no basis to conclude that it was unreasonable for the agency to determine that HGI's facility would meet the specification requirements regarding compliance with applicable fire and safety codes and regulations.

SIH contends that HGI is not providing all of the transportation as required in the specifications.⁷ However, whether a contractor in fact performs in accordance with solicitation requirements is a matter of contract administration that is the responsibility of the contracting agency, and is not for consideration by our Office. 4 C.F.R. § 21.3(m)(1). In any case, we note that the Army reports that HGI is in fact

⁶ We note that SIH did not submit any certificates or official letters with its proposal indicating that its facility was in compliance with applicable fire and safety codes and regulations.

⁷ Under the specifications, the contractor is required to provide transportation from the New York MEPS facility to its facility at 5 p.m., and from its facility back to the MEPS for arrival no later than 5:30 a.m., and transportation for applicants stranded at the airport to its facility. Amend. 1 at 2.

furnishing all of the transportation services required under the specifications.
Contracting Officer's Supplemental Statement, July 20, 2004, at 1.

The protest is denied.

Anthony H. Gamboa
General Counsel