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**Comptroller General
of the United States**

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

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Decision

Matter of: Incident Catering Services, LLC

File: B-296435.2; B-296435.3; B-296435.7; B-296435.8

Date: September 7, 2005

Ronald S. Perlman, Esq., and Michael B. Tuite, Esq., Buchanan Ingersoll PC, for the protester.

David G. Brown, Esq., Merrill O'Sullivan, LLP, for North Slope Catering, LLC; Susan M. Stewart, Stewart's Firefighter Food Catering, Inc.; and Harold M. Nelson, Big Sky Mobile Catering, intervenors.

Byron W. Waters, Esq., Department of Agriculture, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably evaluated the protester's technical proposal is denied where the record shows that the agency's evaluation of proposals was reasonable and consistent with the stated evaluation criteria; protester's disagreement with agency's evaluation is insufficient to show it was unreasonable.
 2. Protest alleging that, in its evaluation of the protester's proposal, the agency unreasonably ignored information that was "close at hand" (but not contained in the protester's proposal) is denied where the information in question bears on whether the protester's proposed equipment satisfied the technical requirements of the solicitation, and thus by nature could vary in response to the individual solicitation.
 3. Protest that agency unreasonably decided not to hold discussions with offerors is denied given that the contracting officer has broad discretion in deciding whether to hold discussions and nothing in the record indicates that the contracting officer abused her discretion in determining not to conduct discussions.
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DECISION

Incident Catering Services, LLC (ICS) protests its nonselection for contract award under request for proposals (RFP) No. 49-05-07, issued by the National Interagency Fire Center, Forest Service, Department of Agriculture, for mobile food services in various locations; for certain locations, the Forest Service awarded contracts to offerors other than ICS and, for other locations, elected not to make contract award.

ICS argues that the agency's evaluation of its proposal and decision not to conduct discussions were improper.

We deny the protest.

BACKGROUND

The RFP, issued on February 9, 2005, contemplated multiple awards of fixed-price and cost-reimbursement requirements contracts for a base year and four 1-year options. The contractors would be required to provide hot and cold meals and supplemental items at 27 field locations (referred to as designated dispatch points, or DDPs) during wildland fires and other types of activities throughout the contiguous western United States and Alaska. RFP § C.1, at 7. The RFP permitted offerors to submit proposals for multiple DDPs, but contemplated the award of one contract for each location.

In addition to cost/price, the solicitation identified the following technical evaluation factors, in descending order of importance: proposed equipment; past performance; experience; and technical approach. The RFP informed offerors that the technical factors, when combined, were approximately equal in importance to cost or price. Contract awards were to be made to the offerors submitting the proposals determined to meet the minimum requirements of the solicitation and to be the most advantageous (*i.e.*, "best value") to the government. Relevant to the protest here, the RFP also stated that contract awards might be made without discussions, and that the agency might reject any or all offers and not award all DDP locations if doing so were determined to be in the government's best interest. RFP § M.2, at 105.

The RFP included detailed instructions for the preparation of proposals, and requested that the offerors' proposals consist of two parts—a technical part and a business/cost part. Offerors were instructed that the technical proposals would be used to determine, among other things, whether the proposals met the requirements of the RFP. In this regard, the RFP required that offerors "clearly and concisely provide" written specifications and drawings of the mobile food service units (MFSU) offered, "indicating equipment location, traffic flow, layout, size, and capacity of the unit." RFP § L.6, at 101. The solicitation also established minimum equipment requirements for an MFSU, and required offerors to complete an equipment requirements checklist for each unit offered. RFP § C.3, at 21-27, *exh. M.2*, at 112-18. The solicitation stated that the equipment requirements would be evaluated on a pass/fail basis, and that "any unit that fails to meet any of these minimum requirements will be unacceptable and may not be considered any further." *Id.* at 112.

Twenty-five offerors, including ICS, submitted proposals by the March 11 closing date. ICS offered four MFSUs for 15 DDP locations.¹ An agency technical evaluation board (TEB) evaluated offerors' technical proposals using an adjectival rating system: exceptional, acceptable, marginal, or unacceptable for those technical factors other than past performance; and exceptional, acceptable, neutral, marginal, or unacceptable for past performance.² The TEB completed its evaluation of offerors' technical proposals on June 2, including each of the MFSUs proposed by ICS, which were rated as follows:

Factor	MFSU A	MFSU B	MFSU C	MFSU D
Equipment	Unacceptable	Unacceptable	Unacceptable	Unacceptable
Past Performance	Exceptional (-)	Exceptional (-)	Exceptional (-)	Exceptional (-)
Experience	Marginal	Exceptional	Marginal (+)	Exceptional
Technical Approach	Acceptable (-)	Acceptable (-)	Acceptable (-)	Acceptable (-)
Overall	Marginal	Marginal	Marginal	Marginal

Agency Report (AR), Tab 21, TEB Consensus Report, at 2. The TEB found each MFSU unacceptable under the equipment factor because it determined that ICS had failed to demonstrate compliance with all minimum equipment requirements of the solicitation. *Id.* at 11-12.

The TEB subsequently considered offerors' evaluated prices and technical ratings, and made award recommendations for each DDP. *Id.*, Tab 22, TEB Best Value Analysis Report. In certain instances the TEB recommended that no contract award be made because of the lack of offerors that were considered technically acceptable with fair and reasonable prices. The contracting officer concurred with the TEB's recommendations, decided not to conduct discussions with offerors, and forwarded the award recommendations and associated materials to the agency's source selection authority for review and approval. *Id.*, Tab 23, Source Selection Decision; Contracting Officer's Statement, July 21, 2005, at 8. The source selection authority accepted the findings and recommendations of the TEB and made contract award to

¹ In accordance with the RFP instructions, ICS's proposal set forth the award location preferences for each of its MFSUs. AR, Tab 5, Proposal of ICS, vol. I, at 4.

² The TEB rated each offeror's MFSUs separately. The TEB also employed the use of "+" and "-" (e.g., "acceptable plus") in its rating system. AR, Tab 21, TEB Consensus Report, at 2-3.

12 offerors for 21 DDPs. AR, Tab 23, Source Selection Decision. ICS received no awards. These protests followed. The agency authorized the offerors who had received awards to begin performance notwithstanding the protests, based on a written determination that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for the decision of our Office. See 31 U.S.C. § 3553(d) (2000).

DISCUSSION

ICS first protests that the agency's evaluation of its technical proposal was improper.³ ICS primarily argues that the Forest Service unreasonably determined that its proposal was unacceptable under the proposed equipment factor for failing to meet various minimum requirements. Although we do not here specifically address each of ICS's complaints about the evaluation of its proposal, we have fully considered all of them and find that they afford no basis to question the agency's selection decision.

Where a protester challenges an agency's evaluation of a proposal's technical acceptability, our review is limited to considering whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Knoll, Inc.; Steelcase, Inc., B-294986.3, B-294986.4, Mar. 18, 2005, 2005 CPD ¶ 63 at 3. Clearly stated RFP technical requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Id.; National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4-5. An offeror is responsible for affirmatively demonstrating the merits of its proposal and risks the rejection of its proposal if it fails to do so. HDL Research Lab, Inc., B-294959, Dec. 21, 2004, 2005 CPD ¶ 8 at 5. As with any evaluation review, our chief concern is whether the record adequately supports the agency's conclusions. Innovative Logistics Techniques, Inc., B-275786.2, Apr. 2, 1997, 97-1 CPD ¶ 144 at 9. A protester's mere disagreement with the agency's judgment does not establish that the evaluation was unreasonable.

³ ICS also initially protested that the agency improperly conducted discussions with other offerors, and that the agency improperly failed to follow the solicitation's small business cascade preference plan. Protest, July 26, 2005, at 3-5. The Forest Service addressed these allegations in its report, and the protester filed no further comments on these issues. Thus, we consider ICS to have abandoned these protest bases and will not consider them further here. International Marine Prods., Inc., B-296127, June 13, 2005, 2005 CPD ¶ 119 at 5 n.3; see Delco Indus. Textile Corp., B-292324, Aug. 8, 2003, 2003 CPD ¶ 141 at 3 n.2. ICS also initially protested that the Forest Service had engaged in an improper quid pro quo, whereby another offeror received contract awards in exchange for the withdrawal of its protest. Protest, July 13, 2005, at 1-2. ICS subsequently withdrew this protest issue. Comments, Aug. 2, 2005, at 4.

C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4. Our review of the record provides us no basis to find the agency's evaluation here unreasonable or otherwise objectionable.

As set forth above, the RFP informed offerors that, with regard to the proposed equipment factor, the agency would evaluate each offeror's proposed MFSU(s) to determine the extent to which the unit(s) would meet or exceed the solicitation's stated performance requirements. RFP § M.3, at 106. In performing its evaluation the TEB determined that ICS's proposal failed to demonstrate that each MFSU offered met all minimum equipment requirements in six specific areas.⁴ AR, Tab 21, TEB Consensus Report, at 11-12. Based on our review of the record, we find that the TEB reasonably concluded that the information submitted by ICS failed to establish that ICS met the solicitation's minimum equipment requirements. For example, the solicitation mandated that offerors propose a minimum of 1,200 cubic feet of refrigeration storage space. RFP § C.3.1.2.2, at 26, exh. M-2, at 117. ICS's proposal failed to show that it met this requirement, instead stating only that "[DELETED]."⁵ AR, Tab 5, ICS Proposal, vol. II, exh. M.2.

ICS does not dispute that its proposal contained various "omissions" and "minor informalities" where it failed to expressly state compliance with the RFP's minimum equipment requirements. See Protest, June 21, 2005, at 3; Comments, Aug. 2, 2005, at 5-6. Rather, ICS contends that the Forest Service did not treat all offerors equally in its evaluation under the proposed equipment factor.⁶ Specifically, ICS argues that

⁴ The areas in which the TEB found that ICS's proposal failed to meet minimum equipment requirements were: (1) the 400 gallon gray water storage capacity for hand washing sinks; (2) the 400 gallon potable water storage capacity for hand washing sinks; (3) the 500 gallon gray water storage capacity for the kitchen unit; (4) the 1,200 cubic feet of refrigeration storage capacity for the kitchen unit; (5) the 512 cubic feet of freezer storage capacity for the kitchen unit; and (6) the 200 gallon potable water storage capacity for the kitchen unit. AR, Tab 21, TEB Consensus Report, at 11-12.

⁵ The agency determined that the other aspects of ICS's proposal also did not clearly demonstrate that the offeror met the solicitation's refrigeration storage capacity requirement. AR, Tab 21, TEB Consensus Report, at 11-12; Contracting Officer's Statement, July 21, 2005, at 10.

⁶ ICS also argues that the agency's evaluation was unreasonable because ICS had the equipment required, its proposal did not state that it was unable or unwilling to provide the equipment required, and ICS would not have submitted a proposal if it did not have the equipment required. Protest, June 21, 2005, at 2-3. The protester's arguments here fundamentally misunderstand what was required by the solicitation. It is the obligation of the offeror to include sufficient information in its proposal for the agency to determine whether the proposal would meet its needs; it was not the

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other offerors' proposals also failed to demonstrate complete compliance with all the minimum equipment requirements, but were nevertheless not found to be unacceptable under the proposed equipment evaluation factor.

It is a fundamental principle of government procurement law that an agency must treat all offerors equally and evaluate their offers evenhandedly against the solicitation's requirements and evaluation criteria. Rockwell Elec. Commerce Corp., B-286201 et al., Dec. 14, 2000, 2001 CPD ¶ 65 at 5; CRAssociates, Inc., B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63 at 5. Our review of the record confirms that the Forest Service evaluated offerors' proposals equally under the proposed equipment factor.

First, in performing its evaluation, the TEB determined that the proposals of eight other offerors also failed to demonstrate compliance with the solicitation's minimum equipment requirements. AR, Tab 21, TEB Consensus Report, at 2-3. In each instance where the TEB determined that an offeror's proposal did not meet all minimum equipment requirements, the TEB rated the proposal as unacceptable under the proposed equipment factor. Id. The record also indicates that the agency treated offerors equally with regard to each minimum equipment requirement. For example, ICS argues that the proposals of six other offerors also failed to demonstrate compliance with the RFP's 1,200-foot refrigeration storage capacity requirement.⁷ The contracting officer states, and the record sufficiently indicates, that in contrast to ICS's proposal, the proposals of the other offerors did demonstrate refrigeration storage capacity meeting or exceeding the RFP requirement.⁸ AR, Tab 9, Proposal of Offeror A, at 89; Tab 10, Proposal of Offeror B,

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agency's obligation during the evaluation process to fill in the gaps or to perform a "leap of faith." G&M Indus., B-290354, July 17, 2002, 2002 CPD ¶ 125 at 4; Robotic Sys. Tech., B-278195.2, Jan. 7, 1998, 98-1 CPD ¶ 20 at 9. Since ICS had the burden of submitting an adequately written proposal, yet failed to do so, we have no basis to question the reasonableness of the agency's evaluation.

⁷ The contracting officer states that while the RFP also mandated refrigeration equipment capable of maintaining a temperature of 41 degrees Fahrenheit, the agency considered refrigeration temperatures to be easily adjustable and, thus, did not fail any offeror for not specially addressing the temperature requirement. Contracting Officer's Statement, Aug. 9, 2005, at 10. The contemporaneous record reflects that the agency treated offerors equally here; no offeror, including ICS, was noted as failing to meet the refrigeration temperature requirement even where the offeror's proposal did not address this requirement. See AR, Tab 5, Proposal of ICS, vol. II, exh. M.2., Tab 21, TEB Consensus Report, at 11-12.

⁸ We note that ICS does not deny that the proposals of the other offerors here demonstrated compliance with the refrigeration storage requirement; rather, ICS
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at 149; Tab 12, Proposal of Offeror C, at 84; Tab 13, Proposal of Offeror D, at 54; Tab 15, Proposal of Offeror E, at 63; Tab 17, Proposal of Offeror F, at 38. Similarly, with regard to ICS's assertion that other offerors also failed to meet the solicitation's freezer storage capacity requirement, the record reflects that the agency reasonably determined that the proposals of other offerors demonstrated compliance with the requirement while the proposal submitted by ICS did not. *Id.*, Tab 21, TEB Consensus Report; Contracting Officer's Statement, Aug. 9, 2005, at 10. In sum, we find that the difference in evaluation ratings here was not the result of unequal treatment by the agency, but instead stemmed from the agency's recognition of differences in the offerors' proposals.

ICS also argues that its proposal should not have been found unacceptable under the proposed equipment factor because the Forest Service failed to consider information known to it regarding ICS's MFSUs. In support of its contention, ICS alleges that the TEB chairman had personally participated in inspections of ICS's equipment during the prior year, and had personal knowledge that ICS actually possessed all the equipment required by the solicitation. ICS contends that this information was "too close at hand" for the agency to ignore in the evaluation of ICS's proposal, citing our decisions that hold that certain information known to an agency in the evaluation process cannot be ignored. Therefore, ICS argues, the agency's failure to consider information known to it here was unreasonable.

An offeror has the burden of submitting an adequately written proposal, and an agency may downgrade a proposal for the lack of requested information. Formal Mgmt. Sys., Inc., B-259824, May 3, 1995, 95-1 CPD ¶ 227 at 3. Our Office has recognized that in certain limited circumstances, however, an agency evaluating an offeror's proposal has an obligation (as opposed to the discretion) to consider "outside information" bearing on the offeror's proposal. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5; G. Marine Diesel; Phillyship, B-232619, B-232619.2, Jan. 27, 1989, 89-1 CPD ¶ 90 at 4-5. Where we have charged an agency with responsibility for considering such outside information, the record has demonstrated that the information in question was "simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, this information." International Bus. Sys., Inc., *supra*; see GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 14.

The facts here regarding the equipment that ICS was allegedly proposing are distinguishable from those in our decisions articulating the "too close at hand" principle. In the decisions cited above, we addressed situations where an agency failed to include in its evaluation past performance information that was specifically

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simply alleges that the contracting officer's statement failed to provide supporting citations to the agency record. Comments, Aug. 17, 2005, attach. 1, at 24.

known to the officials handling the protested procurement. For example, the G. Marine Diesel; Phillyship decision dealt with a contracting officer's failure to consider information, personally known to the contracting officer, that the awardee's performance on a predecessor contract had been deficient; the GTS Duratek decision dealt with the agency's failure to consider the offeror's performance of a prior contract where the contract was discussed in the offeror's past performance proposal and the contracting officer's technical representative for the contract was a member of the technical evaluation team for the subject solicitation.

Here, ICS argues that because the TEB chairman personally knew that ICS possessed and had previously employed mobile food services equipment meeting the RFP's requirements, the agency was required to take this knowledge into account in performing its evaluation. Even accepting that ICS's contention is factually accurate, the protester's argument requires the Forest Service to assume that ICS intended to employ the same equipment as it had in the past. An offeror's proposed technical capabilities, including equipment, may be varied by the offeror in response to the specifics of each solicitation, and merely because certain equipment may have been proposed or used in the past does not require the offeror to propose it on subsequent occasions.⁹ In sum, we see no basis here to regard the information regarding ICS's equipment as falling within the category of data that we deem "too close at hand" for the agency to ignore.

ICS also protests that the agency's decision not to hold discussions with offerors was unreasonable. ICS argues that the various deficiencies identified in the evaluation of its proposal could have been easily corrected through discussions, and that the agency's rationale for forgoing discussions was groundless. The Forest Service maintains that ICS was on notice of the potential for an award without discussions, that its unacceptable technical proposal eliminated it from consideration for award,

⁹ Although the protester asserts that the agency "knew that our intention was to use the same [equipment] . . .," Comments, Aug. 2, 2005, attach. 4, Statement of ICS President, at 8, it does not point to any specific language in its proposal to support this assertion. Our own review of ICS's proposal revealed only that ICS makes the general statement that one of its four MFSUs "[DELETED]." Proposal at 179. This broad statement in the proposal is not sufficient to trigger application of the "too close at hand" rule. Given that the effect of the rule here in essence would be to relieve the protester of the obligation of preparing an adequately written proposal, and shift to the agency the obligation to take into account information outside the proposal, we think its application in this case would be appropriate only if the proposal itself clearly indicated beyond any reasonable doubt that the offeror was committing itself contractually to use the identical equipment, unchanged in any relevant way, as it had in the past. That simply is not the case here.

and that the delay in contract awards resulting from holding discussions with offerors would have adversely affected the government's interests.

There is generally no obligation that a contracting agency conduct discussions where, as here, the RFP specifically instructs offerors of the agency's intent to award a contract on the basis of initial proposals. All Bldg. Servs., Inc., B-293519, Mar. 23, 2004, 2004 CPD ¶ 73 at 4; Techseco, Inc., B-284949, June 19, 2000, 2000 CPD ¶ 105 at 4; see Federal Acquisition Regulation § 15.306(a)(3). The contracting officer has broad discretion in deciding whether to hold discussions, which our Office will review only to ensure that it was reasonably based on the particular circumstances of the procurement. All Bldg. Servs., Inc., *supra*.

From our review of the record, we see nothing which indicates that the contracting officer abused her discretion in determining not to conduct discussions with offerors. The contracting officer states that the Forest Service anticipated above-normal fire potential in many areas of the western United States for the 2005 fire season, that the agency had no long-term contracts for mobile food services in place at the time, and that holding discussions with offerors would have delayed all contract awards by at least another 30 to 45 days.¹⁰ Contracting Officer's Statement, July 21, 2005, at 8; Contracting Officer's Statement, Aug. 9, 2005, at 14. The contracting officer was also aware of the prior difficulties experienced by the Forest Service and contractors when contract awards for mobile food services were made during, instead of in advance of, the fire season. Accordingly, the contracting officer determined that it was in the government's best interests not to conduct discussions and to award contracts for as many DDP locations as possible based on initial proposals. Contracting Officer's Statement, Aug. 9, 2005, at 14. There is no basis on this record to object to the agency's determination not to conduct discussions, and the protester's disagreement with the agency's decision to forgo discussions does not demonstrate that the agency's decision was unreasonable.

The protest is denied.

Anthony H. Gamboa
General Counsel

¹⁰ ICS contends that it would have taken very little time--1 or 2 days--for it to respond to any deficiencies or irregularities in its proposal. Comments, Aug. 17, 2005, at 10. The protester ignores the fact that if the agency had held discussions with any one offeror, the agency would then have been required to hold discussions with all offerors. The Forest Service would then have had to provide each offeror with the opportunity to revise or modify any aspect of its proposal, which would then necessitate the agency having to evaluate all offerors' final proposal revisions. We find nothing unreasonable in the contracting officer's estimate of 30 to 45 days for the resulting delay in contract award.