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Decision

Matter of: DeTekion Security Systems, Inc.

File: B-298235; B-298235.2

Date: July 31, 2006

Michael A. Hordell, Esq., Charles H. Carpenter, Esq., and Sean P. Bamford, Esq., Pepper Hamilton LLP, and Barbara Duncombe, Esq., and Suzanne Sumner, Esq., Sebaly Shillito & Dyer, for the protester.

Robert K. Tompkins, Esq., and Michael J. Carrato, Esq., Patton Boggs LLP, for Sigcom-GDI Fencing Solutions, LLC, an intervenor.

William D. Robinson, Esq., Federal Bureau of Prisons, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that source selection official improperly made award on a low price/technically acceptable basis where solicitation provided for award on a “best value” basis is denied where the record reflects that the source selection official reasonably found the proposals of the awardee and the protester to be substantially equal and selected the lower-priced proposal.

2. Protest challenging source selection official’s determination that protester’s and awardee’s proposals were substantially technically equal is denied where source selection official reasonably determined that the strengths and weaknesses attributed to the proposals by the technical evaluation panel did not reflect a substantial difference between the offerors’ technical proposals; the fact that the source selection official’s decision did not accept the findings and ratings of agency evaluators is unobjectionable where it is otherwise supported by the record.

DECISION

DeTekion Security Systems, Inc. protests the award of a contract to Sigcom-GDI Fencing Solutions, LLC under request for proposals (RFP) No. R00-0531, issued by the Federal Bureau of Prisons (BOP) for the design/build of electrified fence systems at seven BOP correctional facilities. DeTekion argues that the agency’s source selection decision was not consistent with the terms of the solicitation, the agency failed to hold meaningful discussions with DeTekion, and the agency’s evaluation of Sigcom-GDI’s proposal was flawed.

We deny the protest.

The RFP at issue is the “phase two” process of a two-phase design-build selection conducted in accordance with Federal Acquisition Regulation (FAR) subpart 36.3 for the award of a fixed-price contract for the design and installation of “non-lethal/lethal” electrified fencing systems at seven BOP penitentiaries: (1) United States Penitentiary (USP) Coleman I, Florida; (2) USP Coleman II, Florida; (3) USP Pollock, Louisiana; (4) USP Tucson, Arizona; (5) USP Hazelton, West Virginia; (6) USP McCreary, Kentucky; and (7) USP Terre Haute, Indiana. On May 27, 2005, the BOP issued the “phase one” RFP, which provided for an evaluation of offerors’ past performance and their responses to technical evaluation factors, which were evaluated by a past performance evaluation panel and technical evaluation panel (TEP), respectively. Phase one did not include an evaluation of price; rather, it was designed solely to determine which offerors were qualified to submit proposals for phase two. Three firms, including DeTekion and SigCom-GDI, submitted phase one proposals and all were deemed qualified for the purpose of advancing to phase two.

On September 2, 2005, the BOP sent the phase two RFP, which is at issue in this protest, to the three phase one offerors. The phase two RFP provided for award to the offeror proposing the fence system representing the “best value” to the government, and set forth, in descending order of importance, the following non-price evaluation factors: (1) past performance; (2) preliminary design and proposed technical solutions, and system demonstration; (3) specialized experience and proposed organization; and (4) management and scheduling approach, including quality control and quality assurance and post-construction maintenance and service. When combined, these factors were “significantly more important than price” according to the RFP; however, “as Proposals are determined to be more equal in non-price factors, price becomes more important and may become the determining factor for Award.” RFP at 55. With regard to price, the RFP stated that it

shall be a major factor in the selection of a proposal for Award when Offerors are substantially equal technically. If the Government’s evaluation renders an Offeror to be significantly technically superior, the Government reserves the right to warrant payment of a premium and make an Award to an Offeror other than the low Offeror.

RFP at 54.

The second non-price evaluation factor (preliminary design and proposed technical solutions, and system demonstration) included five subfactors with the most important being a “system demonstration” required of the offerors. Under this subfactor, offerors were required to construct a 100-foot section of their proposed fence, which would be “energized” and demonstrated to the contracting officer and

the TEP pursuant to an extensive demonstration checklist. In addition, as it relates to the protest, under the third non-price factor, specialized experience and proposed organization, offerors were required to describe their “relevant experience” with projects of “comparable size and complexity.” RFP at 39.

Also as it relates to the protest, the RFP included specifications requiring compliance with International Electrotechnical Commission (IEC) standard 60335-2-76, which is an international standard pertaining to the safety of electric fence energizers for security fences in non-lethal applications--there are no similar standards governing lethal fences, as explained by the parties. The agency indicated that this standard was included “to establish a non-lethal threshold of 1 hertz and to require compliance with the safety concerns imbedded in the IEC.” Second Supplemental Agency Report (AR) at 20.

By October 26, 2005, the amended closing date for receipt of phase two proposals, the BOP had received proposals from two of the phase one offerors, DeTekion and Sigcom-GDI. The fence systems proposed by the two offerors were significantly different. DeTekion proposed a fence system with a [DELETED] configuration with [DELETED] alternating current (A/C) [DELETED] at a price of [DELETED]. Sigcom-GDI proposed a [DELETED] configuration with [DELETED] direct current (D/C) [DELETED] at a price of [DELETED]. Demonstrations of the systems were held in mid-November and an initial round of discussions were held in late December. During this first round of discussions, the BOP identified to each offeror weaknesses and deficiencies found in their proposals. Revised proposals were timely submitted by both DeTekion and Sigcom-GDI by January 12, 2006. DeTekion reduced its price to \$16,250,000, while Sigcom-GDI’s revised proposal reflected an increase in price to \$12,661,918.96.

On January 26, the BOP opened a second round of discussions in which it sought more detailed pricing information from both offerors. During its discussions with DeTekion, the agency indicated that it found no significant weaknesses or deficiencies in its proposal, and solely sought the additional pricing information. In addition, the agency explained that DeTekion could submit a revised price proposal to provide its “best value pricing.” AR, Tab 13A, Second Discussions--DeTekion. With regard to Sigcom-GDI, because its revised proposal represented a “significantly different system” when compared with its initial proposal, the BOP sought a new demonstration of the revised system, which Sigcom-GDI conducted on March 2. Contracting Officer’s (CO) Statement at 10.

After receipt of second revised proposals, the BOP opened a third and final round of discussions in which the agency, due to perceived conflicting language in the solicitation, sought to clarify that a “basket weave” design was not a requirement of the RFP. The agency was concerned that [DELETED]. In addition, the agency noted one weakness with SigCom-GDI’s proposal. By March 29, both offerors had submitted their final proposals. DeTekion [DELETED] but it did not alter its

proposal or price. SigCom-GDI's final proposal addressed the one weakness identified by the agency in the third round of discussions without changing its price.

In evaluating the offerors' final proposals, the TEP considered the proposals solely under the technical evaluation factors (each of the non-price evaluation factors except for past performance). With regard to DeTekion's proposal, the TEP identified eight strengths and no weaknesses. Of a possible 1,270 points, DeTekion received 1,158 points, which corresponded to an overall adjectival rating of "outstanding to superior" and a "high probability" of successful performance. AR, Tab 20, TEP Consensus Report, at 2. In connection with the fence demonstration, DeTekion received 420 of 429 total available points. AR, Tab 2A, Statement of TEP Chairperson, at 7. With regard to Sigcom-GDI, the TEP noted two strengths and nine weaknesses. Sigcom-GDI received a total of 875 points, corresponding to an overall adjectival rating of "Good to Excellent" with a "good probability" of successful performance. AR, Tab 20, TEP Consensus Report, at 3. In connection with its demonstration of its final system, Sigcom-GDI received 420 of the 429 total points available. AR, Tab 2A, Statement of TEP Chairperson, at 13. At the contracting officer's request, the TEP prepared an award recommendation and recommended award to DeTekion.

The TEP forwarded its technical evaluation report and award recommendation memorandum to the contracting officer, who was also the source selection authority. The contracting officer reviewed the proposals and the TEP's findings, evaluated the offerors' past performance--DeTekion was rated more highly than Sigcom-GDI under this factor as well--and considered the difference between the offerors' pricing.¹ Specifically, with regard to price, the contracting officer price conducted a detailed analysis of the offerors' pricing information, comparing it with the initial government estimate (IGE) of \$16,307,552.50, as well as pricing information obtained in connection with the BOP's prior unsuccessful attempts to procure non-lethal/lethal fence systems through competitive acquisitions. CO Statement at 11-12; AR, Tab16A, Price Analysis Spreadsheet. Based on this analysis the contracting officer concluded that the offerors' prices were reasonable for their chosen technical approaches. CO Statement at 12. The contracting officer also documented his analysis of the TEP's technical evaluation, which discussed the relative strengths and weaknesses identified by the TEP, his consideration of the TEP's award recommendation, as well as his final source selection decision.

¹ Of 1,070 possible points under the past performance factor, DeTekion received a score of 850, while Sigcom-GDI received 696 points. When the past performance scores were combined with the technical scores DeTekion received 1,993 total points and Sigcom-GDI received 1,571 points—the maximum possible point score was 2,340. AR, Tab 28, Source Selection Decision, at 5-6.

In considering the TEP's evaluation of the relative strengths and weaknesses of the offerors' proposals, the contracting officer disagreed with many of the TEP's conclusions. Specifically, as one of DeTekion's strengths, the TEP had noted that DeTekion's fence system was "simple," utilizing [DELETED] energizer, and was therefore a "superior solution." AR, Tab 25, CO's Analysis of Technical Evaluation Report, at 1. In this regard, the TEP explained that DeTekion's fence "utilizes a minimum number of components . . . while providing sophisticated detection capabilities." Id. While agreeing that a simpler system could offer greater reliability since there would be fewer parts to break down, the contracting officer did not agree that simplicity demonstrated superiority. Id. The TEP had also identified a strength in connection with DeTekion's proposed energizer because it provided for [DELETED]. This provision is above and beyond the minimum requirements." Id. The contracting officer, however, regarded this evaluated strength as "equally a weakness" stating that the agency has "security and safety concerns that the energizer [DELETED] to prevent breach of security or accidental electrocution." Id. at 2.

The TEP had also found DeTekion's proposed [DELETED] to be a strength because they utilized a [DELETED]. Id. According to the TEP, [DELETED] was a "superior solution," which provided "the highest level of safety to Bureau staff." Id. The contracting officer discounted this strength, concluding that the system was not a superior solution, but rather a [DELETED]. Id. Also regarding DeTekion's [DELETED], the TEP noted that the type of [DELETED] thus, "[w]ith the proper procurement controls in place," this feature would limit the possibility of [DELETED] being made which could result in an operator defeating the [DELETED]. Id. The contracting officer agreed that DeTekion's [DELETED] system was a "strength," albeit qualified by the fact that "its superiority is dependent upon future procurement controls" and that "[t]here is no way to know whether [DELETED] could or could not be procured." Id.

While DeTekion's use of a [DELETED] configuration for its fence system was listed as one of its strengths by the TEP, the contracting officer rejected this view. Specifically, the TEP concluded that the [DELETED] configuration would provide "superior detection of tamper and passage attempts"; the [DELETED] thus making it "much more sensitive to very slight manipulation" and "greatly increasing the potential that two wires being spread apart will come in contact with other wires [DELETED] Id. at 3. The contracting officer, however, viewed the sensitivity as potentially leading to "a greater number of false alarms" and wrote that "arguments can be made against this configuration (such as entanglement in the fence, etc.)." Id.

The TEP had also evaluated DeTekion's proposed team as a strength and "superior" due to the fact that DeTekion included in its proposal charts and resumes for personnel at all seven fence sites—information beyond that required by the RFP. The contracting officer concurred to the extent that DeTekion had provided information in excess of that required by the solicitation; however, he noted that this did not

demonstrate “superiority” as suggested by the TEP. *Id.* The TEP further identified the experience of DeTekion, its subcontractors, and their proposed personnel as a strength based on their “relevant experience,” including DeTekion’s installation of non-lethal/lethal fence systems at correctional facilities in Wisconsin, Alabama, and Mississippi, as well as the fact that the proposed team had “extensive experience working together on projects of similar scope.” *Id.* at 3,4. While agreeing that the proposed team had experience working together, and that this was a strength, the contracting officer did not agree that DeTekion’s team had “extensive experience working on projects of similar scope” and afforded little weight to the particular experience attributed to DeTekion and its team by the TEP. *Id.* at 3. The contracting officer noted that not all of DeTekion’s staff had relevant experience, and that DeTekion had never previously manufactured or installed the actual fence system it had proposed to the BOP, and concluded that DeTekion’s experience at correctional facilities in Wisconsin, Alabama, and Mississippi was not in fact comparable to the solicitation requirements. AR, Tab 26, TEP Recommendation for Award Memorandum, at 2.

Specifically, the contracting officer reviewed DeTekion’s work at the Wisconsin, Alabama, and Mississippi facilities and found that the projects in each instance involved fence systems of a different design and configuration, with other than a [DELETED] wire array. Moreover, the contracting officer indicated that DeTekion had performed as a subcontractor completing a smaller portion of the work under the Wisconsin and Mississippi projects, for \$280,000 and \$1.6 million, respectively, and that the Alabama project involved upgrading an existing system for \$380,000. With respect to the Wisconsin project the contracting officer also noted that there had been problems with “many false alarms, and that there may also be grounding problems.” AR, Tab 25, CO’s Analysis of Technical Evaluation Report, at 3-4.

Regarding the TEP’s assessment of Sigcom-GDI’s proposal, the contracting officer noted, as a general matter, that the weaknesses identified by the TEP were not considered “significant” by the TEP, since it had not identified these weaknesses as issues that needed to be raised with Sigcom-GDI during discussions. *Id.* The contracting officer also specifically addressed each weakness attributed to Sigcom-GDI’s proposal. In this regard, the contracting officer concluded that two of the weaknesses identified by the TEP, which concerned Sigcom-GDI’s design, were not significant and could be addressed during the design phase of the contract. The TEP had further downgraded Sigcom-GDI for failing to identify “site superintendants” (an issued that had been raised with Sigcom-GDI during discussions), or “sitework,” concrete, and electrical subcontractors. *Id.* at 6. The contracting officer dismissed these concerns as minor in nature and insignificant since they pertained to the lack of information, which the RFP did not call for offerors’ to submit. The contracting officer, however, agreed with the TEP’s view that Sigcom-GDI’s lack of “any actual experience fabricating, manufacturing, installing, maintaining, or servicing non/lethal or lethal electrified fence systems” was a weakness since Sigcom-GDI did not have experience with the system it

proposed. The TEP also noted as a weakness the fact that Sigcom and GDI did not have any previous experience working together. In response, the contracting officer described it as a “nominal weakness,” which the TEP “evaluated accordingly.” Id. As a final weakness, the TEP had indicated that Sigcom-GDI’s proposed fence utilized “galvanized wire,” which is not as durable as steel wire. The contracting officer noted that this was a consequence of Sigcom-GDI’s use of a system with direct current, as opposed to alternating current. Id.

Two strengths had been attributed to Sigcom-GDI’s proposal by the TEP and the contracting officer agreed with the TEP’s assessment in this regard. Specifically, the TEP noted that Sigcom-GDI proposed [DELETED]. In the contracting officer’s view this “greatly enhanced” security. Id. at 5. In addition, the TEP credited Sigcom-GDI with offering a warranty of 5 years on all parts manufactured by GDI, including the energizer units. This was 3 years beyond the 2-year warranty required by the RFP. The contracting officer concurred in finding this a strength of Sigcom-GDI’s proposal.

As noted above, the TEP had prepared a memorandum with a recommendation for award to DeTekion. In doing so, the TEP emphasized two of the strengths it had attributed to DeTekion’s proposal. Specifically, the TEP highlighted the fact that DeTekion had proposed a [DELETED]. The TEP wrote that “[t]his is a superior solution which will provide the highest level of safety to Bureau staff.” AR, Tab 26, Recommendation for Award Memorandum, at 1. However, according to the TEP, the most important reason for making award to DeTekion was its greater experience with the manufacture and installation of non-lethal/lethal fence systems. In this regard, the TEP indicated that Sigcom-GDI did not demonstrate any experience with the manufacture and installation of such systems, while DeTekion had demonstrated comparable experience, specifically its experience at correctional facilities in Wisconsin, Alabama, and Mississippi. The TEP concluded that Sigcom-GDI’s lack of experience “greatly” increased the risks of system failure and disruption of institution operations, thus leading to increased cost to the government. Id. at 2.

In making the best-value determination, the contracting officer rejected the TEP’s award recommendation and the findings therein. Specifically, as he had concluded in addressing the TEP’s technical evaluation, the contracting officer explained that DeTekion’s fence system was a [DELETED] and was not superior to Sigcom-GDI’s fence system, which [DELETED] dissipated fence capacitance when the fence is de-energized.² Specifically, the contracting officer indicated that both systems required stored energy to be dissipated from their systems after being de-energized and stated that he “[did] not consider either solution to be superior to the other, but more a

² Capacitance is a measure of the amount of electric charge stored. Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/>.

matter relative to the system being offered. Both Offerors meet the specified safety requirements.” AR, Tab 27, Best Value Consideration Memorandum.

The contracting officer further disagreed with the TEP’s reliance on DeTekion’s experience as a rationale for award. While acknowledging Sigcom-GDI’s lack of experience and agreeing that it was a weakness of its proposal, the contracting officer indicated that not all of DeTekion’s staff had relevant experience, and that DeTekion had never previously manufactured or installed the actual fence system it had proposed to the BOP. He concluded that DeTekion’s experience at correctional facilities in Wisconsin, Alabama, and Mississippi, which the TEP had identified as “comparable non-lethal/lethal system experience,” was not in fact comparable to the RFP, as he had explained in his assessment of the TEP’s consensus evaluation. AR, Tab 27, Best Value Consideration Memorandum, at 2-3.

Ultimately, the contracting officer concluded that Sigcom-GDI’s proposal represented the best value to the government. DeTekion’s proposal, although higher in score, was “not significantly technically superior,” in the contracting officer’s view, when compared with Sigcom-GDI’s proposal; rather, he found that they were “substantially equal,” thus making price the determining factor for award. As a consequence, the contracting officer concluded there was no justification for paying a premium of more than \$3.5 million for DeTekion’s proposal. AR, Tab 28, Source Selection Decision.

After learning of the agency’s award decision and receiving a debriefing, DeTekion filed this protest. DeTekion argues that the contracting officer deviated from the RFP’s requirement for a best-value tradeoff decision, where non-price evaluation factors were “significantly more important than price,” and instead made award on a low price/technically acceptable basis. In this regard, the protester essentially argues that the contracting officer was so concerned with price that he unreasonably disregarded the strengths of DeTekion’s proposal and ignored the weakness of Sigcom-GDI’s proposal, as found by the TEP, in order to reach the conclusion that the two offerors’ proposals were technically equivalent. DeTekion also argues that the agency’s discussions in connection with its proposal were not meaningful because the agency failed to identify its higher price as a weakness and failed to identify weaknesses attributed by the contracting officer in his assessment of the TEP’s technical evaluation. Moreover, DeTekion challenges technical aspects of Sigcom-GDI’s proposal, arguing that its fence system may not prove fatal while in its lethal mode due to its reliance on direct current and that it fails to comply with IEC 60335-2-76, section 22.109, as required by the RFP, since, according to the protester, Sigcom-GDI’s fence system utilizes [DELETED].

Best Value Decision

As a general matter, where price is secondary to technical considerations under a solicitation’s evaluation scheme, the selection of a lower-priced proposal over a

proposal with a higher technical rating requires an adequate justification, *i.e.*, one showing the agency reasonably concluded that notwithstanding the point or adjectival differential between the two proposals, they were essentially equal in technical merit, or that the differential in the evaluation ratings between the proposals was not worth the cost premium associated with selection of the higher technically rated proposal. In making these determinations the propriety of a price/technical tradeoff turns not on the difference in technical score *per se*, but on whether the contracting agency's judgment concerning the significance of that difference was reasonable in light of the solicitation's evaluation scheme. In this regard, adjectival ratings and point scores are but guides to, and not substitutes for, intelligent decisionmaking. SAMS El Segundo, LLC, B-291620, B-291620.2, Feb. 3, 2003, 2003 CPD ¶ 44 at 17. They are tools to assist source selection officials in evaluating proposals; they do not mandate automatic selection of a particular proposal. Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 31; PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 12. Source selection officials have broad discretion in determining the manner and extent to which they will make use of, not only the adjectival ratings or point scores, but also the written narrative justification underlying those technical results, subject only to the tests of rationality and consistency with the evaluation criteria. Development Alternatives, Inc., B-279920, Aug. 6, 1998, 98-2 CPD ¶ 54 at 9; Midwest Research Inst., B-240268, Nov. 5, 1990, 90-2 CPD P 364 at 4.

In challenging the agency's best value decision, DeTekion first contends that the contracting officer's improper "price centric analysis" is evidenced by his statement that "my primary concern is always the overall price the Government will actually pay." DeTekion's Comments at 5; CO Statement at 16. Given the full context of the comment, however, the protester's argument is misplaced. Specifically, the contracting officer wrote the statement in describing to our Office his decision to advise offerors, during the first round of discussions, that they should provide their "best value pricing," that their pricing should reflect their "latest negotiations held with the Government," and that, while the non-price factors were significantly more important than price, as proposals were determined to be more equal, price would become more important and might become the determining factor. CO Statement at 16-17. These comments, according to the contracting officer, were intended to keep the offerors "mindful that price was always under consideration." *Id.* at 17. Thus, it is clear that the contracting officer's characterization of price as a "primary concern" merely reflected his view that price was an important evaluation factor, and not, as protester suggests, the most important factor.

The protester also argues that the contracting officer's focus on price led him to disregard the TEP's evaluations and best-value judgment and to unreasonably conclude that DeTekion's proposal, which, based on the TEP's evaluation, had a 23 percent higher score than Sigcom's proposal, was "substantially equal" to Sigcom-GDI's proposal, which was 22 percent lower in price. Protester's Comments at 10. Since the bulk of the protester's argument challenging the agency's selection of

Sigcom-GDI concerns the contracting officer's disagreement, in many instances, with the opinions expressed by the TEP, it is important to recognize from the outset that there is nothing per se improper about the contracting officer's decision not to adopt the analysis and recommendation of the TEP here. Selection officials are not bound by the recommendations or evaluation judgments of lower-level evaluators, even though the working level evaluators may well have technical expertise in the matters under their review. TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at ___; University Research Co., LLC, B-294358.6, B294358.7, Apr. 20, 2005, 2005 CPD ¶ 83 at 28; PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 12; Loral Aeronutronic, B-259857.2, B-259858.2, July 5, 1995, 95-2 CPD ¶ 213 at 8. The judgments of selection officials are governed not by the views of those who advise them, but by the tests of rationality and consistency with the stated evaluation criteria. In considering such judgments we will not evaluate offerors' proposals anew or substitute our judgment for those of selection officials. Rather, we will examine the record to determine whether the decisionmaker's judgments were reasonable and in accord with the RFP evaluation criteria and with applicable procurement statutes and regulations. Cooperativa Muratori Riuniti, B-294980, B-294980.2, Jan. 21, 2005, 2005 CPD ¶ 21 at 3.

Here, the record reflects that the contracting officer engaged in a comparative assessment of DeTekion's and Sigcom-GDI's proposals, considering the point scores of the offerors, their adjectival ratings, the strengths and weaknesses attributed to the proposals by the TEP, and the TEP's recommendation for award to DeTekion. The record further reflects that, looking behind the TEP's ratings, the contracting officer considered the underlying qualitative merits that distinguished DeTekion's and Sigcom-GDI's proposals and specifically documented his assessment of each of the strengths and weaknesses of the proposals identified by the TEP. Based on this assessment, the contracting officer concluded that DeTekion's and Sigcom-GDI's proposals were "substantially equal" in technical merit. Consistent with the RFP's provision stating that "proposed price shall be a major factor in the selection of a proposal for Award when Offerors are substantially equal technically," the contracting officer reasonably concluded that price became the determining factor for award and decided that payment of a premium of more than \$3.5 million for DeTekion's proposal was not justified. Under these circumstances, we see no basis to question the agency's decision to make award to Sigcom-GDI.³

³ In support of its protest, DeTekion mistakenly relies on our decision in SOS Interpreting, Ltd., B-293026 et al., Jan. 20, 2004, 2005 CPD ¶ 26. In SOS Interpreting, we sustained a protest where lower-level evaluators found and documented that the protester's higher-priced proposal was technically superior, and the source selection authority determined the proposals were technically equal and made award based on the low-priced proposal. The key factor in that decision was the fact that the record did not reflect the source selection authority's consideration of all the areas where the protester's proposal was found technically superior. Here, as more fully

(continued...)

DeTekion challenges the contracting officer's assessments of the strengths of its proposal as identified by the TEP. In the protester's view, the contracting officer's evaluation was unreasonable and inconsistent with the RFP. Specifically, DeTekion argues that the contracting officer had unreasonably downgraded its proposal where the TEP had evaluated the simplicity of its system combined with its "sophisticated detection capability" as a strength. The record reflects, however, that the contracting officer did not downgrade DeTekion's proposal in this regard. Rather, the contracting officer agreed with the TEP regarding the reliability advantages associated with DeTekion's simpler system; but he disagreed with the TEP's conclusion that DeTekion's system was "technically superior." As explained by the contracting officer, both offerors proposed and demonstrated the required detection capabilities and there was no information provided by the TEP, or contained in the proposals, to determine the relative sophistication of either offeror's detection capability. Second Supplemental CO Statement at 8. While DeTekion faults the contracting officer's judgment, it does not cite any aspect of the record or the offerors' proposals which would suggest that the contracting officer's determination was unreasonable; thus, DeTekion's challenge in this regard amounts to little more than mere disagreement with the contracting officer's judgment and does not render it unreasonable.

According to DeTekion, the contracting officer "does not adequately explain" how its proposed energizer, [DELETED] could be viewed as a weakness, which raised "safety and security concerns." DeTekion's Comments at 11. DeTekion notes that the TEP found this to be a strength which was "above and beyond" the RFP's requirements. The contracting officer, however, clearly explained that "the energizer [DELETED] to prevent breach of security or accidental electrocution." AR, Tab 25, CO's Analysis of Technical Evaluation Report, at 2. While the protester maintains that the contracting officer's concerns about "accidental electrocution" are unfounded given the safety aspects inherent to its system, DeTekion failed to address the reasonably articulated "breach of security" concerns also raised by the contracting officer. As a consequence, we have no basis to conclude that the weight attributed to this strength by the contracting officer was improper or inconsistent with the terms of solicitation.

DeTekion also challenges the contracting officer's assessment of its safety interlock system, which the TEP evaluated as a strength stemming from its utilization of a [DELETED] of the system's grounding switch to dissipate fence energy in conjunction with a [DELETED] to prevent accidental energizing of the fence circuit. Id. DeTekion argues that the contracting officer ignored these advantages of its

(...continued)

discussed below, the record reflects that the contracting officer did in fact consider each of the offerors' strengths and weaknesses as identified by the TEP.

system and unreasonably downgraded its proposal. The record reflects that the contracting officer disagreed with the TEP's determination that being able to [DELETED] that the fence had been [DELETED] disconnected and grounded was "a superior solution." *Id.* The contracting officer noted that SigCom-GDI's system provides for the fence capacitance to [DELETED] dissipate when the fence is de-energized. In the contracting officer's view, this [DELETED] system was equivalent to DeTekion's [DELETED] solution. AR, Tab 27, Best Value Consideration Memorandum, at 2.

Ultimately, discerning the relative safety of each system is a judgment for the agency. The protester has not suggested that the basis of the contracting officer's analysis was erroneous; rather, the protester merely believes that the [DELETED] assurance associated with its system is superior to the [DELETED] nature of SigCom-GDI's system and that the contracting officer's analysis was therefore unreasonable. In view of the discretion afforded the agency in determining its needs and evaluating the relative merits of proposals, and given that the record shows that the agency reasonably considered the relevant differences between the systems and adequately documented its analysis, we see no basis to question the agency's judgment regarding the relative safety of the two systems.

Regarding DeTekion's [DELETED] the contracting officer considered this to be a "nominal strength," since it provides "security." AR, Tab 25, CO's Analysis of Technical Evaluation Report, at 2. The contracting officer, however, qualified this strength, explaining that its superiority was "dependent upon future procurement controls," as the TEP had noted, and that there was "no way to know whether [DELETED] could or could not be procured." *Id.* While the protester contends that this concern was unreasonable since DeTekion states in its proposal that [DELETED] are permitted on site preventing any circumventing of the safety features built into the [system]," Protester's Comments on Second Supplemental AR, exh. 1, at 2, this feature does not address the contracting officer's concern regarding the need to maintain proper procurement controls in relation to the creation of or ability to obtain [DELETED].

DeTekion also asserts that the contracting officer's concern was unreasonable because, had the agency raised this issue with DeTekion through discussions or clarifications, it would have explained that no [DELETED] can be procured. It is incumbent on an offeror, however, to prepare a well-written proposal, with adequately detailed information, which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. Ace Info. Solutions, Inc., B-295450.2, Mar. 7, 2005, 2005 CPD ¶ 75 at 8; Communications and Data Sys. Assocs., B-223988, Oct. 29, 1986, 86-2 CPD ¶ 491. Moreover, the agency was not required to raise this issue with DeTekion during discussions since agencies are not required to afford offerors all-encompassing discussions or to discuss every element that receives less than the maximum score. American Ordnance, LLC, B-292847 *et al.*, Dec. 5, 2003, 2004 CPD ¶ 3 at 4-5. Nor

would clarifications on this issue have been appropriate since they do not permit revisions to proposals. FAR § 15.306(a)(2); A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5-6.

DeTekion also challenges the contracting officer's determination that its [DELETED] fence design was not a valid strength. According to the protester, the contracting officer ignored the TEP's finding that the [DELETED] configuration was "superior" and reached the unreasonable conclusion that such a configuration is more susceptible to false alarms. The record reflects that the contracting officer did not ignore the TEP's evaluation and specifically addressed its comments regarding the advantages associated with the [DELETED] design, explaining that the sensitivity attendant to the configuration, which the TEP preferred, created the potential for a greater number of false alarms. While the protester asserts that such a conclusion is unjustified, DeTekion cites nothing in the record to suggest that this conclusion was unreasonable. Rather, the contracting officer notes sections of Sigcom-GDI's proposal specifically discussing how its [DELETED] fence configuration reduces the possibility of false alarms. CO's Second Supplemental Statement of Facts, at 10; Sigcom-GDI's Proposal, Vol. 1, Tab 1, at 1. In addition, the contracting officer noted other arguments against the [DELETED] configuration, *i.e.*, entanglement in the fence and problems associated with tensioning sagging wires, issues simply ignored by the protester. AR, Tab 25, CO's Analysis of Technical Evaluation Report, at 3; CO's Second Supplemental Statement of Facts, at 10. Based on this record, there is nothing to suggest that the contracting officer's conclusions in this regard were unreasonable or inconsistent with the terms of the RFP.

The TEP had also indicated that DeTekion's identification of its personnel for all seven sites was a strength since this information was not required under the RFP. DeTekion alleges that the contracting officer unreasonably dismissed this strength. The record reflects, however, that the contracting officer did in fact consider this to be a strength, which was properly credited to DeTekion and reflected in its evaluated score. He did not believe, however, that the inclusion of this additional detail demonstrated superiority significant enough to justify payment of a price premium. CO's Second Supplemental Statement of Facts at 10. While the protester may not agree with this conclusion, this disagreement does not render the agency's conclusion unreasonable.

As a final challenge to the contracting officer's evaluation of its strengths, DeTekion argues that the contracting officer improperly downgraded the strength of its experience by misjudging the relevance requirements of the RFP. According to DeTekion, the contracting officer downgraded its experience because it did not have specific experience installing non-lethal or lethal fences at BOP sites. DeTekion maintains that the solicitation did not require such experience at BOP sites and that no offeror would have relevant experience with the BOP, since the BOP had never previously procured electrified fences. According to DeTekion, the contracting officer raised this concern only to "obfuscate the fact that Sigcom-GDI had no

relevant experience designing, fabricating, manufacturing, installing, maintaining or servicing non-lethal/lethal or lethal electrified fence systems.” Protester’s Comments at 15.

DeTekion’s argument, however, misapprehends the contracting officer’s evaluation of its experience. Specifically, the contracting officer noted that DeTekion “does not have any actual experience fabricating, manufacturing, installing, maintaining or servicing the non-lethal/lethal fence proposed to the [BOP].” AR, Tab 25, CO’s Analysis of Technical Evaluation Report, at 3. In this regard, the contracting officer considered DeTekion’s actual experience at correctional facilities in Wisconsin, Alabama, and Mississippi, concluding that the systems installed or serviced at each of these locations was different from that proposed by DeTekion to the BOP. Thus, the record reflects that the contracting officer was concerned by DeTekion’s lack of experience with the actual fence system it had proposed, not its lack of experience with the BOP. The contracting officer found this lack of experience with the fence actually proposed to be a common trait of both DeTekion and Sigcom-GDI. The protester’s challenge to this aspect of the evaluation is therefore without merit.

In challenging the award to Sigcom-GDI, DeTekion also argues that the contracting officer’s best value decision did not properly consider the weaknesses attributed to Sigcom-GDI’s proposal by the TEP. Specifically, DeTekion notes that the contracting officer unreasonably concluded that the weaknesses listed by the TEP were not significant. DeTekion maintains that the weaknesses must have been “significant” since the TEP’s report stated that it did not list any of Sigcom-GDI’s “minor” weaknesses. AR, Tab 20, TEP Consensus Report, at 3. The record reflects that the contracting officer reasonably concluded that the weaknesses identified by the TEP were not “significant” since they had not been identified by the TEP as issues that needed to be raised with Sigcom-GDI during discussions. The fact that the weaknesses identified by the TEP were not considered significant is further bolstered by the fact that the TEP’s award recommendation discussed only one of the weaknesses it had identified in its technical evaluation—Sigcom-GDI’s lack of relevant experience—as a justification for award to DeTekion. Moreover, the record reflects that the contracting officer addressed each weakness, specifically concluding in most instances that they were not significant. In this regard, DeTekion alleges that the contracting officer disregarded concerns raised by one of the evaluators regarding Sigcom-GDI’s proposal, specifically, Sigcom-GDI’s lack of experience with lethal fencing as well as the fact that its system “continues to be a work in progress.” AR, Tab 2C, TEP Panel Member Notes. In fact, the record reflects that the contracting officer considered Sigcom-GDI’s lack of relevant experience, and its lack of experience with the specific system which it had proposed, to be weaknesses, which were noted and considered in his best value determination. Based on this record, we find nothing unreasonable with the agency’s evaluation or source selection decision.

Meaningful Discussions

DeTekion argues that its discussions with the agency were not meaningful because the agency failed to identify its price, which was higher than that of Sigcom-GDI, as a weakness in its proposal and because the agency failed to raise the weaknesses attributed to its proposal by the contracting officer.⁴ Regarding the issue of DeTekion's price, where, as here, an offeror's price is high in comparison to competitors' prices--DeTekion's price was 22 percent higher than Sigcom-GDI's price--the agency may, but is not required to, address the matter during discussions.⁵ Hydraulics Int'l, Inc., B-284684, B-284684.2, May 24, 2000, 2000 CPD ¶ 149 at 17; see FAR §§ 15.306(d)(3), (e)(3). Accordingly, if an offeror's price is not so high as to be unreasonable and unacceptable for contract award, the agency may reasonably conduct meaningful discussions without advising the higher-priced offeror that its prices are not competitive. See Hydraulics Int'l, Inc., *supra*.

Here, the record reflects that the agency conducted a detailed comparison of the offerors' price information, comparing DeTekion's proposed price of \$16,250,000 to the IGE as well as pricing information obtained in connection with the BOP's prior unsuccessful attempts to procure non-lethal/lethal fence systems through competitive acquisitions. While DeTekion's price was higher than the awardee's price, its price was lower than the IGE of \$16,307,552.50. Relying on this information, the agency concluded that the price differential between DeTekion and Sigcom-GDI was the result of their different technical approaches and that

⁴ Premised on the notion that the agency had changed the basis for award to one based on technical acceptability and low price, DeTekion argued that the agency was required to inform DeTekion of this fact during discussions. As discussed above, however, the protester's contention is incorrect--the agency's award decision was based on a best value analysis as required by the RFP--and its challenge is therefore without merit.

⁵ DeTekion also argued for the first time in its comments on the agency report that Sigcom-GDI's price was unrealistic and as a consequence demonstrated that the awardee's proposal was technically unacceptable and represented a substantial risk to the agency. Where, as here, the RFP calls for award of a fixed-price contract and there is no relevant evaluation criterion pertaining to realism or understanding, a determination that an offeror's price is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to successfully perform the contract at its offered price. CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 4-5; Cromartie Constr. Co., B-271788, July 30, 1996, 96-2 CPD ¶ 48 at 5. Thus, to the extent DeTekion is challenging the agency's affirmative determination of responsibility for the first time in its comments, this basis of protest is untimely since it was not raised within 10 days of DeTekion learning of the agency's award decision. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2006).

DeTekion's price was reasonable for its chosen approach. Therefore, the agency's decision not to raise the issue of DeTekion's higher price during discussions does not provide a basis to sustain the protest.

DeTekion also contends that the contracting officer was obligated to discuss with DeTekion his reasons for downgrading DeTekion's proposal as reflected in his analysis of TEP's technical evaluation and award recommendation. As a general matter, although discussions must address at least deficiencies and significant weaknesses identified in proposals, the scope and extent of discussions are largely a matter of the contracting officer's judgment. In this regard, we will review the discussions provided to ensure that the agency pointed out weaknesses that, unless corrected, would prevent the offeror from having a reasonable chance of receiving the award. An agency is not required to afford offerors all-encompassing discussions or to discuss every element that receives less than the maximum score, and is not required to advise an offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor in choosing between two closely ranked proposals. MarLaw-Arco MFPD Mgmt., B-291875, Apr. 23, 2003, 2003 CPD ¶ 85 at 4.

Here, the protester misconstrues the contracting officer's consideration of its proposal and the TEP evaluation. The record reflects that the contracting officer did not find any significant weaknesses in connection with DeTekion's proposal; rather, the contracting officer's comments regarding DeTekion's proposal were in the context of his consideration of the weight of the strengths attributed to DeTekion's proposal by the TEP. While in some instances the contracting officer found that the strengths were not supported and may have used the term "weakness" in several instances, his analysis was in the context of determining that a perceived strength had disadvantages negating it as a strength, as opposed to the finding of a significant weakness. Thus, since there were no weaknesses or deficiencies that kept DeTekion's proposal from being fully acceptable, or from otherwise having a reasonable chance of being selected for award, the agency was not required to provide more extensive discussions with DeTekion.

Technical Acceptability of Sigcom-GDI's Proposal

DeTekion argues that Sigcom-GDI's proposal was not technically acceptable because its system utilizes direct current, which "even when in 'fatal mode' would push the person touching the fence away, which in many instances would prove to not be fatal, but would rather have a potential maiming effect"⁶ and because the system proposed does not comply with required IEC standards.⁷ Supplemental Protest at 4.

⁶ DeTekion argues that the injuries caused by Sigcom-GDI's fence could result in the BOP's violation of the Eighth Amendment of the United States Constitution, which prohibits "cruel and unusual punishment," and further asserts that "individuals who
(continued...)

As noted above, it is not the role of our office to independently evaluate and determine the qualifications or technical capabilities of offerors' proposed systems. Federal Env'tl. Servs., Inc., B-260289, B-260490, May 24, 1995, 95-1 CPD ¶ 261 at 3. Regarding the first issue, the agency explains that there are no standards set for determining the lethal requirements for fence systems. Rather, considering Sigcom-GDI's successful demonstration of its fence's lethal mode, which delivers [DELETED] volts of direct current pulsing at [DELETED] hertz—[DELETED] times the non-lethal IEC standard of 1 hertz impulse frequency—the agency determined that Sigcom-GDI's demonstration of lethality was satisfactory. As explained by the agency, no system can be evaluated to guarantee lethality “short of throwing different sized people against each [fence] under various circumstances.” Second Supplemental AR at 18. Moreover, assuming that the protester's main objection were true—that direct current could cause a muscle contraction strong enough to push a person who touches the fence away—it does not explain how or why this undermines the lethality of the fence; rather, DeTekion assumes the possibility of a

(...continued)

are maimed . . . will be selected arbitrarily, based on the failure rate of the system, which could also be considered torture.” Supplemental Protest at 4-5. The jurisdiction of our Office, however, is limited to deciding protests concerning alleged violations of procurement statutes or regulations. See 31 U.S.C. § 3552 (2000). Because the questions raised do not implicate violations of procurement statutes or regulations, they are not for resolution by our Office and are instead matters for the courts to ultimately decide. DePaul Hospital and the Catholic Health Ass'n of the United States, B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173; Onshore SOG, Inc.—Recon., B-210406.3, Feb. 15, 1984, 84-1 CPD ¶ 203.

⁷ In its report the agency argued, in part, that these bases of protest were untimely challenges to the solicitation, which should have been raised prior to the RFP's closing date. We disagreed because they stemmed from Sigcom-GDI's specific technical approach, which DeTekion was not required to anticipate. As a result, we requested further development of the merits of these issues from the parties. The protester argued that the agency's response should be “stricken” on the ground that the agency abandoned the merits by principally relying on its procedural arguments. We view the protester's argument as a baseless objection to the decision of our Office to seek further development of the issues from the agency. In reviewing the agency report, we found the agency's discussion of the underlying facts regarding technical acceptability of Sigcom-GDI's proposal to be general in nature and, as a consequence, requiring further amplification. Our decision to seek additional information from the agency in this regard is consistent with our Bid Protest Regulations, which expressly provide that “GAO may request or permit the submission of additional statements by the parties . . . as may be necessary for the fair resolution of the protest.” Bid Protest Regulations, 4 C.F.R. § 21.3(j).

non-lethal result. Thus, we find DeTekion's unsupported allegations in this regard to be speculative in nature and without merit.

Regarding the second issue, DeTekion asserts that Sigcom-GDI's proposal fails to comply with IEC 60335-2-76, a requirement of the RFP. Specifically, DeTekion alleges that the Sigcom-GDI's fence system utilizes [DELETED], which, according to DeTekion, is precluded by sections 22.108 and 22.109 of the IEC standard.⁸ The agency explains that the design of Sigcom-GDI's system is compliant with the IEC standards since its system provides for [DELETED] thus safeguarding the system from operating in excess of the 1 hertz non-lethal limit specified by the IEC standards. More specifically, the agency notes that while Sigcom-GDI's system utilizes [DELETED], Sigcom-GDI's proposal explained that its non-lethal and lethal energizers [DELETED] to ensure safety and meet the requirements of IEC 60335-2-76. Specifically, Sigcom-GDI's proposal reads: "In keeping with the requirements of IEC 60335-2-76 . . . the proposed stun/lethal system [DELETED] as is required by IEC 60335-2-76, and are powered from a [DELETED] and explains that [DELETED] it is not possible to accidentally activate the lethal subsystem while the system operates in non-lethal mode only." Sigcom-GDI Proposal, Vol. 1, Tab 3, at 1 and 2. Given the record in this case, we find nothing unreasonable with the agency's conclusion that Sigcom-GDI's proposal is compliant with the applicable IEC standards.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁸ Section 22.108 of the IEC standard sets forth the maximum energizer output for non-lethal fence applications. Section 22.109 provides that where a system utilizes multiple circuits for an energizer, "the output characteristics shall be within the limits specified in 22.108 for any possible connection of the fence circuits."