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Decision

Matter of: General Injectables & Vaccines, Inc.

File: B-298590; B-298590.2; B-298590.3

Date: November 15, 2006

Lawrence Z. Lorber, Esq., Mark J. Biros, Esq., Stephen D. Solomon, Esq., James F. Segroves, Esq., Meredith C. Bailey, Esq., and Rachel F. Glickman, Esq., Proskauer Rose LLP, and Gilbert J. Ginsburg, Esq., Law Office of Gilbert J. Ginsburg, for the protester.

David R. Hazelton, Esq., Roger S. Goldman, Esq., Donald M. Remy, Esq., Kyle R. Jefcoat, Esq., and Joshua K. Chandler, Esq., Latham & Watkins LLP, and Carole S. Ungvarsky, Esq., McKesson Corporation, for McKesson Specialty Distribution LLC, an intervenor.

Daniel Meron, Esq., Dana J. Petti, Esq., and Elise Harris, Esq., Centers for Disease Control and Prevention, Department of Health and Human Services, for the agency. Paul N. Wengert, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency conducted discussions with eventual awardee, to determine whether its proposal met go/no-go requirement, is denied where solicitation did not preclude agency from conducting discussions regarding the requirement, and agency subsequently conducted discussions with all offerors.
 2. Protest that agency's efforts to reach consensus among evaluation panelists constituted improper "pressure" is denied where agency's final evaluation ratings are reasonably supported by record, and protester has not identified any substantive flaw in the evaluation of final proposal revisions.
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DECISION

General Injectables & Vaccines, Inc. (GIV) protests its proposal's exclusion from the competitive range by the Centers for Disease Control and Prevention (CDC) under request for proposals (RFP) No. 2006-N-08248, for vaccine stockpile management and distribution under the Vaccines for Children Act, 42 U.S.C. § 1396s (2000). GIV asserts that evaluators were improperly pressured to change their initial evaluations, and that CDC conducted improper discussions with the eventual awardee, in order

to allow it to pass a go/no-go evaluation, but failed to conduct meaningful discussions with GIV regarding its proposed price.

We deny the protest.¹

On November 1, 2005, CDC issued the RFP, seeking proposals to manage a consolidated supply of vaccines under the Vaccines for Children Act, which provides federally-purchased vaccines for administration to children who meet certain criteria.² RFP at 6. The RFP indicated that the contractor would be responsible for filling an estimated 47,000 shipments initially, increasing to an estimated 260,000 shipments annually.³ RFP at 8.

The RFP provided that each proposal would first be evaluated on the adequacy of the offeror's information technology "Systems Security Plan." RFP amend. 5, at 22.

¹ In its initial protest, GIV raised several grounds of protest which argued, in essence, that GIV's proposal was excluded from the competitive range solely on the basis of GIV's high price, and that CDC could not properly evaluate price under the RFP because CDC had improperly implemented the Service Contract Act (SCA), and thus had failed to include applicable wage determinations in the RFP that would be required for competing offerors to submit proposals in compliance with the SCA. CDC produced a report on these issues on September 8, but produced requested documents on several dates. Our Office set a deadline for comments on the initial agency report on September 25 by 5:30 p.m. Eastern Daylight-Saving Time (EDT). The protester's comments ultimately arrived by fax at 6:16 p.m. EDT, indisputably after our filing deadline. Counsel for GIV has submitted a fax machine error report to show that its counsel attempted to file comments on the report on that date at "17:00" (or 5:00 p.m.) at which time counsel's machine reported "BUSY." Counsel did not request, and our Office did not grant, any further extension of the deadline for comments. Our Bid Protest Regulations provide that when comments from a protester are not received by the time when due, the protest "shall be dismissed." 4 C.F.R. § 21.3(i) (2006). Therefore, we do not address the issues raised in the initial protest.

² The Vaccines for Children Act also directs CDC to maintain a 6-month stockpile of the vaccines, an objective that the contract was also designed to achieve. Contracting Officer's Statement at 2 n.1.

³ As of February 21, 2006, the due date for initial proposals, the RFP divided the areas served into three regions: a west region, an east region, and, as a small business set-aside, the state of Texas, thus providing the potential to award a separate contract for each region. When no proposals were received under the small business set-aside, CDC dissolved the set-aside and added Texas to the west region. RFP amend. 6.

Specifically, the RFP required offerors to respond to various questions regarding security controls, including security of computer information systems. The RFP further provided that the offerors' responses would be pre-screened on a "go/no-go" basis, and stated that "proposals that do not pass this first level of screening will not be further considered in the Source Selection process." RFP amend. 5, at 22.

The RFP also provided that proposals evaluated as acceptable under the go/no-go requirement would be evaluated qualitatively on four technical criteria, which were "soundness of technical approach" (30 points), "personnel/management plan" (25 points), "organizational experience" (25 points), and "facilities" (20 points). Lastly, the RFP specified that "technical merit and other non-cost factors"⁴ were of equal importance to price. RFP amend. 7, at 4.

Three offerors, including GIV and McKesson Specialty Distribution LLC (McKesson), submitted proposals by the February 21, 2006 deadline specified in the RFP. After an initial review of the proposals, the evaluators determined that McKesson's proposal had provided inadequate responses to a significant number of the system security plan questions by responding "N/A," "Unclear," "No," or by leaving the question unanswered. On March 7, CDC asked McKesson to "clarify" its responses. On March 12, McKesson submitted revised answers to those security questions; CDC ultimately determined that those responses were adequate.

CDC then proceeded to evaluate the initial proposals. The contracting specialist who reviewed the evaluation report expressed concern that the evaluation reflected disagreement among the evaluators, and that the numerical scores did not correspond to the narrative. She asked that the evaluation panel reconvene because "we need more detail in some areas." She also pointed out large differences among the evaluators in their scoring for McKesson, and noted that GIV did not "seem to understand our requirement, yet they received the highest score." Agency Report (AR), Tab 13, E-mail from Contracting Specialist to Technical Panel Members (Mar. 22, 2006).

The technical panel reconvened on March 29, and prepared a revised report. Two of the four⁵ voting panel members subsequently stated that they felt "pressured" or were "encouraged to change scores" at this meeting. In contrast, the other panel members stated that they felt that the meeting resulted in an opportunity to reach a clearer understanding of the proposals and establish a consensus on that basis.

⁴ The RFP also stated that CDC would evaluate offerors' small disadvantaged business participation plans, and offerors' past performance. RFP amend. 5, at 23-25; RFP amend. 7, at 4-5.

⁵ The panel consisted of six members. However, the contract specialist and the panel chair did not participate in scoring proposals.

Supplemental Agency Report (Sept. 25, 2006), app. A, Declarations of Individual Technical Panel Members.

CDC conducted oral discussions with GIV on May 8, and then sent a final written discussions document to GIV that identified various remaining concerns. Among other things, the agency's written discussions advised GIV of the following:

GIV is proposing [deleted] people to support CDC for the East Region, but their past 5 contracts document [deleted] personnel supporting multiple state contracts ([deleted] projects) in [deleted] facilities. Why is GIV proposing [deleted] people with two distribution sites with similar volume? It appears GIV's costs are not reasonable based on this assessment of staffing, fewer sites and similar volume of vaccine distribution.

AR, Tab 19, Issues for Discussion, at 4-5.

Similarly, CDC further put GIV on notice that its proposed costs were too high, stating:

We are aware that GIV has existing contracts with similar requirements (72 hour cold chain) with other government entities at unit prices substantially lower than those proposed. Please identify the significant factors that cause this disparity.

Id. at 5.

Subsequently, final proposal revisions (FPRs) were submitted and evaluated. The evaluation panel's final report continued to reflect differences among panel members. AR, Tab 22, Technical Panel FPR Evaluation Report (June 28, 2006) at 1. The narrative evaluation report explained those differences on the basis that some evaluators felt that GIV's greater familiarity with CDC resulted in a more detailed proposal, while "McKesson's FPR was more private sector oriented," but was considered technically sound. Id. at 2. All of the panel members—including those stating that they felt "pressured" during the initial evaluation—have stated that they felt no similar "pressure" in the evaluation of FPRs. Supplemental Agency Report (Sept. 25, 2006), app. A, Declarations of Individual Technical Panel Members.

As reflected in the competitive range determination, CDC evaluated GIV's total price as \$241,640,603.77;⁶ McKesson's corresponding evaluated price was \$98,970,547.02.

⁶ GIV received a copy of the competitive range determination listing GIV's evaluated price on September 8. On September 26, GIV first suggested that its evaluated price should have been lower. Since GIV did not assert any error in its evaluated price
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AR, Tab 24, Competitive Range Determination, at 4-5. Based on GIV's significantly higher evaluated price, along with the fact that the offerors' technical ratings were relatively close, the contracting officer eliminated GIV from further consideration, reducing the competitive range to a single offeror, McKesson. GIV was notified of its proposal's exclusion from the competitive range on July 18, and requested a timely pre-award debriefing. This protest followed.⁷

GIV first protests that it was improper for CDC to seek additional information from McKesson regarding its information technology system security plans, thereby permitting McKesson to revise its initially unacceptable responses. Specifically, GIV argues that CDC's March 7 inquiry to McKesson constituted prohibited discussions. CDC responds that nothing prohibited exchanges with McKesson in this regard.

We agree that CDC's exchanges with McKesson seeking additional information about its security systems constituted discussions, rather than clarifications, because CDC needed this information to conclude that McKesson's proposal was acceptable. See Nu-Way, Inc., B-296435.5, B-296435.10, Sept. 28, 2005, 2005 CPD ¶ 195 at 7. However, GIV was not competitively prejudiced by these discussions. As noted, GIV was similarly provided discussions and an opportunity to revise its proposal prior to CDC's final competitive range determination.

GIV places significant emphasis on the RFP provision that "proposals that do not pass this first level of screening will not be further considered in the Source Selection process." RFP amend. 5, at 22. To the extent that GIV is reading this provision as precluding CDC from conducting discussions with offerors in connection with the "pre-screening" process, GIV has failed to identify a persuasive rationale for its interpretation. Accordingly, we decline to sustain its protest of the agency's determination that McKesson ultimately met the go/no-go security plan requirements.

GIV next protests that CDC "pressured" two evaluators to change their scores regarding initial proposals, and that this "pressure" reflected an effort by CDC "to steer the contract award to McKesson." Supplemental Protest at 1; Protester's Supplemental Comments at 2. CDC responds that the record and the declarations of the panel members reflect that the "pressure" felt by the evaluators in connection with the initial evaluations was, in fact, a valid effort to reach consensus among panelists with strongly-held conflicting views about the benefits of the offerors' proposals.

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until more than 10 days after it obtained that price, its protest regarding that matter is untimely. 4 C.F.R. § 21.2(a)(2).

⁷ While this protest was pending, CDC awarded the contract to McKesson. Thereafter, GIV supplemented its protest to challenge that award.

We have noted that it is not unusual for individual evaluator ratings to differ from one another, or to differ with the consensus ratings eventually assigned, and source selection officials may reasonably disagree with the evaluation ratings and results of lower-level evaluators. Verify, Inc., B-244401.2, Jan. 24, 1992, 92-1 CPD ¶ 107 at 6-8. The overriding concern is not whether the final ratings are consistent with earlier, individual ratings, but whether they reasonably reflect the relative merits of the proposals. Cube-All Star Servs. Joint Venture, B-291903, Apr. 30, 2003, 2003 CPD ¶ 145 at 11 n.21.

Here, the record confirms that there were strong persistent differences of opinion among evaluators, and that evaluators were strongly encouraged to discuss the issues and strive for a consensus during the initial evaluation. While some degree of consensus was reached, the contracting officer was fully informed of any remaining disagreement, and the basis for it. Further, the evaluators are unanimous in stating that they did not feel any “pressure” in the evaluation of FPRs. Supplemental Agency Report (Sept. 25, 2006), app. A, Declarations of Individual Technical Panel Members. Finally, GIV has not identified any substantive flaw in the FPR ratings, nor has it shown how the “pressure” to reach consensus during the initial evaluation affected the elimination of GIV from the competitive range due to its significantly higher price. Accordingly, on the record here, GIV’s assertions regarding CDC’s internal deliberations during the evaluation process provide no basis for sustaining this protest.

GIV also complains that it was not adequately apprised during discussions that its price was too high. In response, CDC references specific questions, quoted above, in which CDC stated, among other things, that “It appears GIV’s costs are not reasonable.” Agencies are not required to “spoon-feed” an offeror during discussions. LaBarge Elecs., B-266210, Feb. 9, 1996, 96-1 CPD ¶ 58 at 6. Rather, discussions must be meaningful; that is, discussions may not mislead offerors and must identify deficiencies and significant weaknesses in each offeror’s proposal that could reasonably be addressed in a manner to materially enhance the offeror’s potential for receiving award. PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 123 at 8. Here, as quoted above, the record supports CDC’s contention that GIV was informed during discussions that its price was too high. CDC’s questions adequately informed GIV of CDC’s concerns regarding GIV’s price.

Finally, GIV protests that CDC improperly failed to inquire of GIV and McKesson whether their prices were erroneous. However, GIV has failed to show any basis for CDC to have been concerned about either McKesson’s or GIV’s own pricing. McKesson itself confirmed its prices during the protest. McKesson’s Supplemental

Comments (Oct. 23, 2006) at 5-6. On this record, we deny this aspect of GIV's protest.⁸

The protest is denied.

Gary L. Kepplinger
General Counsel

⁸ GIV raises various additional issues, including a claim that evaluators did not unanimously conclude that McKesson's proposal was "viable," that pricing should have been evaluated on the basis of different shipment sizes, and that CDC had an allegedly undisclosed preference for McKesson's reliance on leveraging its commercial operations, which functioned as an unstated evaluation criterion. We have considered all of GIV's arguments, and find them to be without merit.