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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: Kuhana-Spectrum Joint Venture, LLC

File: B-400803; B-400803.2

Date: January 29, 2009

Paul M. Vincent, Esq., and E. John Steren, Esq., Ober, Kaler, Grimes & Shriver, for the protester.

Johnathan M. Bailey, Esq., and David C. Bowman, Esq., Bailey & Bailey, P.C., for CasePro, Inc.; Craig A. Holman, Esq., Kara L. Daniels, Esq., and Emma V. Broomfield, Esq., Arnold & Porter LLP, for OMV Medical, Inc.; Ronald S. Perlman, Esq., Holland & Knight LLP, for Saratoga Medical Center, Inc.; and Patricia H. Wittie, Esq., and Kathryn E. Swisher, Esq., Oldaker Belair & Wittie LLP, for Chesapeake Educational Services, LLC, intervenors.

Julia P. Hatch, Esq., Department of the Navy, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated the protester's proposal, and improperly conducted discussions with one awardee, is denied where the record demonstrates that the agency's evaluation was reasonable, and that the agency properly limited its communications with one awardee to a permissible clarification.

DECISION

Kuhana-Spectrum Joint Venture, LLC, of Honolulu, Hawaii, protests the award of eight contracts by the Department of the Navy, Naval Medical Logistics Command (NMLC), under request for proposals (RFP) No. N62645-07-R-0009, issued to provide healthcare personnel at military treatment facilities (MTF) in eight states. The eight awardees are TCMP Staffing Services, LLC, of Springfield, Virginia; OMV Medical, Inc., of Takoma Park, Maryland; Professional Performance Development Group, Inc., of San Antonio, Texas; Chesapeake Educational Services, LLC, of Springfield, Virginia; CasePro, Inc., of San Antonio, Texas; Catalyst Professional Services, Inc., of Colorado Springs, Colorado; Saratoga Medical Center, Inc., of Fairfax, Virginia; and

Cherokee Medical Services, LLC, of Stilwell, Oklahoma. Kuhana-Spectrum argues that its proposal was misevaluated, and that the Navy conducted discussions with one of the awardees, Chesapeake, and allowed that firm to revise its proposal, but never provided a similar opportunity to Kuhana-Spectrum.

We deny the protest.

BACKGROUND

The RFP here sought healthcare workers to provide services at MTFs in several states,¹ to supplement the work of military and civilian employees. The Navy explains that it needs to contract for these healthcare workers because it has an insufficient number of government-employee healthcare workers and because of the higher war-related demand for military healthcare services. Agency Report (AR), Tab 3, Acquisition Plan, at 7.

The RFP was issued on August 30, 2007 as a small business set-aside, and it contemplated the award of multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts with an ordering period of 60 months from the time of award. RFP at 5-6, 87. After issuing the RFP, the Navy issued seven amendments.

As amended, the RFP directed offerors to provide prices for 21 “lots” of services for an initial 8-month period, and stated that the Navy would order at least one lot from each awardee at the time of contract award. Each lot provided for a specified number of hours of one or more labor categories at a particular MTF. For example, Lot 2 addressed supplemental services required at the Corpus Christi, Texas Naval Hospital, and specified 4,152 hours of services by family practice physicians, 2,768 hours by pediatricians, 1,384 hours by a family nurse practitioner, 5,536 hours by outpatient registered nurses, and 8,304 hours by licensed practical nurses. RFP amend. 5 at 12.

The RFP, as amended, provided that the evaluation of proposals would consider past performance, management planning and market research (hereinafter “management plan”), and price. RFP at 327; RFP amend. 5 at 94. The Navy described the past performance factor as being significantly more important than the management plan factor. When combined, the past performance and management plan factors were significantly more important than the “combined price evaluation factors (Completeness, Reasonableness, and Realism).” RFP at 327; RFP amend. 5 at 94.²

¹ The RFP informed offerors that the Navy was employing its authority to contract for personal services pursuant to 10 U.S.C. § 1091. RFP at 11.

² The RFP also stated that the government might consider paying a price premium in order to award three or more contracts in order to obtain additional competition for task orders after the initial performance period. RFP at 327.

The RFP also advised that the past performance evaluation would assess the quality of each offeror's relevant past performance. RFP at 324; RFP amend. 5 at 94. With respect to the management plan evaluation, the RFP advised that the agency would assess "the comprehensiveness, specificity, realism, and quality of the plans, capabilities, and research demonstrated within the offeror's proposal." RFP at 324. The RFP also required offerors to submit their standard representations and certifications electronically, using the Online Representations and Certifications Application (ORCA) at <http://orca.bpn.gov>. RFP at 315.

The Navy received proposals from 24 offerors, including Kuhana-Spectrum and each of the awardees. The Navy began the evaluation by reviewing the past performance of each offeror. The Navy contacted the references listed in each proposal, reviewed relevant information in the past performance information retrieval system (PPIRS), and considered any past performance by the offeror for NMLC. The Navy also evaluated each offeror's management plan and market research, and identified the strengths and weaknesses of the proposal. The Navy assigned adjectival ratings to both the past performance and management plan factors, which it expressed in terms of the risk of unsuccessful performance. Price was evaluated by totaling the offeror's price for all lots for the initial 8-months of services, and by a more detailed analysis of the hourly rate in each proposal.

The protester, Kuhana-Spectrum, described itself in its proposal as an approved mentor-protégé joint venture under the Small Business Administration's (SBA) section 8(a) program, and claimed that it was therefore eligible to compete under this small business set-aside. See 13 C.F.R. § 124.520(d) (2008). The proposal explained that the protégé, Kuhana Associates, LLC, was a Native Hawaiian Organization-owned company (see 13 C.F.R. §§ 124.3, 124.102, 124.110), and an SBA section 8(a) program participant. The proposal also explained that Spectrum Healthcare Resources, Inc., a large business, would be the mentor, but that Kuhana would manage the joint venture. AR, Tab 5, Kuhana-Spectrum Proposal, vol. II, at 1. Notwithstanding this explanation, in several other instances the proposal referred to Spectrum as "Kuhana's subcontractor." Id. at 7-10.

Kuhana-Spectrum's proposal described past performance for both Kuhana and Spectrum, and provided one reference for Kuhana, and four references for Spectrum.³ AR, Tab 5, Kuhana-Spectrum Proposal, vol. I, at 1-6. The proposal expounded upon Kuhana-Spectrum's understanding of the challenges of recruiting and retaining the required healthcare professionals at the particular location of each

³ Spectrum provided four references, each of those was for multiple contracts or orders. None of the references was for the joint venture, however.

MTF, and described Kuhana-Spectrum's approach to obtaining qualified professionals in each locale.

In the management plan section of its proposal, Kuhana-Spectrum identified one employee by name--the project manager--and described his qualifications. No other employees were named; the remainder of the proposal merely described management positions (regional managers and site managers), and a variety of support staff (credentialers, schedulers, and employee relations specialists). Nevertheless, the proposal stated that "[t]he organizational leadership team of [Kuhana-Spectrum] is in place now and ready to perform on the requirements of the contract." AR, Tab 5, Kuhana-Spectrum Proposal, at 3-4.

Consistent with its evaluation approach, the Navy contacted Kuhana-Spectrum's past performance references and documented their responses in detail, considered information obtained from PPIRS, and described the substance of NMLC's experience with both firms. AR, Tab 7, Past Performance Evaluation, at 49-54. The resulting past performance narrative prepared by the Navy for Kuhana-Spectrum listed six strengths and five weaknesses. The five weaknesses included reports that Spectrum had experienced "a few minor issues with credentialing and filling a position" in one instance; that "[s]everal . . . reports state [that Spectrum] had difficulty filling positions, especially in the area of providing back-up personnel for coverage positions;" and, that Spectrum had "been the recipient of several Contract Discrepancy Reports (CDRs) for failing to provide adequate back-up personnel, and as a result, liquidated damages were assessed" by NMLC. The evaluators concluded that this record justified a rating of "MR" (moderate risk) under the past performance factor. *Id.* at 14-15.

Under the management plan factor, the Navy assessed three strengths in Kuhana-Spectrum's proposal and two weaknesses. One weakness was the firm's "apparent misunderstanding of the mentor/protégé program" by referring to Spectrum as a "subcontractor," and the other weakness was the proposal's failure to identify all key personnel, raising a concern that Kuhana-Spectrum might lack qualified experienced personnel to fill all key positions. As a result of these weaknesses, the evaluators rated Kuhana-Spectrum as moderate risk under the management plan factor. *Id.* at 14-15.

The overall evaluation results, and the Navy's rationale for its selection decision, were set forth in detail in the Business Clearance Memorandum, which also ranked all 24 offerors. As relevant to our decision, the top ten ranked offerors--*i.e.*, the eight awardees, a ninth firm (which was not awarded a contract), and the protester--and their factor ratings and evaluated prices (for all lots for the initial 8 months), are set forth below:

Rank	Offeror Name	Past Perf. Rating	Management Plan Rating	Total Price
1	TCMP Staffing	Low Risk	Very Low Risk	\$13,810,491.36
2	Chesapeake	Low Risk	Low Risk	\$12,123,831.48
3 (3-way tie)	CasePro	Low Risk	Moderate Risk	\$12,643,519.16
3	OMV Medical	Low Risk	Moderate Risk	\$13,072,322.60
3	Prof'l Perf. Dev. Group	Low Risk	Moderate Risk	\$12,370,359.52
6	Saratoga	Moderate Risk	Very Low Risk	\$12,396,182.32
7 (2-way tie)	Catalyst	Moderate Risk	Low Risk	\$12,543,841.52
7	Cherokee	Moderate Risk	Low Risk	\$12,214,454.08
9	[Offeror A]	Moderate Risk	Low Risk	\$13,204,294.36
10	Kuhana-Spectrum	Moderate Risk	Moderate Risk	\$11,557,819.36

AR, Tab 8, Business Clearance Memorandum, at 43-44.

Given these results, the Navy selected the eight highest-ranked offerors for award, and provided an explanation of each of its selection decisions. *Id.* at 45-55. After a debriefing, Kuhana-Spectrum filed this protest.

Additional Facts Regarding the Evaluation of Chesapeake

During the course of this protest, counsel for Kuhana-Spectrum received a copy of the Navy's Business Clearance Memorandum under our Office's protective order. Based on a review by its counsel, the protester raised a supplemental protest about the evaluation of one of the eight awardees, Chesapeake. We briefly set forth here the relevant aspects of that firm's evaluation.

During the evaluation, the Navy noted that while the proposal submitted by Chesapeake was signed, it did not explicitly acknowledge the seven amendments to the RFP, and did not include a certification of the firm's ORCA, requested in the RFP. RFP at 315-19. Chesapeake's proposal also did not contain a completed copy of the provision at Defense FAR Supplement (DFARS) § 252.247-7022, which requires each offeror to disclose whether it anticipates transporting supplies by sea in performance of any contract or subcontract resulting from the RFP. *See generally* Supplemental (Supp.) AR, exh. 2, Chesapeake Proposal. As a result, the Navy initially concluded that Chesapeake's proposal was unacceptable because it failed to acknowledge amendments, and failed to include representations and certifications (including the DFARS provision). AR, Tab 8, Business Clearance Memorandum, at 41-42.

Subsequently, the Navy convened an internal meeting to further consider whether Chesapeake was eligible for award. As a result, the Navy determined that Chesapeake's proposal would be acceptable if the firm confirmed the accuracy of its ORCA entries. The Navy explained that "[a]lthough Chesapeake completed their ORCA record and certified it as accurate and the record includes the NAIC[S] code

applicable to the solicitation, Chesapeake did not submit the ORCA certification or [the] provision [in FAR §] 52.204-8. Clarifications were required with Chesapeake to resolve these issues.” Id.

On September 19, 2008, the Navy requested that Chesapeake clarify its proposal in this regard. Supplemental (Supp.) AR, Tab 3, E-mail from Contracting Officer (CO) to Chesapeake, Sept. 19, 2008, at 1. On September 23, Chesapeake submitted a signed copy of the certificate from the RFP affirming that its ORCA representations and certifications were “current, complete and accurate as of the date of my signature,” along with completed representations in FAR §§ 52.204-3, 52.204-8, and DFARS § 252.247-7022. Supp. AR, Tab 3, Fax from Chesapeake to CO, Sept. 23, 2008, at 2-5. The Navy then determined that Chesapeake’s proposal was acceptable, and was eligible for award.

DISCUSSION

In this protest, Kuhana-Spectrum principally argues that the Navy misevaluated the firm’s past performance by overemphasizing certain negative performance information, misevaluated the firm’s management plan by criticizing minor flaws, and improperly held discussions with one of the awardees without affording Kuhana-Spectrum a similar opportunity to improve its proposal.

As a preliminary matter, we note that several of the awardees argued that this protest should be dismissed on the basis that Kuhana-Spectrum is not eligible to compete for these contracts. These awardee-intervenors contended that Kuhana-Spectrum Joint Venture cannot properly be viewed as a small business. Specifically, they argued that since one of the joint venture partners (Spectrum Healthcare) is a large business, the resulting joint venture is therefore other-than-small, and is ineligible for award. Kuhana-Spectrum disputes the factual and legal bases for these claims, and argues that these issues are for resolution by the SBA. Kuhana-Spectrum Response, Nov. 7, 2008, at 4-5. We agree with the protester on this point. We did not grant these dismissal requests because, as provided in our Bid Protest Regulations, the determination of whether a firm has validly claimed status as a small business is a matter for determination by the SBA, not our Office. 4 C.F.R. § 21.5(b)(1) (2008).⁴

Past Performance Evaluation

With respect to the past performance evaluation, Kuhana-Spectrum argues that a rating of “moderate risk” is unreasonable in the context of Spectrum’s performance because that rating implies that successful and unsuccessful performance are both

⁴ For the record, however, our decision to develop and address the merits of this protest should not be read as expressing a view on whether Kuhana-Spectrum is eligible for award under the small business set-aside here.

equally likely, which the firm disputes. Protest at 2. Kuhana-Spectrum also argues that the Navy selectively reviewed only an “unrepresentative sample” of less-relevant past performance reports.

The Navy responds that it conducted an extensive review of the relevant past performance for each offeror, including both of Kuhana-Spectrum’s joint venturers. That review showed that Spectrum had encountered difficulty in fully staffing similar contracts on multiple occasions. AR, Tab 7, Past Performance Evaluation, at 54. The Navy argues that given the mixed record, it was reasonable for its evaluators to be concerned that Spectrum would face similar difficulties again, which created a moderate performance risk. AR at 27-28.

Kuhana-Spectrum does not dispute that Spectrum has experienced the performance problems identified by the Navy, which were reflected in several of the PPIRS reports, and NMLC’s own experience. However, Kuhana-Spectrum argues that those problems were properly addressed in each case, and should be considered in the context of the number of specialized healthcare positions that Spectrum has been required to staff. Protester’s Comments at 7-9.

Determining the relative merits of an offeror’s past performance information is primarily a matter within the contracting agency’s discretion; we will examine an agency’s evaluation only to ensure that it was reasonable and consistent with the solicitation’s evaluation criteria and procurement statutes and regulations. Hanley Indus., Inc., B-295318, Feb. 2, 2005, 2005 CPD ¶ 20 at 4; see also Family Entm’t Servs., Inc., B-291997.4, June 10, 2004, 2004 CPD ¶ 128 at 5.

The record here reflects a conscientious effort by the Navy to contact references and compile relevant past performance information for Kuhana-Spectrum’s joint venturers. While the record does reflect significant positive past performance by Spectrum, the Navy evaluators also had a reasonable basis for their concerns about adverse past performance information concerning Spectrum. In our view, the Navy properly considered both the significant positive past performance information and the problems that had occurred on several contracts, including with NMLC itself. In light of the discretion afforded to agencies in the evaluation of past performance, we conclude that the record here supports the agency’s rating of moderate risk under the past performance factor.

Management Plan Evaluation

Under the management plan factor, Kuhana-Spectrum argues that the Navy unfairly downgraded the firm for occasionally referring to Spectrum as a subcontractor, and for identifying only one key person by name. According to Kuhana-Spectrum, the proposal made amply clear that the offeror was a joint venture, and that Kuhana would serve as the managing joint venture partner. Therefore Kuhana-Spectrum argues that the repeated use of the term “subcontractor” to describe Spectrum elsewhere in the proposal was “a clear misnomer.” Protest at 7. The protester also

argues that the RFP did not require offerors to identify any particular key personnel by name. Kuhana-Spectrum explains that it did not consider its site managers and regional managers to be “key,” and the firm felt that it would be “impractical” to identify the employees it expected to staff those positions, since there could be turnover among those employees before the Navy awarded the contracts. Id.

The Navy responds that its evaluators had concerns about the ability of Kuhana-Spectrum to manage the complex multi-site performance because of both the ambiguity about the relationship between the joint venture members and the identification of only a single employee in Kuhana-Spectrum’s proposal. The Navy explained that these aspects of the proposal raised questions about Kuhana-Spectrum’s ability to recruit competent medical personnel in numerous disciplines at multiple sites. AR at 30-31. As such, the Navy argues that a moderate risk rating for Kuhana-Spectrum under the management plan factor was reasonable.

The evaluation of proposals is primarily a matter within the contracting agency’s discretion which we will not question unless we find the evaluation to be unreasonable or inconsistent with the RFP’s evaluation factors. Centro Mgmt., Inc., B-249411.2, Dec. 2, 1992, 92-2 CPD ¶ 387 at 5. The protester’s disagreement with the agency’s conclusions does not render the evaluation unreasonable. Tate-Griffin Joint Venture, B-241377.2, Jan. 7, 1992, 92-1 CPD ¶ 29 at 8.

In our view, Kuhana-Spectrum was not downgraded simply because its proposal used the term “subcontractor” erroneously, or because it failed to list any particular number of key personnel. Rather, the record here shows that the proposal’s description of Spectrum as a subcontractor, taken together with the proposal’s identification of only one key person by name, led the Navy to be concerned that the proposal did not set forth an adequate management plan to ensure successful performance of the contract requirements. AR at 39; Agency Rebuttal, at 6. In our view, the Navy’s assessment of moderate risk under the management plan factor was reasonable on the basis of the record here.

Discussions

As described earlier, in a supplemental protest, filed timely after Kuhana-Spectrum received additional documents with the agency report, the firm argues that the Navy conducted discussions with Chesapeake to allow it to correct omissions in its proposal. Kuhana-Spectrum argues that once the Navy communicated with Chesapeake (and allowed it to remedy a problem with its proposal), the Navy was required to hold discussions with Kuhana-Spectrum also, to allow it to improve its proposal. Supp. Protest at 2.

The Navy responds, first, that it properly concluded that the omissions in Chesapeake’s proposal were either immaterial, or could be corrected via clarifications. Specifically, the Navy argues that Chesapeake constructively acknowledged each of the material amendments to the RFP, and that a failure to

acknowledge the non-material amendments was properly waived. Specifically, in its supplemental agency report, the Navy explains that amendments 1, 3, 4, 6, and 7 were not material because they dealt with administrative details of the procurement process, such as extensions of the proposal due date, or they merely provided background information to the offerors. Supp. AR at 6-7. The Navy explains that, in its view, amendments 2 and 5 were material, however, and therefore had to be acknowledged.

Specifically, the Navy explains that amendment 2 changed the healthcare specialties identified in several of the lots for the initial 8-month period. However, Chesapeake's proposal included pricing for the revised lots set forth in amendment 2. As a result, the Navy concluded that Chesapeake constructively acknowledged amendment 2 by using the revised lots in its proposal. Supp. AR at 7. Similarly, the Navy explains that amendment 5 added two new MTF locations to the contract requirements. Chesapeake's proposal included a discussion of the firm's approach to staffing both of the new locations, and therefore the Navy concluded that the firm had constructively acknowledged that amendment as well. *Id.* Finally, with respect to Chesapeake's failure to complete DFARS § 252.247-7022, the Navy concluded that the provision should not have been included in the RFP, and Chesapeake's error in failing to respond to it was properly waived. *Id.* at 8.

The Navy further argues that after concluding that Chesapeake had constructively acknowledged each of the material amendments to the RFP, and after concluding that the provision at DFARS § 252.247-7022 should not have been included in the RFP, the agency only needed to confirm that Chesapeake's online representations and certifications were valid. It was this confirmation that the Navy concluded could be accomplished through clarifications. Since the Navy states that its communications with Chesapeake were merely a clarification, the agency argues that it was not required to open discussions with Kuhana-Spectrum. Supp. AR at 14.⁵

We agree with the Navy on both issues. First, we think that the Navy reasonably concluded that Chesapeake's proposal constructively acknowledged both of the material amendments to the RFP. As a general rule, an offeror's failure to acknowledge a material amendment renders the proposal unacceptable, and such

⁵ The Navy denies that it held substantive communications with Chesapeake, other than those described here. Supp. AR at 13-14. Nevertheless, in its comments on the supplemental agency report, Kuhana-Spectrum argues, without support, that the Navy had additional undisclosed communications, and infers that Chesapeake was given an unfair advantage by those actions. Protester's Supp. Comments at 7-9. Nevertheless, the protester does not meaningfully dispute the Navy's analysis of the amendments, and on the record here, the Navy's position that Chesapeake only needed to have constructively acknowledged amendments 2 and 5 in order to be acceptable was reasonable.

proposals may not form the basis for award. However, an amendment may be constructively acknowledged where the proposal includes the material items appearing only in the amendment. See, e.g., Language Servs. Assocs., Inc., B-297392, Jan. 17, 2006, 2006 CPD ¶ 20 at 6 (quotation constructively acknowledged amendment to RFQ).

Second, we agree with the Navy that it was proper to allow Chesapeake to correct the missing affirmation of its ORCA entries through a clarification. Offerors may be given the opportunity to clarify certain aspects of proposals without holding discussions. FAR § 15.306(a). Specifically, an agency may allow an offeror to correct missing representations and certifications through clarifications, and does not hold discussions by doing so. Doty Bros. Equip. Co., B-274634, Dec. 19, 1996, 96-2 CPD ¶ 234 at 2 n.1 (protest sustained where agency improperly rejected proposal based on failure to acknowledge immaterial amendment and failure to complete standard representations and certifications). Accordingly, the Navy did not hold discussions with Chesapeake, and was not required to hold discussions with Kuhana-Spectrum.

In conclusion, our review of the record supports the reasonableness of the evaluation and the Navy's subsequent selection decisions.

The protest is denied.⁶

Gary L. Kepplinger
General Counsel

⁶ Kuhana-Spectrum also argues that the best value judgments of the CO were unreasonable because Kuhana-Spectrum's evaluated price was lower than the awardees. In our view, the CO has provided a reasoned explanation for the award decision, including his decision not to award a contract to Kuhana-Spectrum, which was based on an evaluation that, as explained above, was also reasonable. Since the Navy's best value judgments were reasonable, the protester's disagreement provides no basis to sustain the protest.