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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: A² Group, Inc.

File: B-402829.2; B-402829.3

Date: December 8, 2010

James F. Nagle, Esq., and Anne Marie Tavella, Esq., Oles Morrison Rinker & Baker, LLP, for the protester.

William L. Bruckner, Esq., Bruckner & Walker LLP, for West Construction, Inc., an intervenor.

Stacy North Willis, Esq., Charlma Quarles, Esq., and Phillipa L. Anderson, Esq., Department of Veterans Affairs, for the agency.

Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's various challenges to the agency's identification of multiple weaknesses in protester's technical proposal constitute mere disagreements with the agency's judgments and provide no bases for sustaining the protest.
 2. Request for reimbursement of costs incurred in connection with prior protest that was dismissed due to the agency's corrective action is denied where prior protest was not clearly meritorious.
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DECISION

A² Group, Inc. (AGI), of Miami, Florida, protests the Department of Veterans Affairs' award of a contract to West Construction, Inc., of Lake Worth, Florida, pursuant to request for proposals (RFP) No. VA-101-10-RP-0037 for construction services in connection with gravesite expansion at the Puerto Rico National Cemetery in Bayamon, Puerto Rico. AGI protests the agency's evaluation of multiple weaknesses in AGI's technical proposal. AGI also requests that we recommend reimbursement of the protest costs AGI incurred in connection with a prior protest regarding this procurement.

We deny the protest and the request for reimbursement.

BACKGROUND

In January 2010, the agency published the solicitation at issue, seeking proposals to perform various construction-related activities in connection with planned improvements to, and expansion of, the Puerto Rico National Cemetery.¹ The solicitation advised offerors that award would be made on the basis of the proposal offering the best value to the government, and it identified the following technical evaluation factors, listed in descending order of importance: construction management, past performance, schedule, and small business participation. RFP at 9. The solicitation stated that “[a]ll technical factors, when combined, are significantly more important than cost or price,” but it also advised that, “if the technical proposals are essentially equal, the award will be made on the basis of lowest price.” *Id.* at 9, 10.

With regard to the most important evaluation factor, construction management, the solicitation established two subfactors: personnel experience and technical/management approach. Pursuant to the personnel experience subfactor, offerors were required to provide specific information for key personnel, including disclosure of “what percentage of the individual’s time would be committed to the project during the construction phases.” *Id.* at 14. Pursuant to the technical/management approach subfactor, the solicitation provided that offerors “shall demonstrate the following. . . Project Delivery Philosophy--Include expectation statements concerning elements for Successful Partnering: Communication,

¹ Specifically, the solicitation stated that the contractor

shall furnish all labor, equipment and materials to prepare the Project site for cemetery operations, including, but not limited to, all general construction, general alterations, general demolition, clearing and grubbing, roads, paving, walks, site furnishings, signage, grading, re-grading of existing burial sections, drainage, utility systems, earthwork, landscaping, irrigation, telecommunications, security system, CCTV [closed circuit television], construction of new buildings (2 new committal shelters, a new public information center and a new maintenance complex), selective demolition and renovation/alterations to existing administration building, general mechanical and electrical work, preparation of gravesites and installation of, 6,992 preplaced, double-depth precast concrete crypts, 370 in-ground cremains, 2,910 columbarium niches and certain other items . . . as required by the drawings, specifications, and other referenced documents.

RFP at 1.

Commitment and Conflict Resolution.”² Id. at 14. Under the technical/management approach subfactor, offerors were required to demonstrate that they and/or their various subcontractors had “at least 3 years experience” with various specific types of construction projects, and offerors were further advised that “[p]referably, the landscape [sub]contractor and the irrigation [sub]contractor are one and the same.” Id. at 15.

With regard to the schedule evaluation factor, the solicitation required that proposals include a project schedule in the format of a “time-scaled bar (Gantt) chart,” further requiring that the schedule be broken down into “detailed tasks and critical milestones with linkages between tasks.” The solicitation required that the schedule “shall specify allowances for bad weather, days of the week and hours of operation during each phase of the work, and the percentage of contract completion that will be achieved at the end of each month of the contract period.” Id. at 15-16.

In March 2010, the agency received 14 proposals, including the proposals of AGI and West Construction. In evaluating these proposals, the agency employed a numerical evaluation system with a maximum technical score of 100 points, dividing the maximum score between the technical evaluation factors as follows: 25 possible points for personnel experience; 25 possible points for technical/management approach; 22 possible points for past performance; 18 possible points for schedule; and 10 possible points for small business participation. In evaluating proposals, the agency assigned “strengths” and “weaknesses” to each proposal, then considered those assessments in determining the appropriate score for each proposal under each evaluation factor. The proposals were evaluated with the following results:

² Under the heading “Partnering,” the solicitation further stated as follows:

(a) In order to most effectively accomplish this contract, the Government proposes to form a cohesive partnership with the Contractor and its subcontractors. . . .

(b) This partnership will be totally voluntary. The focus of partnering is to build cooperative relationships with the private sector and avoid or minimize disputes and to nurture a more collaborative ethic characterized by trust, cooperation and teamwork. Partnering is defined as the creation of a relationship between the owner and contractor that promotes mutual and beneficial goals. It is a non-contractual, but formally structured agreement between the parties.

RFP at 7.

	Constr. Mgmt.		Past Perf. (22)	Sch. (18)	Sm. Bus. (10)	Total Score for Technical Factors (100)	Price
	Pers. Exp. (25)	Tech./ Mgmt. (25)					
Offeror A	23.00	21.30	22.00	16.80	10.00	93.10	\$22,491,000
Offeror B	22.60	21.60	22.00	15.80	6.00	88.00	\$24,330,000
West	22.00	23.60	22.00	16.80	3.30	87.70	\$18,972,199
Offeror C	23.50	22.00	22.00	13.60	6.00	87.10	\$26,157,000
Offeror D	23.60	22.60	22.00	14.80	3.30	86.30	\$27,480,528
Offeror E	21.40	21.20	22.00	15.60	6.00	86.20	\$27,203,916
AGI	21.50	21.00	22.00	15.20	6.00	85.70	\$24,162,000
Offeror F	16.40	16.30	22.00	14.00	6.00	74.70	\$28,091,900
Offeror G	14.60	17.80	22.00	13.60	6.00	74.00	\$33,359,511
Offeror H	15.70	19.10	22.00	10.80	6.00	73.60	\$31,207,447
Offeror I	17.80	14.90	22.00	12.00	3.30	70.00	\$19,719,000
Offeror J	14.70	16.00	22.00	6.80	6.00	65.50	\$22,990,000
Offeror K	17.40	18.80	22.00	5.80	1.10	65.10	\$18,010,572
Offeror L	15.10	9.30	22.00	0.00	3.30	49.70	\$31,749,999

Agency Report (AR), exh. 5, Source Selection Memo, at 8, 17.

In assigning AGI’s technical proposal a score of 85.70, the agency identified various weaknesses in the proposal. For example, with regard to construction management, under the personnel experience subfactor, the agency assigned a weakness, stating: “[c]ould not determine [percentage] % commitment for some key personnel.” First Agency Report (First AR), Tab 5, Technical Evaluation Summary, at 13. Similarly, under the technical/management approach subfactor, the agency assigned a weakness on the basis that AGI’s proposal contained only “[m]inimal description concerning partnering,” adding that AGI’s proposal “[m]isses the point on partnering commitment, nothing on conflict resolution.” *Id.* The agency similarly assessed a weakness to AGI’s proposal under the technical/management approach subfactor on the basis that “[i]rrigation and landscape contractors [are] not one and the same as desired.” *Id.* Finally, under the schedule evaluation factor, the agency assessed multiple weaknesses, including “[s]chedule does not provide for weather delays,” “[d]oes not note [percentage] of work each month,” “no crypt testing,” “[n]o

inspection-punchlist time frames or close out timeframes,” and “[n]o weeks/work schedule hours.”³ Id. at 14.

The agency concluded that the four highest-rated technical proposals—that is, the proposals submitted by Offerors A through C and West Construction—were superior to all of the other proposals, were technically equal among themselves, and met all of the solicitation requirements with no need for further revisions; accordingly, consistent with the terms of the solicitation, the agency concluded that discussions would not be conducted.⁴ Thereafter, based on the determination that these four proposals were essentially equal, and were technically superior to the remaining proposals, the agency selected West Construction’s proposal for award on the basis of its low price (\$18,972,199).

On April 19, the agency notified the unsuccessful offerors, including AGI, of the source selection decision. On April 27, upon request, AGI received a written debriefing in which the agency identified the various evaluated weaknesses contained in AGI’s proposal. On May 7, AGI filed its first protest, challenging the agency’s technical evaluation. On June 7, the agency submitted a report responding to that protest, providing the contemporaneous record regarding evaluation of AGI’s proposal, and acknowledging two errors in the evaluation.⁵ On June 17, AGI filed its comments responding to the agency report and raising supplemental protest assertions, arguing, among other things, that, notwithstanding its substantially higher price (\$24,162,000), a proper evaluation of AGI’s technical proposal should have resulted in an award to AGI.

On July 8, the agency advised our Office that it intended to take corrective action by reevaluating the proposals and making a new source selection decision.

³ The above description of weaknesses is not a comprehensive list of all the evaluated weaknesses in AGI’s proposal; rather, for purposes of this decision, we have only listed representative examples. Nonetheless, since AGI has protested virtually every one of the multiple weaknesses assigned by the agency, our resolution of this protest is based on our review and consideration of AGI’s entire proposal and the entire evaluation record.

⁴ The solicitation advised offerors that “the Government may make award without discussions, clarifications or any contact concerning the proposals received.” RFP at 5.

⁵ Specifically, the agency stated that, upon review, it determined that it had incorrectly assessed a weakness in AGI’s proposal on the basis that its irrigation and landscape subcontractors were not one and the same, and had incorrectly assessed a weakness for “no crypt testing” in AGI’s proposed schedule. See First AR, exh. 1, Contracting Officer’s Statement, at 2.

Accordingly, we dismissed AGI's protest on the basis of the agency's pending corrective action. A² Group, Inc., B-402829, July 14, 2010.

Thereafter, the agency reevaluated the seven highest-rated proposals.⁶ The reevaluation resulted in minor changes to the offerors' technical scores;⁷ following the agency's reevaluation, the proposals were rated as follows:

	Constr. Mgmt.					Total Score for Technical Factors (100)	Price
	Per. Exp. (25)	Tech./ Mgmt. (25)	Past Perf. (22)	Sch. (18)	Sm. Bus. (10)		
Offeror A	23.00	21.30	22.00	16.80	10.00	93.10	\$22,491,000
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AGI	21.50	21.50	22.00	15.40	6.00	86.40	\$24,162,000
Offeror D	23.60	22.60	22.00	14.80	3.30	86.30	\$27,480,528

AR, exh. 5, Source Selection Memo, at 9,17.

Based on the reevaluation, and after considering the strengths and weaknesses, assigned to each proposal, the source selection authority (SSA) concluded that the seven technical proposals listed above, including AGI's, were essentially equal.⁸ Id. at 16. Specifically, the SSA's source selection memo states:

The technical advantages are minimal between the proposals. Therefore, based on my analysis of the technical proposals, I have determined that none of them offer a solution technically superior to

⁶ In the initial evaluation, AGI's technical proposal was ranked seventh; the technical scores of the remaining offerors were substantially lower than the scores of the seven highest-rated technical proposals.

⁷ Specifically, the agency increased AGI's score by 0.5 points under the technical/management subfactor, and by 0.2 points under the schedule evaluation factor. In reevaluating all of the proposals, the agency also made a minor correction to Offeror E's score.

⁸ The SSA's source selection memo contains a comprehensive summary of the particular strengths and weaknesses contained in each offeror's proposal. AR, exh. 5, Source Selection Memo, at 11-16.

the others. Thus, I consider [the] seven proposals basically equal. In evaluating the technical proposals, only minor differences were found.

Id.

Thereafter, West Construction's proposal was again selected for award, based on its substantially lower price. This protest followed.

DISCUSSION

Technical Evaluation

As in its initial protest, AGI again challenges the agency's evaluation of AGI's technical proposal, asserting that the agency was unreasonable in its assessment of virtually each and every weakness the agency identified.

The evaluation of an offeror's proposal is a matter within the agency's discretion, and this Office will not reevaluate proposals; rather, we will review an agency's evaluation to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria. See, e.g., Rome Research Corp., B-291162, Nov. 20, 2002, 2002 CPD ¶ 209 at 4. A protester's disagreement with an agency's judgments does not render the evaluation unreasonable. Id. As summarized below, we have reviewed the entire record and find no merit in any of AGI's allegations.

First, AGI challenges the agency's assessment of a weakness under the most important technical evaluation factor, construction management (personnel experience subfactor), where the agency concluded that it "could not determine [the percentage] commitment for some key personnel."⁹ AR, exh. 5, Source Selection Memo, at 15. The record shows that the agency had concerns about the portion of time several of AGI's five key personnel—including the project manager, construction superintendent, and building superintendent—would commit to this contract. Id. AGI asserts that the agency's concern, and the assignment of a weakness as a result, were unreasonable due to the agency's alleged failure to "consider relevant and responsive information set forth in [AGI's] proposal." Protest at 13. We disagree.

With regard to AGI's proposed project manager, AGI refers to the portion of its proposal which states that the project manager "will be responsible for [deleted]," "will provide [deleted]," and "[deleted]." AR, exh. 4, AGI's Proposal, at 3. Based

⁹ As discussed above, the solicitation specifically required that offerors provide certain information regarding key personnel, including disclosure of "what percentage of the individual's time would be committed to the project during the construction phases." RFP at 14.

primarily on these portions of its proposal, AGI asserts that “it is difficult to understand how the VA could not determine the [percentage] commitment [of the project manager],” maintaining that “such commitment is clearly set forth in [AGI’s] proposal.” AGI’s Comments at 5. AGI similarly expresses dismay that the agency failed to ascertain that AGI’s proposed [deleted] and [deleted] would be assigned full time to this project because the proposal stated, among other things, that each would “conduct[] daily inspections.” Id.

Based on our review of the record, including AGI’s entire proposal and the explicit solicitation requirement to disclose the percentage of time each key personnel would commit to this project, we are at a loss to understand how AGI believes that its proposal meaningfully addressed this solicitation requirement, or that the necessary commitments are “clearly set forth” anywhere in AGI’s proposal. More specifically, none of the portions of the proposal on which AGI relies comply with the solicitation requirement to disclose the percentage of time these key personnel will commit to the project. AGI’s protest challenging the assessment of a weakness in this regard is wholly without merit.

Next, AGI complains that it was unreasonable for the agency to assign a weakness to AGI’s proposal related to partnering. AGI first asserts that it was improper for the agency’s evaluation to even consider this issue, since the solicitation provided that the partnership will be “totally voluntary.” AGI’s Comments at 6; see RFP at 7. AGI is mistaken. While any partnerships that may be formed during contract performance are voluntary, the requirement that proposals “shall demonstrate” the offeror’s philosophy regarding partnerships, along with the specific requirement to “include expectation statements” concerning the elements of successful partnering, specifically including “conflict resolution,” were not. See RFP at 14. Accordingly, the agency properly considered the extent to which AGI’s proposal complied with these explicit solicitation requirements regarding partnerships in performing its evaluation.¹⁰

AGI next asserts that, even if the agency’s consideration of AGI’s compliance with these solicitation requirements was proper, the agency’s assignment of a weakness on the basis that AGI’s proposal had only a “[m]inimal description concerning partnering” and “nothing on conflict resolution” was unreasonable. Comments at 6. We disagree.

¹⁰ To the extent AGI is complaining that the solicitation requirements themselves are improper, its protest is not timely filed. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2010); The Law Co., B-248631, Sept. 10, 1992, 92-2 CPD ¶ 165 at 3.

The record shows that AGI's entire response to the solicitation requirements at issue consisted of the following two sentences:

[deleted].

AR, exh. 4, AGI's Proposal, at 15. Upon review of this record, we find nothing unreasonable in the agency's conclusions that AGI's response to the solicitation requirements was "minimal," and that it contained nothing of substance regarding conflict resolution. Accordingly, we find no basis to question the agency's assessment of a weakness for AGI's failure to meaningfully comply with these solicitation requirements. AGI's complaints constitute mere disagreement with the agency's judgment and provide no bases for sustaining its protest.

Next, AGI complains that the agency improperly identified various weaknesses in AGI's proposal with regard to the schedule evaluation factor. Specifically, in addition to the agency's erroneous evaluation with regard to "no crypt testing," AGI asserts that it was also unreasonable for the agency to have assessed weaknesses on the bases that "[s]chedule does not provide for weather delays," "[d]oes not note [percentage] of work each month," "[n]o inspection-punchlist time frames or close out timeframes," and "[n]o weeks/work schedule hours." Protest at 8-9; AGI's Comments at 9-10. We disagree.

For example, the solicitation provided that the offeror's proposed schedule "shall specify . . . the percentage of contract completion that will be achieved at the end of each month . . . based upon the Offeror's cost proposal." RFP at 16. While AGI asserts that various portions of its proposal, including its reliance on [deleted] should have been viewed as complying with this requirement, AGI's Comments at 9, our review does not support this assertion. To the contrary, nothing to which AGI points in its proposal persuades this Office that it was unreasonable for the agency to conclude that AGI's schedule failed to specify the percentage of contract completion that will be achieved each month based upon AGI's cost proposal. We have reviewed all of AGI's challenges to the agency's final assignment of weaknesses under the schedule evaluation factor and find no merit in them.

Finally, AGI complains that the agency's reevaluation of its proposal with regard to the agency's initial errors regarding AGI's proposed irrigation and landscape contractors, and its schedule for crypt testing, should have resulted in an increase of "2-4 points," rather than the increase of 0.7 points that it actually received. Protest at 4.

Here, the solicitation provided that, pursuant to the technical/management approach subfactor of the construction management factor, offerors were required to discuss the four following topics: project delivery philosophy; quality assurance/quality control plan; project organizational chart/narrative; and capability to perform. Under the third topic, project organizational chart/narrative, the solicitation further

listed seven requirements regarding the necessary experience the offeror and/or its various subcontractors must possess. One of these seven requirements stated: “Preferably the landscape contractor and the irrigation contractor are one and the same and have at least 3 years experience on landscaping projects with at least 50 acres in size.” RFP at 15.

In its initial evaluation, the agency assigned AGI’s proposal a score of 22 points out of a possible 25 points under the technical/management approach subfactor; that initial score incorporated the agency’s erroneous conclusion that AGI’s landscape and irrigation subcontractors were not one and the same. First AR, Tab 5, Technical Evaluation Summary, at 13. Upon reevaluation, the agency deleted this weakness and added 0.5 points to AGI’s score to reflect that correction. AR, exh. 5, Source Selection Memo, at 9. As noted above, the agency’s preference that the landscaping and irrigation subcontractors be one and the same was only a portion of one of seven requirements, and the seven requirements, in turn, made up only one of four topics that offerors were required to address under the technical/management subfactor. In the context of the numerous matters for consideration under the technical/management subfactor, AGI has failed to establish that the agency’s reevaluation of this one issue was unreasonable or should have resulted in a greater increase to AGI’s score.

Similarly, in its initial evaluation under the schedule evaluation factor, the agency assigned AGI’s proposal a score of 15.2 points out of a maximum score of 18 points; this score incorporated the agency’s erroneous assessment of “no crypt testing.” First AR, Tab 5, Technical Evaluation Summary, at 14. Upon reevaluation, the agency deleted this weakness and increased AGI’s score by 0.2 points. AR, exh. 5, Source Selection Memo, at 9. As noted above, “no crypt testing” was only one of several weaknesses the agency identified under the schedule evaluation factor and, considering all of the combined weaknesses, the agency still deducted only 2.8 points from the maximum score possible for this factor. As discussed above, we have considered and rejected AGI’s complaints regarding the agency’s assessment of the other schedule weaknesses. On this record, we do not find the agency’s limited increase to AGI’s score under the schedule evaluation factor to be unreasonable.¹¹

¹¹ Further, with regard to the agency’s correction of its initial evaluation errors, we note that, even if AGI’s technical score had been increased by 4 points to account for the agency’s combined errors—the maximum amount to which AGI asserts it was entitled—AGI’s technical rating would still have been no higher than that of Offeror A, and Offeror A’s price (\$22,491,000) was lower than AGI’s price (\$24,162,000). Accordingly, even if AGI were correct regarding the proper increase flowing from the agency’s correction of its initial evaluation errors, which it is not, AGI would not have been in line for award.

In summary, we have reviewed all of AGI's challenges to the agency's evaluation of its technical proposal, including the specific examples discussed above, and conclude that none of them provide a basis for sustaining the protest.¹²

Reimbursement of Protest Costs

AGI also requests that we recommend that the agency reimburse AGI for the costs it incurred in connection with its initial protest since, following submission of an agency report in that matter, the agency elected to take corrective action by reevaluating the proposals. We decline to make such recommendation.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e), provide that we may recommend that an agency pay protest costs where the agency decides to take corrective action in response to a protest. This does not mean, however, that we will recommend cost reimbursement in every case in which an agency takes corrective action; rather, such recommendation is appropriate only where an agency unduly delays corrective action with regard to a clearly meritorious protest. Thus, as a prerequisite to our recommending reimbursement of protest costs where a protest has been dismissed based on the agency's corrective action, it must be clear that the agency's corrective action was unduly delayed in the face of a clearly meritorious protest—that is, a protest presenting issues for which there were no defensible legal positions. See PADCO, Inc.—Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3; Yardney Technical Prods., Inc., B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4.

Here, notwithstanding the agency's decision to reevaluate proposals after submitting a report defending against AGI's initial protest, we do not view that protest as clearly meritorious. Specifically, AGI's initial protest, similar to its current protest, challenged the agency's assessment of virtually each and every weakness identified by the agency. As discussed above, with the exception of the two errors the agency acknowledged, none of AGI's complaints were meritorious. Further, even with regard to the two errors, which the agency corrected in its reevaluation, if AGI had received the maximum score to which it asserts it was entitled, it would still not have been in line for award. Accordingly, we decline to recommend reimbursement of the costs AGI incurred in connection with its initial protest.

The protest and reimbursement request are denied.

Lynn H. Gibson
Acting General Counsel

¹² We have also considered, and rejected, AGI's assertion that the agency's source selection decision failed to recognize that technical factors were more important than price in this procurement.