



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Kola Nut Travel, Inc.

File: B-296090.4

Date: August 25, 2005

Bryant S. Banes, Esq., for the protester.

Josephine L. Ursini, Esq., for Alamo Travel Group and Wingate Travel, Inc., intervenors.

Lt. Col. Frank A. March, Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's contemporaneous evaluation record reasonably supports the agency's evaluation of protester's technical proposal as merely "acceptable."
 2. Where awardees' consultant will earn a fee based on profits earned during the awardees' performance of the contract, and there is no evidence of improper influence on government officials regarding the contract award decisions--rather, the record reflects that award was made on the basis of the awardees' significantly lower prices and higher rated technical proposals--the agreement between the awardees and the consultant does not violate the statutory and regulatory limitations on contingent fees.
-

DECISION

Kola Nut Travel, Inc. protests the Department of the Army's award of contracts to Alamo Travel Group and Wingate Travel, Inc. for travel management services under request for proposals (RFP) No. W91-QUZ-04-R-0003. Kola Nut maintains that the agency failed to properly evaluate its technical proposal and that the awardees' proposals reflect improper contingent fee agreements.

We deny the protest.

BACKGROUND

The Army published the solicitation at issue here in February 2004, seeking proposals to provide travel management and related services for Department of Defense (DOD) travelers whose duty stations are within several specified travel areas.¹ The solicitation contemplated separate contract awards for each of the specified travel areas; accordingly, the agency performed separate evaluations and source selection decisions with regard to each area. All travel areas were set aside for small businesses, and offerors were permitted to submit proposals for any or all areas. Kola Nut's protest challenges the agency's contract awards to Alamo for travel area 67, and to Wingate for travel areas 72 and 82.

The solicitation advised offerors that proposals would be evaluated on the basis of the following factors, listed in descending order of importance: technical,² price,³

¹ The solicitation related to travel from locations other than military entrance processing stations (MEPS), that is, from non-MEPS locations. At the same time, the agency issued another solicitation, W91-QUZ-04-R-0007, which related to travel from MEPS locations; awards under both of these solicitations have been the subject of previous Kola Nut protests. See Kola Nut Travel, Inc., B-296090, March 16, 2005; Kola Nut Travel, Inc., B-296090.2, B-296090.3, June 17, 2005, 2005 CPD ¶ _____. In its protest submissions here, Kola Nut has repeated various arguments previously made in connection with its prior protests, characterizing those repeated arguments as requests for reconsideration. Our Bid Protest Regulations provide that a request for reconsideration must show that our prior decision contained either errors of fact or law or present information not previously considered which warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a) (2005). Kola Nut's submissions, which consists of repetition of arguments we have previously rejected, fail to identify any errors of fact or law, nor does Kola Nut present new information that is material to our prior rejection of its arguments; accordingly Kola Nut has not provided a basis for reconsideration of our prior decisions.

² With regard to the technical evaluation factor, the solicitation provided that the agency would consider the following: understanding the requirements; feasibility of approach; and completeness. RFP at 161. Since the solicitation at issue here contemplated travel service from dispersed, non-MEPS locations, the solicitation advised that evaluation would include an assessment of the offeror's proposed approach to "servicing unique needs of multiple customers from a central location." Id.

³ Offerors were required to propose fixed transaction fees, point-of-sale fees, and fixed prices for certain required reports. Section M.4.3 of the solicitations further provided, "The proposed fees will be evaluated as outlined herein," thereafter stating that the proposed fees and prices "will be multiplied by the [estimated quantity
(continued...)]"

and performance risk.⁴ With regard to proposed price, the solicitation recognized that travel service contractors may receive airline commissions, as well as utilization fees from global distribution system (GDS) providers.⁵ Kola Nut acknowledges that each offeror's proposed price is significantly affected by the level of commissions or utilization fees that the offeror is able to negotiate with the airlines and GDS providers.⁶ Kola Nut Submission (June 22, 2005) at 3.

On or before the specified closing dates, proposals were submitted for the travel areas at issue by several offerors including Alamo, Wingate, and Kola Nut.⁷ The prices proposed by Alamo and Wingate were considerably lower than the prices proposed by Kola Nut. In this regard, Alamo and Wingate advised the agency that they were associated with a group of travel agencies who, with the common assistance of a consultant, Mr. Alvin Chisik,⁸ had negotiated higher commissions and utilization fees from the airlines and GDS providers based on the consolidated higher volume of business that the group of companies is expected to provide to the airlines and GDS providers.

(...continued)

provided for each line item] to arrive at the overall total estimated contract value" RFP at 162-63.

⁴ With regard to performance risk, the solicitation stated: "The Government will conduct a performance risk assessment based on the quality, relevancy, and currency of the Offeror's current and past performance . . . as it relates to the probability of successful accomplishment of the required services." RFP at 162.

⁵ A GDS is defined as an "[o]n-line, transaction processing system with access to computer-based carrier reservation systems capable of providing lowest cost fare evaluations, reservations, ticketing, related travel, and accessorial services." RFP § J, at 5.

⁶ The issue of whether such fees and commissions are likely to continue in the travel industry has been a subject of controversy before our Office for several years. See, e.g., CW Gov't Travel, Inc. d/b/a/ Carlson Wagonlit Travel; American Express Travel Related Serv. Co., Inc., B-283408, B-283408.2, Nov. 17, 1999, 99-2 CPD ¶ 89 (protests asserting that solicitation incorporating commission-based pricing of travel services was contrary to customary commercial practice).

⁷ The agency received a total of 12 proposals for travel area 67, 10 proposals for travel area 72, and 9 proposals for travel area 82. Contracting Officer's Statement (June 10, 2005) at 4.

⁸ Kola Nut has previously identified Mr. Chisik as "the Society of Government Travel Professionals 2003 Person of the Year." Kola Nut Protest Submission (March 28, 2005) at 3.

The agency evaluated the proposals under each of the stated evaluation factors with the following results:

Travel Area 67

	Alamo	Kola Nut
Technical	Good	Acceptable
Performance Risk	Very Low	Very Low
Price	\$1,239,578	\$1,815,401

Agency Report, Tab 59, at 2, 4.

Travel Area 72

	Wingate	Kola Nut
Technical	Good	Acceptable
Performance Risk	Very Low	Very Low
Price	\$1,108,573	\$2,149,632

Agency Report, Tab 62, at 2-4.

Travel Area 82

	Wingate	Kola Nut
Technical	Good	Acceptable
Performance Risk	Very Low	Very Low
Price	\$380,821	\$1,494,530 ⁹

Agency Report, Tab 63, at 2-3.

Based on the significantly lower prices offered by Alamo and Wingate, along with their equal or higher ratings under non-price factors, the agency selected the proposals submitted by Alamo and Wingate for contract awards. Kola Nut's protest followed.

⁹ With regard to travel area 82, Kola Nut submitted an "alternate proposal" which the agency evaluated as offering a price "as much as" 10 percent lower than that stated above. Agency Report, Tab 63, at 3. Accordingly, the record indicates that Kola Nut's "alternate proposal" was evaluated as offering a price of approximately \$1,345,077 (\$1,494,530 minus \$149,453)—still more than three times higher than the price offered by Wingate.

DISCUSSION

Kola Nut first complains, similar to its complaints in previous protests, that the agency's evaluation of proposals "was improper and not in accordance with procurement regulations." Kola Nut Protest (May 18, 2005) at 1. More specifically, Kola Nut asserts that the agency's evaluation of Kola Nut's proposal as only "acceptable" under the technical evaluation factor was improperly based on the agency's assessment that Kola Nut had failed to adequately address its technical approach to servicing the unique needs of multiple customers from a central location, and that the agency's criticism of Kola Nut's proposal under the non-MEPS solicitation was "inconsistent" with the fact that the agency had not similarly criticized Kola Nut's proposal responding to the MEPS solicitation.

As discussed above, the solicitation at issue here related to travel from non-MEPS locations. While travel under the simultaneously-issued MEPS solicitation would frequently entail travelers departing from the same origin and arriving at the same destination via shared transportation, such uniformity was not anticipated for travelers coming from non-MEPS locations. Accordingly, as noted above, the non-MEPS solicitation specifically advised offerors that proposals would be assessed with regard to the offerors' reliance on a central location for "servicing unique needs of multiple customers," RFP at 161; the MEPS solicitation did not have a similar provision.

The record shows that, during discussions conducted in connection with the proposals submitted in response to the non-MEPS solicitation (the solicitation at issue here), the agency specifically sought information from Kola Nut regarding its approach to servicing the unique travel requirements contemplated under that solicitation and that Kola Nut's response was inadequate. Specifically, the agency's contemporaneous documentation supporting its evaluation of Kola Nut's proposal under the technical evaluation factor states:

Offeror's entire discussion illustrates Offeror still interprets this subfactor to apply to travelers (individual or groups) departing the same origin and arriving at the same destination via shared transportation (e.g., the same flight or same train). Offeror appears not to understand that this subfactor actually pertains to having capability to service multiple travelers many of whom may have differing travel needs from a central location (e.g., a singular staffed office or a central call center). Multiple travelers departing same origin/arriving same destination via shared transportation likely would be a purely random event and be the exception rather than the rule.

Agency Report, Tab 58, Final Technical Report, at 4.

In pursuing this protest, Kola Nut has not explained why the agency's concerns regarding the unique requirements of the non-MEPS solicitation were invalid or unreasonable. Indeed, it appears that Kola Nut's assertion that the agency's evaluations under the two solicitations were "inconsistent" reflects an ongoing failure by Kola Nut to discern the differing requirements under the two solicitations. On this record, we find no basis to question the agency's evaluation of Kola Nut's technical proposal as merely "acceptable."

Next, Kola Nut maintains that "the contracting agency's evaluation of price and performance risk [of the awardees' proposals] did not appropriately consider the price and performance risk associated with many offerors' assumptions regarding incentives." Kola Nut Protest Submission (May 18, 2005) at 2. In this regard, Kola Nut continues to complain, as it has under previous protests, that the fee paid to the consultant who negotiated the awardees' airline commissions and GDS utilization fees constitutes a prohibited "contingent fee" and creates performance risks.¹⁰ As discussed in our previous decisions, Kola Nut's perception of what constitutes a prohibited contingent fee is flawed.

Section 2306(b) of title 10, United States Code, places certain limitations on obtaining contracts under "contingent fee" arrangements. However, the purpose of this limitation, as implemented by Federal Acquisition Regulation (FAR) subpart 3.4, is to prevent the attempted or actual exercise of improper influence by third parties over the federal procurement system. Puma Industrial Consulting v. Daal Assocs., Inc., 808 F.2d 89 (2d Cir. 1987); Quinn v. Gulf & Western Corp., 644 F.2d 89 (2d Cir. 1981); E&R, Inc.--Claim for Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 3-4; Howard Johnson Lodge--Recon., B-244302.2, Mar. 24, 1992, 92-1 CPD ¶ 305. We have held that the prohibition applies only to situations where an agent agrees "to solicit or obtain" a contract from a procuring agency. Bertsch Constr., B-253526, Aug. 25, 1993, 93-2 CPD ¶ 122. The fact that an agent's fee is contingent upon the contractor's successful performance of the contract, or even upon receiving the contract award, is not sufficient, by itself, to bring a fee agreement under the contingent fee prohibition; rather, the regulation contemplates a specific demonstration that an agent is retained for the express purpose of contacting government officials, where such contact poses a threat of the exertion of improper influence to obtain

¹⁰ To the extent Kola Nut is arguing that the agency failed to properly consider the alleged risk associated with the consultant fee agreement under the solicitation's performance risk evaluation factor, its arguments are contrary to the specific terms of the solicitation. As noted above, the solicitation expressly advised offerors that proposals would be evaluated under the performance risk factor on the basis of the offerors' "current and past performance." RFP at 163-64. Kola Nut has not identified any aspect of the awardees' current or past performance that the agency failed to consider at the time the evaluation was performed.

government contracts. Convention Mktg. Servs., B-245660.3, B-246175, Feb. 4, 1992, 92-1 CPD ¶ 144.

Here, Kola Nut acknowledges that the consultant's fee agreement is calculated as a portion of the profit resulting from the awardees' performance of the contract—not in exchange for the awardees' receipt of contract awards. Kola Nut Protest Submission (Mar. 28, 2005) at 3. Further, the record is devoid of any evidence that the challenged awards reflect any improper influence on government officials. To the contrary, as shown above, the agency selected proposals that offered significantly lower prices and were evaluated equal to, or higher than, Kola Nut's proposal with regard to the non-price evaluation factors. On this record, Kola Nut's assertion that the contracts incorporate a prohibited contingent fee agreement is without merit.

Next, Kola Nut asserts that "[t]here is a latent agency bias against small businesses" and that the solicitation at issue here "created a system which encourages a conglomerate led by [the awardees' consultant] to negotiate special rates and contingent agreements, thus destroying any small business identity." Kola Nut Protest (May 18, 2005) at 2. We believe this essentially constitutes a challenge to the size status of the awardees, an issue not for consideration by our Office. In this regard, the Small Business Act, 15 U.S.C. § 637(b)(6), gives the Small Business Administration, not our Office, conclusive authority to determine matters of small business size status for federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1); Randolph Eng'g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39 at 3.

Finally, in a "supplemental protest" filed with our Office on June 22, Kola Nut, for the first time, asserts that the discussions the agency conducted with Kola Nut were less than meaningful in that Kola Nut was not specifically advised that its proposal was priced substantially higher than that of the awardees. Kola Nut Protest Submission (June 22, 2005) at 3. Although this issue was not timely presented,¹¹ we briefly respond as follows.

As Kola Nut has, itself, expressly acknowledged, an offeror's proposed price is significantly affected by the level of airline commissions and GDS utilization fees it is able to negotiate. The record is undisputed that the commissions and utilization fees

¹¹ Kola Nut first raised this issue in a submission to our Office dated June 22, 2005; however, it was notified of the awardees' prices at the time award was made, several months prior to the June 22 submission and, of course, Kola Nut previously knew of all the discussions the agency had conducted with Kola Nut during the procurement. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

negotiated by the awardees were significantly greater than those that Kola Nut was able to negotiate. In one of its first submissions to our Office, Kola Nut stated as follows:

[The awardees' association with Chisik and their ability to negotiate higher GDS utilization fees] enables agencies such as Alamo to have an unfair advantage over other small businesses. . . . Given this opportunity, Alamo Travel is able to offer a pricing that would not even cover staffing at this [Kola Nut's] location.

Kola Nut Protest Submission (March 14, 2005) at 1.

Although agencies are required to advise offerors that their prices are unreasonably high, the record, as discussed above, shows that such was not the case here. Rather, the record is clear that the agency believed Kola Nut's proposed prices were reasonable--given the lower level of commissions and utilization fees Kola Nut had been able to negotiate. Accordingly, the agency had no obligation to advise Kola Nut that, as compared to other competitors, its price was too high. See Hydraulics Int'l, Inc., B-284684, B-284684.2, May 24,

2000, 2000 CPD ¶ 149 at 17; MarLaw-Arco MFPD Mgmt., Apr. 23, 2003, 2003 CPD ¶ 85 at 6.

The protest is denied.¹²

Anthony H. Gamboa
General Counsel

¹² In its comments responding to the agency report, Kola Nut, for the first time, argued that the awardees' use of a common consultant to assist in preparation of their proposals in the multiple competitions for the various travel areas constituted improper collusive bidding. The record shows that Alamo and Wingate submitted competing proposals for some of the same travel areas, indicates that Chisik assisted Alamo and Wingate in preparing their proposals, and establishes that Chisik was "an authorized negotiator" for both of these companies, as well as other, competing offerors. See Contracting Officer's Statement (July 20, 2005), at 2. In responding to this matter, the contracting officer described the awardees' proposals as "virtually identical" and stated that their pricing was presented in a similar manner. *Id.* In this regard, the Federal Acquisition Regulation (FAR) § 3.303 provides: "Agencies are required . . . to report to the Attorney General any bids or proposals that evidence violation of the antitrust laws," and lists various practices and events that may evidence violations of the antitrust laws including submission of identical bids. This Office subsequently conducted a conference call with counsel for all of the parties to discuss the matter, expressing concern that some of the indicia of antitrust violations listed in FAR § 3.303 may exist. Following this Office's expression of concern, the agency advised our Office that it had referred the matter to the Department of Justice (DOJ) as contemplated by FAR § 3.303. Letter from Department of the Army to GAO (Aug. 10, 2005). In light of the agency's notification of DOJ regarding this matter, we do not further address Kola Nut's allegations.