



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: Detica

File: B-400523; B-400523.2

Date: December 2, 2008

Grace Bateman, Esq., and Daniel P. Wierzba, Esq., Seyfarth Shaw LLP, for the protester.

Alex D. Tomaszczuk, Esq., and M. Christie Hind, Esq., Pillsbury Winthrop Shaw Pittman, LLP, for CNA Corporation, an intervenor.

Michelle Anderson, Esq., Federal Emergency Management Agency, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that successful vendor has an impermissible “biased ground rules” type of organizational conflict of interest is denied, where record shows that, contrary to protester’s assertion, former agency official working for successful vendor did not participate in planning the acquisition or preparing the solicitation.
 2. Protest that agency evaluator was biased in favor of successful vendor is denied where protester presents no evidence to support its assertion and record shows that evaluator in question rated protester’s and successful vendor’s quotations consistently.
 3. Protest challenging agency’s technical evaluation of protester’s quotation is denied where record supports agency’s evaluation conclusions, including its criticisms of protester’s quotation.
 4. Protest challenging agency’s selection decision is denied where record reflects reasoned judgment of source selection official, and selection was consistent with terms of solicitation.
-

DECISION

Detica, of Arlington, Virginia, protests the award of a task order to CNA Corporation, of Arlington, Virginia, under request for quotations (RFQ) No. HSFEEM-08-Q-0034, issued by the Department of Homeland Security, Federal Emergency Management Agency (FEMA), for services in connection with developing the strategic

preparedness analysis reporting (SPAR) resource program. Detica asserts that CNA has an impermissible organizational conflict of interest (OCI), that one of the agency's evaluators was biased in favor of CNA, and that the agency misevaluated quotations and made an unreasonable source selection decision.

We deny the protest.

The RFQ contemplated the issuance of a labor hours task order against the successful vendor's Federal Supply Schedule (FSS) Mission Oriented Business Integration Services contract, for a base year, with three 1-year options, to develop the agency's SPAR resource program, essentially a research and analysis requirement. Firms were advised that the agency would issue the task order to the concern submitting the quotation deemed to be the "best value" based on price and the following non-price considerations (with specified evaluation weights not relevant here): proposed solution, past performance, and key personnel experience/qualifications. RFQ at D-10. The non-price factors, in combination, were significantly more important than price. RFQ at D-8. Quotations were to outline a technical solution to the requirement, including a statement of work (SOW) responding to the RFQ's statement of objectives (SOO); information relating to the firm's past performance; and resumes for identified key employees.

The agency received three quotations, including those of Detica and CNA. After evaluating the quotations, the agency assigned adjectival ratings (excellent, very good, acceptable, marginal or unacceptable) as follows:

Firm	Solution	Past Performance	Key Personnel	Overall	Price
CNA	Excellent	Excellent	Excellent ¹	Excellent	\$16,904,677
Detica	Very Good	Very Good	Very Good	Very Good	\$14,968,338
Firm A	Acceptable	Acceptable	Acceptable	Acceptable	\$9,731,059

AR, exh. K, at 2, exh. L, at 3. On the basis of these evaluation results, the agency concluded that CNA's quotation was the best value, and issued a task order to CNA.

¹ A table included in the agency's technical evaluation report identifies CNA's rating under the key personnel factor as very good, but the supporting narrative shows it actually received a rating of excellent. AR, exh. K, at 2, 3.

OCI AND BIAS

OCI

Detica asserts that CNA has an impermissible OCI, and that one of the agency's evaluators was biased in favor of CNA. In this connection, the protester asserts that an individual who formerly was the director of the agency's office of preparedness policy, planning, and analysis (PPPA), resigned from his position and subsequently was hired by CNA. The protester maintains that the former PPPA director was involved both in planning the subject acquisition, and in identifying funds for the acquisition. Detica maintains that this gives rise to an OCI that the agency did not identify or attempt to mitigate or neutralize. Detica also asserts that the former director maintained a professional relationship with one of the agency's technical evaluators; according to Detica, this resulted in bias in favor of CNA.

The Federal Acquisition Regulation (FAR) generally requires contracting officers to avoid, neutralize, or mitigate potential significant OCIs in order to prevent unfair competitive advantages or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504, 9.505. As a general matter, OCIs can be broadly categorized into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. Operational Resource Consultants, Inc., B-299131, B-299131.2, Feb. 16, 2007, 2007 CPD ¶ 38 at 5-6. Substantial facts and hard evidence are necessary to establish the existence of an OCI; mere inference or suspicion of an actual or apparent OCI is insufficient for our Office to sustain a protest. Id.

Although Detica has not specifically identified the type of OCI it is alleging, its contention that the former director participated in planning the subject acquisition and identifying funds within the agency suggests an alleged "biased ground rules" OCI; such an OCI arises where an individual or concern has, for example, prepared the SOW for a solicitation. FAR § 9.505-2. We find no basis to conclude that CNA has an impermissible OCI.

The record shows that the individual in question was the director of PPPA from September until December 2007, at which time he tendered his resignation; shortly thereafter, he became an employee of CNA. Intervenor's Comments, Oct. 6, 2008, Affidavit of Former PPPA Director, at 1. The former director states that, during this interval, PPPA's fiscal year 2008 budget remained in draft form and, although this draft budget included funding for research and analysis, there was no SOW or other acquisition documentation for the requirement that eventually evolved into the SPAR acquisition, and the budget was not finalized or approved until after his departure. Id. at 2. These representations are corroborated by affidavits from agency personnel. The new PPPA director states that the former director never saw the research branch quotation that eventually became the basis for the SPAR procurement. AR, exh. B, at 1. He further represents that the individual responsible for preparing the

scope of work (SOW) for the SPAR procurement did not begin working on that document until February or March 2008, after the departure of the former director, and that the SOW document was not forwarded to him for review (as the new PPPA director) until March. Id.

The record also contains the affidavit of the individual who prepared the acquisition package for the SPAR procurement, including the SOO. She states that, at no time did she have any interaction with the former director, and that she neither received information from him, nor provided information to him relating to her development of the acquisition package for the SPAR requirement. AR, exh. C, at 1. She also states that she did not begin preparing the solicitation's SOO until early March 2008, and that she forwarded it to her director in mid-March. Id.

Against the backdrop of this evidence, the only evidence presented by Detica in support of its generalized allegation of an OCI is an affidavit in which one of its employees represents that he has observed that the former director was responsible for overseeing preparation of the agency's budget, that there were several contacts between representatives of Detica and CNA (that did not include the affiant) in February 2008 concerning possible teaming arrangements between the two firms, and that the former director had been involved in these contacts. Letter of Protest, Aug. 29, 2008, attach. A, at 1-3. This affidavit does not establish that the former director participated in planning the subject acquisition and in identifying available agency funding for the requirement, as Detica alleges.

We conclude from the evidence presented that the former director was involved in the preliminary stages of preparing the agency's annual budget; that he was aware that the budget in its draft form included funding for some unspecified research and analysis work; that he was no longer a federal employee at the time the SPAR requirement was identified with specificity and did not participate in preparing the solicitation or SOO; and that identifying the agency's actual requirements and preparing the acquisition package (including the SOO) was accomplished by other individuals who were not in contact with the former director. Simply stated, the evidence does not support a finding of an impermissible OCI on the part of CNA.

Bias

Regarding bias, the protester alleges no more than that the former director maintained a professional relationship with one of the agency's technical evaluators, and that this somehow resulted in bias in favor of CNA.

Government officials are presumed to act in good faith and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition; where a protester alleges bias, it must not only provide credible evidence clearly demonstrating bias against the protester or in favor of the successful vendor, but must also show that this bias translated into action that

unfairly affected the protester's competitive position. Silynx Communications, Inc., B-310667, B-310667.2, Jan 23, 2008, 2008 CPD ¶ 36 at 8. Detica has not met this standard.

First, as noted, the protester alleges only generally that the former director and an agency technical evaluator maintained an ongoing professional relationship. Letter of Protest, Aug. 29, 2008, attach A, at 2, 4. Detica's employee's statements are unsupported as to the nature and extent of the alleged relationship between the agency's evaluator and the former director. In any case, even if the protester's inferences regarding the nature and extent of the alleged relationship are correct, nothing in the record shows that this alleged relationship translated into action that unfairly affected the protester's competitive position. In this regard, the evaluator in question assigned both firms' quotations excellent ratings under the solution and key employee factors, and while she assigned CNA an excellent rating and Detica only a very good rating under the past performance factor, Detica has not challenged the agency's evaluation conclusions regarding either of those ratings.² AR, exh. J, at 9-12. We conclude that there is no basis for a finding of bias on the part of the evaluator in question.

TECHNICAL EVALUATION OF DETICA QUOTATION

In its initial protest, Detica asserted that the agency misevaluated its quotation by 1) assigning it a weakness for not including a fully developed SOW, notwithstanding that it also found that the quotation presented a clear and comprehensive technical approach; 2) downgrading it for emphasizing information technology, despite the protester's view that this was what was called for under the solicitation; and 3) downgrading it for offering too many managers and too few analysts.

The agency responded to Detica's arguments in detail, both in its legal memorandum, and as supported by the record of the findings of its technical evaluation panel. In responding to the agency report, Detica did not substantively rebut the agency's position; instead, the protester merely asserted generally that the agency's report

² In its comments responding to the agency report, Detica generally avers that it was unreasonable for the evaluator to assign it only a very good past performance rating, since the evaluator did not identify any weaknesses. Detica further asserted: "To the extent [the evaluator's] unequal treatment of CNA's and Detica's past performance quotation evaluations is a separate ground of protest, we timely assert this additional protest ground here." Protester's Comments, Oct. 6, 2008, at 7. These generalized assertions, without substantive support or evidence, fail to state a valid basis for protest. 4 C.F.R. § 21.5(f) (2008). In any event, Detica made no further mention of this assertion in its comments responding to the agency's supplemental report. Thus, the allegation was abandoned in any case. See Accumark, Inc., B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 at 2, n.1.

failed to refute the assertions in its initial protest, and that the agency's report and underlying evaluation materials "rely on too much cutting and pasting and too little analysis of facts and legal argument." Protester's Comments, Oct. 6, 2008, at 9.

The agency's evaluation conclusions appear reasonable and supported by the record. In this connection, it is not our role to reevaluate quotations in response to an evaluation challenge; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. Engineered Elec. Co. d/b/a/ DRS Fermont, B-295126.5, B-295126.6, Dec. 7, 2008, 2007 CPD ¶ 4 at 3-4. A protester's mere disagreement with the agency's evaluation judgments, without more, is insufficient to show that the evaluation was unreasonable. Commercial Window Shield, B-400154, July 2, 2008, 2008 CPD ¶ 134 at 2.

Both Detica's initial arguments, and its largely repetitive comments fail to address the substance of the agency's criticism of the firm's quotation. For example, in its initial protest, Detica maintained that the agency misevaluated the key personnel portion of its quotation because, according to the protester, the agency improperly concluded that it had quoted too many managerial personnel and not enough analytical personnel.

We find nothing unreasonable in the evaluation. First, a review of the firm's quotation shows that the evaluators' judgments were reasonable and accurate. Of the personnel identified by name in the Detica quotation, [deleted] are described as performing management-type functions; of these [deleted] are specifically described as performing duties for the firm's proposed management cell, while the remaining [deleted] are designated as leading the analytical and reporting cell and technical development cell respectively. Of the [deleted] remaining personnel identified by name in the firm's quotation, only [deleted] a Detica employee designated as engaged in performing analytical (as opposed to managerial or leadership) functions, while the remaining personnel are all subcontractor personnel. AR, exh. G at 25-27. The agency's conclusion appears reasonable in light of this array of managerial and analytical personnel.

Moreover, Detica ignores the fact that its quotation was downgraded in this area for other related reasons as well. The evaluators stated as follows in downgrading Detica's quotation:

Many of the personnel that are put forward in this quotation . . . are all currently working on other efforts [for the agency]. The Analytical Cell, which is probably the most important cell, is made up of mostly subcontractors (pg. 25, chart). Also, the Subject-Matter Expert Cell is made of mostly [deleted] [subject matter experts], who [is] another subcontractor. Also, many of the personnel from Detica that will be dedicated to this effort are more involved with the program

management of the effort and it seems like most of the analytical work will be done by subcontractors. It seems top-heavy on the management side and not as many personnel with high-level analytical skills (pg. 25-28).

AR, exh. K at 4. We conclude that Detica abandoned its arguments concerning the evaluation of its quotation and that, in any case, its arguments in this regard are without merit.

SOURCE SELECTION DECISION

Detica argues that the source selection decision was unreasonable and lacks adequate documentation.³ Detica's arguments focus largely on the agency's price reasonableness determination and on the adequacy of the documentation supporting the price/technical tradeoff.⁴ Regarding the price reasonableness determination, Detica asserts that the agency failed to give meaningful consideration to vendors' quoted rates; it maintains that, in light of the disparity between the low- and high-priced quotations, the agency was required to perform some meaningful reasonableness evaluation.

This argument is without merit. Under FAR § 8.404, agencies are specifically advised that they are not required to independently evaluate the reasonableness of prices because, in the context of an FSS procurement, the General Services Administration (GSA), prior to awarding the firm's underlying FSS contract, has already determined that the firms' fixed unit or hourly rate prices are fair and reasonable. In this regard, FAR § 804(d) provides:

GSA has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule

³ Detica argues at length regarding the applicable legal standard (Federal Acquisition Regulation (FAR) part 15 versus part 8.4) against which the reasonableness of the evaluation and tradeoff should be assessed. As discussed more fully below, because the acquisition was conducted using the Federal Supply Schedule, the requirements of FAR part 8.4 govern the agency's actions here.

⁴ In its comments responding to the agency's supplemental report, Detica suggests for the first time that CNA's proposed labor hours and labor mix were never adequately considered. To the extent that Detica is raising this as a new protest basis, it is untimely because it was filed more than 10 days after Detica received the agency report which contained all of the information necessary to raise any such contention. 4 C.F.R. § 21.2(a)(2). In any case, the record shows that CNA and Detica quoted virtually the same level of effort for the requirement. Compare AR, exh. G, at 27-28 and AR, exh. H, at 26-27.

contracts to be fair and reasonable. Therefore, ordering activities are not required to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by [FAR] 8.405-2(d).

Thus, the agency here was not required to perform an independent evaluation to determine the reasonableness of the firms' unit prices.⁵

The record also includes a table comparing the prices received and the government's independent estimate (\$18 million). AR, exh. L, at 3. While the record shows that CNA's price was not the lowest received, nonetheless, it was below the government estimate and was found to include a level of effort comparable to that used to prepare the government estimate. AR, exh. L, at 7. We have no basis to question the adequacy of the agency's price analysis or the determination that CNA's total price was fair and reasonable.

As for the price/technical tradeoff, the protester claims the record is inadequate to justify the agency's payment of a higher price than Detica's.⁶

Contrary to the protester's assertion, the record here includes adequate documentatuion to support the agency's source selection. Specifically, the source selection document (SSD) includes a detailed analysis of the respective quotations' evaluated strengths and weaknesses. Significantly, the SSD shows that the agency identified eight strengths with CNA's quotation and no weaknesses. AR, exh. L, at 3-4. Among other things, the agency noted that CNA's quotation articulated all of the task requirements in the SOO and explained their methodology in a clear and concise manner; outlined a unique SOW that tied directly to the agency's objectives;

⁵ In any event, the record shows that the agency determined that CNA's quoted rates were reasonable because they were [deleted] below the rates in the firm's FSS contract. AR, exh. L, at 7. The agency also determined that the rates included for CNA's subcontractors were in accordance with those firms' FSS contract rates. Id.

⁶ Detica asserts that the contract specialist, not the contracting officer (who was also the source selection official), made the tradeoff decision, and that he was not authorized to do so; in the alternative, Detica suggests that the contracting officer did not exercise his independent judgment because he relied largely on the findings of the technical evaluators or materials prepared by the contract specialist. However, the record shows that the source selection memorandum--documenting the tradeoff--was executed by the contracting officer, AR, exh. L, at 7, and the record also includes an affidavit in which the contracting officer states that he approved the selection and award documentation. AR, exh. R. In any event, a contracting officer may properly base his or her independent judgment on documentation prepared by others. Comprehensive Health Servs., Inc., B-310553, Dec. 27, 2007, 2008 CPD ¶ 9 at 11. Accordingly, these assertions are without merit.

that the firm had strong experience and a proven track record with the agency; and laid out a staffing plan that was realistic, thorough and appropriate. Id. In comparison, the agency identified only four strengths in Detica's quotation, and four weaknesses. Id. at 4-5. Ultimately, the source selection official concluded that:

CNA is the only offeror to provide a clear, creative and innovative solution, and the 13 percent cost difference between CNA and Detica, the next closest offeror in price, is justified in that CNA clearly understood the objectives of the project and provides a unique solution to the problem. CNA's excellent Past Performance and strong Key Personnel also contribute to their overall excellent rating.

All three offerors understood the problem, but only CNA's solution was viable and responsive to the problem. Detica offered an [deleted] solution that did not achieve the larger research and data collection objective of which [deleted] was only a small part.

AR, exh. L, at 6. Since the SDD details the evaluation judgments and basis for the agency's determination that CNA's quotation represented the best value, we conclude that the agency adequately documented the rationale for its source selection. See Bulova Tech., LLC, B-281384, B-281384.2, Feb. 3, 1999, 99-1 CPD ¶99 at 9.

The protest is denied.

Gary L. Kepplinger
General Counsel