



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

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

Decision

Matter of: Burchick Construction Company

File: B-400342

Date: October 6, 2008

D. Matthew Jameson III, Esq., Peter H. Schnore, Esq., and Patrick R. Malone, Esq., Babst Calland Clements Zomnir, P.C., for the protester.

David A. Levine, Esq., Blumling & Gusky, LLP, for Massaro Corporation, the intervenor.

Kenneth MacKenzie, Esq., Department of Veterans Affairs, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency failed to conduct meaningful discussions in a negotiated procurement, where discussions conducted with offerors were limited to cost proposals and did not identify significant weaknesses or deficiencies that the agency had identified in the protester's technical proposal.

DECISION

Burchick Construction Company protests the award of a contract to Massaro Corporation under request for proposals (RFP) No. VA-101-07-RP-0043, issued by the Department of Veterans Affairs (VA) for the construction of an ambulatory care center and related work. Burchick challenges VA's evaluation of the firm's technical proposal, conduct of discussions, and source selection decision.

We sustain the protest.

The RFP provided for the award of a fixed-price contract for the construction of a new ambulatory care center and associated support systems and for minor demolition work at the VA Pittsburgh Health Care System, H. J. Heinz Division, Pittsburgh, Pennsylvania. Award was to be made on a "best value" basis, considering price and the following four technical evaluation factors (listed in descending order of importance): past performance, construction management, schedule, and small

business participation.¹ Offerors were informed that the technical factors, when combined, were of equal weight to price. RFP at 7.

Instructions for the preparation of proposals were provided for each evaluation factor. For example, with respect to the past performance factor, offerors were instructed to demonstrate corporate construction experience on a minimum of four projects consisting of ambulatory clinics, hospitals, or projects of similar size, scope, and complexity. As another example, with respect to the construction management factor, offerors were instructed to demonstrate the relevant experience of key project personnel, such as the project manager. RFP at 5-6.

The agency received five proposals, including Burchick's and Massaro's, which were evaluated by the agency's technical evaluation board (TEB). Burchick's and Massaro's technical proposals received the following point scores:²

Evaluation Factor	Burchick	Massaro
Past Performance (40 points)	22	25.4
Construction Management (30 pts.)	14.4	19
Schedule (20 pts.)	14.4	14.4
Small Business Participation (10 pts.)	0	8.5
TOTAL (100 pts.)	50.8	67.3

Agency Report (AR), Tab 3, Price Negotiation Memorandum, at 6-7.³

Burchick's lower technical point scores reflected the evaluators' judgment that the firm's proposal contained "weaknesses" in a number of regards. *Id.* at 7. Specifically, under the most important past performance factor (for which Burchick's proposal only received 22 of 40 available points), the evaluators concluded that Burchick had provided "detailed information on only one project, the OB/GYN Surgery Center, which could be classified as either Clinic Construction or

¹ Subfactors were also identified for the past performance and construction management evaluation factors. For example, one of the past performance subfactors was "awards received on projects completed within the last 5 years." RFP at 8.

² The evaluators assigned point scores for each offeror's proposal under each technical evaluation factor and subfactor.

³ During the protest, VA informed our Office and the parties that it had improperly assigned too many points to the awardee's proposal under the small business participation factor, and that Massaro's proposal should have received only 6 points (2.5 fewer points) under this evaluation factor. Supplemental AR, Tab 12, Supplemental Declaration of VA Project Manager, at 1.

Hospital Construction Experience”; in addition, the TEB was concerned that Burchick “did not provide any information on awards received [on projects completed within the last five years].” See AR, Tab 4, Declaration of VA Project Manager, at 1. Under the construction management factor (for which the TEB assigned only 14.4 of 30 available points), the evaluators noted that Burchick’s proposal

did not include qualifications for anyone to fill the capacity as a project manager and this was considered a weakness. Although, quality control was mentioned in the technical proposal little to no information was provided as to how Burchick manages the quality control process.

AR, Tab 3, Price Negotiation Memorandum, at 7. With respect to the small business participation factor (for which Burchick’s proposal received none of the 10 available points), the evaluators found that Burchick, a large business concern, had “presented no small business participation in management, [that the firm’s] subcontracting plan did not exceed any goals, and past performance did not meet all established goals.” Id.

Based upon the TEB’s evaluation of initial proposals, the contracting officer determined that all offerors were qualified to perform the project; the contracting officer also decided that the agency would not conduct discussions with the offerors with respect to the firms’ technical proposals, because “none of the offerors could materially improve its technical proposal.” Contracting Officer’s Statement, Tab 6, at 2. However, because all of the initial proposals exceeded the government’s estimate and available funding, the contracting officer decided to conduct discussions with the firms with respect to only their price proposals. AR at 4.

Accordingly, the contracting officer “discussed the [architect-engineer’s] cost estimate for each line item, including a comparison [of] the [architect-engineer’s] estimate with the offeror’s cost proposal, the areas in which each offeror’s cost could be improved and other issues such as project phasing and scheduling, which could impact the cost.” Id. The agency received revised price proposals, to which VA assigned point scores ranking the firm’s price proposals from lowest to highest. Burchick’s proposal, which offered the lowest price of \$36,686,000, was assigned all of the 100 available points. Massaro, which offered the next lowest price of \$38,530,000, was assigned 95 points. The agency added the firms’ technical and price point scores to determine which firm’s proposal reflected the best value (the highest combined technical/price score). Massaro’s combined score was calculated to be

162.3, while Burchick's combined score was 150.8.⁴ AR, Tab 3, Price Negotiation Memorandum, at 11. Award was made to Massaro based on its higher combined score, and following a debriefing, Burchick filed this protest.⁵

Burchick complains that VA did not conduct meaningful discussions with Burchick, given that VA did not apprise the firm of, or provide it with the opportunity to address, significant evaluated weaknesses in its technical proposal. The protester contends that it could have resolved the agency's concerns with the firm's proposal had the firm been provided with discussions concerning its technical proposal.

VA argues that the scope and extent of discussions to be conducted with offerors is "a matter of contracting officer judgment" and that agencies are not required to discuss every area in which a proposal can be improved. In this regard, VA contends that the agency was not required to conduct discussions with respect to Burchick's technical proposal, given that the contracting officer concluded that the firm could not have materially improved its technical proposal. AR at 6-7.

We agree with VA that a procuring agency has considerable discretion in determining whether and how to conduct discussions in a negotiated procurement under Federal Acquisition Regulation (FAR) Part 15. However, where, as here, discussions are conducted, they must at a minimum identify deficiencies and significant weaknesses in the proposals of each competitive range offeror. FAR § 15.306(d)(3); Multimax, Inc., et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 at 12; PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8. Discussions must be "meaningful," that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. Smiths Detection, Inc., B-298838, B-298838.2, Dec. 22, 2006, 2007 CPD ¶ 5 at 12; Symlicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 8.

We find that VA did not conduct meaningful discussions with Burchick, since the agency limited its discussions to the firm's cost proposal and did not identify any of the agency's significant concerns with Burchick's technical proposal that resulted in the firm's proposal receiving only 50.8 points out of 100 possible points.⁶ In

⁴ As noted above, the agency now acknowledges that Massaro's combined point score should have been 159.8, because the agency assigned too many points to Massaro's proposal under the small business participation factor.

⁵ Another firm had a higher combined point score than Massaro, but that firm's proposed price exceeded the funds available for award. AR at 5.

⁶ An agency may limit discussions to price alone, and not conduct technical discussions, only where a proposal contains no significant technical weaknesses or deficiencies. See FAR § 15.306(d)(3); Metron Corp., B-227014, June 29, 1987, 87-1

(continued...)

particular, the protester's proposal received only 22 of 40 available points under the past performance factor, based upon the agency's judgment that Burchick had provided detailed information on only one relevant project, where the solicitation requested a minimum of four projects. Similarly, Burchick's proposal received only 14.4 of 30 available points under the construction management factor, based upon the agency's conclusion that Burchick had failed to identify a project manager and to detail its quality control plan, as required by the RFP. Burchick's proposal received no points under the small business participation factor, because the agency found that Burchick had essentially not provided the required small business participation plan. Given the significant reductions in Burchick's technical point score associated with these identified concerns, and the importance to the agency of the omitted information, we find that these concerns can only be considered to be significant weaknesses or deficiencies, and that the agency's failure to identify them during discussions was inconsistent with its obligation to conduct meaningful discussions.

We also do not agree with VA that Burchick could not have materially improved its proposal if discussions were conducted with the firm with respect to the evaluated concerns in its technical proposal. The protester has explained that it could have addressed each of the agency's concerns that resulted in Burchick's technical proposal being downgraded. For example, with respect to the evaluation of the firm's past performance, Burchick contends that it identified 37 other healthcare projects in its technical proposal, which the protester could have detailed if the firm had been asked in discussions. Protester's Comments at 4. With respect to the identity of its project manager and to its proposed quality control plan under the construction management factor, Burchick states that, had it received discussions, the firm would have clarified the identity of its project manager and provided further detail with respect to its quality control plan.⁷ *Id.* at 6-7. With respect to the small business participation factor, Burchick states that it could have further explained the firm's proposed teaming relationship with a service-disabled veteran-owned small business.

In sum, we find that VA failed to conduct meaningful discussions with Burchick, because the agency failed to identify significant weaknesses or deficiencies in the firm's technical proposal. We also find a reasonable possibility that Burchick was prejudiced by the agency's failure to conduct meaningful discussions, given that

(...continued)

CPD ¶ 642 at 5; Sperry Corp., B-220521, Jan. 13, 1986, 86-1 CPD ¶ 28 at 5-6. That is not the case here.

⁷ Burchick contends that its proposed "project executive" was the firm's project manager, although the firm did not use that precise title for that individual. Burchick states that it would have clarified that person's role, if discussions on technical issues had been conducted. Protester's Comments at 6-7.

Burchick offered the lowest price and could have addressed these concerns in its technical proposal such that it may have been found to offer the best value to the agency.⁸

The protester also alleges that the agency may have unreasonably evaluated its proposal in retaliation for Burchick's current contract claim that the firm filed against VA with the U.S. Court of Federal Claims. The protester, however, presents no evidence supporting this allegation other than its inference based upon the protester's belief that its technical proposal was evaluated unreasonably. Government officials are presumed to act in good faith, and a protester's assertion that contracting officials were motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Shinwha Elecs., B-290603 *et al.*, Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. Burchick has not provided convincing proof of bias or bad faith on the part of VA, and we are not prepared to say on this record that the flaws in the selection process were motivated by bias.

The protest is sustained.⁹

⁸ Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

⁹ The protester also challenges the agency's evaluation of its technical proposal and source selection decision. We need not address these contentions, given our recommendation to reopen the competition and make a new selection decision. Nevertheless, and although not specifically challenged by the protester, we note that the agency's selection decision is based upon a mechanical comparison of the firms' technical and price point scores, which is not a valid substitution for the qualitative assessment of the technical differences of the proposals or of the benefits associated with a proposal's additional cost. See FAR § 15.308; Midland Supply, Inc., B-298720, B-298720.2, Nov. 29, 2006, 2007 CPD ¶ 2 at 5; Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 at 5. Point scores are but guides to intelligent decision making; the propriety of a price/technical tradeoff turns not on the difference in point scores and ratings *per se*, but on whether the agency's judgment concerning the significance of the difference is reasonable and adequately justified in light of the evaluation scheme. See Shumaker Trucking and Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 8. In this regard, in order for our Office to be able to perform a meaningful review, the record must contain adequate documentation showing the bases for the evaluation conclusions and source selection decision. Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10.

We recommend that VA conduct discussions with the offerors with respect to their technical proposals, obtain and evaluate revised proposals, and make a new source selection decision. If a firm other than Massaro is selected for award, the agency should terminate Massaro's contract and make award to that other firm. We also recommend that Burchick be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2008). Burchick should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Gary L. Kepplinger
General Counsel