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Decision

Matter of: MSN Services, LLC

File: B-414900; B-414900.2; B-414900.3; B-414900.4

Date: October 4, 2017

Lawrence J. Sklute, Esq., Sklute & Associates, for the protester.
C. Joseph Carroll, Esq., Department of Justice, United States Marshals Service, for the agency.
Joshua R. Gillerman, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of the protester's quotation is denied where the record shows it was consistent with the solicitation and applicable statutes and regulations; allegations concerning the evaluation of the awardee's quotation need not be addressed because the record shows that the protester was not prejudiced by any errors in this regard.

DECISION

MSN Services, LLC, of New York, New York, protests the award of a contract to Flynn Jensen Company (FJC), of Gallatin, Tennessee, by the Department of Justice, United States Marshals Service, under request for quotations (RFQ) No. DJM-17-A44-Q-0014, issued to acquire vehicle towing, storage, maintenance and disposal services. MSN, the incumbent contractor, challenges various aspects of the agency's evaluation of quotations as well as the agency's source selection decision.

We deny the protest.

BACKGROUND

The RFQ, issued on May 5, 2017, as a small business set-aside, contemplated award of an indefinite-delivery, indefinite quantity contract with fixed-price line items for towing, storage, maintenance and disposal services for seized and forfeited vehicles in the

Eastern and Southern Districts of New York and the District of New Jersey. RFQ at 1.¹ The solicitation included Federal Acquisition Regulation (FAR) clause 52.212-2, "Evaluation--Commercial Items," which indicated that award was to be made to the firm whose quotation was most advantageous to the government, considering price and non-price factors. RFQ at 27. When combined, the non-price factors--technical capability and past performance--were significantly more important than price. Id.

In connection with the technical capability factor, the RFQ advised vendors that their responses must contain an adequate description of the services being offered in sufficient detail for the technical evaluation board (TEB) to determine that the firm could meet the solicitation's requirements. RFQ, attach. 4, at 2. Among these requirements was a detailed statement of work (SOW) which paralleled the subfactors described below and provided specific requirements for each, as well as for each component within the respective subfactors. RFQ, attach. 7, SOW.

The technical capability factor was divided into four subfactors (and components within those subfactors): (1) facility, staffing, and security; (2) towing; (3) initial intake, storage, and maintenance; and (4) disposal. RFQ, attach. 4 at 2-3. Under each subfactor, the agency was to assign an adjectival rating of outstanding, good, satisfactory, marginal, or unsatisfactory. Id. Under the past performance factor, vendors would receive one of these adjectival ratings or a neutral rating if it had no relevant past performance, or if past performance information was not available. Id. at 4.

The agency received quotations from six vendors, including those from MSN and FJC. The TEB evaluated the technical capability portion of the quotations, and the contracting officer evaluated the vendors' past performance and conducted a price analysis. The final evaluation results were as follows:

	Technical Capability	Past Performance	Total Price
FJC	Satisfactory	Satisfactory	\$2,290,714.00
Vendor A	Satisfactory	Satisfactory	\$2,480,825.00
Vendor B	Satisfactory	Very Good	\$3,278,962.50
MSN	Satisfactory	Satisfactory	\$4,232,932.50
Vendor C	Marginal	Satisfactory	\$7,627,500.00
Vendor D	Unsatisfactory	Neutral	\$8,860,025.00

AR, Tab 10, Basis for Award at 2.

The contracting officer, acting as the source selection authority (SSA), reviewed the TEB's analysis and conducted a comparative assessment of the quotations against the RFQ's evaluation criteria. Id. at 3-9. Considering both the technical capability and past performance results, he concluded that FJC represented the best value to the

¹ The initial RFQ was amended and replaced it in its entirety. Agency Report (AR), Tab 3, RFQ, amend. 0002. RFQ citations herein are to this amended version.

government as it provided satisfactory knowledge of the SOW requirements, past performance, and the lowest price. Id. at 9. He stated that, although FJC, Vendor B, and MSN were rated satisfactory under the technical capability factor, both FJC and Vendor B had certain technical advantages over MSN, and FJC's technical advantage and lower price made up for Vendor B's superior past performance. Id. MSN filed this protest after it received notice of the agency's source selection and its debriefing.

DISCUSSION

MSN raises numerous challenges to the agency's evaluation of its quotation and the agency's award decision. We note at the outset that, in reviewing protests challenging an agency's evaluation of quotations, our Office does not reevaluate quotations or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria, as well as applicable statutes and regulations. ManTech Advanced Sys. Int'l Inc., B-414717, Dec. 16, 2016, 2016 CPD ¶ 370 at 3.

Technical Capability Factor

As noted above, MSN's quotation was evaluated as satisfactory under the technical capability factor. AR, Tab 9, TEB Report, at 64. Underlying this overall rating were satisfactory ratings under the facility, staffing, and security subfactor and the initial intake, storage, and maintenance subfactor, and marginal ratings under the towing subfactor and disposal subfactor. Id. at 55-64.

MSN challenges nearly every aspect of the evaluation of its quotation, and also challenges various aspects of the evaluation of FJC's quotation. With respect to the evaluation of MSN's quotation, we have considered all of the allegations and find that none provide a basis to sustain the protest.² We address a few of MSN's challenges by example. As discussed further below, we need not address MSN's challenges to the evaluation of FJC's quotation because even if its allegations have merit, MSN cannot demonstrate that it would have been prejudiced by the agency's actions.

² MSN initially argued that the agency unreasonably evaluated FJC's technical quotation under the towing and disposal factors. We granted the agency's request for partial dismissal on this ground for failure to state a legally and factually sufficient basis. Email from GAO to Parties, July 18, 2017; see 4 C.F.R. § 21.1(c)(4). During the course of the protest we also concluded that MSN's allegations regarding Vendors A and B did not warrant further development because MSN had failed to support these allegations with sufficient underlying evidence. Email from GAO to Parties, Aug. 25, 2017. We also note that MSN has withdrawn several protest grounds.

Facility, Staffing, and Security Subfactor

Under the facility, staffing, and security subfactor, the agency was to evaluate whether a vendor's current or proposed storage facilities met the requirements of the SOW; whether the workforce met the requirements of the SOW; and the physical security plan in place at the storage facilities. RFQ, attach. 4, at 2. The SOW contained specific requirements for satisfying each of these components of the subfactor. SOW § 3-4. MSN challenges its overall adjectival rating, as well as the ratings under each component and the agency's assessment of weaknesses.

MSN first argues that the agency applied unstated evaluation criteria in concluding that its quotation failed to address the requirement that its proposed facility possess an 110V or 220V electrical service, as well as the ability to accommodate alternate fuel vehicles. The protester's argument is not supported by the terms of the solicitation.

For the storage facility component of the subfactor, the RFQ expressly advised that the agency would evaluate whether the quotation met the requirements of the SOW. RFQ, attach. 4, at 2. The SOW included a requirement that the vendor's facility must be able to accommodate any type and quantity of alternate fuel vehicles to include an 110v and 220v outlet. SOW § 4(a)(iii). As a result, in concluding that MSN failed to address the above-referenced SOW requirement, the agency did not apply unstated evaluation criteria, but rather evaluated the quotation in accordance with the RFQ's expressly stated evaluation criteria.

MSN argues that, as the incumbent contractor, the agency has "first-hand knowledge" that MSN's proposed facility has the requisite 110V or 220V electrical service and the ability to accommodate alternate fuel vehicles. Protest at 8-9. MSN also argues that the agency improperly failed to consider information in its quotation "demonstrating that the facility has electricity, such as the fact that the facility has electric motion lighting throughout the building" Id. We find no merit to these arguments.

It is a vendor's responsibility to submit an adequately written quotation that establishes its technical capability and the merits of its proposed approach, and allows for a meaningful review by the procuring agency in accordance with the terms of the solicitation. Encentric, Inc., B-412368.3, Apr. 19, 2016, 2016 CPD ¶ 121 at 7. A vendor may not rely on its prior experience with an agency as a substitute for including required information in its quotation. See ASPEC Eng'g., B-406423, May 22, 2012, 2012 CPD ¶ 176 at 3 n.5. There was no inequity in the agency's decision to base its evaluation on MSN's quotation as written--instead of supplementing it with the agency's understanding of the firm's facility under prior projects.³ Id. Moreover, we agree with

³ While we have recognized that in certain limited circumstances an agency has an obligation to consider "outside information" bearing on the offeror's past performance when it is "too close at hand," see, e.g., International Bus. Sys. Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5, the circumstances in these cases are not present here.

the agency that the mere fact that MSN's quotation demonstrated that its facility had electricity does not adequately address the requirement at issue.

MSN also challenges the agency's failure to credit its quotation for exceeding the solicitation's requirements throughout this subfactor. Protest at 17-19. To support this assertion, MSN argues that it exceeded the solicitation's requirements by proposing to secure its outdoor storage facility with an eight-foot tall fence with razor wire, where the solicitation only required a fence wall at least six-feet tall with razor wire attached. Id. The firm also argues that it exceeded the solicitation's requirement that the contractor be available between the hours of 8:30 a.m. and 5:00 p.m. Monday through Friday, because its quotation states that it would fully staff the facility with three dedicated employees during that timeframe. Id. at 18.

We find that these allegations represent nothing more than disagreement with the agency's judgment, which, by itself, is not sufficient to establish that the agency acted unreasonably. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7. While the agency could reasonably conclude that offering features that exceed the requirements offered a benefit, it could just as reasonably determine that providing services not requested in the solicitation offers no benefit. See Federal Express Corp., B-401876.2, Jan. 26, 2010, 2011 CPD ¶ 3 at 10. MSN has not shown that the agency's evaluation was unreasonable. Moreover, even had the agency considered these as strengths, when evaluated in conjunction with MSN's failure to address the requirement discussed above, we have no basis to conclude that the firm's overall rating would have changed.

Towing Subfactor

Under the towing subfactor, the agency was to evaluate whether upon receiving a standard tow order (STO), a vendor's towing fleet and other equipment would handle all requirements of the SOW. RFQ, attach. 4, at 2. The portion of the SOW related to this subfactor contained 12 separate requirements, including that the contractor shall pick up roadside vehicles within 8 hours of notification by the COR [contracting officer's representative] and that all tows should be completed within 7 days issuance of the STO. SOW § 5(b),(c).

The agency concluded that MSN's quotation failed to address five separate SOW requirements related to this subfactor: (1) the time elements of a 7-day response to the sub-task order (2) the time element for an 8-hour roadside pickup and 24-hour station tow; (3) the process for towing tractor trailers; (4) the measures MSN would take to avoid additional mileage accumulation on the towed vehicle; and (5) the possibility that the COR could direct a tow to a location other than the contractor's storage facility. AR, Tab 9, TEB Report, at 58; SOW § 5(b)-(e).

MSN argues that requirements 1-3, and 5, enumerated above, are performance requirements to be met by the awardee after award, rather than requirement for evaluation of quotations, because the SOW refers to the "contractor" rather than

“vendor” or “offeror” when detailing these requirements. Comments and Supp. Protest of Aug. 17, at 23.

Where there are questions concerning the meaning of solicitation language, we resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2; Fox Dev. Corp., B-287118.2, Aug. 3, 2001, 2001 CPD ¶ 140 at 2. An ambiguity exists where two or more reasonable interpretations of the terms of the solicitation are possible. Shivoy, Inc., B-412027, B-412027.2, Dec. 9, 2015, 2015 CPD ¶ 388 at 6.

We conclude that MSN’s reading of the solicitation is unreasonable. The solicitation uses the term “contractor” throughout the SOW when referring to its numerous requirements to be evaluated, as well as in its definitions for the adjectival ratings. As a result, if we adopted MSN’s interpretation that the use of the term “contractor” necessarily means that a SOW requirement is a performance requirement to be satisfied after award, and need not have been addressed in a vendor’s quotation, the agency would be precluded from substantively evaluating any aspect of a vendor’s technical capability. Accordingly, we think the RFQ clearly advised vendors that their quotations needed to adequately describe how they would satisfy the requirements of the SOW mentioned above. To the extent the protester argues that this language was unclear, any ambiguity was patent, *i.e.*, clear or obvious on the face of the RFQ, rather than latent. Since any alleged ambiguity regarding these provisions was apparent on the face of the RFQ itself, a protest on this ground was required to be filed prior to the submission of quotations. 4 C.F.R. § 21.2(a)(1); Shivoy Inc., *supra*.

As for the fourth requirement, MSN argues that its quotation responded to the requirement to take measures to avoid additional mileage accumulation on the towed vehicle by stating the following: “[t]he vehicle will then be loaded, secured, and delivered directly to the facility, where it will be accepted by another MSN employee to be processed. AR, Tab 5, MSN Quotation, § 2.2 at 5. MSN now explains that this statement was a “measure[] taken to avoid additional mileage accumulation on the towed vehicle.” Comments and Supp. Protest of Aug. 17 at 27.

As noted above, MSN had the responsibility to submit an adequately written quotation that established the technical capability and merits of its proposed approach. Encentric, Inc., *supra*. Here, the agency sought an approach for how the vendor would specifically avoid mileage accumulation on towed vehicles. While the steps detailed in MSN’s quotation may be effective at avoiding mileage accumulation, we find nothing unreasonable about the agency’s conclusion that MSN’s quotation failed to address this requirement in adequate detail. Unlike in MSN’s protest pleadings, the firm’s quotation does not even indicate that these steps are its proposed approach for addressing this requirement. AR, Tab 5, MSN’s Technical Quotation, § 2.2 at 5. Accordingly, our review of the record provides us with no basis to question the agency’s evaluation.

Initial Intake, Storage, and Maintenance Subfactor

Under the initial intake, storage, and maintenance subfactor, the solicitation required that vendors address numerous requirements related to the processing and initial intake of vehicles, as well as the storage and provision of maintenance services for these vehicles. RFQ, attach. 4, at 2. The SOW, paralleling the subfactor, further detailed numerous requirements under each component of the subfactor. SOW § 6-8. Relevant here, under the maintenance component, the SOW required that vendors address the requirement “[b]attery [r]eplacement: [c]ontractor shall provide ability to replace batteries if instructed by COR.” SOW § 8(e).

The agency found that MSN failed to address the requirement to be able to check a vehicle’s battery and, if it couldn’t hold a charge, obtain COR approval to replace it. AR, Tab 9, TEB Report, at 60. MSN argues that this finding is based on an unstated evaluation criterion. We disagree.

Although agencies are required to identify in a solicitation all major evaluation factors, they are not required to identify all areas of each factor that might be taken into account in an evaluation, provided that the unidentified areas are reasonably related to, or encompassed by, the stated factors. Northrop Grumman Sys. Corp., B-414312 et al., May 1, 2017, 2017 CPD ¶ 128 at 12. In our view, the requirement to check the battery and, if necessary, obtain COR approval to replace it, is encompassed within the stated evaluation criteria, which expressly included maintenance services to be provided. Although the SOW does not explicitly call for checking a battery to see if it needs to be replaced, it does state that COR approval is required prior to replacing a battery. SOW § 8(e). As a result, checking vehicles’ batteries would be a necessary step in informing the COR to seek approval to replace the battery.

Disposal

Under the disposal subfactor, the agency was to evaluate a vendor’s advertising and marketing methods, as well as its processes for facilitating live auctions and online auctions of vehicles. RFQ, attach. 4, at 2-3. As relevant here, the SOW specified that the COR was to determine the methods for disposal of all vehicles; among these methods were online auctions by the contractor and online auctions by an agency third-party vendor. SOW § 9(a). Vendors were required to detail their “[e]ntire online auction process from preview day through the [agency’s] receipt of sale proceeds and paperwork . . .” RFQ, attach. 4, at 3. The SOW further delineated several requirements concerning online auctions conducted by the contractor, including that the vendor was to ensure the internet website allows bids to be placed on an online platform, posting photographs and a full description of each item, and ensuring the vendor has a knowledgeable representative familiar with the automotive industry available to answer questions. See SOW § 9(c)(i)-(x).

The agency concluded that MSN’s quotation failed to address the solicitation’s online auction requirements because the quotation only alluded to facilitating sales through a

third-party vendor, and did not describe its own process for how it would satisfy the solicitation's online auction requirements. AR, Tab 9, TEB Report, at 64. MSN challenges this determination, which led the agency to conclude that its technical quotation merited an overall rating of marginal for the disposal factor.

Based on this record, we find nothing unreasonable about the agency's evaluation. Our review of MSN's quotation confirms that it did not adequately detail a process for facilitating online auctions itself. While MSN's quotation notes that it would facilitate sales through a third party vendor, it does not actually detail an online auction process or address the several online auction requirements detailed in the SOW. Since the COR would determine the method used to dispose of vehicles, one of which could be online auctions conducted by the contractor, the agency reasonably downgraded MSN's quotation for not describing its process for this disposal method. Accordingly, we have no basis to question the agency's conclusion that MSN's quotation failed to satisfy the requirements for the online auction. Encentric, Inc., supra (vendor has the responsibility to submit an adequately written quotation that established the technical capability and merits of its proposed approach.).

Source Selection Decision and Prejudice

MSN challenges the agency's award decision, generally asserting that the cost/technical tradeoff decision was inadequately documented and that the agency improperly converted the solicitation from a best-value tradeoff source selection methodology to a lowest-priced, technically-acceptable source selection methodology. Comments and Supp. Protest of Aug. 17, at 3-9; Comments on Second Supp. AR of Sept. 13, at 2-5.

Source selection decisions must be documented, and must include the rationale for any business judgments and price/technical tradeoffs made or relied upon by the SSA. Wyle Labs., Inc., B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 6; see FAR § 15.308. However, there is no need for extensive documentation of every factor considered in a tradeoff decision. See Terex Gov't Programs, B-404946.3, Sept. 7, 2011, 2011 CPD ¶ 176 at 3. Rather, the documentation need only be sufficient to establish that the agency was aware of the relative merits and costs of the competing quotations and that the source selection was reasonably based. Id. The source selection decision here meets this standard.

We agree with the agency that MSN's challenges to the adequacy of its source selection decision are largely a rehash of its assertions that it should have received higher technical ratings, which, as we noted above, have no merit. Moreover, our Office has explained that so long as the ultimate selection decision reflects the selection official's independent judgment, agency selection officials may rely on reports and analyses prepared by others. See, e.g., Puglia Eng'g of California, Inc., B-297413 et al., Jan. 20, 2006, 2006 CPD ¶ 33 at 8. Here, the record demonstrates that the SSA reviewed the report prepared by the TEB to assess the relative merits of the respective quotations. He then utilized his own independent judgment in determining, consistent

with the solicitation's evaluation criteria, that FJC represented the best value to the government. Accordingly, on this record, we have no basis to conclude that the SSA failed to adequately document the rationale to support his source selection decision.⁴ See Terex Gov't Programs, supra.

As noted above, after completing his comparative analysis of the quotations with respect to their technical capability and past performance, the SSA found that FJC and Vendor B had technical advantages over MSN's technical proposal for specified reasons, and the record shows that the prices of both vendors were significantly lower than the price of MSN. AR, Tab 10, Basis for Award Decision at 9. The SSA performed a cost/technical tradeoff between FJC and Vendor B, concluding that FJC offered the best value to the government notwithstanding Vendor B's superior past performance based on its technical advantages, and FJC also offered a lower price. Id.

In light of the evaluation results and the SSA's findings, we need not address MSN's numerous challenges to the evaluation of FJC's quotation, or its numerous allegations that the agency engaged in disparate treatment by downgrading the MSN quotation but not the FJC quotation, because the record shows that even if MSN is correct the firm was not prejudiced by the agency's actions.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, the protester would have had a substantial chance of receiving award. Walker Dev. & Trading Grp., Inc., B-413931, Jan. 12, 2017, 2017 CPD ¶ 20 at 7. As the record makes clear, MSN would not be in line for award even if it were to prevail on these challenges because there is at least one intervening vendor properly in line for award ahead of MSN. Vendor B was evaluated as technically superior to MSN at a significantly lower price, and Vendor C had equivalent ratings to MSN at a significantly lower price. MSN has not successfully challenged the evaluation of either firm's quotation. As a result, the record supports the agency's position that there is no reasonable likelihood that the agency would have selected MSN's quotation for award.⁵ See Serco Inc., B-406061.1, B-406061.2, Feb. 1,

⁴ MSN's assertion that the agency improperly changed the award basis from best value tradeoff to lowest-priced, technically acceptable is contradicted by the record. The fact that no tradeoff analysis was required between MSN and FJC as part of the source selection decision does not negate the fact that the agency properly adhered to the RFQ's best-value selection basis. See The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 14.

⁵ MSN argues that it was competitively prejudiced by the alleged disparate treatment because "it was induced to propose a technically superior proposal when a less sophisticated proposal would have been acceptable . . ." and it would have proposed a less costly quotation by proposing, for example, a smaller storage facility. Comments and Supp. Protest of Aug. 17, at 9; Comments on Second Supp. AR of Sept. 13, at 21. We find no merit to this argument. MSN's assertion that it would have proposed a less
(continued...)

2012, 2012 CPD ¶ 61 at 14; Cornerstone Constr. Co., Inc., B-402747, July 23, 2010, 2011 CPD ¶ 54 at 9.

The protest is denied.

Susan A. Poling
General Counsel

(...continued)

costly storage facility is not quantified in any meaningful way. Considering the substantial price differential between MSN's quotation and those of FJC and Vendor B, as well as the technical superiority of both, we have no basis to find that this assertion establishes competitive prejudice--that is, we have no basis to find that MSN would have reduced its costs such that its quotation would have had a substantial chance of being selected for award. See DynCorp Int'l, LLC, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at n.11.