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Decision

Matter of: Sunrise Medical HHG, Inc.

File: B-310230

Date: December 12, 2007

Leigh T. Hansson, Esq., Gregory S. Jacobs, Esq., and Steven D. Tibbets, Esq., Reed Smith LLP, for the protester.

Edward O. Patton, Esq., Mansour, Gavin, Gerlack & Manos Co., LPA, for Invacare Corp., an intervenor.

Melbourne A. Noel, Esq., Department of Veterans Affairs, for the agency.

Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is denied where the agency's evaluation of offerors' technical proposals and past performance were either reasonable or did not prejudice the protester.

2. Protest is denied where agency reasonably did not accept protester's late proposal submission because protester was not the "otherwise successful offeror."

DECISION

Sunrise Medical HHG, Inc. protests the award of a contract to Invacare Corp. under request for proposals (RFP) No. VA-797-NC-06-RP-0001, issued by the Department of Veterans Affairs (VA) for provision of manual wheelchairs. Sunrise contends that the VA unreasonably evaluated offerors' technical and past performance proposals, and that the agency improperly refused to accept the protester's submission of a late proposal modification that lowered its price.

We deny the protest.

BACKGROUND

The RFP sought proposals to provide manual wheelchairs and accessories for the VA's Prosthetic Clinical Management Program. The RFP anticipated award of a contract with a 1-year base term, and four 1-year options. Offerors were advised that award would be made to the responsible offeror whose proposal was "most

advantageous to the Government, price and other factors considered.” RFP at 46. The RFP identified four factors for consideration in the award decision, which were listed in decreasing order of importance as follows: technical, price, quality/past performance, and small disadvantaged business (SDB) participation. Id. Within the technical factor, the following subfactors were identified: quality of materials/design and workmanship, wheelchair performance, portability, test results in compliance with wheelchair standards issued by the American National Standards Institute and Rehabilitation Engineering & Assistance Technology Society of North America (ANSI/RESNA), and warranty period. Id. at 46. The first two technical subfactors were of equal and greatest importance, with the remaining subfactors listed in decreasing order of importance. Id.

The agency received five proposals by the August 17, 2006 due date, including, as relevant here, a proposal from Invacare for its “Patriot Plus” wheelchair model, and proposals from Sunrise for its “Sunrise Quickie 2” (Q2) and “Sunrise LXE” models.

On December 29, 2006, the agency issued RFP amendment 7, requesting that offerors agree to extend their proposed prices through March 30, 2007. RFP amend. 7, at 1. Sunrise acknowledged the amendment, but stated that “not only will we hold the original price but we are also submitting reduced pricing.” Agency Report (AR), Tab 12, Letter from Sunrise to the Contracting Officer (CO), Jan. 11, 2007, at 1. Sunrise stated that it believed that the agency could accept the revised proposal because a Federal Acquisition Regulation (FAR) clause incorporated into the RFP permitted such submissions. Id. This clause, Instructions to Offerors–Commercial Items, states that “a late modification of an otherwise successful offer, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.” RFP at 37; FAR § 52.212-1(f)(2)(ii). The VA, however, did not consider Sunrise’s proposal modification in its evaluation of offerors’ proposals because it was submitted after the proposal due date and Sunrise was not considered by the agency to be the otherwise successful offeror. AR, Tab 9B, Price Negotiation Memorandum, at 29; CO Statement at 5.

As relevant to the protest, the VA evaluated the offerors’ test data demonstrating their compliance with standards promulgated by ANSI/RESNA, a national testing standards organization. The VA rated the Sunrise LXE model test data under the ANSI/RESNA subfactor as “poor,” based on the following evaluation:

Testing appears performed and passed. The 11 year old testing report was unsigned. All testing performed was done by Sunrise QA personnel (In-house vs. independent lab) which is acceptable but preferred method of testing would be by independent lab which would have resulted in a higher score. 11 year old report calls into question whether the current durability of the LXE can be meaningfully authenticated by model built this far in the past.

AR, Tab 9B, Price Negotiation Memorandum, at 9.

The agency rated the Sunrise Q2 model test data under the AMSI/RESNA subfactor as “acceptable,” based on the following evaluation:

Testing appears performed and passed. Six year old unsigned report was submitted. Based on serial numbers, 4 to 5 chairs were tested before drum and curb drop fatigue tests were passed. All testing performed was done by Sunrise QA personnel (In-house vs. independent lab) which is acceptable but preferred method of testing would be by independent lab which would have resulted in a higher score.

Id. at 7.

The agency rated the Invacare Patriot Plus model test data under the AMSI/RESNA subfactor as “good,” based on the following evaluation:

Testing appears performed and passed. 1 1/2 year old testing report with signature was submitted. All testing performed was done by Invacare QA personnel (In-house vs. independent lab) which is acceptable but preferred method of testing would be by independent lab which would have resulted in a higher score but because the report was signed Invacare received a rating higher than acceptable.

Id. at 11.

Also, as relevant to the protest, offerors were required to submit 10 past performance references, representing an offeror’s highest sales of wheelchairs to VA medical centers for the prior 36 months. RFP at 40. Invacare submitted 10 past performance references, and the CO sent surveys to all of the references. AR, Tab 9B, Price Negotiation Memorandum, at 20. Despite three requests to complete the surveys, the CO did not receive any responses from Invacare’s references. Id. The CO subsequently contacted program managers at the VA medical centers to request return of the surveys, and eventually received three completed surveys. Id. These surveys provided Invacare one overall rating of “very good,” and two ratings of “excellent.” Id. Based on these responses, the VA rated Invacare’s past performance as “excellent.” Id.

The VA's final evaluation of the offerors' proposals was as follows:

| | SUNRISE Q2 | SUNRISE LXE | INVACARE |
|-----------------------------------|--------------|--------------|--------------|
| TECHNICAL | ACCEPTABLE | ACCEPTABLE | GOOD |
| -- Quality Design and Workmanship | Acceptable | Acceptable | Good |
| -- Performance | Good | Acceptable | Good |
| -- Portability | Acceptable | Acceptable | Acceptable |
| -- ANSI/RESNA Testing | Acceptable | Poor | Good |
| -- Warranty | Good | Good | Acceptable |
| QUALITY/PAST PERFORMANCE | VERY GOOD | VERY GOOD | EXCELLENT |
| SDB PARTICIPATION | ACCEPTABLE | ACCEPTABLE | EXCELLENT |
| PRICE | \$17,778,402 | \$14,535,189 | \$14,196,220 |

AR, Tab 9B, Price Negotiation Memorandum, at 5, 14, 16, 18, 23.¹

Additionally, the CO noted in her responsibility determination that a Dunn and Bradstreet (D&B) report regarding Invacare identified "8 pending lawsuits against Invacare," and that "4 of these are employee actions and 4 for product liability." Id. at 30. That report, however, did not address the Invacare product offered for the procurement, nor did it indicate any judgments against Invacare. Supplemental (Supp.) AR at 8. The CO's responsibility determination reviewed the information in the report, and concluded that the information did not "present an unacceptable risk to the government." AR, Tab 9B, Price Negotiation Memorandum, at 30.

Based on the evaluation of the offerors' proposals, the CO, who was also the source selection authority, selected Invacare's proposal for award. Id. at 29. The CO determined that Invacare's proposal was technically superior to Sunrise's proposal; in light of Invacare's lower proposed price, the CO concluded that no price-technical tradeoff was required.

The agency advised Sunrise on August 17, 2007 that it had not been selected for award. Sunrise requested a debriefing, which was provided in writing on August 28, 2007. AR, Tab 5, Sunrise Debriefing Letter, Aug. 28, 2007. This protest followed.

DISCUSSION

Sunrise contends that the VA's award determination was flawed for three reasons: (1) the agency unreasonably evaluated Invacare's past performance, (2) the agency

¹ The agency used an evaluation scheme of exceptional, good, acceptable, and poor. Id. at 4.

improperly refused to accept Sunrise's late proposal submission, which would have lowered its proposed price, and (3) the agency unreasonably evaluated Sunrise's ANSI/RESNA test results for both of its proposed wheelchair models.² For the reasons discussed below, we conclude that none of the protester's arguments provides a basis to sustain the protest.

As a general matter, the evaluation of an offeror's proposal is a matter within the agency's discretion, since the agency is responsible for defining its needs and the best method for accommodating them. U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218 at 2. In reviewing a protest against an agency's evaluation of proposals, including technical and past performance evaluations, our Office will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4.

Past Performance Evaluation

Sunrise raises two arguments challenging the reasonableness of the VA's evaluation of Invacare's past performance. First, the protester contends that because the agency received survey responses from only 3 of the 10 past performance references identified by Invacare, the agency lacked a basis to rate the awardee as "excellent" under this evaluation factor.

There is no legal requirement, however, that an agency consider all references in evaluating an offeror's past performance. ITS Servs., Inc., B-298941, B-298941.2, Jan. 10, 2007, 2007 CPD ¶ 23 at 7 n.11. Rather, an agency is only required to make a reasonable effort to contact a reference, and where that effort proves unsuccessful,

² The protester also argued in its protest that the VA improperly determined that the Sunrise wheelchair components were "flimsy," and that the agency spent more time evaluating Sunrise's products as compared to Invacare's products. Protest at 5. Although the VA addressed these allegations in its report on the protest, Sunrise did not comment on the agency's report regarding this issue. Where, as here, an agency provides a detailed response to a protester's assertions and the protester either does not respond to the agency's position or provides a response that merely references or restates the original allegation without substantively rebutting the agency's position, we deem the initially-raised arguments abandoned. Citrus College; KEI Parsons, Inc., B-293543 *et al.*, Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4. We conclude that Sunrise has abandoned this argument regarding the VA's evaluation of its proposal and therefore we will not consider it further.

it is unobjectionable for the agency to proceed with its evaluation without benefit of that reference's input. Universal Bldg. Maint., Inc., B-282456, July 15, 1999, 99-2 CPD ¶ 32 at 8 n.1. Furthermore, absent specific solicitation language, not present here, there is no minimum number of past performance survey responses that an agency must receive relative to the number of references identified by the offeror, nor is there any requirement that offerors' have the same number of references to receive equal ratings. See Paragon Sys., Inc., B-299548.2, Sept. 10, 2007, 2007 CPD ¶ 178 at 11; Data Mgmt. Servs. Joint Venture, B-299702, B-299702.2, July 24, 2007, 2007 CPD ¶ 139 at 8.

Here, the VA attempted to contact all 10 references at least three times. AR, Tab 9B, Price Negotiation Memorandum, at 20. On this record, we conclude that the agency made a reasonable effort to contact Invacare's references, and that the number of surveys received did not preclude the agency from rating Invacare's past performance as "excellent," based on survey information provided by the references that responded.

Second, Sunrise contends that the VA unreasonably failed to consider information concerning lawsuits filed against Invacare in the evaluation of that firm's past performance. As discussed above, the CO reviewed as part of her responsibility determination a D&B report indicating that Invacare was the subject of four product liability suits. Sunrise also contends that certain media reports indicate that Invacare has settled product liability claims regarding an electric wheelchair and that lawsuits are pending against the firm regarding other products.³

The evaluation of past performance, including the agency's determination of the relevance and scope of an offeror's performance history to be considered, is a matter of agency discretion that we will not find improper unless unreasonable, or inconsistent with the solicitation criteria or procurement statute or regulation. Standard Comms., Inc., B-296972, Nov. 1, 2005, 2005 CPD ¶ 200 at 5. Here, the agency argues that the information in the D&B report and news articles cited by Sunrise concerning the product liability lawsuits against Invacare did not concern the product offered by that firm for this procurement. The agency also notes that the information cited does not indicate any court judgments against Invacare holding it responsible for problems with its products.⁴ Supp. AR at 8. The record supports the

³ Although the protester raised this argument as a supplemental protest ground in its comments on the agency report, we consider it timely filed to the extent that it challenges the way in which the VA chose to evaluate information regarding Invacare, *i.e.*, the decision to consider the product liability suits in the context of responsibility, rather than past performance.

⁴ The protester notes the solicitation stated that the VA "may use information from the public domain" in the evaluation of offerors' past performance. RFP at 47. This
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agency's view. Furthermore, the agency did consider this information in its assessment of Invacare's responsibility, but concluded that the information did not represent "an unacceptable risk to the government." AR, Tab 9B, Price Negotiation Memorandum, at 30. On this record, we find no basis to object to the agency's actions.⁵

Late Proposal Submission

Sunrise argues that the agency should have accepted its late proposal submission in January 2007, which lowered the protester's proposed price for both of its proposed wheelchair models. In particular, Sunrise contends that its modified price for the LXE model would have been lower than Invacare's proposed wheelchair, and thus eliminates the VA's rationale for award, *i.e.*, that Invacare's proposal was lower-priced and more highly rated technically than either of Sunrise's proposals. As discussed above, the solicitation included the FAR clause, Instructions to Offerors--Commercial Items, which addresses the submission of late proposals as follows:

(2)(i) Any offer, modification, revision, or withdrawal of an offer received at the Government office designated in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered . . .

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statement, however, does not require the agency to do so, nor does it change the agency's discretion to consider the relevance of past performance information.

⁵ Sunrise also argues that the VA should have considered information disclosed in Invacare's Securities and Exchange Commission (SEC) annual filings concerning an investigation by the SEC of what the protester characterizes a "well-known promotional and rebate programs maintained by it." Sunrise, however, does not clearly explain why an investigation by SEC into rebate allegations is relevant to evaluation of Invacare's past performance. In this regard, the RFP stated that the agency would evaluate an offeror's record as it pertains to the production of wheelchairs, *e.g.*, workmanship and conformance to specifications. RFP at 47. In any event, this protest allegation was filed as a supplemental ground of protest in Sunrise's comments on the agency report, and is thus untimely because the basis for the protester's knowledge, *i.e.*, the publicly-available SEC filings, was available to the protester at the time its original protest was filed. Our Bid Protest Regulations applicable here require protests based on other than solicitation improprieties to be filed within 10 days of when the protester knew or should have known its bases of protest. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2007).

(ii) However, a late modification of an otherwise successful offer, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

FAR § 52.212-1(f).⁶

The protester contends that because its late proposal submission lowered its price below that proposed by Invacare, Sunrise should be considered an “otherwise successful offeror” from whom the agency should have accepted a late proposal. We disagree.

Under negotiated procurements, the FAR provides generally that a proposal received after the time set for receipt shall not be considered. FAR § 15.208(b)(1). Our Office has long held that the late proposal rule alleviates confusion, ensures equal treatment of offerors, and prevents one offeror from obtaining a competitive advantage as a result of being permitted to submit a proposal later than the deadline set for all competitors. Tishman Constr. Corp., B-292097, May 29, 2003, 2003 CPD ¶ 94 at 3. The FAR provides a limited exception for receipt of late proposals that are submitted by the “otherwise successful offeror” and which provide more favorable terms. This exception to the general “late is late” rule is intended to allow the government to receive the benefit of a more advantageous proposal from the offeror who has been selected for award, without offending the general rule that offerors must be treated equally.

With regard to the protester’s arguments, an offeror cannot make itself the “otherwise successful offeror” by submitting a late proposal modification; instead the offeror must already be the offeror in line for award prior to the time the late proposal modification is submitted. Phyllis M. Chestang, B-298394.3, Nov. 20, 2006, 2006 CPD ¶ 176 at 5 n.3. In this regard, an offeror cannot avail itself of the late proposal submission provision where the agency has not already identified an “otherwise successful offeror.” Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57 at 5-6.

Here, the agency evaluated the timely-submitted proposals and selected Invacare, and not Sunrise, for award; therefore, the limited exception to the FAR’s general rule for timely submission and consideration of proposals does not apply.⁷ On this

⁶ The clause at FAR § 52.212-1(f)(2)(ii) contains nearly identical language to the late proposal provisions at FAR § 15.208, which is applicable to negotiated procurements. Although the cases cited herein primarily address the provision in FAR part 15, we consider the two FAR provisions to be interchangeable for purposes of this protest allegation.

⁷ Sunrise submitted its late proposal modification on January 11, 2007, in conjunction with the agency’s request in RFP amendment 7 to extend offeror’s pricing. The
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record, we conclude that the agency's determination not to accept Sunrise's late proposal modification was reasonable.

ANSI/RESNA Test Data

Sunrise raises three arguments that the VA's evaluation of its ANSI/RESNA test data was unreasonable. Sunrise's proposal for its LXE model wheelchair received a rating of "poor" under this subfactor, and its Q2 model received a rating of "acceptable." AR, Tab 9B, Price Negotiation Memorandum, at 5. As discussed below, we find that the first argument lacks merit, and that the second and third arguments are untimely because they were disclosed to Sunrise at its debriefing but were not challenged until the protester filed its comments on the agency report.

First, Sunrise contends that the agency unreasonably determined that the test data for both its proposed models had a weakness because the tests were performed in-house by Sunrise personnel, rather than an outside party. The protester argues that the solicitation did not disclose that the agency would consider this factor in its evaluation. As the agency notes, however, this criticism was leveled at the test data submitted by both Sunrise and Invacare. AR, Tab 9B, Price Negotiation Memorandum, at 11. Thus, even if the agency's evaluation was not consistent with the solicitation, there was no possibility on this record of prejudice to Sunrise because the agency assessed the same weakness to Invacare's proposal.

To succeed in its protest, the protester must demonstrate not only that the agency failed to evaluate proposals in accordance with the solicitation and applicable regulations, but also that the failure could have materially affected the outcome of the competition. 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). Because Sunrise and Invacare had the same weakness, Sunrise cannot demonstrate that, even if the agency should not have assessed the weakness for in-house testing, Sunrise's competitive position would have been improved vis-à-vis Invacare. See NCR Gov't Sys. LLC, B-297959, B-297959.2, May 12, 2006, 2006 CPD ¶ 82 at 14.

The second and third arguments raised by Sunrise are that the agency unreasonably found weaknesses in Sunrise's test data based on the age of the test reports, and because the test reports were not signed. The VA and the intervenor argue, however, that both of these arguments are untimely because although the debriefing provided by the agency disclosed these issues, the protester did not raise them until it filed supplemental protest grounds in its comments on the agency report. In this regard, Sunrise's initial protest challenged only the agency's conclusions regarding the value

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amendment, however, requested that offerors confirm their existing prices; it did not invite or permit offerors to submit revised prices. See RFP amend. 7, at 1.

of the in-house testing approach; the protester raised the second and third arguments for the first time in its comments on the agency report. Protest at 4-5; Protester's Comments on the AR at 2-8. We agree that these two supplemental protest grounds are untimely raised.

The written debriefing provided by the agency clearly identified the two grounds of protest that the protester raised for the first time in its comments on the agency report, as follows:

[Sunrise Q2] The weakness and/or deficiencies found under the factor of ANSI/RESNA: Six year old unsigned report was submitted. Based on serial numbers, 4 to 5 chairs were tested before drum and curb drop fatigue tests were passed. All testing performed was done by Sunrise QA personnel (In-house vs. independent lab) which is acceptable but preferred method of testing would be by independent lab which would have resulted in a higher score.

[Sunrise LXE] The weakness and/or deficiencies found under the factor of ANSI/RESNA: 11 year old testing report was submitted. All testing performed was done by Sunrise QA personnel (In-house vs. independent lab) which is acceptable but preferred method of testing would be by independent lab. 11 year old report calls into question whether the current durability of the LXE can be meaningfully authenticated by model tested this far in the past.

AR, Tab 5, Sunrise Debriefing Letter, Aug. 28, 2007, at 2-3.

Our Bid Protest Regulations require protests based on other than solicitation improprieties to be filed within 10 days of when the protester knew or should have known its bases of protest. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2). Where a protester initially files a timely protest, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. University Research Co., LLC, B-294358.8 et al., Apr. 6, 2006, 2006 CPD ¶ 66 at 16. These two supplemental arguments are clearly distinct from the protester's initial argument that the agency unreasonably determined that the in-house testing was a weakness. On this record, we conclude that the two protest grounds regarding the age of Sunrise's ANSI/RESNA test results and the lack of signature on the Sunrise Q2 model are untimely.⁸

⁸ In its response to these allegations, the agency also notes that its criticism of the age of the Sunrise LXE 11-year-old test data was based on the fact that the ANSI/RESNA test standards were revised in 1998, thereby calling into question the
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Furthermore, even if we were to agree with the protester that the signature and test date issues were meritorious, the record does not demonstrate that Sunrise was prejudiced by the agency's evaluation of the test results. In this regard, eliminating all three weaknesses assessed with regard to Sunrise's ANSI/RESNA test results would have resulted in a similar rating to Invacare. None of the other evaluation ratings would have been affected, and thus Invacare's proposal still would have higher ratings than Sunrise's proposal under the more heavily-weighted subfactors of quality design and workmanship and performance, and Sunrise's and Invacare's proposals would remain equal under the portability subfactor. AR, Tab 9B, Price Negotiation Memorandum, at 5. Further, even if Sunrise were rated equally to Invacare under the technical evaluation factor, Invacare's proposal remains more highly rated under the Past Performance and SDB participation evaluation Factors, while also remaining lower-priced. On this record, we find that there was no possibility of prejudice to Sunrise by the VA's actions.

The protest is denied.

Gary L. Kepplinger
General Counsel

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validity of the tests conducted under the earlier test standards. Supp AR at 2-3; Decl. of VA Engineer at 2.