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Decision

Matter of: CRAssociates, Inc.

File: B-282075.2; B-282075.3

Date: March 15, 2000

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Kirkland & Ellis, for United Payors and United Providers, an intervenor.
Terrence J. Tychan and Michael Colvin, Department of Health & Human Services, for
the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO,
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DIGEST

Source selection decision is not reasonable where it is based on a misevaluation of the protester's and awardee's proposals in numerous areas, and the agency failed to conduct meaningful discussions with the protester.

DECISION

CRAssociates, Inc. (CRA) protests the award of a contract to United Payors and United Providers (UP) under request for proposals (RFP) No. 282-99-0001, issued by the Department of Health and Human Services (HHS) for health care services for alien detainees. CRA alleges that HHS misevaluated CRA's and UP's proposals, failed to conduct meaningful discussions with CRA, and unreasonably determined that UP's proposal represented the best value.

We sustain the protest.

BACKGROUND

The Immigration and Naturalization Service (INS) is responsible for the care and custody of detained aliens located throughout the United States who are held in INS Service Processing Centers (SPC), Contract Detention Centers (CDC), and state, county, or local correctional facilities or jails. The HHS Division of Immigration Health Services (DIHS) supports the INS mission by providing or arranging appropriate and cost effective health care for the detainees. Primary care at all SPCs

and some CDCs is provided by U.S. Public Health Service physicians, pharmacists, physician assistants, nurse practitioners, and nurses. Specialized services are provided through a nationwide integrated health care system. The RFP at issue here contemplated the award of a cost-reimbursement plus fixed-fee contract for specified health care services for a period of 5 years.

According to the RFP's statement of work (SOW), section C.4, the successful contractor is responsible for four tasks. Task I, "staffing," requires the contractor to provide full-time, part-time, and short-term substitution staffing at SPCs and CDCs. The contractor is responsible for identifying, screening, employing, and paying identified practitioners for ongoing needs and unanticipated circumstances such as a sudden influx of aliens or unforeseen shortages of professional staff. Short-term vacancies are to be filled through contractor-developed local staffing pools to meet same-day replacement requirements. Other replacements and provision of consultants are to be provided within specified periods after DIHS requests. Task II, "on-site medical and support services," requires the provision of services such as psychiatric, dental, radiological, and medical laboratory. Task III, "integrated health care support system," requires the establishment of a comprehensive preferred provider network, claims adjudication, and payment processing system, along with computer support systems. Task IV, "fiscal intermediary," requires the contractor to review and pay claims for medical services rendered to detainees. An estimated \$198,884,911 in claims are anticipated over the life of the contract and all offerors were required to include this plug figure in their cost proposals.

According to the RFP § M.3, the technical evaluation was to be based on the completeness and thoroughness of the technical proposals. Specifically, technical proposals were evaluated under the following factors: (1) technical approach (40 points); (2) understanding the problem (15 points); (3) key personnel (15 points); (4) organizational experience (15 points); and (5) adequacy of program management (15 points). The agency also evaluated whether offerors possessed sufficient cash reserves to accomplish task IV. RFP § M.4.

For competitive range proposals, the agency also evaluated past performance. Under past performance, the agency was to assess the relative risks associated with each offeror, including those associated with an offeror's likelihood of success in performing the contract requirements. Past performance was to be assigned a narrative rating of "excellent," "good," "none," "marginal," or "poor." RFP § M.5. Overall, evaluation of the technical proposals was to receive paramount consideration. Cost was to be evaluated on the basis of cost realism "defined as the offerors' ability to project costs which are reasonable and indicate that the offeror understands the nature and extent of the work to be performed." RFP § M.2. Award was to be made to the offeror whose proposal was determined most advantageous to the government.

Four offerors including CRA and UP submitted proposals by the initial closing date of December 4, 1998. After review of the initial proposals, the agency determined that CRA's and another proposal should be excluded from the competitive range. CRA filed a protest with our Office challenging this determination, in response to which and the agency took corrective action and included CRA's proposal in the competitive range. The agency conducted two rounds of discussions with each of the three competitive range offerors and required them to completely revise their technical and business proposals before final submission at the end of July 1999.

The final evaluation scores of the CRA and UP proposals are as follows:

Factor (points) /Offeror	UP	CRA
Technical Approach (40)	34.6	25.2
Understanding Problem (15)	14	11
Key Personnel (15)	7.4	8.8
Organizational Experience (15)	10.3	15
Program Management (15)	13.6	10
Technical Total (100)	79.9 [80]	70
Past Performance	Good	Good
Evaluated Cost	\$252,436,233	[deleted]

In his tradeoff memorandum, the chairman of the technical evaluation panel (TEP) recommended award to UP because its proposal was the best technically and therefore afforded the least amount of risk. While CRA's evaluated cost was lower, the TEP chairman concluded that CRA's proposal "did not demonstrate . . . a clear, confident, capability to perform." Tradeoff Memorandum, Oct. 21, 1999 (Tradeoff Memo) ¶ 2. Based on the TEP chairman's recommendation, the contracting officer, as the source selection authority (SSA), awarded the contract to UP.

After receiving notice of the award and a debriefing, CRA filed this protest with our Office, which it supplemented after reviewing the agency report. The agency has stayed contract performance pending our decision.

ANALYSIS

CRA challenges the evaluation of both its own proposal and that of UP. In this regard, it identifies mistakes in the mathematical scoring of the proposals, instances in which the agency treated the offerors unequally, and a lack of meaningful discussions. CRA also challenges the SSA's award determination on the basis that the cost/technical tradeoff was based on the faulty technical evaluation.¹ In

¹ CRA also argued that the SSA failed to exercise his independent judgment in making his award determination because he did not create a separate source

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addition, CRA questions the SSA's rationale for finding that CRA's lower cost did not outweigh UP's perceived technical superiority.

In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the RFP's stated evaluation criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. In order for our Office to perform a meaningful review of an agency's selection determination, an agency is required to have adequate documentation to support its evaluation of proposals and its selection decision. Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 at 4. The source selection documentation must include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. FAR § 15.308. Where, as here, the SSA's selection determination is based on the TEP chairman's recommendation, the underlying evaluation which led to that recommendation must adequately support it. Without adequate support for the technical evaluation, an award determination lacks a reasonable basis. Mechanical Contractors, S.A., B-277916, Oct. 27, 1997, 97-2 CPD ¶ 121 at 3.

Here, the record evidences numerous errors in the technical evaluations, compounded by a lack of meaningful discussions and mathematical errors in scoring the proposals, to CRA's detriment. These errors in turn are compounded by a cost/technical tradeoff rationale that is not properly substantiated. While, as explained below, no one of the individual deficiencies by itself warrants sustaining the protest, taken together, the cumulative effect of these shortcomings calls into question the reasonableness of the evaluation and the resulting award determination.

Technical Evaluation Errors

In CRA's debriefing, the agency identified 13 areas which constituted weaknesses or deficiencies in CRA's proposal, only two of which were specifically relied upon by the SSA. Neither of these identified deficiencies provides adequate support for the

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selection document. While Federal Acquisition Regulation (FAR) § 15.308 contemplates a separate source selection document, we do not believe the failure to create one is fatal to an otherwise reasonable selection determination. Here the SSA explains in the agency report that he used his own judgment to determine that award to UP was in the government's best interest. Supplemental Agency Report, Jan. 31, 2000, § A. In this regard, he states that he consulted with the TEP chairman and contract specialist, and he reviewed and made suggestions for revisions to the TEP chairman's memorandum. Id. Accordingly, in this decision we will consider the memorandum as essentially the SSA's document.

SSA's award selection because one reflects unequal treatment of the two offerors and the other represents a matter on which the SSA appears to have placed undue emphasis.²

First, under the "understanding the problem" factor, the evaluators deducted a total of [deleted] points because CRA's contract compliance matrix included food service and housing/hygiene inspections, which were agency responsibilities and not SOW requirements. Tradeoff Memo ¶ 8. Despite the fact that the entry correctly identified these tasks as agency responsibilities, CRA's decision to include the entry led the evaluators, and the SSA in the Tradeoff Memo, to conclude that this "demonstrates a very poor understanding of what the Government is asking for." *Id.* However, while UP's contract compliance matrix contains a similar entry, its proposal was not similarly downgraded in the evaluation.³ It is a fundamental principle of government procurement that the contracting agency must treat all offerors equally; it must evaluate offers evenhandedly against common requirements and evaluation criteria. *U.S. Property Management Serv. Corp.*, B-278727, Mar. 6, 1998, 98-1 CPD ¶ 88 at 6. Clearly, the agency failed to adhere to this standard with respect to its evaluation of the two offerors' similar entries here.

The agency explains that the matrix entry was simply an example of CRA's lack of understanding and identifies several other matters which ostensibly support the SSA's assessment. Although two of these matters were identified by some evaluators, they were not included in the contemporaneous Tradeoff Memo. While we consider the entire record, including statements and arguments made in response to a protest in determining whether a selection decision is supportable, we accord much greater weight to contemporaneous source selection materials than to judgments, such as the selection official's additional rationales here, made in response to protest contentions. *Southwest Marine, Inc.; American Sys. Eng'g Corp.*, B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10; *Dyncorp*, B-245289, B-245289.2, Dec. 23, 1991, 91-2 CPD ¶ 575 at 7 n.13. This reflects our concern that

² Of the six deficiencies challenged by CRA only two appear to be valid without question: CRA's proposal of computer equipment and its orientation schedule. With regard to the computer equipment, [deleted] CRA Proposal at 2-10. An offeror is responsible for affirmatively demonstrating the merits of its proposal and risks the rejection of its proposal if it fails to do so. *DBA Sys., Inc.*, B-241048, Jan. 15, 1991, 91-1 CPD ¶ 36 at 4.

³ CRA also argues that it received unequal treatment regarding the evaluation of the availability of its psychiatric services. The SOW required services rendered under Task IIIA (Preferred Provider Networks) to be available from providers within 30 miles of designated detention centers. CRA's compliance with this requirement was the subject of discussions and it lost points in the final evaluation under the "technical approach" factor. [deleted].

reevaluations and redeterminations prepared in the heat of an adversarial process may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Here, in our view, the contemporaneous record evidences that the agency inappropriately relied on CRA's compliance matrix entry as a basis to downgrade CRA's understanding of the requirement, and the post-protest augmentation and explanation by the agency do not establish otherwise.

The other technical deficiency specified by the SSA in the Tradeoff Memo concerned CRA's [deleted]. Tradeoff Memo ¶ 6. The Tradeoff Memo explains at some length why the evaluators were not convinced that CRA's [deleted]. While we find nothing inherently improper in the agency's assessment of this aspect of CRA's proposal, the record suggests that the SSA placed undue emphasis upon it. As noted by CRA, only one of five evaluators expressed concern with CRA's [deleted]. Protester's Comments at 18. Another evaluator commented favorably on CRA's realistic methods for staffing and the fact that CRA had proposed [deleted], while another observed that CRA had acknowledged [deleted]. Id. Further, as observed by the protester, UP proposed [deleted].

Lack of Meaningful Discussions

In discussions, an agency "shall . . . indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR § 15.306(d)(3). It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. Cotton & Co., LLP, B-282808, Aug. 30, 1999, 99-2 CPD ¶ 48 at 6. SRS Techs., B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 at 6.

While not relied upon in the Tradeoff Memo, the agency identified two other areas as deficiencies at the debriefing. The first concerned CRA's failure to identify [deleted]. The second concerned its proposal to designate [deleted]. CRA's initial, revised, and final proposals addressed these matters in the same fashion, yet neither deficiency was discussed with the protester. While the agency argues that the [deleted] matters were the subject of questions and answers, we could not find any reference to the matters in the discussions record.⁴ Further, while the agency

⁴ To the extent the agency relies on a CRA question regarding the government's request for "specific providers in specific instances," we do not believe this is sufficient evidence that the agency's concerns were communicated to the protester. Discussions Memorandum, Apr. 28, 1999, Q.2, at 4.

argues that [deleted] changed in the final proposal, in fact, CRA's [deleted] clearly described its plan to [deleted]. The agency could have raised both matters in its final discussions held on July 19, but did not.

While these negative evaluations were not specifically relied upon in the SSA's tradeoff, we cannot conclude that they did not have an impact on CRA's overall rating. Had the agency pointed out these matters, CRA could have added additional information and either changed the staff coordinator's designation or furnished additional information to convince the agency that the additional responsibility would not adversely affect the employee's ability to perform normal duties. Discussions cannot be meaningful where, as here, the agency fails to advise the offeror, in some way, of material proposal deficiencies. CitiWest Properties, Inc., B-274689.4, Nov. 26, 1997, 98-1 CPD ¶ 3 at 5; Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168 at 9.

Mathematical Errors

In its comments on the agency report, CRA observed that the agency had not accurately totaled the evaluation scores for CRA's or UP's proposals. Specifically, CRA identified an additional 2 points to which it was entitled and 2 points to which it is clear from the record that UP was not entitled. Protester's Comments at 9-10. When these points are added to CRA's evaluation score, it increases to 72 points and when deducted from UP's evaluation score, it drops to 78. The agency maintains the difference in points would have no effect on its award determination because it was based on the "strengths and weaknesses of the proposals and the reasonableness of the costs proposed." Supplemental Agency Report, Jan. 31, 2000, at 3. While this may be true, the fact remains that the assessment of strengths and weaknesses took into account an evaluation with a larger point spread than that actually reflected in the evaluation. Further, if additional adjustments are made for the evaluation errors and discussion issues addressed above, the point spread could easily be smaller still. For example, based on the contract compliance matrix point deficiency, CRA's proposal lost 2 total points. Either adding these to CRA's total or deducting them from UP's total would reduce the technical point difference to only 4 points. In view of the significant cost difference between the proposals (approximately 23 percent), the smaller point difference in technical merit raises doubt as to whether the technical differences are sufficient to support the SSA's tradeoff determination.

Cost/Technical Tradeoff Rationale

In addition to the shortcomings associated with the agency's technical evaluation, there is insufficient support in the record for the SSA's determination that UP's technical superiority outweighed CRA's lower cost. The SSA based his tradeoff on UP's incumbent status, CRA's predicted staff retention difficulties, and the likelihood of increased costs associated with CRA.

With regard to UP's technical superiority, the SSA focused primarily on UP's incumbent status. For example, he noted UP's sound plan for recruiting, managing, and delivering medical staff and support; continuation of established working relationships with vendors, providers, and suppliers; currently operating preferred provider network; and existing computer databases of medical and ancillary services. Tradeoff Memo ¶¶ 7, 9-10. He also found UP's preferred provider network to be the largest of any proposed, and that its diversity and locations would be important if there were a "substantial increase in the level of effort required," such as a "large alien influx." Tradeoff Memo ¶ 9. Because UP was the incumbent, the SSA had the "utmost confidence" in its performance, noting that "[m]aintaining the current circumstances will reduce both start up effort and [performance] risk." Tradeoff Memo ¶ 7, 9-10.

While an agency may properly recognize an incumbent's experience and additional value in making a tradeoff determination, here, the SSA does not acknowledge the relevant "incumbent" experience of CRA's management team members (including the chief executive officer, chief operating officer, and the executive vice president), who held senior management positions at PHP prior to their forming CRA. Protest at 2 n.1; Protester's Comments at 27. In addition, we note that for 2 years, PHP Healthcare Corporation was the incumbent for this requirement, and it submitted the original proposal. It was not until after PHP declared bankruptcy that UP purchased it, including the incumbent contract, and continued in the procurement process. At the time of the SSA's selection decision, UP had performed the contract for less than 6 months. In view of UP's limited experience in performing the contract and the failure to acknowledge CRA's incumbent connection, it appears that the SSA placed undue reliance on UP's incumbent status.

With regard to the greater risk associated with CRA's proposal, the SSA found that CRA's [deleted] were less realistic than UP's [deleted]. Tradeoff Memo ¶¶ 3, 4-5. He also noted that proposed [deleted] appeared low. Id. ¶¶ 4-5. Consequently, he anticipated additional costs to the government for [deleted]. Id. ¶ 5. In his view it would "become necessary . . . to instruct [CRA] to increase [deleted] causing a substantial increase in cost to the Government." Tradeoff Memo ¶ 11. The SSA also was concerned over CRA's ability to successfully perform the requirement without "substantial intervention" by the agency. Id.

Although the record is not entirely clear (and, again, our references to the SSA's findings in fact refer to the Tradeoff Memo, which he did not sign), it appears that the SSA was primarily concerned about CRA's ability to perform at the cost proposed. Before we turn to the question of cost-related risks, we note that, if the SSA had any concern about performance risk not based on cost, this view is not substantiated in this record. In this regard, RFP § M.5 provided for the evaluation of risk as follows:

The Government will assess the relative risks associated with each offeror. Performance risks are those associated with an offeror's likelihood of success in performing the acquisition requirements as indicated by that offeror's record of past performance.

Both CRA and UP were evaluated as "good" with regard to past performance. A "good" rating is defined as "[b]ased on the offeror's performance record, little doubt exists that the offeror will successfully perform the required effort." RFP § M.5. Here, the record reflects a favorable evaluation of CRA's past performance, and the SSA has not provided any substantiation for his conclusory statements questioning CRA's ability to successfully perform.

We recognize that the agency, and the SSA, could properly base a risk assessment on cost realism. The RFP specifically provided: "If a cost realism analysis is performed, cost realism may be considered by the [SSA] in evaluating performance or schedule risk." RFP § L.1.(f)(9). Here, however, a cost evaluation was performed by the cost analyst, who found that CRA's proposed costs were reasonable. Specifically, the cost analyst did not take any exception to CRA's proposed [deleted] rates. On the contrary, in the initial cost evaluation of [deleted], the cost analyst observed that the proposal was based on data [deleted]. CRA Cost Analysis, Apr. 28, 1999, note A. In the final cost analysis, the cost analyst noted that [deleted]. Based on the review of supporting documentation, the analyst found CRA's direct labor costs to be "fair and reasonable." CRA Cost Analysis, Aug. 16, 1999, note A. The cost analyst took no exceptions to the [deleted] the same assessment the analyst had of UP's [deleted]. *Id.*, note B. While the cost analyst approved of CRA's [deleted], the cost analyst who assessed UP's costs found [deleted] inadequate. UP Cost Analysis, Aug. 11, 1999, at 1. She recommended acceptance pending submission of proper support.

The lack of stated concerns by the cost team does not bar the SSA from reaching his own--and different--conclusions regarding the realism of CRA's proposed costs and the probable cost of that firm's proposal, so long as those conclusions have a rational basis. *ITT Fed. Servs. Int'l Corp.*, B- 283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 8. However, the SSA's conclusory findings in the Tradeoff Memo that some CRA rates [deleted] do not in themselves provide a rational basis for disagreeing with the cost analysts. Neither the evaluation record, nor any of the protest submissions provide adequate support for the reasonableness of the SSA's stated concerns and, as a result, his tradeoff decision lacks a rational basis.

The SSA's understanding of the relative magnitude of the cost difference between the two proposals also is open to question. In this regard, the proposed cost differential is approximately \$10 million. In the agency report, the SSA refers to the difference as accounting for approximately "2 ½ months of work on a 5-year project" and that this is "easily worth the security and assurance attained by awarding to the clearly more competent and capabl[e] offeror." Agency Report, Contracting Officer's Statement of Fact, at 25. Since this assessment was not included in the original

determination, it is entitled to less weight than we would otherwise accord it. Boeing Sikorsky Aircraft Support, *supra*. However, even if the SSA had included this assessment, we would ascribe it little weight. In this regard, the SSA's assessment ignores that both offerors' cost proposals include the same plug amount of nearly \$200 million for claims that the contractor must settle. Since this same amount is present regardless of which contractor is selected, it is more accurate to assess cost differences based on the costs associated with each offeror's unique approach. In this case, the \$10 million difference should be assessed in light of UP's \$52 million proposal and CRA's \$42 million proposal. When this is done the cost difference represents more than 1 year of the 5½-year contract period or some 23 percent, not simply 2 ½ months.

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, 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). While the agency argues that the matters identified by CRA would not have affected its source selection, we conclude, particularly in light of the multiple, material errors explained above, that the source selection cannot be viewed as reasonable and that the protester was prejudiced by the agency's actions.

RECOMMENDATION

We recommend that the agency reopen negotiations with the competitive range offerors, obtain best and final offers, reevaluate the proposals, and make a new, properly documented, award determination.⁵ We also recommend that CRA be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States

⁵ We have not addressed every error alleged by CRA or the agency's responses thereto. We suggest that the agency ensure that all its concerns are raised in discussions, which will afford the offerors the opportunity to address all matters identified by the agency.