



GAO

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 redacted version has been approved for public release.

Decision

Matter of: Optimum Management Systems, LLC

File: B-299322.3

Date: May 23, 2007

Randall H. Miller, Esq., and James N. Phillips, Esq., Holme Robert & Owen, LLP, for the protester.

Mike Lebofsky for SofTec Solutions, Inc., an intervenor.

Sherry Kinland Kaswell, Esq., Department of Interior, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of award to offeror with lower-rated, lower-priced proposal is denied where agency reasonably determined that premium involved in awarding to offeror with higher-rated, higher-priced proposal was not justified.

DECISION

Optimum Management Solutions, LLC protests the decision by the Department of the Interior to terminate its contract and instead make award to SofTec Solutions, Inc. under request for proposals (RFP) No. NBC07003, issued by the Department of the Interior for financial systems support for its National Business Center (NBC). The protester argues that the agency's selection of SofTec for award was inconsistent with the RFP's evaluation scheme.

We deny the protest.

The RFP, which was issued on November 9, 2006 as an 8(a) set-aside, contemplated the award of a fixed-price, indefinite-quantity/indefinite-delivery contract for a base and 4 option years. The solicitation provided for award to the offeror whose proposal was determined to be most advantageous to the government, with proposals to be evaluated on the basis of the following factors: management approach and technical capabilities, personnel qualifications, organizational experience, past performance, and price. The solicitation advised that the technical and past performance factors, when combined, were significantly more important than price.

Ten firms submitted proposals by the December 1, 2006 closing date. Each of four evaluators rated each proposal on a scale of 1-4 under each of the four non-price factors;¹ these points were then totaled to yield the offeror's overall technical score.² The evaluators determined only the following three proposals to be technically acceptable:

Offeror	Technical Score	Price
OMS	59	\$9,450,410
SofTec	56	\$7,249,312
Offeror A	56	\$9,069,406

The contracting officer determined that OMS's proposal represented the best value to the government based on its having received the highest technical score. On December 22, the agency awarded a contract to OMS and posted notice of the award on the Federal Business Opportunities (FedBizOpps) website.

SofTec, the incumbent contractor, learned of the award to OMS on December 26 and requested a debriefing the following day. SofTec also filed a protest with our Office on December 27, alleging that the award to OMS was improper because OMS had not proposed, and did not intend, to meet the solicitation requirement for a quality assurance (QA) manager working on-site at the NBC 20 hours per week. In a supplemental submission to our Office dated January 15, 2007, SofTec further argued that the proposed hourly rate for OMS's QA manager was unrealistically low.

While SofTec's initial protest was pending, SofTec again contacted the agency and renewed its request for a debriefing. In reviewing the request, the contract specialist realized that she had overlooked SofTec's December 27 debriefing request and agreed to furnish SofTec a debriefing. The debriefing was held on January 24. On January 29, SofTec filed a second protest, objecting to the evaluation of its own

¹ The evaluation worksheet defined the ratings to be used by the evaluators as follows:

- 4: Outstanding--Exceptionally Meets the Requirement
- 3: Good--Meets the Requirement
- 2: Marginal--Minimally Meets the Requirement
- 1: Unacceptable--Does Not Meet the Requirement

² Since there were four evaluators assigning points under four factors and the maximum possible score under each factor was four, the maximum possible overall technical score was 64.

proposal. This protest was based on information learned by SofTec at the debriefing.

By decision dated January 30, we dismissed SofTec's initial protest, finding that its allegations concerning OMS's QA manager were unsupported and concerned a matter of contract administration not subject to our review. Eight days later, on February 7, the agency notified us that it was taking corrective action in response to SofTec's second protest. Specifically, the agency informed us that the contracting officer had terminated for convenience the contract awarded to OMS and that she planned to award to SofTec. The agency explained that it was taking this corrective action because it had concluded that the procurement record did not support a defense against SofTec's second protest. By decision dated February 9, we dismissed SofTec's protest as academic. OMS requested a debriefing on February 9, which the agency provided on February 14. On February 26, OMS protested to our Office.

OMS raises two preliminary challenges to the agency's decision to take corrective action in response to SofTec's second protest. OMS first asserts that the agency should not have taken corrective action because SofTec's protest was untimely filed. We disagree. It was within the agency's discretion to take corrective action in connection with the procurement regardless of whether SofTec's protest was timely; all that is required is that the agency have reasonable concerns that errors in the procurement occurred.³ Alfa Consult S.A., B-298164.2, B-298288, Aug. 3, 2006, 2006 CPD ¶ 127 at 2, 3 n.1.

³ In any event, we note that SofTec's protest was timely filed. OMS premises its argument that SofTec's protest was untimely on the fact that SofTec failed to request a debriefing within 3 days after it was constructively placed on notice of the award via publication on FedBizOpps, and the debriefing it ultimately received thus was not a "required" debriefing. See Federal Acquisition Regulation § 15.506(a)(1), (3). As a consequence, the protester maintains, SofTec's 10-day period for filing a protest should have started to run on the date of the award and not on the date of its debriefing. The provision in our timeliness rules cited by the protester, 4 C.F.R. § 21.2(a)(2) (2007), extends the time period for filing a protest based on information known to a protester prior to a debriefing beyond the usual 10-day period in the situation in which a debriefing is both requested and required. However, even where a disappointed offeror does not secure a required debriefing, it retains its right to file a protest within 10 days after it learns, as here, or should have learned, of the basis for its protest, provided it has diligently pursued the matter. This includes the right to file a timely protest based on information obtained during a debriefing that was not required. Raith Eng'g and Mfg. Co., W.L.L., B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9.

OMS next asserts that even if the agency's procurement record did not support a defense against SofTec's second protest, termination of the contract previously awarded to it and award of a contract to SofTec were not necessarily the appropriate corrective measures since the conclusion that the agency erred in its evaluation of SofTec's proposal does not necessarily lead to the conclusion that SofTec's proposal represents the best value to the government.⁴

The agency responds that it took the corrective action that it did because the contracting officer determined, after reexamining the evaluation record in response to SofTec's second protest, that "the record could not support a rational cost/technical tradeoff justifying award based on a proposal that was rated only slightly higher technically, but was over \$2 million . . . higher in price." Agency Report at 2. That is, the contracting officer determined that OMS's proposal did not offer technical advantages sufficient to outweigh its higher price. Thus, contrary to the protester's assertion, the agency did not decide to terminate OMS's contract and award to SofTec simply because it concluded that it had erred in its initial evaluation; it took this action because, after reexamining the record, it concluded that SofTec's combination of technical merit and price represented the best value to the government.

With regard to the selection of SofTec, OMS argues that it was inconsistent with the evaluation scheme set forth in the RFP, which provided that technical factors would be significantly more important than price in the determination of best value, for the agency to have selected SofTec's lower-rated proposal for award on the basis of SofTec's lower price.

This argument is without merit. Even where price is the least important evaluation criterion, an agency may properly award to an offeror with a lower-rated, lower-priced proposal if the agency reasonably determines that the premium involved in awarding to an offeror with a higher-rated, higher-priced proposal is not justified. Computer Tech. Servs., Inc., B-271435, June 20, 1996, 96-1 CPD ¶ 283 at 5. Here, the record clearly demonstrates the reasonableness of the contracting officer's conclusion that OMS's proposal did not offer technical advantages over SofTec's sufficient to justify its higher price.

The agency reports that, in reviewing its source selection decision in response to SofTec's second protest, it reconsidered whether the large disparity between OMS's and SofTec's proposed prices could be justified by specific advantages in OMS's

⁴ OMS also asserts that the agency should have "reopened the bidding" because "there has been a defect in the solicitation identified after the agency" made award to SofTec. Comments at 11. There is no basis to conclude that the agency should have called for submission of revised proposals given that the flaws identified by the agency related to the evaluation of proposals, not any terms of the RFP.

technical proposal. It found that while the technical evaluators had credited OMS for its plan to retain the incumbent staff since this would minimize the transition effort, [deleted]. Further, while the technical evaluators described OMS's experience on similar contracts as a strength, SofTec was performing as the incumbent on the project in question. In other words, these grounds did not furnish a reasonable basis for preferring OMS's proposal over SofTec's. The agency further noted that the major discriminator between the two proposals appeared to be in the area of past performance, where SofTec's proposal was perceived as weaker than OMS's due to difficulties that NBC officials had encountered in dealing with SofTec's project manager under the predecessor contract. In reexamining the record, however, the agency found that the contract file did not contain documentation demonstrating a basis for the negative perceptions regarding the performance of SofTec's project manager.⁵

OMS contends that in her initial best value tradeoff determination in its favor, the contracting officer identified an additional advantage in its technical proposal, *i.e.*, its low staff turnover, which she then improperly ignored in her second tradeoff determination in favor of SofTec. The protester cites the following excerpt from the initial price analysis of proposals as its basis for this argument:

OMS has a history of hiring, and retaining highly skilled personnel. It is believed that this is due to OMS' decision to pay its employees slightly higher (but reasonable) labor rates. Low staff turnover is extremely important for this requirement, therefore, the Government considers OMS' proposed prices to be fair and reasonable.

Price Analysis Attachment to Price Negotiation Memorandum.

We do not think that OMS's low staff turnover was cited in the foregoing excerpt as an advantage justifying the selection of OMS's proposal over SofTec's; rather, it appears to have been cited as a justification for finding OMS's prices, which were substantially higher than SofTec's, reasonable. We note in this connection that the excerpt concludes by finding OMS's proposed prices fair and reasonable. Moreover, there is no mention of SofTec's rate of staff turnover or comparison of SofTec's rate to OMS's rate anywhere in the evaluation documentation.

In sum, we think that the contracting officer reasonably concluded after reexamining

⁵ We note in this connection that while the protester speculates that the agency's concerns regarding SofTec's project manager were eliminated through discussions that the agency improperly held with SofTec only, we find no support in the record for this speculation.

the evaluation record that OMS's proposal did not offer sufficient advantages over SofTec's to make it worth a considerably higher price.⁶

The protest is denied.

Gary L. Kepplinger
General Counsel

⁶ With regard to the protester's complaint that the agency failed to disclose required information to it at its debriefing, our Office will not review a protester's contention that the debriefing it received was inadequate because the adequacy of a debriefing is a procedural matter concerning an agency's actions after award, which are unrelated to the validity of the award itself. Symplicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 4 n.4.