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Comptroller General
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Decision

Matter of: Inchcape Shipping Services Holding, Ltd.

File: B-403399.3; B-403399.4

Date: February 6, 2012

Craig A. Holman, Esq., Kara L. Daniels, Esq., and Lauren J. Schlanger, Esq., Arnold & Porter LLP, for the protester.

Walter A.I. Wilson, Esq., Claude P. Goddard, Jr., Esq., Daniel J. Donohue, Esq., and Sarah M. Graves, Esq., Husch Blackwell LLP, for Multinational Logistic Services, Ltd., an intervenor.

Keith M. Dunn, Esq., and Jacqueline McCain, Esq., Department of the Navy, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency was not required to provide for the submission of revised proposals due to the fact that approximately one year had elapsed between the submission of proposals and contract award.
 2. Protest that awardee's prices were impermissibly unbalanced is denied where record fails to establish that awardee's unit prices were overstated or understated.
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DECISION

Inchcape Shipping Services Holding, Ltd. (ISS), of Essex, Great Britain, protests the award of a contract to Multinational Logistic Services, Ltd. (MLS), of St. Julians, Malta, under request for proposals (RFP) No. N68171-10-R-0004, issued by the Department of the Navy, Fleet Industrial Supply Center Sigonella for maritime husbanding support in the United States Africa Command area of responsibility. The protester argues that the agency unreasonably failed to give offerors the opportunity to update their proposals and that MLS's prices were impermissibly unbalanced. ISS also challenges the agency's evaluation of its technical proposal.

We deny the protest.

BACKGROUND

The RFP, which was issued on March 22, 2010, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for a base period of one year, with four 1-year options. The solicitation provided for award to the offeror whose proposal was determined most advantageous to the agency based on technical approach, past performance, and price. Technical approach was to be evaluated on an acceptable/unacceptable basis, and in selecting among the technically acceptable proposals, past performance was more important than price.

With respect to price, the solicitation included 40 lots, 39 of which corresponded to individual countries (and the 40th of which encompassed a group of inland African countries). Each lot included line items for supplies and services for one or more ports. Some of the ports/lots were designated as “targeted ports/lots,” while others were designated as “non-targeted ports.” In this regard, because the agency did not know which specific ports would be visited during the term of the contract, the RFP established that only the prices for goods and services for the targeted ports would be considered in establishing total evaluated price.¹ Prices for the non-targeted ports were to be evaluated for reasonableness, and the RFP reserved to the agency the right not to award line items for a non-targeted port if the proposed pricing for that port was determined to be unreasonable. The RFP also established that evaluated price would be calculated by adding together the base and option period prices, and provided for rejection of a proposal as unacceptable “if the evaluated option prices [were] significantly unbalanced.” RFP, amend. 0018, at 95.

The RFP, as amended, set the closing date for receipt of proposals as July 28, 2010. On July 27, 2010, a third offeror filed a protest with our Office objecting to various terms of the solicitation. Both ISS and MLS proceeded with submission of their proposals, but the agency did not evaluate them due to the pending protest. After considering the protest, the agency issued an amendment to the RFP that reopened the solicitation and set a new closing date. The new closing date was subsequently extended to October 29, 2010, and all three offerors submitted timely proposals.

The agency evaluated the proposals and assigned the following ratings:

¹ The solicitation includes 355 targeted port line items.

	Offeror A	MLS	ISS
Technical	Unacceptable	Acceptable	Unacceptable
Past Performance	Not evaluated	Outstanding	Not evaluated
Total Evaluated Price	[deleted]	[deleted]	[deleted]
Total Price	\$31,308,746	\$52,258,940	\$67,556,106

Agency Report at 3. MLS's proposal was the only proposal evaluated as technically acceptable, it received the highest possible rating of "outstanding" under the past performance factor, and its proposed price was determined to be fair and reasonable. On April 1, 2011, the Navy made award to MLS.

ISS protested to our Office on April 8. The same day, ISS asked the Navy to investigate an alleged Procurement Integrity Act (PIA) violation on the part of MLS. The agency opened an investigation of the alleged PIA violation and, on May 9, terminated the contract awarded to MLS pending completion of that investigation. The Navy requested that we dismiss ISS's protest, and by decision dated May 12, we did so, noting that the agency's termination of MLS's contract rendered ISS's protest of that award academic. Inchcape Shipping Servs. Holding, Ltd., B-403399.2, May 12, 2011.

The Navy concluded its investigation of the alleged PIA violation and determined that no violation had occurred. On November 4, the Navy again made award to MLS. On November 10, ISS protested to our Office.

DISCUSSION

First, ISS argues that given the amount of time that elapsed between offerors' submission of their proposals and the award, the agency should have permitted offerors to update their proposals.² In this connection, the protester argues that

² ISS raised two arguments that we dismissed prior to submission of the agency report. Specifically, the protester argued that MLS was not eligible for award because it is an inverted domestic corporation, and that MLS violated the PIA by hiring three former ISS employees. In dismissing the former argument, we noted that the Federal Acquisition Regulation in effect at the time the solicitation was issued precluded award to an inverted domestic corporation using fiscal year (FY) 2006-FY 2009 appropriated funds. Because the delivery orders under the contract awarded here would not be funded with FY 2006-FY 2009 appropriated funds, whether MLS was an inverted domestic corporation had no bearing on its eligibility for award. We dismissed the second argument as legally insufficient, finding that even if the facts alleged by the protester were shown to be true, it would not demonstrate a PIA violation.

agency contracting officials knew that some of its proposed key personnel had left its employ and that the portion of its proposal addressing its organizational structure/key personnel therefore required revision. ISS also argues that given the passage of time, the agency should have required offerors to update their past performance information.

The protester's argument has no merit. Agencies are not required to provide for the submission of revised proposals merely because of the passage of time. Highmark Medicare Servs., Inc.; Cahaba Gov't Benefit Adm'rs, LLC; Nat'l Gov't Servs., Inc., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 11 n.10; System Planning Corp., B-244697.4, June 15, 1992, 92-1 CPD ¶ 516 at 5. Moreover, it is clear from the record that allowing the protester to update the portions of its proposal addressing key personnel and past performance would have had no material impact on the rating of the proposal as technically unacceptable given that the unacceptable rating was based on findings unrelated to these areas.³ Contrast DRS ICAS, LLC, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261; Panacea Consulting, Inc., B-299307.4, B-299308.4, July 27, 2007, 2007 CPD ¶ 141; and G. Marine Diesel, B-232619.3, Aug. 3, 1989, 89-2 CPD ¶ 101. Thus, the protester suffered no prejudice as a result of the agency's failure to permit it to update the key personnel and past performance information in its proposal.

Next, the protester argues that the agency misevaluated MLS's prices. In particular, ISS contends that MLS's prices were materially unbalanced and that some of MLS's line item prices were unrealistically low.

In support of its argument that MLS's prices were materially unbalanced, ISS points out that for several of the targeted port line items, MLS proposed lower unit prices in its October 2010 proposal as compared to its July 2010 proposal, and that for several of the non-targeted port line items, MLS proposed higher prices in its October proposal as compared to its July proposal. According to the protester, these changes demonstrate that ISS was "gaming" the system.

The protester's argument is unavailing. Unbalanced pricing exists where the prices of one or more line items are significantly overstated, despite an acceptable total evaluated price (typically achieved through under pricing of one or more other line items). General Dynamics--Ordnance & Tactical Sys., B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 5. The protester has not demonstrated that any of MLS's prices were overstated; that is, the mere fact that MLS adjusted its unit price for a few of the 355 line items upward in its October 2010 proposal does not

³ The agency found ISS's proposal technically unacceptable due to the protester's failure to demonstrate the functionality of its on-line pricing application and to describe its port cost management practices.

demonstrate that the October 2010 prices were overstated.⁴ Moreover, even assuming for the sake of argument that a few of MLS's non-targeted port line item prices were overstated, there was no risk to the government that award to MLS would result in the government paying unreasonably high prices for contract performance (which is the risk inherent in overstated prices) given that the RFP specifically reserved to the agency the discretion not to award line items for a non-targeted port if the proposed pricing for the port was determined to be unreasonable. The agency did not find any of MLS's prices to be unreasonable.

The protester's allegation that MLS's prices for some line items were too low fails to state a legally sufficient basis for protest. There is no prohibition against an agency accepting below-cost prices on a fixed-price contract. McRae Indus., Inc., B-403335, Oct. 20, 2010, 2010 CPD ¶ 266 at 10. Although an agency may provide for a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror's low price reflects on its understanding of the contract requirements or the risk inherent in an offeror's approach, the RFP here did not provide for such a realism evaluation. Where a solicitation does not provide for such an evaluation, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to perform the contract successfully at its offered price, which is not a matter that we will review. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2011); Milani Constr., LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87 at 4-5.

Finally, the protester argues that the agency failed to conduct meaningful discussions with it regarding the shortcomings in its technical proposal, and that the evaluation of its proposal as technically unacceptable was unreasonable.

We dismiss these complaints on the grounds that the protester is not an interested party to raise them because it would not be in line for award if the arguments were sustained.⁵ See Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57

⁴ ISS also argues that MLS's pricing was unbalanced as reflected by the fact that MLS offered higher prices than ISS on some line items and lower prices on others. A comparison of the awardee's prices to those of the protester, without more, is insufficient to show that the awardee's prices are unbalanced. General Dynamics--Ordnance & Tactical Sys., *supra*.

⁵ Or, put another way, even assuming that the protester were to prevail on these arguments, and its proposal were to be considered technically acceptable, there is no reasonable possibility that it would move into line for award. Thus it is clear that it suffered no prejudice as a result of the agency's allegedly improper actions. In this connection, prejudice is an essential element of every viable protest, and where none is shown or is otherwise apparent, we will not sustain a protest, even if the

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at 2. In this regard, it is clear from the record that ISS would not be in line for award regardless of its proposal's technical rating because MLS's proposal was rated as technically acceptable, MLS received an "outstanding" rating under the past performance factor,⁶ and MLS's evaluated price was significantly lower than the protester's.

The protest is denied.

Lynn H. Gibson
General Counsel

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agency's actions may arguably have been improper. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7.

⁶ ISS did not challenge MLS's "outstanding" rating under the past performance factor, or otherwise challenge MLS's technical acceptability.