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Decision

Matter of: Cyberdata Technologies, Inc.

File: B-406692

Date: August 8, 2012

Edward J. Tolchin, Esq., Offit Kurman, for the protester.
Catherine Crow, Esq., General Services Administration, for the agency.
Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's argument that its technically acceptable quotation was excluded from the competition without consideration of price in a best value acquisition for the establishment of blanket purchase agreements (BPA) under the Federal Supply Schedule (FSS) is sustained where Federal Acquisition Regulation subpart 8.4 requires that price be considered in establishing BPAs under the FSS, and where the record shows that the agency "downsized" the pool of vendors, by excluding some of them, like the protester, who were technically acceptable, without consideration of their lower prices.

2. Where a protest raises an untimely issue that has not been previously decided and is potentially of widespread interest to the procurement system, the Government Accountability Office (GAO) may consider the issue pursuant to the significant issue exception in its timeliness rules, 4 C.F.R. § 21.2(c) (2012); here, the GAO invokes the significant issue exception and sustains the protest, however, since the protester did not raise the issue in a timely manner--when it clearly could have done so--GAO does not recommend reimbursement of protest costs.

DECISION

Cyberdata Technologies, Inc., of Herndon, Virginia, protests the General Services Administration's (GSA) decision not to establish a blanket purchase agreement (BPA) with the company under request for quotations (RFQ) No. PGE-01-25-2012, RFQ 646760. Cyberdata asserts that its quotation improperly was excluded from the competition without consideration of its price.

We sustain the protest.

BACKGROUND

The RFQ, issued under Federal Acquisition Regulation (FAR) subpart 8.4, Federal Supply Schedule (FSS), to support the Chief Information Officer for GSA's Public Building Service, sought quotations from vendors holding contracts under GSA Information Technology Schedule 70, Special Item Number 132-51, Information Technology Professional Services. The RFQ provided for the establishment of up to 6 BPAs, with a 5-year term, with a total combined maximum value of \$30 million annually for all BPA holders and \$150 million over 5 years.

The RFQ provided that the BPAs would be issued on a best value basis--"[t]he method to establish the BPA will be based on the best value to the government, price and other factors considered"--considering price and four technical evaluation factors: technical understanding, management plans, past performance, and small business participation. AR, exh.1, RFQ, at 55-61. Technical was "more significant" than price. RFQ at 55.

The RFQ further provided that:

The Technical Evaluation Board (TEB) shall review and downsize the number of quotations to no more than twelve (12) of the most favorably evaluated quotations. The chosen Contractors, approximately six (6) large businesses and approximately six (6) small businesses, shall present oral presentations to GSA.

Id. at 61. In addition, the RFQ was amended to include the following question and answer regarding the methodology for "downsizing" the number of vendors that would be permitted to make an oral presentation:

Q6: Page 61 states: "The Technical Evaluation Board (TEB) shall review and downsize the number of quotations to no more than twelve (12) of the most favorably evaluated quotations." Is this based on technical or technical and price?

A6: The TEB will downsize the quotations to the most favorably evaluated quotations based on the technical quotation only.

AR, exh. 4, RFQ amend. No. 1, Questions and Answers, at 2.

The closing date was March 2, 2012. GSA received 35 responses to the solicitation, including 12 from large businesses and 23 from small businesses (including Cyberdata). The TEB evaluated the technical quotations of all 35 vendors, and prepared a narrative report describing for each vendor the strengths and weaknesses under each of the four technical evaluation factors, and

the overall consensus technical score for the vendor. AR, exh. 21, TEB Report; AR, exh. 24, Best Value Determination.

The TEB ranked the vendors by overall technical score to determine the top twelve most technically favorable quotations. Only those vendors were to be invited to deliver oral presentations. Contracting Officer's (CO) Statement at 3; see TEB Report; Best Value Determination at 1. Cyberdata's technical quotation received an overall adjectival rating of "good," and was ranked 14th technically. CO's Statement at 6.

Of particular importance here, the CO's best value determination made clear that "[p]ricing was not used in determining the top twelve (12) most technically favorable quotations." Best Value Determination at 1. Instead, the best value determination indicated that the twelve most technically favorable quotations "would be able to provide a fair and adequate pricing competition for the Best Value Determination." Id.; see also CO's Statement at 4. While the best value determination generally acknowledged that "some of the unselected [o]fferors may have been able to provide BPA services at a lower cost," it indicated that "it would be at the reduction of technical quality and not worth a trade-off to that extent. GSA's primary goal on this solicitation was to select technically superior [o]fferors." Best Value Determination at 1.

Vendors not selected to deliver oral presentations, including Cyberdata, were notified that they were excluded from further consideration for receipt of a BPA. GSA ultimately decided to establish BPAs with six of the Schedule 70 contract holders, including 2 large businesses and 4 small businesses.

DISCUSSION

In its protest to our Office, Cyberdata challenges the decision to exclude its quotation from the competition without consideration of price. In response to this protest, GSA argues that the protest should be dismissed as untimely because the solicitation--and its amendments, including the Questions and Answers--clearly communicated the agency's intended evaluation approach.

Significant Issue Exception to Timeliness Requirements

As an initial matter, our Bid Protest Regulations provide that protests based upon alleged improprieties in a solicitation which are apparent prior to closing shall be filed prior to closing. 4 C.F.R. § 21.2(a)(1) (2012). However, our Regulations also provide that GAO may consider a protest that raises issues significant to the procurement system. 4 C.F.R. § 21.2(c). In this regard, what constitutes a significant issue is to be decided on a case-by-case basis. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18 at 4. We generally regard a significant issue as one of widespread interest to the procurement community and that has not

been previously decided. Satilla Rural Electric Membership Corp., B-238187, May 7, 1990, 90-1 CPD ¶ 456 at 3.

Here, while we have previously addressed the requirement that price or cost be considered before a technically acceptable proposal (or quotation) can be excluded from consideration for award, see Kathpal Tech., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6 at 9, we have not previously considered this issue in the context establishing a BPA under the FSS. In addition, as set forth more fully below, the Federal Acquisition Regulation (FAR) imposes specific requirements applicable to best value decisions related to the creation of BPAs under the FSS. See FAR § 8.405(a). Given these requirements, and given the extensive reliance on BPAs in federal procurement, we think an agency's decision to ignore the role of price or cost in excluding technically acceptable vendors from further consideration for receipt of a BPA under the FSS is too fundamental to ignore. Accordingly, even though this solicitation sufficiently placed vendors on notice that the agency would not consider price in "downsizing" the competition, we find that this situation is appropriate for the use of the significant issue exception to our bid protest timeliness rules.

GSA's "Downsizing" Decision Improperly Ignored Prices

As discussed above, there is little dispute in this record that Cyberdata was excluded from the competition without consideration of its price. Vendors were specifically advised that the agency "will downsize the quotations to the most favorably evaluated quotations based on the technical quotation only." RFQ amend. No. 1, Questions and Answers, at 2. In addition, the best value determination, submitted as part of the agency report, indicated that in fact "[p]ricing was not used in determining the top twelve (12) most technically favorable quotations." Best Value Determination at 1. Likewise, the contracting officer reports that "[t]he Government used the overall technical ranking to determine which twelve [v]endors would be invited to deliver oral presentations." CO's Statement at 3.

The FAR, however, requires with regard to creating BPAs under the FSS that: "[o]rdering activities shall establish the BPA with the schedule contractor(s) that can provide the supply or service that represents the best value." FAR § 8.405-3(a)(1). Further, the FAR indicates with regard to establishing a BPA that "[i]n addition to price (see 8.404(d) and 8.405-4), when determining best value, the ordering activity may consider [various other enumerated factors.]" FAR § 8.405-3(a)(2). Thus, under the FAR, price is the one factor that, at a minimum, must always be considered when determining best value for purposes of establishing a BPA under the FSS.

Moreover, we have previously held that a best value analysis necessarily encompasses consideration of an offeror's price or cost since, to be meaningful, a

best value determination requires a weighing of the value and benefits associated with a firm's approach against their associated cost to the government. See TtEC-Tesoro, JV, B-405313, B-405313.3, Oct 7, 2011, 2012 CPD ¶ 2 at 9. In a best value procurement, it is the function of the source selection authority to perform a tradeoff between price and non-price factors, that is, to determine whether one proposal's superiority under the non-price factor is worth a higher price. Even where, as here, price is stated to be of less importance than the non-price factors, an agency must meaningfully consider cost or price to the government in making its selection decision. See e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 7. Thus, before an agency can select a higher-priced proposal that has been rated technically superior to a lower-priced but acceptable one, the decision must be supported by a rational explanation of why the higher-rated proposal is, in fact, superior, and explaining why its technical superiority warrants paying a price premium. See Coastal Environments, Inc., B-401889, Dec. 18, 2009, 2009 CPD ¶ 261 at 4.

Here, the agency's elimination of technically acceptable quotations, such as Cyberdata's, without consideration of their price, was inconsistent with the requirement that price be considered in a best value analysis. See System Eng'g Int'l, Inc., B-402754, July 20, 2010, 2010 CPD ¶ 167 at 5 (protest sustained where record shows that agency in best value procurement performed tradeoff between two higher-rated, higher-priced quotations, but did not consider the lower prices submitted by other lower-rated but technically acceptable vendors); Coastal Environments, Inc., supra (protest sustained where agency conducted a tradeoff between the two highest-rated, highest-priced proposals, but did not consider the lower prices offered by other lower-rated, but technically acceptable offerors); Kathpal Tech., Inc.; Computer & Hi-Tech Mgmt., Inc., supra, at 9 (agency cannot eliminate a technically acceptable proposal from consideration for award without taking into account the relative cost of that proposal to the government).¹ We

¹ We note that GSA contends--almost as an argument in the alternative--that it did consider price in its decision to "downsize" the pool of vendors that responded to this solicitation. Specifically, GSA refers to two sentences in its Best Value Determination acknowledging that "some of the unselected [o]fferors may have been able to provide BPA services at a lower cost," but indicating that "it would be at the reduction of technical quality and not worth a trade-off to that extent. GSA's primary goal on this solicitation was to select technically superior [o]fferors." Best Value Determination at 1. To the extent that GSA is arguing that these sentences constitute a consideration of cost, we think the consideration was not meaningful. See e-LYNXX Corp., supra. The selection of a higher-priced offer that has been rated technically superior to a lower-priced but acceptable one must be supported by a rational explanation of why the technical superiority warrants paying a price premium. Coastal Environments, Inc., supra. A global statement addressing all 35 quotations, with no consideration of the value offered by any particular

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therefore sustain the protest on the basis that GSA failed to evaluate quotations consistent with the FAR requirement that BPAs established with FSS contractors must provide the supply or service that represents the best value. FAR § 8.405-3(a).

Technical Evaluation

Cyberdata also challenges certain aspects of its technical evaluation. In this regard, the TEB identified 16 weaknesses and risks in its evaluation of Cyberdata's technical quotation. As an initial matter, we note that Cyberdata challenges only five of the weaknesses and risks identified by the TEB in its quotation. Absent a detailed rebuttal to the agency's evaluation conclusions from the protester in these unchallenged areas, we will not substitute our judgment for that of the agency. Atmospheric Research Sys., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 4. With respect to the five areas challenged by Cyberdata, we discuss below two of those challenges--one of which appears to have merit, one of which does not.

For example, Cyberdata argues that the TEB's evaluation of its quality control plan (QCP) was unreasonable. The TEB found that, although Cyberdata discussed how it would respond to complaints, it did not explain "how [it would] try to ensure quality to avoid poor performance that would result in complaints in the first place." TEB Report at 108. Our review of Cyberdata's quotation, however, indicates that the TEB's findings were not justified, since Cyberdata's quotation includes extensive information regarding proactive actions it will take to prevent quality control problems, such as periodic inspections and audits and monitoring of the performance of the contract and tasks. Cyberdata Quotation at 35-39.

On the other hand, the record supports the reasonableness of the TEB's assessment of a weakness with respect to Cyberdata's management plan in that, although section 2.2.3 of Cyberdata's quotation discussed training, that discussion included "no mention of [a] current training Program." TEB Report at 108; see Cyberdata Quotation at 31. Our review of section 2.2.3 indicates that it is both brief and, consistent with the TEB's findings in this regard, devoid of any discussion of a current, established training plan.

Given that Cyberdata has challenged only 5 of the evaluated 16 weaknesses and risks in its technical quotation, and given the mixed results of its challenges, we find no basis for sustaining the protester's challenge to the agency's determination that its proposal was not among the 12 most highly-rated technical quotations. Prejudice is an essential element of every viable protest and, where it is not demonstrated or

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combination of technical merit and price, does not amount to an adequate, or reasonable, best value determination.

otherwise evident, we will not sustain a protest allegation, even where the record shows that the agency's actions arguably were improper. GC Servs. Ltd. P'ship, B-298102, B-298102.3, June 14, 2006, 2006 CPD ¶ 96 at 7-8.

RECOMMENDATION

We recommend that the agency amend the solicitation to provide for an evaluation approach consistent with its obligations under the FAR, request revised quotations, and make a new source selection decision. Since, as discussed above, the issue we are sustaining was not raised by Cyberdata prior to the date set for receipt of quotations, we are not recommending that the company be reimbursed its costs of filing and pursuing its protest, including its attorneys' fees.

The protest is sustained.

Lynn H. Gibson
General Counsel