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Decision

Matter of: Lyon Shipyard, Inc.

File: B-407771.2

Date: July 15, 2013

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DIGEST

1. Protest that discussions on price were insufficient or misleading is denied where the agency advised the protester during discussions that its price was significantly higher than the independent government estimate, but the protester's price was not found to be unreasonably high.

2. Protest that agency failed to properly consider protester's alleged history of competitive pricing in task order competitions under other multiple award contracts is denied where the agency consideration of the protester's price was reasonable and consistent with the terms of the solicitation.

DECISION

Lyon Shipyard, Inc., of Norfolk, Virginia, protests the decision of the Department of the Navy, Naval Sea Systems Command, not to select it for an award under request for proposals (RFP) No. N50054-11-R-0002, for marine boatyard services. Lyon argues that the agency's discussions regarding its price were inadequate and misleading, and that in making the award decision, the agency failed to properly consider the protester's history of competitive pricing in task order competitions under other contracts for the same services.

We deny the protest.

BACKGROUND

The RFP, issued on June 20, 2011, contemplated the award of multiple indefinite-delivery/indefinite-quantity (IDIQ) contracts to provide a full range of marine boatyard support services for modifications, upgrades, service life extension, and repairs to noncommissioned navy boats, craft, lighterage, and service craft. Contracts were to be awarded for a 1-year base ordering period, plus four 1-year option periods, with individual task orders to be competed among the various awardees.

The RFP organized the work requirements into two separate lots depending on the size of the vessel to be serviced. Lot I was for services for craft that “can be transported by roadway . . . and which are less than 15 meters or 50 feet in length.” RFP at 19. Lot II was for services for craft that are either less than 50 feet in length but not able to be transported by roadway, or are greater than 50 feet in length. Id. Offerors were permitted to submit proposals on one or both lots. Only the requirement for Lot II is at issue in this protest.

Contracts were to be awarded on a best value basis considering two non-price factors (technical and past performance) and price. Technical and past performance, taken together, were to be more important than price, however, according to the RFP, “as non-price factors equalize, price may assume a greater degree of importance.” RFP at 112.

For the purpose of evaluating price, offerors were to propose a single composite burdened labor rate using labor categories listed in the RFP for each contract year. Evaluated prices were calculated by multiplying the proposed composite rate for each year by labor hour quantities provided by the government for evaluation purposes. Offerors were also to propose burdened rates for material handling and travel, and rates for boat storage, boat lift, and boat towing, which were also multiplied by annual estimated quantities. The total evaluated price for each offeror was then determined by adding together these amounts for the base year and all option years. The RFP cautioned that any offer that the government determined to be “unrealistic, unreasonable, or unbalanced may be rejected.” Id. at 115.

The agency received 8 proposals for Lot II by the RFP’s closing date, including a proposal from Lyon. The agency’s technical and past performance source selection evaluation boards (SSEBs) evaluated the initial proposals and drafted questions identifying significant weaknesses, omissions, and deficiencies in each proposal. The agency then established a competitive range limited to six offerors, which included Lyon. The agency conducted three rounds of discussions with the firms in the competitive range.

As it relates to the protest, the agency’s initial discussion questions advised offerors how their prices stood in comparison to the independent government estimate

(IGE)--noting whether the proposed price was higher, lower, or consistent with the IGE. Additionally, regardless of whether an offeror's price was higher, lower, or consistent with the IGE, offerors were reminded to review their pricing to ensure that it was consistent with all the requirements. Agency Report, Tab 36, at 57-58.

During this initial round of discussions the agency did not, however, request new pricing. Rather, it asked offerors to submit rationales for their proposed prices, and to confirm that they had accounted for all price requirements of the RFP. Following subsequent rounds of discussions, offerors were permitted to submit proposal revisions, including revisions to price.

As relevant here, Lyon's total evaluated price was \$117,217,915.40--more than [DELETED] percent above the Lot II IGE of \$[DELETED]. Accordingly, during the initial discussions, the agency advised Lyon that its "price proposal for Lot II is significantly higher than the Government estimate." Id. at 57. As discussed above, the agency did not request that Lyon revise its price during initial discussions, but rather requested that Lyon provide its "rationale" for its price. Id. In response Lyon stated in part as follows:

It should be recognized that the offered pricing represents [DELETED]. Our past history explicitly shows that [DELETED]. However, we will review and evaluate all pricing offered for mistakes, completeness, and accountability. Should we deem it necessary to make any changes to our pricing, we will do so when requested for final offers.

AR, Tab 33, at 5 (emphasis added). The agency did not revisit Lyon's price during the second and third rounds of discussions and Lyon made no adjustment to its price.

Following the final evaluation, the Lot II offeror's final revised proposal ratings and prices were as follows:

Offeror	Technical	Past Performance	Price
East Coast Repair	Very Good	Very Good	\$80,269,356.44
Davis Boat Works	Very Good	Very Good	\$89,061,384.24
Alliance Technical	Satisfactory	Satisfactory	\$89,074,484.86
Colonna's Shipyard	Very Good	Very Good	\$103,384,711.08
Marine Hydraulics	Very Good	Very Good	\$107,005,537.54
Lyon Shipyard	Very Good	Very Good	\$117,217,915.40

AR, Tab 55, at 138, 141. As shown, Lyon's price was the highest price received.

On March 1, 2013, the Source Selection Authority (SSA) decided to make award to each Lot II offeror remaining in the competitive range, except Lyon, concluding that

“[t]here were no circumstances present which justified paying the price differential,” for an additional award to Lyon. Id. at 148. Lyon did not receive notice of the award decision until March 25, and promptly requested a debriefing on March 26. On April 3, the agency issued Lyon a debriefing letter explaining its evaluation ratings, and concluding that “the circumstances presented did not justify paying the price differential necessary to award to your firm.” AR, Tab 58, at 11. This protest followed.

DISCUSSION

Lyon argues that the discussions provided by the agency were not meaningful and that by failing to raise its high price during the second and third rounds of discussions, they were, in fact, misleading. Lyon also challenges the agency’s selection decision, arguing that the agency unreasonably failed to consider Lyon’s track record of competitive pricing during competitions for task orders under prior contracts for the same requirements. We find no error in the agency’s conduct of discussions or consideration of Lyon’s price in its selection decision.

The Federal Acquisition Regulation (FAR) requires agencies conducting discussions with offerors to address, “[a]t a minimum . . . deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond.” FAR § 15.306(d)(3). When an agency engages in discussions with an offeror, the discussions must be “meaningful,” that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror’s potential for receiving the award. FAR § 15.306(d); Bank of Am., [B-287608](#), [B-287608.2](#), July 26, 2001, 2001 CPD ¶ 137 at 10-11. Nonetheless, an agency need not “spoon feed” an offeror as to each and every item that could be revised to improve an offeror’s proposal. L-3 Sys. Co., [B-404671.2](#), [B-404671.4](#), Apr. 8, 2011, 2011 CPD ¶ 93 at 15. While an agency must advise an offeror if its proposed cost/price is considered unreasonably high, an agency need not advise an offeror that its cost/price is higher than those of its competitors if the higher cost/price is not viewed as unreasonable. Id.

In this case, Lyon’s proposed price, although higher than the IGE and the proposed prices of other offeror’s, did not constitute a deficiency or significant weakness, nor was it considered unreasonably high.¹ Accordingly, there were no issues

¹ In fact, the SSA specifically determined that all proposed prices received in response to Lot II--from more than 20 percent below the IGE to Lyon’s price of more than [DELETED] percent above the IGE--were reasonable where “it is not uncommon for large disparities to exist in pricing for a five year effort of this magnitude.” Contracting Specialist’s Statement of Facts at 2.

concerning Lyon's price that the agency was required to raise during its discussions with Lyon.²

We also disagree with Lyon's contention that it was misled by the agency's failure to raise the issue of Lyon's high price in the second or third rounds of discussions when price revisions were permitted. While Lyon was not requested to revise its price in response to the first round of discussions, we fail to see how Lyon was misled where it was ultimately given the opportunity to revise its price with the full knowledge that its price was "significantly higher than the IGE" but made the apparent business decision not to do so, and to instead advance pricing based on "[DELETED]." AR, Tab 33, at 5. Lyon could not have reasonably concluded that this response to the first round of discussions--explaining its price approach--could have changed the mathematical relationship of its proposed price to the IGE, and therefore knew that its price proposal remained significantly higher than the IGE at the time that proposal revisions were requested.

Next, Lyon asserts that the agency should have considered its record of competitive pricing at the task order level under prior contracts for this requirement. In this regard, Lyon contends that the FAR guidance on price analysis provides that price analysis techniques include "[c]omparison of the proposed prices to historical prices paid . . . for the same or similar items." FAR § 15.404-1(b)(2)(ii). According to Lyon, this provision required the agency to consider Lyon's prior pricing as an incumbent contractor, and should have led the agency to conclude that Lyon was a good value, as Lyon was a cost-effective bidder under the prior contract. We disagree.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. Smiths Detection, Inc.; Am. Sci. and Eng'g, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 6-7. Rather, we will review the record only to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3.

As an initial matter, Lyon's application of FAR § 15.404-1(b)(2)(ii) is misplaced. FAR § 15.404-1 establishes proposal analysis techniques for the purpose of

² To the extent the protester has argued that the agency price discussions were unequal, the allegation is not supported by the record. As discussed above, the agency advised each offer whether its proposed price was higher, lower, or consistent with the IGE, and requested that each offeror review its price proposal for compliance with the RFP. The record confirms that the agency applied this approach to price discussions equally.

ensuring that final agreed-to contract prices are “fair and reasonable.” FAR § 15.404-1(a). In that context, the purpose of an agency’s “[c]omparison of the proposed prices to historical prices paid,” is to analyze whether the currently proposed prices are higher than historical prices to such an extent that the current proposed prices cannot be considered fair and reasonable. This analysis is not for the purpose of examining an individual contractor’s previous task order prices for insight into a firm’s pricing strategy on future task orders.³

Moreover, as set forth above, the RFP established specific price evaluation criteria, requiring offerors to propose a composite labor rate, a material handling and a travel rate, and rates for boat storage, boat lift, and boat towing, each of which were multiplied by set annual quantities. Lyon’s final evaluated price was properly the result of that formula and properly served as the relevant benchmark for the agency’s best value award determination. Lyon’s task order pricing under prior contracts for this requirement were simply not for consideration under the solicitation. Accordingly, we see no error in the agency’s consideration of Lyon’s evaluated price as the basis for making its selection decision.

The protest is denied.

Susan A. Poling
General Counsel

³ Lyon argues that the agency did conduct an individualized examination of prior prices for another offeror--Marine Hydraulics. The record, however, does not support Lyon’s assertion. In concluding that Marine Hydraulics warranted an award despite its somewhat high price, the agency reasoned that “[s]ince this will be a multiple award, additional competition will occur at the task order level,” “[i]t is felt that competition of individual task orders will result in lower prices from the firms and thereby the potential for [Marine Hydraulics’] pricing to become more in line with the other offerors.” AR, Tab 35, at 2. This record does not indicate an examination of Marine Hydraulics’ individual historical task order pricing. Rather, it reflects a general understanding of competitive tendencies under multiple award contracts to justify a decision to extend an award to an additional firm with prices somewhat higher than those of its competitors.