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Decision

Matter of: OSG, Inc.

File: B-410406; B-410406.2

Date: December 24, 2014

William Weisberg, Esq., Law Offices of William Weisberg, PLLC, for the protester.
Richard Ferguson, Esq., Defense Logistics Agency, for the agency.
Peter D. Verchinski, Esq., and Nora K. Adkins, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that it was competitively prejudiced in a procurement for passenger-side windows by the release of its price on a procurement for driver-side windows--although the release did not identify the company that submitted the price--is denied where the record shows that the price was displayed anonymously as part of a planned, but cancelled, reverse auction, and where the record shows that the protester ultimately won the award for the driver-side windows, leading to the release of an award announcement which provided the same pricing information and the protester's name. Under these circumstances, we cannot see how the protester was competitively harmed by the release of a price that was ultimately disclosed in the award announcement.

DECISION

OSG, Inc., of Emporia, Virginia, protests the Defense Logistics Agency's (DLA) actions under request for proposals (RFP) No. SPE7L3-14-R-0121 (R-0121) for mine-resistant ambush-protected (MRAP) vehicle passenger-side windows. The protester contends that DLA's release of OSG's price in a separate procurement--for MRAP driver-side windows--competitively prejudiced the firm in the current procurement.

We deny the protest.

BACKGROUND

Solicitation R-0121, issued on June 30, 2014, provided for the award of a fixed-price contract for 560 vehicular windows, identified as national stock number (NSN) 2541-

01-600-1901, for the passenger side of the MRAP vehicle. Agency Report (AR), Tab 6. Offerors were informed that award would be made on a best-value basis considering price and the following evaluation factors (listed in descending order of importance): past performance, proposed delivery, socioeconomic support, and use of Ability One entities. Price was approximately equal to the combined weight of the other evaluation factors. RFP § M.

On July 7, the agency issued a separate solicitation, RFP No. SPE7L3-14-R-0137 (R-0137), which provided for the award of a fixed-price contract for 800 vehicular windows, identified as NSN 2541-01-600-1887, for the driver side of the MRAP vehicle. Solicitation R-0137 included the same evaluation scheme found in solicitation R-0121.

Both solicitations incorporated the clause at Defense Logistics Agency Directive (DLAD) section 52.215-9023, Reverse Auctions, which provides that the agency may use “reverse auctioning as a means of conducting price discussions under this solicitation.” RFP R-0137, § L at 30; RFP R-0121, § L at 34. The clause states that, by submitting a proposal, offerors agree to participate in the reverse auction and acknowledge that their prices may be disclosed to other offerors as part of the auction. DLAD § 52.215-9023(d). The clause further provides that the reverse auction prices will be anonymous, that is, the lowest price for each round will be disclosed to the other offerors, but the identity of the lowest-priced offeror will be concealed. Id.

The agency received initial proposals in response to both solicitations. The agency informed offerors that, with regard to the driver-side window solicitation (R-0137), the agency intended to conduct a reverse auction for that procurement on September 5, at 2 pm. The DLA also notified offerors that the agency had submitted the offerors’ prices as their initial bid for the auction, and that only the lowest price “will be visible to all participants and is anonymous” on the reverse auction website. Protest, attach. A, DLA Memorandum, Aug. 29, 2014.

Instead of proceeding as planned, the agency cancelled the reverse auction on the morning of September 5. As a result, OSG subsequently asked whether its price was visible to any firm that had accessed the reverse auction website prior to the opening of the auction. AR, Tab 8, Memorandum for Record, Potential Procurement Integrity Act Violation. The agency conceded that the protester’s price was visible as the lowest price, but that the firm’s name was not visible to outside parties. Id.

On September 18, OSG protested the agency's disclosure of its price to our Office, asserting that the firm was competitively harmed with regard to both procurements.¹ Our Office docketed the filing as two separate protests: one for the driver-side window solicitation (R-0137) (protest B-410407), and one for the passenger-side window solicitation (R-0121) (protest B-410406).² With regard to the protest of the driver-side window solicitation (R-0137), OSG alleged that the firm was directly harmed by the release of its price, as the agency intended to receive revised proposals that same day, and other offerors may have used OSG's price to revise their proposals. With regard to the protest of the passenger-side window solicitation (R-0121), the subject of the instant protest, the protester maintained that the passenger-side window was a "mirror image" of the driver-side window being procured under R-0137, and thus potential competitors could use the price disclosure under solicitation R-0137 to determine OSG's price in the passenger-side window procurement. The protester noted that revised proposals under the passenger-side window procurement were also due on September 18. OSG's protests included a "screen shot" of the reverse auction website, showing that the disclosed pricing information under the driver-side window RFP included a starting unit price (\$3,049.99), a quantity of (1600), and a total price (\$4,879,984). Protest at 3; Protest, attach. B.

At approximately the same time OSG filed its protests with our Office, the agency conducted an investigation into a possible Procurement Integrity Act (PIA) violation with regard to the disclosure of OSG's price in the driver-side window solicitation (R-0137). AR, Tab 8, Memorandum for Record, Potential Procurement Integrity Act Violation. The contracting officer found that there was a potential PIA violation because OSG's price was disclosed (albeit anonymously) to other offerors, and because the agency was not permitted to release this price under DLAD § 52.215-9023.³ Id. The contracting officer concluded, however, that any possible violation had no impact on the driver-side window procurement (R-0137) because OSG was in line for award, and no offerors had submitted revised proposals with changes to their prices after the alleged violation took place.⁴ Id.

¹ OSG's protest maintained that other offerors would know that the disclosed pricing was OSG's pricing. Protest at 3. The protester also maintains that there are only 2 offerors (it and another firm) competing for these requirements. Id.

² As explained further below, OSG ultimately withdrew its protest of the driver-side window solicitation (R-0137).

³ The agency concluded that it was not allowed to release OSG's price under this provision because a reverse auction had not, in fact, taken place. Id.

⁴ The investigation did not examine the impact of the pricing disclosure on the procurement conducted under solicitation R-0121. Id.

The protester received the results of the agency's investigation on September 25. The protester then filed supplemental protest grounds in both protests. With regard to its protest of the passenger-side window procurement (R-0121), the protester argued that, since the procurement is a "mirror image" of the driver-side window procurement, the agency's conclusion that the disclosure in the driver-side window procurement had no impact on the passenger-side window procurement was unreasonable. Supp. Protest, B-401406.2, Sept. 30, 2014, at 1.

On October 8, the protester withdrew its protests of the driver-side window procurement (R-0137) (B-410407, B-410407.2), and on October 28, OSG was awarded the contract for the MRAP driver-side window. The agency posted an award notice on FedBizOpps, stating that the awarded price was \$4,879,984. The agency also sent an unsuccessful offeror notice, dated October 27, stating that award had been made to OSG, at a unit price of \$3,049.99, and a quantity of 1600.

DISCUSSION

The protester alleges the agency's release of its pricing information under the driver-side window RFP competitively harmed the protester under the passenger-side window solicitation. We disagree.

The disclosure of source selection information, including an offeror's price, during the course of a procurement is improper and the agency may take remedial steps, including canceling the procurement, if it reasonably determines that the disclosure harmed the integrity of the procurement process. Information Ventures, Inc., B-241441.4, B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583 at 4-5. Where an agency decides that no remedial steps are necessary, we will sustain a protest based on the improper disclosure only where the protester demonstrates that it was in some way competitively prejudiced by the disclosure. Kemron Env'tl. Servs., Inc., B-299880, Sept. 7, 2007, 2007 CPD ¶ 176 at 2. Here, the record reflects that OSG cannot demonstrate that it has been competitively prejudiced in this procurement for passenger-side windows by the agency's displaying of its pricing information for driver-side windows on the reverse auction website.

As stated above, during the course of the current protest, OSG withdrew its protests with regard to the driver-side window procurement and was subsequently awarded the contract. Thereafter, DLA posted its notice of award on FedBizOpps, which provided OSG's total price. The agency also informed disappointed offerors in the "unsuccessful offeror" letter of OSG's unit price and quantity awarded, which is the same information that forms the basis of OSG's improper disclosure allegations here. Furthermore, the agency states that it intends to amend the passenger-side window solicitation to correct option quantities, and that the amendment will permit offerors to revise their price proposals. AR, Tab 10, Agency Official Declaration, at 1.

Accordingly, based upon the unique circumstances described herein, we find that OSG cannot demonstrate that it was competitively prejudiced by the agency's price disclosure in the driver-side window procurement, when the same information was ultimately released pursuant to a proper notice of award. In addition, the offerors here will be allowed to update their prices subsequent to the release of the notice of award in the other procurement.

The protest is denied.

Susan A. Poling
General Counsel