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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Lilly Timber Services

File: B-411435.2

Date: August 5, 2015

Blake Lilly, for the protester.

Elin M. Dugan, Esq., Department of Agriculture, for the agency.

Joshua R. Gillerman, Noah B. Bleicher, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under solicitation calling for award of fixed-price contract, protest challenging agency's conclusion that protester's low prices created a risk of unsuccessful performance is sustained where solicitation lacked any evaluation criteria that reasonably would have put vendors on notice that the agency intended to consider the realism of vendors' prices.

DECISION

Lilly Timber Services, a small business, of Mode, Illinois, protests the award of contracts to Roepke & Niemerg Tree & Conservation Service (R&N), of Effingham, Illinois; Higgins Outdoors, Inc., of Gays, Illinois; and Midwest Seedling Supply, Inc. (MSS), of Meredosia, Illinois, under request for quotations (RFQ) No. AG-5A12-S-15-0001, issued by the Department of Agriculture, Natural Resources Conservation Service (NRCS), for tree planting services in Illinois. Lilly Timber challenges the agency's evaluation of its price.

We sustain the protest.

BACKGROUND

NRCS posted the RFQ on March 9, 2015, as a combined synopsis/solicitation under Federal Acquisition Regulation (FAR) subpart 12.6. The RFQ, which was set aside for small businesses, contemplated the award of up to six fixed-price contracts for six separate projects entailing bare-root seedling planting services in four counties in Illinois. RFQ at 1-2. The RFQ permitted vendors to submit quotations for any number of projects and provided that the project awards would

be made to the “lowest reasonable price and responsive/responsible (past performance) [vendor].” Id. According to the solicitation, past performance was considered equal in weight to price. Id.

The solicitation stated that the contractor was to provide all labor, materials, and equipment necessary to perform the tree planting on plots of land ranging from approximately 50 to 229 acres. Id. at 1. As relevant here, projects 3-5 sought to accomplish bottomland and upland hardwood reforestation and restoration on three separate sites, ranging from 94.4 acres to 228.9 acres, in White County, Illinois.¹ Id. at 3. The RFQ advised vendors that the government estimate for projects 3 and 4 was between \$25,000 and \$100,000, and the estimate for project 5 was between \$100,000 and \$150,000. Id.

On March 25, the agency received six quotations for projects 3 and 4, and five quotations for project 5, including quotations from Lilly Timber. Contracting Officer (CO) Statement at 2. On April 3, the agency awarded the contracts for projects 3-5 to R&N, Higgins, and MSS, respectively. Id. On April 15, Lilly Timber protested these awards, and on April 22, NRCS advised our Office that it would take corrective action and conduct a reevaluation of the quotations for these projects. Based on the agency’s corrective action, we dismissed Lilly Timber’s protest. Lilly Timber Servs., B-411435, Apr. 22, 2015.

As part of its reevaluation, the CO reviewed the vendor’s prices and assigned each a rating of reasonable, risky, or unreasonably (low or high) based upon how far the price deviated from the agency’s price estimate. Agency Report (AR), Tab 5, Source Selection Decisions (Projects 3-5), at 26, 29, 32. A reasonable rating was assigned to prices that were within 15 percent of the government’s estimate; a risky rating was assessed to prices that were between 16 and 30 percent of the estimate; and a rating of unreasonably low or high was assigned to prices that varied more than 31 percent from the estimate. Id.

With respect to project 3, the CO rated Lilly Timber’s price risky because it was 30 percent below the government estimate. Id. at 27. For projects 4 and 5, the CO deemed Lilly Timber’s prices unreasonably low because the prices were 31 percent below and 35 percent below the government estimate, respectively. Id. at 30, 32. In making the award determinations, the CO concluded that Lilly Timber’s prices “created a risk of unsatisfactory performance.” AR, Tab 3, Notice of Unsuccessful Quotation, 7-9. Because the other vendor’s quotations were “closer to the Government’s estimate” and had received overall excellent responsibility ratings,²

¹ Lilly Timber does not challenge the agency’s award of the three other projects.

² The record shows that the CO assigned responsibility ratings of excellent, good, fair, poor, and unsatisfactory based on the vendor’s “technical ability to make timely delivery of a fully satisfactory product, taking into account past performance as well
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their quotations were deemed “more advantageous.” Id. Thus, the agency re-affirmed the awards for projects 3-5 to R&N, Higgins, and MSS. CO Statement at 2; AR, Tab 3, Notice of Unsuccessful Quotation, at 7-9. The agency provided Lilly Timber with notice of the awards on April 29, and this protest followed.

DISCUSSION

Lilly Timber protests the agency’s evaluation of its prices as risky and unreasonably low. As detailed below, we find that the agency’s evaluation and ultimate award decisions were unreasonable because NRCS conducted a price realism analysis that was not provided for in the solicitation. We sustain Lilly Timber’s protest on this basis.³

Before awarding a fixed-price contract, an agency is required to determine that the price offered is fair and reasonable. FAR § 15.402(a). An agency’s concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted. See McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. Although not required, an agency may also provide for a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether a vendor’s low price reflects a lack of understanding of the contract requirements, or risk inherent in a vendor’s approach. See Milani Constr., LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87 at 4. However, where there is no relevant evaluation criteria pertaining to realism or understanding, a determination that a vendor’s price on a fixed-price contract is too low generally concerns the vendor’s responsibility, *i.e.*, the vendor’s ability and capacity to successfully perform the contract at its offered price. See id.; J.A. Farrington Janitorial Servs., B-296875, Oct. 18, 2005, 2005 CPD ¶ 187 at 4; CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 5. Agencies therefore may not conduct a price realism analysis without first advising vendors that the agency intends to do so. See Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 4-6.

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as equipment, personnel, etc.” AR, Tab 5, Source Selection Decision for Project 3-5, at 26. Lilly Timber was assigned a responsibility rating of good. Id. at 27, 30, 33.

³ Without any elaboration, Lilly Timber also alleges that the CO was biased against the firm. Government officials are presumed to act in good faith, and a protester’s contention that contracting officials are motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. See KAES Enters., LLC, B-407964.4, Aug. 21, 2013, 2013 CPD ¶ 196 at 4. Lilly Timber did not provide proof or substantiation to support its claim of bias.

The solicitation here did not furnish vendors with reasonable notice that the agency intended to perform a price realism analysis. Rather, the RFQ provided only for the evaluation of the “reasonableness” of the quoted price, that is, whether the price was unreasonably high. See RFQ at 2. The solicitation lacked any evaluation criteria that reasonably would have put vendors on notice that the agency intended to consider the realism of vendors’ prices. Despite the absence of a price realism provision in the RFQ, the record demonstrates that the agency’s evaluation of Lilly Timber’s price considered whether the protester’s price was too low. For example, and as indicated above, the agency concluded that Lilly Timber’s project 3 price was “risky” and its project 4 and 5 prices were “unreasonably low,” which did not reflect an understanding of the work. AR, Tab 5, Source Selection Decisions (Projects 3-5), at 26-30. As a result, Lilly Timber was not awarded the contracts for projects 3-5 because the agency determined that the low prices created a risk of unsatisfactory performance.

Because below-cost prices are not inherently improper when vendors are competing for award of a fixed-price contract, firms must be given reasonable notice that a business decision to submit a low-priced quotation may be considered as reflecting on their understanding of the contract requirements or the risk associated with their approach. See Milani Constr., LLC, supra. Since the RFQ did not contain a provision indicating that the agency would conduct a price realism analysis, and because the agency’s award decision clearly relied on the agency’s assessment of risk related to the protester’s low fixed-price, we conclude that the agency failed to reasonably evaluate Lilly Timber’s quotations. We sustain Lilly Timber’s protest on this basis.

Further, the agency’s concern that Lilly Timber’s price was too low was a matter of the vendor’s responsibility. Since Lilly Timber is a small business, if NRCS believed that Lilly Timber would not satisfactorily perform the contract at its quoted price, the agency was required to refer this finding of nonresponsibility to the Small Business Administration (SBA) for that agency’s review under its certificate of competency procedures. See FAR § 19.602-1(a); CSE Constr., supra, at 4.

RECOMMENDATION

We recommend that the agency perform a new evaluation of quotations, giving appropriate consideration to Lilly Timber’s price consistent with our decision. If, as a result, a vendor other than R&N, Higgins, or MSS is selected for award, the respective contract should be terminated and award made to the vendor meeting the solicitation’s award criteria. Alternatively, if the agency decides that consideration of the realism of vendor’s proposed prices is necessary, the agency should amend the RFQ to so indicate, allow submission of revised quotations, reevaluate the revised quotations received, and make a new award decision. To the extent that the agency does not amend the RFQ but continues to have concerns

that Lilly Timber's price is too low, the agency should refer this finding of nonresponsibility to the SBA. We also recommend that the agency reimburse Lilly Timber the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). Lilly Timber should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of this decision.

The protest is sustained.

Susan A. Poling
General Counsel