



Decision

Matter of: Lulus Ostrich Ranch

File: B-403874.2

Date: January 13, 2011

William R. Hayward for the protester.
Tina M. Pixler, Esq., Department of the Army, for the agency.
Susan K. McAuliffe, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency did not mislead offeror to increase its price during discussions by asking the protester to confirm whether its prices for certain contract line item numbers were in error, and that it understood the requirements, since its pricing for these items was low as compared to the agency's historical price information.

DECISION

Lulus Ostrich Ranch, of San Marcos, Texas, protests the award of a contract to Immediate Supply General Trading Co., of Hawally, Kuwait, under request for proposals (RFP) No. W52P1J-10-R-0199, issued by the Department of the Army, U.S. Army Materiel Command, for pallet cleaning and repair services. The protester contends that during discussions with the agency it was misled to increase what otherwise would have been the winning price.

We deny the protest.

The RFP contemplated the award of an indefinite-delivery/indefinite-quantity fixed-price contract for a base year and four 1-year options. Pursuant to the RFP, award was to be made to the offeror that submitted the lowest priced technically acceptable proposal.¹ RFP at 2. Offerors were required to propose separate prices for contract line item numbers (CLIN) listed in the RFP's price schedule and the RFP advised that the agency would evaluate offerors' prices by adding all CLIN prices for

¹ The RFP established the following technical evaluation factors: technical capability, quality control plan, management plan, and transition plan. RFP at 36.

the base and option periods and calculating a total evaluated price. RFP, attach. 4, at 4. The RFP further advised that an offeror's price would be evaluated for reasonableness, and cautioned that unrealistic offers, reflecting a failure to comprehend requirements, as well as those demonstrating significantly unbalanced prices among CLINs, quantities or performance periods, could be rejected. RFP, attach. 4, at 2, 4.

The agency received seven proposals in response to the RFP and four, including the protester's, were found to be technically acceptable. By letter dated September 2, 2010, the agency sent Lulus written discussion questions informing Lulus that it did not submit its prices for the surge requirements under CLIN 0007 (as well as the related option year CLINs) consistent with the RFP, since Lulus did not provide unit prices for four separate surge ranges set forth in the price schedule. In response, the protester submitted a revised proposal with a total price of \$7,660,225.50. By letter dated September 8, the agency again informed Lulus that its pricing for the surge CLINs was inconsistent with the price schedule because it had not provided unit prices for the ranges identified. In that September 8 discussions letter, the agency also informed Lulus that

[d]uring review of your [p]rice [p]roposal it appears that your prices for CLIN[s] 0001 and all option years, Pallet Cleaning and 0006 and all option years, Pallet Repair may be in error. It is perceived as low when compared to current historical pricing. Please confirm that the prices as proposed are correct and that the requirements of these line items are fully understood and reflected in the proposed prices.

Discussions Letter, Sept. 8, 2010, at 1 (emphasis added).

In response to the agency's September 8 discussions letter, Lulus confirmed its previously proposed prices for pallet cleaning under CLIN 0001 (and all related option year CLINs). Lulus also provided unit prices for the range of potential surge requirements, as requested. Lulus did not, however, confirm its previously proposed prices for the pallet repair CLINs (CLIN 0006 and the related option year CLINs); rather, Lulus significantly increased its prices for these CLINs. In this regard, the record reflects that Lulus increased its unit price for the pallet repair work by more than 125 percent, which increased its total price to \$8,238,329.50. Award was made to Immediate on the basis of its technically acceptable, low price proposal at a total evaluated price of \$7,834,336.25. After receiving an adverse decision in response to a protest it filed with the agency alleging that it had been improperly misled during discussions to increase its proposed price, Lulus filed the subject protest with our Office.

Lulus essentially argues that it was improperly misled by the September 8 discussions letter to increase its proposed price. In this regard, Lulus asserts that it interpreted the statements in the agency's discussions letter--that some of the firm's

proposed CLIN prices were low as compared to historical pricing information—to mean that its total proposed price was too low.² According to Lulus, had it not followed the agency’s instruction to increase its price, it would have been the lowest priced technically acceptable offeror, since Immediate’s price was slightly higher than the price it had proposed before the September 8 round of discussions.

It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. Trusted Hand Serv., Inc., B-285355, Aug. 21, 2000, 2000 CPD ¶ 136 at 4. Specifically, an agency may not, even inadvertently, mislead an offeror—through the framing of a discussion question or a response to a question—into responding in a manner that does not address the agency’s concerns; misinform the offeror concerning a problem with its proposal; misinform the offeror about the government’s requirements; or, as is pertinent to this case, mislead an offeror into raising its price. Id.; SIMSHIP Corp., B-253655.2, Dec. 2, 1993, 93-2 CPD ¶ 293 at 4.

The protester’s contention that the agency misled it to increase its price is without merit. As set forth above, the agency’s September 8 discussions letter merely asked Lulus to “confirm” whether its prices for specific CLINs were possibly in “error,” since the CLIN prices appeared to be low when compared to the agency’s historical price information. The letter further advised Lulus that if its prices were correct, it was to confirm its understanding of the requirements. To the extent Lulus contends that it interpreted the September 8 discussions letter as advising it (either explicitly or implicitly) to increase its total price, its interpretation in this regard was not reasonable. The September 8 letter provided Lulus with the option of either confirming or revising its pricing for the specific CLINs at issue—simply put, the letter said nothing about Lulus’ total price and it did not advise Lulus to increase its price for the particular CLINs addressed. The fact that the agency provided the protester with a choice is further apparent from the protester’s own actions in response to the agency’s discussions letter where it confirmed the prices for certain CLINs identified by the agency as being possibly in error, yet increased its price for

² To the extent Lulus argues that it was unreasonable for the agency to use historical pricing in its evaluation and that the RFP did not provide for evaluation of CLIN prices separate from the total evaluated price basis for award, its contentions are without merit. The RFP expressly provided for the use of price analysis techniques (which includes the use of comparative historical procurement information) for the purpose of reviewing offeror’s proposed prices. See Federal Acquisition Regulation (FAR) § 15.404-1(b); RFP, attach. 4, at 4. In addition, contrary to the protester’s suggestion, the RFP provided for evaluating offeror’s CLIN pricing for unbalancing, which implicitly requires the agency to consider whether an offeror’s CLIN prices are too high or too low. See FAR § 15.404-1(g); RFP, attach. 4, at 4.

others.³ Given this record, there is no basis for our Office to conclude that the agency's discussions were misleading or otherwise improper.

The protest is denied.

Lynn H. Gibson
General Counsel

³ To the extent Lulus argues that the RFP did not provide sufficient information to meaningfully propose prices for the pallet repair CLINs, or that the RFP's pricing terms unreasonably skewed the importance of the pallet repair or other work, since unit prices had to be multiplied by estimated quantities, these challenges are untimely filed and not for our consideration. To be timely, protests of apparent solicitation improprieties must be filed prior to the closing time for the receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2010).