



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

Decision

Matter of: W.P. Tax & Accounting Group

File: B-411899

Date: November 13, 2015

Dee Monbo, for the protester.

William B. Schultz, Esq., Dana J. Petti, Esq., and Scott C. Briles, Esq., Department of Health and Human Services, for the agency.

Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under a solicitation for a fixed-priced contract, a protest challenging the agency's evaluation of the protester's quotation as technically unacceptable is sustained where the agency concluded that the protester's low price created a risk of unsuccessful performance, but 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.

DECISION

W.P. Tax & Accounting Group, of Owings Mills, Maryland, a woman-owned small business, protests the award of a contract to Sowing Seeds of Success, Inc., of Houston, Texas, under request for quotations (RFQ) No. 2015-Q-17006, which was issued by the Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), for payroll processing services. W.P. Tax challenges the agency's evaluation of its proposal as technically unacceptable.

We sustain the protest.

BACKGROUND

On February 19, 2015, the CDC posted the RFQ as a combined synopsis/solicitation under the commercial item procedures of Federal Acquisition Regulation (FAR) subpart 12.6. RFQ at 1. The RFQ, which was set aside for women-owned small businesses, sought payroll processing services for off-duty police officers in Atlanta, Georgia. Specifically, the solicitation required that the

contractor provide “all labor, tools, materials, equipment, and supervision, necessary to perform electronic payment services for approximately 40 to 100 Off-Duty DeKalb County Police Officers on a bi-weekly basis” for security guards at federal facilities. Id. The solicitation contemplated the award of a fixed-price contract, for a base year and four 1-year options. Id.

The RFQ provided for award on a lowest-priced, technically acceptable basis, considering two factors: (1) technical capability, and (2) price. Id. at 2. In addition, the solicitation stated that vendors should submit past performance statements. RFQ, Questions and Answers (Q&As), No. 10. With regard to pricing, the solicitation specified only that vendors submit “the itemized price, separate pricing for a 12 month base period and four (4) 12 month option periods, prompt payment terms, . . . and descriptive literature of the product quoted.” RFQ at 1-2.

The solicitation also included a statement of work (SOW), which set forth the duties and responsibilities for the contractor. RFQ, SOW, at 1. Specifically, the SOW explained that the Government would provide sufficient funds to the contractor for payment to the off-duty police officers by the Government, and for payroll services provided by the contractor. Id. The agency estimated that the cost of the officer salaries to be included in the contract award amount was \$490,000 per year. RFQ, Q&As, No. 11. In addition, the SOW stated that the contractor would provide the agency with bi-weekly reports detailing the amounts paid to the officers, as well as provide the agency with copies of the officers’ end of the year federal tax forms (Form W-2 and Form 1099). Id. at 2.

The CDC received quotations from 36 vendors, including W.P. Tax and Sowing Seeds. Contracting Officer (CO) Statement at 2. W.P. Tax submitted the lowest-priced quotation of \$6,968, and Sowing Seeds submitted the second lowest-priced quotation of \$20,000. AR, Tab 12, Summary of Negotiations, at 1-2. After evaluating quotations, the agency rated W.P. Tax’s quotation unacceptable. Id. Specifically, the evaluators found as follows:

The Technical Proposal submitted by the lowest priced offeror, W.P. Tax and Accounting Group, was evaluated . . . and considered unacceptable. The level of effort proposed is extremely low for the requirements and deliverables listed in the Statement of Work. . . . Not enough labor hours were bid for the work effort required by the SOW.

Id. at 2-3.

On July 29, the CDC awarded the contract to Sowing Seeds, which is also the incumbent contractor. CO Statement at 3. This protest followed.

DECISION

W.P. Tax protests the CDC's evaluation of its quotation as technically unacceptable. Specifically, the protester argues that it was unreasonable for the agency to make assumptions regarding W.P. Tax's proposed level of effort based upon its proposed fixed price.¹ As discussed below, we find that the CDC's evaluation was unreasonable because the agency conducted a price realism analysis that was not provided for in the solicitation. We sustain W.P. Tax's protest on this basis.

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 criterion 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.

We conclude that the CDC improperly relied upon an unstated evaluation factor in determining that the protester's proposed pricing was so low as to pose performance and schedule risk. As the record reflects, and the agency acknowledges, the RFQ did not contemplate the performance of a price realism evaluation. RFQ at 1-2; see AR (Oct. 21, 2015), at 2 ("The solicitation does not

¹ The protester also argues that the agency unreasonably relied on negative past performance information in finding W.P. Tax's quotation unacceptable. The agency responds that it did not rely on past performance information as a basis for finding W.P. Tax's quotation unacceptable. Agency Report (AR) (Oct. 21, 2015), at 2. Although the agency record provided in response to the protest includes past performance information regarding W.P. Tax, and the owner of the company, the agency's contemporaneous rationale for finding W.P. Tax's quotation unacceptable was based solely upon the protester's price, as discussed above. AR, Tab 10, Past Performance Review; Tab 9, Evaluation of W.P. Tax, at 1; Tab 12, Summary of Negotiations, at 2-3.

include a provision regarding price realism.”). We also note that, although the RFQ required that vendors propose a fixed price for the base year and option years, it did not require that vendors provide information concerning the labor hours or level of effort upon which the price was based. RFQ at 1-2. In this regard, the record reflects that, in accordance with the RFQ, W.P. Tax’s quotation included a proposed fixed price for the base year and options years, but did not specify labor hours or level of effort.² See AR, Tab 6, W.P. Tax Proposal.

Despite the absence of a price realism provision in the RFQ, and despite the lack of any information in W.P. Tax’s proposal regarding labor hours or level of effort, the record demonstrates that the agency’s evaluation of W.P. Tax’s quotation considered whether the protester’s proposed price was too low to perform the required work. For example, and as referenced above, the CDC concluded that W.P. Tax’s proposed fixed fee “indicates very little time spent on the payroll services.” AR, Tab 9, Evaluation of W.P. Tax, at 1. The agency also found that W.P. Tax’s “level of effort proposed is extremely low for the requirements and deliverables listed in the [SOW],” and that “[n]ot enough labor hours were bid for the work effort required by the SOW.” AR, Tab 12, Summary of Negotiations, at 1-3. As a result, the agency concluded that W.P. Tax’s quotation posed “a very high performance and schedule risk.” Id. at 7. Based on this assessment of the protester’s quotation, the agency found W.P. Tax’s proposal unacceptable. Id.

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 the agency’s evaluation of W.P. Tax as technically unacceptable 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 W.P. Tax’s quotation. We sustain W.P. Tax’s protest on this basis.

Further, the CDC’s concern that W.P. Tax’s price was too low was a matter of the vendor’s responsibility. Since W.P. Tax is a small business, if the CDC believed that W.P. Tax 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.

² Specifically, W.P. Tax proposed a fixed price of \$1,393.60 for the base year and each option year. AR, Tab 6, W.P. Tax Proposal, at 1.

RECOMMENDATION

We recommend that the CDC perform a new evaluation of quotations, giving appropriate consideration to W.P. Tax's price consistent with our decision. If, as a result, a vendor other than Sowing Seeds is selected for award, the 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 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 W.P. Tax's proposed price is too low, the agency should refer this finding of nonresponsibility to the SBA. We also recommend that the agency reimburse W.P. Tax the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). W.P. Tax 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