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Decision

Matter of: Aderas, Inc

File: B-418151

Date: January 16, 2020

Richard Kelley, Esq., Bean, Kinney & Korman, PC, for the protester.
Zachary Schroeder, Esq., and Jonathan Baker, Esq., Crowell & Moring LLP, for the intervenor.

Kevin Bolin, Esq., Defense Health Agency, for the agency.

Christopher Alwood, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest asserting that the agency's pre-award exchanges with vendors constituted improper and unequal discussions is denied where the agency conducted meaningful discussions with both the protester and the awardee, and provided an opportunity for the protester to revise or modify its quotation.

DECISION

Aderas, Inc., a small business of Reston, Virginia, protests the issuance of a task order to Concept Plus LLC, a small business of Fairfax, Virginia, under request for quotations¹ (RFQ) No. HT001519R0014 issued by the Defense Health Agency (DHA), for commercial information technology (IT) sustainment and development services in support of the individual longitudinal exposure record (ILER) platform. The protester argues that the agency improperly evaluated Concept Plus's technical approach, failed to conduct a price realism analysis, and failed to provide meaningful and equal discussions.

¹ The record is inconsistent as to whether the solicitation is in fact an RFQ or a request for proposals. Compare Agency Report (AR), Tab 1, RFQ at 1, with id. at 51. The distinction is not relevant to the resolution of this protest. As this procurement was conducted pursuant to Federal Acquisition Regulation subpart 8.4, this decision will refer to the solicitation as an RFQ.

We deny the protest.

On June 28, 2019, DHA issued the RFQ as a total small business set-aside pursuant to Federal Acquisition Regulation (FAR) subpart 8.4 to vendors holding contracts under the General Services Administration Federal Supply Schedule (FSS) No. 70, Information Technology, Health IT special item number 132-56. Contracting Officer's Statement (COS) at 3; see also AR Tab 1, RFQ at 1, 54. The RFQ contemplated the issuance of a task order for sustainment and development IT services in support of the ILER platform.² COS at 3; RFQ at 3-31. The RFQ provided that the task order would be performed over a base year, three option years, an 8-month option period, and a 3-month option period. RFQ at 3-31.

The RFQ stated award would be made on a best-value tradeoff basis, based on an integrated assessment of all evaluation factors. RFQ at 60. The RFQ listed five evaluation factors with no specified order of importance: technical approach, experience and personnel qualifications, management approach, past performance, and price. Id. at 60-63. The RFQ provided that as part of the evaluation of the technical approach, the agency would assess strengths, weaknesses, deficiencies, or risks to the vendors' quotations. Id. at 60-61. The RFQ provided that the agency intended to issue a task order based on initial proposals, but explicitly reserved the right to hold discussions. Id. at 60.

On or before the August 16, 2019 closing date for initial quotations, the agency received complete quotations from three vendors, including Aderas and Concept Plus. COS at 3. After initial evaluation of the quotations, the agency entered into discussions to better understand the technical solutions quoted. Id. at 4. On August 30, the agency initiated discussions via email with all three vendors. Id. The emails each included a memorandum and evaluation notices describing each quotation's assessed weaknesses.³ See, e.g. AR, Tab 7, Communications with Aderas Regarding Discussions. The memorandum provided to Aderas stated that the agency would conduct meaningful discussions and upon the conclusion of discussions request revised quotations. Id. at 3. The agency email to Aderas specified that the response to the evaluation notice and any revised quotations were due September 9. Id. at 1.

² ILER is a web-based application developed to create a complete record of service members' occupational and environmental health exposures for use by Department of Defense and Department of Veterans Affairs healthcare providers, researchers, and administrators to enhance exposure-related medical diagnosis, evaluation, and treatment. AR, Tab 4, Performance Work Statement at 2.

³ The agency sent each vendor one evaluation notice per assigned weakness. COS at 5. Accordingly, Aderas received one evaluation notice and Concept Plus received five evaluation notices. Id.

On September 8, both Aderas and Concept Plus provided the agency with responses to the evaluation notices and revised quotations. COS at 5-6. The agency evaluated the revised quotations of Aderas and Concept Plus as follows:

	Aderas	Concept Plus
Technical Approach	Outstanding	Outstanding
Experience and Personnel Qualifications	Acceptable	Acceptable
Management Approach	Acceptable	Acceptable
Past performance	Acceptable	Acceptable
Total Price	\$26,817,798	\$24,868,323

AR, Tab 12, Notice to Unsuccessful Offeror at 2; see also COS at 6. On September 30, the agency made award to Concept Plus. AR, Tab 11, Executed Contract at 1. On October 10, Aderas filed this protest with our Office.

DISCUSSION

Aderas contends that the agency improperly evaluated Concept Plus's technical approach. Protest at 7-9. Aderas also contends that the agency unreasonably failed to conduct a price realism analysis. Protest at 9-10. Aderas further argues that the agency conducted improper and unequal discussions. Protest at 5-7; Protester's Comments at 2-5. Specifically, Aderas contends that the agency decision to conduct discussions was unreasonable because Aderas does not believe its quotation could be improved; in Aderas's view, its initial quotation merited the highest available rating. Protester's Comments at 2-3. Aderas also contends that the agency conducted unequal discussions, alleging that it engaged in meaningful discussions with Concept Plus, but not with Aderas. Id. at 3-5.

The agency argues that Aderas's challenges to its technical evaluation and lack of price realism analysis fail to state a valid basis for protest and should be dismissed. Request for Dismissal at 5-10. The agency also argues that its decision to enter into discussions was reasonable given that the language of the RFQ explicitly permitted the agency to conduct discussions. Memorandum of Law (MOL) at 3. Finally, the agency argues that the discussions were equal and reasonable because the agency conducted meaningful discussions with all three vendors, including Aderas. Id. at 2-7. For the reasons set forth below, we agree with the agency.

As an initial matter, we dismiss as legally insufficient the protester's challenges to the agency's technical evaluation and lack of price realism analysis. Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper action. Metson Marine Servs., Inc., B-413392, Oct. 19, 2016, 2016 CPD ¶ 313 at 5.

Aderas argues that the agency's technical evaluation was improper because Concept Plus's technical approach did not deserve the outstanding rating it was given. Protest at 8. However, the only support offered by the protester for its allegation is that Concept Plus lacks Aderas's incumbent experience for this DHA requirement. Id. at 8-9; Protester's Response to Request for Dismissal at 4. The RFQ required the agency to evaluate a quotation's technical approach for understanding of the problem, feasibility of approach, and completeness. RFQ at 60. The protester does not allege that the RFQ required a vendor to have specific incumbent experience in order to demonstrate understanding of the problem, feasibility of approach, or completeness.⁴ Accordingly, even were we to agree with the protester's assertion that Concept Plus had no incumbent experience, we have no basis to review whether the alleged lack of experience would affect the evaluation of Concept Plus's technical approach as the RFQ did not require the agency to assess incumbent experience to determine technical approach. We therefore dismiss this aspect of the protest.

Aderas also contends that the agency did not conduct a required price realism analysis.⁵ Protest at 9-10. Generally, for fixed-price contracts, while an agency may conduct a price realism analysis for the limited purpose of assessing whether an offeror's low price reflects a lack of technical understanding or risk (see FAR § 15.404-1(d)(3)), it may do so only when offerors have been advised that the agency will conduct such an analysis. Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. Absent a solicitation provision so advising offerors, agencies are neither required nor permitted to conduct a price realism analysis in awarding a fixed-price contract. Id.

Here, the RFQ specified that nothing in the submission instructions should be construed to imply the agency would perform a price realism analysis, and that the agency would "only perform a price reasonableness analysis." RFQ at 57. Because the RFQ did not require the analysis that Aderas claims the agency failed to perform, we have no basis to review the argument, and therefore dismiss this ground of protest.

⁴ Notably, the RFQ provides for the evaluation of both "experience & personnel qualifications" and past performance, but both are separate from the evaluation of technical approach. RFQ at 61-63.

⁵ In its pleadings, the protester conflates the RFQ's requirement to conduct a price reasonableness analysis with price realism. Protest at 9; Protester's Response to Request for Dismissal at 5. However, price reasonableness and price realism are distinct concepts. Logistics 2020, Inc., B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 7. The purpose of a price reasonableness review is to determine whether the prices offered are too high, as opposed to too low. See FAR § 15.404-1(b); Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. Conversely, a price realism review is to determine whether prices are too low, such that there may be a risk of poor performance.

As relevant to Aderas's challenges to the agency's conduct of discussions, the procedures of FAR part 15 governing contracting by negotiation--including those concerning exchanges with offerors after receipt of proposals--do not govern competitive procurements under the FSS program. FAR § 8.404(a); USGC Inc., B-400184.2 et al., Dec. 24, 2008, 2009 CPD ¶ 9 at 3. There is no requirement in FAR subpart 8.4 that an agency seek clarifications or conduct discussions with vendors. See USGC Inc., supra. However, exchanges that do occur with vendors in a FAR subpart 8.4 procurement, like all other aspects of such a procurement, must be fair and equitable; our Office has looked to the standards in FAR part 15 for guidance in making this determination. See, e.g., Ricoh USA, B-411888.2, Nov. 18, 2015, 2015 CPD ¶ 355 at 5-6.

Aderas has not shown that the agency's decision to conduct discussions was unreasonable or contrary to procurement laws or regulations. Aderas contends that the agency decision to conduct discussions was unreasonable because Aderas does not believe its quotation could be improved. Protester's Comments at 2-3. Aderas further argues that the decision to conduct discussions was inconsistent with the RFQ language stating that award would be made on a best-value basis because any discussions would unfairly favor lower-priced quotations. Id. at 3. An agency's discretion to hold discussions is quite broad, and is not generally reviewed by this Office. Alliance Worldwide Distrib., LLC, B-408491, Sept. 12, 2013, 2013 CPD ¶ 223 at 3.

Here, the RFQ explicitly provided that the agency could conduct discussions, putting vendors on notice that award may not be made on initial quotations. RFQ at 60. Aderas has not identified any statute or regulation which prohibits an agency from entering into discussions when the agency has not identified aspects of one vendor's quotation that require modification or correction, or where one vendor's initial quotation was evaluated as technically superior. Further, it defies logic that an agency would be prohibited from conducting discussions because award is to be made on a best-value basis, as Aderas suggests, when the primary objective of discussions is to maximize the government's ability to obtain the best value. FAR 15.306(d)(2). In sum, Aderas has not shown that the agency's decision to conduct discussions was unreasonable or violated procurement laws or regulations, and we deny this aspect of Aderas's protest.

Aderas also argues that the agency conducted unequal discussions because it engaged in meaningful discussions with Concept Plus, but limited its exchanges to Aderas to clarifications. Protester's Comments at 3-5. Aderas specifically argues that the agency's exchanges regarding its quotation could not have constituted meaningful discussions because the agency disclosed only one weakness to Aderas while disclosing five weaknesses to Concept Plus. Id. at 4. We disagree.

Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or quotations, or provides the offeror with an opportunity to revise or modify its proposal or

quotation. Diversified Collection Servs., Inc., B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 11-12; see FAR § 15.306(d). 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. UNICCO Gov’t Servs., Inc., B-409111 et al., January 23, 2014, 2014 CPD ¶ 55 at 9 (citing Hanford Env’tl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8).

The record shows that the agency treated these vendors fairly. The agency disclosed each quotation’s assessed weaknesses and permitted the vendors to revise their quotations. MOL at 3-4. As relevant here, the agency disclosed to Aderas the only weakness assessed to its technical quotation and permitted Aderas to revise its quotation. AR, Tab 7, Communications with Aderas Regarding Discussions at 1-4. Aderas submitted a revised quotation which was evaluated by the agency to have resolved the sole weakness assessed to Aderas’s initial quotation. MOL at 4-6; see AR, Tab 6, Source Selection Decision Document at 6.

On this record we find that the agency’s exchanges with Aderas constituted meaningful discussions. Accordingly, we see no basis to conclude that these exchanges were unfair to Aderas and deny this aspect of Aderas’s protest.

We deny the protest.

Thomas H. Armstrong
General Counsel