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Decision

Matter of: EMS Ice, Inc.

File: B-401688.3; B-401688.6

Date: October 8, 2009

Dawn L. Serafine, Esq., Troutman Sanders LLP, for the protester.
Jeff Mansfield, Esq., and Bruce Potocki, Esq., Department of the Navy, for the agency.
Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's use of allegedly flawed independent government estimate (IGE) and comparison with proposed prices in determining that protester's proposed price was unreasonable is denied; challenged IGE was replaced and not used in reasonableness determination, and Federal Acquisition Regulation (FAR) specifically provides for use of proposed prices in determining price reasonableness.
 2. Protest that agency's providing awardee opportunity--after receipt of final revised proposals--to confirm apparent mistake in price proposal constituted improper discussions is denied, where mistake and intended price were apparent from face of proposal; confirmation of error therefore constituted clarification.
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DECISION

EMS Ice, Inc., of Chesapeake, Virginia, protests the award of a contract to Integrated Marine Services, Inc. (IMS), of Chula Vista, California, under request for proposals (RFP) No. N55236-09-R-0005, issued by the Department of the Navy as a HubZone set-aside for ship ventilation cleaning services. EMS principally asserts that the Navy improperly evaluated its and IMS's proposals.

We deny the protest.

The RFP, issued on January 15, 2009, provided for the award of an indefinite-delivery indefinite-quantity contract for ship ventilation cleaning services on board Navy ships and other government vessels. Agency Report (AR) at 2. The RFP provided for a "best value" award based on evaluation of price reasonableness

(evaluated in accordance with Federal Acquisition Regulation (FAR) § 15.305(a)(1) and subpart 15.4) and performance risk (with subfactors for past performance, experience, and price realism). RFP at 138-39.

Proposals were received from five offerors, including EMS and IMS. AR at 3. At this point, the Navy discovered that the independent government estimate (IGE) of \$30,000,000 had not been revised to reflect removal of a requirement for dry ice ventilation cleaning. AR, Tab 17, Post Negotiation Memo (PNM), June 18, 2009, at 5. The Navy proceeded to use the existing IGE in evaluating proposals, however, since it determined that “the remaining CLINs [contract line items] had been increased, thus resulting in a relatively similar price,” although it would be “impossible to perform a CLIN-by-CLIN analysis of the proposals.” Id.

Following discussions and evaluation of revised proposals, the Navy determined that the original statement of work did not accurately reflect the requirement. Id. at 6. The Navy thus issued amendment No. 8, which significantly changed certain CLINs and quantities. Id. Discussions were reopened and final proposal revisions (FPR) were received by June 15. Id. The FPRs were subjected to a revised price analysis based on a new IGE of \$36,378,801, prepared by the Navy’s Commercial Industrial Services (CIS) group, and reflecting the CLIN changes made by amendment No. 8. PNM at 7. Under the revised price analysis, each price proposal was compared to the revised IGE. If the proposed price was within +/- 10% of the IGE, it would be determined to be realistic and reasonable. Id. The FPRs were evaluated as follows:

Offeror	Price Realism	Past Performance	Experience	Overall Performance Risk	Price Reasonableness
EMS	Realistic	Satisfactory	Very Good	Moderate	Unreasonable
IMS	Realistic	Very Good	Satisfactory	Moderate	Reasonable
Offeror A	Realistic	Satisfactory	Satisfactory	Moderate	Reasonable
Offeror B	Unrealistic	Satisfactory	Marginal	Very High	Reasonable

Id. at 8-9.

EMS’s proposed price (\$46,754,161) was found to be 29% higher than the IGE, and therefore unreasonable. Id. at 8. The Navy nevertheless included EMS in a ranking of the proposals, which was based on a series of “paired comparisons” and “trading off the difference in performance risk against the difference in price between the members of each pair.” Id. at 9. The ranking was as follows:

Offeror	Performance Risk	Price
IMS	Moderate Risk	\$33,343,779
Offeror A	Moderate Risk	\$36,334,810
EMS	Moderate Risk	\$46,754,161
Offeror B	Very High Risk	\$31, 893,100

Id. at 10. Based on this ranking, the agency determined that IMS's proposal represented the best value, and thus made award to IMS. This protest followed.

UNREASONABLE PRICE

EMS challenges the Navy's determination that its proposed price was unreasonable. First, EMS asserts that there were several flaws in the original IGE used by the agency in evaluating initial proposals. EMS Letter, Sept. 4, 2009, at 5. For example, EMS points-out that the original IGE was not revised to reflect deletion from the RFP of a requirement for dry ice ventilation cleaning and asserts that the Navy's decision to leave the IGE "as is" was based on an improper hypothetical calculation of what the remaining services would cost, without a comprehensive review and market analysis. Id. at 6. Further, EMS asserts that the Navy's use of the IGE was not based on market research and did not involve "careful consideration of the products or services being acquired." Id. at 5.

These arguments are without merit. First, as the Navy points out, while the original IGE challenged by the protester was used in the initial evaluation, it was not used in the evaluation of FPRs. Navy Letter, Sept. 10, 2009, at 4. Rather, the Navy's evaluation was based on the IGE as revised following issuance of amendment No. 8, together with a comparison with other proposed prices. As discussed, the IGE revisions were aimed at resolving the CLIN discrepancies underlying the protester's challenge to the original IGE. Id.; PNM at 7. EMS also challenges the revised IGE, asserting that the Navy "fails to explain how the [revised] IGE was calculated or to give any indication that it was prepared any differently than the first IGE or the 'market' average." EMS Letter, Sept. 17, 2009, at 2. However, this assertion fails to state a valid basis of protest, since the protester has provided no argument or evidence indicating that the new IGE may have been erroneous. See, e.g., Saturn Landscape Plus, Inc., B-297450.3, Apr. 18, 2006, 2006 CPD ¶ 70 at 9. For example, unlike its challenge to the original IGE, EMS does not identify any specific alleged flaws in the revised IGE. The Navy was not required to "explain" its IGE in the absence of a valid protest assertion that the IGE is in some way erroneous.

EMS asserts that the agency's reliance on a comparison of offerors' prices was unreasonable, since it included only the proposed prices, rather than prices in the "larger market place." EMS Letter, Sept. 4, 2009, at 6. This argument is without merit. The FAR specifically provides that a price reasonableness determination may be based on a comparison of prices received in response to the solicitation. FAR § 15.404-1(b)(2)(i); Comprehensive Health Servs., Inc., B-310553, Dec. 27, 2007, 2008 CPD ¶ 9 at 8. There is no requirement that an agency consider broader marketplace prices in its analysis.

Before awarding a fixed-price contract, an agency is required to determine that the offered price is fair and reasonable, FAR § 15.402(a); CSE Constr., B-291268.2, Dec.

16, 2002, 2002 CPD ¶ 207 at 4. Because the Navy found EMS's proposed price to be unreasonable, EMS was ineligible for award.

IMPROPER DISCUSSIONS

EMS asserts that the Navy improperly conducted price discussions only with IMS after receipt of FPRs. EMS Letter, Sept. 25, 2009, at 2-3. The record indicates that, following receipt of FPRs, the Navy contracting specialist discovered that errors in IMS's proposal had resulted in a significant overstatement of IMS's price. Navy Letter, Sept. 23, 2009, exh. E. The contracting specialist advises that, with regard to five separate line items (CLIN) in IMS's proposal, each relating to accelerated delivery of certain supplies and services, the proposed "Amount" (approximately \$160,000 in each case) had not been carried forward to the "Net" amount entry for each CLIN. *Id.*; AR, Tab 15, IMS Proposal, at 16, 31, 46, 61, and 76. Rather, the "Net" amount for each CLIN had been drastically miscalculated, increasing the proposed "Amount" entry for each of the five CLINs from approximately \$160,000 to over \$7 million each. The contracting specialist determined that the overstatement was clearly erroneous and contacted IMS to confirm that, in each case, the stated CLIN "Amount" was correct and that the calculated "Net" amount was erroneous. IMS confirmed that this was the case.

EMS asserts that the contracting specialist's contact with IMS to confirm the error constituted discussions, since it "allowed IMS to modify its proposal," and that EMS similarly should have been permitted to revise its proposed price. EMS Letter, Sept. 25, 2009, at 2-3. We do not agree. While discussions provide a firm the opportunity to make substantive revisions to its proposal, *TDS, Inc.*, B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6, and thus must be held with all competitive range offerors, agencies are permitted to initiate limited exchanges--clarifications--with any offeror in order to clarify aspects of a proposal or to resolve minor or clerical mistakes. See FAR § 15.306(a). Here, the contracting specialist contacted IMS only to confirm an obvious error in its pricing; IMS's confirming this error and the apparent intended price did not rise to the level of a proposal modification, but, rather, constituted a permissible clarification. *IPlus, Inc.*, B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 3-7. See, e.g., *Park Tower Mngt. Ltd.*, B-295589, B-295589.2, Mar. 22, 2005, 2005 CPD ¶ 77 at 7 (contracting officer's contacts with awardee after discussions were held and final proposals received were clarifications and not invitation to modify or revise awardee's proposal). Accordingly, the agency's actions did not trigger the obligation to initiate discussions with EMS and other offerors.

OTHER ARGUMENTS

EMS challenges other aspects of the evaluation of its proposal, including the Navy's failure to contact its past performance references and its rating of EMS's proposal as moderate (rather than low) performance risk, bias against EMS evidenced by the Navy's permitting another offeror to submit additional references, and failure of the

Navy adequately to document its source selection decision, and the Navy's failure to make multiple awards. These protest grounds are academic, since, even if we found the arguments meritorious, EMS would remain ineligible for award due to its unreasonable price. We do not consider academic protests because to do so would serve no useful public policy purpose. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

EVALUATION OF IMS PROPOSAL

EMS challenges the propriety of the award to IMS, alleging that IMS does not have the experience or capability to perform the contract, EMS Letter, Sept. 25, 2009, at 8, and that a precipitous decrease in IMS's proposed price from its initial proposal to its final proposal should have alerted the Navy that IMS would be a performance risk. Id. at 9. Only an "interested party" may protest a federal procurement; that is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (2009). A protester is not an interested party where it would not be in line for contract award if its protest were sustained. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57. Here, since EMS's proposal was ineligible for award due to its unreasonable price, the third- or fourth-ranked offeror--whose eligibility for award EMS does not challenge--would be in line for award if we agreed with EMS that the award to IMS was improper. EMS therefore is not an interested party for purposes of challenging the award to IMS. See Gold Cross Safety Corp., supra, at 3-4.

The protest is denied.

Lynn H. Gibson
Acting General Counsel