



Decision

Matter of: A1 Procurement, JVG

File: B-404618

Date: March 14, 2011

Derrick Storms, Esq., for the protester.
Tracy Downing, Esq., Department of Veterans Affairs, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement for a fixed-price contract, protest of the rejection of the protester's proposal on the basis of its low price is sustained, where the agency's evaluation of the protester's proposal was not reasonable or in accordance with the terms of the solicitation.

DECISION

A1 Procurement, JVG,¹ of Miami, Florida, protests the rejection of its proposal and the award of a contract to DRT Cemetery Management, of San Francisco, California, under request for proposals (RFP) No. VA-786-10-RP-0329, issued by the Department of Veterans Affairs (VA) for ground maintenance service. A1 Procurement contends that the VA unreasonably rejected its proposal on the basis of its low price without any evaluation of the protester's approach to performing the contract.

We sustain the protest.

BACKGROUND

The RFP, issued as an SDVOSB set-aside, provided for the award of a fixed-price contract for ground maintenance service at the Golden Gate National Cemetery in

¹ The protester is a joint venture consisting of A1 Procurement, LLC, a verified service-disabled, veteran-owned small business (SDVOSB) concern, and Greencarpet Landscaping & Maintenance, Inc., a small business concern. See Protester's Proposal at 9.

San Bruno, California, for a base period and four option years. Offerors were informed that award would be made on a best value basis, considering technical capability, past performance, and price. The technical capability and past performance factors were stated to be, when combined, significantly more important than price. RFP at 88. As part of the technical capability factor, offerors were to provide their plans for managing the project. Id. at 89.

With regard to price, the RFP contained five separate contract line items (CLIN) for mowing, trimming, turf weed control by means of pre- and post-emergent herbicides, and fertilizer applications. See id. at 7. In addition, offerors were required to provide a pricing breakdown and their pricing methodology to support their CLIN prices. Id. at 90. In this regard, offerors were warned:

Just providing a price with no substantial information on pricing and/or capabilities and/or performance will result in an inferior proposal and may be considered non-responsive. The Government will not consider proposals that are considerably too low or too high. Pricing may be compared against the Government Cost Estimate (GCE) or against the average mean of the offers received to arrive at a competitive range in determining too low/too high offers.

Id. The RFP also provided that the agency intended to first evaluate the offerors' proposed pricing and that "offers significantly below the GCE will also be considered for elimination from the competitive range." Id.

The VA received 10 proposals, including A1 Procurement's and DRT's. Upon receiving notification of the award to DRT, A1 Procurement requested and received a debriefing, in which the protester was informed that its proposal was rejected because its proposed price was significantly below the GCE and the prices of the other offerors, and therefore the protester's proposal was considered a significant risk to performance. Agency Report (AR), Tab 6, VA Debriefing Letter, Dec. 1, 2010. A1 Procurement subsequently filed this protest.

DISCUSSION

A1 Procurement complains that the VA improperly rejected its proposal on the basis of the firm's low price without any consideration of the firm's technical approach. In this regard, A1 Procurement states it was able to offer its low price because the firm's headquarters is only two blocks from the cemetery. Protest at 5; Protester's Proposal at 6. The protester also complains that its proposed overall price was only 6 percent below the awardee's price. Comments at 8.

The VA responds that A1 Procurement's proposed price was considered to be too low because the firm's proposed unit price of \$7,200 for the trimming CLIN was considered too low in comparison to the government's unit price estimate of \$16,200

for this CLIN.² The agency states that on this basis it concluded that the protester's proposal was technically unacceptable.³ Supp. AR at 7-8.

Before awarding a fixed-price contract, an agency is required to determine that the price offered is fair and reasonable. Federal Acquisition Regulation (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, as opposed to lower.⁴ CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 4. Although not required, an agency also may provide for a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror's low price reflected its understanding of the contract requirements or the risk inherent in an offeror's approach. Id.

Here, there is no explanation in the record as to the purpose for the agency's evaluation of whether an offeror's proposed fixed price was too low. The RFP does not state that the VA intended to perform a price realism analysis to assess the offerors' understanding or to assess performance risk, nor does the VA assert that it performed a price realism analysis.

Regardless of the agency's purpose for assessing whether offerors' proposed fixed prices were too low, however, we conclude that the VA's assessment that A1

² The record does not include a copy of the GCE.

³ In defending against this matter, the VA's counsel requested that we dismiss A1 Procurement's protest for various reasons, including that the joint venture was not listed in the VA's Vendor Information Pages database, as required. A1 Procurement disputes VA's contention that the joint venture itself has to be listed in the VA's database. Comments at 4, 7. We declined to dismiss the protest based on these post-protest assertions, given that A1 Procurement's eligibility to compete was not questioned during the procurement and the agency failed to provide a determination from the requisite agency authority supporting its arguments concerning A1 Procurement's eligibility. Under the circumstances, we view the agency's post-protest assertions as being made "in the heat of litigation," and we will not rely on them as bases for dismissing the protest. Port of Bellingham, B-401837, Dec. 2, 2009, 2009 CPD ¶ 245 at 9 n.18 citing Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

⁴ The fact that a firm, in its business judgment, submits an offer that may not include any profit or be below-cost, or may be an attempted buy-in, generally does not render the firm ineligible for award. Property Analysts, Inc., B-277266, Sept. 12, 1997, 97-2 CPD ¶ 77 at 6; McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. This is so because below-cost pricing is not prohibited and the government cannot withhold an award from a responsible offeror merely because its low offer is or may be below cost. McDonnell Douglas Corp., supra.

Procurement's price was too low is unsupported by the record and does not appear to be consistent with the solicitation. As noted above, the RFP provided that the agency would consider, among other things, the offerors' price breakdowns, pricing methodology, and technical approaches and capabilities in assessing whether proposed prices were too low or too high. RFP at 90. There is no documentation in the record (nor does the agency claim) that such an analysis was performed with respect to the protester's proposal. Rather, the record contains only the VA's conclusory judgment that the protester's fixed price was too low. An agency's evaluation must be sufficiently documented to allow review of the merits of a protest. Northeast MEP Servs., Inc., B-285963.5 et al., Jan 5, 2001, 2001 CPD ¶ 28 at 7. Where an agency fails to provide documentation of its evaluation, it bears the risk that there may not be adequately supporting rationale in the record for us to conclude the agency had a reasonable basis for the selection decision. Id.

Furthermore, here the VA initially informed the protester that its price was too low and represented a performance risk because A1 Procurement's fixed price was significantly below the GCE and the prices of the other offerors. See AR, Tab 6, VA Debriefing Letter, Dec. 1, 2010. In response, the protester noted that its price was only 6 percent below the awardee's price. Rather than explain why it viewed the protester's overall fixed price to be too low, the VA asserted that A1 Procurement's proposal was rejected because the agency found the firm's proposed price for one of the five CLINs to be too low. See Supp. AR at 7-8. There is no contemporaneous documentation evidencing the agency's concern that the protester's price for one CLIN was too low in comparison to the GCE for this CLIN. Nor does the VA state how the protester's price compares to the awardee's or other offerors' prices for this CLIN or overall. There is also no explanation in the record as to why A1 Procurement's low price for this one CLIN reflects a performance risk.

In short, the record is devoid of contemporaneous documentation showing that the agency evaluated A1 Procurement's price in accordance with the RFP, and contains no explanation in response to the protest to support the agency's conclusion that A1 Procurement's price is too low. Accordingly, we find unreasonable the VA's rejection of A1 Procurement's proposal on the basis of the agency's unsupported judgment that the firm's price was too low.

RECOMMENDATION

We recommend that the VA reevaluate A1 Procurement's proposal. As part of this reevaluation, the agency may consider whether the joint venture is an eligible SDVOSB to receive award. If A1 Procurement is found to be an eligible SDVOSB and its proposal is found technically acceptable, the agency should make a new source selection decision. If A1 Procurement's proposal is selected for award, we recommend that the VA terminate the awardee's contract and make award to the protester, if that firm is otherwise found responsible. We also recommend that A1 Procurement be reimbursed its reasonable costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2010). The protester's certified claims

for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.⁵

Lynn H. Gibson
General Counsel

⁵ A1 Procurement raises a number of other protest grounds that we dismiss. For example, A1 Procurement complains that the contracting officer acted in bad faith in rejecting the firm's proposal. This assertion was not supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. Also, the protester complains that the VA did not comply with FAR §15.505 in the debriefing provided to A1 Procurement. Our Office will not review a protester's contention that the debriefing it received was inadequate because the adequacy of a debriefing is a procedural matter that does not involve the validity of an award. Healthcare Tech. Solutions Int'l, B-299781, July 19, 2007, 2007 CPD ¶ 132 at 5. A1 Procurement also challenges the awardee's status as an SDVOSB concern. This issue is not for our review as the authority to determine the awardee's SDVOSB eligibility is vested in the VA, not our Office. TEC/WEST-TEC JV, B-402573.3, July 30, 2010, 2010 CPD ¶ 174 at 2-3.