



Comptroller General
of the United States

950149

Washington, D.C. 20548

Decision

Matter of: American Environmental Services, Inc.

File: B-257297

Date: September 8, 1994

David F. Torrence for the protester.

Lou Ann Keenan-Killane, Esq., Defense Logistics Agency, for the agency.

Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly excluded a proposal from the competitive range where the proposal included no significant technical advantage over the remaining proposals, its price exceeded the low offeror's by 31 percent, and the agency had no reason to believe that protester would improve its price standing based on information which could be provided to the firm during discussions.

DECISION

American Environmental Services, Inc. protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. SP4400-94-R-0007, issued by the Defense Logistics Agency (DLA), for the removal, transportation, and disposal of hazardous waste from a number of Defense Reutilization and Marketing offices. American contends that the decision to exclude its proposal from the competitive range was unreasonable.

We deny the protest.

The RFP contemplated the award of a firm, fixed-price requirements contract and provided descriptions and quantity estimates of the hazardous material which would be removed and disposed of under the contract. Award was to be made to the responsible offeror whose proposal was technically acceptable and demonstrated the best value to the government based solely on price and past performance. The RFP provided that past performance would be used to evaluate the relative capability of the offerors and would be considered more important than price.

The agency received 12 proposals in response to the RFP. Seven of the proposals, including American's, were determined to be within the competitive range. After receipt of the initial proposals, the agency issued an RFP amendment which made substantial changes to many of the line items and quantity estimates. DLA requested and received new pricing proposals from all 12 offerors and established a new competitive range. The three lowest-priced offers were included in the competitive range; the other nine offers, including American's, were excluded. American's offer was eighth low and was \$614,808 or 31 percent higher than the lowest-priced proposal. The second low offer was less than 1 percent higher than the low offer, the third low offer was approximately 2 percent higher than the low offer, and the fourth low offer was approximately 16 percent higher. Concerning past performance, two of the three proposals in the competitive range, as well as American's proposal, were rated "good"; the third competitive range proposal was rated "marginal" in this area.

American argues that its proposal should have been considered to be within the competitive range because, despite its initial price standing, it had the potential of reducing its price in its best and final offer (BAFO) to effectively compete with the other lower-priced offers. The protester argues that its review of previous DLA procurements for similar services shows that it is common for awardees to reduce their initial proposed price by 30 or 40 percent in their BAFOs. Moreover, it contends that often the eventual awardee's initial offer is between fourth low to tenth low. American concludes that offerors whose initial prices are "in the top 10 and are within 50 percent of the initial low proposal cost show promise of providing meaningful reduction during negotiation and should thus be considered competitive."

The competitive range consists of all proposals that have a reasonable chance of being selected for award, generally including proposals that are technically acceptable or reasonably susceptible of being made acceptable through discussions. Kranco Inc., B-242579, May 1, 1991, 91-1 CPD ¶ 425. However, a technically acceptable proposal may be excluded from the competitive range if, based upon the array of technical ratings actually obtained by the offerors and consideration of proposed prices, the proposal does not stand a real chance of being selected for award. The Cadmus Group, Inc., B-241372.3, Sept. 25, 1991, 91-2 CPD ¶ 271. Indeed, cost or price not only is a proper factor for consideration, but may emerge as the dominant factor in determining whether proposals fall within the competitive range. Motorola, Inc., B-247937.2, Sept. 9, 1992, 92-2 CPD ¶ 334. We will not disturb a determination to exclude a

proposal from the competitive range unless the record indicates that the determination was unreasonable. Id.

We find that DLA's exclusion of American's proposal from the competitive range was reasonably based on its price. As stated, the three lowest-priced offers were within a range of approximately 2 percent, while American's proposal was 31 percent higher than the lowest offer. Moreover, there is nothing in the record to suggest that there were areas in American's proposal which, if discussed, could have reasonably caused the firm to significantly lower its price, which, as stated, exceeded the low offeror's by more than \$600,000. Despite American's assertion that it would have substantially reduced its price if given the opportunity to do so through discussions, DLA had no reason (nor has one been offered during the protest proceedings) to believe that discussions would have led American to make such a significant reduction.

Even assuming the protester would have lowered its BAFO price as a matter of business judgment, the competitive range determination is based upon the proposals as submitted, so that a firm that does not submit its best price at the first opportunity always runs the risk of being excluded from further competition for the award. Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114. Moreover, while American contends that it is the common business practice of offerors of these services to make such price reductions in their BAFOs, it is unreasonable to expect that only the protester would reduce its BAFO price. In this regard, contrary to the protester's position, there is no requirement that agencies, in establishing the competitive range, attempt to predict whether, or the extent to which, a particular offeror will reduce its price by examining pricing patterns in other "similar" procurements. Thus, we have no basis to find the agency's competitive range determination unreasonable.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel