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Decision

Matter of: Symbion Power, LLC-Haytrac, JV; Symbion Power, LLC

File: B-405507; B-405507.2; B-405507.3

Date: November 16, 2011

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Joseph C. Kovars, Esq., Barbara G. Werther, Esq., and Christian F. Henel, Esq., Ober Kaler Grimes & Shriver, for Perini Management Services, Inc., the intervenor.

R. Rene Dupuy, Esq., United States Agency for International Development, for the agency.

Paula J. Haurilesko, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that an agency failed to perform a cost/technical tradeoff analysis in making its selection decision is denied, where the solicitation was amended to clarify that award would be made to the lowest-priced, technically acceptable offeror.
 2. Protest that the agency in a competition for the award of a fixed-price contract failed to perform a cost realism analysis of proposed prices is denied, where the agency considered the realism of offerors' proposed prices by comparing them to the government's cost estimates and the agency did not obtain cost information that would allow a more detailed examination of the realism of the offerors' prices.
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DECISION

Symbion Power, LLC-Haytrac, JV, of Washington, D.C., protests the award of a contract to Perini Management Services, Inc., of Framingham, Massachusetts, by the U.S. Agency for International Development (USAID) for the rehabilitation and upgrade of five electrical substations in Port-au-Prince, Haiti.

We deny the protest.

BACKGROUND

The RFP, issued May 6, 2011, provided for the award of a fixed-price contract to repair, rehabilitate, and upgrade the following five electrical substations in Port-au-Prince, Haiti: Canapé-Vert, Carrefour Feuilles, Croix-des-Bouquets, Nouveau Delmas, and Toussaint-Brave.¹ RFP at 4. Work was to be completed within 12 months of contract award.

The RFP, as originally issued, contained conflicting language as to the basis for contract award. For example, the RFP stated that “[t]he contract will be awarded to the lowest qualified bidder,” and that “a proposal with the lowest estimated cost may not be selected if award to a higher priced proposal affords the Government a greater overall benefit.” *Id.* at 85. In response to questions, the RFP was amended to clarify that the contract would be awarded to the lowest-priced, technically acceptable offeror. RFP amend. 3, Question/Answer No. 28. The RFP also advised offerors that the government intended to make award without conducting discussions. RFP at 85, 87.

The RFP identified the following technical evaluation factors:

1	Corporate experience to perform the proposed project
2	Demonstrated reliability and suitability of the proposed equipment package to meet USAID requirements; realism of activity timeline and innovative approaches to meet scheduled commissioning date
3	Experience in executing similar projects under similar conditions
4	Key personnel qualifications

Id. at 86.

Detailed instructions for the preparation of proposals were provided. As relevant here, offerors were required to demonstrate minimum technical qualifications in four categories: corporate experience, description of supplies and services, project schedule, and key personnel. *Id.* at 77-78. The RFP also advised that “[a] technical proposal can be categorized as unacceptable when it has many deficiencies or gross omissions or both” which demonstrate a failure to understand much of the scope of work necessary to perform the required tasks; fails to provide a reasonable, logical approach to fulfilling the government’s requirements; or fails to meet the personnel requirements. *Id.* at 85.

¹ The RFP also provided for replacing power distribution lines at the Carrefour Feuilles location. RFP at 4.

With regard to price, offerors were instructed to provide a price proposal that was sufficient for USAID to determine that proposed prices were reasonable and realistic. Id. at 79. In this regard, the RFP provided a contract line item number (CLIN) for each substation, and each CLIN included sub-CLINs for three major types of activities: installation of electrical apparatus, execution of civil works,² and installation of a control monitoring and protection system at each substation. Attachments to the RFP explained the requirements for each sub-CLIN and included a detailed price schedule for offerors to complete. See, e.g., RFP Vol. 5, Control and Protection Specification, App. 1, Price Schedule. The price schedules sought fixed prices for line items for equipment and tasks to be performed by the contractor, but did not provide for identification of labor mix or labor rates or any cost elements for each line item. Id. The RFP as originally issued also contained a requirement for offerors to provide certified cost or pricing data in accordance with Federal Acquisition Regulation (FAR) § 52.215-20, but that requirement was deleted by an amendment to the solicitation. See RFP amend. 3, Question/Answer No. 26.

USAID received proposals from six offerors, including Symbion and Perini. Contracting Officer's (CO) Statement at 2. Proposals were evaluated by the agency's technical evaluation committee, which found that five of the proposals, including Symbion's and Perini's, were technically acceptable. Id. at 4.

The agency also evaluated the offerors' proposed prices for reasonableness and realism. Symbion proposed an overall price of \$13,372,124,³ and Perini submitted an overall price of \$12,742,629. USAID compared offerors' prices to two government cost estimates (GCE). The first GCE, dated March 2011, estimated an overall cost of \$11,327,318, and included line items for equipment and tasks to be performed by the contractor as well as subtotals for each sub-CLIN. See AR, Tab 7, GCE, at 7-30. USAID's evaluators used this GCE to evaluate the offerors' prices for each sub-CLIN. See AR, Tab 8, Perini Price Analysis, and Tab 9, Symbion Price Analysis. The second GCE (entitled a summary), dated April 2011, estimated an overall cost of \$12,498,318, and contained bottom-line prices for each sub-CLIN. AR, Tab 7, Summary of GCE for the Five Substations - April 2011.

² Specific civil works tasks included providing new foundations and structures for transformers and new pieces of equipment, reconstructing new firewalls, replacing fences, and completely renovating substation buildings. See RFP Vol. 4, Civil Specification for Contractors, at 3.

³ In its price comparison, USAID used \$13,900,000 as Symbion's price, which was the price Symbion identified at the beginning of its price proposal. See Symbion Price Proposal, Standard Form 1442, at 2.

Perini was selected to receive award as the lowest-priced, technically acceptable offeror. In this regard, the source selection authority found that Perini's proposed price was reasonable and realistic. AR, Tab 20, Negotiation Memorandum, at 6, 8.

Following a debriefing, Symbion filed this protest.

DISCUSSION

Symbion complains about various aspects of USAID's evaluation of proposals.⁴ Symbion argues that USAID improperly awarded the contract on a lowest-price, technically acceptable basis. Symbion contends that the solicitation required USAID to award the contract to the offeror offering the best value based on a cost-technical tradeoff analysis. In support of its position, Symbion points to language in the solicitation that advised offerors that technical proposals would be scored and ranked, and award would be made to the offeror whose proposal is the most advantageous to the government, price and other factors considered, and characterizes language informing offerors of the intention to award to the lowest-priced offeror as "passing references."⁵ Protest at 11-12.

Here, Symbion is correct that the solicitation contained language that could lead offerors to believe the basis for award was best value rather than lowest-price, technically acceptable. However, the RFP was amended to clarify that award would be made to the lowest-priced, technically acceptable offeror. That is, prior to the closing date for receipt of proposals, in response to a question concerning conflicting language in the RFP, USAID stated that award would be made on a lowest-price, technically acceptable basis. See RFP amend. 3, Question/Answer No. 28.⁶

⁴ We have considered all of Symbion's arguments, and although we only specifically discuss a few in this decision, we do not find that any of Symbion's arguments provide a basis to object to the agency's selection of Perini's proposal for award.

⁵ Symbion also argues that, in any event, the record does not show that USAID properly determined that Perini's proposal was technically acceptable. See Protester's Comments/Supp. Protest at 11. Symbion, however, does not identify any deficiency or other infirmity in Perini's proposal that the protester alleges would render the awardee's proposal technically unacceptable. Thus, there is no merit to this argument.

⁶ To the extent that Symbion argues that amendment 3 was insufficient to clarify that the agency would make award to the lowest-priced, technically acceptable offeror, this argument concerns an alleged, apparent solicitation impropriety that was required to be protested by the closing time for receipt of proposals. See 4 C.F.R. § 21.2(a)(1) (2011); SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 6 n.10.

Symbion argues, however, that amendment 3 was not properly incorporated into the RFP because the agency failed to check the box in block 11 of the standard form 30 that provides that the solicitation was amended by that form. We disagree. The written questions and answers were issued on standard form 30 (“Amendment of Solicitation/Modification of Contract”), signed by the contracting officer, and made available to all offerors. Moreover, offerors were informed that the “purpose of this amendment to the solicitation . . . is to provide Answers to Questions received from potential[] offerors.” RFP amend. 3 at 1.

Symbion also argues that USAID failed to conduct a cost realism analysis as required by the solicitation, which Symbion claims would have shown that Perini’s price was unrealistically low.⁷ Protest at 9-11.

Cost realism is ordinarily not considered in the evaluation of proposals for the award of fixed-price contracts because these contracts place the risk and responsibility of loss upon the contractor. Simmonds Precision Products, Inc., B-244559.3, June 23, 1993, 93-1 CPD ¶ 483 at 17. However, an agency may, in its discretion, provide for the use of cost realism analysis in a solicitation for the award of a fixed-price contract for the limited purpose of measuring an offeror’s understanding of the solicitation’s technical requirements or to assess the risk inherent in an offeror’s approach.⁸ PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381 at 5.

While it is true that the RFP advised offerors to ensure that the cost information provided is sufficient to provide a basis for USAID to determine that the costs proposed are reasonable and realistic, see RFP at 79, the RFP was amended to eliminate the requirement for cost or pricing data. See RFP amend. 3, Question/Answer No. 26. Instead, the RFP required offerors to propose fixed prices on price schedule line items for equipment and tasks to be performed by the contractor. This schedule did not provide for identification of labor mix or labor rates or any cost elements for each line item. Consistent with the RFP’s instructions,

⁷ Symbion states that USAID admitted in its report that it did not perform a “cost realism” analysis. See Protester’s Supp. Comments at 7. The agency states that a “cost realism” analysis was not required nor performed, but that the agency reviewed offerors’ prices to determine whether they were realistic to perform the work. See AR at 13-14.

⁸ Although Symbion notes that some language in the RFP warned offerors that prices may be adjusted as result of the realism analysis, we note that an offeror’s proposed prices may not be adjusted under a fixed-price contract. See FAR § 15.404-1(d)(3) (2010); IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 at 11; PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366 at 6.

neither Symbion nor Perini submitted detailed cost information that would permit the sort of cost realism analysis that Symbion now asserts was required. See Simmonds Precision Products, Inc., supra.

Symbion also generally challenges the adequacy of USAID's price analysis, arguing, for example, that the agency was required to conduct line-by-line analyses and was inconsistent in its application of a government cost estimate. However, Symbion fails to demonstrate that USAID's actions were improper, or that Symbion was prejudiced by the government's actions.

The depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion. Computer Sys. Int'l, Inc., B-276955, B-276955.2, Aug. 13, 1997, 97-2 CPD ¶ 49 at 3. Here, the agency compared both Symbion's and Perini's proposed prices with the initial March 2011 GCE of \$11,327,318. See AR, Tab 8, Perini Price Analysis, and Tab 9, Symbion Price Analysis. As Symbion notes, the source selection decision refers to the April 2011 GCE of \$12.5 million as the basis for determining that Perini's price was reasonable and realistic. AR, Tab 10, Memorandum of Negotiation, at 6, 8.

Regardless of which GCE is relied upon by the agency in its price analysis, Symbion has not demonstrated that USAID unreasonably determined that Perini's price was reasonable and realistic. Perini's price is approximately 11 percent higher than the March 2011 estimate and almost 2 percent higher than the April 2011 estimate. Thus, under the circumstances of this case, the record supports the agency's determination that Perini's price was not unrealistically low.⁹ Although Symbion suggests that the GCE should be higher, Symbion does not provide support showing that this is the case, and thus merely expresses disagreement with the agency's judgment.¹⁰ We also note that the difference between Symbion's and Perini's prices is less than 5 percent.

⁹ Symbion contends that Perini's prices are unrealistic under the control and protection category because Perini's prices are [Deleted] Symbion's in this category. Protester's Comments/Supp. Protest at 9-10. However, Perini's prices for this category are [Deleted] those cited in the government's initial estimate. See AR, Tab 8, Perini Price Analysis. In contrast, Symbion's prices for this category are [Deleted] the prices listed in the government estimate. See AR, Tab 9, Symbion Price Analysis.

¹⁰ Symbion's arguments in this regard are replete with factual inaccuracies. For example, Symbion states that USAID's estimate of \$12.5 million "is so outdated that it became USAID's benchmark for reasonableness only after a 17% across the board increase was added." Protester's Comments/Supp. Protest at 10. However, Symbion misstates the record, which indicates that the 17 percent increase was applied to an earlier estimate to form the basis for the \$12.5 million estimate. See AR, Tab 7, Summary of GCE for the Five Substations - April 2011.

In short, there is no support in the record for Symbion's claim that Perini's price was unrealistically low, while its own prices were realistic. See, e.g., Mindleaf Techs., Inc., B-294242, B-294242.2, Aug. 24, 2004, 2004 CPD ¶ 157 at 3; J&J Maint., Inc., B-244366.2, Mar. 7, 1994, 94-1 CPD ¶ 177 at 11.

The protest is denied.¹¹

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General Counsel

¹¹ Symbion also argues that USAID applied unstated evaluation subfactors in evaluating its proposal. Protester's Supp. Comments at 4. The record does not show any possible prejudice to Symbion, even accepting the protester's argument, given that Symbion's proposal was determined to be technically acceptable.