



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: EMR, Inc.
File: B-406625
Date: July 17, 2012

Michael Gross, EMR, Inc., for the protester.
Greg Harding, Esq., Department of the Air Force, for the agency.
Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly coerced protester to raise its labor rates and overall price, by advising during discussions that specific labor rates appeared to be low in relation to other offerors, and represented a weakness, is denied where information provided by agency was accurate, protester was specifically advised to either verify the proposed rates or provide revised rates, and record indicates that protester's decision to raise its labor rates was a business decision, not compelled by the agency.

DECISION

EMR, Inc., of Lawrence, Kansas, protests the Department of the Air Force's failure to award it a contract under request for proposals (RFP) No. FA6643-11-R-0003, for the Command-wide O&M Program Execution Contract (COMPEC II) program, for construction and engineering services at Air Force activities. EMR asserts that the agency's evaluation of its labor rates was inconsistent with the RFP's statement that the evaluation of price would be based upon total price. EMR also argues that the agency improperly coerced it during discussions into raising its price.¹

¹ EMR proceeded with its protest pro se and therefore did not have an attorney who could obtain access to nonpublic information pursuant to the terms of a protective order. Accordingly, our discussion of the facts of this protest is necessarily general in nature to avoid reference to nonpublic information. Our conclusions, however, are based on our review of the entire record, including nonpublic information.

We deny the protest.

BACKGROUND

The RFP for COMPEC II contemplated the award of multiple indefinite-delivery, indefinite-quantity contracts to support a range of real property construction and engineering services. Id. Pertinent here, the RFP required offerors to provide fixed-price fully burdened labor rates in certain identified categories. AR, Tab 9, RFP Amend. 3 at 14. The RFP provided for evaluation of proposed prices for both price realism and price reasonableness. RFP Amend. 3 at 14, 23. Award under the RFP was to be made “on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors,” i.e., on a lowest price, technically acceptable basis. RFP Amend. 3 at 16. The RFP provided that the total evaluated price “will be the basis for evaluating price for contract award decision purposes.” Id. at 24.

EMR submitted a timely proposal in response to the RFP. The contracting officer advises that the agency, in evaluating offerors’ prices, not only compared the total evaluated prices, but also reviewed

the rates proposed for each labor category for each [Fiscal Year] by each offeror. In order to fairly compare the rates and identify which rates were unbalanced, an average rate for each labor category was calculated and any rate that was outside the 20% range (+ or -) of the average rate was identified to each offeror as being high or low in comparison with other offerors. This methodology was applied to all offerors for both the field and home rates. All offerors that had rates that were outside the 20% range of the average rate were sent ENs [Evaluation Notices] to address the low or high rates.

Contracting Officer’s (CO) Statement at 10.

EMR received four ENs, two of which dealt with price and indicated that certain rates were low or high in comparison with other offerors. AR, Tab 14. The first EN advised EMR that the field rates for certain labor categories “appear to be low in relation to other offerors.” Id. at 1. The second EN advised EMR that the home rates for certain labor categories “appear to be high in relation to other offerors.” Id. at 2. In each case, the EN indicated that the proposed rates constituted a “weakness,” but further advised that “[t]he offeror shall verify that the prices are what it intended to propose or make adjustments as necessary and provide the revised prices in response to this Evaluation Notice.” Id.

In its response to the first EN, EMR explained that its proposed field labor rates were “developed using a combination of (1) EMR labor rates, (2) [subcontractor] [Defense Contract Audit Agency]-approved rates, and (3) anticipated local

contractor rates,” as modified by a capping of rates and modifying the labor mix. AR, Tab 15, at 3. Nevertheless, EMR also advised that:

[s]ince the selection committee deemed these reduced field rates as being a weakness, we have reduced or removed the voluntary capping, where applied, and we revised the architect skill mix to be less weighted toward the junior level. Thus, these rates have been increased and are now more in line with industry averages, as reflected on the revised Attachment L-6. The remaining field rates remain unchanged.

Id., at 3-4.

While EMR accordingly raised its proposed field rates for the three labor categories identified in the first EN, it also lowered the home rates for the 14 labor categories identified in the second EN. CO’s Statement at 12; compare AR, Tab 12, EMR Original section L, Attach. 6, with AR, Tab 17, EMR FPR section L, Attach. 6. However, the lower home rates did not offset the higher field rates, and thus EMR’s overall price increased. EMR’s revised pricing proposal was determined reasonable and balanced.

The agency subsequently made award to the ten technically acceptable offerors with the lowest proposed prices. AR at 3; Source Selection Decision Document, Feb. 23, 2012. The awards ranged in price from \$29,967,750 to \$37,526,167. Id. EMR’s final revised proposed price was slightly higher than the proposed price of the highest-priced awardee, and it did not receive an award. Id.; Protest at 2-3. EMR first filed an agency-level protest and then this protest challenging its failure to be selected for award.

DISCUSSION

As an initial matter, EMR asserts that the agency’s consideration of its proposed labor rates in determining price realism was not permissible under the RFP. According to the protester, only total price was to be evaluated under the RFP and therefore the agency acted unreasonably in evaluating its proposed labor rates. According to the protester, “rates that are lower compared to other contractors [are] not a ‘weakness’ at all and should never have been cited as such, especially since evaluation criteria should have been based only upon TOTAL price as cited above.” Protest at 4-5.

The RFP, however, clearly provided that the agency, in evaluating proposed prices, would conduct a price realism analysis, as well as a price reasonableness analysis,

and that those analyses would include consideration of proposed labor rates.² In this regard, with respect to the price realism analysis, the RFP provided that the agency could:

[r]eject any proposal, at any time during the evaluation, which is unrealistic in terms of performance commitments or based on unrealistically high or low price. Such proposals may be deemed to reflect a lack of technical competence, a lack of understanding of the requirements, an inability to perceive the complexity of the requirement, or a lack of sound business judgment.

AR, Tab 9, at 17. Likewise, the solicitation cautioned that the government “may reject any proposal that is determined to be unreasonably high or low in price when compared to other offerors and Government estimates, such that the proposal is deemed to reflect an inherent lack of competence or failure to comprehend the complexity and risks of the program.” Id. Further, the RFP advised that the agency had “developed a pricing model to evaluate labor costs. The model is based on proposed rates in . . . Attachment L-6,” the schedule of fully burdened field and home office direct labor rates that offerors were to include in their proposals. RFP Amend. 3 at 14, 23.

EMR also asserts that it was improperly coerced into raising its labor rates, thereby putting its proposal outside of the range of awardees. According to the protester, “[w]hen the government cites a weakness in a contractor’s proposal, that contractor is compelled to revise its proposal in response.” Protest at 4.

This issue is without merit. During discussions, agencies may not consciously mislead or coerce an offeror into raising its prices. Eagle Tech., Inc., B-236255, Nov. 16, 1989, 89-2 CPD ¶ 468 at 3-4. Here, however, the record does not support EMR’s assertion that it was misled or coerced into raising its labor rates. The first

² The RFP at some points appears to conflate price reasonableness and price realism. 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. See McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. Although not required, an agency may also provide in the solicitation 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 price reflects an understanding of the contract requirements or the risk inherent in an offeror’s approach. Grove Resource Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5. In general, a price realism determination focuses on whether an offeror’s prices are too low. See, e.g., Vital Link, Inc., B-405123, Aug. 26, 2011, 2011 CPD ¶ 233 at 6.

EN advised EMR that the agency had found its field rates for certain labor categories to be “low in relation to other offerors,” and EMR does not dispute, nor is there any basis in the record to question, the accuracy of this information. AR, Tab 14, at 1. Further, the EN did not require EMR to raise its labor rates, but instead simply directed that “[t]he offeror shall verify that the prices are what it intended to propose or make adjustments as necessary and provide the revised prices in response to the Evaluation Notice.” Id. (emphasis added).

The fundamental purpose of discussions is to afford offerors the opportunity to improve their proposals “to maximize the Government’s ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.” FAR § 5.306(d); see Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6. In discussions, an agency is required to discuss with each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. In addition, the contracting officer also is encouraged to discuss other aspects of the offeror’s proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award. FAR § 15.306(d)(3).

Here, the agency advised EMR of areas of its proposal that needed to be explained or altered to enhance the proposal’s potential for award. We will not find coercion in discussions where, as here, the agency in good faith provides accurate information to an offeror, even where the offeror uses that information to its ultimate competitive detriment. See Academy Facilities Management--Advisory Opinion, B-401094.3, May 21, 2009, 2009 CPD ¶ 139 at 6 (discussions were not misleading or coercive where information provided by agency accurately reflected the agency’s concerns); SIMSHIP Corp., B-253655.2, Dec. 2, 1993, 93-2 CPD ¶ 293 at 4-5 (agency did not coerce or mislead protester into raising its price where, based on concern that protester had offered unreasonably low prices, agency during discussions advised protester to review proposed prices, without stating that the protester was required to raise its prices). In sum, EMR’s decision to revise certain prices upward reflected the exercise of the firm’s own business judgment, not improper conduct by the agency. See First Preston Housing Initiatives, LP, B-293105.2, Oct. 15, 2004, 2004 CPD ¶ 221 at 3.

The protest is denied.

Lynn H. Gibson
General Counsel