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Decision

Matter of: Theodor Wille Intertrade AG

File: B-409976.3

Date: January 22, 2015

Marc Lamer, Esq., Kostos and Lamer, P.C., for the protester.
Michael A. Hordell, Esq., Thomas J. Madigan, Esq., Robert A. Gallagher, Esq., and Kristopher Berr, Esq., Pepper Hamilton LLP, for Noble Supply and Logistics, Inc., the intervenor.

Nicole M. Franchetti, Esq., Defense Logistics Agency, for the agency.
Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency's non-price evaluation and discussions were objectionable is denied where the record shows that the agency's evaluation of the protester's non-price proposal was reasonable and discussions were meaningful.

DECISION

Theodor Wille Intertrade AG (TWI), of Zug, Switzerland, protests the award of contracts to Atlantic Diving Supply, Inc. (ADS), of Virginia Beach, Virginia, and Noble Supply and Logistics, Inc., of Rockland, Massachusetts, by the Defense Logistics Agency (DLA) Troop Support, Europe and Africa under request for proposals (RFP) No. SPE5B1-14-R-0001 for logistics support services in Europe and Africa. TWI argues that the agency failed to conduct meaningful discussions, and challenges the agency's price analysis, past performance evaluation, and best value tradeoff decision.

We deny the protest.

BACKGROUND

The RFP, issued on March 28, 2014, contemplated the award of four indefinite-delivery/indefinite-quantity contracts, each with a two-year base ordering period, and two 18-month option periods. RFP at 9. These contracts will provide total logistics support of various maintenance, repair and operations requirements to

military installations and federal activities in two regions of the U.S. European Command (EUCOM) and two regions of the U.S. Africa Command (AFRICOM) areas of responsibility (AOR). Id. at 36. Offerors were permitted to submit proposals for one or more of the four zones, with one contract being awarded for each zone.

Proposals were to be evaluated using best value tradeoff procedures, with non-price factors being significantly more important than price. Id. at 7. The non-price factors, listed in descending order of importance, were past performance confidence assessment and technical merit. The technical merit factor included the following subfactors, listed in descending order of importance: product sourcing, distribution/delivery, customer support, and local sourcing. Id. at 69.

Past performance information was to be reviewed in order to determine its quality and usefulness as it applied to the performance confidence assessment. Id. at 72. Sources for past performance information were to include information provided by the offeror; information obtained from questionnaires; and information from any other sources available to the government, such as the Past Performance Information Retrieval System and Contractor Performance Assessment Reporting System (CPARS). Id. Each offeror was to be assigned a performance confidence assessment rating of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral), based on the offeror's recent/relevant performance record and the government's expectation, based on this record, on how the offeror will perform on the contract. Id. at 72-73.

Total evaluated price was to consist of the sum of the overall aggregate acquisition ceiling price of Price Evaluation List (PEL) line items and acceptable alternates, overall aggregate management fee, transportation charge and total acquisition price for incidental services. Id. at 75. Price was to be evaluated for reasonableness utilizing accepted price analysis methods, including comparison of offers to each other, comparison with market research, and comparison with prior procurements. Id. at 71, 74-75.

The PEL illustrated the types of supplies that have been provided to customers in the EUCOM and AFRICOM AORs. Id. at 4. Offerors were required to submit ceiling prices for 100 percent of the items on the PEL; failure to do so might result in exclusion from further consideration. Id. at 38. Upon award contractors were prohibited from submitting prices exceeding the PEL list ceiling price on resulting orders. Id. The aggregate price for PEL line items was to be determined by multiplying the offeror's acquisition ceiling price by the estimated annual quantity for each line item and adding the totals for all line items in the PEL for each applicable pricing period. Id. at 75. Offerors were advised that if any PEL items could not be determined to be fair and reasonable for the awardee, they would be removed from

the PEL at time of award, resulting in an award for less than 100 PEL Items for each Zone.¹ Id.

The two contracts relevant to this protest are AFRICOM Zone 1 and Zone 2. With respect to Zone 1, DLA received eight offers, including from TWI and the awardee, ADS. AR, exh. 6, Competitive Range Determination, at 4. After initial evaluations, two proposals were eliminated from further consideration, and the agency entered into discussions with the remaining six offerors. Id. With respect to Zone 2, DLA received ten offers, including from TWI, and the awardee, Noble. AR, exh. 7, Competitive Range Determination, at 4. After initial evaluations, three proposals were excluded from the competition, and the agency entered into discussions with the remaining seven offerors. Id.

With respect to price evaluation of the PELs for both Zone 1 and Zone 2, the agency determined that adequate price competition was not present, and determined that price negotiation was in the best interests of the government. AR, exh. 6, Competitive Range Determination, at 74; exh. 7, Competitive Range Determination, at 84. Specifically, the agency noted for Zone 1 that the submitted prices ranged from 5 percent to 443 percent higher than the lowest priced offeror, and for Zone 2, submitted prices ranged from 43 percent to 288 percent higher. Id. As relevant here, ADS' original total PEL price was [DELETED] for Zone 1, whereas TWI's original total PEL price was [DELETED]; the lowest original total PEL price was submitted by a third offeror, and was [DELETED]. AR, exh. 6, Competitive Range Determination, at 74. For Zone 2, Noble submitted the lowest original total PEL price of [DELETED], whereas TWI submitted the third-lowest original price of [DELETED]. AR, exh. 7, Competitive Range Determination, at 84.

As part of its price negotiations, DLA established minimum and maximum price objectives, based in part on historical pricing, prices obtained from comparable General Services Administration (GSA) contract pricing and commercial pricing. AR, exh. 6, Competitive Range Determination, at 86-88; exh. 7, Competitive Range Determination, at 100-105. According to the record, at no point did the maximum objective price for each PEL exceed the lower of historical, GSA or commercial pricing. Id. The agency's price negotiation consisted of identifying unit prices for any given PEL that exceeded the maximum objective, and advising the offeror that it should improve its price for that PEL.

As an example, for Zone 1 the agency identified nine PEL's for which TWI's price exceeded the maximum objective, and identified to ADS 27 PEL's that exceeded the maximum objective. AR, exh. 6, Competitive Range Determination, at 94, 104.

¹ The record shows that at some point in the procurement two of the PEL items were deleted, resulting in 98 evaluated PEL items. Agency Report (AR), exh. 6, Competitive Range Determination, at 86.

After three rounds of negotiations, ADS' total price for Zone 1 went from \$31,088,509 to \$9,387,898, whereas TWI's total price went from \$25,812,202 to \$24,693,276, with the vast majority of ADS' price change being attributable to reductions in its PEL prices. AR, exh. 14, Source Selection Decision Document (SSDD), at 43, 58-59.

For Zone 1, ADS, TWI and a third offeror each received past performance confidence assessment ratings of substantial confidence and technical merit ratings of outstanding. Id. at 59. The third offeror was rated higher than TWI in the agency's best value tradeoff determination and was significantly lower-priced. Ultimately, the agency decided to award the Zone 1 contract to ADS. For Zone 2, each of the four highest-rated offerors received past performance confidence assessment ratings of substantial confidence, including Noble and TWI, and each of these four offerors received a technical merit rating of outstanding. AR, exh. 15, SSDD, at 68. Of these four offerors, TWI was by far the highest-priced offeror, with a total evaluated price more than double that of the next lower-priced offeror. Id. The agency determined that Noble was the best-value offeror. Id. TWI was notified of the agency's decisions regarding these contracts on September 29; this protest followed.

DISCUSSION

TWI first argues that DLA failed to conduct meaningful discussions because it failed to alert the firm that its overall PEL pricing was significantly higher than that of its competitors. Protest at 29-30; Protester's Comments at 28. TWI asserts that the error committed by the agency in its price analysis and subsequent discussions stemmed from its focus on pricing for individual PEL items, instead of total evaluated price. TWI also argues that the minimum and maximum price ranges used in the agency's price evaluation were not reasonable. Comments at 29. Our review of the record offers us no basis to object to the agency's price evaluation, or its subsequent discussions with offerors in the competitive range.

When an agency engages in discussions with an offeror, the discussions must be meaningful. In order to be meaningful, discussions must be sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror's potential for receiving award. Powersolv, Inc., B-402534, B-402534.2, June 1, 2010, 2010 CPD ¶ 206 at 7. While the precise content of discussions is largely a matter of the contracting officer's judgment, such discussions must, at a minimum, address significant weaknesses, deficiencies and adverse past performance information to which the offeror has not yet had an opportunity to respond. Federal Acquisition Regulation (FAR) §15.306(d)(3); American States Utilities Servs, Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 5. With respect to issues related to price, however, we have long held that the decision to inform an offeror that its price is too high or too low during discussions is discretionary. See Hydraulics Int'l, Inc., B-284684,

B-284684.2, May 24, 2000, 2000 CPD ¶ 149 at 12. In this regard, when discussions are conducted, we have held that price need be discussed only if the price is found by the agency to be unreasonable. Id.; see also Price Waterhouse, B-220049, Jan. 16, 1986, 86-1 CPD ¶ 54 at 4. Similarly, we have held that agencies need not conduct discussions with respect to price, even where the offeror's price is significantly higher than competitors, but is still below the government's reasonable price estimate. Price Waterhouse, supra, at 4.

The protester has given us no basis to question the agency's price evaluation or the discussions based on the agency's price evaluation. The record shows that the agency's maximum price objectives were based on historical, commercial and GSA pricing for the various PEL items. TWI has made no effort to show why use of such metrics was unreasonable. Instead, the protester's challenge appears to be based on the wide disparity between the agency's minimum and maximum objectives. Protester's Comments at 29. However, in determining whether the price metric used by the agency was reasonable, we need only focus on the maximum objective, as price reasonableness concerns whether a price is unreasonably high. See Vital Link, Inc., B-405123, Aug. 26, 2011, 2011 CPD ¶ 233 at 6. Moreover, historical and commercial pricing, as well as pricing obtained from other competitive contracts are exactly the metrics envisioned by the FAR for use in price analysis. See FAR § 15.404-1(b). In sum, we have no basis to question the agency's price analysis or the maximum objectives established by the agency for each PEL item.

TWI has also not shown why the agency's focus on individual PEL item pricing, rather than total PEL pricing was unreasonable. Here, the maximum objective for the total PEL price was determined from the sum of the maximum objectives for each of the 98 PEL item prices. The record also shows that TWI's total price for PEL items was lower than the agency's relevant maximum objective, and was lower than the agency's maximum objective prices for each of the PEL items after the completion of discussions. Thus, there is no evidence in the record showing that the protester's prices, either for each PEL item, or its total PEL pricing, were found by the agency to be unreasonable.

TWI appears to confuse the agency's obligation to inform an offeror that its price is unreasonably high, which our decisions hold is compulsory when discussions are held, with the agency's discretionary act of informing offerors that their price is too high as it relates to competitive standing. In fact, the error alleged by the protester is based on its assertion that the agency was required to inform the firm that its price was "significantly higher than that of its competitors." Protest at 29-30. Such a comparative price analysis during discussions is not required, and we conclude that the agency's decision not to inform TWI that its PEL prices were significantly

higher than that of its competitors, but were otherwise reasonable, evidences no error on the part of the agency.²

Finally, there is no evidence in the record that the agency treated offerors disparately such as, for example, advising another offeror to lower its price, even though the offered price was below the maximum price objective. In this regard, while the FAR prohibits favoring one offeror over another, discussions need not be identical; rather, discussions must be tailored to each offeror's proposal. FAR §§ 15.306(d)(1), (e)(1); WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6. Here, the record shows that with respect to discussions conducted with ADS and TWI for Zone 1, and Noble and TWI for Zone 2, the agency treated offerors equally by only informing them to improve their price for each PEL item if it exceeded the agency's maximum objective.

Next, with respect to its own technical evaluation, TWI argues that the agency misevaluated the firm under the past performance factor because it assigned a "good" rating for one of its six past performance references, when, according to TWI, CPARS reports showed that an "outstanding" rating was appropriate. Comments at 30-31. The protester also asserts that it should have received a strength under the local sourcing subfactor of the technical merit factor. Id. Finally, TWI argues that DLA's source selection decision for both contracts was a mechanical comparison of evaluation ratings, and improperly made award based on price alone.³ Comments at 32.

² Additionally, the protester does not allege that its price proposal would have been any different had it been informed that its price was significantly higher than other offerors. For example, TWI does not allege that if it had been informed of its significantly higher prices, it would have drastically reduced its prices to be competitive. In fact, in its protest TWI challenged the responsibility of the awardees based on their submitted low prices. Protest at 32-33. Moreover, for both zones, TWI's proposed management fees, which were obtained by reserve auction, were substantially higher than other offerors in the competitive range; essentially double the proposed fees of the next lowest priced offerors, or about \$5 million higher for each zone. AR, exh. 3, Price Negotiation Memorandum, at 12; exh. 4, Price Negotiation Memorandum, at 6. We conclude that the protester has not shown any prejudice owing from the agency's actions. Gas Turbine Engines, Inc., B-401868.2, Dec. 14, 2009, 2009 CPD ¶ 257 at 3.

³ In its protest, TWI additionally argued that the agency improperly engaged in technical leveling and the awardees' extremely low PEL and management fee prices should have led DLA to question their responsibility. Protest at 32-33. The agency addressed these allegations in its report, but TWI failed to rebut or otherwise substantively address the agency's arguments in its comments. See Legal Memorandum at 31-34; see generally Protester's Comments. We conclude that TWI abandoned this protest ground and it will not be considered further.

(continued...)

While we conclude that the substance of TWI's allegations is without merit, we need not address these allegations further, as we conclude that TWI has not shown prejudice. Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 4 (prejudice is an element of every viable protest). In this regard, the record shows that TWI received the highest rating of substantial confidence under the past performance confidence assessment factor, but was qualitatively inferior to both ADS and Noble, in regards to the respective procurements. Further, TWI has given us no basis to question the agency's evaluation of other offerors under the non-price factors. Finally, given TWI's significantly higher price, we have no basis to conclude that TWI's competitive position would have improved even if it had received an outstanding rating for the relevant past performance reference. The same rationale applies to TWI's challenge to its evaluation under the local sourcing subfactor. The protester has made no showing of why it should have received a strength under this subfactor, nor does it make any specific showing of prejudice, that is, had it received a strength the firm has not shown its relative competitive position would have improved.

Finally, contrary to the protester's unsupported allegation, the record provides us no basis to question the agency's best value tradeoff decision. The record clearly shows that the agency made a qualitative assessment of proposals under the non-price factor, and conducted a tradeoff between price and non-price factors in its best value tradeoff decision. Absent allegations to the contrary, we have no basis to question the agency's relatively high ratings for each of the most competitive offerors for each procurement, including the agency's evaluation of TWI. That the award decision may have ultimately turned on price under such circumstances does not evidence an unreasonable best value tradeoff decision on the part of the agency.

The protest is denied.

Susan A. Poling
General Counsel

(...continued)

Alliance Tech. Servs., Inc., B-410307, B-410307.3, Dec. 1, 2014, 2014 CPD ¶ 345 at 2 n.2.