Decision

Matter of:  InfoZen, Inc.

File:  B-411530; B-411530.2

Date:  August 12, 2015

H. Todd Whay, Esq., The Whay Law Firm, for the protester.
James H. Roberts III, Esq., Van Scoyoc Kelly & Roberts PLLC, for Smartronix, Inc.,
the intervenor.
George Tereschuk, Esq., and John J. Reynolds, Esq., Department of Veterans
Affairs, for the agency.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably found the successful vendor’s price was fair
   and reasonable is denied where the agency determined the successful vendor’s
   evaluated price was slightly lower than the independent estimate, and where the
   record showed the price ranked in middle of the prices proposed by other vendors.

2. Protest that agency unreasonably found that successful vendor’s price was not
   unbalanced is denied where, although agency failed to consider the risk posed by
   apparent unbalanced pricing in awardee’s proposal, the protester merely speculated
   that the agency would fail to obtain the benefit of awardee’s much lower pricing in
   later years of performance, and thus failed to show prejudice.

DECISION

InfoZen, Inc., of Bethesda, Maryland, protests the issuance of a task order¹ to
Smartronix, Inc., of Hollywood, Maryland, by the Department of Veterans Affairs
(VA), under request for proposals (RFP) No. VA118-15-R-0028 for commercial

¹ The RFP anticipated issuance of a task order to a contractor under the General
Services Administration’s Alliant multiple-award indefinite-delivery/indefinite-quantity
(ID/IQ) contract program. We have protest jurisdiction because the task order at
information technology services. InfoZen argues that the VA should have rejected Smartronix’s task order proposal as unreasonably high priced and unbalanced.\(^2\)

We deny the protest.

BACKGROUND

The VA issued the RFP to Alliant contractors, seeking task order proposals to provide on-demand data storage services for a base year and six option years. The RFP provided that a single fixed-price\(^3\) task order would be issued to the firm whose task order proposal provided the best value to the government. RFP at 1, 219. Best value was to be assessed under four evaluation factors, listed in descending order of importance: technical, past performance, price, and veterans involvement. RFP at 209.

The RFP described the required services in a performance work statement (PWS). Under the technical evaluation factor, the RFP directed vendors to submit a detailed technical approach demonstrating the firm’s capabilities to perform in five general areas. RFP at 213. The agency evaluated the technical factor using adjectival ratings of outstanding, good, acceptable, susceptible to being made acceptable, and unacceptable.

Vendors were to submit price information by completing entries in accompanying electronic spreadsheets, which sought pricing both for the required tasks, and for each of the repetitively-exercised optional tasks. RFP attach. 0 (electronic spreadsheets). For required tasks, the RFP requested lump sum annual or monthly prices for specific elements of the PWS. In contrast, for optional tasks, the RFP requested range pricing for particular tasks (for example, separate prices to increase a particular type of storage by 1 to 50 terabytes (TB), by 51-200 TB, by 201-1000 TB, or by over 1000 TB). Using the range prices entered by the vendor, and the estimates of how much of each part of the range would be exercised, the spreadsheet calculated a weighted average. The weighted average, in turn, was

\(^2\) Although InfoZen’s initial protest also raised challenges to aspects of the technical evaluation, and raised a general challenge to the best value tradeoff rationale, the protester later withdrew those grounds of protest. Protester’s Comments at 3 n.1.

\(^3\) Notwithstanding the VA’s description of the task order as “firm fixed price,” RFP at 219, the RFP provided nine contract line items that were optional tasks for various categories of storage, each of which the agency would exercise numerous times--the RFP included individual estimates of the number of times each line item would be exercised, which range from 48 to 5767 times a year. RFP at 148, 175, 178; RFP attach. 0 (pricing spreadsheet estimated option line item quantities). The RFP also provided similar repeated-exercise options for training services and for extending the vendor’s services to additional facilities. RFP at 181-83.
then applied to stated quantity estimates to establish an estimated price for each optional line item each year. RFP attach. 0 (pricing spreadsheet).

The RFP stated that for the purposes of price evaluation, the agency would add the total of all fixed-price line items, including all options. RFP at 210. For range-pricing contract lines, the RFP stated that the agency would use the evaluated price (calculated using the estimated quantities in the RFP spreadsheet). Id. at 210-211. The RFP also stated that the VA “may evaluate whether the Offeror has submitted unbalanced pricing,” which it described as being one or more contract line items that was found to be “significantly overstated or understated and which will result in the Government paying an unreasonably high price for contract performance or otherwise present an unacceptable level of risk to the Government.” Id. at 211.

The VA prepared an independent government cost estimate (IGCE) in spreadsheet form, which estimated the labor categories, rates, and hours required to perform each year of services, and also estimated the hardware/software and travel costs that vendors would incur. AR Tab 1, IGCE, at sheet 2. The resulting price estimate anticipated a steady level of effort across all years, and fairly steady price escalation (between 15 and 18 percent annually). Id. Although the IGCE factored in labor rate escalation, most of the estimated annual price increase was driven by increased storage requirements in successive years. Id.

The VA received task order proposals from seven vendors, including InfoZen and Smartronix. The technical evaluation identified two significant strengths and three strengths in Smartronix’s proposal, leading to an adjectival rating of outstanding. AR, Tab 10, Source Selection Authority Briefing, at 29-33. The evaluation of InfoZen’s proposal identified one weakness and one significant weakness, resulting in an adjectival rating of acceptable under the technical factor. Id. at 27-28.

In evaluating Smartronix’s price, the VA confirmed that the firm had not modified any of the spreadsheet formulas. The VA also compared Smartronix’s annual evaluated prices to the IGCE, which revealed that Smartronix’s prices were more than double (140 percent above) the government estimate for the base year, but then decreased to almost half (46 percent below) the estimate by the final option year. However, for all years combined, Smartronix’s total evaluated price was near the IGCE (3 percent below). AR, Tab 8, Smartronix Price Evaluation, at 2. The VA then calculated the year-to-year differences for each of the 15 range-priced contract line items. That analysis showed that Smartronix’s price for each optional line item varied significantly from year to year, in a nonlinear fashion. Specifically, on average

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4 As described above, the RFP did not require vendors to identify Alliant ID/IQ contract labor categories, rates, hours, or other price elements. Since the RFP requested prices for each task as a lump sum or as range pricing, the VA could only compare the vendor’s annual total evaluated price to the IGCE annual estimate.
Smartronix’s prices for the 15 optional line item tasks increased by 39 percent in option year 1, and by 16 percent in option year 2, then decreased by 12 percent in option year 3, decreased by 5 percent in option year 4, decreased by 23 percent in option year 5, but then increased by 34 percent in option year 6. Id. at 2. Other than calculating these figures, the price evaluation did not identify any basis for this pricing structure, or analyze any risk to the agency it might pose. Instead the evaluator simply stated that Smartronix had taken no exceptions to the pricing, and “[did] not appear to have submitted a materially unbalanced bid.” Id. at 3.

The final evaluation ratings for the protester and intervenor were as follows:

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<thead>
<tr>
<th></th>
<th>InfoZen</th>
<th>Smartronix</th>
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<tbody>
<tr>
<td>Technical</td>
<td>Acceptable</td>
<td>Outstanding</td>
</tr>
<tr>
<td>Past Performance</td>
<td>Low Risk</td>
<td>Low Risk</td>
</tr>
<tr>
<td>Evaluated Price</td>
<td>$74.7 million</td>
<td>$110.7 million</td>
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<tr>
<td>Veterans Involvement</td>
<td>Some Consideration</td>
<td>Some Consideration</td>
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On April 24, the source selection authority (SSA) reviewed the evaluation record. Id. at 4. In comparing the proposals of “Offeror E” (InfoZen) and “Offeror F” (Smartronix), the SSA noted that while InfoZen’s price was significantly lower, Smartronix had received a higher adjectival rating of outstanding under the technical factor, compared to the acceptable rating for InfoZen. Id. at 3. The SSA noted that the higher rating for Smartronix reflected the firm’s thorough understanding of the requirement, and “a highly feasible, low risk approach.” Id. In contrast, InfoZen’s proposal showed a “minimal understanding” of the requirement, and a “minimally feasible, high risk approach.” Id. at 3-4. The SSA reviewed the evaluated strengths and weaknesses of the two proposals under the technical factor, and then the past performance or veterans involvement factors, where the SSA found no basis to distinguish them. In a tradeoff analysis, the SSA then determined that Smartronix’s technical superiority outweighed its higher price, and selected Smartronix’s proposal as the best value. Id. at 4.

The contracting officer then assessed the reasonableness of Smartronix’s price, and concluded that “[s]ince more than one proposal was received, adequate price competition was achieved and price reasonableness has been established.” AR, Tab 9, Fair & Reasonable Price Determination Memorandum, Apr. 30, 2015, at 2.

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5 These percentages are averages calculated by our Office, to provide a general description of the record.
6 The ratings of the other vendors are not relevant to the protest.
On May 1, the VA notified InfoZen that the agency had selected Smartronix for award. After requesting and received a debriefing, InfoZen filed this protest.

ANALYSIS

InfoZen argues that the VA should have rejected Smartronix’s proposal both because it was unreasonably high priced, and because its pricing was unbalanced. As explained below, we conclude that the VA’s determination that Smartronix’s total price was reasonable was proper, and that while the VA failed to assess whether Smartronix’s prices were unbalanced, InfoZen was not prejudiced by this error.

Price Reasonableness

InfoZen argues that the VA should have considered Smartronix’s price to be unreasonably high because the VA is paying $110.7 million for commercial services, when acceptable services were offered by InfoZen for $75 million. Protest at 8. InfoZen also argues that the record fails to show that the VA meaningfully considered whether Smartronix’s price was fair and reasonable, and instead stated incorrectly that because more than one proposal was submitted, Smartronix’s price was per se reasonable. Protester’s Comments at 2; Protester’s Supplemental Comments at 5.

The VA argues that it correctly found Smartronix’s price to be fair and reasonable. As support, the agency points out that the price evaluator found that Smartronix’s total evaluated price for all years was less than the IGCE. AR at 9 (citing AR, Tab 8, Smartronix Price Evaluation, at 2). Furthermore, the agency argues that the contracting officer and the SSA also reviewed the prices of all seven vendors, which ranged from $92 million to $187 million (excluding, for the moment, InfoZen). Supplemental AR, Tab 21, SSA Overall Ratings Briefing Slide, at 1. As such, the VA argues that the contracting officer reasonably concluded that $110 million was a fair and reasonable price. AR at 10-11; Contracting Officer’s Statement at 3; Supplemental AR at 5.


The record here supports the agency’s determination that Smartronix’s price was fair and reasonable. Specifically, as the agency points out, Smartronix’s total price was slightly below the IGCE, and when compared to the other offers, four of the six competing offers were higher priced, even though InfoZen and another vendor
offered lower total prices. Given this factual support, we see no basis on this record to question the contracting officer’s judgment that Smartronix’s total price was reasonable.

Unbalanced Pricing

InfoZen argues that the VA should have rejected Smartronix’s price proposal as unbalanced. Supplemental Protest at 5-7. The protester argues that Smartronix’s base year price far exceeded both the IGCE and the firm’s own prices for later years, despite the fact that the agency expected a steady staffing level in each year of performance. Id. at 6. InfoZen also argues that the VA failed to consider the fact that, at the level of individual fixed-price line items, Smartronix’s prices significantly exceeded the IGCE in the base year, but decreased significantly (to zero for one contract line item) for the remaining performance periods. Id. at 7. InfoZen argues that together, these circumstances indicate that Smartronix has priced its proposal to obtain overpayments in the initial contract years, which places the agency at risk if it does not exercise the much lower-priced option years. Protester’s Supplemental Comments at 3.

The VA argues that unbalanced pricing is not a significant consideration in a negotiated procurement such as this one, where the selection was to be based on best value, rather than on price. Supplemental AR at 8-9 (citing Legacy Mgmt. Solutions, LLC, B-299981.2, B-299981.4, Oct. 10, 2007, 2007 CPD ¶ 197 at 5 n.4; Human Resource Sys., Inc.; Health Staffers, Inc., B-262254.3 et al., Dec. 21, 1995, 96-1 CPD ¶ 35 at 7 (decided before revisions to FAR Part 15 in 1997)). However, as noted above, the RFP specifically provided that the VA would evaluate proposed prices for unbalancing, and would consider the risk to the agency posed by unbalanced pricing. RFP at 219. Moreover, the VA argues that it did evaluate Smartronix’s price, and concluded that it was not unbalanced. Supplemental AR at 11. Accordingly, our Office will review the record to determine whether the VA’s determination was reasonable.

Although competition for a task order under a multiple-award contract is generally governed by Part 16 of the Federal Acquisition Regulation (FAR), the concept of unbalanced pricing used by the RFP here is defined in FAR Part 15, which we therefore apply by analogy. See AIS Eng’g, Inc., B-410246, B-410246.2, Nov. 21, 2014, 2015 CPD ¶ 5 at 3 (unbalancing analysis applied to task order evaluation); Triumvirate Envtl., Inc., B-406809, Sept. 5, 2012, 2012 CPD ¶ 244 at 5 n.3 (unbalancing analysis applied by analogy to competition for blanket purchase agreement under FAR subpart 8.4). Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly over or understated as indicated by the application of cost or price analysis techniques. FAR § 15.404-1(g)(1). The areas where the risk of unbalanced pricing is greatest include pricing where base quantities and option quantities are separate line items, or where the evaluated price is the aggregate of
estimated quantities to be ordered under separate line items of an indefinite-delivery contract. FAR § 15.404-1(g)(1)(ii)-(iii). Therefore, a contracting officer “shall analyze” offers with separately-priced line items or subline items, to detect unbalancing. FAR § 15.404-1(g)(2). Where unbalancing is detected, the contracting officer must then consider the risk posed, including the risk of paying an unreasonable price, and must consider whether to reject the offer if the risk is unreasonable. FAR § 15.404-1(g)(2)-(3).

To prevail on an allegation of unbalanced pricing, a protester must first show that one or more prices are overstated. AIS Eng’g, Inc., supra, at 3. Even then, while unbalanced pricing may increase risk to the government, an agency is not required to reject an offer solely because it is unbalanced. Ronsons SDVOSB P&L JV-1, B-410605, Jan. 6, 2015, 2015 CPD ¶ 1 at 4. Rather, the contracting officer is required to consider the risks to the government associated with the unbalanced pricing in making the award decision, and whether a contract will result in unreasonably high prices for contract performance. Id. Our Office will review for reasonableness both the agency’s determination as to whether an offeror’s prices are unbalanced, and an agency’s determination as to whether an offeror’s unbalanced prices pose an unacceptable risk to the government. Id.

Even then, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions, that is, unless the protester demonstrates that, but for the agency’s actions, it would have had a substantial chance of receiving the award. McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Where an agency overlooks unbalanced pricing, and thus fails to consider the risk it poses, we will not sustain the protest if no material risk to the government from this unbalancing is apparent from the record, because the agency’s error has not prejudiced the protester. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 8. Moreover, if the risk posed by unbalanced pricing is that the agency will not obtain the lower pricing—for example, due to the potential that the agency’s requirement may change, or requirements may be deleted—but the record provides no basis to conclude that such changes are likely, the risk is merely speculative and does not provide a basis to sustain the protest.7 Id. at 9.

In its protest, while InfoZen argues extensively that the awardee’s price is unbalanced, it has not shown that the VA faces a significant risk of failing to obtain

7 We recognize that in our decision in Citywide Managing, we also emphasized that the protester’s price was higher than the awardee’s price, whereas the protester’s price here is lower than Smartronix’s. Nevertheless, we view the protest here as analogous because, in both cases, the risk of the agency failing to obtain the benefit of low pricing in later years is wholly speculative.
the benefit of Smartronix’s lower pricing offered in the later years of the contract. Rather, InfoZen only speculates that it is possible that the VA will not exercise options for the later contract years. Protester’s Supplemental Comments at 3. Other than this brief speculation, however, InfoZen provides no facts to show that it is likely that the VA’s needs will change such that the agency will not need these services for much or all of the term of the contract. Absent such evidence that the risk of Smartronix’s unbalanced pricing was significant, we cannot find that InfoZen has been prejudiced. Accordingly, we deny this ground of protest.

The protest is denied.\(^8\)

Susan A. Poling
General Counsel

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\(^8\) To the extent that InfoZen also appears to argue that Smartronix’s pricing of the repetitively-exercised optional contract line items also shows significantly different prices for the same services from year to year as another form of unbalanced pricing (see Supplemental Protest at 5, 7; Protester’s Unbalancing Brief at 2-3), we dismiss this argument. The RFP provided estimated quantities for individual items to be used in calculating a total price. RFP attach. 0 (pricing spreadsheet estimated option line item quantities). Those estimated quantities were not challenged, so whether or not the VA considered the variations in Smartronix’s pricing of those line items, there can be no basis for our Office to find a risk that the agency will pay unreasonably high prices, which is a necessary aspect of an unbalanced pricing argument. Decisive Analytics Corp., B-410950.2, B-410950.3, June 22, 2015, 2015 CPD ¶ 187 at 11 n.20; ABSG Consulting, Inc., B-404863.7, June 26, 2013, 2013 CPD ¶ 185 at 7; cf. FAR § 15.404-1(g)(1)(iii).