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Decision

Matter of: Southeastern Kidney Council

File: B-412538

Date: March 17, 2016

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DIGEST

1. Protest that discussions were not meaningful because the agency did not inform the protester that it had a higher price than the price proposed by the awardee is denied where the record does not show that the agency found the protester's proposed price to be excessive or unreasonable.
 2. Protest challenging an agency's price analysis, and the resulting determination that the awardee's low fixed price was realistic, is denied where the methodology used by the agency was reasonable, consistent with the terms of the solicitation, and well-documented.
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DECISION

Southeastern Kidney Council (SKC), located in Raleigh, North Carolina, protests the award of a contract for network six to Island Peer Review Organization (IPRO), located in Lake Success, New York, under request for proposals (RFP) No. CMS-2016-ESRD-NETWORKS, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) for quality improvement services to improve the care of patients with end stage renal disease in eighteen different geographical regions (referred to as networks). SKC challenges the discussions conducted by CMS, and alleges that CMS failed to conduct a proper cost/price realism analysis.

We deny the protest.

BACKGROUND

The RFP was issued on June 24, 2015, and contemplated the award of eighteen separate fixed-price contracts, for services in eighteen distinct geographic regions, for a one-month transition period, one-year base period, and four one-year options. RFP at 5-6. The RFP provided that award would be made on a best-value basis, considering: (1) technical approach; (2) past performance and experience; (3) management plan; (4) staffing plan and personnel; and (5) cost/price. Id. at 176-181. The RFP provided that, when combined, the non-cost/price factors were significantly more important than cost/price. The RFP also provided that the evaluation factors were of equal importance with the exception of technical approach, which was the most important. Id. at 181.

As relevant here, regarding discussions, the RFP established that, unless the award was made without discussions, the agency intended to conduct written discussions with all offerors in the competitive range. RFP at 181. Regarding cost/price, in addition to requesting a fixed price for each period of performance, the solicitation instructed offerors to provide a breakdown of the costs underlying the proposed prices (eg., the labor rates for proposed personnel and indirect rates). The RFP advised offerors that the agency intended to perform “a price analysis and cost realism analysis in accordance with FAR [Federal Acquisition Regulation] § 15.404-1(d) and if necessary, a limited cost analysis on the total estimated cost to determine if it is fair and reasonable.” RFP at 175.

Of relevance here, amendment two to the RFP informed offerors that certain staff, including the executive director, could be shared among more than one network as long as the offeror’s staffing successfully met the requirements of the statement of work (SOW). Agency Report (AR), Tab 2, Amendment 0002, at 8. The RFP required offerors wishing to compete for awards in multiple networks to submit separate business and technical approaches for each network, and the agency evaluated proposals for each network separately.¹ RFP at 158.

SKC and IPRO were the only offerors to submit proposals for network six. Contracting Officer’s (CO’s) Statement at 4. A technical evaluation panel (TEP) evaluated the proposals submitted by SKC and IPRO, and provided the contracting officer a consensus report on August 28. Id. The agency also conducted a business evaluation and a cost realism analysis of both proposals. Id. On October 6, the agency sent discussion letters to the offerors informing them it had completed initial

¹ Each proposal was divided into three parts: (1) technical proposal; (2) business proposal; and (3) conflict of interest. RFP at 156.

evaluations, and providing the technical, business, and cost realism issues for negotiation. Id. at 5. Offerors submitted responses to the discussion letters, which were reviewed by the TEP chair. Id. Final negotiation letters were sent to the offerors on October 28, which included additional questions and a request for final proposal revisions (FPRs) to be submitted by November 5.

The TEP completed a technical evaluation, business evaluation, and cost realism analysis of FPRs, and, based on the results, recommended that IPRO be selected for award.² The results of the evaluation were as follows:

Offeror	Overall Technical Rating	Proposed Price
IPRO	Very Good	\$6,321,951
SKC	Very Good	\$8,611,832

CO's Statement at 6.

The Source Selection Authority considered the proposals to be equally rated, and awarded the network six contract to IPRO on November 30, based on its lower price. AR, Tab 8.A., Source Selection Decision, at 4. SKC requested a debriefing, which was provided on December 8. This protest followed on December 11.

DISCUSSION

SKC argues that discussions were not meaningful, and complains that the agency did not perform a proper price/cost realism analysis of IPRO's proposal.³ Comments at 1. While we do not address each argument raised by the protester in this decision, we have considered all of the protester's arguments and have concluded that none of them provide a basis upon which to sustain the protest.

² Separate business and cost evaluations were also conducted for both offerors' final proposals. CO's Statement at 6.

³ In its protest, SKC also argued that the agency improperly converted this best-value procurement to a lowest-priced, technically-acceptable procurement, and that the agency failed to make a proper best-value determination. SKC withdrew the first of those protest grounds in its comments on the agency report. SKC withdrew the second protest ground "except to the extent that SKC's [remaining protest grounds] show that if the [a]gency had properly conducted discussions and its price/cost analysis, SKC would have received award." Comments at 14.

Network Six Discussions

SKC argues discussions were not meaningful because the agency should have informed SKC that its proposed price, which was higher than IPRO's proposed price, was too high to be competitive. Protest at 12. Specifically, SKC argues the agency should have informed it that it needed to reduce its staffing, which would have resulted in a lower proposed price. The agency argues, however, that it had no duty to engage in discussions on this matter because it did not find SKC's price to be unreasonable. AR at 4.

When an agency engages in discussions with an offeror, the discussions must be "meaningful," that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. Hanford Envtl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8. Although discussions must address deficiencies and significant weaknesses identified in proposals, the precise content of discussions is largely a matter of the contracting officer's judgment. FAR §15.306(d)(3); American States Utilities Servs., Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 5. There is no requirement, however, that an agency inform an offeror during discussions that its price may be too high, where the offeror's price is not considered excessive or unreasonable. Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 11.

Here, the record does not show that the agency considered SKC's proposed price excessive or unreasonable, or that the TEP found that SKC's final proposed staffing level was too high. The evaluators assigned no weaknesses, significant weaknesses, or deficiencies to SKC's proposal. See AR, Tab 5.A.2, Technical Evaluation Consensus Report for SKC. Additionally, the evaluators concluded that SKC's final proposed labor mix, hours, and level of effort were commensurate with the work proposed. CO's Statement at 8; AR, Tab 6.B.2, Alliant/SKC Network Six Cost Realism Evaluation, at 2. As such, there is no support for a finding that the agency's discussions with the protester, in this regard, were unreasonable.

SKC also argues that discussions were not equal. The protester contends in this regard that its parent company, Alliant Health Solutions, which conducted negotiations on behalf of the protester for network six and on behalf of another subsidiary for network fourteen, was instructed to reduce staffing for network fourteen, but that IPRO was not instructed to reduce staffing for networks one and two. SKC maintains that the instruction to reduce staffing for network fourteen had an impact on its proposed pricing for network six since it intended to share staff with the Alliant subsidiary that submitted the network fourteen proposal. The protester speculates that a similar instruction to IPRO regarding its network one and/or two staffing might have had an impact on its network six price.

We find the protester's argument to be unpersuasive. The discussions to which the protester objects pertained to networks other than the network at issue in this protest (i.e., network six), and, as noted above, the agency evaluated proposals for each network separately. Moreover, the argument is premised on the assumption that the agency regarded IPRO's proposed staffing for networks one and two to be excessive, just like the Alliant subsidiary's proposed staffing for network fourteen, and the protester has not demonstrated a reasonable basis for this assumption.

Price/Cost Realism Analysis

SKC also challenges the agency's realism evaluation of IPRO's network six proposal, arguing that IPRO's proposed per beneficiary and per facility price is too low to be realistic. SKC argues that had the agency compared IPRO's proposed per beneficiary/facility prices for networks one, two, and nine with its proposed price for network six, it would have recognized that IPRO's proposed price for network six was much lower than its proposed prices for the other networks, and would have thus concluded that IPRO failed to understand the requirements of the solicitation, creating a risk to the government. Protest at 17. In response, the agency maintains that the RFP did not establish a comparison of prices between separately submitted network proposals as a metric for the evaluation of cost/price realism. Further, the agency notes that the networks represent different geographical regions, which means the networks are not the same for purposes of a cost comparison. AR at 10. We agree with the agency's arguments in this regard and find nothing in the record to support a finding that the agency's evaluation of the awardee's proposed price for network six was unreasonable.

As noted above, despite the fact that the solicitation here contemplated the award of a fixed-price contract, it provided for a cost realism analysis in accordance with FAR § 15.404-1(d). In this regard, FAR § 15.404-1(d)(3) provides for cost realism analyses on competitive fixed-price contracts in certain circumstances for the purpose of assessing performance risk. Here, the agency performed a realism analysis to determine whether IPRO's proposed price was realistic for the work to be performed under the contract, reflective of a clear understanding of contract requirements, and consistent with the various elements of the offeror's technical proposal. AR, Tab 6.D.2, IPRO Cost Realism Report, at 1. This analysis included consideration of IPRO's proposed direct labor rates, escalation factor, fringe benefits, proposed travel, other direct costs, proposed mix/type of labor, number of proposed hours, and level of effort. Id. Given that the solicitation did not provide for the price comparison methodology advocated by the protester (i.e., a comparison of per beneficiary/per facility pricing across the networks); consistency in these prices

was not anticipated due to differences in the regions represented by the networks; and the agency otherwise reasonably analyzed IPRO's proposed pricing for network six, we see no basis to sustain the protester's objection to the agency's realism analysis.

The protest is denied.

Susan A. Poling
General Counsel