Decision

Matter of: Cyber Solutions & Services, Inc. (d/b/a American Cyber, Inc.)

File: B-413563; B-413563.2

Date: November 18, 2016

Paul F. Khoury, Esq., Margaret E. Matavich, Esq., George E. Petel, Esq., and Brian G. Walsh, Esq., Wiley Rein LLP, for the protester.


Debra J. Talley, Esq., and Pamela Kennerly Ignatius, Esq., Department of the Army, for the agency.

Gabriel D. Soll, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that an awardee was ineligible for award under a small business set-aside because it would violate the solicitation’s limitation on subcontracting clause is denied where the agency reasonably concluded that the awardee’s quotation showed the awardee would comply with the clause.

2. Protest that price reasonableness analysis was inadequate is denied where the record shows the agency’s approach complied with the requirements of the Federal Acquisition Regulation and its conclusions were reasonable.

DECISION

Cyber Solutions & Services, Inc., of Clifton, Virginia, doing business as American Cyber, Inc., protests the issuance of a task order to Rivera Consulting Group, of Sellersburg, Indiana, by the Department of the Army, under request for quotations (RFQ) No. W52P1J-15-R-0088, for support services to the Army’s Program Executive Officer – Enterprise Information Systems. American Cyber, a small business concern, protests that the Army accepted a proposal that fails to comply with Federal Acquisition Regulation clause 52.219-14, Limitation on Subcontracting, and that the agency’s best-value determination was flawed.

We deny the protest.
BACKGROUND

The RFQ, issued as a small business set-aside task order solicitation to vendors holding General Services Administration’s (GSA) Federal Supply Schedule (FSS) 70 (information technology) contracts, contemplated the issuance of a time-and-materials task order for mission support services for the Army’s Hardware Software Integration Branch (HSIB). The services were to be provided in three primary function areas: (1) Engineering Support Office (ESO), which manages systems authorizations and vulnerabilities; (2) Customer Support Office (CSO), to provide help desk support for logistic systems; and, (3) Software Integration Laboratory (SIL), which evaluates business systems and software products relating to logistics systems. RFQ, at 2.

The RFQ stated that the award would be made on a best-value basis and noted that a minimum rating of acceptable for the technical factor was required in order to be considered for award. RFQ attach. 8, Evaluation Factors for Award at 1. The RFQ further indicated that the technical factor was to be weighted as more important than past performance, and that these two factors together were more important than price. Id.

The Army received six timely initial quotations, and, after evaluations, retained three quotations in the competitive range. Agency Report (AR) at 2. The Army held discussions with the competitive range vendors and accepted final quotation revisions. These quotations were evaluated as follows:

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<th></th>
<th>American Cyber</th>
<th>Rivera</th>
<th>Offeror 3</th>
</tr>
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<tbody>
<tr>
<td>Technical</td>
<td>Good</td>
<td>Outstanding</td>
<td>Acceptable</td>
</tr>
<tr>
<td>Past Performance</td>
<td>Satisfactory</td>
<td>Satisfactory</td>
<td>Satisfactory</td>
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<tr>
<td></td>
<td>Confidence</td>
<td>Confidence</td>
<td>Confidence</td>
</tr>
<tr>
<td>Price</td>
<td>$16,561,266</td>
<td>$28,482,371</td>
<td>$13,579,326</td>
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Id. at 3. Based on these results, the agency concluded that Rivera’s quotation offered the best value to the government. American Cyber received a brief explanation of the award decision on August 8, 2016, and this protest followed.

DISCUSSION

American Cyber protests that the awardee’s quotation does not demonstrate compliance with the solicitation’s limitation on subcontracting clause. Supp. Protest and Comments at 2-6. The protester also alleges that the Army made an improper
award decision by failing to adequately evaluate the reasonableness of the awardee’s proposed price. Protest at 15. We disagree.

American Cyber first argues that it is evident from Rivera’s proposal that the awardee intends to rely on its large-business subcontractor, Engility, for more than 50 percent of the performance effort, in violation of the Limitation on Subcontracting clause. Supp. Protest and Comments at 2-6. The protester claims that Rivera’s quotation proposed to staff two of the primary function areas (the CSO and the SIL) with all incumbent (Engility) employees, which, American Cyber asserts, represents two-thirds of the requirement’s staffing. On this basis, the protester contends that the awardee’s quotation, “on its face, proclaims that it will not comply with the 50 percent rule.” Id. at 2; citing AR, Tab 28, Rivera Technical Volume, at 6.

American Cyber also cites a statement in the awardee’s quotation that Rivera “will seek to re-badge all current qualified ESO staff,” as support for its contention. Supp. Protest and Comments at 2; citing AR, Tab 28, Rivera Technical Volume, at 6. The argument here is that the ESO function has been previously performed by Jacob’s Technology, Inc. (a large business), and represents the remaining one-third of the work to be performed. The protester infers that, in contrast, the current employees of Engility, not being specifically discussed as employees to be hired (or “re-badged”) by the awardee, would remain employees of the large business subcontractor. Since Rivera estimates that SIL and CSO functions in this procurement represent two-thirds of the “required capability,” American Cyber argues that two-thirds of the performance will be subcontracted to a large business, in violation of the limitation on subcontracting clause. Id. at 3-4. Supp. Protest and Comments at 2-6.

1 The protester initially also challenged aspects of the agency’s evaluation of American Cyber’s quotation under the technical and past performance evaluation factors. In its comments on the agency report, the protester expressly withdrew those grounds of protest. Supp. Protest and Comments on the Agency Report, at 1 n.1. Further, in its initial protest, American Cyber argued that the best-value determination was flawed because: (1) it failed to document the reason for accepting the price premium; (2) it lacked an adequate price reasonableness evaluation (discussed below); and, (3) the determination was predicated on an incorrect evaluation. Protest at 14-15. We dismiss the first of these complaints because the protester did not address, or seek to rebut, the agency’s responses regarding the acceptance of the price premium associated with Rivera’s quotation. Under these circumstances, we consider the protester to have abandoned this argument. Nexagen Networks, Inc., B-411209.7, June 20, 2016, 2016 CPD ¶ 164 at 3 n.4. Since all of the protester’s remaining challenges to the evaluation are denied in this decision or were withdrawn by the protester, we need not address the protester’s third complaint.
With regard to small business set-aside contracts for services, FAR clause 52.219-14(c)(1), Limitations on Subcontracting—which was incorporated by reference in the RFQ—provides that “at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.” RFQ at 30. As a general matter, an agency’s judgment as to whether a small business offeror will comply with the subcontracting limitation clause is a matter of responsibility, and whether the contractor actually complies is a matter of contract administration. Geiler/Schrudde & Zimmerman, B-412219, et al., Jan. 7, 2016, 2016 CPD ¶ 16 at 7; citing Raloid Corp., B-297176, Nov. 10, 2005, 2005 CPD ¶ 205 at 4. Neither issue is one that our Office generally reviews. Id. at 7-8; see also 4 C.F.R. § 21.5(a), (c). However, as our Office has consistently held, where a proposal, on its face, should lead an agency to conclude that an offeror has not agreed to comply with the subcontracting limitation, the matter concerns the proposal’s acceptability. Id. at 8; citing Sealift, Inc., B-409001, Jan. 6, 2014, 2014 CPD ¶ 22 at 4. Because the limitation on subcontracting is a material term of the solicitation, a proposal that fails to conform to it is unacceptable and may not form the basis for an award. Id.; citing Addx Corp., B-404888, May 4, 2011, 2011 CPD ¶ 89 at 3-4.

Here, the protester has not shown that Rivera’s quotation fails to agree to comply with the limitation on subcontracting clause. To the contrary, Rivera’s pricing matrix indicates which of its subcontractors will provide workers for each labor category, but does not indicate what percentage of the work will be performed by any particular entity, or what percentage of the cost of contract performance will be performed by each subcontractor. See, AR, Tab 31, Rivera Vol. III Spreadsheet. The agency found that Rivera’s quotation conformed to the instructions issued for the RFQ and for the sample matrix provided by the Army. AR, Tab 10, RFQ attach. 7 Instructions, Conditions, and Notices to Quoters, at 7-8; AR, Tab 13, RFQ attach. 10, Price Matrix. Rivera also included an affirmative statement in its quotation that it planned to subcontract less than 50% of the effort to Engility, Rivera’s large business subcontractor. AR, Tab 85, Rivera Vol. IV, Letters of Commitment, at 1.

American Cyber’s self-serving interpretation of Rivera’s quotation is not sufficient to prove that the Army accepted a quotation that did not comply with the limitation on subcontracting clause. In light of the affirmative representations in the proposal, as well as the compliant pricing matrix, we find no merit to this aspect of the protest.

American Cyber also protests that the Army failed to adequately analyze the reasonableness of Rivera’s proposed price, and that the agency’s award decision is therefore unsupported. Protest at 15. The protester argues that because Rivera’s price is higher than the protester’s by a substantial margin, the price reasonableness determination must have been flawed. Id. American Cyber alleges, further, after receiving the agency report, that the Army could not properly

When an agency issues an RFQ to vendors holding FSS contracts for the delivery of services at hourly rates, and, as here, a statement of work is included, the ordering agency must evaluate the quotations received consistent with the stated evaluation criteria. FAR § 8.405-2(d). While the GSA has already determined that the rates for services offered at hourly rates under FSS contracts are fair and reasonable (and, thus, ordering activities are generally not required to make a separate determination of fair and reasonable pricing), where a statement of work is required, the ordering agency must still perform a price evaluation to determine that the vendor's total price is reasonable. FAR §§ 8.404, 8.405-2(d);2 see also, U.S. Information Technologies Corp., B-404357, B-404375.2, Feb. 2, 2011, 2011 CPD ¶ 74 at 6-7.

The protester has not shown that this aspect of the evaluation was flawed. The RFQ required the agency to conduct a price reasonableness evaluation and stated that the agency would perform a "price analysis" for this purpose.3 AR, Tab 11, RFQ attach. 8, Evaluation Factors for Award, at 5. The price analysis considered the total prices of all five quotations received by the agency, and compared them to each other and the IGCE. AR, Tab 40, Revised Price Analysis, at 6-7. The agency explains that the IGCE was developed by multiplying estimated hourly requirements by the median hourly rates (for the corresponding labor categories) of all GSA’s Alliant4 contract holders—i.e., the contract under which these requirements were separately procured prior to being consolidated in the instant effort, and purchased using the FSS. Supp. AR at 3-4; AR, Tab 51, IGCE.

The protester bases its price analysis challenge on two of the agency’s findings: (1) that the difference between the IGCE and the lowest-priced quotation was

2 This regulatory requirement reflects consideration of GAO audit report findings that reliance on labor rates alone did not provide agencies with a meaningful basis for assessing which vendor was providing the best and most cost-effective services. See 68 Fed. Reg. 19,294, 19,296 (Apr. 18, 2003); GAO, Contract Management: Not Following Procedures Undermines Best Pricing Under GSA’s Schedule, GAO-01-125, Nov. 28, 2000.

3 The RFQ stated that in accordance with FAR § 15.404-1(b)(2), the agency might use various price analysis techniques and procedures, such as comparing prices received under adequate competition; comparing prices received to historical prices paid; and comparing prices received to an independent government cost estimate, among others. AR, Tab 11, RFQ attach. 8, Evaluation Factors for Award, at 5.

4 Alliant is GSA’s Government-Wide Acquisition Contract for federal agency use in buying information technology support services.
significant; and (2) that none of the proposed prices was unreasonable. AR, Tab 40, Revised Price Analysis, at 6-7.

Regarding the first finding, the protester argues that this statement shows that the IGCE was fundamentally flawed and therefore provides no reliable standard for assessing the reasonableness of the awardee’s price because both American Cyber’s and the third vendor’s quotations were significantly lower than the IGCE. Supp. Protest and Comments on the AR, at 8. As noted above, the record shows that the Army developed the IGCE based on the rates of the prior efforts being consolidated in this contract. These rates represent the best estimates the agency had available to it, and were reasonable for use in the price analysis. Therefore, the protester’s conclusion regarding the IGCE is misplaced. We see nothing improper about the agency’s reliance on the IGCE in conducting its price analysis.

Regarding the second finding, the fact that the agency found prices that were significantly lower than the IGCE “not unreasonable” simply means that those prices were not considered too high. We have held that the purpose of a price reasonableness review is to determine whether the prices offered are too high, as opposed to too low. Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. We are not persuaded that simply because the agency found the lowest-priced quotations reasonable, the awardee’s higher-priced quotation—which was closer to the IGCE—should not also be found reasonable. The price analysis clearly shows that the agency compared the quotations it received to each other, as well as to the historical data about the program’s cost. AR, Tab 40, Revised Price Analysis, at 6-7. This price analysis utilized the preferred methods discussed in the applicable FAR provision and was consistent with the terms of the RFQ. FAR § 15.404-1(b)(3).

Finally, with regard to the protester’s objections to the agency’s award decision, the source selection authority (SSA) relied on both the price analysis and the specifics of the technical evaluation to conduct a thorough trade-off analysis in making the selection decision. See AR, Tab 42, Award Decision Document, at 9-14. In this analysis, the SSA details aspects of American Cyber’s approach (and that of the other lower-priced vendor) that might reduce the cost to the agency but increase various performance risks. Id. Conversely, the SSA also justifies the premium associated with Rivera’s quotation by documenting, in detailed fashion, the areas where the additional expenditure will benefit the government. Id. On this record,
the protester’s arguments provide no basis to object to the Army’s best-value determination.

This protest is denied.

Susan A. Poling
General Counsel