Decision

Matter of: Daniels Building Company, Inc.

File: B-416611

Date: October 1, 2018

W. Barron A. Avery, Esq., and William B. O'Reilly, Esq., Baker & Hostetler, LLP, for the protester.
Deborah K. Morrell, Esq., and Donald C. Mobly, Esq., Department of Veterans Affairs, for the agency.
Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the solicitation precluded the agency from making award in amount over $10 million is denied where the record does not show that the protester suffered competitive prejudice because, even had it known that the agency would accept bids greater than $10 million, there is no indication that the protester would have submitted a lower-priced bid.

DECISION

Daniels Building Company, Inc., of Farmington Hills, Michigan, protests the award of a contract to Patriot Group Construction, LLC, of Monroe, Michigan, under invitation for bids (IFB) No. 36C25018B0093, issued by the Department of Veterans Affairs (VA) for building construction services. The protester alleges that the agency should have rejected the awardee’s bid as nonresponsive because the awarded contract exceeded $10 million in consideration of the solicitation’s terms.

We deny the protest.

The solicitation, issued on January 12, 2018, contemplated the award of a fixed-price contract to be completed over a 1-year period for the construction of a parking garage at the VA Ann Arbor Healthcare System in Michigan. IFB at 3, 7, 14. Bids were required to offer prices for a base item and a deductive alternate item. Id. at 3. The base item was for the entire parking garage, and the deductive alternate item was for the parking garage with one fewer level. Id.
The solicitation included the following notice:

The requirements identified within this solicitation fall under Veterans Health Administration’s (VHA) “Minor” or “Non-Recurring Maintenance” programs. Under both programs, VHA must ensure the total cost of the project does not exceed $10 million (design, and construction associated with the project).

This notice is provided to all prospective [bidders] to ensure that they are aware of the strict budgetary limitations associated with this project. In the event pricing offered for the work to be performed under this solicitation would cause the total price of the project to exceed $10 million, this solicitation could be cancelled and a contract award not be made.

IFB at 8. Bidders were further advised that “[i]t is the intent of the government to award a contract based on the base bid; a single award will be made on Item No. 1 (Base Proposal), but in the event the offer exceeds the funds available, a single award will be made on [the alternate] item.” Id. at 3.

The agency received six bids prior to bid opening on March 14. Contracting Officer’s Statement (COS) at 2. For the base item, Patriot was the low bidder at $10,098,000, and Daniels was the second-low bidder at $10,150,000. Tab 7, Abstract of Bids at 1. For the alternate item, Daniels was the low bidder at $8,000,035, and Patriot was the third-low bidder at $8,248,000. Id. The agency identified Daniels as the apparent successful bidder because all of the bids for the base item exceeded the $10 million budgetary limitation and Daniels was the low bidder for the alternate item. COS at 2. However, the agency did not make an immediate award because it was “waiting on [a] funding transfer from [another entity within the agency] to the local facility.” Id.

The agency explains that, on June, 6, the minor construction program limitation changed and therefore the agency could at that point spend up to $20 million on the parking garage.1 COS at 2; MOL at 2. In light of the increase, the agency made award to Patriot on July 13 because it submitted the lowest bid for the base item. COS at 3. The instant protest followed.

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1 In its report, the agency highlights 38 U.S.C. § 8104 as its authority for the minor construction program limitation of $10 million. Memorandum of Law (MOL) at 2 n.1. On June 6, 2018, the provision was revised to reflect that a major medical facility project was a construction, alteration, or acquisition of a medical facility involving an expenditure of more than $20 million. John S. McCain III, Danial K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018, Pub. L. No. 115-82, Title V, § 503, 132 Stat. 1393, 1476 (June 6, 2018). Based on that revision, the record shows that the agency’s authority to make award under the minor construction program limitation increased to $20 million and was effective as of June 6.
DISCUSSION

Daniels argues that Patriot’s bid was nonresponsive and that it was prejudiced by the VA’s acceptance of Patriot’s allegedly nonresponsive bid. The firm asserts that the solicitation contained a price ceiling restricting award to bids priced at less than $10 million, and therefore the agency should have rejected Patriot’s base item bid as nonresponsive. Comments at 2. Daniels argues that, as a consequence, it should have received award as the low bidder for the deductive alternate item, or that the agency should have cancelled the solicitation. Protest at 6. For its part, the agency argues that the solicitation did not contain a price ceiling, but rather informed bidders that the solicitation was subject to the minor construction program’s budgetary limitations. MOL at 4. To this end, the agency explains that Patriot’s bid was responsive because the budgetary limitation increased to $20 million prior to award. Id. at 4-5.

It is a basic principle of federal contract law that for a bid to be responsive it must, at the time of bid opening, represent an unequivocal offer to provide the requested item or service in conformance with the material terms and conditions of the solicitation. Massillon Constr. and Supply, Inc., B-407931, Mar. 28, 2013, 2013 CPD ¶ 85 at 3. Otherwise, bidders will not be competing on an equal basis, with the result that one bidder may obtain an unfair advantage over another. Edward L. Nezelek, Inc., B-192478, June 19, 1980, 80-1 CPD ¶ 431 at 9.

It is undisputed that Patriot’s base bid price exceeded $10 million, but whether that rendered the bid nonresponsive is not clear. Nevertheless, we need not decide the question because, even if Patriot’s bid was nonresponsive, we believe acceptance of Patriot’s bid was proper because a technically nonresponsive bid may be accepted where the awarded contract will serve the agency’s needs and no bidder will be prejudiced by the acceptance of the nonresponsive bid. Union Carbide Corp., B-187617, Apr. 7, 1977, 77-1 CPD ¶ 243 at 5-6; accord Everett Dykes Gassing Co.; Peach State Sanitation Co., Inc., B-210223.4, B-210223.5, Feb. 13, 1984, 84-1 CPD ¶ 176 at 4.

Acceptance of Patriot’s bid clearly fulfills the actual needs of the agency because Patriot offered to build the base item. Therefore, our decision as to whether Patriot’s deviation from the solicitation’s requirements could be waived turns on whether the agency’s acceptance of Patriot’s bid prejudiced any other bidder. Under these circumstances, the test of prejudice is whether it is reasonably clear that another bidder, given the benefit of a similarly relaxed requirement—waiver of the price ceiling—would have bid in such a manner that it would have been in line for award. E.F. Matelich Constr. Co., B-207600, Sept. 28, 1982, 82-2 CPD ¶ 291 at 3; cf. Keco Indus., Inc., B-216396.2, Nov. 2, 1984, 84-2 CPD ¶ 491 at 4 (‘‘In cases dealing with a bidder’s failure to level price its bid, the determinative issue is whether or not this deviation worked to the prejudice of other bidders for the award.’’).
On this record, we have no basis to conclude that Daniels was prejudiced by the agency’s alleged waiver of the price ceiling. Daniels has not alleged that it would have changed its bid had it known that the agency would not enforce the price ceiling, and its president declared by affidavit that the base bid item could not be performed for less than [DELETED]. Comments, President’s Declaration at ¶ 6. Furthermore, we fail to see any evidence that Daniels would have lowered its bid for the base item had it been aware of the agency’s waiver. In this regard, the solicitation advised that the award would be made on the base item, so long as the agency received a bid price within its budgetary limitation. Thus, the record shows that Daniels already had a strong incentive to bid a lower price during the original competition and was unable to do so. Accordingly, we deny the protest because the record does not show that Daniels would have lowered its bid price for the base item had it known that the agency would not enforce the $10 million budgetary limitation. Cf. CW Constr. Servs. & Materials, Inc., B-279724, July 15, 1998, 98-2 CPD ¶ 20 at 9 (protester did not suffer competitive prejudice where the record did not show that it would have prepared its bid differently had it been aware of the agency’s interpretation of a solicitation ambiguity); Platinum Business Corp., B-415584, Jan. 18, 2018, 2018 CPD ¶ 34 at 4 (protester was not prejudiced where there was no evidence that it would have changed its proposal had it been aware that the agency would not enforce strict proposal submission requirements).

The protest is denied.

Thomas H. Armstrong
General Counsel