U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Shearwater Mission Support, LLC

File: B-416717

Date: November 20, 2018

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DIGEST

Protest alleging that the agency engaged in misleading discussions is sustained where the agency's discussion questions were based on the results of a price realism analysis that was inconsistent with the solicitation, which allowed only a price reasonableness evaluation.

DECISION

Shearwater Mission Support, LLC (Shearwater) of Anchorage, Alaska, protests the award of a contract to KJS Support Services Joint Venture, LLC (KJS), of Fort Worth, Texas, under request for proposals (RFP) No. N62473-17-R-3807, issued by the Department of the Navy, Naval Facilities Engineering Command (NAVFAC) for base operating support services at the Naval Air Facility (NAF) in El Centro, California. Shearwater protests that the agency engaged in misleading discussions, in part because the discussions relied upon the agency's improper price realism analysis. The protester also challenges various aspects of NAVFAC's evaluation of both Shearwater's and KJS's proposals.

We sustain the protest.

BACKGROUND

NAVFAC issued the RFP on September 26, 2017, for the procurement of base support services at the NAF in El Centro. RFP § C, Performance Work Statement (PWS) at 1. Under the RFP, the contractor is to provide all "labor, supervision, management, tools, materials, equipment, facilities, transportation, incidental engineering, and other items necessary" to provide a variety of services at the NAF. Id. The PWS identified 19 different technical annexes, each representing a discrete service or area of work that the contractor has to perform at the NAF.[1] See generally id.

The RFP contemplated the award of a fixed-price indefinite-delivery, indefinite-quantity (IDIQ) contract for a 1-year base period and seven 1-year option periods. RFP at 4-11. Offerors were advised that a best-value tradeoff process would be used to select the awardee, weighing price and the following five non-price factors: recent, relevant experience of the firm; technical approach; management approach; safety; and past performance on recent, relevant projects. Id. § M at 166-169. When combined, the first four factors were of equal importance to the past performance factor, and all five non-price factors when combined were approximately equal to price. Id. at 166. The RFP contemplated award without discussions, but the agency reserved its right to conduct discussions if necessary.

With respect to price, the RFP contained a pricing schedule for multiple exhibit line item numbers (ELINs) that identified different services the offerors had to perform under each annex. See id., Amend. 0013.[2] For the price proposal, offerors had to submit the ELIN pricing schedule with proposed prices for each ELIN. Id. § M at 170. The individual ELIN prices added up to a total price for each annex, and the total prices for each annex summed to the total price for each performance period. See id., Amend. 0013.

The RFP stated that the agency would evaluate the total price, which consisted of the basic requirements and all option items. Id. § M at 170. The RFP further provides:

> Analysis will be performed by one or more of the following techniques to ensure a fair and reasonable price:
> (i) Comparison of proposed prices received in response to the RFP.

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[1] The 19 technical annexes are: grounds electronics; airfield facilities; passenger termination and cargo handling; material management; morale, welfare, and recreation; facility management; facility investment; custodial/janitorial; pest control; swimming pool operations; grounds maintenance and landscaping; pavement clearance; utility management; electrical; natural gas; wastewater; water; base support vehicles and equipment; and environmental. See RFP § C, PWS.

[2] The RFP was amended 14 times; amendment 13 contained the most up-to-date version of the ELIN pricing schedule.

(ii) Comparison of proposed prices with the [Independent Government Cost Estimate (IGCE)].
(iii) Comparison of proposed prices with available historical information.
(iv) Comparison of market survey results.

Id. at 171. The solicitation did not provide for a price realism analysis.

After receiving initial proposals, the agency engaged in discussions with the offerors. As relevant to this protest, in the initial round of discussions, the agency sent Shearwater an evaluation notice (EN) informing Shearwater that its proposed prices for [redacted] annexes "appeared to be unreasonably low," and that its proposed prices for [redacted] other annexes "appeared to be unreasonably high." Agency Report (AR), Encl. 6, EN, Feb. 26, 2018. In response, Shearwater increased its prices for all [redacted] of the annexes identified as "unreasonably low," and decreased its price for [redacted] of the [redacted] annexes that were "unreasonably high." See AR, Encl. 21, Agency Spreadsheet of Shearwater Proposed Prices.[3]

On April 25, 2018, offerors submitted final proposal revisions (FPRs).[4] On May 15, 2018, after evaluating the offerors' FPRs, the agency sent additional price discussion questions to Shearwater and asked it to provide responses and submit its best and final price proposal.[5] In these discussion questions, the agency informed Shearwater that its current proposed prices for [redacted] annexes "appeared to be unreasonably low," while its proposed prices for [redacted] other annexes "appeared to be unreasonably high." AR, Encl. 9, Request for Best and Final Proposal, May 15, 2018. In response, Shearwater submitted its second FPR, in which it increased the prices for [redacted] of the [redacted] annexes identified as "unreasonably low," and decreased its prices for all [redacted] of the annexes identified as "unreasonably high." See AR, Encl. 21, Agency Spreadsheet of Shearwater Proposed Prices.

Shearwater's final total proposed price was $83,013,464, while the awardee's final total proposed price was $79,889,539. See AR, Encl. 21; AR, Encl. 15, Notice of Contract Award. The agency evaluated Shearwater's and KJS's technical proposals as outstanding for each of the four non-price factors that were not past performance, with

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[3] This spreadsheet shows Shearwater's proposed prices, by annex, from its original proposal through its final proposal. The agency has explained that this spreadsheet was developed in response to the protest and is not a source selection document. Combined Contracting Officer's Statement of Facts and Memorandum of Law (hereinafter Agency Report or AR) at 14 n.12.

[4] Between the initial proposals and FPRs, offerors had the opportunity to submit additional revisions to their proposals, but those revisions do not relate to any issues raised in this protest.

[5] While the agency refers to this as the "best and final proposal," in this decision we will refer to it as the second FPR.

an overall technical rating of outstanding.[6] AR, Encl. 13, Source Selection Decision Document (SSDD) at 1. Both offerors received a substantial confidence rating for the past performance factor. Id. The agency found that both offerors proposed "an exceptional approach" that contained "multiple strengths." Id. at 5. The agency concluded that the two offerors' proposals were "essentially equal for all technical factors, while KJS's price proposal was lower than [Shearwater's] price proposal. Consequently, KJS's proposal represents the most advantageous offer when considering technical and price evaluation factors." Id.

On August 1, 2018, the agency informed Shearwater that it had awarded the contract to KJS. Following a debriefing, Shearwater timely filed a protest with our Office.

DISCUSSION

Shearwater's protest centers principally on the allegation that the agency conducted misleading discussions by advising Shearwater that its proposed prices for certain annexes were "unreasonably low." In particular, Shearwater argues that the agency's discussion questions were based on its impermissible price realism analysis, which led the agency to incorrectly question Shearwater's prices as being too low in a fixed-price procurement where the solicitation required a determination of only whether the prices were reasonable. Shearwater claims that in direct response to the agency's misleading discussions, Shearwater raised its proposed prices for certain annexes, which resulted in its proposal having a higher total proposed price than the awardee's proposal. Given that Shearwater's proposal and the awardee's proposal were evaluated as being equal on the non-price factors, Shearwater argues that its higher price prevented it from receiving the contract.

We sustain the protest because the record shows that the agency performed an improper price realism analysis, which led it to conduct misleading discussions with Shearwater.[7]

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[6] Under the agency's evaluation scheme, outstanding was the highest rating a proposal could receive for a technical factor.

[7] Shearwater first alleged in its comments on the agency report that the agency performed an improper price realism analysis, but raised this complaint as part of its misleading-discussions protest ground and did not identify it as a supplemental protest ground. In this decision, we first address the agency's improper price realism analysis, then discuss how that led to the misleading discussions. Shearwater also raised a number of other protest grounds, including that the agency failed to award it additional strengths for its technical proposal and that the agency's evaluation of KJS under the experience factor was improper. We have reviewed all of Shearwater's additional allegations and find that none provides a basis on which to sustain the protest.

Improper Price Realism Analysis

Shearwater asserts that because the solicitation's price evaluation terms authorized the agency to conduct only a price reasonableness evaluation, the agency was not permitted to perform a price realism analysis. Shearwater claims that the agency nonetheless analyzed price proposals for realism, and that this improper price realism evaluation led the agency to conclude incorrectly that Shearwater's proposed prices for certain annexes were "unreasonably low."

When awarding a fixed-price contract, as here, agencies are required to determine that the price offered is fair and reasonable. Federal Acquisition Regulation (FAR) § 15.402(a). A price reasonableness analysis focuses primarily on whether the proposed prices are too high. Lily Timber Servs., B-411435.2, Aug. 5, 2015, 2015 CPD ¶ 246 at 3. Although it is not required, an agency also may provide for a price realism analysis in a solicitation for award of a fixed-price contract to assess whether an offeror's low price reflects a lack of understanding of the contract requirements, or risk inherent in an offeror's proposed approach. See Milani Constr., LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87 at 4-5. However, where the solicitation does not contain any criteria pertaining to realism or understanding, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, i.e., the offeror's ability to successfully perform the contract at its offered price. See id.; J.A. Farrington Janitorial Servs., B-296875, Oct. 18, 2005, 2005 CPD ¶ 187 at 4. Agencies therefore may not conduct a price realism analysis without first advising offerors that the agency intends to do so. See Lily Timber Servs., supra; Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 6-7. Indeed, absent a solicitation provision providing for a price realism evaluation, agencies are neither required, nor permitted, to conduct one in awarding a fixed-price contract. ERIMAX, Inc., B-410682, Jan. 22, 2015, 2015 CPD ¶ 92 at 8.

In response to Shearwater's protest, and without any additional clarification, the agency asserts that "[t]he Solicitation and the evaluation criteria did not contain a price realism criterion, nor did the Agency apply an unstated price realism criterion." Supplemental AR at 1 n.1.[8] The protester represents that during the debriefing, the agency also stated that it "did not perform a price realism analysis." Protest at 8. We agree with the agency that the solicitation did not provide for a price realism analysis. However, the contemporaneous price evaluation shows that the agency nevertheless performed a price realism analysis.

For the price evaluation of the offerors' initial proposals, the agency compared the offerors' proposed prices for all 19 annexes to the IGCE. AR at 14; AR, Encl. 20,

[8] After comments were submitted on the agency record, GAO directed the agency to produce additional documents, on the basis of which the protester supplemented its previously filed comments, to which the agency submitted a response. We refer to the agency's response as the Supplemental AR.

Declaration of First Contract Specialist, Sept. 18, 2018, ¶ 5, at 1. The agency used a [redacted] percent variance to determine whether a proposed price for a technical annex was "unreasonably high or low." Id. If an offeror's proposed price for a particular annex was [redacted] percent higher than the IGCE price for that annex, it was considered unreasonably high; conversely if it was [redacted] percent lower than the IGCE, it was considered unreasonably low. Id. Based on this evaluation, the agency entered into discussions with offerors and informed Shearwater that its proposed prices for certain annexes were either "unreasonably low" or "unreasonably high." AR, Encl. 6, EN, Feb. 26, 2018.

After receiving FPRs from offerors, the agency again reviewed the proposed prices for each annex by comparing them to the IGCE. The agency states that this time, it used a [redacted] percent variance to determine whether an offeror's price was "unreasonably high or low." AR at 15; AR, Encl. 12, Declaration of Second Contract Specialist, Sept. 18, 2018, ¶¶ 8-9, at 1-2.[9]

In describing the price evaluation, the source selection evaluation board (SSEB) Report further explained that:

> [t]he result of the [price] analysis demonstrated that revised pricing from Offerors represented Unbalanced pricing and may increase performance risk and could result in payment of unreasonably low and high prices. The pricing for these Offerors are unrealistically high/low for different priced line items . . . in relation to the proposed work.

AR, Encl. 7, SSEB Report, May 24, 2018 at 2. The SSEB Report also stated that "[a] price that is found to be either unreasonably high or unrealistically low in relation to the proposed work may be indicative of an inherent lack of understanding of the RFP requirements and may result in the overall proposal not being considered for award." Id. at 83. Based on this price evaluation, the agency issued another round of discussion questions to Shearwater, identifying certain annexes as either "unreasonably high" or "unreasonably low" and requesting second FPRs. AR, Encl. 9, Request for Best and Final Proposal, May 15, 2018.

The contemporaneous price evaluation record thus shows that the agency found that Shearwater's proposed prices for certain annexes were "unreasonably low" because the agency was concerned that the low prices were "unrealistic" and "may increase

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[9] The agency's use of a [redacted] percent variance for the price evaluation of initial proposals and a [redacted] percent variance for the FPRs is not documented in the contemporaneous evaluation record. Rather, the agency report included declarations from the two contract specialists that performed these evaluations, in which each specialist explained the methodology used to perform the respective price evaluations. See AR at 14-15; AR, Encl. 12, Declaration of Second Contract Specialist, Sept. 18, 2018; AR, Encl. 20, Declaration of First Contract Specialist, Sept. 18, 2018.

performance risk" or indicate an "inherent lack of understanding of the RFP requirements."[10] These are the hallmarks of a price realism evaluation. Indeed, our Office has repeatedly found that an analysis of whether prices are unrealistically low, such that they might indicate a lack of understanding of the technical requirements and could result in rejection of the proposal--as the SSEB report states was done here--constitutes a price realism evaluation. See, e.g., DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9.

In contrast, as explained above, a price reasonableness evaluation looks at whether the price is too high, not too low. Lily Timber Servs., supra. Under the terms of the RFP, Shearwater's low prices therefore should not have raised any reasonableness concerns. See Crawford RealStreet Joint Venture, B-415193.2, B-415193.3, Apr. 2, 2018, 2018 CPD ¶ 121 at 9 (where solicitation for a fixed price contract required a price reasonableness evaluation, agency erred in finding that a protester's price that was 23 percent less than the independent government estimate was unreasonable). Thus, the agency erred in conducting a price realism analysis and concluding that Shearwater's proposed prices for certain annexes were "unreasonably low."

Misleading Discussions

As noted above, Shearwater alleges that the agency's improper price realism analysis led it to conduct misleading discussions by informing Shearwater that its proposed prices for certain annexes were "unreasonably low." We agree.

It is a fundamental principle of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in an offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8; Spherix, Inc., B-294572, B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3 at 13-14. An agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency's actual concerns, or otherwise misinform the offeror concerning a problem with its proposal. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6.

Here, the agency has stated that the discussions "were based on its evaluation of prices as required by . . . the Solicitation." AR at 13. However, as explained above, the agency performed an improper price realism analysis and incorrectly concluded that Shearwater's prices were "unreasonably low" because they were unrealistic or

[10] Consistent with the FPR price evaluation, the agency's evaluation record of the offerors' second FPRs also noted that the offerors' FPR prices "were either unreasonably high or unrealistically low in relation to the proposed work and when compared to the IG[C]E." AR, Encl. 10, SSEB Report, May 30, 2018 at 85.

introduced performance risk.[11] Because the solicitation required only a price reasonableness evaluation--and precluded the agency from performing a price realism evaluation--Shearwater's low prices should not have raised any reasonableness concerns that needed to be addressed during discussions, and the agency should not have questioned Shearwater about its "unreasonably low" prices.[12]

Shearwater notes that in response to the discussion questions regarding both its initial proposal and FPR, each time it increased its pricing for most of the annexes that the agency identified as "unreasonably low." Protester's Comments at 17-18. Shearwater further states that the price increases made in response to the FPR discussion questions resulted in an increase of $[redacted] to its final total price, making it more expensive than KJS's final proposal. Id. at 16-17. Ultimately, Shearwater's higher price was the primary reason for the agency's decision not to select Shearwater for award. Shearwater states that had it maintained the same prices for the "unreasonably low" annexes that it proposed in its FPR, its total second FPR price would have been $[redacted], putting it just under the awardee's price of $79,889,539. See id. at 17.

Given the offerors' equal ratings on the five non-price factors, and the source selection authority's conclusion that the identically rated proposals were, in fact, technically equal, a lower price could have put Shearwater in line for award. Because the record shows that Shearwater's pricing was increased in direct response to the agency's discussion questions--which were based on the improper price realism analysis--we conclude that

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[11] Moreover, the agency's identification of Shearwater's FPR prices for two annexes as "unreasonably low" and two other annexes as "unreasonably high" was incorrect under the agency's [redacted] percent-variation analysis. For example, Shearwater's proposed FPR price for the material management annex was $[redacted] while the IGCE was $[redacted], resulting in Shearwater's proposed price being [redacted] percent lower than the IGCE. See AR, Encl. 7, SSEB Report, May 24, 2018 at 84. Nonetheless, the agency informed Shearwater that the proposed price for this annex was "unreasonably low." AR, Encl. 9, Request for Best and Final Proposal, May 15, 2018.

[12] The agency claims that its discussion questions arose because of concerns about unbalanced pricing in Shearwater's proposal. See AR at 15. But the discussion questions did not mention unbalanced pricing. Moreover, to the extent the agency was concerned about unbalanced pricing, its focus on low prices was misplaced. While both understated and overstated prices are relevant to the question of whether unbalanced pricing exists, the primary risk to be assessed in an unbalanced pricing context is the risk by overstatement of prices. Crawford RealStreet Joint Venture, B-415193.2, B-415193.3, Apr. 2, 2018, 2018 CPD ¶ 121 at 8; FAR § 15.404-1(g)(1) (unbalanced pricing "could result in payment of unreasonably high prices."). Low prices, by themselves, are not improper and do not establish (or create the risk inherent in) unbalanced pricing. JCMCS, B-409407, Apr. 8, 2014, 2014 CPD ¶ 125 at 3.

Shearwater was misled, to its competitive prejudice. We therefore sustain Shearwater's protest.

RECOMMENDATION

We recommend that the agency reopen the competition, conduct discussions, accept revised proposals, and make a new source selection decision in a manner consistent with the RFP and our discussion above. Alternatively, if the agency decides that consideration of the realism of offerors' proposed prices is necessary, it should amend the RFP to so indicate, allow submission of revised proposals, evaluate the proposals received, and make a new source selection decision. In either case, if the agency determines that a proposal other than the one submitted by KJS represents the best value to the government, we recommend that the agency terminate the contract awarded to KJS for the convenience of the government and make award to the newly-selected offeror. We also recommend that the agency reimburse Shearwater the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1).

The protester should submit its certified claim for cost, detailing the time expended and costs incurred directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Thomas H. Armstrong
General Counsel