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Decision

Matter of: Norfolk Dredging Company

File: B-417213; B-417213.2

Date: March 26, 2019

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John P. Kassebaum, Esq., Department of the Army, for the agency.
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DIGEST

Agency properly canceled a solicitation after bid opening and converted the procurement from sealed bidding to a negotiated procurement based upon the unreasonableness of bid prices, where the low bid exceeded the government's estimate by more than 24 percent and where the protester has not shown that the government's estimate was unreasonably low.

DECISION

Norfolk Dredging Company (Norfolk), of Chesapeake, Virginia, protests the cancellation of invitation for bids (IFB) No. W912HP-18-B-0004, issued by the Department of the Army, Corps of Engineers (Corps), for dredging services near Charleston, South Carolina. Norfolk contends that the agency's decision to cancel the IFB and complete the acquisition as a negotiated procurement is unreasonable, as the agency should have awarded the contract to Norfolk, the low bidder.

We deny the protest.

BACKGROUND

The IFB was issued on September 6, 2018, pursuant to the sealed bidding procedures of Federal Acquisition Regulation (FAR) part 14, and contemplated the award of a fixed-price contract for maintenance and new dredging work of approximately 11 million cubic yards of material from the Charleston Lower Harbor Channel and Wando River in Charleston and Berkeley counties, South Carolina. Agency Report (AR), Tab 4, IFB

at 1, 16. The deadline for submission of bids was November 1 at 2:00 p.m. IFB amend. 3 at 2.

The agency received five timely bids, to include one from Norfolk. AR, Tab 1, Contracting Officer's Statement (COS) at 1. The bids, and the agency's original independent government estimate (IGE), were as follows:

Bidders	Total Bid
Norfolk Dredging	\$138,896,830
Great Lakes Dredge & Dock	\$164,106,500
Mason Construction	\$181,673,500
Weeks Marine	\$194,596,000
Cashman Dredging & Marine	\$322,900,000
IGE	\$84,413,277

COS at 2. Following a determination that all bids exceeded the IGE by more than 25 percent,¹ on November 6, the agency notified bidders that it was considering cancelling the IFB and completing the acquisition as a negotiated procurement. Id. The agency's notice requested bidders to identify areas of risk in the solicitation, and ways in which the IFB could be amended to minimize those risks, thereby resulting in potentially lower bid prices. Id.; AR Tab 14, Contracting Officer's Notice to Norfolk, Nov. 6, 2018. Four of the five bidders, including Norfolk, submitted information for the agency's consideration. COS at 2.

The contracting officer requested that a revised IGE be prepared to identify potential errors in the original IGE. Id. A second, revised estimate was created, resulting in an upward adjustment of \$1.25 million to the IGE, for a total estimated cost of \$85,663,277. Id. The contracting officer then requested that a third IGE be prepared by the Charleston District cost estimator, whom the agency identified as a regional subject matter expert for dredging cost estimating in the Charleston area. Id. This third IGE made a number of adjustments to the original IGE, resulting in a revised IGE of \$111,273,986. COS at 2-3; AR, Tab 9, Third Revised IGE, at 1.

Although Norfolk's bid was within 25 percent of this third IGE (24.8 percent above), the contracting officer determined that all bids, including Norfolk's, remained unreasonably high in comparison with the IGE. COS at 3. Additionally, the contracting officer found

¹ The agency states that the Corps is prohibited from awarding a dredging contract where the contract price is more than 25 percent in excess of what the Corps determines to be a fair and reasonable estimated cost. COS at 2. See 33 U.S.C. § 624 ("No works of river and harbor improvement shall be done by private contract . . . [where] the contract price is more than 25 per centum in excess of what [the Chief of Engineers] determines to be a fair and reasonable estimated cost of a well-equipped contractor doing the work.").

that Norfolk's bid included unbalanced pricing for certain mobilization/demobilization contract line items. Id. Moreover, the contracting officer determined that the Corps did not have sufficient funds available to make award at the price bid by Norfolk. Id. On December 17, in accordance with FAR § 14.404(e)(1), the contracting officer canceled the IFB and converted the acquisition to a negotiated procurement. Id. at 3-4; Memorandum of Law at 4; IFB amend. 4 at 1. Norfolk submitted this protest on December 24.

DISCUSSION

Norfolk argues that the agency's decision to cancel the IFB after bid opening and convert the acquisition to a negotiated procurement was unreasonable. Protest at 1. In this regard, the protester contends that the agency's price reasonableness analysis, which determined that Norfolk's bid price was unreasonably high, was flawed, in part because it was predicated upon an unreasonably low IGE. Protest at 7-9; Comments at 9-10. Accordingly, the protester contends that given the flaws in the agency's IGE, Norfolk bid price was, in fact, reasonable, and as the low bidder, it should have been awarded the contract. Norfolk further argues that even if the IGE was not flawed, the agency unreasonably determined that its price was unreasonable.

Norfolk first challenges the reasonableness of the Corps' IGE, arguing that the estimate's reliance on historical data failed to properly account for the type of materials to be dredged and the costs necessary to perform the work. Protest at 7-9; Comments at 9-10. In this regard, the protester argues that this project--as opposed to the historical projects in Charleston Harbor upon which the IGE is based--involves dredging a larger percentage of harder and stiffer materials, which are more costly to dredge than softer materials. Protest at 7; Comments at 9. Norfolk calculates that prior dredging projects in the area included approximately [DELETED] soft new work, while this project will include only [DELETED]. Comments at 9. While agency's third IGE accounts for the harder materials by increasing the projected cost, Norfolk argues that these adjustments are inadequate to account for the true cost of the work. Id. at 9-10.

Our Office will review challenges to government estimates for reasonableness. See Division Laundry and Cleaners, Inc., B-311242, May 19, 2008, 2008 CPD ¶ 97 at 3; OMNI Gov't Servs., LP, B-297240.2 et al., Mar. 22, 2006, 2006 CPD ¶ 56 at 3. A protester's disagreement with an agency's basis for developing an estimate, without more, provides no basis to sustain a protest. See Quantech Servs., Inc., B-408227.8, B-408227.9, 2015 CPD ¶ 380 at 8.

Here, the record shows that the agency's approach in developing the IGE was reasonable. The Corps first solicited, and then considered, information submitted by bidders regarding potential ways to reduce the cost of the underlying dredging work, and then revised its cost estimate. COS at 2; AR Tab 14, Contracting Officer's Notice to Norfolk, Nov. 6, 2018. The agency also asked its regional subject matter expert for dredging cost estimating in the Charleston area to review the agency's estimate and prepare another IGE; this IGE incorporated "more accurate current conditions and

corrected erroneous assumptions” from the first two IGEs. AR Tab 9, Third Revised IGE, at 1. This third IGE noted that the first two estimates did not properly account for harder materials, and that after reviewing “the available boring logs, it was determined that there is a much higher quantity of [harder materials] in several reaches that would require a much higher effort to excavate resulting in lower production rates and increased unit cost.” *Id.* at 1; AR Tab 11, Declaration from Cost Estimator at 1. Accordingly, the IGE was adjusted to account for this increased cost. While Norfolk disagrees with the extent of the upward adjustment, we find reasonable the agency’s explanation for its adjustments.² On this record, Norfolk has not demonstrated that the agency’s IGE was flawed or unreasonable; the protester’s disagreement with the agency’s estimate and its use of this estimate for its price reasonableness analysis provides no basis to sustain the protest.³

Norfolk next argues that its bid is reasonable in comparison to the revised IGE. Comments at 10. The protester asserts that its bid is within 25 percent of the revised IGE and, when compared to the other bid prices, it “should be apparent that Norfolk’s bid was reasonable.” *Id.* As such, Norfolk argues that the Corps should not have converted the acquisition to a negotiated procurement, and instead, should have made award to Norfolk, the only bidder eligible for award. *Id.*

The agency argues that its decision to cancel the IFB and complete the acquisition as a negotiated procurement is warranted given the bid prices. The Corps argues that because it properly found that all bids received were unreasonably priced, the agency was permitted to convert the IFB to a negotiated procurement. COS at 2-4; Supplemental Contracting Officer’s Statement (Supp. COS) at 1-2. As it relates to

² Norfolk also argues that the third IGE underestimated increases in the cost of fuel, labor, benefits, and supply and repair costs. Protest at 8; Comments at 9. For example, the protester contends that marine diesel costs have increased [DELETED] percent, since the last dredging work occurred in the area in 1999. Protest at 8. However, Norfolk has not provided any industry data or historical pricing information in the record to suggest that the Corps’ estimate for these costs is somehow deficient.

³ In its supplemental comments, the protester, for the first time, argues that the estimating techniques employed by Norfolk to develop its bid were “significantly more accurate than the methodology employed by the agency” to develop the IGE. Supp. Comments at 5. This argument constitutes a piecemeal presentation of issues; the timeliness requirements of our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues. See Battelle Memorial Institute, B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 24 n.32; 4 C.F.R. §21.2(a)(1). In any event, while Norfolk’s [DELETED] analysis and estimating methodology may be more accurate than those employed by the Corps to develop the IGE, the protester fails to show how the agency’s reliance on alternative estimating methods resulted in an unreasonable IGE. See Acker Electric Co., Inc., B-250673, Feb. 12, 1993, 93-1 CPD ¶ 130.

Norfolk, the agency provides that the protester's bid price was unreasonably high as compared to other bidders, as compared to historical pricing, and as compared to the IGE. Supp. COS at 1-2.

Once bids have been opened, award must be made to the responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the IFB. FAR § 14.404-1(a)(1). An IFB may be canceled after bid opening if the prices of all otherwise acceptable bids are unreasonable. FAR § 14.404-1(c)(6). An agency may complete the acquisition through negotiation, after cancellation of an IFB, where all otherwise acceptable bids are unreasonably priced. FAR § 14.404-1(e)(1). The determination that prices are unreasonable is a matter of administrative discretion, which we will not disturb unless the determination is unsupported or there is a showing of fraud or bad faith on the part of contracting officials. G. Marine Diesel Corp., B-238703, B-238704, May 31, 1990, 90-1 CPD ¶ 515 at 3.

Having already found the Corps' IGE to be reasonable, we find no basis to conclude that the agency's determination that Norfolk's bid was unreasonably high as compared to the IGE was unreasonable.⁴ A determination that a price is unreasonable may be based upon a comparison with the government estimate. Hawkins Builders, Inc., B-237680, Feb. 5, 1990, 90-1 CPD ¶ 154 at 2; FAR § 15.404-1(b)(2)(v).⁵ Here, the agency found that Norfolk's "bid exceeded the IGE by \$27,622,844.00, or more than 24 percent." Supp. COS at 1. We have found that an agency may reject a bid as unreasonably priced when the bid exceeds the government estimate by as little as 7.2 percent. See Building Maintenance Specialists, Inc., B-186441, Sept. 10, 1976, 76-2 CPD ¶ 233 at 4; J. Morris & Assocs., Inc., B-256840, July 27, 1994, 94-2 CPD ¶ 47 at 2; Metric Constructors, Inc.; H.B. Zachry Co., B-229947; B-229947.2, Mar. 25, 1988, 88-1 CPD ¶ 311. Given the disparity between the IGE and Norfolk's bid price, we see no basis to object to the contracting officer's determination that Norfolk's price was

⁴ The protester also challenges the agency's use of historical pricing data, and its comparison of received bid prices to each other, to evaluate whether Norfolk's bid was reasonable. Supp. Comments at 2-3. As we find reasonable the agency's comparison of prices to the IGE to determine price reasonableness, we need not address Norfolk's arguments concerning the agency's alternative grounds for determining that Norfolk's price was unreasonable.

⁵ Section 14.408-2 of the FAR provides that the price analysis techniques of FAR § 15.404-1(b) may be used as guidelines to determine whether offered prices are reasonable.

unreasonable, here.⁶ We therefore conclude that the agency, after finding all bids to be unreasonably priced, was permitted to cancel the IFB and convert the acquisition to a negotiated procurement.⁷

The protest is denied.

Thomas H. Armstrong
General Counsel

⁶ To the extent Norfolk argues that because its bid was within 25 percent of the IGE, its price must be deemed reasonable, we disagree. While 33 U.S.C. § 624 prohibits the Corps from awarding a dredging contract to a bidder whose bid price exceeds a fair and reasonable government estimate by more than 25 percent, it does not require the Corps to award a dredging contract to a bidder whose price is within 25 percent of that estimate, if the agency does not believe the bid price is fair and reasonable. The agency's ability to determine that a price is unreasonable, even if it is within 25 percent of the government estimate, is within its discretion. See Overstreet Electric Company, Inc., B-284691, May 12, 2000, 2000 CPD ¶ 79 at 3-4; Atkinson Dredging Co., Inc.--Recon., B-250965.2, B-250967.2, July 19, 1993, 93-2 CPD ¶ 31 at 3-4.

⁷ Norfolk also contests the agency's other bases for converting the IFB to a negotiated procurement. Specifically, Norfolk argues that the Corps' unbalanced pricing analysis was flawed because it failed to consider risk, and that the agency's conversion based on having insufficient project funds was impermissible under FAR § 14.404-1(e)(2). Comments at 11-14. As we find no basis to conclude that the Corps' decision to convert the IFB to a negotiated procurement, due to unreasonable bid pricing, was flawed, we need not address Norfolk's allegations concerning the agency's alternative bases for conversion.