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Decision

Matter of: Total Home Health

File: B-417283; B-417283.2

Date: April 26, 2019

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DIGEST

1. Protest challenging the agency’s conduct of discussions is sustained where the agency advised the protester that it was concerned with three areas of the protester’s price in a manner that misled the protester into believing a revision in only those three areas would increase its chances for award.

2. Protest challenging the agency’s affirmative determination of responsibility for the awardee is denied where the record shows that the contracting officer considered the information cited by the protester concerning the awardee.

DECISION

Total Home Health (THH), of Elgin, Illinois, challenges the award of a contract to Rotech Healthcare, Inc., of Orlando, Florida, by the Department of Veterans Affairs (VA) under request for proposals (RFP) No. 36C25218R1040, for medical services and equipment. The protester argues that the agency misled it during discussions, and unreasonably concluded that the awardee was a responsible offeror.

We sustain in part and deny in part the protest.

BACKGROUND

The VA issued the solicitation on October 23, 2018, seeking proposals to provide home respiratory services and durable medical equipment for Veterans Integrated Service

Network 12, which encompasses “most of Illinois and Wisconsin, and the upper peninsula of Michigan.” Memorandum of Law (MOL) at 1. The RFP anticipated the award of a fixed-price contract with a base period of 1 year and four 1-year options. Agency Report (AR), Attach. 6, RFP at 8-18, 132.

The RFP advised that award was to be made to the offeror that submitted the lowest-priced, technically acceptable (LPTA) proposal. Id. at 134. The solicitation stated that technical acceptability would be evaluated based on whether a proposal “take[s] exception to any of the requirements of this procurement specified in the solicitation.” Id. The RFP required offers to submit prices for 14 contract line item numbers (CLINs), which included equipment rental and delivery, supplies, and respiratory therapist visits. Id. at 8-18. In addition, the solicitation identified two “special standards of responsibility,” which were to be evaluated on a pass/fail basis: (1) experience in similar contracts, and (2) licenses and credentials for offerors’ proposed therapists. Id. at 130.

The VA received proposals from six offerors, including THH and Rotech, by the closing date of November 30, 2018. Contracting Officer’s Statement (COS) at 1. THH’s initial price was \$34,779,590, which was the fourth-lowest price. MOL at 4. Rotech’s initial price was \$24,446,100, which was the lowest price. Id. The agency found that all proposals were technically acceptable, in that none took exception to the solicitation requirements. COS at 1. The agency found, however, that three of the six proposals failed to meet the special standards of responsibility, and two of the prices were not fair and reasonable. Id. at 1-2. The agency therefore conducted discussions with offerors “to increase competition and to get the best price.” Id. at 2.

On December 6, the VA advised THH that its proposal met the solicitation’s technical acceptability and special responsibility criteria, and that “[t]he Contracting Officer is giving all firms until Monday December 10th at 5:00 pm central time to submit final proposal revision(s) if your firm chooses to do so.” Protest, Exh. 7b, Email from VA to THH, Dec. 6, 2018. This exchange did not provide information to the protester about its price or the prices of other offerors. See id. The protester submitted a revised proposal on December 10, which lowered its price to \$34,414,404. Id., Email from THH to VA, Dec. 10, 2018.

On December 11, the contracting officer advised THH that “[i]n reviewing our correspondence, I noticed that I neglected to inform you of the reason we were seeking revised proposals.” Protest, Exh. 7c, Email from VA to THH, Dec. 11, 2018, Attach. 1, at 1. The contracting officer explained the reason for seeking revised proposals as follows: “We have found your proposal to be technically acceptable. However, we found your price proposal to be relatively weak. At this time, we are providing all offerors the opportunity to review their pricing and submit revised price proposals in order to make their offers more competitive.” Id.

On December 12, THH requested that the agency provide more information regarding the request for revised pricing: “We would like to send in an updated price proposal and

I was hoping to get some additional insight in regards to what the VA is looking for. Is there [] a specific area we should be focused on within the proposal or is there a neighborhood the VA is looking for bidders to be in?" Protest, Exh. 7d, Email from THH to VA, Dec. 12, 2018. The contracting officer responded on December 13, advising the protester that "[w]ith regard to your pricing, the Government anticipated lower pricing on CLINs 5, 11, and 14." Protest, Exh. 7e, Email from VA to THH, Dec. 13, 2018. On December 16, THH submitted a revised proposal which lowered its price to \$33,915,031. Protest, Exh. 7f, Email from THH to VA, Dec 16, 2018.

The offerors' final prices were as follows:

| Offeror | Total Proposed Price |
|-----------|----------------------|
| Rotech | \$22,557,492 |
| Offeror 3 | \$25,558,721 |
| Offeror 4 | \$33,131,049 |
| THH | \$33,915,031 |
| Offeror 5 | \$42,421,500 |
| Offeror 6 | \$46,103,760 |

AR, Attach. 5, Price Summary, at 1; Protest, Exh. 7f, THH Final Revised Proposal, at 1.

The VA concluded that Rotech's proposal met the technical acceptability and special responsibility criteria, and that the awardee was a responsible offeror. COS at 3-4. The agency therefore selected Rotech's proposal for award based on its overall low price. Id. at 4. The agency advised THH of the award and provided a debriefing on January 31, 2019, and this protest followed.

DISCUSSION

THH challenges the award to Rotech based on two primary arguments: (1) the VA conducted misleading discussions regarding price, and (2) the agency's affirmative determination of responsibility for the awardee failed to consider available relevant information. For the reasons discussed below, we sustain the protester's first argument, and deny the second.

Misleading Discussions Regarding Price

THH argues that the VA conducted misleading discussions regarding its price because the agency directed the protester to concerns regarding its prices for three CLINs which, when combined, were significantly smaller than the difference between the protester's overall price and the awardee's overall price. The protester contends that the agency's discussions misled it into believing that reducing its prices for those three CLINs would make its proposal competitive for award under the RFP's LPTA criteria. For the reasons discussed below, we agree with the protester.

Discussions, when conducted, must identify proposal deficiencies and significant weaknesses and should discuss other aspects that reasonably could be addressed in order to materially enhance the offeror's potential for receiving award. Federal Acquisition Regulation (FAR) §15.306(d)(3); Serco Inc., B-405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 11. 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. See FAR §15.306(d)(3); Southeastern Kidney Council, B-412538, Mar. 17, 2016, 2016 CPD ¶ 90 at 4. Agencies, however, are not required to "spoon-feed" an offeror during discussions by identifying every possible area where a proposal might be improved or suggesting alternative approaches. Vizada Inc., B-405251 et al., Oct. 5, 2011, 2011 CPD ¶ 235 at 11. Agencies may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns. MCT JV, B-311245.2, B-311245.4, May 16, 2008, 2008 CPD ¶ 121 at 15-16; Multimax, Inc., et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 at 12; Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6.

Where an offeror's price or cost is high in comparison to competitors' prices or the government estimate, but is not considered unreasonable, the agency may, but is not required to, address the matter during discussions. IAP World Servs., Inc., B-297084, Nov. 1, 2005, 2005 CPD ¶ 199 at 4; AT&T Gov't Solutions, Inc., B-413012, B-413012.2, July 28, 2016, 2016 CPD ¶ 237 at 26. Where an agency elects to conduct discussions with an offeror concerning price, it is not required to advise the offeror of the specific areas where its price or cost is too high or to provide a specific price that the offeror must meet; simply advising the offeror that its price is too high is sufficient. Northstate Heavy Equip. Rental, B-416821, Dec. 19, 2018, 2018 CPD ¶ 430 at 6.

As discussed above, the VA advised THH that its proposal was "technically acceptable," but that "we found your price proposal to be relatively weak." Protest, Exh. 7c, Email from VA to THH, Dec. 11, 2018, Attach. 1, at 1. In response, the protester asked the agency the following: "Is there [] a specific area we should be focused on within the proposal or is there a neighborhood the VA is looking for bidders to be in?" Protest, Exh. 7d, Email from THH to VA, Dec. 12, 2018. The contracting officer responded on December 13, advising the protester that "[w]ith regard to your pricing, the Government anticipated lower pricing on CLINs 5, 11, and 14." Protest, Exh. 7e, Email from VA to THH, Dec. 13, 2018.

The VA states that its response to THH regarding the "neighborhood VA is looking for bidders to be in" was based on the agency's comparison of the protester's CLIN prices to the independent government estimate (IGE) for each CLIN. MOL at 3. The agency states that it advised THH of any CLIN that was more than twice the IGE. COS at 2. The contracting officer explains that offerors "appeared to have priced their CLINs strategically in developing their overall price, so it was nearly impossible to discuss minor CLIN price variations for large quantity line items without going into in-depth discussions about repricing all of them." Id. at 2. For this reason, the contracting officer

states that discussions were limited to comparisons to the IGE, so as to avoid “revealing other offerors’ contract line item pricing strategy.” Id.

Where, as here, a solicitation provides that award will be made on an LPTA basis, we think that advising an offeror that its proposal is technically acceptable but its price is weak is sufficient to let the protester know that it must lower its price to be competitive for award. Thus, had the VA simply advised THH that its price was too high, and declined to provide additional information, we think that this would have satisfied the agency’s obligation to ensure that the discussions with the protester were meaningful. See Northstate Heavy Equip. Rental, supra.

As the record shows, however, THH asked the VA for additional information regarding the areas of its price proposal that were considered too high, and the agency elected to respond by identifying three CLINs. The protester argues that the identification of these three CLINs was misleading, because the protester understood the agency’s response to the question to indicate that they were the only areas where the price was too high. Protester’s Comments at 4. We agree with the protester.

THH’s prices for CLIN Nos. 5, 11, and 14 were as follows:

| | CLIN 00005 | CLIN 00011 | CLIN 00014 | Total For 3 CLINS |
|--|--------------|--------------|--------------|-------------------|
| THH Price Prior to Dec. 13, 2018, Discussions | [\$[DELETED] | [\$[DELETED] | [\$[DELETED] | [\$[DELETED] |
| THH Price After Dec. 13, 2018, Discussions | [\$[DELETED] | [\$[DELETED] | [\$[DELETED] | \$747,420 |

Protest at 9-10.

As THH notes, the difference between the protester’s and awardee’s initial prices was approximately \$10 million, or about 30 percent. See MOL at 4. For this reason, even if the protester had reduced its prices for CLINs 5, 11, and 14 to \$0, the protester would not have been in line for award.

Although the VA’s response to the protest explains that the agency’s discussions identified only those CLINs where THH’s prices were high relative to the IGE, rather than to other offerors, these considerations were not communicated to the protester. Instead, the protester was advised that the agency “anticipated lower pricing” for the three identified CLINs. Protest, Exh. 7e, Email from VA to THH, Dec. 13, 2018. Under these circumstances--the specificity of the agency’s response regarding the three low-value CLINs and the absence of other explanatory information--we think the agency misled the protester during discussions into believing that revision of its price for the three identified CLINs would have been sufficient to enhance the protester’s prospect for award.

We also conclude that the protester was prejudiced by the misleading discussions. Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. DRS ICAS, LLC, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21. Here, we recognize that the protester's final price was ranked fourth-lowest, and was \$11.3 million more than the awardee's final price of \$22.5 million. AR, Attach. 5, Price Summary, at 1. Nonetheless, THH submitted a declaration from the president of THH, who stated that, had the agency advised that its price was high in other than the three low-value CLINs, the protester would have been able to "submit a more competitively priced proposal that could have received a contract award." Protest, Exh. 10, Decl. of THH President, Feb. 4, 2019, at 2.

We conclude that the protester was prejudiced because the agency's discussions caused the protester to base its final revised price on misleading information. Although the agency and intervenor argue that there is no basis to conclude that the protester would have submitted the lowest price in the absence of these misleading discussions, we cannot assume for purposes of prejudice that the protester would not have submitted the lowest price. See Creative Info. Tech., Inc., B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 at 9 (protest based on defective discussions must be sustained unless it is "clear from the record" that the protester was not prejudiced). We therefore sustain the protest.

Affirmative Determination of Responsibility

Next, THH argues that the VA unreasonably concluded that Rotech was a responsible offeror because the contracting officer failed to consider available relevant information regarding a False Claims Act settlement involving the awardee. For the reasons discussed below, we find no basis to sustain the protest.

The FAR provides that a contract may not be awarded unless the contracting officer makes an affirmative determination of responsibility. FAR § 9.103(b). In most cases, responsibility is determined based on the standards set forth in FAR § 9.104-1. As our Office has explained, determinations of responsibility involve subjective business judgments that are within the broad discretion of the contracting agency. ExecuTech Strategic Consulting, LLC; TRI-COR Indus., Inc., B-410893 et al., Mar. 9, 2015, 2015 CPD ¶ 103 at 11.

Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer failed to consider available relevant information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Id.; FCi Fed., Inc., B-408558.4 et al., Oct. 20, 2014, 2014 CPD ¶ 308 at 7. Where the record shows that

the contracting officer was aware of the facts or allegations identified by the protester, we will generally not review an allegation that the contracting officer should have found the awardee nonresponsible based on those facts or allegations. See DynCorp Int'l LLC, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 19-20.

THH argues that the contracting officer failed to consider information relating to a False Claims Act settlement between Rotech and the Department of Justice (DOJ) that was announced in 2018. Protest at 14-16. The protester cites press releases which state that Rotech agreed to pay a fine of \$9.68 million associated with improper billing of portable oxygen to Medicare patients from January 2009 to March 2012. Id. at 3-4; Exh. 3, DOJ Public Statement, Apr. 12, 2018, at 1.

The contracting officer states that he was aware of the settlement because it was mentioned in a Dun & Bradstreet (D&B) report he reviewed during his consideration of Rotech's responsibility.¹ COS at 3. The contracting officer further states that he conducted an online search for information regarding the settlement, and reviewed the DOJ statement. Id. The contracting officer concluded that this matter did not preclude a finding that Rotech was responsible because it related to events in 2009-12, and because the awardee "voluntarily took corrective action by issuing refunds and paying a fine." Id. The contracting officer also stated that he was "struck by the fact that DOJ included in its press release Rotech's explanation for the billing as a software programming error," and that this information factored into his responsibility determination. Id.

THH argues that the contracting officer's conclusions regarding the settlement were not reasonable. In particular, the protester contends that the contracting officer unreasonably understood the press release to indicate that the improper billing was attributable to a software issue, rather than deliberate action on the part of the awardee. Protester's Comments at 10. The protester argues, therefore, that the contracting officer's interpretation of the information in the press release shows that he did not fully or adequately consider the available information. Id. at 10-11.

We conclude that the record here shows that the contracting officer considered the information cited by the protester regarding the False Claims Act settlement. Although the protester disagrees with the conclusions drawn by the contracting officer regarding this information, this is not a matter that our Office considers under the limited exceptions provided in our regulations. See 4 C.F.R. § 21.5(c); DynCorp Int'l LLC, supra. We therefore find no basis to sustain the protest regarding the contracting officer's responsibility determination.

¹ Although the settlement was not discussed in the contracting officer's responsibility determination, the D&B report was specifically cited. AR, Attach. 2, Responsibility Determination, at 1, 2. The protester does not specifically contend that there is any basis to doubt the contracting officer's representation that he was aware of the settlement at the time the responsibility determination was made.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we conclude that the VA misled THH during discussions and that the protester was prejudiced by the agency's actions. We recommend that the VA reopen discussions with all offerors and accept revised proposals. We recognize that as a result of the award notice, the awardee's price has been disclosed. Because the RFP provides for award on an LPTA basis, and the agency has found all offerors' proposals to be technically acceptable, discussions will likely be limited to price reductions. Consistent with our discussion above, the agency may, within its discretion, either generally advise offerors that they should reduce their prices or provide specific guidance to offerors regarding the areas of their prices that require revision--provided such guidance is not misleading.

We also recommend that the agency reimburse the protester's reasonable costs associated with filing and pursuing its protest concerning the misleading discussions, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained in part and denied in part.

Thomas H. Armstrong
General Counsel