U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Kiewit Infrastructure West Company

File: B-417924; B-417924.2

Date: December 10, 2019

Douglas L. Patin, Esq., Aaron C. Beezley, Esq., Patrick R. Quigley, Esq., and Lisa A. Markman, Esq., Bradley Arant Boult Cummings LLP, for the protester.
Major Stephen M. Hernandez, Department of the Army, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision to convert from sealed bidding procedures to negotiated procedures after bids were opened is denied where record shows that agency reasonably determined that prices submitted were unreasonably high, and this provided an appropriate basis to make the conversion.

DECISION

Kiewit Infrastructure West Company, of Vancouver, Washington, protests the actions of the United States National Guard Bureau in connection with solicitation No. W912JV-19-B-7001, issued for construction services to repair an aircraft maintenance ramp at Kingsley Field, Klamath Falls, Oregon. Kiewit argues that the agency improperly converted the acquisition from using sealed bidding procedures to using negotiated procedures after bids were opened and prices were exposed.

We deny the protest.

BACKGROUND

The original solicitation, issued as an invitation for bids (IFB), solicited bids to perform construction services on a fixed-price basis. The agency received two timely bids, one from Kiewit in the amount of $38,875,500, and one from Rocky Mountain Construction, LLC, in the amount of $43,973,034. Agency Report (AR), exh. 15, Bid Abstract. At the time of bid opening, the agency made available for review a copy of an independent government estimate (IGE) which was in the amount of $27,016,699. Id.; AR, exh. 5, IGE. The IGE was prepared by an architect-engineer (A-E) firm retained by the agency.

After performing an initial review of the bids, the contracting officer made a preliminary finding that Kiewit's low bid was reasonable based on a comparison of the bids to one another, and the presence of competition for the requirement. AR, exh. 19, Memorandum for the Record Concerning Price Reasonableness. The record shows that the agency revisited the question of price reasonableness and concluded, upon reflection, that the two bids received were not reasonably priced. The agency therefore decided to convert the acquisition from sealed bidding to negotiated procedures so it could engage in discussions with the firms.

To this end, the agency executed a determination and finding (D&F) to memorialize its conclusion that the prices submitted were not reasonable, and that the agency intended to proceed using negotiated contracting procedures. AR, exh. 20, D&F.[1] The principal basis for the agency's finding was a comparison of the bids received to the IGE. Id. at 2. After executing the D&F, the agency amended the solicitation to convert it to a request for proposals (RFP). AR, exh. 14, Amendments 1-3. After learning of the agency's decision, Kiewit filed the instant protest.

DISCUSSION

Kiewit argues that it was unreasonable for the agency to have converted the acquisition from sealed bidding to negotiated procedures after bid opening because its price--which was the lowest price received--has been exposed. The protester argues that soliciting further responses from the original bidders now will result in what the protester characterizes as a prohibited auction.

We find no merit to the protest. While agencies are required to have a compelling reason to cancel an IFB after bid opening, a determination that all prices received are unreasonable provides such a compelling reason. FAR § 14.404-1(c)(6). Agencies also properly may convert an acquisition from sealed bidding to negotiated procedures--even after bids are exposed--where the agency determines that all prices received are unreasonably high, and also determines that it is in the government's interest to proceed using negotiated procedures. FAR §§ 14.404-1(e), 14.404-1(f); see also G. Marine Diesel Corporation, B-238703, B-238704, May 31, 1990, 90-1 CPD ¶ 515 at 3. In addition, the FAR does not prohibit auctions, and agencies properly may take action to complete an acquisition even after prices have been exposed. J. Morris &

[1] The D&F was executed by the agency citing Federal Acquisition Regulation (FAR) § 14.404-1(c)(6), which provides that an agency may cancel an IFB after bid opening if it is determined that all of the bids received are unreasonable as to price. The D&F also cites the authority found in FAR §§ 14.404-1(e)(1) and 14.404-1(f), which permits an agency to complete the acquisition using negotiated procedures when the agency determines that it is in the government's interest to do so. Here, the record shows that the agency determined that it was in the interest of the government to proceed using negotiated procedures. AR, exh. 20, D& F at 3.

Associates, Inc., B-256840, July 27, 1994, 94-2 CPD ¶ 47 at 2-3; see also, Zegler, LLC, B-410877, B-410983, Mar. 4, 2015, 2015 CPD ¶ 168 at 3.

Here, as noted, the agency determined that Kiewit's and Rocky Mountain's prices were unreasonably high based on a comparison of those prices to the IGE. The record shows that Kiewit's price was approximately 44 percent higher than the IGE, and that Rocky Mountain's price was significantly higher still. Based on these facts, we have no reason to conclude that the agency's actions in converting the acquisition from sealed bidding to negotiated procedures was objectionable in light of its conclusion that all prices submitted were unreasonably high. We therefore deny this aspect of the protest.

Kiewit also argues that the agency erroneously reached its conclusion regarding the unreasonableness of the prices submitted based on an IGE that the protester maintains was inaccurate and failed to take into consideration several significant factors. According to Kiewit, if the IGE had taken these factors into account, it would have been significantly higher, resulting in the agency finding that the prices bid were reasonable.

In support of its allegation, Kiewit directs our attention to the D&F executed in connection with the agency's decision to convert the acquisition to negotiated procedures. In the course of explaining the decision to convert the acquisition, the contracting officer describes asking personnel from the A-E firm that prepared the IGE to offer possible explanations for the disparity between the IGE and bids received. The contracting officer described the response he received as follows:

> The A-E firm cited three possible reasons for the discrepancy between the bids and the IGE:
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> a. Risk associated with contaminated soils and groundwater. The contractor is being extremely conservative with regards to the handling of contaminated materials.
>
> b. Lack of competitive bidding environment. Only 2 bids were received, and there was considerable deviation in cost between those two bidders, over $5M. The bid environment of the area and availability of qualified subcontractors for this specialized work likely contributed to premium pricing.
>
> c. Phasing requirements based on the projected project schedule likely added to the contractor's general conditions cost to account for multiple mobilization efforts.

AR, exh. 20, D&F, at 3. Kiewit argues that this shows that the IGE was, in fact, inaccurate. We disagree.

These observations on the part of the A-E firm are not conclusions regarding possible inaccuracies in the IGE as suggested by Kiewit. Instead, they amount to speculation on the part of the A-E firm regarding possible causes that could underlie the fact that the

bids submitted were significantly higher than the IGE. Logic dictates that, if these observations were factual, Kiewit could have demonstrated that its bid price was relatively high because of the suggested reasons. The record shows otherwise. Kiewit submitted materials with its protest that it represents were used in connection with the preparation of its bid. Supp. Protest, exh. 2. Those materials effectively refute the speculation advanced by the A-E firm regarding possible reasons for the bids being high in comparison to the IGE, at least with respect to the bid submitted by Kiewit.[2]

As to the first possible cause identified by the A-E firm--that the firms might have bid a comparatively high amount to cover the costs of handling hazardous soil or water--the materials submitted by Kiewit show that it claimed to have bid a total of approximately $[deleted] for this aspect of the requirement. Supp. Protest, exh 2, at 4. Kiewit's allegation is confined to the removal of contaminated groundwater (as opposed to contaminated soil); Kiewit maintains the IGE did not include the cost of removing contaminated groundwater. Kiewit's materials show that it bid just $[deleted] for this aspect of the requirement. Id. It is therefore clear that the difference between the IGE and the Kiewit bid was not driven by Kiewit's comparatively high costs for disposal of contaminated soil and groundwater, as speculated by the A-E firm.[3]

As to the second possible cause identified by the A-E firm--lack of competition and use of specialized subcontractors to perform the work--the Kiewit materials do not address the limited competition overall, but do address the question of Kiewit's possible use of subcontractors. Kiewit's materials provide as follows: "As part of KIWC's [Kiewit's]

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[2] Kiewit asserts that the agency erred in refusing to review these same materials (which it submitted directly to the agency shortly after filing its protest) as part of its price reasonableness determination. According to Kiewit, had the agency performed such a review, it would have determined that its bid was not unreasonably high.

The FAR does not contemplate a review of materials such as those submitted by Kiewit to the agency--subcontractor quotes, or self-serving, but unsupported, claims regarding the reasonableness of a firm's bid or proposal--in connection with an agency's finding of price reasonableness in a sealed bid acquisition. Section 14.408-2 of the FAR permits agencies to use the price analysis techniques found in FAR § 15.404-1(b) as guidelines for determining price reasonableness. Section 15.404-1(b) of the FAR, in turn, outlines a variety of methods for evaluating the question of price reasonableness. While one of those methods involves an agency's review of other than certified cost or pricing data to determine price reasonableness, FAR § 15.404-1(b)(vii), there is no requirement in a sealed bid acquisition, either for a contracting officer to request--or for a bidder to submit--such data.

[3] The record shows that the IGE included approximately $3.6 million for disposal of contaminated soil. AR, exh. 5, IGE, at 13. In comparison, Kiewit's materials claim that it bid approximately $[deleted] for disposal of contaminated soil. Thus, even if, as suggested by Kiewit, the IGE did not include the cost associated with removal of contaminated groundwater, this still would not demonstrate that its significantly higher price was driven by costs associated with removal of contaminated soil or groundwater.

June 13th bid proposal, most of the work required was estimated on a self-perform basis as well as a subcontracted basis. Had KIWC subcontracted more of the work, KIWC's price would have been higher." Supp. Protest, exh. 2, at 3 (emphasis supplied). By Kiewit's own calculations, it saved approximately $[deleted] by not using subcontractors. Id. The record therefore shows that Kiewit's comparatively high price was not driven by the high cost of specialized subcontractors, as speculated by the A-E firm; in fact, Kiewit claims just the opposite.

As to the final possible cause identified by the A-E firm--phasing requirements based on the project's schedule to account for multiple mobilization efforts--the record shows that, while Kiewit claims to have bid a total cost of $[deleted] for mobilization costs associated with plant mobilization and temporary facilities, it identified a cost of just $[deleted] associated with seasonal/staging downtime rent. Supp. Protest, exh. 2, at 4. Even if these costs are considered together, there is no basis for our Office to conclude that Kiewit's high price was driven principally by these costs, as speculated by the A-E firm.

In sum, the record shows that the A-E firm speculated about the possible reasons that the bids received were significantly higher than the IGE. The record shows that, in fact, none of those reasons played a material role in Kiewit's price being much higher than the IGE. We therefore deny this aspect of Kiewit's protest.

Finally Kiewit argues that the converted RFP does not solicit additional information (for example, cost or pricing data) that will assist the agency in determining price reasonableness, and that the agency unreasonably has failed to engage in discussions under the converted RFP. We dismiss these allegations because Kiewit is not an interested party to advance them. To be an interested party, a protester must be an actual or prospective bidder or offeror that has a direct economic interest in the award of a contract, or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Proposals responding to the RFP were due by September 6. Kiewit did not submit a proposal by that deadline. Accordingly, it is not an interested party to advance these allegations.

The protest is denied.

Thomas H. Armstrong
General Counsel