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Decision

Matter of: EA Industries, Inc.

File: B-284078

Date: February 15, 2000

Marc Lamer, Esq., Kostos and Lamer, for the protester.
James J. McCullough, Esq., and Catherine E. Pollack, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Terry Manufacturing, Inc., an intervenor.
Keith Levinson, Esq., Defense Logistics Agency, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester's proposal is found marginally acceptable, four other proposals were rated acceptable, and the agency considered price in its competitive range determination, the contracting agency reasonably excluded the protester's proposal from the competitive range.

DECISION

EA Industries, Inc. protests the exclusion of its proposal from the competitive range for a contract to be awarded under request for proposals (RFP) No. SPO100-99-R-0012, issued by the Defense Logistics Agency, Defense Supply Center Philadelphia, for combat coats.

We deny the protest.

The RFP, as amended, contemplated award of four fixed-price, indefinite-quantity contracts for varying percentages of the projected quantities of combat coats, for 1 year with 4 option years. RFP at 8, 67 and 116. The RFP provided for award to the offeror whose proposal provided the best value to the government, price and other factors considered. RFP at 8. The solicitation established four award scenarios for 35 percent, 30 percent, 20 percent and 15 percent of the total quantity, with a 10-percent price evaluation adjustment for small disadvantaged business concerns (SDB). RFP at 72. Each award scenario was to be evaluated separately and offerors could submit separately priced offers for each award scenario; however, no offeror

was to receive more than one of the four awards. RFP at 8. The award scenario at issue here is for the 15-percent award.¹

The RFP contained nine technical evaluation factors, including past performance, and informed offerors that when combined, all non-price evaluation factors are significantly more important than cost or price. RFP at 5, 133-34. Offerors were advised that the agency intended to evaluate proposals and award a contract without discussions, but reserved the right to conduct discussions if necessary with offerors determined to be in the competitive range. RFP at 116.

The agency received [deleted] proposals for the 15 percent award scenario by the March 26, 1999 extended closing date. Proposals were evaluated by a technical evaluation team, using an adjectival rating scheme of highly acceptable, acceptable, marginally acceptable and unacceptable. RFP at 141-42. Following the evaluation of proposals, [deleted] proposals were determined to be unacceptable and [deleted], including EAI's received an overall marginally acceptable rating. EAI was rated marginally acceptable under the past performance evaluation factor primarily due to a record of late deliveries under prior contracts. Agency Report, Tab 6, Competitive Range Determination, at 6.

The ratings of the relevant proposals, together with their prices, were as follows:

[Deleted]

*These firms are not SDB concerns; therefore, the prices listed are their offered price adjusted by addition of the 10-percent evaluation factor.

Agency Report, Tab 6, Competitive Range Determination, at 3.

After reviewing the evaluation results, the contracting officer determined that discussions would be necessary. Before making a competitive range determination, requests for additional information/clarifications of negative past performance information were made to [deleted], including EAI, whose proposals were rated marginally acceptable under the past performance evaluation factor. Responses were received and evaluated; each offeror's past performance rating remained unchanged. On the basis of this review, the contracting officer established a competitive range consisting of the [deleted] proposals that received an overall technical rating of acceptable. Agency Report, Tab 6, Competitive Range Determination, at 3-4. More specifically, the contracting officer stated as follows:

¹ On September 30, 1999, three separate contracts were awarded without discussions for the 35-percent, 30-percent, and 20-percent award scenarios to American Apparel, Inc., Golden Manufacturing Co., Inc., and D.J. Manufacturing Co., respectively. Agency Report, Tab 6, Competitive Range Determination, at 1-2.

A determination is made to include, in the competitive range, the [deleted] offerors having received an overall Acceptable rating for their technical proposals. In addition, due to the fact that the evaluated prices offered by the [deleted] offerors receiving Marginally Acceptable were comparable to and in some cases lower than some of the Acceptable offerors, a review of the technical effort of these firms was considered.

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A review of the Technical Merit Analysis . . . reveals [deleted] offerors, receiving an overall rating of Acceptable. . . . While the evaluated prices of these [deleted] firms are all higher than the Government's estimated price, it is reasonable to believe that with the commencement of discussions, price reductions can be expected from these [deleted] firms. Therefore, these firms will be in competitive range.

Agency Report, Tab 6, Competitive Range Determination, at 4. EAI was subsequently advised of its exclusion from the competitive range and this protest followed.

EAI contends that the agency's decision to exclude its proposal from the competitive range lacks a rational basis because the contracting officer completely ignored the offerors' prices.² Protester's Comments at 2-3. In this regard, the protester asserts that if the contracting officer had considered relative proposed prices, then the agency should not have excluded EAI's proposal from the competitive range, as its price was below those of three of the competitive range offerors. Protester's Response to Agency's Supplemental Comments at 3.

As noted above, the protester does not challenge the rating assigned to its proposal. Instead, it merely questions whether the agency's competitive range took price into account. Price must be taken into account before a proposal can be excluded from a competitive range, unless the proposal has been found to be technically unacceptable. See SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5; SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33 at 7. While the contracting officer's language (quoted above) is not entirely clear, we read it to mean (and the agency report confirms our understanding in this regard) that the agency

² In its protest, EAI initially also challenged the agency's evaluation of its proposal under the past performance factor. The protester, however, withdrew this protest ground in its comments in response to the agency's explanation of its evaluation determinations. Protester's Comments at 1.

did consider, before making its competitive range determination, the lower prices offered by the marginally acceptable proposals, such as the protester's. Because price was thus considered in the competitive range determination and the agency's conclusions based on that consideration were not unreasonable, we conclude that the record does not support the protester's position.

The protest is denied.

Comptroller General
of the United States