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Decision

Matter of: Metcalf Construction Company, Inc.

File: B-289100

Date: January 14, 2002

Robert J. Symon, Esq., Spriggs & Hollingsworth, for the protester.
Stephen D. Tom, Esq., White & Tom, for Lend Lease Actus, an intervenor.
Richard G. Welsh, Esq., and Ron R. Ashlock, Esq., Naval Facilities Engineering Command, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency did not act improperly in excluding protester's proposal from consideration for award where request for proposals set cost limitation on each line item and protester's price for one line item exceeded the limitation for that item.
 2. Agency was not required to reopen discussions to permit protester to cure defect in pricing introduced in its final proposal revision.
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DECISION

Metcalf Construction Company, Inc., a small business concern located in an historically underutilized business (HUB) zone, protests the rejection of its proposal and the award of a contract to Lend Lease Actus under request for proposals (RFP) No. N62742-00-R-1345, issued by the Department of the Navy for the design and construction of military family housing at the Marine Corps Base in Kaneohe Bay, Hawaii. Metcalf contends that the agency improperly excluded its proposal from consideration for award because its price for one of the RFP's line items was over the budget ceiling specified in the solicitation for that item.

We deny the protest.

The RFP, which contemplated the award of a fixed-price contract, provided for award to the responsible offeror whose proposal was determined to be most advantageous to the government. The solicitation stated that in the evaluation of proposals, technical factors (which consisted of past performance, qualifications and

experience, small business utilization, technical approach, and management plans) would be approximately equal in weight to price.

The solicitation schedule contained three line items relating to three different projects for the design and construction of family housing on the Marine Corps Base. Item 0001, which was to be awarded during fiscal year (FY) 2001, called for the construction of 30 units pursuant to Project H-570; Option 0001, to be exercised during FY 2002, called for the construction of 158 units pursuant to Project H-571; and Option 0002, to be exercised during FY 2003, called for the construction of 24 units pursuant to Projects H-571 and H-563.

The solicitation, as amended, contained the following paragraph relating to price limitations on the various items:

1A.7 INFORMATION CONCERNING COST LIMITATIONS: The budget ceiling for the award of this contract is as follows:

Base Item: \$7,300,000 for Project H-570 (30 units)

Option 0001: \$35,780,000 for Project H-571 (158 units)

Option 0002: \$5,400,000 for Projects H-571 and H-563 (24 units)

Proposals in excess of this amount will not be considered. Offerors should prepare their proposals so as to permit award at a price within the cost limitation.

RFP, as amended by Amendment No. 0007.¹

The solicitation also contained the following paragraph concerning the evaluation of prices:

1B.8 PRICE EVALUATION. Price proposals will be evaluated in accordance with FAR 52.217-5, Evaluation of Options. For award purposes, the price for pre-priced Options 0001 and 0002 will be added to the Item 0001 price. Upon addition of Item 0001, Option 0001 and Option 0002 prices, prices will be evaluated in accordance with FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business concerns.²

¹ Amendment No. 0007 inserted the word "will" in place of the word "may" in line 6.

² Federal Acquisition Regulation (FAR) § 52.219-4 provides in relevant part that where an offer is received from a HUBZone small business concern that has not waived the evaluation preference, other offers will be evaluated by adding a factor of 10 percent to their prices.

RFP, Amendment 0004. After initial proposals had been received, the above section was amended to substitute the word "evaluation" for the word "award" in line 2. RFP, Amendment No. 0008.

Three offerors submitted proposals prior to the May 24 closing date. The agency conducted discussions with, and requested a revised proposal from, each of the three. The technical evaluation board assigned each of the final proposals a technical rating of acceptable. Each of the final proposals complied with each of the line item budget ceilings specified in section 1A.7.

The day after receipt of final proposal revisions (FPR), the agency amended the RFP to incorporate an updated Davis-Bacon Act wage determination and requested a second round of FPRs. Prices received were as follows:

	Budget Ceiling	Lend Lease Actus	Offeror A	Metcalf
Base	\$7,300,000	\$7,300,000	[Deleted]	[Deleted]
1st Option	\$35,780,000	\$34,283,457	[Deleted]	[Deleted]
2nd Option	\$5,400,000	\$5,400,000	[Deleted]	[Deleted]
Total	\$48,480,000	\$46,983,457	[Deleted]	[Deleted]
HUBZone Preference Adjusted Total³		\$51,681,802.70	[Deleted]	

Agency report at 8.

Because Metcalf's final revised price for Option 0002 exceeded the budget ceiling set forth in the RFP, Metcalf's proposal was eliminated from further consideration. The agency subsequently determined that the technical proposals of Lend Lease Actus and Offeror A were essentially equal and selected the former for award based on its lower price. On or about September 28, the agency awarded a contract to Lend Lease Actus.

Metcalf argues that the agency unreasonably eliminated its proposal from further consideration for exceeding the budget ceiling for Option 0002 by [deleted]. The protester maintains that RFP § 1A.7 does not provide for the elimination of a proposal for exceeding the budget ceiling for a single line item; rather, Metcalf argues, it provides for the elimination of a proposal with a total evaluated price in

³ Because Metcalf is a HUBZone small business concern, the prices of the other offerors were increased by 10 percent for evaluation purposes.

excess of the total obtained by adding together the three budget ceilings (i.e., \$48,400,000). The protester contends that the correctness of its interpretation is apparent from the fact that the key language regarding compliance with a budget ceiling is in the singular rather than the plural, i.e., line 6 of section 1A.7 refers to "this amount," rather than "these amounts," and line 7 refers to "the cost limitation," rather than "the cost limitations." Metcalf further argues that one of the other two offerors originally interpreted the language of section 1A.7 in the manner that Metcalf now proposes, and that the agency acknowledged the reasonableness of this interpretation.

While we recognize that the language of section 1A.7 is somewhat confusing, we nonetheless think that the provision is susceptible of only one reasonable interpretation: it imposes a separate budget ceiling on each line item and excludes from consideration any proposal offering a price in excess of any of the budget ceilings. In our view, the only reasonable inference that can be drawn from the separate listing of the budget ceilings for the three line items is that the agency intended to set a separate cost limitation for each line item. Moreover, given that the initial award price will cover the Item 0001 work only, the instruction to offerors to prepare their proposals so as to permit award at a price within the cost limitation makes sense only if the solicitation is interpreted as imposing separate line item cost limitations.

The protester's argument that Offeror A interpreted section 1A.7 in the same manner that Metcalf did—as evidenced by the fact that Offeror A's initial proposal included prices in excess of the budget ceilings for both Item 0001 and option 0002⁴—and that the agency acknowledged the reasonableness of this interpretation, is not supported by the record. The issue Metcalf raises here concerns language in RFP § 1B.8 (quoted above)—not section 1A.7—that subsequently was amended to eliminate any possible misinterpretation regarding the budget ceilings in the RFP. In this regard, the contract specialist noted in her price analysis of initial proposals that Offeror A's prices for Item 0001 and Option 0002 exceeded the stated budget ceilings for those line items, and thus that strict application of section 1A.7 would require rejection of the proposal as nonconforming. The contract specialist further noted, however, that section 1B.8 of the RFP (as then worded) provided that "[f]or award purposes, the price of pre-priced Options 0001 and 0002 will be added to the Item 0001 price," (emphasis added), which, in her view, could be construed as establishing a "total budget ceiling [rather than] an individual line item budget ceiling." Memorandum from Contract Specialist to Source Selection Board, June 4, 2001, ¶ 6. Accordingly, the contract specialist recommended that Offeror A's proposal be included in the competitive range and that the RFP be amended to substitute the word "evaluation"

⁴ In its initial offer, Offeror A proposed a price of [deleted] for Item 0001, which exceeded the budget ceiling of \$7,300,000 set forth in the RFP, and a price of [deleted] for Option 0002, which exceeded the budget limitation of \$5,400,000.

for the word "award" in the foregoing sentence, which was accomplished via Amendment 0008. Thus, there is no basis in the record to conclude either that Offeror A's initial prices reflected that it shared Metcalf's interpretation of RFP § 1A.7, or that the agency found that interpretation reasonable. Further, even assuming that the language in section 1B.8 was the reason that Offeror A submitted prices exceeding the individual budget ceilings, any possible ambiguity in the language was corrected by Amendment 0008, which was issued before Metcalf submitted its FPR containing a price in excess of the ceiling for Option 0002.

Metcalf further argues that the agency should have reopened discussions with it after submission of its FPR to permit it to eliminate the defect in its pricing.

The decision whether to reopen discussions and request a new round of revised proposals is largely within the discretion of the contracting officer. Mine Safety Appliances, Co., B-242379.5, Aug. 6, 1992, 92-2 CPD ¶ 76 at 6. Where an offeror introduces material ambiguities or defects into its proposal in its FPR, it runs the risk that the agency will exercise its discretion not to reopen discussions. Logicon RDA, B-261714.2, Dec. 22, 1995 95-2 CPD ¶ 286 at 5.

Here, we see no evidence that the contracting officer abused her discretion in determining not to reopen discussions with Metcalf. As the agency points out, it had already gone through two rounds of FPRs, and we see no basis to require the reopening of discussions here.

Metcalf also argues that the agency conducted unequal discussions by advising Offeror A that it should review its proposal to ensure that its pricing for each line item did not exceed the specified budget limitation for that line item, while failing to so advise Metcalf.

In discussions here, the agency informed Offeror A of the fact that two of its prices exceeded the applicable budget ceilings. At the time discussions were held, none of Metcalf's prices exceeded the budget ceilings, so there was no reason for the agency to have discussed the ceilings with Metcalf. Contrary to the protester's assertion, the agency did not inform Offeror A of any "conflicting interpretations regarding the application of the budget ceiling." Protester's Comments, Nov. 15, 2001, at 7. Rather, as Metcalf notes, the agency advised Offeror A that its costs should not exceed the budget ceilings established for each project, Agency Report, Tab 18, thereby advising the offeror of the specific deficiency in its proposal by reference to the pertinent provisions of the RFP. In Metcalf's view, the agency's use of the plural—"budget ceilings"—in the discussions letter to Offeror A unfairly communicated the agency's interpretation of the RFP only to that offeror. We disagree. Given that RFP § 1A.7 advised offerors that they had to comply with the individual budget ceilings for each project, there simply was no reason for the agency to reiterate this requirement or otherwise to discuss the budget ceilings during discussions with Metcalf, when its prices were below each of the individual budget ceilings.

Finally, Metcalf argues that the contracting officer should have waived its noncompliance with the RFP's budget ceilings as a minor informality or irregularity. In this regard, Metcalf maintains that the contracting officer could have circumvented the funding limitation on Option 0002 by obtaining additional funding, carrying over funding from one fiscal year to the next, deleting work from the option, or not exercising the option. Protester's Comments, supra, at 10.

An agency may waive compliance with a material solicitation requirement in awarding a contract only if the award will meet the agency's actual needs without prejudice to other offerors. Safety-Kleen (TS), Inc., B-284125, Feb. 23, 2000, 2000 CPD ¶ 30 at 2-3. Here, there is no evidence that the agency has concluded that its needs will be met by an award at a price in excess of the stated budget ceiling for Option 0002. Moreover, either of the other offerors might have altered the pricing in its offer had it been aware that the agency did not intend to enforce the stated cost limitations; accordingly, we have no basis upon which to conclude that other offerors would not be prejudiced by waiver of the cost limitation on Option 0002 for Metcalf.

Because we conclude that the agency had an adequate basis for rejecting Metcalf's proposal for exceeding the cost limitation for Option 0002, we need not address the protester's additional argument that the agency misevaluated its technical proposal.

The protest is denied.

Anthony H. Gamboa
General Counsel