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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Angel Menendez Environmental Services, Inc.

File: B-310340.2

Date: April 11, 2008

A. S. Menendez and Gil Bakshi for the protester.
Phillipa L. Anderson, Esq., Stacey North Willis, Esq., and Charlma Quarles, Esq.,
Department of Veterans Affairs, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of award to firm that submitted lower-rated, lower-priced proposal in negotiated procurement where all technical factors combined were approximately equal in importance to cost is denied where protest is based on an unreasonable interpretation of a solicitation provision (calling for selection of lower-priced proposal if technical proposals are found essentially equal) as prohibiting award to lower-priced offeror if technical proposals are not considered essentially equal.

DECISION

Angel Menendez Environmental Services, Inc. (AMES) protests the award of a contract to Strategic Perspectives Development, LLC under solicitation No. VA-101-07-RP-0030, issued by the Department of Veterans Affairs (VA) for general construction, asbestos abatement, and lead abatement work at the VA Medical Center (VAMC) in San Antonio, Texas. AMES contends that the agency's evaluation and selection of the awardee's proposal were inconsistent with the evaluation scheme provided in the solicitation.

We deny the protest.

The RFP, issued as a service-disabled veteran-owned small business set-aside procurement, sought proposals for the award of a fixed-price contract for construction services, including architectural construction and work on mechanical, electrical, utility, fire alarm, and fire protection systems. RFP at 1. The RFP advised that the evaluation and award would be "made on the basis of both cost and technical considerations most advantageous to the Government . . ." *Id.* at 2-3.

Offerors were advised that the stated technical evaluation factors (construction management, past performance, and schedule, listed in descending order of importance) combined were to be “approximately equal in importance to cost or price.” Id. at 3. The RFP also advised that “if the technical proposals are essentially equal, the award will be made on the basis of lowest cost.” Id. The RFP further provided that cost would be evaluated “on the basis of its realism and acceptability to the Government.” Id.

For the evaluation of technical proposals, under the construction management factor, offerors were to describe project personnel experience and technical/management approach (including a list of all proposed major subcontractors). Id. at 6. The past performance evaluation factor included a subfactor for corporate project experience (regarding recent projects of similar size and scope) and a less important subfactor for client satisfaction (based on past performance reference responses). Id. at 6-8. For the corporate project experience subfactor, the evaluation was to include the offeror’s “experience as a prime contractor, subcontractor or other,” with prime contractor experience being most important. Id. at 3. For the final technical evaluation factor, schedule, the offeror’s proposed schedule was to be evaluated for realism and reasonableness. Id.

As a matter of background, the agency notes that an initial award that had been made under the RFP was terminated after a successful size status protest; that award had been made on the basis of that firm’s higher-rated technical proposal, which also offered a lower price than that offered by AMES. The remaining three technically acceptable proposals were then reevaluated for a new source selection. Strategic’s technical proposal was rated lower than AMES’s proposal and offered a lower price. A third offeror submitted the highest-rated technically acceptable proposal, and also offered a higher price. Having determined that the price premiums involved in selecting either of the two higher-rated proposals were not warranted in light of the acceptable level of technical competence offered in Strategic’s lower-priced proposal, the agency concluded that Strategic’s proposal presented the best value to the agency and made an award to the firm. This protest followed.

In its protest, AMES initially alleged that the agency improperly evaluated Strategic’s past performance; AMES argued that, as a new business, Strategic lacked corporate experience. AMES also argued that the agency failed to conduct a cost realism analysis, and had failed to follow the RFP’s best value evaluation terms by instead awarding the contract to Strategic on the basis of its lower-priced, technically acceptable proposal. In its report on the protest, the agency responded to each of the protester’s allegations. Regarding the evaluation of Strategic’s past performance, the agency’s report explained that, as a new business, the awardee was credited with its personnel’s general construction and management experience, as well as its major subcontractor’s relevant prime contractor experience with similar construction projects at other VAMCs. The agency also contended that no cost realism evaluation was required under the RFP, and that the agency’s price analysis fully supported the reasonableness and realism of the awardee’s proposed price.

The agency also reported that in considering strengths and weaknesses of the technically acceptable proposals, the agency determined that the price premiums associated with both the AMES and the third offeror's higher-rated, higher-priced technical proposals were not warranted given the level of technical competence of the lower-priced Strategic proposal. Although the agency responded to each of the protester's initial protest contentions, AMES failed to rebut the substantive responses in its comments on the agency's report. Since the protester failed to respond to the agency's responses on these issues, we consider them abandoned. Citrus College; KEI Pearson, Inc., B-293543 *et al.*, Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4; MFVega & Assocs., LLC, B-291605.3, Mar. 25, 2003, 2003 CPD ¶ 65 at 4.

Rather, in its comments, AMES contends that award on the basis of Strategic's lower-priced, lower-rated proposal is improper because the record shows that its and the awardee's technical proposals were not technically equal. According to AMES, the solicitation required a finding of technical equality in order to make award to a lower-rated, lower-priced proposal.

As an initial matter, the protester's argument in this regard is untimely, as it is based on information known to the protester as early as when it filed its protest, but was not raised until weeks later in its comments on the agency report. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2007). In any event, the protester's argument is unpersuasive as it reflects an unreasonable interpretation of the RFP. To be reasonable, an interpretation of solicitation language must be consistent with the solicitation when read as a whole and in a manner that gives effect to all of its provisions. Stabro Labs, Inc., B-256921, Aug. 8, 1994, 94-2 CPD ¶ 66 at 4. The protester's interpretation that the RFP does not permit the agency to find that a lower-rated, lower-priced proposal represents the best value to the agency unless the proposals are found to be technically equal, is unreasonable because it renders meaningless the RFP's clear instruction to all offerors that all technical factors combined were to be approximately equal in importance to price.¹ Contrary to the

¹ While AMES, as stated above, has abandoned its initial contention that the agency failed to conduct a proper technical/price tradeoff to support its determination that Strategic's lower-rated, lower-priced offer presented the best value, we note generally that in a negotiated procurement, an agency may properly select a lower-rated, lower-priced proposal where it reasonably concludes that the price premium involved in selecting a higher-rated proposal is not justified in light of the acceptable level of technical competence available at a lower price. Bella Vista Landscaping, Inc., B-291310, Dec. 16, 2002, 2002 CPD ¶ 217 at 4.

protester's position, the solicitation permitted a tradeoff between technical and price factors and did not prohibit an award to an offeror that submitted a lower-rated, lower-priced proposal.²

The protest is denied.

Gary L. Kepplinger
General Counsel

² We also do not find persuasive the protester's suggestion that, since the initial, terminated award under the RFP was made at a higher price to a firm with a proposal rated higher technically than Strategic's or AMES's proposals, the current award to Strategic shows there has been a new emphasis on price by the agency. The basis of the initial, terminated award is irrelevant here as it was based on a separate technical/price tradeoff determination reflecting that offeror's higher technical rating (as it was rated higher technically than both AMES's and Strategic's proposals) at a price higher than Strategic's but lower than AMES's proposed price.