



**G A O**

Accountability \* Integrity \* Reliability

**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

## Decision

**Matter of:** DMS-All Star Joint Venture

**File:** B-310932.6; B-310932.7

**Date:** October 9, 2009

---

John C. Dulske, Esq., Joan Kelley Fowler Gluys, Esq., and Bryan L. Kost, Esq., Dulske & Gluys, P.C., for the protester.

Johnathan M. Bailey, Esq., Bailey & Bailey, P.C., for He & I Construction, Inc., an intervenor.

Cpt. Charles D. Halverson, Department of the Army, for the agency.

Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### **DIGEST**

1. Protest that agency's price evaluation of awardee's low fixed-price was not in accordance with the solicitation criteria is denied where the record shows that the agency reasonably determined that awardee's price was reasonable and realistically reflected the awardee's understanding of the complexity and risk associated with the requirement.

2. Protest that agency failed to conduct meaningful discussions is denied where agency was not required to hold discussions regarding protester's indirect labor rates, or its fuel, maintenance and insurance costs for vehicles, where these rates and costs were not considered a significant weakness or deficiency and did not prevent the protester from having a reasonable opportunity for award.

---

### **DECISION**

DMS-All Star Joint Venture of Salt Lake City, Utah, protests the award of a contract to He & I Construction, Inc. of Lawton, Oklahoma, under request for proposals (RFP) No. W9124J-06-R-0031, issued by the Department of the Army for a broad range of maintenance and repair of real property at Fort Sill, Oklahoma. DMS argues that the agency failed to conduct a reasonable price realism analysis of the awardee's proposal and failed to conduct meaningful discussions with the protester.

We deny the protests.

**BACKGROUND**

The RFP, issued on March 9, 2007, as an 8(a) set-aside, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contract for a base year and four 1-year option periods. The RFP, as amended, provided that the award would be made to the offeror whose proposal was determined to be the best overall value to the government, technical/management approach, past and present performance (risk) evaluation factors and price considered. RFP amend. 2, at 68. The RFP also provided that the technical/management, and past and present performance evaluation factors, when combined, were significantly more important than price.

Offerors were required to submit a fixed-price coefficient multiplier for several areas identified in the RFP. The coefficients proposed by the offerors were to be multiplied by the unit prices in the RS Means (RSM) Facilities Construction Cost Data Book, a trade publication, to calculate a price for individual task orders. The RFP further provided that these coefficients must include, among other items, contractor's and subcontractor's overhead and profit; insurance; all costs associated with bonding; employee payroll taxes, insurance and fringe benefits; business taxes; and sales taxes. The RFP stated that each coefficient would be evaluated to determine cost reasonableness and completeness of the coefficient in terms of the agency's requirement. Id.

The agency received three initial proposals, including those from DMS and He & I. The technical proposals were evaluated by a source selection evaluation board (SSEB); a price realism analysis was performed by the Defense Contract Audit Agency's (DCAA) Financial Liaison Advisor. The DCAA analyst stated that she did not see any price realism issues in the proposals of DMS and Offeror C, but could not comment on the realism of He & I's prices because He & I did not provide the required cost breakdown. Agency Report (AR) Tab 2, DCAA Memo, at 6.

On October 2, 2007, written discussions were held with all three offerors and final proposal revisions (FPR) were received. On October 17, 2007, the DCAA reviewed the revised proposals for accuracy, completeness and price realism, and again indicated that a realism analysis could not be performed for He & I because of the lack of a cost breakdown. AR, Tab 17, Memo from FLA.

After reviewing the evaluation results, the source selection authority (SSA) determined that DMS represented the best value and on November 30, 2007, award was made to DMS. On December 17, He & I protested to our Office. In response, the agency decided to take corrective action, which included establishing a new SSEB, appointing a new SSA, and re-evaluating the FPRs. As a result, our Office dismissed the protest on January 18, 2008.

When the FPRs were re-evaluated DMS received a marginal rating, while He & I received a rating of good. As a result, the Army terminated the contract with DMS

and awarded it to He & I. On July 29, 2008, DMS protested the termination of its contract to our Office. In response, the agency again took corrective action to reevaluate the FPRs, conduct additional discussions and request new FPRs, if necessary, and to make a new selection decision. We subsequently dismissed that protest.

At the conclusion of the second reevaluation, the proposals were rated as follows: DMS, marginal; He & I, good; and Offeror C, satisfactory. Discussions were held with all three offerors and proposal revisions were received on January 8, 2009. According to the contracting officer (CO), DMS made extensive revisions to the technical/management portion of its proposal but did not revise its price, He & I made limited revisions to its technical/management proposal and price proposal; and Offeror C did not revise its proposal. CO's Statement at 5.

The SSEB evaluated the revised proposals and rated DMS and He & I good, and Offeror C satisfactory. On January 28, 2009, FPRs were again requested from all three offerors. None of the offerors made any changes to their January 8 submissions. On February 9, the Army prepared a price evaluation report that analyzed the prices submitted by He & I. AR, Tab 31, Price Evaluation Report, FPRs. The report concluded that He & I's proposed coefficients reflected a pricing strategy of opting for a steady and continuous flow of work and a lower profit margin. In short, the Army concluded that He & I's proposed coefficients were reasonable. *Id.* at 2. The final price proposals submitted by the offerors were as follows:

<b>Contact Line Items (CLINS)</b>	<b>Quantity/Unit of Measure<sup>1</sup></b>	<b>DMS</b>	<b>He &amp; I</b>	<b>Offeror C</b>
		<b>Coefficients</b>	<b>Coefficients</b>	<b>Coefficients</b>
0001-4001AA	\$19,000,000	[DELETED]	1.0000	[DELETED]
0001-4001AB	\$ 5,000	[DELETED]	1.0000	[DELETED]
0001-4001AC	\$ 500,000	[DELETED]	1.1052	[DELETED]
0001-4001AD	\$ 495,000	[DELETED]	1.0000	[DELETED]
<b>Total Base Price</b>		[DELETED]	\$20,052,600	[DELETED]
<b>Total Option Prices</b>		[DELETED]	\$80,210,400	[DELETED]
<b>Total Base + Options</b>		\$102,544,250	\$100,263,000	[DELETED]

<sup>1</sup> Although identified as quantity/unit of measure, this item represents the notional target cost of \$20 million of effort which the RFP provided would be used for evaluation purposes only. RFP at 68.

Id. at 1.

On April 14, DMS was notified that a new award had been made to He & I; after a debriefing DMS filed several protests with our Office. After the Army advised our Office that it again intended to take corrective action, we dismissed those protests.

In its final reevaluation, the Army re-examined each offeror's price proposal. The Army again reviewed all of the price coefficients and attempted to determine whether they were reasonable. AR, Tab 34, Price Evaluation Report. In this regard, the agency attempted to identify the degree of risk associated with each proposal. AR, Tab 36, Price Negotiation Memo at 14.

Specifically the agency noted that He & I's total proposed coefficient of 1.000 for several CLINS offered less of a margin for error than the slightly higher coefficient proposed by DMS, but the agency also concluded that He & I presented significantly less risk on one cost factor and similar amounts of risk on other cost factors. Additionally, the agency concluded that He & I's total coefficient was not significantly lower than the total coefficient of DMS, which further confirmed the agency's conclusion that He & I's pricing was not unrealistic. Id.

Given that DMS and He & I were rated equal in the technical/management evaluation factor and the past performance factor, and given that He & I proposed the lowest coefficient, the agency concluded that He & I represented the best value, and the award was made to He & I.

DMS challenges the award decision on several grounds, including that the agency failed to perform the price realism analysis contemplated by the RFP, and conducted unequal discussions.<sup>2</sup>

## DISCUSSION

### Price Evaluation

The RFP provided that price would be evaluated using price and/or cost analysis techniques to determine the reasonableness and completeness of each offeror's proposed coefficient. RFP, amend. 2, at 68. The RFP stated that the government

---

<sup>2</sup> In its comments on the agency report submitted in response to the protest, DMS withdrew its initial challenge to the evaluation of He & I's past performance, as well as its allegation that the agency conducted a flawed technical evaluation. DMS also withdrew its challenge with respect to He & I's ability to satisfy the limitations on subcontracting requirement. Protester's Comments at 13 and 16.

was interested in proposals that offer value in meeting the requirements, with an acceptable performance risk, at a fair and reasonable price. Id.

Price realism is not ordinarily a consideration in fixed-price contracts, since the risk of performing the contract at the proposed price is borne by the contractor. Here, however, the agency elected to use a price realism review not to evaluate prices, but to assess the risk of poor performance in an offeror's approach and to measure each offeror's understanding of the solicitation's technical requirements. PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381 at 5. The manner in which a price realism analysis is conducted is a matter subject to a contracting agency's sound discretion, which we will not disturb unless it lacks a reasonable basis. OMV Med., Inc., B-281490, Feb. 16, 1999, 99-1 CPD ¶ 38 at 8.

In our view, the agency's price realism analysis was reasonable. DMS's protest is primarily based on its belief that the agency simply compared the proposed coefficients and did not consider He & I's substantial reductions in price over the course of this extended procurement. DMS also contends that He & I's price coefficient does not contain all the elements required by the RFP.

The record shows that the agency specifically determined that each offeror's total proposed coefficients were realistic based on each offeror's understanding of the complexity and risk associated with the requirement. AR, Tab 35, Source Selection Document at 12. In this regard, the price analysis recognized that He & I calculated its coefficient factors using the latest five years of actual historical cost figures derived from 222 actual job order contract projects at Fort Sill, as well as using the 2009 Means Facility Construction Cost Data. AR, Tab 34, Price Evaluation Report, FPR at 3. In fact, the agency specifically found that He & I's proposal actually posed significantly less risk than the other proposals. Id.

To the extent that DMS argues that He & I omitted certain cost elements from its coefficient calculation, DMS's complaint amounts to no more than a challenge to He & I's submission of a below-cost proposal. Such a complaint does not provide a basis for protest as there is no prohibition against an agency's decision to accept a below-cost proposal on a fixed-price contract. Ocean House Builders, B-283057, Sept. 21, 1999, 99-2 CPD ¶ 53 at 6. To the extent DMS is arguing that He & I cannot perform this work at its proposed price, this matter concerns He & I's responsibility. We will not consider protests challenging affirmative determinations of responsibility except under limited, specified exceptions that are not applicable here. 4 C.F.R. § 21.5(c) (2009); T.F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52 at 5. As explained above, the agency specifically determined that He & I's low coefficient did not indicate a lack of understanding of the requirement. On this record, we have no basis to conclude that this determination was unreasonable.

## Meaningful Discussions

DMS next argues that the Army failed to engage in meaningful discussions by neglecting to bring to DMS's attention two pricing issues—one regarding its indirect labor rates, the other regarding its gas, maintenance and insurance costs for vehicles. DMS also contends that the discussions were unequal in that the agency failed to mention to DMS its concerns with DMS's price proposal, but directed He & I to specific deficiencies and areas of concern with respect to He & I's price proposal.

It is a fundamental precept of negotiated procurements that discussions, when held, must be meaningful; that is, discussions may not mislead offerors and must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. Federal Acquisition Regulation (FAR) § 15.306(d); Lockheed Martin Corp., B-293679 et al., May 27, 2004, 2004 CPD ¶ 115 at 7. Based on our review of the record, and for the reasons set forth below, we find that the agency's discussions with the protester were meaningful.

The record shows that the DCAA's initial price evaluation report noted that DMS's indirect salary rates were, on average, [DELETED] percent higher than similar salaries in the same geographical area. AR, Tab 13, June 4, 2007 Price Report, at 3. The DCAA review noted that a lack of exact matches for the labor categories proposed by DMS could account for the differences. Id. In a later price evaluation of DMS's revised proposals, the DCAA noted that DMS's indirect salaries were, on average, [DELETED] % higher than expected. AR, Tab 17, Oct. 17, 2007 Price Report, at 4. With respect to the fuel, maintenance and insurance costs for vehicles, the DCAA review noted—both initially and in subsequent reviews—that DMS's costs for these items appeared to be overstated. AR, Tab 13, June 4, 2007, Price Report, at 5 and Tab 17, Oct. 17, 2007 Price Report, at 7.

The record also shows that the agency did not consider DMS's indirect labor rates or its other non-labor costs (such as fuel, maintenance and insurance costs for vehicles) to be a proposal deficiency or weakness. In fact, as stated above, the contemporaneous evaluation record shows that the agency consistently concluded that DMS's price was reasonable and that DMS demonstrated an understanding of the complexity of the requirement and the associated risks.

Although agencies are required to advise offerors through discussions of significant weaknesses or deficiencies in their proposals, agencies need not inform an offeror that its costs are not as competitive as those of another offeror. SOS Interpreting, Ltd., B-287477.2, May 16, 2001, 2001 CPD ¶ 84 at 3. Accordingly, if an offeror's costs are not so high as to be unreasonable and unacceptable for contract award, the agency may conduct meaningful discussions without raising the issue of the offeror's price. Mechanical Equip. Co., Inc., Highland Eng'g, Inc., Etnyre Int'l, Ltd., Kara Aerospace, Inc., B-292789.2 et al., Dec. 15, 2003, 2004 CPD ¶ 192 at 18.

Notwithstanding DCAA's reports concerning the DMS indirect labor rates and vehicle-related costs, DMS's prices were not evaluated as either unreasonable or unrealistic and, in fact, the record shows that DMS's price was only slightly higher than the awardee's. The agency was not obligated to advise DMS that its proposed prices were slightly higher than the awardee's, and therefore we find that the agency's discussions with DMS were adequate.

Finally, we see no evidence in this record that discussions were misleading. DMS maintains that because He & I lowered its prices over the course of this procurement, the agency must have coached He & I to lower its prices when asking the company for detailed cost breakdown information. The record simply does not support this allegation. Specifically, the record shows that because of He & I's initial failure to provide a detailed cost breakdown, the agency was unable to perform a price realism analysis of He & I's proposed coefficient. The agency simply requested He & I to provide the necessary cost breakdown for each price proponent that supported He & I's proposed coefficient. The agency did not make any specific suggestion concerning the competitiveness of He & I's price proposal but merely advised He & I on the items to be included, such as, materials, direct labor, overhead and profit. The record further shows that all offerors were given the same opportunity to revise every aspect of their proposal, including price. In response, He & I provided the requested information and reduced its proposed price. DMS was given the opportunity to make its proposal more competitive but chose not to do so.<sup>3</sup>

The protests are denied.

Lynn H. Gibson  
Acting General Counsel

---

<sup>3</sup> DMS also argues that He & I does not have the required bonding capacity. Questions regarding an awardee's fulfillment of payment and performance bond requirements, which are to be implemented after contract award, are matters of contract administration, which are not cognizable under our Bid Protest Regulations. Safeguard Maintenance Corp., B-215588.2, Nov. 14, 1984, 84-2 CPD ¶ 532. 4 C.F.R. § 22.5(a).