



Decision

Matter of: Cherokee Painting LLC

File: B-311020.3

Date: January 14, 2009

Melanie Breeden for the protester.

Michael P. Byrne, Esq., Lane & Waterman LLP, for Wind River Construction, an intervenor.

Christopher S. Cole, Esq., Department of the Air Force, for the agency.

Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency should have rejected awardee's proposal for offering unbalanced prices is denied where awardee's price was low overall and agency considered risk of high and low line item prices for contract performance and reasonably determined that awardee's pricing did not pose unacceptable risk to government.

DECISION

Cherokee Painting LLC, of Midwest City, Oklahoma, protests the award of a contract to Wind River Construction, of Lawton, Oklahoma, under request for proposals (RFP) No. FA8101-07-R-0023, issued by the Department of the Air Force for protective coating work at Tinker Air Force Base, Oklahoma. Cherokee (the incumbent contractor) argues that Wind River's pricing was unbalanced and that its proposal should have been rejected on this basis.¹

We deny the protest.

¹ The protester was not represented by counsel who could be admitted to a protective order, and therefore did not have access to source selection sensitive and proprietary information. Accordingly, our discussion in this decision is necessarily general. Our conclusions, however, are based on our review of the entire record.

The RFP, issued on September 27, 2007 as a section 8(a) small business set-aside, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contract for 36 months. The contractor was to provide all labor, materials, and parts for protective coating necessary for maintenance and upkeep of all real property, including, for example, painting fences, swimming pools and water tanks; staining doors, wood walls and trim; sealing or filling brick/concrete; and painting/repairing pavement and crosswalk markings. RFP at 6-62.

Offerors were to submit unit and extended prices for each of 114 contract line items (CLINs) covering the various tasks for the 36-month contract period. In addition to an estimated quantity for each CLIN, the solicitation provided a total estimated price range of between \$5 million and \$10 million. RFP amend. 5, at 2.

The RFP provided for a “best value” award decision using a performance/price tradeoff (PPT). RFP at 115. Under the PPT procedure, proposals would be evaluated for technical acceptability under the technical capability factor (comprised of three subfactors—resources, quality control plan, and project management), and also evaluated under the past performance factor, with a rating of substantial confidence, satisfactory confidence, unknown confidence, or little or no confidence. *Id.* at 118. As relevant here, a rating of substantial confidence indicated that the agency had a high expectation that the offeror would successfully perform the required effort, while a rating of satisfactory confidence indicated that the agency had an expectation that the offeror would successfully perform the required effort. *Id.* The agency would determine which technically acceptable proposal represented the best value by performing a tradeoff of past performance and price, past performance being significantly more important than price. *Id.* at 114-115.

The agency received three proposals, including Cherokee’s and Wind River’s. Initially, only Cherokee’s proposal was determined to be technically acceptable and included in the competitive range. Wind River subsequently challenged its proposal’s elimination from the competitive range in a protest filed in our Office; in response to the protest, the Air Force determined to reevaluate Wind River’s proposal and, if appropriate, include the proposal in the competitive range. Accordingly, we dismissed the protest as academic (B-311020, Jan. 29, 2008). Following the reevaluation, the agency included Wind River’s proposal in the competitive range.

The Air Force conducted discussions with both offerors and issued evaluation notices to both, inquiring as to the variation in their CLIN prices above and below the CLIN prices in the independent government estimate (IGE). Cherokee made no changes to its prices in its final proposal revision; Wind River revised several CLIN prices. Agency Report (AR), Tab 1, Memorandum of Law, at 8.

Cherokee received a past performance rating of substantial confidence and Wind River a rating of satisfactory confidence. AR, Tab 2, Contracting Officer’s (CO) Statement of Facts, at 7. Cherokee’s total price was \$5,815,864.67, and Wind River’s

was \$4,421,905.93. The CO determined that Cherokee's slightly higher performance rating did not offset Wind River's \$1.4 million price advantage, and that Wind River's proposal therefore offered the best value to the government. Id. In this regard, despite remaining variances in certain of Wind River's CLIN prices following discussions, the CO determined that Wind River's pricing did not pose an unacceptable level of risk to the government. Id. The agency made award to Wind River on September 26, 2008 and, after a debriefing, Cherokee filed this protest with our Office.

Noting that Wind River submitted significantly higher prices (than Cherokee's) on 4 CLINs and significantly lower prices on 18, Cherokee asserts that Wind River's proposed CLIN pricing is unbalanced, Protest at 3-8, and poses "a risk to Tinker Air Force Base which could cost the government additional funds during the life of this contract." Protester's Comments at 2. Cherokee concludes that Wind River's proposal should have been rejected.

Unbalanced pricing exists where, despite a proposal's low overall price, individual line item prices are either understated or overstated. Federal Acquisition Regulation (FAR) § 15.404-1(g); Semont Travel, Inc., B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 3. While unbalanced pricing may increase risk to the government, agencies are not required to reject an offer solely because it is unbalanced. FAR § 15.404-1(g)(1). Rather, where an unbalanced offer is received, the contracting officer is required to consider the risks to the government associated with the unbalanced pricing in making the award decision, including the risk that the unbalancing will result in unreasonably high prices for contract performance. FAR § 15.404-1(g)(2). In the context of an ID/IQ contract, as here, a key consideration is the accuracy of the government's quantity estimates; if the estimates are reasonably accurate, then evidence of mathematical unbalancing generally does not present a risk that the government will pay unreasonably high prices for contract performance. Accumark, Inc., B-310814, Feb. 13, 2008, 2008 CPD ¶ 68, at 4.

Cherokee does not challenge the accuracy of the agency's estimated quantities. Moreover, we find nothing in the record to suggest that the agency was concerned about the accuracy of its estimated quantities. Where a protester does not challenge the estimated quantities used in the calculation of total item prices, there is no basis in the record for us to find a risk that the agency will pay unreasonably high prices for the items; it follows that, in such cases, there is no basis for us to object to mathematically unbalanced pricing. See Accumark, Inc., supra, at 4.

In any event, even if the estimates were in question, as noted above, the agency conducted a risk assessment and determined that the risk associated with Wind River's pricing strategy was acceptable. In this regard, the CO analyzed the risk in two ways: by cost comparisons with recent delivery orders and by total maximum cost. AR, Tab 1, Memorandum of Law, at 8. Specifically, the CO compared each CLIN price with the corresponding IGE price and then conducted an analysis of five recent delivery orders under the current contract, which showed that Wind River's

prices would result in a lower cost than the IGE on four of the five. AR, Tab 12, Final Price Competition Memorandum, at 15 (not released to the protester). The CO also assessed the maximum possible liability to the Air Force by comparing the maximum cost under each IGE price with the maximum cost under each of Wind River's CLIN prices. AR, Tab 1, Memorandum of Law, at 8. Other than asserting generally that Wind River's pricing may pose a risk to the agency, Cherokee does not challenge this risk assessment, and we find no basis for questioning it. Thus, to the extent that Wind River's pricing may be viewed as unbalanced, the agency has satisfied the FAR requirement by reasonably determining that the risks of any unbalancing were not significant enough to render its offer unacceptable.

Cherokee also maintains that Wind River improperly priced its offer below the \$5 million price estimate set forth in the solicitation, that Cherokee was not notified of any revised estimated price range for the requirement, and that Cherokee should have received the award on the basis that its past performance was rated higher than Wind River's. The agency responded to these arguments in its report, however, and Cherokee did not rebut the agency's position in its comments on the report. Under these circumstances, we consider these issues abandoned. See Delco Indus. Textile Corp., B-292324, Aug. 8, 2003, 2003, CPD ¶ 141 at 3 n.2.

The protest is denied.

Gary L. Kepplinger
General Counsel