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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: ALJUCAR, LLC

File: B-401249.4

Date: August 17, 2009

Rudy Sutherland for the protester.

William Sullivan, for Sullivan Land Services, Ltd., an intervenor.

Michelle Anderson, Esq., Federal Emergency Management Agency, for the agency.

Paula A. Williams, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that agency deviated from solicitation's stated evaluation scheme in evaluating price proposals is denied where protester failed to show that it was competitively prejudiced by any alleged deviations.

DECISION

ALJUCAR, LLC of Missouri City, Texas, protests the award of contracts to RV Services, LLC (RVS) of New Ulm, Texas, and Sullivan Land Services, Ltd. (SLS) of Galveston, Texas, under request for proposals (RFP) No. HSFE06-09-R-0018. This RFP was issued by the Department of Homeland Security, Federal Emergency Management Agency (FEMA), for maintenance and deactivation services for FEMA-supplied temporary housing units located in 51 counties within the state of Texas. ALJUCAR argues that the agency failed to make awards in accordance with the best value methodology identified in the RFP.

We deny the protest.¹

¹ Our Office did not issue a protective order in connection with this protest because the protester elected not to retain counsel and therefore the protester 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.

As amended, the RFP contemplated award of one or more fixed-priced indefinite-delivery/indefinite-quantity contracts, each for a base year with four 1-year options. RFP amend. 1, at 2. The solicitation provided for award to those offerors whose proposals were the most advantageous to the government, price and other factors (defined in the RFP as technical approach, company experience, and past performance) considered, with the non-price factors, when combined, of equal importance to price. RFP at 29-31.

With regard to price, the focus of this protest, offerors were required to submit unit and extended prices for each contract line item (CLIN) and contract subline item (SCLIN) listed on the amended pricing schedules.² RFP amend. 2, attach. 1. The RFP stated that for price evaluation purposes, the base and option year prices would be added together to arrive at an overall total evaluated price. The RFP also stated that price was to be evaluated for fairness and reasonableness by comparing the offerors' proposed prices to the independent government cost estimate (IGCE) and to the proposed prices of other offerors competing for the requirement. The solicitation stated that prices "are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, installation and deactivation procedures, limitations of seller's liability, quantities ordered, delivery schedule. . ." RFP at 31.

The agency received 34 proposals, including the proposals submitted by ALJUCAR and the two awardees. A source evaluation board (SEB) reviewed and evaluated proposals under each non-price factor, and the contracting officer conducted price evaluations of the offerors' proposals.³ AR exh. 4, Declaration of Contracting Officer (June 5, 2009); AR exh. 5, Source Selection Report. As relevant here, only 13 proposals, including those submitted by the protester and the awardees, were assigned overall consensus ratings of satisfactory under the non-price evaluation factors; the remaining proposals received lower ratings. *Id.* at 9-34.

In evaluating the total prices for each offer, the contracting officer reports that she calculated prices assuming the agency would make only one award, rather than as many as three awards as originally anticipated. Accordingly, she increased the estimated quantities for some CLINs by a factor of three, and deleted, in their

² The solicitation highlighted the fact that all quantities listed on the pricing schedules were "estimates for bidding purposes only" and were based on the number of housing units within the identified counties. RFP at 1; RFP amend. 1, attach. 3, FEMA Map, Number of Units, and County Locations.

³ The SEB used an evaluation scheme of excellent, satisfactory, marginal, and unsatisfactory under the non-price evaluation factors. No proposal received an overall adjectival rating higher than satisfactory. Agency Report (AR) exh. 5, Source Selection Report, at 4.

entirety, certain other CLINs from the base and option years. AR exh. 4, Declaration of Contracting Officer, at 3-4 (June 5, 2009). The contracting officer then compared the total evaluated price for each offeror with the IGCE and with other competing offerors. AR exh. 5, Source Selection Report, at 7-8. As a result of the price analysis, RVS' total evaluated price of \$19,188,689 was the lowest; SLS' was the third lowest at \$28,600,522; and ALJUCAR's was the tenth lowest at \$41,202,640.12.

Among the proposals receiving an overall satisfactory rating for the non-price factors, the SEB recommended award to the lowest-priced offeror, RVS. The agency evaluators considered Offeror A for award--whose proposal was also rated satisfactory overall, and offered the second-lowest total evaluated price--but concluded that Offeror A's proposal posed a potential performance risk because its employees were currently working on other FEMA projects. The agency evaluators next considered SLS, the third lowest-priced offeror with an overall rating of satisfactory. The evaluators noted that although SLS' total price was more than \$500,000 higher than Offeror A's price, SLS's higher price was offset by significant strengths in SLS's proposal under the past performance and company experience factors. AR exh. 5, Source Selection Report, at 7-8; 34-35. At the end of the review, the SEB recommended award to RVS and SLS, in order to cover two separate geographical areas. *Id.* at 34-35.

After reviewing the SEB's recommendations, the source selection authority (SSA) concluded that the proposals submitted by RVS and SLS represented the best value to the government, and award was made to those offerors. AR exh. 6, Source Selection Decision Document, at 2-3. After ALJUCAR's agency-level protest challenging the awards was denied, ALJUCAR protested to our Office.

ALJUCAR in essence, raises three arguments about the selection decision here. First, ALJUCAR argues that the agency improperly abandoned the solicitation's stated scheme for price evaluation when it evaluated prices using different estimates for some CLINS, and eliminating other CLINS from the analysis altogether. In this regard, the protester argues that its pricing strategy was based on the announced evaluation scheme, and contends that if it had known that the agency would deviate from this methodology it would have changed its pricing strategy. Second, ALJUCAR argues that the agency converted this best value procurement to a lowest-priced, technically-acceptable procurement. Finally, ALJUCAR argues that the agency did not do a proper tradeoff consideration before rejecting its higher-priced, and allegedly higher-quality proposal.

With respect to ALJUCAR's contention that the agency improperly changed the estimates in some CLINs (and omitted other CLINs entirely) in performing its price analysis, ALJUCAR is essentially correct. As a general matter, where an agency's award methodology materially changes after a solicitation has been issued, the agency must issue an amendment to notify offerors of the changed ground rules and afford them an opportunity to respond. Federal Acquisition Regulation § 15.206(a); Symetrics Indus., Inc., B-274246.3 et al., Aug. 20, 1997, 97-2 ¶ 59 at 6.

Nonetheless, even if we assume that the contracting officer acted improperly in making changes to the estimated quantities identified in some CLINs, and in removing some of the CLINs entirely from her analysis of price, a protester must demonstrate a reasonable possibility that it was prejudiced by the agency's actions. Specifically, we will not sustain a protest absent a showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Here, ALJUCAR has failed to establish that it was competitively prejudiced. The protester submitted a proposal that was priced approximately \$22,013,951 higher than RVS' and \$12,602,118 higher than SLS' respectively, over the 5-year performance period. In its challenge, ALJUCAR has provided no more than bare statements that if it had been aware of the assumptions used by the agency in performing the price evaluation, it would have changed its pricing strategy. In fact, the protester has neither explained how it would have changed its proposal, nor analyzed the effect of the specific changes that were made in the price evaluation. Protester's Comments at 3. We have reviewed the specific changes and find no basis for concluding that ALJUCAR was harmed by the agency's actions here.

Moreover and significantly, the agency has also recalculated the prices without making the changes in estimated quantities and line items the contracting officer used in her price analysis--i.e., using ALJUCAR's interpretation of the RFP's price evaluation scheme, where the prices for all CLINs for the base and option years are added together to arrive at an overall total price. Under this approach, the record shows that ALJUCAR's evaluated total price would still be significantly higher than either of the other two offerors who received an award. Specifically, the record shows that the protester's price of \$16,196,421 was approximately \$9,102,653 higher than RVS's price and \$5,334,052 higher than SLS's price. AR, exh. 16, Declaration of Contract Specialist (June 4, 2009). On this record, we conclude that ALJUCAR has failed to show that it was competitively prejudiced by the agency's actions here.

With respect to the protester's second contention that the agency improperly converted a best-value procurement, to one conducted on a lowest-priced technically-acceptable basis, the record again does not support this contention. In this regard, the record shows that while the lowest-priced proposal with an overall rating of satisfactory was selected for award, the agency made a trade-off decision between the second- and third-lowest priced offerors considering the comparative technical merit of the two offerors' proposals. Had this procurement been converted in the manner the protester claims, no such trade-off would have been made.

As to the protester's third contention that the agency should have performed a price/technical tradeoff including its proposal, we disagree. Both awardees and ALJUCAR received overall ratings of satisfactory under the non-price evaluation factors. Since the protester's higher-priced proposal was not evaluated as

technically superior to either awardee, the SSA did not have to perform a tradeoff between ALJUCAR's proposal and that of either awardee.⁴

The protest is denied.

Daniel I. Gordon
Acting General Counsel

⁴ There is also evidence in this record to suggest that the protester is not an interested party for purposes of filing this protest because it would not be in line for award even if its protest were sustained. While we did not dismiss on this basis (and took note that the agency conducted a tradeoff between the second- and third-lowest priced proposals with overall ratings of satisfactory), we think the protester's position as the tenth-lowest priced offeror--among the thirteen offerors with overall ratings of satisfactory--suggests that its standing to pursue this protest is, at best, tenuous.