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Decision

Matter of: FCN, Inc.

File: B-408316; B-408316.2

Date: August 19, 2013

William T. Welch, Esq., McMahon, Welch and Learned, PLLC, for the protester.
Clayton S. Marsh, Esq., for RGS Federal, Inc., the intervenor.
Kyle E. Chadwick, Esq., Department of the Army, for the agency.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Under solicitation contemplating the award of a fixed-price contract, protest challenging agency's price realism analysis is denied where the contracting officer reasonably evaluated the awardee's lower price.

DECISION

FCN, Inc., of Rockville, Maryland, protests the award of a contract to RGS Federal, Inc., of Arlington, Virginia, by the Air National Guard (ANG), under request for proposals (RFP) No. W9133L-13-R-0015, for a mass notification system/net-centric alerting system for the ANG. The protester argues that the agency's price realism evaluation of the awardee's low price was unreasonable.

We deny the protest.

BACKGROUND

The agency issued the RFP on February 13, 2013, for the purposes of obtaining a mass notification system. The RFP anticipated the award of a fixed-price contract for a 1-year base period with two 1-year option periods for sustainment support of the system. The RFP provided for award on a best-value basis, considering three non-price evaluation factors as well as price. The non-price evaluation factors were mission capability, past performance, and small business participation. According to the RFP, the mission capability factor was more important than the past performance factor and significantly more important than the small business participation factor; the past performance factor was more important than the small

business participation factor; and the non-price factors, individually and when combined, were more important than the price factor.

Concerning the price factor, as relevant, the RFP indicated that the total contract price would be evaluated for “completeness, accuracy, reasonableness and realism, using the techniques in FAR 15.404-1(b)(2).” RFP at 27. The RFP further provided that:

1) The RFP requires firm-fixed-priced contract line items. A price reasonableness approach will be utilized by the Government to determine that the proposed prices offered are fair and reasonable and that a “buy-in” or unbalanced pricing between CLINs or Option Periods is not occurring. [. . .] Indications of potential underbidding or unbalanced pricing will be reflected in the cost/pricing report and may impact the ratings for non-price factors as such indications may be determined to indicate a lack of understanding of the requirement.

2) The Government will examine price proposals for artificially low unit prices. Offers found to be unreasonably high, unrealistically low (an indication of “buy-in”), or unbalanced, may be considered unacceptable and may be rejected on that basis.

Id. at 28.

The RFP contained a statement of objectives (SOO) detailing the goals and objectives for the required mass notification system. The SOO also set forth certain “considerations” relevant to the offerors. Among these considerations, the SOO provided that “[l]everaging existing resources/capabilities to achieve program objectives could be included in the offeror’s proposal.” Id. at 9.

The agency received seven proposals in response to the RFP, including the proposals of FCN and RGS. After evaluation, the agency concluded FCN, RGS, and one other offer were the highest rated under the non-price evaluation factors. Each of the three offerors received ratings of outstanding under the mission capability factor, substantial confidence/very relevant under the past performance factor, and outstanding under the small business participation factor. FCN debriefing at 2. Concerning price, RGS submitted the lowest price of \$1,316,357.58, while FCN’s price was [DELETED]. Id.

As relevant here, the agency recognized that the primary basis for RGS’ significantly lower price was its proposal of a commercial software product-- IWSAlerts, developed by RGS’ partner, AtHoc, Inc.--for which the United States Air

Force had already purchased sufficient [DELETED].” RGS Technical Proposal at 4. RGS’ proposal provided that, in accordance with the SOO considerations, it would leverage the existing Air Force resources resulting in “[DELETED].” Id.

During the evaluation, the evaluators became concerned about software licensing issues. As a result, the agency requested that the offerors:

provide clarification to confirm that (1) the number of licenses provided in their proposal covers the total ANG population (currently estimated at 108,436) at all times, (2) if costs are figured with the idea that licensing is covered by [government furnished equipment (GFE)]; will the vendor provide in writing and signed by the appropriate government official proof of such claim, and (3) will the vendor assume ALL RISK with licensing issues related to this effort; meaning the ANG will not be charged/billed in any way for additional licensing throughout the life (POP) of this contract; to include Base plus any Option Years beyond the cost/price proposal submitted in response to this solicitation.

Evaluation Questionnaire Response at 4.

RGS responded that “[DELETED].” Id. RGS further provided that “[DELETED].” Id. RGS also confirmed that an appropriate Air Force mass notification system official would verify [DELETED] by later email, and that RGS assumed “ALL RISK” for licensing issues that could arise during the contract. Id. at 5. Finally, RGS attached to its response a copy of the Air Force contract containing the terms of the [DELETED]. As relevant, the contract provides that “[DELETED].” Id. at 24. Based on RGS’ responses, the evaluators concluded that their concerns were resolved and did not impact RGS’ evaluation ratings or demonstrate a lack of understanding.

In the source selection decision (SSD), the contracting officer concluded that RGS’ price proposal was reasonable, realistic, and “appropriate to the technical solutions offered.” SSD at 8. The contracting officer further found that RGS “demonstrate[d] an in-depth understanding of [Air Force] and ANG architecture as well as current policies and procedures.” Id. at 11. In the ultimate trade-off, the contracting officer determined that RGS, FCN, and a third offeror were technically equal, given their identical factor ratings. As such, the contracting officer concluded that “the discriminator became price,” and that there was “no way to justify paying the price premiums for the other two offerors in light of the non-price factor parity.” Id. at 24. ANG notified the unsuccessful offerors of award to RGS on April 23, 2013. FCN requested a debriefing, which ANG delivered on May 6. This protest followed.

DISCUSSION

In its protest, FCN does not challenge the technical evaluations of its own, or RGS', proposal. Rather, FCN's protest is limited to the allegation that ANG failed to reasonably consider the cost realism of RGS' proposal as required by the terms of the RFP. According to FCN, a reasonable price realism analysis would have shown that RGS was improperly "buying in," and that RGS' proposal of existing Air Force software licenses was an unacceptable pricing strategy that made RGS' price artificially low, representing a potentially unacceptable risk to performance. We disagree with FCN's allegations.¹

While agencies are required to perform some sort of price analysis or cost analysis on negotiated contracts to ensure that the agreed-upon price is fair and reasonable, where the award of a fixed-price contract is contemplated, a proposal's price realism is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor. OMV Med., Inc.; Saratoga Med. Ctr., Inc., B-281387 et al., Feb. 3, 1999, 99-1 CPD ¶ 52 at 5. However, an agency may, as here, provide for price realism analysis in the solicitation for such purposes as measuring an offeror's understanding of the solicitation requirements, or to avoid the risk of poor performance from a contractor who is forced to provide services at little or no profit. See The Cube Corp., B-277353, Oct. 2, 1997, 97-2 CPD ¶ 92 at 4; Ameriko, Inc., B-277068, Aug. 29, 1997, 97-2 CPD ¶ 76 at 3. The nature and extent of an agency's price realism analysis are matters within the sound exercise of the agency's discretion. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 5.

Here, FCN's chief assertion is essentially that RGS' proposal of the IWSAlerts software, developed by its partner AtHoc, allowed RGS to offer a "significantly lower price than FCN (and the other competitors in the competitive range)." FCN Comments at 3. According to FCN, the agency failed to reasonably consider the risks associated with RGS' low price, which stemmed from its proposal of IWSAlert software licenses as GFE, where the licenses are maintained under a separate Air Force contract.

¹ FCN also alleges that RGS ignored the RFP's instructions and improperly included cost information in its mission capability proposal. We disagree. The record shows that the cost information in RGS' mission capability proposal was limited to a description of RGS' approach of [DELETED], consistent with the RFP direction to discuss "technical approach" and "business approach," in the mission capability proposal. RFP at 13. We also find the inclusion of this information consistent with the SOO's provisions for "[l]everaging existing resources/capabilities to achieve program objectives." Id. at 9.

The record, however, indicates that the agency specifically considered the underlying issues associated with RGS' software licensing arrangement. As noted above, the agency required offerors to confirm that they maintained sufficient licenses, provide proof of available licenses if proposing licenses as GFE, and assume all risk against the need for additional licenses for the life of the contract. RGS addressed all of these issues in its response. Specifically, RGS represented that it had confirmed [DELETED]. RGS also provided a copy of the relevant language in [DELETED]. RGS also confirmed that it assumed "ALL RISK" for licensing issues that could arise. Upon consideration of this information, the agency concluded that RGS' price was reasonable, realistic, and appropriate to the technical solution proposed.² Further, the agency found that RGS demonstrated an "in-depth understanding" of Air Force and Air National Guard architecture, policies and procedures. On review of this record, we have no basis to conclude that the agency acted unreasonably in its evaluation of the realism of RGS' low price, based on RGS' proposed utilization of existing and available software licenses, previously issued to the Air Force by RGS' partner AtHoc.

The protest is denied.

Susan A. Poling
General Counsel

² FCN alleges that RGS' response to the agency's inquiry requesting proof of availability of software licenses--specifically, an email from the Air Force which was to follow RGS' response--was not received by the agency in time, and that there is no evidence that the Air Force's confirmation statement was reviewed by the agency. The contracting officer, however, states that he did review the statement provided in an email from the Air Force. Contracting Officer Declaration, at 1. Further, the record indicates that the agency received, in RGS' direct response to the inquiry, a signed copy of the [DELETED]. Evaluation Questionnaire Response, at 24.