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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Richen Management, LLC

File: B-409706.3

Date: October 24, 2016

Richard McCue, for the protester.

Lucie J. McDonald, Esq., Department of the Navy, for the agency.

Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency had pre-award intent to modify the scope of work of a contract is denied where there is no basis on this record to conclude that agency had such pre-award intent or that amending the solicitation would have significantly affected the competitive position of the offerors.

DECISION

Richen Management, LLC, of Dover-Foxcroft, Maine, protests modifications of a contract awarded to JDD, Inc., of Cleveland, Ohio, under request for proposals (RFP) No. N40085-13-R-3510, for janitorial services for the Portsmouth Naval Shipyard, Kittery, Maine. The protester asserts that the agency had a pre-award intent to modify the contract and that the modifications to the contract exceeded the scope of the original contract.

We deny the protest.

The RFP, issued on March 28, 2013, for janitorial services and set aside for HUBZone small businesses, contemplated the award of a combination fixed-price and indefinite-delivery/indefinite-quantity (ID/IQ) contract for a term of 1 year with four 1-year options to the firm providing the lowest-priced, technically acceptable offer. RFP at 1, 7. The RFP contained a requirement for performance of janitorial services at two Common Output Levels (COL)--COL 3 and COL 4--with COL 3 being a higher and more costly level of janitorial service than COL 4. Agency Report (AR) at 6.

The RFP required offerors to submit a lump sum price for COLs 3 and COLs 4 and the ID/IQ portion of the contract. RFP at 7. The RFP advised offerors that the price evaluation would be based on the aggregate totals for COLs 3 and COLs 4 and the total IDIQ prices for the base and the option years. Id. The government reserved the right to make award at either COLs 3 or COLs 4. Id.

The agency received proposals from several offerors, including the protester and the awardee; the proposals from both firms were evaluated as technically acceptable. JDD offered the lowest, total evaluated price in accordance with the price evaluation set forth in the RFP. On April 1, 2014, award was made to JDD at a price of \$1,674,241.84--\$1,476,381.84 for the fixed-price work, and \$197,860.00 for the ID/IQ work. AR at 4; see also Protest at 5 citing Notice of Award (noting that the five-year aggregate value of the award was \$8,371,207.40).

Since the issuance of the solicitation in March 2013 and contract award in April 2015, contract modifications have increased the value of the fixed-price portion of the base-year contract from \$1,476,381.84 to \$3,710,358, a difference of \$2,233,976.16. These modifications include adding and deleting services to buildings or areas, adding services to COL 4 requirements, and eventually changing the service from COL 4 to COL 3. AR, Exh. 3, Decl. of Supervisory Contract Specialist at 2.

Richen asserts that the modifications were outside the scope of the original contract, and that therefore the agency was required to cancel the contract and resolicit the services. Protest at 6. Richen also argues that the Navy was aware of the need for future modifications prior to contract award. Id. at 5-6 (asserting that agency knew “well ahead of time” of the need to make “Huge” modifications to the contract). Specifically, the protester argues that the Navy knew at the time of award that it did not intend to use COL 4 services, but instead needed COL 3 services. Id. at 6. The protester asserts that if it had known that the value of the contract would increase as much as it did, and that the agency would use COL 3 instead of COL 4, Richen would have decreased its cleaning rates, especially for COL 4, and made money on the greater volume of work. Response to Agency Request for Dismissal, July 28, 2016, at 2. The protester also asserts that the awardee had knowledge of the upcoming modifications that would increase the value of the contract and that the need for changes to the requirement was “well known to many” around the shipyard. Protest at 7 (asserting that the awardee, but not Richen, had knowledge of the significant changes that would be made to the value of the contract).

The agency asserts that it was not aware of the need to modify the contract at the time of award, that the modifications made were within the scope of the contract, and that Richen, who was not the second lowest-priced offeror in this procurement, has not demonstrated that it was prejudiced by the agency’s actions. AR at 7-8 (noting that “there was more than one offeror that was lower than Richen”).

The Competition in Contracting Act generally requires “full and open competition” in government procurements as obtained through the use of competitive procedures. 41 U.S.C. § 3301. Our Office generally will not review modifications to contracts, because such matters are related to contract administration and are beyond the scope of GAO’s bid protest function. 4 C.F.R. § 21.5(a); MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7. However, the allegation that an agency awarded a contract with the intent to modify the scope of work concerns pre-contract award actions in violation of Federal Acquisition Regulation (FAR) § 15.206(a), which requires that the solicitation be amended, even after receipt of proposals, to reflect the agency’s actual requirements. The appropriate standard in reviewing these pre-contract actions is not whether the subsequent modification is within the scope of the original contract, but whether the changed work could significantly affect the competitive positions of offerors such that the RFP should have been amended. NV Servs., B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64 at 23.

As noted above, the value of the contract has increased, and that increase was driven by two significant changes in requirements. First, modifications 3 and 10 changed service levels from COL 4 to COL 3. AR, Exh. 3, Decl. of Supervisory Contract Specialist at 2. Second, one of the buildings under renovation at the time of contract award--building 174--was returned to use; modification 2 added that building to the contract requirements. Id. Together, those 3 modifications accounted for \$1,821,538 of the \$2,233,976.16 increase in contract value for the base year.

With respect to the change in COL levels, the agency explains that the level is dictated by the Commander, Naval Installations Command, and not the specific shipyard; therefore, the contracting activity had no prior knowledge that the service level would definitively change after award. AR at 8-9. Further, the RFP required offerors to submit fixed prices on both COLs 3 and 4, stated that the agency would evaluate the aggregate of the COLs 3 and 4 pricing, and reserved for the agency the right to award at either COL. Id. at 8. In addition, the agency argues that, based on the prices offered, even if the agency had evaluated offerors only on COL 3 prices for the fixed-price portion of the contract, Richen would still have not been the lowest-priced offeror. See AR, Exh. 3, Decl. of Supervisory Contract Specialist at 4. With respect to the addition of the renovated building to the contract, which also increased the value of the contract, the agency explains that this and other changes are the result of ongoing changes in government spaces that result in both deletion of some services and addition of others. AR at 7.

Here, the record shows that the solicitation adequately advised offerors of the potential for the type of changes that occurred during the course of contract performance (e.g., change from COL 4 to COL 3), and that in the context of the type of work at issue here, the modifications encompass changes which the field of competitors could reasonably have anticipated. The protester fails to provide evidence to support its assertion of any unfair dealing on the part of the agency.

Moreover, the protester asserts that, had it known that the value of the contract would increase, Richen would have lowered its rates and made a profit on the greater volume of work to be performed. Response to Agency Request for Dismissal, July 28, 2016, at 2. However, we generally do not view as persuasive generalized arguments that a protester's price would have been more competitive under an increased requirement as amended, NV Servs., supra, and, absent some evidence in the record to indicate otherwise, in a case such as this where the value of the contract has increased, we may assume that the protester's price would increase proportionately to the other offerors' prices. See Central Texas Coll. Sys., B-215172, Feb. 7, 1985, 85-1 CPD ¶ 153 at 6 (finding no evidence of prejudice where contract increased in value by approximately 67 percent through modifications, because there was nothing in the record to suggest that offerors' prices would have been disparately impacted). Therefore, the record in this case provides no basis on which to sustain this protest. NV Servs., supra.

The protest is denied.

Susan A. Poling
General Counsel