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Decision

Matter of: Wall Colmonoy Corporation

File: B-413320; B-413322

Date: October 3, 2016

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Gregory A. Harding, Esq., Lt. Col. C. Taylor Smith, and Lt. Col. Damund E. Williams, Department of the Air Force, for the agency.

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DIGEST

Agency properly canceled solicitation set aside for small businesses where the agency reasonably determined that the offerors' prices were unreasonably high.

DECISION

Wall Colmonoy Corporation (WCC), a small business of Madison Heights, Michigan, protests the decision by the Department of the Air Force to cancel request for proposals (RFP) No. FA8118-16-R-0030 and resolicit for the remanufacture of F-16 heat exchangers. The protester contends that the agency lacked a reasonable basis for canceling the solicitation.

We deny the protest.

BACKGROUND

On February 29, 2016, the Air Force issued the RFP as a small business set-aside seeking proposals for the remanufacture of approximately 80 heat exchangers per year on a fixed-price basis for a base year and four 1-year option periods.¹ RFP at § B. The RFP explained that remanufacturing the heat exchangers included

¹ The solicitation was issued pursuant to Federal Acquisition Regulation (FAR) part 15 procedures. RFP at § M.1.1.2.

cleaning, disassembling, component inspecting, assembling, and “test[ing] according to applicable TOs [technical orders] and OEM [original equipment manufacturer] specifications.” Agency Report (AR), Tab 7, Statement of Work (SOW), at 13. Award would be made to the firm submitting the lowest-priced, technically acceptable offer. RFP at § M.1.1. The RFP also provided that, among other things, prices would be evaluated for reasonableness and realism. RFP at § M.2.3.

Prior to issuing the solicitation, the agency conducted market research to determine whether the procurement should be set aside for small businesses. The agency’s research found that there were two approved sources that were also small businesses, and that both sources were likely to submit proposals. AR, Tab 5, Market Research, at 2. Based on this market research, the procurement was set aside for small businesses. Id. The due date for receipt of proposals was March 30, 2016.

Two offerors, WCC and the other approved small business, submitted proposals by the due date. Contracting Officer’s (CO) Statement at 3. WCC’s proposed price of \$17,426 per unit was \$5,426 per unit higher than the Independent Government Estimate (IGE), and \$5,490 higher than the previous contract to procure these items. Id. at 4. The other small business submitted a unit price of \$29,950. Id. at 4.

After receiving the proposals, the CO determined that there had been no changes in the underlying requirement that might explain the higher prices. CO Statement at 4. The CO compared the offered prices with the prices received for this item in previous years. The CO noted that the agency had procured these services in August 2008, from a small business at a price of \$8,882 per unit, and then procured these services again in 2012 from the same firm (which had then become a large business) at a price of \$11,936 per unit. Id. at 7.

The agency decided to conduct discussions with the two offerors. Each firm was sent an evaluation notice (EN) stating that the firm’s “proposed unit prices are significantly higher than anticipated by the Government when compared to the Independent Government Estimate.” AR, Tab 12, Evaluation Notice; Tab 13, Evaluation Notice. The offerors were further informed that they should review their prices, and, if prices were incorrect, they were to provide both corrected prices and an explanation of the revised prices. If prices were correct, they were to verify the prices and provide “a complete explanation to justify how the price was developed.” Id.

In response to the EN, WCC asked the CO two questions. Protester Comments, exh. A, at 1-3. First, WCC asked what an IGE was, and whether the agency had come up with its own estimate based on the SOW, or whether the government had asked a third party to come up with an estimate based on the SOW. Id. Second, WCC asked “Does the workscope used for the IGE include full performance testing

of the F-16 Primary/Secondary Heat Exchanger, after the re-core process has been completed?” Id. According to the protester, WCC asked the second question because “the Solicitation was unclear as to whether ‘performance’ testing was part of the required testing.” Protester’s Comments at 3.

The CO responded that the IGE was created by the agency using both the contract history for the item and market research for the manufacturing process. In response to the protester’s second question, the agency responded “Yes. Testing will be conducted during an IPE [Initial Production Evaluation].”² Id.

On May 5, the offerors responded to the EN. WCC stated that it had found a mistake in its proposed price, explained the origin of its mistake, and submitted a revised price of \$15,950 per unit. AR, Tab 15, at 2. The other small business offeror did not lower its price. AR, Tab 19, at 1.

The agency decided to issue a second round of ENs to the offerors. Both firms were sent an EN stating that the government had reviewed its response, that its response lacked “a detailed explanation . . . for the proposed unit prices being significantly higher than anticipated by the Government when compared to the independent government estimate,” and that the offeror should provide both a basis of estimate (BOE) for its unit price and a “complete explanation to justify how the price was developed.” AR, Tab 17, EN; Tab 18, EN.

On May 23, WCC responded to the second EN. WCC provided a breakdown of its price of \$15,950 per unit, which included [DELETED] for “unit performance testing.” AR, Tab 20, at 1. WCC explained that this testing was “outside processing cost for conducting a performance test of an overhauled” heat exchanger. Id. The other small business, which again did not lower its price, provided a narrative explanation of its pricing. AR, Tab 19, at 1-3.

Shortly after submitting its response to the second EN, WCC emailed the agency and requested an update on proposal evaluations. Protester’s Comments, exh.C. The CO responded on May 31 that she was waiting on an internal clarification regarding the IGE. Id. In an email reply that same day, WCC thanked the agency for the update and asked if the agency would

please consider a face-to-face meeting, in order to discuss any questions/clarifications regarding our proposal and BOE as compared to the IGE? I believe it would be helpful if the two parties could meet,

² The SOW stated that IPE testing was to be completed on two units of each line item within 60 days of the issuance of a delivery order, and that remanufacture of the remaining units could not begin until the testing was successfully completed. AR, Tab 7, SOW, at 7.

in order to have an open back and forth discussion, in an effort to resolve any lingering questions.

Protester's Comments, exh. C, at 1.³ The protester explains that it requested the face-to-face meeting because it "still wanted to discuss the issue of whether the work covered performance testing." Protester's Comments at 3.

Following the second round of ENs, the agency conducted an analysis of the offerors' prices. The agency found that WCC's price of \$15,950 per unit was 25 percent higher than the IGE for these items, and this would result in an additional cost of \$1,580,216 over the life of the contract. CO Statement at 10. The agency also noted that the other small business offeror had proposed a unit price of \$29,500 per unit. AR, Tab 21, Memo to File, June 15, 2016.

The CO concluded that award could not be made at a reasonable price. Id. Therefore, the CO determined that the solicitation should be canceled and reissued to allow for greater price competition.⁴ Id. On June 20, 2016, the CO canceled solicitation No. FA8118-16-R-0030 and, the next day, resolicited the requirement on an unrestricted basis under solicitation No. FA8118-16-R-0077. CO Statement at 6. Except for removing the small business set-aside, the new solicitation was essentially identical to the previous solicitation, including identical SOWs. CO Statement at 6; AR, Tab 9, Solicitation No. FA8118-16-R-0030; AR, Tab 23, Solicitation No. FA8118-16-R-0077.

On June 23, WCC emailed the CO. WCC noted that the SOW for solicitation No. FA8118-16-R-0077 did not include any instructions for "performance testing." WCC asked for "written confirmation" that the agency was not requiring performance testing under this solicitation. Protester's Comments, exh. B. The CO responded that the protester was correct "with the one exception that performance testing may be required during an IPE. Performance testing will not be required for 100%." Id. WCC submitted a proposal with a unit price of \$12,974. Protester's Comments at 5.

On June 28, WCC filed two protests with our Office: one protest challenging the agency's decision to cancel solicitation No. FA8118-16-R-0030 (B-413322), and one protest challenging the agency's failure to set aside solicitation No. FA8118-16-R-0077 for small businesses (B-413320).

³ The record does not contain any agency response to WCC's email.

⁴ The small business representative concurred with the CO's determination. AR, Tab 22, Small Business Coordination Record.

DISCUSSION

The protester primarily argues that the agency's decision to cancel solicitation No. FA8118-16-R-0030 was unreasonable because the agency failed to provide WCC with meaningful discussions. Specifically, WCC maintains that the agency failed to respond to the protester's inquiries about performance testing, and that, had the agency properly informed WCC that such testing was not required, WCC would have submitted a lower price during discussions for solicitation No. FA8118-16-R-0030. In support of this, WCC points to the lower price it submitted in response to solicitation No. FA8118-16-R-0077.

In negotiated procurements, whenever discussions are conducted by an agency, they are required to be meaningful, equitable, and not misleading. Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 19. It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8; Spherix, Inc., B-294572, B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3 at 13.

Here, the agency initially viewed WCC's proposed prices as "significantly higher than anticipated." AR, Tab 13, EN, at 1. Even after WCC lowered its proposed price following the first round of ENs, WCC was again informed that the agency viewed its price as "being significantly higher than anticipated." AR, Tab 18, EN, at 1. The record establishes that the agency engaged in multiple rounds of discussions with WCC, repeatedly advising WCC that its unit price was too high. Thereafter, the agency canceled the solicitation because it concluded that the offerors' prices were unreasonably high. On this record, WCC's complaints regarding the agency's discussions provide no basis for sustaining the protest because the agency properly informed WCC of its high price and gave WCC an opportunity to enhance its proposal in this regard.

With regard to the protester's contention that discussions were not meaningful because the agency failed to clearly inform WCC that performance testing was not required under this procurement, we find that this argument is an untimely challenge to the terms of the solicitation. The essence of WCC's allegation is that the agency failed to provide the firm with sufficient information to allow WCC to properly price its proposal. That is, WCC viewed the solicitation as unclear as to whether full performance testing was required, and WCC viewed the agency's answers to its questions as insufficient to resolve the ambiguity.⁵ Under these circumstances,

⁵ The agency does not concede that the solicitation contained any ambiguity, either on its face or otherwise. Supp. Legal Memorandum, at 5-6.

where the protester believes the solicitation is unclear on its face as to what is required, the protester is required to challenge the terms of the solicitation prior to closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1); See Harmonia Holdings Group, LLC, B-410633, B-410633.2, Jan. 20, 2015, 2015 CPD ¶ 46 at 8 n.4. To the extent the protester is asserting that the agency failed to answer its questions during discussions, which left the firm unsure as to what was required, it is incumbent upon the protester to challenge any alleged ambiguity created by the agency's response prior to the next closing time for receipt of proposals.⁶ See Harrington, Moran, Barksdale, Inc., B-401934.2, B-401934.3, Sept. 10, 2010, 2010 CPD ¶ 231 at 5.

Finally, the protester argues that solicitation No. FA8118-16-R-0077 should be set aside for small businesses. Under FAR § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000 must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and award will be made at a fair market price. Given that the agency canceled solicitation No. FA8118-16-R-0030 because the agency concluded that it was unable to make an award at a fair market price, we find nothing improper with the contracting officer's decision to not set aside solicitation No. FA8118-16-R-0077 for the same requirements. See Information Ventures, Inc., B-400604, Dec. 22, 2008, 2008 CPD ¶ 232 at 3 (a decision whether to set aside a procurement is a matter of business

⁶ In its final comments, WCC argues for the first time that the agency's responses during discussions misled the protester into believing that performance testing was required. The protester's new argument on this issue, however, could have been made in its initial protest. Because the protester failed to raise this protest ground in its initial protest, the allegation is untimely. 4 C.F.R. § 21.2(a)(2) (requiring protest issues be filed within 10 days after the basis is known or should have been known); see Lanmark Tech., Inc., B-410214.3, Mar. 20, 2015, 2015 CPD ¶ 139 at 5 n.2 (piecemeal presentation of protest grounds, raised for the first time in comments, are untimely). In any case, there is no merit to the protester's allegation, as the agency's response during discussions stated that performance testing was required during the IPE phase of the procurement, and the agency did not state that performance testing was required for every heat exchanger.

judgement within the CO's discretion such that our review generally is limited to ascertaining whether that official abused his or her discretion).

The protest is denied.

Susan A. Poling
General Counsel