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Decision

Matter of: U.S. Electroynamics, Inc.

File: B-414678

Date: August 1, 2017

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DIGEST

Protest challenging the agency's price evaluation and source selection decision is denied where the agency evaluated price proposals and made its source selection decision in accordance with the solicitation and procurement statutes and regulations.

DECISION

U.S. Electroynamics, Inc. (USEI), a service-disabled veteran-owned small business of Brewster, Washington, protests the decision not to award USEI a contract under request for proposals (RFP) No. QTA0015SDA4003, issued by the General Services Administration (GSA) for complex commercial satellite communication service solutions. The protester contends that the agency improperly evaluated its price proposal using unstated evaluation criteria and performed a disparate and unequal evaluation. The protester further contends that the source selection authority (SSA) failed to exercise independent judgment and perform a comparative assessment during source selection, in violation of Federal Acquisition Regulation (FAR) § 15.308.

We deny the protest.

BACKGROUND

The RFP, issued on December 29, 2015, contemplated the award of multiple indefinite-delivery, indefinite-quantity (IDIQ) fixed-price contracts with a potential 10.5 year period of performance, consisting of a 5-year base period, a 3-year first option period, a 2-year second option period, and a 6-month option period authorized by FAR clause 52.217-8.¹ Agency Report (AR), Tab 2, RFP, at B-2 to B-4. The agency issued the solicitation as a follow-on procurement to provide contract vehicles for complex commercial satellite communications services for the Federal government, including the Department of Defense and civilian agencies.² COS at 1.

Offerors were required to submit five proposal volumes: (1) general; (2) technical; (3) past performance; (4) management; and (5) price. RFP at L-10. Each offeror was required to provide a technical proposal illustrating its approach to satisfying the requirements of the following three sample task orders: (1) contingency satellite communications system and services; (2) environmental data network; and (3) base communications network for Ouargla, Algeria. *Id.* at L-17. Offerors were required to propose fixed prices for only the first two sample tasks. *Id.* at L-21. For each of these sample tasks, the RFP required offerors to complete an Excel spreadsheet providing cost detail worksheets; the RFP was amended to also require, during final proposal revisions, a narrative providing a detailed basis of estimate that identified individual cost elements and how they add up to the overall system price. *Id.* at L-22; see also RFP § J, attachs. J-9, J-11a, and J-11b.

Regarding evaluation of the technical, past performance, and management factors, the RFP included detailed evaluation criteria and provided for the following adjectival ratings to be assigned: outstanding, good, acceptable, marginal, unacceptable, and neutral (for past performance). See RFP at M-5 to M-20. Regarding price, the RFP provided that the government would perform a price analysis on the proposed prices for sample tasks 1 and 2 to ensure fair and reasonable prices. RFP at M-3. The RFP stated:

In addition to price analysis, the Government will perform a variety of proposal evaluation techniques in accordance with FAR Part 15.404 to ensure fair and reasonable prices, including evaluation for unbalanced pricing. Prices that are determined to be not fair and reasonable will not

¹ The RFP was amended 17 times over the course of the procurement. Although the agency did not produce a conformed copy of the RFP, our citations nevertheless refer to the RFP as amended, rather than to individual RFP amendments.

² Pursuant to a memorandum of agreement between GSA and the Defense Information Systems Agency (DISA) signed in July 2009, GSA provides contracting and acquisition support and DISA provides technical and acquisition support to develop contract vehicles for satellite services across the Federal government. Contracting Officer's Statement (COS) at 1.

be accepted by the Government. The Government may reject any offer that is materially unbalanced in pricing such that the proposal is deemed to reflect an inherent lack of competence or failure to comprehend the complexity and risks of the program.

Id. The RFP further advised:

The Government may determine that an offer is unacceptable if the prices are significantly unbalanced. Offerors are cautioned against submitting an offer that contains unbalanced pricing. Unbalanced pricing may increase performance risk and could result in payment of unreasonably high prices. Unbalanced pricing exists when, despite an acceptable proposal, the price of one or more items is significantly over or understated as indicated by the application of price analysis techniques. The Government reserves the right to analyze offers to determine whether they are unbalanced with respect to separately priced items.

Proposed prices will be compared with prices of other Offerors. If that comparison is not sufficient to establish fair and reasonableness, proposed prices will be compared to other Government and commercial prices for similar tasks. If both of those are insufficient, proposed prices will be compared to the independent Government cost estimate (IGCE) for each sample task.

Id. at M-21. The RFP stated that the government would determine if prices were reasonable and complete, and reserved the right, but would not be obligated, to review prices for realism. Id. at M-20.

The RFP further stated that the basis for the selection decision would not be lowest-priced, technically-acceptable or a tradeoff. Instead, the agency would select the highest technically rated offers with a fair and reasonable price. RFP at M-1. The number of awards made would be within the sole discretion of the government; however, two or more awards would be reserved for small businesses. Id. at M-1.

The agency received twenty-four proposals by the February 29, 2016, due date. COS at 3. After the initial evaluation of proposals, the agency established a competitive range, which included USEI, and conducted discussions with offerors. Id. Discussions concluded on December 5, and a common cut-off date of December 19 was set for final proposal revisions. Id. at 4.

After reviewing USEI's final price proposal, the agency determined that there was a discrepancy between the prices reflected in the Excel spreadsheet and the basis of estimate submitted for sample task 2. COS at 5. The contracting officer sent a clarification question to USEI on January 26, 2017, stating that the government was unable to evaluate the task order 2 price proposal due to the conflicting price information. AR, Tab 28, USEI Clarifications, at 1. The contracting officer requested

that USEI clarify whether the government should evaluate the pricing proposed in the Excel spreadsheet or the basis of estimate. Id. The contracting officer specifically advised that the government would evaluate only one price proposal and that: “The Government is not initiating discussions and therefore will not consider any new information that you submit now.” Id. at 1-2.

On January 27, USEI responded that the proposed price submitted in the Excel spreadsheet was the correct price for the agency to evaluate and that the basis of estimate provided with the USEI final proposal revision was incorrect, and therefore USEI provided the correct basis of estimate as an attachment. AR, Tab 28, USEI Clarifications, at 3. Thereafter, the contracting officer advised USEI again that “the Government is not initiating discussions and therefore will not consider any new information that you submit, which includes the attachment you provided in your clarification response [dated] January 27, 2017.” Id. at 7.

In its final evaluation of the USEI proposal, the agency assigned ratings of outstanding to USEI under the technical, past performance, and management factors, and assigned an overall technical rating of outstanding. AR, Tab 29, USEI Evaluation Report, at 1; Tab 32, Price Negotiation Memorandum, at 11. However, under the price factor, the agency determined that USEI’s price for sample task 2 was not fair and reasonable, and stated “USEI is ineligible and therefore not recommended for award.” AR, Tab 29, USEI Evaluation Report, at 1; see also Tab 32, Price Negotiation Memorandum, at 46.

All offerors received overall technical ratings of good or outstanding. AR, Tab 33, Award Decision, at 2-3. The contracting officer, who also served as the SSA, selected 20 of the 24 offers in the competitive range for award. Id. at 15. On April 28, the contracting officer issued post-award notifications to competitive range offerors that were not selected for award. COS at 9; AR, Tab 34, USEI Post-Award Notification. USEI requested a debriefing, which was provided on May 4. See AR, Tab 36, USEI Post-Award Debriefing Script. This protest followed.

DISCUSSION

The protester raises a variety of arguments to support its contention that the agency improperly and unreasonably concluded that its proposed price for sample task 2 was not fair and reasonable. USEI additionally argues that the SSA violated FAR § 15.308 by failing to exercise independent judgment and perform a comparative assessment to determine whether an award should be made to USEI. Comments & Supp. Protest at 42-44. While we do not specifically address all of the arguments raised by USEI, we have considered all of them and find none provide a basis to sustain the protest.

Price Evaluation

USEI contends that the agency’s price evaluation treated USEI in an unreasonable, unequal and disparate manner. Protest at 14-17. The agency argues that its evaluation was reasonable and in accordance with the solicitation. COS at 6-7.

The manner and depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion, and we will not disturb such an analysis unless it lacks a reasonable basis. Gentex Corp.--Western Operations, B-291793 et al., Mar 25, 2003, 2003 CPD ¶ 66 at 27-28. It is up to the agency to decide upon the appropriate method for evaluation of cost or price in a given procurement, although the agency must use an evaluation method that provides a basis for a reasonable assessment of the cost of performance under the competing proposals. S. J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73 at 3. In reviewing a protest against the propriety of an evaluation, we will review an evaluation to ensure that it was reasonable and consistent with the evaluation criteria in the solicitation and applicable procurement statutes and regulations. Decisive Analytics Corp., B-410950.2, B-410950.3, June 22, 2015, 2015 CPD ¶ 187 at 11.

USEI contends that the agency's evaluation of prices was improper because the comparison of offerors' proposed pricing to other offerors' proposed pricing, and to the IGCE, failed to take into account each offeror's unique technical approach and was insufficient to determine that prices were unreasonable and unbalanced. Protest at 15-16. USEI also argues that it was meaningless and contrary to the RFP for the agency to employ a standard deviation analysis, and that the use of a standard deviation analysis amounted to application of an unstated evaluation criterion. Id. at 16.

The agency explains that although offerors proposed varied solutions, the price proposal instructions for the sample task orders set forth the same set of requirements to allow the government to fairly evaluate the prices. COS at 6. To evaluate proposed prices, the agency compared all offerors' overall system pricing to determine whether prices were fair and reasonable, and further compared offerors' prices to the historical prices paid, and to the IGCE, to determine whether the prices were fair and reasonable. Id. The agency performed this same analysis for offerors' line item pricing to determine if proposed prices were significantly unbalanced; an individual line item was considered significantly unbalanced if it was 30 percent above or below the mean price for the line item. Id. The agency further explains that despite the discrepancy in pricing between USEI's Excel spreadsheet for sample task 2 and the figures in the basis of estimate provided with USEI's final proposal revision, the agency reviewed the basis of estimate submitted with the final proposal revision, along with pricing information found elsewhere in USEI's proposal, to determine if the pricing was fair and reasonable. Id. at 7.

As a general matter, when awarding a fixed-price contract, an agency is only required to determine whether the offered prices are fair and reasonable. FAR § 15.402(a). An agency may use various price analysis techniques and procedures to ensure a fair and reasonable price, including a comparison of proposed prices received, of historical prices paid, or a comparison with the IGCE. Id. § 15.404-1(b)(2). An agency's concern in making a price reasonableness determination focuses on whether the offered prices are too high, rather than too low. Vital Link, Inc., B-405123, Aug. 26, 2011, 2011 CPD ¶ 233 at 6.

In addition, contracting officers may also evaluate unbalanced pricing to determine if it increases performance risk and could result in the payment of unreasonably high prices. FAR § 15.404-1(g)(1). With respect to unbalanced pricing generally, contracting officers must analyze offers with separately-priced line items or subline items, to detect unbalancing. Id. § 15.404-1(g)(2). Where unbalancing is detected, the contracting officer must then consider the risk posed, including the risk of paying an unreasonable price, and must consider whether to reject the offer if the risk is unreasonable. Id. § 15.404-1(g)(2)-(3). While both understated and overstated prices are relevant to the question of whether unbalanced pricing exists, the primary risk to be assessed in an unbalanced pricing context is the risk posed by overstatement of prices. Crown Point Systems, B-413940, B-413940.2, Jan. 11, 2017, 2017 CPD ¶ 19 at 5.

As noted, offerors were allowed to propose unique technical solutions. Nonetheless, the awards in this procurement were based on the evaluation of fixed prices proposed for sample tasks 1 and 2. Therefore, although offerors could propose varied technical solutions, for purposes of price evaluation, the RFP required offerors to submit their pricing for the sample tasks using Excel spreadsheets that set forth the same set of requirements to allow the government to fairly evaluate proposed prices. RFP at L-22.

In addition, the RFP explicitly disclosed that proposed prices would be compared to other offers, other government and commercial prices, and the IGCE to determine whether they were fair and reasonable. RFP at M-21. The RFP also explicitly disclosed that the agency would employ price analysis techniques to determine if an offeror's proposed pricing was unbalanced, and could determine that an offer is unacceptable if its prices were significantly unbalanced. Id. at M-3, M-21. The record reflects that the agency's price evaluation was performed precisely as set forth in the solicitation; the agency compared offerors' proposed prices to each other and the IGCE, and utilized a standard deviation methodology to perform this comparison. AR, Tab 32, Price Negotiation Memorandum, at 3-4. Further, to determine whether pricing was unbalanced, the agency similarly compared offerors' line item pricing. Id. at 4.

The agency determined that USEI's pricing for sample task 1 was unbalanced, but concluded that the proposed price for sample task 1 posed an acceptable risk to the government because the overall price was fair and reasonable. AR, Tab 29, USEI Evaluation Report, at 72-73; Tab 32, Price Negotiation Memorandum, at 46. However, the agency determined that USEI's proposed price for sample task 2 was not fair and reasonable; for this sample task USEI's proposed price was [DELETED] percent above the upper bound of one standard deviation of the mean of all offerors, and [DELETED] percent higher than the IGCE. AR, Tab 29, USEI Evaluation Report, at 72; Tab 32, Price Negotiation Memorandum, at 46. The agency determined that pricing under sample task 2 was unbalanced, and in particular, prices for [DELETED] line items were between two and four times higher than the mean prices for those line items proposed by all offerors. AR, Tab 29, USEI Evaluation Report, at 73, 76-78; Tab 32, Price Negotiation Memorandum, at 46. Therefore, the agency determined USEI's price proposal was not fair and reasonable because its overall price for sample task 2 was

significantly higher when compared to other offers and the IGCE. AR, Tab 29, USEI Evaluation Report, at 72; Tab 32, Price Negotiation Memorandum, at 46. On this record, we find that the evaluation of USEI's price proposal was reasonable.

We also find nothing objectionable in the agency's utilization of a standard deviation methodology to evaluate proposed prices. Although USEI argues that the agency's use of the standard deviation methodology here amounted to application of an unstated evaluation criterion, there is no requirement that an agency disclose in its RFP an intent to use a standard deviation methodology. In using the standard deviation here, the agency was comparing proposed prices received—it calculated the mean for each line item using the offerors' proposed prices and then used a standard deviation of that mean as a guideline to quantify the amount of variation of an offeror's prices as compared to the mean. The FAR affords contracting officers the discretion to determine which techniques to employ when evaluating price. FAR § 15.404-1(b)(3); S. J. Thomas Co., Inc., supra.

Next, USEI argues that it was unreasonable for the agency not to consider either its incorrect basis of estimate submitted with its final proposal revision or the corrected basis of estimate provided in response to the contracting officer's clarification question. The protester also contends that the agency's failure to consider either basis of estimate constitutes unfair and unequal treatment since the agency considered the basis of estimate information submitted by other offerors. Protest at 17-18; Comments & Supp. Protest at 39-41. The agency argues that it did not conduct discussions with any offerors after receipt of final proposal revisions, and it properly did not consider the corrected basis of estimate provided by USEI in response to the contracting officer's clarification question because to do so would have amounted to discussions with USEI. Memorandum of Law (MOL) at 9; COS at 9. The agency further argues that it was not unfair or unequal treatment to consider the basis of estimate information submitted by other offerors to evaluate their proposed prices, and that USEI was responsible for adequately explaining its significantly higher price. MOL at 12-15.

We find no merit in the protester's argument that the agency performed a disparate price evaluation by failing to consider the corrected basis of estimate submitted by USEI in response to the contracting officer's clarification question. As an initial matter, we agree with the agency that if it had considered the corrected basis of estimate, it would have engaged in discussions with USEI. Discussions occur when an agency indicates to an offeror aspects of its proposal that could be altered or explained to materially enhance the proposal's potential for award or to obtain information from the offeror that is necessary to determine the proposal's acceptability. See FAR § 15.306(d)(3); Raytheon Co., B-404998, July 25, 2011, 2011 CPD ¶ 232 at 5. Where proposal defects are first introduced in response to discussions or in a post-discussion proposal revision, an agency has no duty to reopen discussions or conduct additional rounds of discussions. DRS C3 Sys., LLC, B-310825, B-310825.2, Feb. 26, 2008, 2008 CPD ¶ 103 at 11-12. Offerors are responsible for submitting a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the

solicitation and allows for meaningful review by the procuring agency. DLT Solutions, Inc., B-412237 et al., Jan. 11, 2016, 2016 CPD ¶ 19 at 7.

The record reflects that the agency considered the basis of estimate information provided by all offerors when determining whether pricing was fair and reasonable. COS at 7; MOL at 13-15. Although the agency was aware that USEI submitted an incorrect basis of estimate for sample task 2, the agency nonetheless considered it, and other information in USEI's proposal that explained its proposed pricing, to determine whether it provided adequate justification for USEI's higher proposed price. MOL at 12. However, as clarified by USEI, the agency evaluated the proposed price provided in its Excel spreadsheet, and determined it was not fair and reasonable. Simply put, the agency was not required to allow USEI to revise its proposal to correct its erroneous basis of estimate for sample task 2, and the agency's consideration of the basis of estimate information submitted by other offerors did not constitute unequal treatment.

Source Selection

Finally, the protester argues that the SSA violated FAR § 15.308 by failing to exercise independent judgment during source selection. USEI argues that the SSA failed to consider USEI's overall technical rating of outstanding, despite the fact that its price was determined to be not fair and reasonable, when making the selection decision. The agency responds that the SSA reasonably relied on the conclusions of the evaluators, and made a selection decision consistent with the solicitation and the FAR. Supp. MOL at 3-5.

As an initial matter, we note that a selection official may rely on evaluation reports provided by technical evaluators. HP Enter. Servs., LLC, B-408825, Dec. 23, 2013, 2014 CPD ¶ 13 at 7. Here, the award decision explains that the SSA "considered the results of the evaluations and consider[ed] that the [] source selection team conducted a thorough, fair, and objective evaluation of all proposals in accordance with the established source selection evaluation plan." AR, Tab 33, Award Decision, at 15. In the award decision, the SSA agreed with the evaluation board's ratings of outstanding for USEI's three proposal volumes, and with the finding that USEI's pricing was not fair and reasonable. Id. The SSA determined to make award to the 20 offerors that were the highest technically rated and whose pricing was fair and reasonable. Id. at 15.

The protester also argues that the SSA should have performed a comparative assessment during source selection. In essence, the protester's argument can only be construed as asserting that the SSA should have performed a tradeoff during source selection; however, such a tradeoff would have been contrary to the explicit terms of the solicitation. Here, the RFP provided that source selection would be neither lowest-priced, technically-acceptable nor tradeoff. RFP at M-1. More specifically, the RFP stated: "[T]he best value basis for awards will be determined by the Highest Technically Rated Offerors with a Fair and Reasonable Price." Id.

The FAR does not expressly identify a “highest technically rated with a fair and reasonable price” type of evaluation scheme. In this regard, FAR subpart 15.1, Source Selection Processes and Techniques, specifically provides for a “lowest price technically acceptable” source selection process, and a “tradeoff” process. FAR §§ 15.101-1, 15.101-2. Nevertheless, the FAR explicitly recognizes that these two processes are not the only source selection processes available to the agency. See id. § 15.100. With regard to the tradeoff selection process, the FAR further states that a tradeoff “is appropriate when it may be in the best interests of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.” Id. § 15.101-1(a). Our Office has recognized that an agency may employ a source selection process that results in award to the highest technically rated offerors without using a tradeoff process. See Sevatec, Inc.; InfoReliance Corp.; Enterprise Information Services, Inc.; Buchanan & Edwards, Inc., B-413559.3 et al., Jan. 11, 2017, 2017 CPD ¶ 3 at 5-6.

Although USEI received the highest rating of outstanding for its technical proposal, as discussed, its price was determined to be not fair and reasonable, and therefore USEI was not considered for an award. AR, Tab 33, Award Decision, at 14. On this record, we find nothing objectionable about the SSA’s determination.

The protest is denied.

Susan A. Poling
General Counsel