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Decision

Matter of: Systems Plus, Inc.

File: B-415559; B-415559.2

Date: January 12, 2018

Richard B. Oliver, Esq., and J. Matthew Carter, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.

Erin L. Felix, Esq., and Gregory S. Jacobs, Esq., Polsinelli PC, for Advanced Concepts and Technologies, Inc., the intervenor.

Andrew Lieberman, Esq., and Matthew Faust, Esq., Department of Homeland Security, for the agency.

Jonathan L. Kang, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency's evaluation of proposals improperly departed from the process set forth in the solicitation is denied where the agency's decision to evaluate more proposals than anticipated by the solicitation did not prejudice the protester.
 2. Protest that the agency failed to evaluate the realism of the awardee's proposed price is denied where the solicitation did not provide for such an evaluation.
 3. Protest that the agency failed to reasonably evaluate the awardee's proposed transition plan is denied where, contrary to the protester's allegation, the solicitation did not expressly require vendors' plans to address whether proposed key personnel had completed background investigations.
 4. Protest that the awardee engaged in an improper bait and switch scheme is denied where the record does not show that the awardee misrepresented its intention to provide personnel identified in its proposal.
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DECISION

Systems Plus, Inc., a small business, of Rockville, Maryland, protests the issuance of a task order to Advanced Concepts and Technologies, Inc. (ACT), also a small business, of Arlington, Virginia, by the Department of Homeland Security (DHS), Customs and Border Protection (CBP), under task order request for proposals (TORFP)

No. HSBP1017F00278, for administrative support services. The protester argues that the agency failed to follow the evaluation procedures set forth in the TORFP, failed to evaluate the realism of ACT's proposed price, and unreasonably evaluated the awardee's transition plan. The protester also argues the awardee engaged in an improper bait and switch scheme regarding its proposed personnel.

We deny the protest.

BACKGROUND

CBP issued the TORFP on December 2, 2016, seeking proposals to provide enterprise-level program management office services for the agency's Office of Information and Technology (OIT). Agency Report (AR), Tab 4, TORFP, at 1. The mission of the OIT is to "deliver high-quality information technologies and services to [CBP], other government agencies, the travelling public, and the international trade community in support of the agency's day-to-day activities to secure the border and facilitate trade and travel." AR, Tab 5, Statement of Work (SOW) at 4. The SOW will require the successful contractor to provide personnel to perform services in the following areas: (1) finance, (2) acquisition, (3) asset management, (4) investment management, (5) executive administration, (6) logistics, (7) human resources, (8) project management, (9) program management, and (10) surge support. Id. at 7.

The competition was limited to firms holding one of the General Services Administration's One Acquisition Solution for Integrated Services (OASIS) small business-pool 1 multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts for program management services.¹ TORFP at 1. The TORFP anticipated issuance of a time-and-materials/labor-hour task order with a base period of 1 year, and four 1-year options. Id. at 3.

The TORFP provided that the task order would be awarded to the vendor that submitted the lowest-priced, technically acceptable proposal. Id. at 27. The solicitation advised that the acceptability of proposals would be evaluated based on the following two factors: (1) technical approach/management approach, and (2) past performance. Id. The technical approach/management approach factor had the following three subfactors: (1) capability maturity model integration level 2 or higher certification, (2) program management plan, and (3) education requirements/resume review. Id. at 27-29. As relevant here, the program management plan subfactor had five sub-criteria: (1) staffing plan/approach, (2) transition-in plan, (3) transition-out plan, (4) organizational conflict of interest (OCI)/non-disclosure agreement firewall, and (5) quality control. Id.

¹ Although firms who compete for task orders under IDIQ contracts are generally referred to as "vendors," the record here uses the terms "offerors" and "vendors" interchangeably.

CBP received proposals from nine vendors, including Systems Plus and ACT, by the closing date of May 30, 2017. AR, Tab 9, Source Selection Decision Document (SSDD), at 3. The agency evaluated the proposals submitted by the three vendors whose proposals offered the lowest price: (1) Vendor 1, whose proposal offered the lowest price but was found to be technically unacceptable; (2) ACT, whose proposal offered the second-lowest price of \$60,294,656 and was found to be technically acceptable; and (3) Systems Plus, whose proposal offered the third-lowest price of \$65,127,666 and was found to be technically acceptable. Id.; Tab 7, Technical Evaluation Report, at 1; Tab 10, Systems Plus Debriefing Letter, Oct. 12, 2017, at 3. The agency selected ACT's proposal for award as it was the lowest-priced of the technically acceptable proposals. AR, Tab 9, SSDD, at 7. The agency provided a debriefing to Systems Plus on October 12, and this protest followed.²

DISCUSSION

Systems Plus challenges CBP's award to ACT based on four primary arguments: (1) the agency's evaluation of proposals improperly departed from the process set forth in the TORFP, (2) the agency failed to evaluate the realism of the awardee's proposed price, (3) the agency failed to evaluate whether the awardee's transition plan posed risk regarding the status of background investigations for proposed key personnel, and (4) the awardee engaged in an improper bait and switch scheme by proposing personnel that it did not intend to provide during contract performance.³ Protest at 14-28.⁴ For the reasons discussed below, we find no basis to sustain the protest.

The task order competition here was conducted among OASIS IDIQ contract holders pursuant to the provisions of Federal Acquisition Regulation (FAR) subpart 16.5. In reviewing protests of awards in task order competitions, we do not reevaluate proposals but examine the record to determine whether the evaluations and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. DynCorp Int'l LLC, B-411465,

² The awarded value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts that were awarded under the authority of Title 41 of the U.S. Code. 41 U.S.C. § 4106(f)(1)(B).

³ Systems Plus also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find that none provides a basis to sustain the protest. In addition, the protester withdrew arguments concerning alleged OCIs and the qualifications of the awardee's proposed personnel for logistician positions. Protester's Comments, Nov. 27, 2017, at 3 n.2; Protester's Response to Agency Request for Dismissal, Nov. 3, 2017, at 3 n.1.

⁴ References to the protest herein are to the supplemental and consolidated protest filed by System Plus on October 23, 2017.

B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 7. A protester's disagreement with the agency's judgment regarding the evaluation of proposals, without more, is not sufficient to establish that the agency acted unreasonably. Imagine One Tech. & Mgmt., Ltd., B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 4-5.

Evaluation Process

Systems Plus argues that CBP's evaluation of proposals improperly departed from the process set forth in the TORFP. Specifically, the protester contends that the agency evaluated more proposals than anticipated by the solicitation, which in turn implies that the agency evaluated the awardee's proposal more than once. For the reasons discussed below, we find no basis to sustain the protest.

The TORFP provided for award of the task order to the vendor that submitted the lowest-priced, technically acceptable proposal. TORFP at 27. The solicitation set forth the following procedure for the evaluation of proposals:

Proposals will be evaluated in order by offered price, lowest to highest. The proposal with the lowest offered price will be reviewed first. The proposal will be evaluated in accordance with the factors, sub-factors and evaluation criteria detailed herein. Upon completion of the evaluation, the proposal will be determined to be either technically acceptable or technically unacceptable. If the proposal is deemed technically unacceptable it will not receive further consideration and the next lowest priced proposal will be evaluated. This process will be repeated until a technically acceptable proposal is determined.

The task order, under this solicitation, will be awarded to the offeror who proposes a technically acceptable proposal with the lowest evaluated price.

Id.

As discussed above, CBP evaluated the proposals submitted by three vendors: (1) Vendor 1, whose proposal offered the lowest price but was found to be technically unacceptable; (2) ACT, whose proposal offered the second-lowest price and was found to be technically acceptable; and (3) Systems Plus, whose proposal offered the third-lowest price and was also found to be technically acceptable. AR, Tab 7, Technical Evaluation Report, at 1. The SSDD addressed the evaluation of only two proposals, Vendor 1's and ACT's, and concluded that ACT submitted the lowest-priced, technically acceptable proposal. AR, Tab 9, SSDD, at 3, 8.

Systems Plus argues that, under the TORFP's evaluation process, the agency would have had no reason to evaluate its own proposal, had it found ACT's proposal technically acceptable; the agency would have simply awarded the task order to ACT, without any need to consider System Plus' proposal. The protester argues, therefore,

that the agency's evaluation of System's Plus' proposal shows that the agency must have initially found ACT's proposal unacceptable, and subsequently revised that evaluation to receive the benefit of ACT's lower proposed price. Systems Plus argues that such an evaluation process violated the terms of the TORFP, which stated that any proposal found to be technically unacceptable "will not receive further consideration." TORFP at 27.

In its response to the protest, the agency acknowledges that it evaluated three proposals for technical acceptability, and that this approach arguably "did not strictly adhere to the procedure by which CBP said it would evaluate proposals. . . ." Memorandum of Law at 9. The agency argues, however, that such a "minor deviation" from the process set forth in TORFP was not prejudicial to Systems Plus because the agency followed the solicitation's criteria concerning the evaluation of technical and price proposals. Id. We agree with the agency.

Competitive prejudice is an essential element of a viable protest and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. DRS ICAS, LLC, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21. Here, ACT submitted the lowest-priced technically acceptable proposal, and Systems Plus submitted the second-lowest-priced technically acceptable proposal. Thus, the evaluation of proposals other than ACT's lowest-priced, technically acceptable proposal could not have affected System Plus' prospects for receiving the award, provided the evaluation of ACT's proposal was reasonable. As discussed below, we find that none of System Plus' challenges to the evaluation of ACT's proposal have merit; thus, the evaluation of any additional proposals besides the awardee's did not prejudice the protester.

Additionally, even if, as the protester contends, the evaluation of its own technical proposal shows that the agency reevaluated the awardee's proposal after initially finding it technically unacceptable, we find no basis to conclude that such an action would have been improper. We do not read the language in the TORFP that states that proposals found to be technically unacceptable "will not receive further consideration" to preclude the agency from reconsidering its evaluation of a proposal. The protester's interpretation of the solicitation would preclude an agency from, for example, correcting errors in its evaluation. Such an interpretation would be inconsistent with the discretion accorded to agencies in evaluating proposals. See Wyle Labs., Inc., B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 6. Instead, we think the language in the solicitation regarding "further consideration" is reasonably understood to mean that a proposal that is found to be technically unacceptable will not be eligible for award--consistent with the lowest-priced, technically acceptable award criteria. On this record, we find no basis to sustain the protest.

Price Realism

Next, Systems Plus argues that the TORFP required CBP to conduct a price realism evaluation and that the agency failed to do so. The protester contends that, had the agency evaluated ACT's proposed price as required by the solicitation, it would have rejected it as unrealistically low. For the reasons discussed below, we find no basis to sustain the protest.

As our Office has explained, price reasonableness and price realism are distinct concepts. Logistics 2020, Inc., B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 7. The purpose of a price reasonableness review is to determine whether the prices offered are fair and reasonable, *i.e.*, not too high. See FAR § 15.404-1(b); Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. In contrast, a price realism review is to determine whether prices are too low, such that there may be a risk of poor performance. See FAR § 15.404-1(d); C.L. Price & Assocs., Inc., B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3.

Where the award of a fixed-price labor hour task order is contemplated, price realism is not ordinarily considered, because a fixed-priced order places the risk and responsibility for costs and resulting profit or loss on the contractor. Applied Research Solutions, B-414719, Aug. 28, 2017, 2017 CPD ¶ 276 at 5; see FAR § 15.402(a). While an agency may conduct a price realism analysis in awarding a fixed-price contract or task order for the limited purpose of assessing whether an offeror's or vendor's low price reflects a lack of technical understanding of risk, offerors or vendors must be advised that the agency will conduct such an analysis. FAR § 15.404-1(d)(3); Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. In the absence of an express price realism provision, we will only conclude that a solicitation contemplates a price realism evaluation where the solicitation: (1) states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and (2) states that a proposal can be rejected or assessed technical risk for offering low prices. NJVC, LLC, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 4; DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. Absent a solicitation provision providing for a price realism evaluation, agencies are neither required, nor permitted, to conduct a realism evaluation in awarding a fixed-price contract. Emergint Techs., Inc., *supra*.

Here, the TORFP provided the following regarding the evaluation of price:

Factor 3: Price

Note: The offeror's price will be evaluated for reasonableness through one or more of the methods specified in FAR 15.404-1(b)(2).

Evaluation Criteria:

The Government will evaluate the reasonableness of the total price which will reflect the proposed labor mix as a result of the offeror's understanding of the Government's requirements. The total price analysis is a reflection of the offeror's understanding of the Government's requirements and will be used in the final determination of the lowest priced-technically acceptable offer. The Government will also evaluate the labor rates to ensure consistency with the OASIS SB Pool 1 labor rates.

Id. at 31.

As the protester acknowledges, the provision above does not use the term realism with regard to the evaluation of price. See Protester's Comments, Nov. 27, 2017, at 13. Instead, the provision refers twice to the reasonableness of vendors' proposed prices, and specifically cites the price analysis provision of FAR § 15.404-1(b)(2)--a provision which pertains to price reasonableness, rather than price realism. The solicitation provision's statement concerning "the offeror's understanding of the Government's requirements" does not clearly refer to the adequacy of the proposed price for the technical solution, nor does the statement advise vendors that their proposals could be rejected or assessed risk based on an analysis of whether their proposed prices are adequate for the proposed technical approach. Rather, given the specific reference to "price analysis" and the two references to reasonableness, we agree with the agency that the reference to a vendor's understanding of the requirements refers to whether the vendor has substantiated the reasonableness of its proposed price.

On this record, we conclude that the TORFP did not require the agency to evaluate the realism of vendors' proposed prices, and thus find no merit to the protester's argument that the agency unreasonably failed to conclude that awardee's proposed price was unrealistically low. See Emergint Techs., Inc., supra; DynCorp Int'l LLC, B-407762.3, supra. We therefore find no basis to sustain the protest.

Transition Plan

Next, Systems Plus contends that CBP unreasonably evaluated the acceptability of ACT's transition plan with regard to the awardee's proposed key personnel. In this regard, the protester argues that the agency did not reasonably consider whether the awardee proposed key personnel who met the background investigation requirements in the statement of work. For the reasons discussed below, we find no basis to sustain the protest.

The program management plan subfactor of the technical approach/management approach evaluation factor had five sub-criteria, including transition-in plan. TORFP at 28. This sub-criterion stated that vendors were required to address the following items in their plans:

- Coordination with Government Representatives
- Risks associated with the transition and the Contractor's Plan to mitigate such risks
- Risk Management Plan
- Review, evaluation and transition of current support services
- Government-approved training and certification process
- Transfer of all necessary business and/or technical documentation
- Orientation phase and program to introduce Government personnel, programs, and users to the Contractor's team, tools, methodologies, and business processes

Id. The solicitation advised that a transition-in plan was to be evaluated based on the items above, as well as the plan's "methodology to meet all the requirements of the SOW. . . ." Id.

The SOW set forth the following requirements regarding background investigations:

A background investigation (BI) is required for performance under this effort. Contractor employees shall not begin working until the BI is approved by CBP, Security Programs Division. Exceptions to this requirement will be handled on a case-by-case basis, and access to facilities, systems, data, etc. will be limited until the individual is cleared. All personnel employed by the Contractor for the performance under this Task Order shall either currently possess or are able to favorably pass a background investigation.

* * * * *

All personnel employed by the Contractor or responsible to the Contractor for work performed hereunder shall either currently possess or be able to favorably pass a full five (5) year background investigation (BI) required by CBP policies and procedures for employment prior to beginning work with CBP. This policy applies to any new personnel hired during the term of this contract. Executive Order 13467 allows for the acceptance of "suitability reciprocity" to contract personnel who are component employees within DHS.

The Contractor shall submit within ten (10) business days after award for BIs . . . after written authority from the [contracting officer's representative]. The Contractor shall submit within ten (10) business days

after award: A list containing the full name, Social Security Number, and date of birth of those people who shall require background investigations by CBP, and submit such information and documentation as may be required by the Government to have a BI performed.

* * * * *

All background investigation forms must be accepted by CBP with verbal approval from a representative for CBP Office of Management Inspection and Integrity Assurance, Security Program Division (MIIA-SPD) before contract personnel can begin work under this order. MIIA-SPD estimates these procedures will take approximately ten (10) days [from] the time they receive the packet. Currently, completion of background investigations is taking approximately six (6) months from initial acceptance of the package.

SOW at 38-39; see also TORFP at 10.⁵

Systems Plus argues that CBP's evaluation of ACT's proposal for the transition-in plan sub-criterion failed to consider whether the awardee had proposed key personnel who could meet the SOW's background investigation requirements. In this regard, the protester contends that one of the "chief risk concerns to be addressed in the Transition-In Plan was the offeror's ability to obtain for each of its Key Personnel" a background investigation prior to commencing work on the task order. Protester's Comments, Nov. 27, 2017, at 16.

CBP argues that nothing in the transition-in plan sub-criterion, or any other part of the solicitation, required vendors to address the status of background investigations for proposed key personnel. Although the protester characterizes background investigations as a "chief risk," the agency notes that the transition-in plan did not specifically identify background investigations as a matter to be addressed in the plan. See TORFP at 28.

We agree with CBP that the TORFP did not specifically require the vendors to address the status of background investigations for key personnel, nor did it specifically state that the agency would evaluate background investigations in the evaluation of transition-in risk. We therefore conclude that the agency reasonably found that consideration of background investigations was not necessary to find vendors' proposals technically acceptable under the transition-in subfactor because the solicitation did not require vendors to address this matter in their proposals, and because the SOW anticipated

⁵ The SOW stated that although "[t]his work will be UNCLASSIFIED," it also advised that "[s]hould additional security clearance requirements beyond a CBP BI (e.g. Secret, Top Secret, etc.) be needed a modification will be issued to add this requirement to the key personnel identified as needing such requirement." SOW at 37-38.

that such information would be provided after the issuance of the task order. On this record we find no basis to sustain the protest.

Bait and Switch

Finally, Systems Plus argues that ACT's proposal contained material misrepresentations concerning personnel identified in its proposal. Specifically, the protester contends that ACT proposed individuals for key positions whom the awardee did not intend to provide during contract performance. For the reasons discussed below, we find no basis to sustain the protest.

The issue of whether personnel identified in a vendor's proposal, in fact, perform under the subsequently-awarded contract is generally a matter of contract administration that our Office does not review. See 4 C.F.R. § 21.5(a); Patricio Enters. Inc., B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 4. Nonetheless, our Office will consider allegations that a vendor proposed personnel that it did not have a reasonable basis to expect to provide during contract performance in order to obtain a more favorable evaluation, as such a material misrepresentation has an adverse effect on the integrity of the competitive procurement system. Ryan Assocs., Inc., B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 6. Our decisions frequently refer to such circumstances as a "bait and switch." Id. In order to establish an impermissible bait and switch, a protester must show: (1) that the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance, (2) that the misrepresentation was relied on by the agency, and (3) that the agency's reliance on the misrepresentation had a material effect on the evaluation results. Patricio Enters., Inc., supra; ACS Gov't Servs., Inc., B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 3, 10.

Systems Plus contends that ACT knew that its proposed key personnel could not meet the SOW's background investigation requirements, and thus must have intended to switch its proposed personnel with other individuals after award. In support of its argument, the protester contends that ACT has solicited for employment eight of Systems Plus' incumbent personnel to work on the new task order. Protest at 18-19. The protester argues that the solicitation of its key personnel demonstrates that the awardee did not intend to perform using the key personnel identified in its proposal.

As an initial matter, the protester's bait and switch argument is largely premised on its allegation that the TORFP required vendors to propose key personnel who have completed background investigations. The protester contends, therefore, that the awardee knew or should have known that it would not be able to perform using the key personnel proposed, based on the lack of completed background investigations. As discussed above, however, the solicitation did not expressly require vendors to provide information regarding background investigations for key personnel. SOW at 38. Thus, the protester's speculation that the awardee will not be able to provide key personnel who meet the SOW's performance requirements concerns a matter of contract administration that our Office does not review. See Bid Protest Regulations, 4 C.F.R.

§ 21.5(a); Aegis Def. Servs. Ltd., B-400093.4, B-400093.5, Oct. 16, 2008, 2008 CPD ¶ 205 at 8.

With regard to Systems Plus' allegation that the awardee has solicited incumbent key personnel for employment, the protester does not identify specific individuals proposed by ACT that it believes the awardee will not or cannot provide.⁶ Instead, Systems Plus argues, generally, that ACT's solicitation for employment of the protester's key personnel demonstrates that the awardee did not intend to provide the personnel identified in its proposal.

ACT's proposal did not state that it was proposing incumbent personnel for any of the key personnel positions. The awardee's proposal stated, however, that it would pursue opportunities to hire incumbent staff as follows:

[DELETED], upon award of [the task order] and following the kick-off meeting, we will pursue any possibilities for hiring any displaced, qualified incumbent contractor personnel [DELETED].

AR, Tab 2, ACT Technical Proposal, at 8.

We conclude that neither the awardee's proposal, nor the protester's allegation that the awardee has solicited its key personnel for employment demonstrates an improper bait and switch scheme. As our Office has explained it is neither unusual nor inherently improper for an awardee to recruit and hire personnel previously employed by an incumbent contractor. Invertix Corp., B-411329.2, July 8, 2015, 2015 CPD ¶ 197 at 6.

Further, the protester concedes that it does not know the positions for which any of its key personnel were allegedly solicited by the awardee: "[S]ince each of these individuals have specific skills that they have acquired working on the incumbent contracts, we assume that [ACT] has solicited these Key Personnel to fill the same or similar positions." Protest at 18 n.1. Thus, even if the awardee has solicited the protester's key personnel for employment on the task order, the protester provides no evidence that the awardee intended at the time it submitted its proposal to replace its key personnel with different individuals.⁷

⁶ Although the protester represents that eight of its incumbent personnel were "solicited" by ACT, the protester provides no evidence to support its allegation, such as statements by these individuals or correspondence reflecting offers of employment. Protest at 18-19.

⁷ In response to the protest, the contracting officer stated that CBP has not received notice from ACT that it would be unable to provide its proposed key personnel, nor has the agency received a request to substitute any of the proposed key personnel. Contracting Officer's Statement at 4.

In sum, Systems Plus provides no evidence that ACT knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance. See Patricio Enters., Inc., supra, at 4; ACS Gov't Servs., Inc., supra at 3. On this record, we find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel