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Decision

Matter of: Louis Berger Power, LLC

File: B-416059

Date: May 24, 2018

David M. Nadler, Esq., Scott Arnold, Esq., Michael Montalbano, Esq., Ioana Cristei, Esq., and Adam Proujansky, Esq., Blank Rome LLP, for the protester. Dana B. Pashkoff, Esq., Jessica C. Abrahams, Esq., and Amanda M. Pasquini, Esq., Drinker Biddle & Reath, LLP, for Inglett & Stubbs International, Ltd., the intervenor. Maureen A. McAndrew, Esq., Madeline Shay, Esq., John A. Skarbek, Esq., and Thomas J. Warren, Esq., Department of the Army, for the agency. Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the awardee made material misrepresentations in connection with requesting a waiver of a mandatory site visit and that the agency's waiver was otherwise unreasonable is denied where the record does not establish any material misrepresentation and the protester otherwise cannot establish any competitive prejudice.
 2. Protest alleging that the agency should have excluded the awardee's quotation based on its unreasonably low price is denied where the solicitation did not contemplate a price realism evaluation.
 3. Protest challenging the agency's evaluation of the awardee's technical quotation as technically acceptable is denied where the record shows that the agency's evaluation was reasonable and in accordance with the terms of the solicitation.
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DECISION

Louis Berger Power, LLC (LBP), of Washington, District of Columbia, protests the issuance of a task order under Federal Acquisition Regulation (FAR) subpart 8.4 to Inglett & Stubbs International, Ltd. (ISI), of Atlanta, Georgia, under request for quotations (RFQ) No. W912BU-18-R-0012, which was issued by the Department of the

Army, Corps of Engineers (Corps), for the operation and maintenance of a 56 megawatt (MW) power plant and associated distribution at Bagram Airfield in Afghanistan.¹ LBP challenges the agency's waiver of a mandatory site visit for ISI, the evaluation of ISI's price and technical quotations, and the adequacy of discussions.

We deny the protest.

BACKGROUND

The Corps issued the RFQ on December 15, 2017, to holders of General Services Administration's Federal Supply Schedule (FSS) Facilities Maintenance and Management Schedule 03FAC contracts for the operation and maintenance of a government-owned 56 MW power plant and associated power distribution at Bagram Airfield in Afghanistan. RFQ at 421; id., Performance Work Statement (PWS), at 471.² The period of performance included: a 45-day phase-in period; a 320-day base period of performance for operations and maintenance and logistical support; an option to extend services pursuant to FAR clause 52.217-8 for up to six months; an option to rebuild a turbine engine generator; and a phasing-out option after the completion of performance. RFQ at 429-35. The RFQ contemplated the award of a fixed-price order. RFQ, Instructions to Offerors (ITO), at 504.

The RFQ provided for selecting the vendor for the task order on a lowest-priced, technically acceptable (LPTA) basis. The non-price factors for evaluation were technical and past performance. Id. at 509. With regard to price, the RFQ established that the Corps would sum the total of all prices, including all options. Id. The Corps also reserved the right to request a further breakdown of each line item if necessary to determine price reasonableness. Id.

With respect to the technical factor, the RFQ required the agency to consider two subfactors. First, with respect to the adequacy of a vendor's quotation, the agency was to evaluate whether the vendor's method and approach adequately and completely considered, defined, and satisfied the PWS's requirements. Id. Second, with respect to the vendor's understanding of the problem and feasibility of approach, the agency was to evaluate the extent to which the quotation demonstrated a clear understanding of all features involved in solving the problems and meeting the requirements presented in

¹ We note that the Standard Form 1449 for the solicitation indicated that the method of solicitation was a "RFP," a request for proposals; however, the solicitation was issued pursuant to FAR subpart 8.4, the solicitation's instructions described vendors' "quotes," and the agency refers to the solicitation as a RFQ in its agency report (AR). Therefore, we will refer to the solicitation as a RFQ herein.

² The RFQ was amended once; references herein are to the RFQ as amended. Additionally, references herein to page numbers are to the Corps' Bates numbering in the AR.

the task, identified uncertainties and proposed resolutions, and whether the proposed methods and approaches provided the Corps with a high level of confidence of successful performance. Additionally, the agency was to consider the reasonableness of allocated hours, labor categories, and materials proposed in order to successfully meet the task requirements. Id. at 509-10. To be found acceptable, the quotation had to clearly meet the minimum requirements of the PWS, and contain at least minimal details to provide the Corps with a level of confidence of successful completion that demonstrated the vendor's understanding of the problem and feasibility of approach. Id. at 510.

With respect to past performance, the agency was to evaluate the quality of the vendors' work, cost control, schedule, business relations, and management of key personnel on prior orders under the Facilities Maintenance and Management Schedule 03FAC contract or on similar contracts based on information obtained from the Contractor Performance Assessment Reporting System. Id. To be found acceptable, the Corps had to conclude that there was a reasonable expectation that the vendor will successfully perform the required effort based on the vendor's performance record. Id. at 511.

In addition to the above evaluation criteria, the RFQ also included a mandatory site visit provision, which the agency could waive. Id. at 504. Specifically, the provision stated that: "[i]f the site visit was not conducted and there are significant mitigating circumstances that are beyond the fault or control of the Contractor and the Contractor made all reasonable attempts to complete it, detailed documentation must be submitted with the quote to support this." Id.

Prior to the quotation submission deadline, ISI requested a waiver of the site visit requirement. ISI explained that it would not be able to make the scheduled date for the site visit because the company did not have any active contracts in Afghanistan and would need to secure an Afghan visa and a letter of authorization (LOA) from the U.S. government to visit Bagram. AR, Tab 6, Email from ISI to Contracting Officer (Dec. 18, 2017), at 464.³ Specifically, the intervenor explained that:

Unfortunately, we cannot gain country access in time to make this site visit. We currently have no active contracts in [Afghanistan], so would have to mobilize personnel specifically for this site visit. In order to do this, ISI would need to get the site visit attendee an Afghan Visa for country access (minimum of 15 days to process – reference attachment),

³ A LOA "is a document issued by a government contracting officer or designee that authorizes contractor personnel to travel to, from, and within a designated area; and to identify any additional authorizations, privileges, or government support the contractor is entitled to under the contract." Iraq and Afghanistan: Agencies Face Challenges in Tracking Contracts, Grants, Cooperative Agreements, and Associated Personnel, GAO-10-509T, Mar. 23, 2010, at 6, n.11.

an LOA issued against the solicitation and book a commercial flight to Bagram.

Id.

Attached to ISI's email, as referenced above, was a printout from a commercial, third-party passport and visa processing service which indicated a "processing time" of "15 days." Id., attach., "Afghanistan Government Contractor Visa" from www.passportsandvisas.com, at 463. Additionally, ISI's email explained that the company had previously designed, constructed, installed, and/or maintained all or most of the power plant, grid, distribution, perimeter lighting, and pad-mount transformers, thus ISI was "familiar with the plant, distribution system, and other power driven systems on base, so feel that we fully understand this project and what it would take to submit a proposal on the opportunity." AR, Tab 6, Email from ISI to Contracting Officer (Dec. 18, 2017), at 464.⁴ The Corps subsequently granted the requested waiver. AR, Tab 6, Email from Contracting Officer to ISI (Jan. 11, 2018), at 468.

The Corps ultimately received two timely quotations from LBP and ISI, respectively. LBP is the lead member of the joint venture that is the current incumbent contractor for these requirements at Bagram, while ISI was the incumbent contractor for the requirements immediately before the current contract. See, e.g., AR at 5. After receipt of initial quotations, the Corps engaged in discussions with the vendors and requested and received final revised quotations. AR, Tab 12c, Contracting Officer's Memo. for Record, at 753. The final revised quotations were evaluated accordingly:

	ISI	LBP
Technical	Acceptable	Acceptable
Past Performance	Acceptable	Acceptable
Price	\$9,817,104	\$11,873,541

Id. at 753-54.

Based on its evaluation that ISI submitted the LPTA quotation, the Corps selected ISI's quotation for award. AR, Tab 12d, Source Selection Decision, at 759. This timely protest to our Office followed.

⁴ In its initial technical quotation, ISI represented that it would have taken 30 to 45 days to apply for an Afghan visa, request a LOA, and book a flight to Bagram. AR, Tab 8b, ISI Initial Technical Quotation, at 529.

DISCUSSION

LBP primarily raises three challenges. First, the protester alleges that the Corps unreasonably waived the mandatory site visit for ISI. Second, LBP alleges that the agency failed to reasonably consider the awardee's low proposed price under the price evaluation factor. Third, the protester challenges the agency's determination that ISI's quotation was technically acceptable. For the reasons that follow, we find no basis on which to sustain the protest.⁵

Where, as here, an agency issues an RFQ to FSS contractors under FAR subpart 8.4 and conducts a competition, we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation. Salient Fed. Solutions, Inc., B-410174.3, B-410174.4, Apr. 1, 2016, 2016 CPD ¶ 104 at 5. In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate the quotations; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 4. A protester's disagreement with the agency's judgments does not establish that the evaluation was unreasonable. Amyx, Inc., B-410623, B-410623.2, Jan. 16, 2015, 2015 CPD ¶ 45 at 6.

Waiver of Mandatory Site Visit

LBP challenges the Corps' waiver of the mandatory site visit requirement for ISI. The protester first contends that the waiver was inappropriate because the intervenor failed to demonstrate that there were significant mitigating circumstances that were beyond its fault or control and that it had made all reasonable attempts to attend the site visit. LBP further alleges that ISI made material misrepresentations to the agency regarding the time it would take to secure an Afghan visa. The agency and intervenor both argue that

⁵ LBP raises other collateral issues. While our decision does not specifically address every argument, we have considered all of the protester's arguments and find that none provides a basis on which to sustain the protest. For example, the protester complains that the Corps failed to engage in meaningful discussions with LBP because the agency "failed to . . . alert LBP to its significantly higher proposed price, even though price was the determinative factor in this procurement." Protest at 16. We have recognized, however, that, unless a vendor's proposed price or cost is so high as to be unreasonable or unacceptable, an agency is generally not required to tell a vendor during discussions that its proposed price or cost is high in comparison to a competitor's proposed price or cost, even where price or cost is the determinative factor for award. Salient Fed. Solutions, Inc., *supra*, at 6-7; DeTekion Security Sys., Inc., B-298235, B-298235.2, July 31, 2006, 2006 CPD ¶ 130 at 13. Here, the Corps had no concerns with the reasonableness of LBP's proposed price, which was approximately 17 percent below the independent government estimate. *See* AR, Tab 12c, Contracting Officer's Memo. for Record, at 754.

the request and subsequent granting of the waiver were reasonable and in accordance with the terms of the RFQ, and, even if the waiver was improper, that LBP did not suffer any competitive prejudice as a result. For the reasons that follow, we find no basis on which to sustain the protest.

A vendor's material misrepresentation in its quotation can provide a basis for disqualification of the quotation and cancellation of a contract award based upon the quotation. Crown Point Sys., B-413940, B-413940.2, Jan. 11, 2017, 2017 CPD ¶ 19 at 6. A misrepresentation is material where the agency relied upon it and it likely had a significant impact on the evaluation. ERIMAX, Inc., B-410682, Jan. 22, 2015, 2015 CPD ¶ 92 at 6. For a protester to prevail on a claim of material misrepresentation, the record must show that the information is false. Id. Here, it is not apparent that the alleged misrepresentation was false or material.

As addressed above, ISI's request for the waiver of the site visit identified the potential for schedule delays arising from the vendor needing to (a) request an Afghan visa, (b) secure a LOA, and (c) arrange for travel to Bagram. AR, Tab 6, Email from ISI to Contracting Officer (Dec. 18, 2017), at 464. In its initial waiver request, ISI indicated that it could take 15 days to secure a visa, based on an attached estimate from a commercial third party passport and visa processing company. Id. LBP argues that the 15 day representation was "false, or at the very least misleading," because information available from the Embassy of Afghanistan indicates that a visa can be processed in 4 to 5 business days. LBP Comments at 5. We fail, however, to see how this apparent disconnect between the sources relied upon by the parties establishes that ISI intentionally misled the Corps. While the protester may believe that the processing time estimate on the Afghan Embassy's website is more convincing, that does not equate to ISI having manufactured, omitted, or otherwise misrepresented to the government information it received from a third-party commercial firm.

LBP also selectively relies on information from ISI's waiver request and quotation to suggest that ISI misrepresented the anticipated processing time for securing an Afghan visa. As addressed above, ISI's waiver request provides in relevant part that "ISI would need to get the site visit attendee an Afghan Visa for country access (minimum of 15 days to process – reference attachment), an LOA issued against the solicitation and book a commercial flight to Bagram." AR, Tab 6, Email from ISI to Contracting Officer (Dec. 18, 2017), at 464. LBP argues that ISI subsequently misled the agency when it represented in its quotation that the visa process could have taken up to 45 days. Specifically, ISI's quotation indicates that: "[a]ccordingly, to mobilize to Afghanistan we would have had to apply for an Afghan Visa for Country access, request to have a [LOA] issued against the solicitation and purchase international ticketing to [Bagram]. At best, this would have been a 30 to 45 day process." AR, Tab 8b, ISI Initial Technical Quotation, at 529. Read in context, however, it is clear that the relied upon reference from the quotation applied not just to securing the required visa, but also securing the necessary LOA and booking the travel. In contrast, the above passage from the waiver request suggests that the 15 days applies to the visa, without addressing the time needed to secure the necessary LOA and travel accommodations. Thus, we find

unavailing LBP's attempts to manufacture a material disconnect between the 15 days cited in the initial waiver request relating only to the visa processing time and the 30 to 45 day period cited in the quotation relating to the visa processing, LOA, and travel time.

Furthermore, even accepting all of the protester's allegations regarding the possibility for more expedient visa processing, the agency's waiver of the site visit requirement would not provide a basis on which to sustain the protest. We have explained that, even where an agency clearly should have amended a solicitation or otherwise apprised vendors that it had waived a requirement, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. Complete Packaging and Shipping Supplies, Inc., B-412392 et al., Feb. 1, 2016, 2016 CPD ¶ 28 at 8. Competitive prejudice from such a waiver exists only where the requirement was not similarly waived for the protester, or where the protester would be able to alter its quotation to its competitive advantage if given the opportunity to respond to the relaxed term. Id.; Phoebe Putney Memorial Hospital, B-311385, June 19, 2008, 2008 CPD ¶ 128 at 4.

Here, it is apparent that LBP satisfies neither prong of this competitive prejudice standard. First, the protester has not alleged that the Corps unreasonably failed to grant it a waiver of the site visit requirement. Indeed, LBP as the current incumbent was already onsite at Bagram. Second, the protester cannot credibly argue that it would have altered its quotation to its competitive advantage had the agency waived the site visit requirement. As addressed in the remainder of this decision, LBP primarily alleges that ISI's proposed price is unreasonably low because it did not fully understand the scope of work to be performed. Indeed, the protester itself characterized the alleged competitive prejudice that it suffered resulting from the site visit waiver for the awardee as being the "skewing of the competitive process" due to ISI submitting an "unreasonably low proposal price" because it was not "in a position to fully understand the requirements." Protest at 12. Thus, on this record, we find no basis to sustain LBP's challenge of the agency's waiver of the site visit requirement for ISI.

Evaluation of ISI's Quotation

LBP challenges the agency's evaluation of ISI's price and technical quotations. With respect to the awardee's proposed price, the protester argues that the Corps failed to reasonably consider whether ISI's proposed price was unreasonably low. With respect to ISI's technical approach, LBP asserts two primary arguments for why the awardee's quotation should have been rated unacceptable. First, the protester alleges that the agency failed to reasonably evaluate the awardee's technical understanding of the phase-in requirements due to its low proposed price for the phase-in contract line item. Second, LBP argues that the agency unreasonably found that ISI's proposed equipment allocation was sufficient to meet the performance requirements. The agency and intervenor primarily respond that the protester's allegations, in essence, argue that the Corps failed to conduct an adequate price realism evaluation, and that no such evaluation was required by the RFQ. With respect to the remaining allegations, the

Corps and ISI argue that the agency's evaluation was reasonable, adequately documented, and in accordance with the terms of the RFQ. For the reasons that follow, we find no basis on which to sustain the protest.

As a general matter, when awarding a fixed-price order or contract, an agency is only required to determine whether offered prices are fair and reasonable. FAR § 15.402(a). An agency's concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted, as opposed to lower. Salient Fed. Solutions, Inc., supra, at 7. Although not required, an agency also may provide for a price realism analysis in a solicitation for the award of a fixed-price contract or order for the purpose of assessing whether an offeror's low price reflects its understanding of the requirements or the risk inherent in an offeror's approach. Id. Analyzing whether an offeror's fixed price is so low that it reflects a lack of understanding of solicitation requirements, or creates a risk that the firm cannot perform its proposed technical solution at the price offered is the crux of a price realism evaluation. NJVC, LLC, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 8. In order to conduct a price realism analysis, however, an agency must provide for such an analysis in the solicitation. Crown Point, supra, at 5.

The RFQ here did not provide for a price realism evaluation. Rather, it merely indicated that the agency would sum the proposed prices for the contract line items, and evaluate to determine price reasonableness. RFP, amend. No. 1, at 89. Given the terms of the RFQ, we conclude that the Corps was not required to conduct a price realism analysis.

We find that the lack of a price realism requirement similarly dooms LBP's allegation that the agency should have found ISI's technical quotation unacceptable due to its low proposed phase-in price. The protester's allegations that certain of the awardee's proposed contract line item prices are so low as to evidence a lack of understanding of the technical requirements, in the absence of a price realism requirement, do not present a sufficient basis on which to sustain the protest. As our Office has recognized, a fixed-price order or contract places the risk and responsibility for contract costs and resulting profit or losses on the contractor. AGE Logistics Corp., B-412049, Dec. 9, 2015, 2015 CPD ¶ 386 at 6. Thus, even assuming that ISI did submit a quotation that is below anticipated costs, there is no prohibition against an agency accepting below-cost prices on a fixed-price contract. Id. Moreover, where there is no relevant evaluation criterion pertaining to price realism, a determination that an offeror's price on a fixed-price order or contract is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to successfully perform the order or contract at its offered price. See Milani Constr., LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87 at 4-5. Our Office generally does not review an agency's affirmative responsibility determination, absent allegations not at issue in this protest. 4 C.F.R. § 21.5(c). Thus, LBP's allegations regarding ISI's low proposed prices for the phase-in or other contract line items fails to state a legally and factually sufficient basis of protest.

The protester's remaining challenge relating to the alleged inadequacy of the quantity of ISI's proposed equipment primarily centers on the awardee's alleged proposal to use

only a single bucket truck in performance of the resulting order. The protester contends that a single bucket truck will be insufficient to satisfy the performance requirements, and points to the agency's concern relating to this issue based on ISI's initial quotation. Specifically, the Corps rated ISI's initial technical quotation unacceptable because:

[M]aterial quantities do not seem sufficient to successfully meet task requirements. [The quotation] states that they know how many nuts and bolts it takes to repair different parts of the electrical system here at [Bagram] however from quantities of personnel, and equipment illustrate that they are not properly equipped or do not properly understand the job and are strictly relying on past performance and reputation to get them through.

AR, Tab 9, Initial Evaluation Report for ISI, at 610.

During discussions, the Corps raised three questions pertaining to ISI's proposed staffing and materials. In addition to requesting the inclusion of the required bill of materials, the agency sought additional explanation regarding the adequacy of ISI's proposed staffing and equipment. Relevant to the issues in this protest, the Corps specifically asked ISI:

5. The [quotation] indicates that one bucket truck, three pickup trucks, one forklift (size unk[nown]) and one trailer (size unk[nown]) would be deployed. Please provide further explanation of how this amount of support vehicles will be able to accomplish the plant, grid, and lighting [operation and maintenance] in the PWS.

AR, Tab 10a, ISI Discussions Letter, at 616-17.

In its response to the foregoing question, ISI represented that the equipment contained in its quotation represented the minimum equipment that would be mobilized for performance of the operation and maintenance task only, and that additional resources would be mobilized for the feeder repair contract line item. AR, Tab 11b, ISI Discussions Response, at 656. The intervenor further explained that additional equipment and personnel would be mobilized as necessary in the event of change orders or as otherwise necessary to address maintenance tempo increases. Id. ISI additionally provided further information about its management approach, including its intent to [DELETED] to maximize the efficiency and utilization of resources. Id. For example, pertaining to the bucket truck, ISI explained that it would have technicians [DELETED] and use the bucket truck to [DELETED]. That information would then be conveyed to [DELETED], who would utilize the bucket truck to [DELETED]. Id. at 655-56. The additional information regarding staffing and the approach to utilizing equipment from ISI's discussion response was also incorporated into ISI's final revised quotation. See AR, Tab 11b, ISI Revised Technical Quotation, at 679, 681, 686. Based on the additional information, the agency found that the equipment listing, although "a little weak" due to the proposed staffing and use of one bucket truck, was sufficient, and

therefore found ISI's revised quotation acceptable. AR, Tab 12a, Final Evaluation Report for ISI, at 715.

Based on this record, we find no basis to sustain the protest. The Corps specifically identified the exact concern alleged by LBP and sought further clarification from ISI through discussions. The intervenor specifically addressed the concern, explaining based on its incumbent performance and specific management approach why it believed it had proposed sufficient resources to meet the minimum performance requirements. Based on this additional information from ISI, the Corps, under the LPTA basis for award, concluded that the intervenor had sufficiently demonstrated at least a minimally acceptable level of understanding of the technical requirements. While LBP strongly disagrees with the agency's judgement in this regard, that is an insufficient basis to sustain its challenge to the agency's evaluation.

The protest is denied.

Thomas H. Armstrong
General Counsel