



Decision

Matter of: AeroSage, LLC

File: B-416200

Date: July 6, 2018

David M. Snyder, for the protester.
Suzanne L. Brangan, Esq., Defense Logistics Agency, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision to make reprocurement award on basis of third lowest-priced quotation is denied, where record reflects that protester, the second lowest-priced vendor, could not immediately commit to its previously quoted price, and a relatively short time-span had elapsed between the receipt of quotations and the reprocurement award.

DECISION

AeroSage, LLC, a small business of Tampa Florida, protests the Defense Logistics Agency's issuance of a purchase order to Tayrona Investments, LLC, a small business of West Palm Beach, Florida, for 2,000 gallons of red-dyed diesel fuel. The purchase order was issued as a reprocurement following the default of the original lowest-priced vendor, and the protester contends that as the second lowest-priced vendor it should have received award.

We deny the protest.

BACKGROUND

The agency issued a request for quotations (RFQ) on March 20, for delivery of 2,000 gallons of red-dyed diesel fuel to Mechanicsburg, Pennsylvania, on March 22. Agency Report (AR), Memorandum of Law (MOL) at 2. The RFQ, issued under Federal Acquisition Regulation (FAR) part 13 simplified acquisition procedures, contemplated a fixed-price, one-time order, issued to the vendor submitting the lowest-priced quotation. Id. Several quotations were received, including quotations from Aero Energy, AeroSage, and Tayrona. Id. Aero Energy quoted the lowest price, and award was

made to Aero Energy later the same day that the RFQ was issued, March 20. Id. AeroSage's quotation was the second lowest-priced, and Tayrona's the third lowest-priced. MOL at 2-3; AR, Tab 17, Memorandum for the Record at 1.

At 10:52 a.m. on March 22 (the day of delivery), Aero Energy sent written notice to the agency that it was unable to perform the contract. Id. At 11:39 a.m., the agency called AeroSage seeking to confirm whether AeroSage was capable and willing to perform under the terms of its previous quotation, but AeroSage did not immediately commit to performing on those terms. MOL at 3. At 11:52 a.m., the agency emailed AeroSage to clarify which procurement was under discussion and again seek confirmation of whether AeroSage could perform on the terms previously quoted, and at 12:24 p.m. AeroSage responded that "I will get back to you shortly on whether we can delivery [sic] today and pricing for this short notice request." AR, Tab 7, Email from Agency to Protester, March 22, 2018 (11:52 a.m.); AR, Tab 8, Email from Protester to Agency, March 22, 2018 (12:24 p.m.).

At 2:08 p.m., having received no further correspondence from AeroSage, the agency contacted Tayrona, the next lowest-priced vendor, who immediately confirmed its originally quoted price, but could not deliver the fuel until the following day. MOL at 3-4; Agency Response to Agency-Level Protest at 2. The agency agreed to Tayrona's updated delivery schedule, and at 2:17 p.m. and 2:23 p.m. sent emails to AeroSage indicating that it had made award to Tayrona and to disregard the agency's prior inquiries. AR, Tab 9, Email from Agency to Protester, March 22, 2018 (2:17 p.m.); AR, Tab 10, Email from Agency to Protester, March 22, 2018 (2:23 p.m.)

At 2:42 p.m., after award had been made to Tayrona and the agency had notified AeroSage of the award, AeroSage forwarded its prior quotation confirming that it would be willing to perform for the price it originally quoted, but was still waiting for its supplier to confirm possible delivery times. AR, Tab 11, Email from Protester to Agency, March 22, 2018 (2:42 p.m.). At 3:08 p.m., AeroSage filed an agency-level protest of the award to Tayrona on the basis that the agency had failed to award to the lowest-priced vendor. MOL at 4-5. At 10:14 a.m. on March 23, Tayrona delivered the fuel to the agency. Id. This protest followed.

DISCUSSION

AeroSage challenges the agency's decision to make the reprocurement award to Tayrona instead of issuing the award to AeroSage on the basis that AeroSage originally proposed a lower price than Tayrona. Protest at 1. AeroSage additionally argues that the agency allowed it inadequate time to respond by moving on to the next vendor arbitrarily, especially in light of the fact that the agency ultimately accepted delivery on the following day rather than the original delivery date.¹ Id.

¹ The protester also alleges the agency engaged in fraud or misrepresentation in connection with this procurement, among other claims, but provides no evidence
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As a preliminary matter, with regard to the repurchase of supplies or services not delivered under a contract terminated for default, FAR § 49.402-6(b) provides that a contracting officer “shall obtain competition to the maximum extent practicable.” Section 49.402-6(b) of the FAR further provides that if, as here, the repurchase is for a quantity not over the undelivered quantity, the contracting officer may “use any terms and acquisition methods deemed appropriate for the repurchase.”

While recognizing, as a general rule, that the statutes and regulations governing regular procurements are not strictly applicable where the government seeks cover after default, also called reprocurement or repurchase, our Office will review such a procurement to determine whether the contracting agency acted reasonably under the circumstances. Derm-Buro, Inc., B-400558, Dec. 11, 2008, 2008 CPD ¶ 226 at 2; Adaptive Concepts, Inc., B-243304, June 25, 1991, 91-1 CPD ¶ 605 at 3. In this context, our Office has concluded that it is reasonable to award a reprocurement contract to the next lowest-priced, qualified firm under the original solicitation at its original price, provided the time span between the original competition and the default is relatively short, and there is a continuing need for the services. Adaptive Concepts, Inc., *supra*; DCX, Inc., B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55 at 3. Under such circumstances, an agency reasonably can view the responses received under the original solicitation as an acceptable measure of what competition would bring, sufficient to satisfy the requirement of FAR § 49.402-6(b) for competition to the maximum extent practicable. Maersk Line, Limited, B-410445, B-410445.2, Dec. 29, 2014, 2015 CPD ¶ 16 at 4-5; International Tech. Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 at 3.

Here, given that only two days had elapsed since the quotations had been received, it is clear that the agency acted reasonably in attempting to reprocure the requirement from AeroSage, the next lowest-priced vendor, especially in light of the fact that the original awardee indicated that it could not perform the contract on the day that the fuel was to be delivered. AeroSage’s immediate response, however, was to indicate that AeroSage would “get back to you shortly on whether we can delivery [sic] today and pricing for this short notice request.” AR, Tab 8, Email from Protester to Agency Mar. 22, 2018 (12:22 p.m.) (emphasis added). This email indicated that AeroSage could not commit to its previously quoted price at that time. After waiting for an hour and half for a response from AeroSage, the agency then contacted the next lowest-priced vendor, which committed immediately to deliver at its original price, albeit with a one-day delay in the delivery schedule.² MOL at 3-4; Agency Response to Agency-Level Protest at 2.

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relevant to those contentions. Accordingly those arguments are dismissed as legally insufficient. 4 C.F.R. § 21.1(f).

² AeroSage’s subsequent email attempting to reinstate its quotation by confirming its original price was sent only after the agency had notified AeroSage that it had made award to the next lowest-priced vendor, and is therefore irrelevant to the question of

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Based on our prior decisions in this area and the specific circumstances present here, we cannot conclude that the agency acted unreasonably. A key point in our prior decisions concluding that an agency acted reasonably in returning to previously received responses, rather than conducting a new competition on a full and open basis, was the fact that, in those cases, the award was made for the same quantity at the original price. See, e.g., Maersk Line, Limited, supra at 4-5; DCX, Inc., supra at 3. Our decisions have taken a more flexible view on changes to the delivery schedule, recognizing that a contractor's default may render the original delivery schedule impossible, or impractical, while simultaneously creating an urgent need for delivery. Id. Because AeroSage indicated that the agency could not rely on the price that it previously quoted, we believe it was reasonable for the agency to seek delivery from the next lowest-priced vendor. Additionally, because the original awardee notified the agency that it could not perform the contract on the day of delivery, and because AeroSage indicated that the agency could not rely on its previously quoted terms after noon on the day of delivery, we conclude that the agency's acceptance of the revised delivery schedule--a one-day delay--in making award to Tayrona was reasonable under the circumstances.

The protest is denied

Thomas H. Armstrong
General Counsel

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whether the agency's award decision was reasonable. See AR, Tab 11, Email from Protester to Agency, March 22, 2018 (2:42 p.m.).