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Decision

Matter of: Community Education Centers, Inc.

File: B-418207; B-418207.2

Date: January 24, 2020

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Franklin Turner, Esq., Ethan Brown, Esq., Alexander Major, Esq., and Cara Wulf, Esq., McCarter & English, LLP, for The Kintock Group, Inc., the intervenor.
William D. Robinson, Esq., Oleta Vassilopoulos, Esq., and Nihar Vora, Esq., Department of Justice, for the agency.
Christine Milne, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly failed to raise protester's high price with the firm during discussions is denied where the record shows that the agency did not find the firm's price unreasonably high; protester has also not shown that the price reasonableness evaluation was unreasonable.
 2. Protest that agency improperly failed to raise significant weaknesses and deficiencies with the protester's past performance during discussions is denied where the agency did not find any such weaknesses or deficiencies, and where the protester had an opportunity to address any performance issues noted by the agency.
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DECISION

Community Education Centers, Inc. (CEC), of Boca Raton, Florida, protests the award of a contract to The Kintock Group, Inc., of Fort Washington, Pennsylvania, under request for proposals (RFP) No. RFP-200-1360-ES, issued by the Department of Justice, Federal Bureau of Prisons (BOP), for residential reentry center (RRC) and home confinement services for male and female federal offenders held within the boundaries of Essex, Hudson, or Union County, New Jersey. The protester argues that the agency failed to conduct meaningful discussions with the firm and improperly evaluated its proposal under the price and past performance evaluation factors.

We deny the protest.

BACKGROUND

The RFP, issued on November 14, 2016, contemplated award of a fixed-price contract to provide services over a 1-year base period and up to four 1-year option periods. Agency Report (AR), Tab 3, RFP at 7-8. Offerors were to provide monthly prices for a 64-bed facility for the RRC services and for 32 home confinement placements. Id. at 8. Award was to be made to the firm whose proposal was in the best interest of the government considering past performance, technical/management, and price factors.¹ Id. at 43. The past performance factor was more important than the technical/management factor and, when combined, these two factors were significantly more important than price. Id. Price would, however, become more important as the evaluation of the non-price factors became more equal. Id.

Under the past performance factor, the agency was to evaluate aspects of an offeror's relevant present and recent past performance.² Id. at 44. Offerors were to identify the five most relevant contracts performed in the past three years and were cautioned that the evaluation might be negatively impacted if the contracts were less relevant or not relevant. Compliance Matrix at 2. The technical/management factor is not at issue in this protest. Offerors' prices for the overall requirement would be evaluated for reasonableness. RFP at 43.

The agency received four proposals by the February 2, 2017, closing date, including those from CEC and Kintock. In March, the agency reexamined the solicitation's requirements to ensure they were consistent with the agency's needs and determined that, in order to ensure flexibility for placement of offenders, the use of an indefinite-delivery, indefinite-quantity (IDIQ) contract would provide the agency with increased flexibility to order services. Contracting Officer's Statement of Facts (COS) at 2.

As a result, on July 25, the agency issued amendment No. 004, to, among other things, change the contemplated contract to an IDIQ contract with fixed-price unit prices, and replace the statement of work (SOW), compliance matrix, and schedule of supplies and services. The new schedule required pricing for a guaranteed minimum of 17 RRC beds and eight home confinement placements for the base year only, and a maximum of 64 RRC beds and 32 home confinement placements for each year. RFP at 8; COS at 6. The schedule required offerors to submit pricing on a daily rate basis. Tab 4D, RFP at 2, amend. 004.

¹ For the non-price factors, the agency used an adjectival rating scheme with ratings of exceptional, very good, satisfactory, marginal, and unsatisfactory. RFP at 44.

² The RFP set forth six past performance subfactors: (1) in-house RRC accountability; (2) in-house RRC programs; (3) in-house RRC community relations; (4) in-house RRC personnel; (5) in-house RRC communications and responsiveness; and (6) home confinement accountability and programming. RFP at 44. These track the evaluation criteria set forth in the relevant Contract Performance Assessment Reports (CPARs).

On October 10, the agency received revised proposals in response to amendment No. 004. After evaluating proposals, the agency sent discussion questions to the offerors and received and evaluated their responses. In May 2019, after two rounds of discussions and subsequent evaluation of responses, the agency requested and received final proposal revisions (FPR). The FPRs were evaluated with the following relevant results:

	CEC	Kintock
Technical/Management	Very Good	Very Good
Past Performance	Satisfactory	Satisfactory
Price	\$18,920,866.56	\$13,288,560.00

AR, Tab 14, Source Selection Decision (SSD), at 47; Tab 13, Price Analysis, at 4-5. The contracting officer, who also served as the source selection authority, evaluated both firms' past performance as satisfactory based on an extensive review of their proposal narratives and CPARs. The record reflects that both firms had CPARs that included strengths, weaknesses, and deficiencies, including repeat deficiencies, that were considered and weighed. The contracting officer concluded that neither proposal provided a higher level of confidence than satisfactory, and assessed no weaknesses or deficiencies to CEC's past performance proposal. AR, Tab 12, Past Performance Evaluation, at 3-15. The agency found both proposals very similar under the technical/management factor. COS at 7. For price, the agency found that both firms provided daily rates and hence overall prices that were reasonable based on price competition and comparison to historical rates paid for the same or similar services. AR, Tab 13, Price Analysis, at 6-7.

The contracting officer determined that while the non-price proposals were extremely close, CEC's strengths under the past performance and technical/management factors did not outweigh those of Kintock. AR, Tab 14, SSD, at 47. Because the non-price factors were so close, the contracting officer determined that price became more important in selecting the best value, and that Kintock's proposal presented the best value to the agency. Id. Kintock was awarded the contract on October 11. CEC filed this protest after its debriefing.

DISCUSSION

CEC challenges the agency's conduct of discussions with the firm as well as its price and past performance evaluations. We have reviewed all of CEC's allegations and, as discussed below, find no basis to sustain the protest.

Price Issues

CEC argues that the agency improperly failed to inform the firm during discussions that its price was a significant weakness, and further contends that the agency failed to conduct an adequate price analysis. Protest at 3.

In evaluating proposals for price reasonableness, section 15.404-1(b)(2) of the Federal Acquisition Regulation (FAR) permits the use of various price analysis techniques and procedures to ensure fair and reasonable pricing. These techniques include the comparison of proposed prices to each other and to historical prices paid for the same or similar items. FAR § 15.404-1(b)(2)(i), (ii). The contracting officer first looked for contracts for the same or similar services performed in the New York/New Jersey/Pennsylvania region with a similar number of beds, and found two performed in Philadelphia (one performed by CEC and one performed by Kintock). AR, Tab 13, Price Analysis, at 1-2. The agency analyzed the daily rates for those contracts and arrived at an average of \$90.25 for RRC services and \$45.13 for home placement services (\$90.25/\$45.13). *Id.* at 2. In their proposals submitted in response to amendment No. 004, CEC's proposed daily rates for the base year were \$[DELETED], and Kintock's were \$[DELETED]. *Id.* at 2-4.³ In its subsequent amended proposal, CEC increased its pricing. For example, the firm's proposed daily rates for the base year increased from \$[DELETED] to \$[DELETED]. *Id.* at 4. Kintock did not revise its prices, and no other price changes were subsequently made by either offeror.

The contracting officer's price analysis report concluded that CEC's finalized inmate date rates for the base year were [DELETED] percent and [DELETED] percent higher, respectively, than the average rates for the historical contracts used for comparison, and that Kintock's rates were [DELETED] percent below those rates, and deemed them both within a reasonable range of the historical prices paid for the same or similar items, in accordance with FAR § 15.404-1(b)(2)(ii). *Id.* at 6. The agency also found that, based on adequate price competition, the firms' rates were within 35 percent of each other and that the prices were reasonable.

The protester contends that the agency failed to conduct meaningful discussions with the firm because the agency did not advise the firm that its price was a significant weakness. CEC argues that agencies are required to advise a firm that its prices are considered high if it has determined that the offeror's prices are unreasonably high, such that they would preclude award to the firm.

The decision to inform an offeror that its price is too high or too low during discussions is discretionary. *See Hydraulics Int'l, Inc.*, B-284684, B-284684.2, May 24, 2000, 2000 CPD ¶ 149 at 17. When discussions are conducted, price need be discussed only if the price is found by the agency to be unreasonable. *Id.* Here, the record shows that the agency found CEC's price reasonable and thus it was not required to raise the matter during discussions.

³ CEC's proposal also noted its concern that the option years did not include a guaranteed minimum amount; stated that this pricing structure placed too much risk on contractors; and submitted an alternate pricing proposal to address its concern. AR, Tab 6A, CEC's Business Proposal, at 5. The agency determined that the alternate pricing proposal did not conform to the solicitation and notified CEC that it would not be considered. COS at 5-6.

CEC asserts that discussions were misleading because the agency asked the firm whether the removal of unrequired services from CEC's proposal would lower its price, but did not raise the firm's "high price." Comments and Supp. Protest at 5. CEC asserts that this discussion question "lulled CEC into the reasonable belief that it had addressed all BOP's concerns with regard to price."⁴ Id. Again, the agency did not find CEC's price to be unreasonably high.⁵ As we have recognized, if an offeror's price is not so high as to be unreasonable, the agency may reasonably conduct meaningful discussions without advising the higher-priced offeror that its prices are not competitive. MarLaw-Arco MFPD Mgmt., B-291875, Apr. 23, 2003, 2003 CPD ¶ 85 at 6.

CEC finally argues that the agency did not adequately analyze the prices of either CEC's or Kintock's proposals. Protest at 7-8. CEC argues that "the wide disparity between CEC's price and Kintock's price should have prompted BOP to look more closely at those two prices in evaluating reasonableness." Comments and Supp. Protest at 7.

Again, the FAR permits the use of various price analysis techniques and procedures to ensure fair and reasonable pricing, including the comparison of proposed prices to each other, to prices found reasonable on previous purchases, or to an independent government estimate. FAR § 15.404-(b)(2); Comprehensive Health Servs., Inc., B-310553, Dec. 27, 2007, 2008 CPD ¶ 9 at 8. A price reasonableness determination is a matter of administrative discretion involving the exercise of business judgment by the contracting officer that we will question only where it is unreasonable. PJ Helicopters, Inc., B-402524.2, May 20, 2010, 2010 CPD ¶ 155 at 3.

⁴ To the extent that CEC argues that the agency should have conducted a price realism evaluation of Kintock's proposal, there is no provision in the solicitation providing for one. In the absence of an express price realism provision, we will only conclude that a solicitation contemplates a price realism evaluation where the RFP expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and the RFP states that a proposal can be rejected for offering low prices. Absent such language, our decisions are clear that agencies cannot conduct a price realism analysis. Arctic Slope Mission Servs., LLC, B-412851.2, June 21, 2016, 2016 CPD ¶ 169 at 7; see also Dyncorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 8-9.

⁵ CEC also argues that, in previous negotiations with the agency, the agency consistently raised high pricing as an issue when present, and therefore the agency's prior course of conduct undercuts its decision here not to raise it. Comments and Supp. Protest at 5. As noted, the agency did not consider CEC's price to be high but, in any event, every procurement stands on its own. See, e.g., Custom Pak, Inc.; M-Pak, Inc., B-409308 et al., Mar. 4, 2014, 2014 CPD ¶ 73 at 5. An agency's practices or actions under one procurement do not bind its practices or actions on others. Ideal Fastener Corp., B-404206, Jan. 11, 2011, 2011 CPD ¶ 19 at 4.

As discussed in detail above, the agency employed reasonable methods pursuant to the FAR, including comparison to current and historical prices, to determine that the prices were reasonable. As our decisions have found, a price reasonableness determination is a matter of administrative discretion involving the exercise of business judgment by the contracting officer that we will question only where it is unreasonable. PJ Helicopters, Inc., *supra*; see also The Right One Co., B-290751.8, Dec. 9, 2002, 2002 CPD ¶ 214 at 5. While CEC asserts that the agency could have conducted a more in-depth or precise analysis, the firm has not shown that the analysis here was unreasonable.

Past Performance Issues

CEC argues that the agency improperly failed to advise the firm during discussions that its past performance was a significant weakness or deficiency. Protest at 8. The agency counters that the underlying performance issues it considered came from the CPARs it reviewed and that CEC already had an opportunity to respond to them. Memorandum of Law (MOL) at 6. As a result, the agency argues, it was not required to raise any performance issues during discussions.

An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. AT&T Gov't Solutions, Inc., B-406926 *et al.*, Oct. 2, 2012, 2013 CPD ¶ 88. Since the agency is responsible for defining its needs and the best method for accommodating them, we will not substitute our judgment for reasonably based past performance ratings. *Id.* We have stated that when a protester has had an opportunity to respond to adverse past performance information contained in CPARs, an agency is not required to raise that information during discussions in an ongoing procurement. *Id.*; see also Torres-Advanced Enter. Sols., LLC, B-412755.2, June 7, 2016, 2016 CPD ¶ 167. The record confirms CEC had an opportunity to respond to its adverse past performance raised within the CPARs and therefore the agency was not required to raise the matter during discussions.⁶

CEC next argues that the agency evaluated its proposal using an unstated evaluation criterion of "repeat deficiencies." Comments and Supp. Protest at 17. The firm asserts that because the agency "added the repetition of performance deficiencies as an

⁶ CEC argues that even if the agency was not required to raise its performance issues during discussions, the discussions were still not meaningful because, when taken together, the deficiencies within the CPARs were considered "repeat deficiencies" and CEC had not previously had an opportunity to address the deficiencies when taken together as "repeat deficiencies." Comments and Supp. Protest at 13-14. However, the fact that multiple CPARs indicate the same or similar deficiencies or "repeat deficiencies" does not transform them substantively into a new deficiency.

evaluation criterion,” its past performance was improperly downgraded. *Id.* at 17-18. The agency responds that the contracting officer’s use of the term “repeat deficiencies” was merely descriptive; it was referring to what the CPARs themselves referred to as “repeat deficiencies.” Supp. MOL at 2. The term “repeat deficiency” appears multiple times in the CPARs reviewed by the agency and, as noted above, CEC already had a chance to address these “repeat deficiencies.” Supp. AR, Tab 25, CPAR_DJB200286 at 3, 5; Tab 24, CPAR_DJB200108 at 2-6. The record does not show that the agency used “repeat deficiency” as an evaluation criterion. Given that the RFP expressly provided that, where the relevant performance record indicated performance problems, the government would consider the number and severity of the problems and the appropriateness and effectiveness of any corrective action taken, RFP at 44, it was entirely appropriate for the agency to consider any “repeat deficiencies.”

CEC finally argues that its overall satisfactory rating for past performance conflicted with the contracting officer’s written evaluation. Comments and Supp. Protest at 20-21. CEC states that it should have received a rating of “very good” because, in the final performance evaluation, the contracting officer found that “CEC’s performance has complied with contract requirements [in the past] in most of the factors and CEC corrected the deficiencies in several factors [in past CPARs],” citing the source selection decision. AR, Tab 14, SSD at 12. The record shows that, in assessing the firm’s proposal a satisfactory rating, the contracting officer performed a detailed qualitative assessment of CEC’s past performance and carefully weighed the nature of the performance issues and corrective action taken. We find that CEC’s argument amounts to disagreement with the agency’s evaluation.⁷ We have repeatedly stated that disagreement, without more, with the agency’s evaluation is not sufficient to render the evaluation unreasonable. Unispec Enterprises, Inc., B-407937, B-407937.2, Apr. 16, 2013, 2013 CPD ¶ 104.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁷ In any event, evaluation ratings, whether numerical, color, or adjectival, are merely guides for intelligent decision making and the agency must look behind those ratings. Protection Strategies, Inc., B-414573.3, Nov. 9, 2017, 2017 CPD ¶ 348.