



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: American Systems Group

File: B-418535

Date: June 9, 2020

Ritobrata Banerjee, for the protester.

Alexis J. Bernstein, Esq., Capt. Seiji Ohashi, Department of the Air Force, for the agency.

Robert T. Wu, 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 improperly conducted a price realism evaluation and failed to request additional information from the protester prior to rejecting the firm's quotation is dismissed where the allegations are untimely challenges to alleged defects evident from the face of the solicitation.

 2. Protest that the agency's price realism evaluation did not comply with the terms of the solicitation is dismissed as untimely, where the record shows that the protester could have raised the allegation in its initial protest, but failed to do so.
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DECISION

American Systems Group (ASG), of San Diego, California, protests the award of a contract to Summit Services, Inc., of Black Mountain, North Carolina, under request for quotations (RFQ) No. FA4690-19-Q-A035 by the Department of the Air Force for administrative support services. The protester challenges the agency's decision to reject the firm's quotation as being unrealistic pursuant to a price realism evaluation.

We dismiss the protest.

BACKGROUND

The RFQ, issued on September 16, 2019, as a competitive set-aside for participants in the Small Business Administration's Historically Underutilized Business Zone program, sought quotations to provide administrative support services, including standardization and evaluation program support, security administration management, as well as

personnel and physical security support. Agency Report (AR) Tab 3, RFQ at 8.¹ The resulting contract, awarded under the simplified acquisition procedures of Federal Acquisition Regulations part 13, was to consist of one base year, and four 1-year option periods. *Id.* at 3-7. Award was to be made on a best-value basis considering past performance and price. *Id.* at 67.

Under the stated evaluation scheme, quotations were to be evaluated first for responsiveness. *Id.* Quotations that were found to be responsive would then be evaluated on price. The RFQ explained that price would be evaluated as follows:

Price Evaluation Standard. Evaluation of price will consider the total of the annual prices for all contract years (base plus all options, including a possible six-month extension), with each year's price evaluated as the sum of the prices of all contract line items (CLINs) for that year. Each CLIN price will be evaluated as the quantity multiplied by the unit price, rounded to the nearest cent. The Government may determine that a vendor's quote is unacceptable if the option prices are significantly unbalanced. *For a price to be determined realistic, the quoter's total evaluated price will not be less than 25 [percent] of the average of all responsive quotes identified in Step 2.*

Id. (emphasis added).

Next, the agency was to evaluate the lowest priced vendor's past performance "until an acceptable rating is achieved." *Id.* An acceptable past performance rating was to be assigned based on an evaluation of recent and relevant past performance where the agency determines that "[b]ased on the quoter's overall performance record, the Government has a reasonable expectation that the quoter will successfully perform the required effort." *Id.* at 68. Finally, the agency was to make a best-value award decision based on the past performance evaluation and a determination that the vendor's price was fair and reasonable. *Id.* at 67. The solicitation warned that the agency "reserves the right to award a contract to other than the lowest priced quote if the lowest priced quote is judged to have a performance rating of unacceptable." *Id.* at 68.

Twenty-one quotations were received by the agency, including one from ASG. AR, Tab 8, Simplified Acquisition Decision Document at 1. Of the 21 quotations received, six were found to be non-responsive, and were not considered further. *Id.* The agency evaluated responsive quotations to determine whether their proposed prices were balanced and realistic. *Id.* at 4. As part of the price analysis, the agency aggregated the total evaluated prices (TEP) for all responsive vendors, and then divided that total by the number of responsive

¹ The Air Force provided both a redacted and an unredacted version of the agency report. Unless noted otherwise, all citations to the record are to the redacted version of the agency report.

quotations. *Id.* This resulted in an average price, to which the agency applied a deviation of 25 percent, resulting in a cutoff price, for purposes of determining whether a vendor's TEP was realistic. *Id.* The agency found that several vendors, including ASG, proposed prices below the calculated cutoff price, and excluded those vendors based on a determination that their proposed TEPs were unrealistic. *Id.* at 5.

ASG was informed that it was an unsuccessful vendor on February 20, 2020. AR, Tab 11, Unsuccessful Vendor Letter at 1. In that letter, the protester was notified, among other things, that the winning quotation's price was \$1,788,888 and that ASG's quotation "was not accepted because [its] quote was not determined to be the best value in accordance with the evaluation factors." *Id.* ASG requested a debriefing, and the agency responded with a written explanation on February 27, notifying ASG that the firm's TEP "did not meet the price evaluation standard for realism" and, as a result, the firm's quotation "did not proceed further in the evaluation process." AR, Tab 13, Debriefing Letter at 1-2. This protest followed on March 4.

DISCUSSION

ASG argues that the agency unreasonably failed to award a contract based on the lowest priced vendor with acceptable past performance, and instead "capriciously adopted" a 25 percent price realism factor in its price analysis. Protest at 3. Additionally, according to the protester, if the agency "truly had concerns regarding ASG's ability to execute this contract at this low price, it could have done a price realism [sic] by first affording ASG an opportunity to provide a [p]rice [b]reakdown before taking the position that ASG's price was unrealistically low." *Id.* at 3, 5-7. The Air Force requests that our Office dismiss the two protest allegations raised by ASG, as well as the protester's subsequent allegation, discussed below, as untimely. Memorandum of Law (MOL) at 5-9. For the following reasons, we dismiss this protest.²

Use of Price Realism

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

² Because ASG elected to proceed with its protest *pro se*, and therefore no protective order was issued, protected information cannot be included in this decision. Accordingly, our discussion of some aspects of the evaluation is necessarily general in nature in order to avoid reference to non-public information.

In its protest, ASG first argues that the agency “capriciously adopted” a 25 percent price realism factor in its price analysis. Protest at 3. The solicitation, however, clearly states that “[f]or a price to be determined realistic, the quoter’s total evaluated price will not be less than 25 [percent] of the average of all responsive quotes.” RFQ at 67. As such, vendors were on notice that a price realism analysis was contemplated by the terms of the solicitation, and that vendors’ prices would be evaluated using 25 percent of the average of all responsive quotations as the benchmark. Because the protester’s allegation here is essentially a challenge to the terms of the solicitation, ASG was required to file its protest prior to the closing time for receipt of initial proposals, which it did not. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc., surpa; Southeastern Enterprises, Inc.--Request for Reconsideration*, B-244989, B-244989.2, Apr. 20, 1992, 92-1 CPD ¶ 371 at 3 (finding that challenges to the propriety of conducting a price realism analysis is ultimately an allegation of impropriety in the solicitation, that need to be protested prior to the time set for receipt of proposals). Consequently, this protest allegation is dismissed as untimely.

Conduct of Price Realism Analysis

Likewise, we dismiss ASG’s argument that the agency should have afforded the firm an opportunity to provide a price breakdown prior to determining its price to be unrealistic. Protest at 3, 5-7. In this regard, our review of the solicitation reveals no requirement, nor has ASG cited to any, that obligated the agency to request a price breakdown as part of its price realism evaluation. See RFQ. Thus, to the extent ASG is arguing that the agency was required to do so, such an allegation is also an untimely challenge to an alleged impropriety in the solicitation that was apparent prior to the closing time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc., surpa*.

To the extent that the protester now argues that the agency was, nonetheless, unreasonable in not requesting a price breakdown, such matters are within the agency’s broad discretion in conducting its evaluation of quotations. See *CDS Network Systems, Inc.*, B-281200, Dec. 21, 1998, 98-2 CPD ¶ 154 at 3 (determining that, consistent with terms of solicitation, agency was reasonable in rejecting quotation and denying protester’s argument that agency should have sought additional information before rejecting quotation). Moreover, 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.-W. Operations*, B-291793 et al., Mar. 25, 2003, 2003 CPD ¶ 66 at 27-28. Our review of the record here provides no basis to sustain the protest.

Subsequent Allegation

Finally, prior to submission of the agency report, the agency submitted a request that our Office dismiss the protest, arguing that ASG’s challenge to the agency’s price realism evaluation is an untimely challenge to the terms of the solicitation. Agency Request for Dismissal at 2. The agency also asserted that the protester’s second

allegation, that the agency should have further analyzed ASG's price and requested a price breakdown, was both untimely and legally insufficient. *Id.* at 2-3. In response to the agency's request for dismissal, we requested that the parties submit additional briefings on their respective interpretations of the price realism requirement found in the solicitation. See GAO Request for Additional Briefing.

The parties complied with our Office's request for additional briefing, submitting filings prior to the agency's production of the agency report. In its submission, the protester argued, for the first time, that the agency's method of performing the price realism evaluation to quotations was inconsistent with the terms of the solicitation. Protester's Response to Briefing Request at 2. In this regard, ASG alleges that "for ASG to be eliminated on the basis of [price realism] . . . the average TEPs of all [vendors] would necessarily have been greater than \$6,199,512." *Id.* The protester contends this would have been "an impossible scenario in view of the rather small 4 [full-time equivalent] . . . procurement to provide Administrative Support Services." *Id.* We declined to dismiss the protest at that time and requested that the agency submit an agency report to provide a full record for our review.

The agency argues that the protester knew or should have known of this basis of protest at the time of award, and, consequently, this new challenge is untimely. MOL at 8-9. Specifically, the agency points to the fact that the information relied on by ASG in fashioning its latest challenge was available to the protester in the notice to unsuccessful offerors. *Id.* We agree.

Under our regulations, protests must be filed no later than 10 days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our review of the record shows that the argument made by ASG, that the agency misapplied the price realism criteria in its evaluation could have been raised in its initial protest, but was not.

In this regard, the protester knew from the unsuccessful vendor notice it received from the agency both its own price, and that of the awardee. AR, Tab 11, Unsuccessful Vendor Notice at 1. ASG subsequently learned from the agency's February 27 letter that ASG's quotation was rejected based on the agency's price realism analysis. AR, Tab 13, Basis of Award at 1-2. As discussed, the solicitation notified vendors of the following: "For a price to be determined realistic, the quoter's total evaluated price will not be less than 25 [percent] of the average of all responsive quotes . . ." RFQ at 67. The protester's subsequent allegation that "for ASG to be eliminated on the basis of [price realism] . . . the average TEPs of all [vendors] would necessarily have been greater than \$6,199,512," which ASG argued was "an impossible scenario in view of the rather small 4 [full-time equivalent] . . . procurement to provide Administrative Support Services." Protester's Response to Briefing Request at 2; Comments at 4. Based on these facts, ASG could have--but did not--raise this allegation in the protest filed with our Office on February 28.

Indeed, the fact that the protester was able to fashion its argument in response to our Office's request for additional briefing, with information available at the time of award--and prior to production of the agency report--only supports this conclusion. As the protester did not raise this allegation within 10 days of when it knew or should have known of the basis of protest, this allegation is untimely, and will not be considered further. 4 C.F.R. § 21.2(a)(2); *XL Assocs., Inc., d/b/a/ XLA*, B-417426.3, Jan. 16, 2020, 2020 CPD ¶ 33 at 13 n.12 (finding that protester knew the operative facts underlying its allegation prior to submitting its protest and allegation is therefore untimely).

Moreover, the notice of award here provided sufficient evidence to conclude that the agency's application of its price realism provision varied significantly from the terms of the provision included in the solicitation. The agency apparently meant to provide that, "For a price to be determined to be realistic, the quoter's total evaluated price will be not more than 25 percent less than the average of all responsive quotes." The resulting calculation from the apparent meaning of this language is markedly different from a calculation of 25 percent of the average price from all responsive quotes. While the provision was not ambiguous on its face (and thus did not need to be challenged before the submission of quotations), as discussed above, the misapplication of this solicitation provision was evident from the unsuccessful vendor notice and basis of award. As a result, any challenge to the agency's evaluation of price is untimely at this juncture.

The protest is dismissed.

Thomas H. Armstrong
General Counsel