



Decision

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Matter of: KTS Solutions, Inc.

File: B-418665.2; B-418665.4; B-418665.5

Date: August 13, 2020

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Kathleen Ellis, Esq., Department of Veterans Affairs, for the agency.
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DIGEST

Protest challenging agency's proposed corrective action, which includes reopening discussions, requesting revised proposals, and making a new award decision, is denied where the agency reasonably determined that it had conducted unequal discussions and that corrective action is necessary to remedy the error.

DECISION

KTS Solutions, Inc., a service-disabled veteran-owned small business (SDVOSB) located in Portsmouth, Virginia, protests the corrective action proposed by the Department of Veterans Affairs (VA) in connection with the agency's procurement for special mode transportation services under request for proposals (RFP) No. 36C24819R0207. The agency proposed to take the corrective action in response to a protest from another offeror. KTS argues that the corrective action is unreasonable.

We deny the protest.

BACKGROUND

The VA issued the RFP on October 18, 2019, as a SDVOSB set-aside. Protest, exh. A, RFP, at 1. The RFP contemplated the award of multiple fixed-price indefinite-delivery, indefinite-quantity contracts, for a base year with four 1-year options. RFP at 10, 60. The solicitation anticipated that award would be made on a best-value tradeoff basis, considering four evaluation factors in descending order of importance: customer service experience, technical experience, past performance, and price. *Id.* at 62. The

RFP emphasized that “[d]ue to the critical nature of these services,” the offeror’s customer service experience, technical experience, and past performance, when combined, “are considered significantly more important than getting the lowest price for the services.” *Id.* Additionally, the solicitation provided that all offerors selected for the competitive range “will be required to conduct a live, oral presentation of their proposal.” *Id.*

As relevant here, the solicitation included a price/cost schedule of contract line item numbers (CLINs) for the base year and each option year. For each CLIN, the schedule provided a description of the rate for the type of transportation to be provided (such as the rate for wheelchair/scooter patient, stretcher patient, or a cancelled trip). Agency Report (AR), Tab 3, Price/Cost Schedule, at 1. The CLINs for trips more than thirty miles included mileage estimates and requested unit pricing on a per mile basis; whereas, the CLINs for trips less than 30 miles included estimates for the quantity of trips and requested pricing on a per trip basis.¹ *Id.*

The VA received proposals from six offerors, including KTS, by the November 12 closing date. AR, Tab 2, Contracting Officer’s Statement (COS) at 1. After evaluating proposals, the contracting officer established a competitive range of all six offerors. *Id.* In accordance with the solicitation, all offerors included in the competitive range were invited to conduct live presentations on November 25. *Id.* The agency also asked offerors to address proposal weaknesses identified by the agency during the initial evaluation. *Id.* After live presentations, the VA requested final proposal revisions (FPRs), which all six offerors submitted by the December 2 deadline. *Id.*

On December 26, the agency notified offerors of its intent to award contracts to two companies: Navarre Corp., and 28 Trans, LLC. *Id.*; Protest, exh. D, Debriefing at 1. In its award notifications, the agency disclosed the technical ratings and proposed prices of all offerors. *Id.* As relevant here, KTS’s proposal was listed as the third lowest-priced proposal. *Id.*

Following the notice of awards, several offerors took issue with the eligibility of the selected firms. Multiple protests challenging Navarre’s small business size status were filed with the U.S. Small Business Administration (SBA), but all were ultimately denied or dismissed. COS at 1; AR, Tab 1, Memorandum of Law (MOL) at 2. KTS also filed a protest with the SBA challenging 28 Trans’s status as a small business. *Id.* The SBA area office ultimately determined that 28 Trans was “other than small.” MOL at 2; Protest at 3. As a result, the agency rescinded the award to 28 Trans. MOL at 2.

After the VA received notification of the size determination regarding 28 Trans, the agency “reviewed the procurement file to determine the next-in-line offer for award,” and

¹ For example, for CLIN 0001 (wheelchair/scooter patient), the schedule explained that the price included “[l]oaded passenger mileage rate, for trips more than 30 miles in length [w]ithin the [c]atchment [a]rea,” and provided an estimated quantity of 300,000 miles.” AR, Tab 3, Price/Cost Schedule, at 1, CLIN 0001, 0001AA.

also “discovered a need to revise its [p]rice/[c]ost [s]chedule by consolidating a few line items.” MOL at 2. Accordingly, on March 5, 2020, the contracting officer advised KTS that the VA was again considering KTS’s proposal and asked if KTS would revise its price/cost schedule in light of the changes made by the agency. The contracting officer also asked if KTS would “entertain the idea of eliminating mileage completely.” 2nd Supp. Protest & Comments, exh. B, VA Email, Mar. 5, 2020, at 1-2. KTS responded that it would be willing to “bring[] the pricing down,” by \$[DELETED], but that if [DELETED].” *Id.*, exh. C, KTS Email, Mar. 5, 2020, at 1. KTS also provided the VA with a revised price proposal, in which it made changes to some of its unit pricing, which resulted in a decrease in its total proposed price from \$[DELETED] to \$[DELETED]. AR, Tab 5, KTS Revised Price Proposal, Consolidated Line Items, at 1; COS at 1.

About a month later, on April 6, the agency discovered “[d]uring a Progress Meeting with Navarre . . . that the original estimated quantities for the solicitation are inaccurate.” COS at 2. The agency then told KTS about this issue, advising it that the quantities listed in the price/cost schedule would need to be increased. 2nd Supp. Protest & Comments, exh. D, VA Email, Apr. 6, 2020, at 1. KTS responded with another revised price proposal in which it again reduced its proposed unit pricing for some CLINs. See AR, Tab 6, KTS Revised Price Proposal, Increased Quantities, at 1. A few days later, however, on April 9, the contracting officer advised KTS that “[a]fter talking with the team here,” we “think it’s best to stay with the first set of quantities for now.” 2nd Supp. Protest & Comments, exh. E, VA Email, Apr. 9, 2020, at 1. The contracting officer explained that there are “too many variables in play” so we are “going to stay with the revised pricing you agreed to previously and the original quantities for now.” *Id.*

On April 14, another offeror, Excelsior, filed a protest with our Office, challenging the VA’s evaluation and source selection decision. In response, the VA informed our Office of its intent to take corrective action by conducting discussions with all remaining offerors, allowing for final proposal revisions, evaluating the revised proposals, and making an award decision. The VA also noted that it had not yet made a second award. As a result of the VA’s proposed corrective action, we dismissed the protest as academic on April 24. *Excelsior Ambulance Service, Inc.*, B-418665.1, Apr. 24, 2020 (unpublished decision).

On May 5, the VA advised all offerors in the competitive range that “[a]s a result of a recent protest and better estimated quantities for these services, we are asking all remaining vendors to submit their final revised pricing for the solicitation[.]” Protest, exh. H, Agency Email, May 5, 2020, at 1. Attached to the email, the agency provided offerors with a Revised Price/Cost Schedule, which contained consolidated line items and adjusted estimated quantities.² *Id.*; AR, Tab 4, Revised Price/Cost Schedule, Quantity & Consolidated Line Items, at 1; COS at 2.

² The email included a revised price/cost spreadsheet, with the following changes: all estimated quantities were changed based on historical data from the previous year; cancelled trips were consolidated into one line item, with no breakdown for different mileage; and the line item for contractor attendant rates was changed to an hourly rate,

On May 7, KTS filed the instant protest challenging the agency's corrective action. On May 13, the agency notified offerors of the stay in the procurement due to the pending KTS protest. AR, Tab 8, Agency Email, at 1; COS at 2. The VA also informed the offerors that "[p]ending the resolution of all active protests, it is the Government's intent to conduct full discussions with all remaining [offerors] to address significant weaknesses in their proposals (technical, past performance and price), in accordance with [Federal Acquisition Regulation] 15.306(d)."³ *Id.* Thereafter, on May 19, KTS filed a supplemental protest.⁴

DISCUSSION

KTS protests the agency's proposed corrective action as unreasonable. KTS contends that the agency's corrective action--conducting discussions with all remaining offerors in the competitive range--fails to address an impropriety with the procurement. In particular, KTS contends that the agency conducted a reasonable evaluation up to the date of the initial awards in December 2019, and that any problems with the procurement emerged only after the agency re-engaged KTS in exchanges regarding the agency's decision to consolidate CLINS and modify estimated quantities. According to KTS, the agency ultimately disregarded these exchanges with KTS, which obviated the need for the agency to address any improper communications between KTS and the VA. KTS therefore argues that there is no justification for the agency to repeat a portion of the procurement now. In the alternative, the protester asserts that the agency's decision to revise the pricing structure is "unwarranted" and "unjustified." The protester maintains that KTS is the apparent awardee based on the December 2019 evaluation, and in the absence of any procurement improprieties, the agency should be directed to make award to KTS. While we do not discuss each of the protester's arguments below, we have considered them all and find that none provide a basis to sustain the protest.

In response, the agency asserts that the VA's decision to take corrective action was reasonable and appropriate to remedy the concerns raised by Excelsior's April 14

instead of a rate based on mileage. Protest, exh. H, Corrective Action Email, Revised Price/Cost Schedule, at 1-6; Supp. COS at 2.

³ On May 12, Excelsior filed another protest with our Office, challenging the agency's evaluation of Excelsior's and KTS's technical proposals and best-value determination; this protest was docketed as B-418665.4. The protester elected to withdraw this protest after the VA's May 13 notice regarding its intended corrective action for the procurement.

⁴ The supplemental protest challenges generally the agency's decision to engage in discussions with all offerors, arguing that the corrective action was overbroad and failed to "address a VA concern." Supp. Protest at 3-4. KTS first learned the agency's rationale for taking corrective action when the VA filed its agency report in response to KTS's initial and supplemental protest grounds. MOL at 3. In response to the agency report, KTS filed a second supplemental protest challenging specifically the agency's rationale for the corrective action. 2nd Supp. Protest & Comments at 5-9.

protest. The VA explains that after receiving the protest, the agency reviewed the procurement and concluded that the discussions were unequal because “only one offeror, [KTS], of the remaining group of offerors in consideration for award, had been permitted the opportunity to revise its pricing, a material term.” MOL at 6. The agency argues that conducting discussions with all remaining offerors, allowing for final proposal revisions, evaluating the final proposal revisions, and making an award decision, is appropriate to resolve the concern it identified. MOL at 4.

As a general rule, agencies have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure fair and impartial competition. *MSC Indus. Direct Co., Inc.*, B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5; *Zegler, LLC*, B-410877, B-410983, Mar. 4, 2015, 2015 CPD ¶ 168 at 3. The details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *DGC Int'l*, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; *Northrop Grumman Info. Tech., Inc.*, B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3. Where an agency has reasonable concerns that there were errors in the procurement, corrective action may appropriately include reopening discussions and requesting revised proposals before reevaluating. See, e.g., *DGC Int'l*, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; *Consortium HSG Technischer Service GmbH and GeBe Gebäude-und Betriebstechnik GmbH Südwest Co., Management KG*, B-292699.4, Feb. 24, 2004, 2004 CPD ¶ 44 at 3.

We see no basis to object to the VA’s corrective action. Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. Federal Acquisition Regulation (FAR) 15.306(d); see *Alliant Enter. JV, LLC*, B-410352.4, Feb. 25, 2015, 2015 CPD ¶ 82 at 5. Here, the record supports the agency’s assertion that it engaged in discussions solely with KTS and that KTS was permitted to revise its pricing, while the other offerors in the competitive range were not provided with the same opportunity. See 2nd Supp. Protest & Comments, exh. B, VA Email, Mar. 5, 2020, at 1-2; *id.*, exh. C, KTS Email, Mar. 5, 2020, at 1; AR, Tab 5, KTS Revised Price Proposal, Consolidated Line Items, at 1; AR, Tab 4, Revised Price/Cost Schedule, Quantity & Consolidated Line Items, at 1 (emails and attachment showing that on March 5, 2020, the VA provided KTS with a revised cost/price schedule, which consolidated certain line items, and invited KTS to reconsider its proposed price, and that KTS responded with a revised price proposal that reduced the offeror’s overall proposed price by \$[DELETED]).⁵

⁵ Although KTS opted not to take advantage of the opportunity, the agency also invited KTS to “entertain the idea of eliminating mileage completely.” 2nd Supp. Protest & Comments, exh. B, Agency Email, Mar. 5, 2020, at 2; AR, Tab 5, Revised Price Proposal, Consolidated Line Items.

KTS also does not dispute that it engaged in these exchanges with the agency or that it was the only offeror provided with the opportunity to submit revised pricing to the VA. Protest at 5 (“[O]n March 5, 2020, [the VA] relayed to KTS that the VA was ‘reviewing [its] proposal ‘again’ and asked KTS if it could negotiate its price. . . . KTS agreed to reduce its price.”); *id.* at 7 (“[T]he VA first approached only KTS with a request for revised pricing, and then [with its corrective action] sought revised pricing from all remaining offerors.”). When an agency conducts discussions with one offeror, it must conduct discussions with all offerors in the competitive range. *Gulf Copper Ship Repair, Inc.*, B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 8-9. Here, we find nothing unreasonable regarding the VA’s conclusion that it treated offerors unequally by conducting discussions solely with KTS.

Although the protester asserts that any changes made to the price/cost schedule were only “nominal tweaks” and “not substantive,” as the agency points out, the changes resulted in KTS knowingly negotiating and reducing its proposed pricing in a negotiated procurement where price is one of the evaluation factors. We therefore agree with the agency’s view that the changes were material. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. *IDEAL Indus., Inc.*, B-416416, July 26, 2018, 2018 CPD ¶ 253 at 4. Thus, we conclude that the agency’s corrective action was reasonable because it remedies the errors uncovered by the agency.

The protester also asserts that the corrective action is unreasonable because any harm from unequal discussions has already been mitigated by the agency’s decision to disregard the revised price proposal submitted by KTS on March 6, and instead revert to the proposal submitted by KTS on December 2, 2019. We find nothing in the record, however, that supports the protester’s position that the agency has decided to disregard the protester’s March 6 price proposal.

Instead, as noted above, the record reflects that the agency conducted two rounds of exchanges with KTS—one on March 6 (consolidating CLINs in the price/cost schedule), and one on April 6 (modifying estimated quantities in addition to consolidating the CLINs in the price/cost schedule). 2nd Supp. Protest & Comments, exh. B, VA Email, Mar. 5, 2020, at 1-2; *id.*, exh. D, VA Email, Apr. 6, 2020, at 1. The record also reflects that KTS responded to the agency in both instances with revised pricing. *Id.*, exh. C, KTS Email, Mar. 5, 2020, at 1; AR, Tab 5, KTS Revised Price Proposal, Consolidated Line Items; *id.*, TAB 6, KTS Revised Price Proposal, Revised Quantities, at 1. After the protester’s second price revision, the contracting officer “determined that there were too many variables in play to make a decision on new estimated quantities.” COS at 2. Therefore, on April 9, 2020, he conveyed that decision in an email to KTS and continued with the evaluation with the “revised proposal received from KTS on March 6, 2020.” *Id.*

Although the contracting officer changed his mind regarding the use of the modified estimated quantities, there is nothing in the record to indicate that he changed his mind or “disregarded” the change to consolidate CLINs, or that he changed his mind about using the revised price proposal submitted by KTS on March 6 in response to the

change to consolidate CLINs. *Id.* KTS points to the agency's April 9 email as support for its assertion that the agency decided to "disregard" the exchanges and price proposal submitted by KTS on March 6; the protester also acknowledges, however, that this email is "somewhat unclear" regarding whether the agency was "referring to KTS's December 2" proposal or to "KTS's March input."⁶ 2nd Supp. Protest & Comments at 5 n.3. On this record, the protester has not demonstrated that the agency decided to "disregard" its exchanges with KTS or the March 6, 2020 revised price proposal submitted by KTS.

We also find no merit to the protester's contention that none of the other offerors were competitively prejudiced by the unequal discussions with KTS, and that, without demonstrated prejudice, the agency's proposed corrective action is unreasonable. *Id.* at 7-8. The protester asserts that, even if the agency engaged in unequal discussions with KTS, "no other offeror had the chance of receiving the award" because KTS had the lowest-priced proposal and its proposal was "equal or better to every other offeror on every single technical rating." *Id.* at 6-7. As noted above, the solicitation anticipates that award will be made on a best-value tradeoff basis, based on all four of the evaluation factors in descending order of importance, with price listed as the least important. RFP at 62. As also previously discussed, the record reflects that, during discussions, KTS was provided with an opportunity to revise its price proposal and, in fact, changed some of its unit pricing which lowered its overall proposed price. AR, Tab 5, KTS Revised Price Proposal, Consolidated Line Items, at 1; COS at 1.

The record also shows, as the protester acknowledges, that although KTS was the lowest-priced offeror, KTS received the same overall technical ratings as the offeror with the second lowest-priced proposal. See Protest, exh. D, Debriefing, at 1. Based on the record here, had the second-lowest priced offeror been given the same opportunity as KTS to revise its pricing, there is a reasonable possibility that the agency might have selected its proposal for award. We therefore disagree with the protester that none of the other offerors was prejudiced by the agency's discussions with KTS.

We further disagree with the protester's assertion that reopening the competition would foster an impermissible auction because the offerors' contract prices and ratings have been disclosed. We have previously noted that the FAR does not prohibit auctions. FAR 15.306(e)(3); see *Jackson Contractor Grp., Inc.*, B-402348.2, May 10, 2010, 2010 CPD ¶ 154 at 3. In addition, as a general matter, agencies are not required to equalize the possible competitive advantage flowing to other offerors as a result of the release of information in a post-award setting where the release was not the result of preferential treatment or other improper action on the part of the agency. *IDEAL Indus., Inc.*, *supra* at 4-5. Here, the offerors' prices and ratings were released to competitors in the context

⁶ Specifically, in the April 9 email, the VA advised KTS that the agency wanted to stick with the "original quantities for now," instead of the modified quantities, and also stated that the agency wanted to "stay with the revised pricing you agreed to." 2nd Supp. Protest & Comments, exh. E, VA Email, Apr. 9, 2020, at 1.

of a post-award debriefing as contemplated by FAR 15.506(d)(2), and not as a result of preferential treatment or other improper action on the part of the agency. See Protest, exh. D, Debriefing, at 1. On this record, we find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel