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Decision

Matter of: Facility Healthcare Services, Inc.

File: B-418743.2; B-418743.3

Date: September 2, 2021

William Weisberg, Esq., Law Offices of William Weisberg, for the protester.
John R. Prairie, Esq., George E. Petel, Esq., and Adam Briscoe, Esq., Wiley Rein LLP, for Peak Facility Solutions, LLC, the intervenor.
Jonathan S. Baker, Esq., Department of Commerce, for the agency.
Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the adequacy of discussions involving price is denied where the agency informed the protester that its price was significantly higher than the independent government cost estimate, and pointed the protester to the exact contract line item prices requiring revision.
2. Protester is not an interested party to challenge the agency's evaluation of the awardee's proposal or the agency's source selection decision where the agency reasonably determined that the protester's proposed price was unreasonably high, effectively rendering the protester's proposal unawardable, and there were eligible intervening offerors whose proposals were unchallenged.

DECISION

Facility Healthcare Services, Inc. (Facility), a small business of Brighton, Colorado, protests the award of a contract to Peak Facility Solutions, LLC (Peak), a small business of Conifer, Colorado, under request for proposals (RFP) No. 1333ND20RNB190010, issued by the Department of Commerce, National Institute of Standards and Technology (NIST), for facilities maintenance and operations services. The protester challenges the adequacy of discussions conducted by the agency, the agency's evaluation of proposals, and the source selection decision.

We deny the protest.

BACKGROUND

NIST issued the RFP as a small business set-aside under the commercial item procedures of Federal Acquisition Regulation (FAR) part 12, and the negotiated procurement procedures of FAR part 15. Agency Report (AR), Attach. 6, RFP at 1, 9-10. The solicitation sought proposals for facilities maintenance and operation of NIST's central utility plant at the agency's Boulder, Colorado campus, as well as equipment maintenance at other NIST facilities in Colorado and Hawaii. *Id.* at 3-8.

The RFP contemplated the award of a fixed-price contract to the responsible offeror whose proposal represented the best value to the government considering the following factors: past performance; organization, management, and key personnel; technical approach; and price. RFP at 135, 145-147. Each non-price factor was approximately equal in importance, and when combined, the non-price factors were approximately equal in importance to price. *Id.* at 145-147.

The RFP explained that prices would be evaluated for reasonableness using at least one of the following three techniques: comparing all proposed prices received in response to the solicitation with each other; comparing proposed prices with the independent government cost estimate (IGCE); or comparing proposed prices with available historical information. *Id.* at 147. Further, the RFP advised that a price "found to be either unreasonably high or unrealistically low in relation to the proposed work may be indicative of an inherent lack of understanding of the solicitation requirements and may result in the overall proposal being considered unacceptable." *Id.* at 147. Proposals were due on November 13, 2020. *Id.* at 1.

NIST received five proposals in response to the RFP. Contracting Officer's Statement (COS) at ¶ 11. The agency's initial evaluation found all five proposals technically unacceptable. AR, Attach. 9, Competitive Range Determination at 5. Facility's proposed price was "not determined as fair and reasonable in comparison with the [IGCE] and competitive[ly] price[ed] offers." *Id.* at 19. Following the initial evaluation, NIST established a competitive range including all five offerors, and opened discussions. *Id.*; COS at ¶ 12. On February 21, Facility received its initial discussion letter which informed Facility that, along with issues regarding its technical proposal, its proposed price was "significantly higher than the Government Estimate." AR, Attach. 11, Facility Initial Discussions at 1, 4. The letter stated: "Please review the price proposal to ensure it is consistent with the technical proposal and ensure there are no errors." *Id.*

On March 5, Facility submitted a revised proposal which included a reduction in price. AR, Attach. 16, Facility Revised Price Proposal at 3-8. The agency's evaluation found that Facility's reduced price was still significantly higher than the IGCE; in particular, the agency found that the pricing for five specific contract line item numbers (CLINs) was significantly higher than the IGCE. AR, Attach. 22, Source Selection Decision Document (SSDD) at 8. After reviewing all revised proposals, the source selection

evaluation board (SSEB) noted that Facility’s revised price could not “be determined as fair and reasonable.” *Id.*

Following the evaluation of revised proposals, the agency issued a second round of discussion letters. COS at ¶ 16. In the second discussion letter issued to Facility, the agency again noted issues with Facility’s technical proposal and its revised price. AR, Attach. 12, Final Discussion Letter at 1. Regarding price, the letter stated that Facility’s proposed total price was “significantly higher than the Government Estimate,” and that Facility’s proposed pricing for five specific CLINs was “significantly higher than the Government Estimate.” *Id.* The letter did not expressly state that the SSEB considered Facility’s revised price to be unreasonably high. *See id.* at 1-2. On March 31, Facility submitted its final proposal revision and chose not to revise its pricing. COS at ¶ 18.

The SSEB evaluated the final proposal revisions and ranked them based on technical ratings and proposed pricing--the results are shown below listing offerors ranked first to last:

	Past Performance	Organization, Management & Key Personnel	Technical Approach	Overall Technical	Total Price
Peak	Neutral	Good	Good	Good	\$11,101,079
Offeror 2	-- ¹	--	--	Good	\$11,450,040
Offeror 3	--	--	--	Good	\$12,443,080
Facility	Good	Good	Good	Good	\$16,624,584
Offeror 5	--	--	--	Unacceptable	\$10,296,504

AR, Attach. 21, Final SSEB Report at 58-62. The SSEB found that Facility’s total price was “not determined as fair and reasonable in comparison with the [IGCE] and competitive offeror pricing.” *Id.* at 57. The source selection authority agreed with this conclusion and adopted it in the selection decision. AR, Attach. 22, SSDD at 58, 61-62. Based on the final proposal revisions, NIST determined that Peak offered the best value to the government and selected Peak for award. *Id.* at 62-64. On May 21, NIST awarded the contract to Peak. COS at ¶ 29. Facility timely requested a debriefing, which the agency provided on May 26. *Id.* ¶ 30. On June 1, Facility filed this protest with our Office.

Preliminary Procedural Matters

Prior to the due date for submission of the agency report, NIST filed a request for dismissal, arguing that Facility was not an interested party to challenge the agency’s decision to award the contract to Peak. Req. for Dismissal at 1. In this regard, the

¹ The boxes containing “--” represent ratings that were not provided by the agency as part of the record submitted in response to this protest.

agency argued that since Facility's price was found to be unreasonably high, Facility's proposal was rendered ineligible for award pursuant to FAR section 15.402(a). *Id.* at 4-7. According to the agency, even if Facility's challenges to Peak's proposal were successful, there were two eligible intervening offerors that would be in line for award, not Facility.² *Id.* For these reasons, the agency asserted that Facility lacks the direct economic interest required to qualify as an interested party. *Id.* Facility responded, arguing that its protest raises issues which must be decided on the merits, not in the preliminary procedural stages of the bid protest process. Resp. to Req. for Dismissal at 2-3. For the reasons explained below, we declined the agency's request for dismissal at that time.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an interested party may protest a federal procurement. 31 U.S.C. § 3551. To qualify as an interested party, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or failure to award a contract. *Id.* § 3551(2)(A); 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the relief sought, and the party's status in relation to the procurement. *REEL COH Inc.*, B-418095, B-418095.2, Jan. 10, 2020, 2020 CPD ¶ 55 at 7. Generally, to have the requisite economic interest to maintain a protest, the protester must demonstrate that it would be in line for award if its protest were sustained. *Id.*

Our Office concluded that dismissal was not appropriate here because certain issues raised in Facility's protest required additional record development and briefing prior to issuing a decision. For example, Facility's protest challenged the agency's price reasonableness determination, arguing that it was based on arbitrary historical data and that the agency never actually analyzed Facility's price. Protest at 2, 6-7. Therefore, we concluded that additional record development and briefing was required on that issue.

As another example, the agency's request for dismissal and supporting documentation redacted the underlying technical factor ratings of Offerors 2, 3, and 5. Req. for Dismissal at 3; Req. for Dismissal, attach. 4, SSDD at Adobe PDF pages 3-7. Without being able to review the underlying technical factor ratings of these offerors, and in light of the limited record available at the time, we were unable to conclude that dismissal on the basis of the protester not being an interested party was appropriate.

As a final example, Facility's protest argued that the RFP required the agency to evaluate proposals for price realism, Protest at 2, which the agency admittedly did not do. Req. for Dismissal at 6-7. If Facility had prevailed on that argument, our Office would have likely recommend that the agency reevaluate proposals in accordance with

² The agency's request for dismissal included a document showing the existence of the intervening offerors and their prices. Req. for Dismissal, attach. 4, SSDD at Adobe PDF pages 3-7. The agency redacted the technical ratings of the intervening offerors. *Id.*

the terms of the solicitation and make a new best-value decision. See e.g., *Logistics 2020, Inc.*, B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 9-10. Such a result would allow Facility another opportunity to compete for award, and render the company an interested party for purposes of this procurement. We concluded that based on the issues raised, the relief sought, and the protester's status in relation to the procurement, dismissal prior to reviewing the agency report and any related briefing was not appropriate.

DISCUSSION

Facility's protest challenges the agency's evaluation of Facility's and Peak's technical proposals, argues that the agency was required by the RFP to evaluate proposals for price realism, challenges the agency's price reasonableness determinations, challenges the adequacy of discussions, and asserts that the agency improperly made award on the basis of the lowest-priced, technically acceptable (LPTA) proposal. Protest at 1-10.

The agency's memorandum of law (MOL) substantively addresses each of the protester's allegations, MOL at 8-19, however, the protester's comments on the agency report address only the adequacy of discussions and Peak's overall technical rating, and raise a supplemental protest alleging that Peak's technical proposal was materially non-compliant with the RFP. See Comments & Supp. Protest. Accordingly, we dismiss as abandoned the challenges to the agency's evaluation of Facility's and Peak's technical proposals under the individual factors, the argument that the RFP required proposals to be evaluated for price realism, the challenges to the agency's price reasonableness determinations, and the argument that the agency improperly made award on an LPTA basis.³ 4 C.F.R. § 21.3(i)(3). We discuss the remaining protest grounds below.

Adequacy of Discussions

Facility argues that the agency failed to conduct meaningful discussions regarding price. Protest at 3; Comments & Supp. Protest at 1-3. The protester argues that FAR section 15.306(d)(3) requires agencies to inform offerors during discussions of any deficiencies

³ In its comments on the agency report, the protester stated the following: "For any protest ground not specifically addressed in these Comments, [Facility] requests that GAO decide the issue on the basis of [Facility's] filings to date." Comments & Supp. Protest at 1. Such a statement does not sufficiently respond to the agency report as required by our Bid Protest Regulations. 4 C.F.R. § 21.3(i)(3) ("GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response."). Where an agency provides a detailed response to a protester's assertions and the protester fails to rebut or otherwise substantively address the agency's arguments in its comments, the protester provides us with no basis to conclude that the agency's position is unreasonable or improper. See *Israel Aircraft Indus., Ltd.--TAMAM Div.*, B-297691, Mar. 13, 2006, 2006 CPD ¶ 62 at 6-7.

or significant weaknesses identified in the proposals. Protest at 9; Comments & Supp. Protest at 2. Facility contends that the agency failed to fulfill this obligation by not expressly telling Facility during discussions that NIST found its price unreasonably high. Comments & Supp. Protest at 2 The protester maintains that had NIST expressly stated that it found Facility's price to be unreasonable, Facility "would have either reduced its price, or explained to NIST why the price was in fact fair and reasonable[.]" Protest at 3; see *also* Comments & Supp. Protest at 3 (arguing that had NIST told Facility that its price was viewed as a significant weakness or deficiency, Facility would have "significantly reduced its price.").

NIST argues that it met its obligation to conduct meaningful discussions by informing Facility on two separate occasions that the agency found Facility's price to be significantly higher than the IGCE. MOL at 17-18. For the reasons explained below, we find that the agency conducted meaningful discussions with Facility and therefore deny this protest ground.

Discussions, when conducted, must identify proposal deficiencies and significant weaknesses, and should discuss other aspects that reasonably could be addressed in order to materially enhance the offeror's potential for receiving award. FAR 15.306(d)(3). The scope and extent of discussions are a matter of contracting officer judgment. *Id.* When an agency engages in discussions with an offeror, the discussions must be meaningful; however, this requirement does not obligate an agency to spoon-feed an offeror. See, e.g., *Metro Machine Corp.*, B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 19. Rather, discussions are meaningful when they are sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. *Id.*

Regarding the adequacy of discussions involving price, an agency generally does not have an obligation to tell an offeror that its price is high unless the agency finds the offeror's price to be unreasonable or unacceptable. See *Joint Logistics Managers, Inc.*, B-410465.2, B-410465.3, May 5, 2015, 2015 CPD ¶ 152 at 4; *Creative Info. Tech., Inc.*, B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 at 7-8. When an agency conducts discussions with an offeror concerning price, advising the offeror that its price is too high is generally sufficient. See *Northstate Heavy Equip. Rental*, B-416821, Dec. 19, 2018, 2018 CPD ¶ 430 at 5; *Securiguard, Inc., et al.*, B-254392.8 *et al.*, Feb. 9, 1994, 94-1 CPD ¶ 92 at 6 (denying allegation that discussions were misleading where the agency advised the offeror that its proposed price exceeded the government estimate).

Based on the record here, we conclude that the agency fulfilled its obligation to conduct meaningful discussions with Facility regarding price. The record shows that the agency identified Facility's price as an issue during each round of proposal evaluations. AR, Attach. 9, Competitive Range Determination at 19; AR, Attach. 22, SSDD at 8, 58. Facility was given two opportunities to adjust its price in a meaningful way, or to ask the agency additional questions about the discussions letters. During the second round of discussions, the agency informed Facility that its "price proposal of \$16,624,581.00 [was] significantly higher than the Government Estimate," and that the pricing for five

specific CLINs was “significantly higher than the Government Estimate.”⁴ AR, Attach. 12, Final Discussion Letter at 1. With this feedback in hand, Facility chose not to adjust its price, nor did it ask any questions about the discussion letter. The record shows that Facility’s final price was found unreasonable for the exact reasons described in the second discussions letter--its total price and the five highlighted CLINs were found to be significantly higher than the IGCE. AR, Attach. 12, Final Discussion Letter at 1; AR, Attach. 22, SSDD at 58.

Given these facts, we conclude that the discussions were meaningful. The agency clearly advised Facility that its price was too high, and sufficiently pointed Facility to the area of its proposal requiring revision. The absence of a particular word does not render discussions inadequate. This protest ground is denied.

Facility is not an Interested Party to Raise Remaining Issues

NIST argues that it reasonably found Facility’s price to be unreasonably high. MOL at 18. The agency asserts that this finding rendered Facility’s proposal unawardable, and therefore argues that Facility is not an interested party to challenge the agency’s evaluation of the awardee’s proposal or the agency’s source selection decision. COS at ¶ 27; MOL at 8-9. In this regard, the agency contends that there were two intervening offerors with award-eligible proposals, and that those offerors, not Facility, would be in line for award were Facility’s challenges to be sustained. MOL at 8-9.

For the reasons explained below, we conclude that Facility is not an interested party to maintain its remaining challenges. Our discussion below first addresses whether NIST properly found Facility’s proposed price to be unreasonably high. We next address Facility’s interested party status.

Agencies are required to ensure that the award of any contract is at a fair and reasonable price. See FAR 15.404-1. The purpose of conducting a price reasonableness evaluation in a fixed-price environment is to determine whether prices are too high. *Root9B, LLC*, B-417801, B-417801.2, Nov. 4, 2019, 2020 CPD ¶ 4 at 7. A price reasonableness determination is a matter of agency discretion involving the exercise of business judgement. *REEL COH Inc., supra* at 5. Where a protester alleges that an agency’s determination regarding fair and reasonable pricing was flawed or improper, our Office will review the agency’s determination for compliance with applicable law and regulation, and will consider whether the agency’s determination was reasonable. See *Vectrus Sys. Corp.*, B-419143, B-419143.2, Dec. 23, 2020, 2021 CPD

⁴ To the extent Facility argues that comparing proposed prices to an IGCE is not an adequate method of evaluating prices for reasonableness, we note that the solicitation expressly informed offerors that such an evaluation could take place. See Protest at 6; RFP at 147. Therefore, a post-award challenge on this basis is untimely. 4 C.F.R. § 21.2(a)(1). We further note that the FAR lays out a list of price analysis techniques which the government may use to ensure that it pays a fair and reasonable price, one of which is the comparison of proposed prices to an IGCE. FAR 15.404-1(b)(2)(v).

¶ 138 at 14; *REEL COH, Inc., supra* at 5; *Root9B, LLC, supra*. Where an agency properly determines that a proposal offers unreasonably high prices, it may reject that proposal solely on that basis. *REEL COH, Inc., supra* at 5; *PJ Helicopters, Inc., B-402524.2*, May 20, 2010, 2010 CPD ¶ 155 at 4.

We conclude that NIST reasonably found Facility's proposed price to be unreasonably high, and that the record supports the agency's position that Facility's proposal therefore was rendered unawardable. See RFP at 145, 147 (stating that the contracting officer will award a contract to a firm offering fair and reasonable pricing, and that a price found to be unreasonably high "may result in the overall proposal being considered unacceptable."); AR, Attach. 22, SSDD at 63 ("[Facility's] price proposal . . . is not determined as fair and reasonable in comparison with the [IGCE] and competitive offeror pricing."); COS at ¶ 27 ("[Facility's] price was not fair and reasonable, which renders its proposal unawardable"); see also *PJ Helicopters, Inc., supra*. Here, the agency evaluated price reasonableness by comparing Facility's proposed price with the IGCE and the other offerors' proposed prices, and found that Facility's proposed price was 45.5 percent higher than the IGCE and 33.6 percent higher than the fourth lowest proposed price. COS at 27; AR, Attach. 22, SSDD at 57-63. These price evaluation methods are identified in the FAR as acceptable ways to ensure that the government awards contracts at fair and reasonable prices. FAR 15.404-1(b)(2)(i), (v). The solicitation also expressly stated that the agency may use these methods to evaluate price reasonableness. RFP at 147. We therefore find nothing unreasonable about the agency's price evaluation here. Given that Facility's price was found to be unreasonably high, we find reasonable the agency's position that Facility's proposal was unawardable. We next turn to the issue of Facility's interested party status.

In order for a protest to be considered by our Office, a protester must be an interested party. 4 C.F.R. § 21.0(a). Where there is an intervening offeror who would be in line for award if the protester's challenge to the award were sustained, the intervening offeror has a greater economic interest in the procurement than the protester, and we generally consider the protester's interest to be too remote for the protester to qualify as an interested party. *IAP World Servs., Inc., B-418735.3, B-418735.4*, Apr. 30, 2021, 2021 CPD ¶ 212 at 5; see also *REEL COH, Inc., supra* at 7; *NCI Info. Sys., Inc., B-417685, B-417685.2*, Sept. 23, 2019, 2019 CPD ¶ 344 at 8.

We conclude that Facility is not an interested party to maintain a protest challenging the agency's technical evaluation of Peak's proposal or the agency's source selection decision. Facility's price was found to be unreasonably high, and the agency's position that this rendered Facility's proposal unawardable is supported by the record. Here, there are two intervening offerors with award-eligible proposals. AR, Attach. 22, SSDD at 59-62. Even if we found that Facility's remaining challenges had merit, the intervening offerors with award-eligible proposals, not Facility, would be next in line for

award.⁵ Facility is unable to demonstrate the direct economic interest required to maintain its remaining challenges, therefore, they are dismissed. See 31 U.S.C. §§ 3551(1)(C), (2)(A); 4 C.F.R. § 21.0(a)(1).

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁵ On June 9, Facility was informed of the two intervening offerors. Req. for Dismissal at 1, 3, 7. Facility has not challenged the agency's evaluation of the proposals submitted by the intervening offerors.