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Decision

Matter of: Zodiac-Poettker HBZ JV, LLC

File: B-419292

Date: January 15, 2021

Scott F. Lane, Esq., Jayna Rust, Esq., and Katherine Nucci, Esq., Thompson Coburn LLP, for the protester.

C. Thomas Miller, Esq., Whitlow, Roberts, Houston & Straub, PLLC; Laurence Schor, Esq., David Edelstein, Esq., Allison Geewax, Esq., Asmar, Schor, & McKenna, PLLC, for A&K Construction, Inc., the intervenor.

Jennifer Kirby-McLemore, Esq., and Tarrah M. Beavin, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency's discussions were misleading is denied where the discussions were sufficient to lead the protester into the areas of its proposal which required revision.

DECISION

Zodiac-Poettker HBZ Joint Venture, LLC, (Zodiac), a small business of St. Louis, Missouri, protests the award of a contract by the Department of the Army, Corps of Engineers, to A&K Construction, Inc., of Paducah, Kentucky, under request for proposals (RFP) No. W912QR-20-R-0057 for the construction of a middle school at Fort Campbell, Kentucky. Zodiac contends that the agency conducted misleading discussions and that the agency failed to apply a Historically Underutilized Business Zone (HUBZone) preference, as required by the solicitation.

We deny the protest.

BACKGROUND

On June 29, 2020, the agency issued the RFP in accordance with the procedures of Federal Acquisition Regulation (FAR) part 15, Contracting by Negotiation. The solicitation sought proposals for the construction of a middle school, including a combination of new construction, as well as the renovation and demolition of an existing building on Fort Campbell. Agency Report (AR), Tab 1, RFP at 9. The project will also

include related infrastructure such as parking areas, mechanical rooms, delivery areas, storage, and lighting. *Id.*

The solicitation contemplated the award of a fixed-price contract on a best-value tradeoff basis, considering the following factors, listed in descending order of importance: past performance, management plan, and small business (SB) participation plan. *Id.* at 1, 9, 11.

With respect to price, the RFP provided that the proposals would be evaluated for fairness and reasonableness through the use of a price analysis. *Id.* at 17. In addition, the solicitation warned offerors that the agency reserved the right to accept other than the lowest-priced offers and the right to reject all offers. *Id.* at 9.

The solicitation also included the following regarding the application of the HUBZone price evaluation preference:

In accordance with Federal Acquisition Regulation 19.1307, this project requires the HUBZone 10% price evaluation.

Id. at 1. The solicitation further informed potential offerors that the estimated contract cost was between \$25,000,000 and \$100,000,000. *Id.*

The agency received eight proposals in response to the solicitation, including those of Zodiac, a HUB-Zone small business, and A&K, a large business. AR, Tab 4, Summary Evaluation Report at 1. The agency evaluated the proposals and determined that the prices were fair and reasonable. The agency then applied the 10% price evaluation preference to the prices of all large businesses, including that of A&K, and determined that Zodiac's initial price proposal (\$61,371,000) was the lowest evaluated price proposal. *Id.* at 41.

The contracting officer was subsequently informed by the requiring activity that the available funding limit for this project was \$56,200,000. *Id.* at 43. The contracting officer states that because none of the existing proposals offered prices below this threshold, the agency decided to hold discussions. *Id.*

On August 28, each offeror was sent a discussion letter providing an opportunity to correct any weaknesses in their technical proposals, and inviting them to reduce their price. AR, Tab 7, First Discussion Letter to Zodiac (Aug. 28, 2020). Specifically, the agency's discussion letter to Zodiac stated the following regarding price:

Please take this opportunity to also review your proposed price. Please note per the Department of Defense Form 1391 (DD 1391), the Estimated Contract Cost is \$56.2M. The Government cannot guarantee funds above this amount will be available for use.

Id. at 2. Zodiac responded by submitting a revised proposal that addressed its technical weaknesses and lowered its price from \$61,371,000 to \$60,492,000. AR, Tab 8, Zodiac

First Response (Sept. 3, 2020) at 49. After reviewing the revised proposals received from all eight offerors, the agency issued a second discussion letter that included the identical notice regarding price included in the first discussion letter. AR, Tab 9, Second Discussion Letter to Zodiac (Sept. 8, 2020). Specifically, it included the following:

Please take this opportunity to also review your proposed price. Please note per the Department of Defense Form 1391 (DD 1391), the Estimated Contract Cost is \$56.2M. The Government cannot guarantee funds above this amount will be available for use.

Id. Zodiac responded to the agency's second discussion letter, and did not change its price. AR, Tab 10, Zodiac Second Response (Sept. 11, 2020). The agency sent a third discussion letter to Zodiac, which as relevant here, stated the following:

We invite you to please take this opportunity to review your proposed price. As previously stated, per the Department of Defense Form 1391 (DD 1391), the Estimated Contract Cost for this project is \$56.2M. *The Government cannot guarantee funds above this amount will be available for use and may be forced to delay or cancel award of this particular solicitation.*

AR, Tab 11, Third Discussion Letter to Zodiac (Sept. 15, 2020) (emphasis added). Zodiac responded to this discussion letter and declined to further reduce its price. AR, Tab 12, Zodiac Third Response (Sept. 17, 2020).

Based upon its evaluation of the offerors' final revised proposals, the agency's final evaluation ratings were as follows:

	AK	Zodiac
Past Performance	Satisfactory Confidence	Substantial Confidence
Management Plan	Good	Good
SB Participation Plan	Acceptable	Acceptable
Evaluated Price¹	\$61,677,000	\$60,492,000
Proposed Price	\$56,070,000	\$60,492,000

¹ A&K proposed the lowest total actual price (base plus option) in the amount of \$56,070,000. However, since a HUBZone Small Business firm (Zodiac) submitted a qualified proposal, the agency added 10% to the price of the non-HUBZone businesses for the purpose of providing a price preference to HUBZone offerors, pursuant to section 19.1307 of the FAR. AR, Tab 15, Source Selection Decision (SSD) at 19. Adding 10% to A&K's proposed price resulted in an evaluated price of \$61,677,000; however, in the event A&K was selected, the proposed price would be the amount the government would pay. *Id.*

AR, Tab 15, SSD at 3-4.

Since A&K was the only offeror to submit a proposal that offered a proposed price below the available funding limit, the agency made award to that firm on September 30. AR, Tab 15, Source Selection Decision at 21. In reaching this conclusion, the agency determined that Zodiac's proposed price, which was in excess of the available funding limit, was not awardable. *Id.* at 20-21. After receiving a debriefing, Zodiac filed this protest with our Office.

DISCUSSION

Zodiac argues that the agency conducted misleading discussions because while the agency mentioned the funding estimate during discussions, and advised that funds might not be available beyond that estimate, the agency never specifically informed it that submitting a price above that estimate would result in the exclusion of the proposal from the competition. Protest at 2. The protester also contends that the agency failed to apply the HUBZone preference required by the solicitation.² *Id.* We find no basis to sustain the protest.³

As explained below, we first conclude that the agency did not conduct misleading discussions with Zodiac and that the agency reasonably found Zodiac's proposal unawardable due to its proposed price. Second, under the circumstances presented here, we conclude that the protester is not an interested party to challenge any other aspects of the agency's award decision.

Discussions

In response to the protest, the agency contends that it offered as much information to Zodiac as permissible within the rules governing the disclosure of source selection sensitive information. Memorandum of Law (MOL) at 6 (citing FAR 3.104-4). In addition, the agency points out that it notified Zodiac three times about the available funding limitation, and that the final notice expressly explained to Zodiac the possible outcomes of not reducing its price. AR, Tab 7, First Discussion Letter to Zodiac (Aug. 28, 2020); Tab 9, Second Discussion Letter to Zodiac (Sept. 8, 2020); Tab 11, Third Discussion Letter to Zodiac (Sept. 15, 2020); MOL at 6. In this regard, the agency maintains that its discussions were meaningful and not misleading.

² Pursuant to FAR clause 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, the price of the proposal of each non-HUBZone small business, with the exception of an "[o]therwise successful offer[] from [a] small business concern[s]," was to be evaluated by adding a factor of 10 percent to the actual price offered. RFP at 52.

³ Zodiac also raises other collateral arguments. Although not addressed in this decision, we have considered the protester's various arguments and conclude that none provide a basis to sustain the protest.

When an agency engages in discussions with an offeror, the discussions must be “meaningful,” that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror’s potential for receiving the award. FAR 15.306(d); *Computer Sciences Corp., et al.*, B-408694.7 *et al.*, Nov. 3, 2014, 2014 CPD ¶ 331 at 23. In this regard, agencies may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency’s concerns. *Raytheon Co.*, B-416211 *et al.*, July 10, 2018, 2018 CPD ¶ 262 at 19-20.

Agencies are not required to “spoon feed” offerors during discussions, rather the degree of specificity required in conducting discussions is primarily a matter for the procuring agency to determine. See *Northstate Heavy Equipment Rental*, B-416821, Dec. 19, 2018, 2018 CPD ¶ 430 at 5. While an agency need not inform an offeror that its price is higher than that of its competitors, it must advise an offeror if its price is considered unreasonably high, or unawardable. See FAR 15.306(d); *Computer Sciences Corp. et al.*, *supra* at 23 (citing *Bank of Am.*, B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶137 at 10-11).

Based upon our review of the record, we find no basis to conclude that the agency misled the protester or failed to conduct meaningful discussions.

Here, the record plainly shows that the agency notified Zodiac during discussions, on three separate occasions, that the agency had concerns regarding Zodiac’s proposed price and the available funding limitation. AR, Tab 7, First Discussion Letter to Zodiac (Aug. 28, 2020); Tab 9, Second Discussion Letter to Zodiac (Sept. 8, 2020); Tab 11, Third Discussion Letter to Zodiac (Sept. 15, 2020). Indeed, in the agency’s final discussion letter to Zodiac, the agency advised: “The Government cannot guarantee funds above this amount will be available for use and may be forced to delay or cancel award of this particular solicitation.” AR, Tab 11, Third Discussion Letter to Zodiac (Sept. 15, 2020). Thus, the record demonstrates that the agency made clear to Zodiac that affordability and cost constraints were important concerns to the agency. *Gentex Corp.--Western Operations*, B-291793 *et al.*, Mar. 25, 2003, 2003 CPD ¶ 66 at 21-22. On this basis, we conclude that the agency provided sufficient information to afford Zodiac a fair and reasonable opportunity to address the agency’s concerns regarding its proposed price.

To the extent the protester contends the agency was required to be more explicit--for example, by specifically informing the firm that submitting a proposed price above the funding limit would necessarily make its proposal unawardable--it is well-established that agencies are not required to “spoon feed” offerors during discussions. See *Raytheon Co.*, *supra* at 20; *Northstate Heavy Equipment Rental*, *supra*. In the end, Zodiac’s failure to take seriously the agency’s repeatedly expressed concerns regarding the available funding limitation does not, in our view, render the agency’s discussions misleading.

Having found the agency's discussions with respect to Zodiac's price unobjectionable, we also find reasonable the agency's determination that Zodiac's proposal was unawardable. Our Office has stated that such funding limitations are not evaluation factors within the meaning of the FAR. *Energy and Env'tl. Research Corp.*, B-261422, B-261422.2, Aug. 23, 1995, 95-2 CPD ¶ 81 at 8-9. Further, under similar circumstances, where an agency has decided that its needs can be met within the amount budgeted, and the record shows that the agency can meet its needs by making award to an offeror that submitted a proposal within the funding limitation, our Office has declined to disturb the agency's discretionary decision. See, e.g., *OMNIPLEX World Services Corp.--Recon. and Protest*, B-278105.2, B-278105.3, Nov. 13, 1997, 97-2 CPD ¶ 147 at 2-3 (denying request for reconsideration of dismissal where protester's proposed and evaluated costs exceeded the available funding for the project); *Charles Trimble Co.*, B-250570, Jan. 28, 1993, 93-1 CPD ¶ 77 at 2-3 (denying challenge to award where protester submitted proposal in excess of agency's available funding).

The protester also argues that the agency's stated funding constraints merely reflect a discretionary decision on how to allocate its actual funding, and suggests that the agency could have obtained additional funds from elsewhere within its budget or revised its needs in order to make award to Zodiac. Protester's Comments at 5-6. We will not, however, review the agency's decision to allocate current funds for purposes other than this procurement since that decision depends on the agency's judgment concerning which projects or activities shall receive funding. *Allied-Signal Aerospace Company*, B-240938.2, Jan. 18, 1991, 91-1 CPD ¶ 58 at 4 n.2. As it relates to whether the agency should have reassessed its needs, our Office has consistently stated that a protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. *Chromalloy Component Servs., Inc.*, B-417362.2, Nov. 6, 2019, 2019 CPD ¶ 382 at 4. As a result, we find the protester's challenges to the agency's exercise of its discretion in this regard unconvincing.

Simply put, Zodiac's proposed price of \$60,492,000 exceeded the agency available funding limitation of \$56,200,000; A&K's price of \$56,070,000 did not. In these circumstances, where the agency advised the protester of this concern during discussions and the protester's decision not to lower its proposed price was a business decision it made at its own risk, we find nothing unreasonable about the agency's decision to find that this proposal was unawardable.

Interested Party

Since we find no basis to object to the agency's conduct of discussions and conclusion that Zodiac's proposal was unawardable, we need not address the protester's remaining challenges to the award decision as Zodiac is not an interested party to raise them.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract.

4 C.F.R. § 21.0(a). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. *OMNIPLEX World Services Corp.*, B-278105, Oct. 15, 1997, 97-2 CPD ¶ 145 at 2 (protester lacked requisite economic interest where its proposed price exceeded the funding limitation and other eligible offerors existed); see also *OMNIPLEX World Services Corp.--Recon. and Protest, supra* at 2-3 (denying request for reconsideration). Accordingly, we dismiss Zodiac's remaining arguments. 4 C.F.R. § 21.0(a).

The protest is denied.

Thomas H. Armstrong
General Counsel