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Decision

Matter of: AGMA Security Service, Inc.

File: B-419443

Date: February 19, 2021

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DIGEST

Protest that the agency improperly failed to evaluate protester's proposal under technical factors is denied where solicitation anticipated limiting the number of proposals to be evaluated and the agency complied with the terms of the provision; and protest that agency miscalculated awardee's proposal is denied where evaluation was reasonable and consistent with the solicitation's terms.

DECISION

AGMA Security Service, Inc., of Hormigueros, Puerto Rico, a small business, protests the award of a contract to Kerberos International, Inc., also a small business, of Temple, Texas, under request for proposals (RFP) No. 70RFP120RE2000002, issued by the Department of Homeland Security (DHS), Federal Protective Service, for protective security officer (PSO) services at various Customs and Border Protection facilities in Puerto Rico. AGMA argues that DHS improperly failed to evaluate its proposal and miscalculated the awardee's proposal.

We deny the protest.

BACKGROUND

The RFP, issued August 25, 2020, sought proposals to provide PSO services under a single fixed-price indefinite-delivery, indefinite-quantity contract for a base year and four option years, and an additional 6-month extension of services option. The RFP was set aside for participants in the Small Business Administration's section 8(a) program, and provided that a contract would be awarded to the offeror whose proposal provided the best value under three factors: past performance, management approach, and price.

The RFP indicated that the non-price factors were more important than price in determining which proposal offered the best value, but that not all proposals would be fully evaluated. Instead, the agency would select the most competitively priced offers for evaluation under the past performance and management approach factors (together described as the technical evaluation), according to the following rationale:¹

The technical proposals of those offerors whose pricing is determined by the Contracting Officer to be most competitive may be reviewed prior to, or instead of, other technical proposals received. Based on the initial review of these technical proposals, the Government may not evaluate the technical proposals of other offerors, whose total evaluated pricing was higher than that of one already evaluated and already assigned the highest possible technical adjectival rating. This would occur when the Contracting Officer determines that one or more of the technical proposals already reviewed is of such a level of quality that it would not be in the interest of the Government to incur cost beyond the price of the technical proposals already reviewed.

Agency Report (AR), Tab 5a, RFP at 299.

Each offeror was to submit past performance information on contracts currently being performed or performed within the past three years that would be assessed to determine relevance to the requirements. *Id.* The agency would consider the quality of relevant performance, based on all available information, and would use both relevance and quality to determine an overall past performance rating. *Id.* at 300. The offeror's management approach proposal was to include specific explanations of its approach in the areas of quality assurance and transition. AR, Tab 5b, RFP amend. 1 at 6.

Each offeror's price schedule was to include both unit prices and extended prices (that is, the unit price multiplied by the RFP's estimated quantity). Additionally, offerors were instructed to submit a separate detailed price breakdown for use in assessing price realism. AR, Tab 5a, RFP at 5, 281; AR, Tab 5b, RFP amend. 1 at 7. The agency would determine a total evaluated price to be based on the base period and all options, plus the 6-month extension of services option, and would "ensure that [the prices] are fair and reasonable for performance of the requirements established in the solicitation and as proposed in the technical submission." *Id.* The RFP also stated that

[t]he Government will determine whether the price, inclusive of all options . . . is fair and reasonable, and whether the price of the base period and all

¹ DHS notes that the application of essentially the same "efficient competition" solicitation provision was the subject of a previous decision by our Office. AR, Tab 2, Memorandum of Law (MOL), at 7-8 (quoting *COGAR Grp., Ltd., B-413004 et al.*, July 22, 2016, 2016 CPD ¶ 189 at 3-4).

option periods . . . in combination with the other evaluation factors specified in the solicitation, represents the best value to the Government.

Id.

DHS received proposals from 10 offerors, including AGMA and Kerberos. AR, Tab 1, Contracting Officer's Statement at 2. The agency first determined the total price for each offeror, which the contracting officer used to select the most competitively priced proposals. To do so, the contracting officer noted that the proposals could be grouped in four distinct groups (only the first two groups are relevant here). The first group consisted of three proposals (including Kerberos's) whose prices were within approximately 2.5 percent of the lowest-priced offeror's proposal (Offeror A). The second group consisted of four proposals (including AGMA) whose prices were between 8.85 percent and 11.2 percent of the lowest-priced offeror. The proposals in the first group were deemed to be the most competitively priced, and were evaluated under the technical factors. AR, Tab 9, Pre-Award Business Memorandum at 7. The evaluation results and overall ranking were as follows:

Overall Ranking	Offeror	Past Performance	Management Approach	Total Proposed Price
1	Kerberos	Highly Acceptable	Highly Acceptable	\$21.9 million
2	Offeror B	Acceptable	Acceptable	\$22.0 million
3	Offeror A	Acceptable	Acceptable	\$21.5 million

Id. Following the technical evaluation, the contracting officer determined that:

any possible technical superiority of an unevaluated (and higher priced) technical proposal, over a (lower priced) proposal that was already evaluated and assigned the highest possible technical rating, would not warrant an additional price premium.

Id.

The source selection authority (SSA) reviewed the technical evaluation and pricing of the three offerors and prepared a source selection decision memorandum (SSD) to document the source selection judgments. The SSA considered the evaluations of the three offerors and their prices, including a detailed discussion of the past performance and management approach of both Kerberos and Offeror A.² The SSA next directly compared both of these offerors, and concluded that Kerberos was superior to Offeror A in multiple ways under each factor. AR, Tab 10, SSD at 3-10. Finally, the SSA reviewed both firms' prices and concluded that the additional cost of awarding the

² The SSA determined that no tradeoff was needed regarding Offeror B because that firm's proposal was both lower-rated and higher-priced than Kerberos's.

contract to Kerberos was slightly under \$400,000--a premium of less than two percent--and that the strengths in Kerberos's proposal justified incurring that additional cost. *Id.* at 10. The agency notified AGMA of the award decision, and this protest followed.

DISCUSSION

AGMA challenges the decision not to evaluate its proposal, the evaluation of prices, and the acceptability of Kerberos's proposal. We address each of its challenges and determine that none provide a basis to sustain this protest.

AGMA's first two grounds of protest challenge the propriety of the efficient competition evaluation process. The efficient competition evaluation was outlined in the RFP, as quoted above, and included an express statement that not all proposals would be evaluated under the technical factors. In another protest that also challenged the operation of this efficient competition provision, we observed that essentially the same solicitation provision placed offerors on notice that even though non-price factors, together, may be more important than price, the government might not evaluate all technical proposals. *COGAR Grp., Ltd., supra*, at 5. AGMA's contentions are that the efficient competition provision is inconsistent with the requirements of FAR section 15.101-1 generally, and specifically that it was improper to make a source selection tradeoff without fully assessing AGMA's proposal under the technical factors. We view both of these grounds of protest as challenges to the express terms of the RFP.

Our Bid Protest Regulations contain strict rules for the timely submission of protests, which 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 specifically 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. Here, the protest was filed on November 30, 2020, after the closing time for submission of proposals, and after the selection decision. AGMA's challenges to the terms of the RFP are thus untimely and will not be considered further.

Next, AGMA contends that it learned at its debriefing that the contract awarded to Kerberos allegedly implemented a different wage determination than the one provided in the RFP, which had resulted from a newly-implemented collective bargaining agreement regarding security staff. Protest at 5. AGMA contends that this amounted to a material change in the agency's requirement, which required the agency to amend the RFP and allow offerors to submit revised proposals. *Id.* DHS disputes this allegation, arguing that the topic of a collective bargaining agreement was not discussed at the debriefing, and that the contract with Kerberos had the same collective bargaining agreement that the agency provided to all offerors in the RFP. MOL at 12. DHS asserts that AGMA's protest was thus refuted by the record. *Id.* (citing AR, Tab 5a, RFP at 248-280; AR, Tab 11a, Awarded Contract with Kerberos, at 240-272).

In its comments on the agency report, AGMA contends that the collective bargaining agreement in the RFP expired six weeks before DHS awarded the contract, rendering improper both the evaluation and the award decision. Protester's Comments at 8. As support for its contention, AGMA cites the collective bargaining agreement in the RFP, which expressly stated that it was "[e]ffective 1 April 2020 – 30 September 2020." Protester's Comments at 7 (quoting AR, Tab 5a, RFP at 248-249). Notably, the only material support for AGMA's allegation is a statement in the RFP itself.³ As a result, we view this argument as simply a further effort to raise an alleged defect in the RFP after the closing date for submission of proposals and, for the same reasons discussed above, it is untimely.

AGMA next contends that DHS unreasonably determined that Kerberos's pricing was realistic. After receiving the agency report, AGMA conceded that the contemporaneous record contained "admittedly, a very detailed and comprehensive price realism analysis" of Kerberos's pricing. Protester's Comments at 8. AGMA now alternatively contends that the analysis was nevertheless meaningless because it was based on the allegedly superseded collective bargaining agreement. *Id.* However, as we concluded above, AGMA's has failed to show a factual basis for its claim that DHS has implemented a new collective bargaining agreement, so this ground of protest likewise lacks a factual basis.

AGMA also contends that the price evaluation omitted consideration of the extension of services option under FAR clause 52.217-8, and contends that if it had been included, its proposal would have been one of the most competitively priced proposals and would have been fully evaluated. DHS contends that the evaluation was reasonable and properly included an evaluation of the price of services under the extension of services option. MOL at 11.

We agree with AGMA that the RFP provided for pricing under the 6-month extension of services option to be included in determining which proposals were the most competitively priced. See, AR, Tab 5a, RFP at 298, 305 (price evaluation would add "the total price for all options (including the 6 month option available under FAR 52.217-8) to the total price for the basic requirement"). In addition, the record shows that DHS calculated the price of the extension of services option by multiplying hourly prices for the fourth option year by 81,500 hours (representing six months of services), and included those calculations in the total evaluated prices for purposes of the source selection decision. AR, Tab 9, Pre-Award Business Memorandum at 8.

³ To the extent that AGMA argues that DHS improperly withheld the alleged new wage determination and collective bargaining agreement from the record provided to our Office, it has failed to support that claim. The protester did not specifically request such documents, and DHS did not identify that either document existed or had been withheld. AGMA's objection to the agency's production of documents was only a general unsupported assertion, made after the agency submitted its list of agency report exhibits, that a wage determination had been withheld. As a result, we can only conclude that AGMA's claim lacks a factual foundation and decline to consider it further.

However, the record also shows that DHS made this calculation only for Kerberos and Offeror A in making the final source selection, and did not include the price of the extension of services option when determining which proposals were the most competitively priced. *Id.* Even so, as explained below, the record does not show that the matter was prejudicial to AGMA.

Competitive prejudice is an essential element of a viable protest; where a protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. *Engility Corp.*, B-413120.3 *et al.*, Feb. 14, 2017, 2017 CPD ¶ 70 at 17. AGMA does not show that the failure to include the 6-month extension of services pricing in the price calculations was prejudicial, other than broadly contending that including the pricing of that option "could have led to a different determination by the agency regarding whether to evaluate AGMA's technical proposal." Protest at 12; see also Protester's Comments at 16. Despite having access to the relevant pricing information, AGMA has provided no specific factual basis to support this contention.

Our review shows that DHS calculated Kerberos's price for a 6-month extension of services as \$[DELETED] million. In comparison, AGMA's hourly rate for the fourth option year was higher than Kerberos's, and the same calculation based on AGMA's pricing schedule yields \$[DELETED] million for the 6-month extension of services option. See Electronic Protest Docketing System No. 23, AGMA Price Proposal at 3. Based on the record, we cannot conclude that AGMA was prejudiced by any error in DHS's omission of the extension of service option pricing in determining which proposals provided the most competitive pricing. *Engility Corp.*, *supra*.

AGMA next contends that DHS should have rejected Kerberos's proposal because the firm lacked a required license to provide PSO services in Puerto Rico. DHS responds that the requirement to become licensed was not evaluated, and offerors were not required to submit evidence of licensure with their proposals; rather the RFP specified that licensing would be required after award (but prior to PSOs taking up duties at the security officer posts), which thus made the issue a matter of contract administration, not an issue of technical acceptability. MOL at 14.

Our review of the record supports DHS's argument that the RFP did not require offerors to submit proof of licensing, and did not provide for the agency to evaluate licensing in the technical evaluation. Here, as is typically the case, questions of local licensing are matters of contract administration. *E.g.*, *YWCA of Greater Los Angeles*, B-414596.7, B-414596.8, Mar. 11, 2019, 2019 CPD ¶ 104 at 6 (challenge to awardee's lack of state licenses needed to perform contract raised a matter of contract administration). Our Office generally does not review matters of contract administration, which are within the discretion of the contracting agency (and in case of a dispute over performance, can be reviewed by a cognizant board of contract appeals or the Court of Federal Claims). Bid Protest Regulations, 4 C.F.R. § 21.5(a). The few exceptions to this rule (for example, a contract modification that allegedly improperly exceeds the scope of the contract, or

where the exercise of a contractor's option is contrary to applicable regulations) are not at issue here. Accordingly we dismiss this ground of protest.

Finally, AGMA asserts that Kerberos has an arrangement with the incumbent contractor that should have been considered as "a possible antitrust violation, under FAR Subpart 3.3," and should raise concern about whether Kerberos had "truthfully certifi[ed] to independent price determination." Protest at 9. DHS contends that AGMA's allegations are based on speculation and, even if supported, would raise issues beyond our Office's bid protest jurisdiction. AGMA argues that DHS has improperly failed in its duty to report suspicions that Kerberos submitted a false independent pricing certificate to the Department of Justice, and failed to report evidence of antitrust violations to the Attorney General. Protester's Comments at 23-24. What AGMA's arguments lack, however, is a factual basis for believing that Kerberos submitted a false certification or violated antitrust laws; rather, its arguments simply assume that such evidence exists. In short, AGMA has provided no basis to conclude that DHS erred in proceeding to award the contract to Kerberos as the offeror whose proposal provided the best value to the agency under the efficient competition provision in the RFP.⁴

The protest is denied.

Thomas H. Armstrong
General Counsel

⁴ Additionally, our Office does not consider allegations of anti-trust violations. *Barrier Indus., Inc.*, B-210050, Jan. 6, 1983, 83-1 CPD ¶ 11 at 1.