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Decision

Matter of: Kiewit Infrastructure West Company

File: B-419687; B-419687.2

Date: June 25, 2021

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DIGEST

1. Protest alleging that the awardee's proposal took exception to the requirement to propose a fixed price by offering a discount for one of the line items is denied where the solicitation did not prohibit offerors from proposing a discount and where the awardee was bound to perform at its discounted price.
 2. Protest alleging that the awardee's pricing is unbalanced is denied where the protester fails to make the threshold showing that the agency failed to evaluate the risk of unbalanced pricing, and where the agency reasonably determined that the risk of unbalanced pricing was low.
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DECISION

Kiewit Infrastructure West Company, of Honolulu, Hawaii, protests the issuance of a task order to Hensel Phelps Construction Company, under request for proposals (RFP) No. N62478-20-D-4003/4004/4005/4006/4007/4014/4015, issued by the Department of the Navy for repair, design, and conversion of existing facilities into administrative facilities in Oahu, Hawaii. Kiewit challenges the agency's evaluation of Hensel's price and technical proposals.

We deny the protest.

BACKGROUND

On November 17, 2020, the agency issued the RFP to holders of the Navy's multiple-award construction contract for design-build and design-bid-build construction projects in Oahu, Hawaii. Agency Report (AR), Tab 2, RFP at 1-2. The construction projects contemplated under the solicitation included the repair of existing space, design and construction of various administrative facilities, and remediation work for hazardous materials. *Id.* at 5; AR, Tab 1, Contracting Officer's Statement (COS) at 1.

The Navy anticipated award of a fixed-price task order to the responsible offeror with the lowest evaluated price of proposals meeting or exceeding the acceptability standards for the following non-price evaluation factors: technical approach, experience, and past performance. RFP at 23-28. The RFP instructed that proposals would be evaluated for acceptability but not ranked; to be eligible for award, all non-price evaluation factors must have been rated "acceptable." *Id.* at 24.

Relevant here, offerors were instructed to submit prices for 14 contract line item numbers (CLINs) in the solicitation's schedule, including for separate work areas A through J, corresponding to 10 separate CLINs. *Id.* at 431-32; AR, Tab 4, RFP amend. 6 at 2-3. Additionally, the RFP provided for four CLINs that allowed the agency to accelerate the "beneficial occupancy date" for particular project areas by 30 days each. AR, Tab 4, RFP amend. 6 at 3. Of particular importance, for those accelerated completion CLINs, including CLIN 0001AK, at issue in this protest, offerors were advised to "[p]rovide [a] cost which is solely attributable to accelerating delivery" of that particular project area.¹ *Id.* at 3. The RFP further stated that "[f]ailure to provide an offer on all items in the proposal schedule may cause the offeror to be considered nonresponsive." *Id.* Award was to be "based on the [t]otal [p]rice" for all 14 CLINS, and the price was to be evaluated for reasonableness.² *Id.*

The solicitation provided for a four-phase construction schedule. AR, Tab 4, RFP amend. 6 at 9-10. In phase 1, the awardee had to finalize the design, and obtain agency approval, within 210 days of the contract award. *Id.* at 9. Phases 2 and 3 provided for completion of the work under the requirement, including under the accelerated completion CLINs. *Id.* In case of delays, the Navy was to assess liquidated damages according to Federal Acquisition Regulation (FAR) clause 52.211-12, Liquidated Damages-Construction (Sept. 2000), which was incorporated in

¹ The work encompassed by CLIN 0001AK covered areas A and B1, as defined in the project schedule. RFP at 431.

² The RFP provided that the agency would use "one or more" price analysis techniques to "ensure a fair and reasonable" price, including comparison of received price proposals; comparison of price proposals with the independent government estimate (IGE), as well as with available historical information, and the results of the market survey. RFP at 29.

the RFP. *Id.* at 10. Under this clause, for phase 2 of the construction schedule, the liquidated damages for each calendar day of delay would amount to “\$13,267/day plus the per day cost of the [p]eriod of [p]erformance” for not meeting the 30-day accelerated completion date. *Id.*

The technical specifications in the RFP, amended several times, provided for potential tunneling work, *i.e.*, tunnel excavation and modification, and reinforcement of the existing tunnel structure, in ten rooms included in the requirement. RFP at 430; AR, Tab 4, RFP amend. 6 at 59-60; AR, Tab 1, RFP amend. 6, Tech Rev. at 1.³ The tunneling work requirements table provided estimated dimensions for rooms which might require tunnel modification. AR, Tab 1, RFP amend. 6, Tech Rev. at 23. The solicitation instructed, however, that those estimated dimensions “represent a baseline assumption for bidding purposes only” and that the “[d]esigner of [r]ecord must determine the actual requirements during the course of design and in coordination with all disciplines with work in each room.” *Id.*

The agency received approximately 271 requests for information (RFI) regarding the solicitation, including requests for the technical specifications and the revised tunneling table. COS at 1. Among those RFIs was one submitted by Hensel, RFI no. 260, requesting clarification of whether the “table is now the minimum required tunneling work or if the design-builder is able to utilize other engineering solutions to accommodate the RFP requirements.” AR, Tab 4, RFP amend. 6 at 58. The agency responded that the design-builder is able to utilize other engineering solutions to accommodate the solicitation’s requirements. *Id.*

Three vendors submitted proposals by the January 22, 2021 due date, including Kiewit and Hensel. COS at 2. After evaluating technical proposals, the Task Order Evaluation Board (TOEB) rated Kiewit and Hensel’s proposals unacceptable; only offeror A’s proposal received a rating of acceptable. *Id.*

With respect to price proposals, all three offerors proposed prices for the base CLIN that substantially exceeded the IGE. AR, Tab 5, TOEB Report at 30. The prices for other CLINs, however, were significantly below the IGE. *Id.* For the accelerated completion CLIN at issue in this protest, 0001AK, Hensel proposed a “negative value,” or a discount, of \$4,788,000. *Id.*

The total price proposed by Kiewit was \$134,958,004, which was 23.7 percent higher than the IGE and the total price proposed by Hensel was \$113,942,000, which was 4.44 percent higher than the IGE. *Id.* All three offerors were included in the competitive range. AR, Tab 6, Decl. of Price Evaluator at 2.

³ The technical revisions to the RFP in amendment 6 were not included in the agency report, but were produced at a later date in the development of the protest. We retained the original tabulation used by the agency throughout the decision.

On January 28, 2021, the Navy entered into discussions with offerors regarding price and technical proposals. COS at 3. The agency sent offerors virtually identical questions regarding their price proposals, requesting explanation for the proposed prices, and exploring opportunities for offerors to lower their prices. AR, Tab 8, Evaluation Notices. The Navy also informed offerors that their proposed prices for the base line item were “significantly above” the agency estimate. *Id.* In addition, offerors were notified of the specific areas in their technical proposals that required revisions. *Id.* at 3-6, 20-22, 37.

After evaluating revised technical proposals, the agency found all three proposals acceptable. AR, Tab 9, Revised TOEB Report at 23. With respect to price proposals, although none of the offerors elected to revise their proposed prices, each explained the rationale for their high proposed base CLIN prices. *Id.* at 22. Based upon those explanations, the Navy noted that both Kiewit and Hensel included a larger portion of their proposed total price in the base CLIN, as compared with the IGE, resulting in higher base CLIN prices and lower option CLIN prices. AR, Tab 6, Decl. of Price Evaluator at 2. Accordingly, the agency concluded that amending or de-scoping the RFP would not guarantee a significant decrease in proposed prices, and concluded that it would be in the best interest of the government to obtain additional funding for the requirement. AR, Tab 9, Revised TOEB Report at 22.

Subsequently, the agency analyzed the price proposals for potentially unbalanced pricing. AR, Tab 6, Decl. of Price Evaluator at 2. As to Hensel’s proposed price, only one CLIN, other than the base CLIN, discussed above, exceeded the IGE; this CLIN exceeded the IGE by 10 percent. *Id.* Accordingly, the Navy concluded that award to Hensel would not result in an unacceptable risk that the government would have to pay unreasonably high prices, and awarded the task order to that firm. AR, Tab 13, Award Letter. This protest followed.⁴

DISCUSSION

Kiewit contends that Hensel, by proposing a “negative value” for one of the CLINs, submitted a nonconforming proposal which the Navy improperly found acceptable. In this regard, Kiewit complains that this proposed pricing scheme fails to satisfy a material requirement of the RFP, which called for the insertion of a “cost” for each CLIN. Kiewit also alleges that Hensel proposed an improper reduction in scope in its technical

⁴ The value of the task order exceeds \$25 million and hence, this procurement is within our jurisdiction to consider protests of task orders placed under indefinite-delivery, indefinite-quantity multiple award contracts established pursuant to title 10 of the United States Code. 10 U.S.C. § 2304c(e)(1)(B).

proposal, and that the agency failed to analyze Hensel's price proposal for unbalanced pricing. For the reasons discussed below, we deny the protest.⁵

Acceptability of Hensel's Price Proposal

Kiewit argues that the Navy improperly accepted Hensel's proposed discount of \$4,788,000 for the accelerated completion CLIN 0001AK. Protest at 7-8. The protester contends that the RFP required offerors to provide their "cost" for the accelerated completion, and argues that the discount proposed by Hensel is not a "cost." *Id.* The protester also points to the solicitation's pricing instructions advising that a "[f]ailure to provide an offer" on all CLINs "may cause the offeror to be considered nonresponsive," and argues that the Navy should have rejected Hensel as such.⁶ *Id.* at 7 (citing AR, Tab 4, RFP amend. 6 at 3).

In response, the agency asserts that the awardee provided an offer for all 14 CLINs in the proposal schedule, and maintains that offering a discount did not warrant rejection of Hensel's proposal or provide a basis for finding it noncompliant. Memorandum of Law (MOL) at 11-12. The Navy notes that in fixed-price procurements, offerors are not prohibited from submitting below-cost price proposals, as they bear the financial risk of performing the work at proposed prices. *Id.* The agency also represents that during discussions, Hensel explained its proposed discount, which was based on a novel

⁵ Although we do not specifically address every collateral argument the protester raises, we have carefully considered all of them and find that none provides a basis to sustain the protest. For example, Kiewit contends that the agency's acceptance of the discount proposed by Hensel for CLIN 0001AK would undermine the purpose of FAR clause 52.211-12, Liquidated Damages-Construction, as it relates to the liquidated damages established for phase 2, by allowing Hensel to be paid a bonus for failing to meet the 30-day accelerated completion date. Protest at 8-12. We find that this allegation is a matter of contract administration that our Office does not review as part of its bid protest function. *Ashland Sales & Serv. Co.*, B-408969, Nov. 1, 2013, 2013 CPD ¶ 256 at 1 (matters of contract administration are within the discretion of the contracting agency and are not a matter for our review). Our Office has specifically declined to entertain challenges of liquidated damages provisions in solicitations, including challenges to the propriety of implementing the clause. *Grace Indus., Inc.*, B-224325, Nov. 13, 1986, 86-2 CPD ¶ 558 at 2. Accordingly, to the extent that the protester asks us to address a matter of contract administration, this protest ground is dismissed.

⁶ To the extent Kiewit alleges that the solicitation was ambiguous, *i.e.*, included two different references, "cost" and "offer," that were intended to have the same meaning, Kiewit was required to challenge any alleged apparent solicitation improprieties prior to the deadline for submission of proposals. See 4 C.F.R. § 21.2(a)(1); *Allied Tech. Grp., Inc.*, B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 9 n.10. Accordingly, any allegations in this regard are untimely challenges to the terms of the solicitation, and we dismiss them.

technical solution, allowing Hensel to “shorten its critical path by thirty (30) days,” resulting in a total price reduction of \$4,788,000. *Id.* at 13.

Our Office has stated that in the context of fixed-price contracts, there is nothing objectionable in an offeror’s proposal of low, or even below-cost, prices. *Ultimate Concrete, L.L.C.*, B-412255, B-412255.2, Jan. 13, 2016, 2016 CPD ¶ 20 at 15; *Brewer-Taylor Assocs.*, B-277845, Oct. 30, 1997, 97-2 CPD ¶ 124 at 4. For example, in *SatoTravel*, B-287655, July 5, 2001, 2001 CPD ¶ 111 at 4, we declined to sustain a protest alleging that by proposing a negative value, *i.e.*, an amount less than zero, for each option period of performance, an offeror took an exception to the solicitation, where the RFP did not prohibit a firm from proposing such a value. *See also AAI Eng’g Support, Inc.*, B-257857, Nov. 16, 1994, 95-1 CPD ¶ 2 at 4 (denying protest of a time-and-materials contract, setting forth a pricing scheme for discounted cost of labor to be charged to the agency, because “there is nothing improper about the agency’s decision to accept a contractor’s offer to waive or discount certain charges.”).

Here, the RFP instructed offerors to insert a “cost” or an offer for each CLIN, but did not expressly prohibit offerors from proposing discounts or amounts less than zero for the items in the pricing schedule. AR, Tab 4, RFP amend. 6 at 2-3. Thus, Kiewit has failed to make the threshold showing that the awardee’s proposal took exception to the requirement to submit a fixed price or that the agency’s acceptance of Hensel’s price was inconsistent with the solicitation.

Kiewit argues, however, that while below-cost proposals on a fixed-priced contract are generally permissible, in the particular circumstances here, Hensel is not bound by its offer to reduce its price and accelerate completion, and has no financial incentive to do so. Comments and Supp. Protest at 11. According to the protester, the decision whether to accelerate completion is entirely within Hensel’s control, making the discount offer illusory and not firm, and hence, improper for award. *Id.* at 11-12.

We fail to see any merit in the protester’s argument here. Kiewit does not provide any support, either legal or factual, for its contention that the awardee was not bound by its offer, or that its performance on CLIN 0001AK remained entirely within its control. We also disagree with the protester that Hensel’s proposed price was not firm because it was “subject to an[] adjustment on the basis of the contractor’s cost experience in performing the contract.” Comments and Supp. Protest at 11 (citing FAR 16.202-1).

In fact, based on our review of the record, Hensel’s proposal indicated its clear intent to be bound by the offer of a proposed discount of \$4,788,000 for CLIN 0001AK. We find that the agency properly accepted Hensel’s offer in this regard, and that its offer was sufficient to bind Hensel to perform the requirement. *See SatoTravel, supra* at 4 (finding that a proposed fee of zero, or a negative fee, for a required CLIN is sufficient to bind the offeror to perform the requirement); *cf. GTSI Corp.*, B-286979, Mar. 22, 2001, 2001 CPD ¶ 55 at 8-9 (concluding that CLIN marked as “NSP” [not separately priced] might cast doubt upon the offeror’s intent to be bound where the RFP mandated that each CLIN be separated priced). In sum, we disagree that Hensel proposed “illusory

negative amounts for option prices” which could threaten the integrity of the bidding system. Comments and Supp. Protest 13. Accordingly, we find no basis upon which the Navy should have deemed Hensel’s price proposal nonresponsive, and deny this protest ground.

Change of Scope Allegations

Related to the allegation that the awardee proposed an improper price discount, the protester also contends that the agency erred by accepting Hensel’s revised technical proposal, which eliminated certain work originally included in the specifications, and the associated cost of that work. Comments and Supp. Protest at 2-8. In this regard, Kiewit alleges the proposed discount is based upon a reduction in scope for the tunneling work, which the Navy improperly accepted without revising the solicitation requirements or notifying other offerors. *Id.* at 2.

The agency responds that Hensel did not propose a reduction in scope, but instead proposed a new engineering solution regarding the tunneling requirement that was permitted under the RFP and subsequently accepted by the technical evaluation team. Supp. MOL at 2-7. Specifically, Hensel concluded that additional tunneling/expansion of three rooms, initially included in the specification, was not mandatory, and accordingly, by not including this tunneling, Hensel was able to “strategize accelerated performance” under CLIN 0001AK, resulting in a proposed discount. *Id.* at 6-9. As explained by the intervenor, Hensel made permissible assumptions regarding its proposed technical solution and price for CLIN 0001AK based on the terms of the RFP and the Navy’s response to RFI no. 260, which expressly allowed the awardee’s design-builder to propose its own engineering solutions.⁷ Intervenor’s Comments on Supp. MOL at 2.

We agree with the agency and the intervenor that the RFP did not prescribe mandatory work related to tunneling. As noted above, the design included in the solicitation was only preliminary, and the awardee had to propose its own final design, in coordination with the agency, after contract award. See AR, Tab 4, RFP amend. 6 at 9 (instructing that the agency would approve the final design, submitted by the awardee’s designer of record, 210 calendar days after contract award). Our Office has noted that such a design flexibility to meet RFP requirements is at the core of design-build construction contracts. See, e.g., *Shirley Constr. Co.*, B-240357, Nov. 8, 1990, 90-2 CPD ¶ 380 at 3. Additionally, the agency made clear in its responses to offerors’ questions regarding the tunneling specifications that offerors would be able to utilize other engineering solutions to accommodate the RFP’s requirements. AR, Tab 4, RFP amend. 6 at 58. Thus, we conclude that the protester failed to establish that the awardee here improperly proposed a reduction in scope for the requirement.

⁷ To the extent the protester argues that offerors did not have flexibility on the final design, such an argument is inconsistent with the agency’s responses to the RFIs, including RFI no. 260. Therefore, Kiewit’s arguments in this regard are denied.

Unbalanced Pricing

Finally, Kiewit challenges the Navy's conclusion that Hensel's price proposal was not unbalanced. Based on the agency's unbalanced pricing analysis, the Navy concluded that "awarding the task order to Hensel Phelps would not result in unacceptable risk to the [g]overnment nor the payment of unreasonably high prices." AR, Tab 6, Decl. of Price Evaluator at 2. The agency points out that in light of this determination, Kiewit's unsupported allegations that Hensel's negative value offer for one of the CLIN "clearly creates a risk for the [a]gency" provides no basis to question the award. MOL at 19-20. We agree.

With respect to unbalanced pricing, the FAR requires that contracting officers analyze offers with separately priced line items or subline items to detect unbalancing. FAR 15.404-1(g)(2). Where unbalancing is detected, the contracting officer must then consider the risk posed, including the risk of paying an unreasonable price, and must consider whether to reject the offer if the risk is unreasonable. FAR 15.404-1(g)(2)-(3). While both understated and overstated prices are relevant to the question of whether unbalanced pricing exists, the primary risk to be assessed in an unbalanced pricing context is the risk posed by overstatement of prices because low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. See *AIS Eng'g, Inc.*, B-410246, B-410246.2, Nov. 21, 2014, 2015 CPD ¶ 5 at 3.

Here, Kiewit's contentions regarding the alleged unbalanced pricing focus on the negative value for CLIN 0001AK proposed by Hensel but, generally, fail to allege that any of the awardee's prices are overstated, which is at core of an unbalanced pricing analysis. That is, the protester has not alleged that Hensel's price was too high. In addition, the record shows that the contracting officer conducted an unbalanced pricing analysis of the awardee's price proposal, as required by the FAR. AR, Tab 6, Decl. of Price Evaluator at 2; MOL 15-21.

In our view, the agency has satisfied the requirements of the FAR to conduct an unbalanced pricing analysis by reasonably determining that the risk posed to the government was not sufficiently significant to render Hensel's proposal unacceptable and Kiewit has failed to establish that any additional analysis was required here. We will not disturb an agency's assessment of the risk posed by unbalanced pricing when, as here, the agency reasonably considers the relevant circumstances. See, e.g., *Gulf Master Gen. Trading, LLC*, B-407941.2, July 15, 2013, 2013 CPD ¶ 210 at 5.

The protest is denied.

Thomas H. Armstrong
General Counsel