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# Decision

**Matter of:** Cherokee CRC, LLC

**File:** B-420205; B-420205.2

**Date:** December 21, 2021

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**DIGEST**

1. Protest that the agency engaged in unequal discussions is denied where the agency's exchanges with the awardee were clarifications, not discussions.
2. Protest that the agency's price realism evaluation of the awardee's proposed price was inadequate is denied where the record shows that the evaluation was consistent with the solicitation.

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**DECISION**

Cherokee CRC, LLC, a small business of Tulsa, Oklahoma, protests the issuance of an order by the United States Department of the Interior, Bureau of Indian Affairs (BIA), to Walga Ross Group JV (WRG), a small business of Joplin, Missouri, under task order request for proposal (TORFP) No. 140A1621R0062 for design-build services for an adult detention center in Mescalero, New Mexico. Cherokee alleges the agency's evaluation of WRG's price was improper for several reasons.

We deny the protest.

**BACKGROUND**

The BIA issued the TORFP on July 2, 2021, under the BIA indefinite-delivery, indefinite-quantity National Multiple Award Construction Contract (NMACC) in accordance with the procedures of FAR part 16. Agency Report (AR), Tab 3, TORFP at 1. The TORFP seeks a contractor to provide design-build services for a 40-bed Mescalero Adult Detention Center in New Mexico. AR, Tab 15, Statement of Work (SOW) at 1-2. The

solicitation contemplated issuance of a single fixed-price order with a 2-year period of performance.<sup>1</sup> TORFP at 3, 5.

The TORFP requested that offerors submit technical and price proposals and provided for award to be made on a lowest-priced, technically-acceptable (LPTA) basis, considering price and four non-price (technical) evaluation factors.<sup>2</sup> *Id.* at 11, 14. In the final solicitation amendment, the BIA replaced the Section B price schedule “to obtain more detailed pricing information.” AR, Tab 6, TORFP Amend. 3 at 2. The final price schedule was still organized as a single contract line item number (CLIN), and retained the caution from the original solicitation that “Price Proposals must be submitted following the price schedule/format herein” and that “[i]ncomplete price proposals” would not be considered for award. *Compare* TORFP at 5 *with* AR, Tab 6, TORFP Amend. 3 at 2. The BIA, however, added “price categories” and directed offerors to propose their “best prices for each of the Price Categories in accordance with the Statement of Work (SOW) and attachments.” AR, Tab 6, TORFP Amend. 3 at 2. The price categories were: design, value engineering, detention center building, utilities, offsite improvements, equipment, and management and inspection.<sup>3</sup> *Id.* With regards to price, award would be made to the lowest-priced, technically-acceptable offeror whose overall price was determined to be “realistic, reasonable, and complete.” TORFP at 16.

The agency received four proposals by the August 31 deadline. Contracting Officer’s Statement at 1. Cherokee proposed a price of \$24,967,038. AR, Tab 12, Source Selection Decision Document (SSDD) at 3. WRG proposed a price of \$24,070,220. *Id.* Under the price categories, WRG specified a dollar figure for all of the categories except

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<sup>1</sup> Although firms that compete for task orders under indefinite-delivery, indefinite quantity (IDIQ) contracts are generally referred to as “vendors” who submit “quotations” and are “issued” task orders, the record and the parties’ briefing primarily use the terms “offerors,” “proposals,” and “award.” For the sake of consistency with the record, we refer to the firms that competed here as offerors who submitted proposals for issuance of a task order.

<sup>2</sup> The technical factors--evaluated on an “acceptable” or “unacceptable” basis--are: technical approach; key project management; project schedule; and quality control plan. TORFP at 14. They are not relevant to the discussion here.

<sup>3</sup> Relevant here, the SOW requires the contractor to “[p]rovide two (2) Value Engineering Studies as required by OMB [Office of Management and Budget] Circular A-131” at two design stages. AR, Tab 15, SOW at 8. The referenced OMB Circular defines value engineering as “[a]n organized effort directed at analyzing the functions of systems, equipment, facilities, services and supplies for the purpose of achieving the essential functions at the lowest life-cycle cost consistent with requirement performance, reliability, quality, and safety.” OMB Circular A-131, Value Engineering (May 21, 1983).

value engineering. AR, Tab 8, WRG Price Proposal at 10. For value engineering, WRG's proposal simply stated "TBD during design."<sup>4</sup> *Id.*

The same source selection evaluation board (SSEB) evaluated both price and technical proposals. The evaluators found Cherokee's and WRG's proposal to be acceptable under all technical factors. AR, Tab 10, SSEB Report at 1. In the SSEB's price evaluation report, the evaluators did not observe any price proposal submitted to be incomplete. The evaluators, however, did recommend that the contracting officer--who was also the source selection authority for this procurement--"clarify with [WRG] to confirm that price to perform value engineering analysis has been include[ed] in the proposal and that the total price for all categories and total price of CLIN0010 capture all costs despite small irregularity in formatting." AR, Tab 9, Source Selection Price Report.

On September 7, the agency emailed WRG and asked that WRG "clarify whether or not your total price of \$24,070,220 includes value engineering analysis services." AR, Tab 11, WRG Email at 1-2. The agency did not email any other offerors. WRG responded to the agency's email the next day, confirming that its total price included "value engineering analysis services." *Id.* at 1.

On September 16, the agency issued the task order to WRG, as the lowest-priced, technically acceptable offeror. AR, Tab 12, SSDD at 4. This protest followed.<sup>5</sup>

## DISCUSSION

Cherokee contends that the agency's evaluation of WRG's price was improper because (1) the agency engaged in discussions with WRG and did not conduct discussions with any other offeror; (2) the agency unreasonably found WRG's price to be realistic when WRG's proposal was incomplete; and (3) as a result of the flawed evaluation, the agency's award decision was unreasonable. In filing and pursuing this protest, Cherokee has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester's arguments and conclude that none furnishes a basis on which to sustain the protest.<sup>6</sup>

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<sup>4</sup> We understand "TBD" to be the commonly accepted abbreviation for "to be determined."

<sup>5</sup> Because the value of the task order at issue is greater than \$10 million, the procurement here is within our jurisdiction to hear protests related to the issuance of task orders under IDIQ contracts awarded by civilian agencies. 41 U.S.C. § 4106(f); *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

<sup>6</sup> For example, in its initial protest, Cherokee asserted that WRG had failed to include all applicable taxes in its proposed price, rendering WRG's price unrealistic and WRG

## Unequal Discussions

Cherokee first argues that the agency's communication with WRG regarding its price proposal constituted discussions, and that the agency was therefore obligated to conduct discussions with all offerors. Supp. Protest at 7-14; Supp. Comments at 3-9. The BIA asserts that the agency's email to did not constitute discussions. Supp. Memorandum of Law (MOL) at 2-6.

This task order competition was conducted among NMACC contract holders pursuant to the provisions of Federal Acquisition Regulation (FAR) subpart 16.5. Although the regulations concerning discussions in procurements conducted pursuant to FAR part 15 do not, as a general rule, govern task order competitions conducted pursuant to FAR subpart 16.5, when an agency engages in exchanges with vendors in task order competitions, such exchanges must be fair and reasonable. *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 16; *Companion Data Servs., LLC*, B-410022, B-410022.2, Oct. 9, 2014, 2014 CPD ¶ 300 at 12; *Hurricane Consulting, Inc.*, B-404619 *et al.*, Mar. 7, 2011, 2011 CPD ¶ 70 at 6. Our analysis regarding fairness, will, in large part, reflect the standards applicable to the negotiated procurements in FAR part 15. *Technatomy Corp.*, B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 7.

The discussions provisions of FAR part 15 describe a spectrum of exchanges that may take place between an agency and an offeror during negotiated procurements. The agency's characterization of a communication as clarifications or discussions is not controlling; it is the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency. *Priority One Servs., Inc.*, B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

In situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. *Id.*; *Ranger American of the Virgin Islands, Inc.*, B-418539, B-418539.2, June 11, 2020, 2020 CPD ¶ 194 at 9. Clarifications, on the other hand, are limited exchanges that agencies may use to allow offerors to clarify certain aspects of their proposals or to resolve minor or clerical issues. See FAR 15.306(a)(2). Therefore, clarifications are not to be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. See, e.g., *Res Rei Dev., Inc.*, B-410466.7, Oct. 16, 2015, 2015 CPD ¶ 320 at 10.

Here, the Solicitation required offerors to propose an overall price in a single CLIN. AR, Tab 6, TORFP Amend. 3 at 2. The format of section B of the TORFP included two different breakdowns of this overall price: (1) identification of the amounts attributable

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ineligible for award. Protest at 5-10. Cherokee, later, withdrew these protest grounds. Notice of Withdrawal of Initial Protest.

to the subtotal, general contractor's overhead, taxes, and bonding; and (2) identification of the amounts attributable to seven price categories, including value engineering. *Id.* The solicitation directed offerors to propose their best prices for each of the price categories in accordance with the SOW. The SOW, however, does not contain a work breakdown structure that mirrors the seven price categories present in section B of the solicitation. *Id.*; see generally AR, Tab 15, SOW at 2-5 (defining the scope of services under three tasks: administration of contract, procurement phase services, and general services).

After the receipt of proposals, the agency emailed WRG regarding its price proposal. AR, Tab 11, WRG Email. Cherokee's argument here is focused on one part of that email, wherein the agency inquired about the way that WRG completed the price categories breakout under the overall, single-CLIN price:

Additionally, [WRG's] price category for value engineering is noted as "TBD during Design." This element was meant to break out the cost for the offeror to perform value engineering analysis, which is a price that can be fixed at proposal as it is driven by known labor. However, it appears that you may have misunderstood this category to mean the price increases or reductions from any value engineering changes, which naturally can only be determined during design. Please clarify whether or not your total price of \$24,070,220 includes value engineering analysis services.

See *id.* at 2. WRG's response to this inquiry, in full, was: "Yes, the total price of \$24,070,220 includes value engineering analysis services." *Id.* at 1.

Cherokee argues that this exchange constituted discussions. Supp. Protest at 7-14; Supp. Comments at 3-9. The protester contends that WRG's proposal was incomplete without a dollar figure for the value engineering price category, and WRG's proposal was, therefore, unacceptable. Supp. Protest at 11-12. Recognizing that WRG did not change its overall price, the protester argues that this exchange nonetheless constituted discussions because WRG "was able to provide the missing pricing by replacing the 'TBD during Design' language with \$0 for Value Engineering," correcting a material defect. *Id.* at 13; Supp. Comments at 4-5.

The agency responds that the exchange did not amount to discussions because the agency never determined that WRG's proposal was unacceptable, and WRG merely confirmed its proposed overall price encompassed the required value engineering analysis. Supp. MOL at 2-6. The agency also argues that Cherokee has not established that it was unfairly prejudiced by the exchange in any event. *Id.* at 6-8. We agree.

Here, the exchange between BIA and WRG were clarifications, not discussions. The protester's argument is premised on the claim that WRG's price proposal was "incomplete," and that the communication between the BIA and WRG allowed WRG to

“fix a material defect in its proposal.” Supp. Protest at 13. First, we find no merit with the protester’s characterization that WRG’s price proposal was incomplete without a dollar figure for the value engineering category. Regarding completeness, the solicitation provided that agency would review the price proposal “to determine whether the offeror provided sufficient data as required by the solicitation and the Contracting Officer during the evaluation.” TORFP at 16. In its evaluation of price, the agency concluded that WRG’s overall price was complete. See AR, Tab 12, SSDD at 3 (“WRG price is determined to be complete . . .”).

Cherokee argues that WRG’s price proposal was incomplete based on instructions to offerors in sections B and L of the TORFP, which provided the format for price proposals and explained that a proposal was complete when “all price cost/data as outlined in this TORFP, in the required format, has been submitted.” Supp. Protest at 11-12. From there, Cherokee argues that “a set price for each price category” was part of the price proposal format, and therefore any proposal without a dollar figure for each price category was incomplete and ineligible for award. We disagree with this characterization of the solicitation’s requirements.

Solicitation instructions, such as in section L, generally provide guidance to assist offerors in preparing proposals; they do not establish minimum evaluation standards. *Al-Razaq Computing Servs.*, B-410491, B-410491.2, Jan. 7, 2015, 2015 CPD ¶ 28 at 5. The TORFP’s minimum evaluation standards here establish requirements only with respect to *overall price*, and only the overall price was incorporated in the awarded task order. TORFP at 16 (“This criterion evaluates the overall price to the Government . . .”); AR, Tab 13, Awarded Task Order at 7. It was reasonable and consistent with the solicitation for the agency to determine that WRG’s proposal was complete because it submitted an overall price within the required format, even if it did not submit a dollar value for one price category in one breakdown. See *Kiewit Infrastructure W. Co.*, B-419687, B-419687.2, June 25, 2021, 2021 CPD ¶ 247 at 6-7 (denying protest that awardee was unacceptable because it did not provide a “cost” for each CLIN because the awardee provided an offer for all CLINs). Because the record reflects that the agency reasonably determined that WRG’s proposal was complete even with “TBD during Design” for the value engineering price category, there was no defect for WRG to remedy. The exchange therefore fails the acid test for discussions.

Furthermore, the agency was clear in its email to WRG that its question was intended as “clarifications only, not discussions, and no revised proposal will be accepted at this time.” AR, Tab 11, WRG Email at 2. As the protester admits, WRG never changed its overall, single-CLIN price, Supp. Protest at 13; instead, WRG’s response was limited to confirming that WRG’s overall, single-CLIN price included value engineering services. AR, Tab 11, WRG Email at 2. Here, the communication from the agency did not permit WRG to revise or modify its proposal, but rather to confirm what WRG had already proposed to do. Because the agency did not conduct discussions with WRG, the agency was not required to engage in discussions with any other offeror. *STG, Inc.*, B-411415, B-411415.2, July 22, 2015, 2015 CPD ¶ 240 at 8 (denying protest that communication constituted discussions where there was no indication that the offerors

were permitted to revise or modify their proposals). Accordingly, this allegation is denied.

## Price Realism

Cherokee also challenges the agency's evaluation of WRG's proposed price as being realistic. Supp. Protest at 14-16; Supp. Comments at 9-13. In this regard, Cherokee contends that even if "WRG fixed its incomplete pricing," the "TBD" in WRG's proposal effectively "resulted in a price of \$0 for value engineering," which, according to WRG, the agency should have rejected as being unrealistic. Supp. Protest at 15. The agency defends that any failure to specify an amount for one price category does not necessarily connote that WRG's prices were unrealistically low, particularly where WRG confirmed that it included all required work within its overall price. Supp. MOL at 8-9.

Where, as here, a solicitation contemplates the award of a fixed-price contract, the agency is not required to conduct a realism analysis; this is because a fixed-price contract places the risk and responsibility for loss on the contractor. *Rodgers Travel, Inc.*, B-291785, Mar. 12, 2003, 2003 CPD ¶ 60 at 2. An agency may, however, provide for the use of a price realism analysis for the limited purpose of measuring offerors' understanding of the requirements or to assess the risk inherent in an offeror's proposal. *Id.* When a solicitation provides for a price realism analysis, the manner and depth of an agency's price realism analysis is a matter within the sound exercise of the agency's discretion. *Apptis Inc.*, B-403249, B-403249.3, Sept. 30, 2010, 2010 CPD ¶ 237 at 9. In reviewing protests challenging price realism evaluations, our focus is on whether the agency acted reasonably and in a manner consistent with the solicitation's requirements. *MicroTechnologies, LLC*, B-413091.4, Feb. 3, 2017, 2017 CPD ¶ 48 at 8.

For price realism, the TORFP specified that overall price would

be evaluated to determine if it is unrealistically low in relation to the Government's Independent Cost Estimate, market conditions evidenced by other competitive proposals received, and the offeror's technical / management approach, such that there is a risk the offeror does not understand the procurement's technical requirements or may not satisfactorily perform at the proposed price.

TORFP at 16.

Cherokee argues that the agency's analysis and documentation were insufficient and the agency's conclusion was flawed. Supp. Protest at 15-16. As was with Cherokee's allegation of unequal discussions, the protester's argument here is again premised on the claim that WRG's pricing was incomplete, with regards to the value engineering price category. *Id.* The protester argues that because, in its view, the "TBD" response was equivalent to WRG proposing \$0 for value engineering services, the response "reflect[ed] a lack of understanding of those services." *Id.* at 16.

Here, the solicitation specified that the agency would evaluate overall price. The record reflects that the agency compared WRG's overall price to the independent cost estimate and the other offerors' prices. AR, Tab 9, Source Selection Price Report. Further, the record demonstrates that the evaluators, in reviewing WRG's price proposal, "cross-walked the price proposal with the technical proposal," and confirmed that WRG's proposal did not include any improper assumptions or clarifications. *Id.* In the context of a fixed-price contract, we find nothing unreasonable about the agency's price realism evaluation where the solicitation provided for the agency to evaluate overall price, not the price categories. See *Rogers Travel, supra*; *B & B Med. Servs. Inc.*, B-409705.2, Apr. 17, 2015, 2015 CPD ¶ 142 at 4 (denying protest challenging price realism evaluation of particular CLINs where the solicitation provided for analysis of overall prices). Accordingly, we find no merit to this argument, and the allegation is denied.

#### Best-Value Determination

Finally, Cherokee argues that the agency's LPTA best-value determination was flawed because it was based on miscalculation of WRG's price. Supp. Protest at 16-17. This allegation is dismissed as derivative of Cherokee's challenges to the agency's evaluation, which we have denied. See *Deloitte & Touche LLP*, B-420038, Oct. 28, 2021, 2021 CPD ¶ 353 at 11.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel