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Decision

Matter of: D&S Consultants, Inc.

File: B-403713.7; B-403713.9

Date: July 11, 2011

Anthony H. Anikeeff, Esq., and William A. Wozniak, Esq., Williams Mullen, and R. James Kravitz, Esq., for the protester.

Robert A. Russo, Esq., Frank V. DiNicola, Esq., Desiree A. DiCorcia, Esq., Department of Veterans Affairs, for the agency.

Mary G. Curcio, Esq., and Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably determined that offeror's proposed labor rates were unrealistic is denied where protester offered a substantial number of hours that were priced at rates significantly below the rates used to calculate the government estimate, and protester has not shown that the government estimate was unreasonable.

DECISION

D&S Consultants, Inc., of Eatontown, New Jersey, protests the elimination from the competitive range of the proposal it submitted in response to the Department of Veterans Affairs (VA) request for proposals (RFP) No. VA-118-10-RP-0052, for information technology (IT) services. D&S asserts that the agency misevaluated its proposal.

We deny the protest.

BACKGROUND

The solicitation provided for the award of up to 15 contracts on a "best value" basis considering the following factors: technical (with subfactors for sample task orders (STO) and management), past performance, veterans involvement, small business participation commitment, and price. A proposal had to receive a rating of at least acceptable for the technical factor (as well as for each of the subfactors) and small business participation commitment factor to be considered for award. RFP § M.2.A. With respect to price, the government provided a list of 167 labor categories; for

each labor category offerors were required to propose loaded labor rates and to allocate the number of hours that the prime contractor and each subcontractor would perform within each labor category. RFP L.7(v).

As is relevant to the protest, the solicitation provided that the management subfactor would be evaluated for understanding the problem and feasibility of approach. With respect to feasibility of approach the solicitation provided:

(2) Feasibility of Approach . . . The Government may evaluate the offeror's proposed labor rates to determine if the proposed rates are unrealistically low in order to assess the ability of the offeror to meet the PWS requirements and whether the proposal provides the Government with a high level of confidence of successful performance. Unrealistically low labor rates may indicate a high-risk approach to contract performance. . . This analysis, if undertaken, is for the limited purpose of aiding the agency in measuring the risk of the offeror's approach to meeting the PWS requirements.

RFP § M.2.C. Prior to issuing the solicitation, to determine whether the offerors' proposed labor rates were unrealistic, the agency prepared a government estimate for each of the 167 labor categories that reflected the IT categories required to perform the work. To prepare the estimate, the agency made reference to the General Services Administration's Federal Supply Schedule (FSS) contracts, Schedule 70, for IT services. Supplemental Agency Report, May 24, 2011, (SAR) at 3. The agency randomly selected the FSS price schedules of 10 firms that had expressed an interest in this acquisition--7 large businesses and 3 small--averaged the loaded labor rates for each category, and then reduced the averaged rates by 20 percent to account for competition.¹ SAR at 3.

In evaluating proposals, the agency determined that a proposed labor rate would only be considered unrealistic if it was more than 50 percent below the rate calculated for the government estimate. SAR at 5. Further, the agency only considered that a proposal created a performance risk if it offered a substantial number of hours at unrealistic rates. SAR at 6.

The record shows that, in evaluating D&S's initial proposal, the agency concluded that it had offered unrealistically low labor rates for a substantial portion of the hours it proposed. The agency therefore raised the issue with D&S during discussions and provided the protester with the following item for negotiation (IFN):

¹ Where there was no exact category match, the agency used a 'best fit' analysis to determine what rate to use.

You have described your approach to attracting and retaining your workforce, yet you have proposed unrealistically low labor rates for a substantial quantity of the total labor hours proposed. This presents a very high degree of risk for attracting and retaining the workforce required to perform all functional areas of the PWS

IFN-DSCI-MGMT-01. The agency also provided D&S with a list of each labor rate for D&S and its proposed subcontractor that the agency considered unrealistically low and asked D&S to demonstrate in detail how it would attract and retain the necessary workforce. Id. D&S's response did not alleviate the agency's concerns.

The agency therefore concluded that D&S had proposed unrealistically low rates for approximately two-thirds of the proposed hours called for under the contract and found that this created a performance risk. Interim Evaluation Report at 4-6. This performance risk led the agency to assign an unacceptable rating to the D&S proposal under the management subfactor. Id. at 7. Consequently, D&S's proposal was removed from the competitive range. Debriefing Memorandum at 34.

DISCUSSION

Reasonableness of the Government Estimate

D&S's protest raises several assertions that challenge the reasonableness of the agency's government estimate. We emphasize at the outset the fact that the agency only found a firm's proposed rates unrealistic where they were more than 50 percent below the rates used to prepare the government estimate, and that the rates used to prepare the government estimate were 20 percent below the rates actually found in the FSS schedule. Thus, an offeror's proposed rates were found unrealistic only where they were approximately 60 percent below the actual rates being charged to the government under awarded FSS contracts. Under these circumstances, the starting point for our analysis is a presumption that the agency's determination that an offeror's rates were unrealistic was reasonable, since the rates had to be substantially below rates previously determined to be fair and reasonable by the GSA before they would be determined unrealistic. See U.S. Info. Techs. Corp., B-404357, B-404357.2, Feb. 2, 2011, 2011 CPD ¶ 74 at 7 n.8.

D&S contends that the estimate discriminates against small businesses because they comprise only 30 percent of the contractors whose rates were used to arrive at the average rates that make up the estimate.

This aspect of D&S's protest lacks merit. The agency explains that it chose to use small business prices for 30 percent of the prices used to calculate its average hourly rates because the agency has an overall goal of contracting with small businesses for approximately 28 percent of all prime contract dollars that it awards.

Conference Call Memorandum, June 24, 2011. In effect, the agency calculated a weighted average rate using the same proportion of rates from small businesses as the proportion of small businesses it intends to contract with when making its purchases. Simply stated, the agency had a logical basis to calculate weighted average rates.

The protester next questions whether the agency, in fact, randomly selected the contractors whose prices it used to prepare the estimate. According to the protester the record shows that, when the VA was selecting the contractors, it knew the names of the contractors whose rates it used to calculate the government estimate. The protester therefore asserts that the selection was not genuinely random.

This assertion provides no basis to question the underlying reasonableness of the agency's average rates. First, the agency explains that it selected the contractors whose prices it would use by dividing the more than 400 concerns that expressed interest in the procurement into large and small businesses, listing them alphabetically, and randomly picking contractors from the two lists. Conference Call Memorandum, June 24, 2011. The protester has provided no evidence that draws into question the agency's representation that the selection was random, and we have no basis to otherwise question that the agency randomly selected the contractors whose rates were used to arrive at the average rates. In any case, even if the selection was not random, the protester has not explained, and it is not evident to us, why this would invalidate the government estimate.

D&S asserts that the agency did not consider geographic location when it prepared the government estimate. This does not provide a basis for us to question the estimate. First, at the time it prepared its estimate, the agency had no idea where the contractors submitting offers would be located; it follows that there was no underlying basis to choose contractor rates for the estimate based on geographic location in advance of receiving proposals. Second, as discussed below, to the extent that D&S's proposed rates were lower because of the location of its proposed performance, it had the opportunity to explain this during discussions, but it did not do so.

Evaluation of D&S's Management Proposal

D&S challenges the agency's evaluation of its proposal. In considering protests challenging an agency's evaluation of proposals, we will not reevaluate proposals; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. Engineered Elec. Co. d/b/a/ DRS Vermont, B-295126.5, B-295126.6, Dec. 7, 2007, 2008 CPD ¶ 4 at 3-4. A protester's mere disagreement with a procuring agency's judgment is insufficient to establish that the agency acted unreasonably. CIGNA Gov't Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 16. We have carefully

reviewed all of D&S's challenges to the agency's evaluation of its proposal and find them to be without merit. We discuss D&S's principal allegations below.

D&S asserts that the VA found its proposal unacceptable under the management factor based solely on its determination that D&S's proposed rates were unrealistic, and that this determination was based on nothing more than a comparison of its labor rates with the government estimate. D&S argues that this was inconsistent with the solicitation which stated that its management plan also would be evaluated to determine D&S's ability to successfully meet the requirements of the PWS.

We find no merit to this aspect of D&S's protest. The solicitation made it clear that the VA could specifically consider whether an offeror's unrealistically low labor rates created a performance risk. RFP M.2.C. Thus, the agency could properly find that an offeror's unrealistically low proposed rates created a substantial performance risk, and, correspondingly, could find the proposal unacceptable under the management factor on that basis alone. Here, while the agency did recognize that D&S's compensation plan offered certain benefits, Interim Evaluation Report, at 3, the agency ultimately concluded that the proposal created an unacceptable performance risk because it offered such a high percentage of rates that were unrealistically low.

D&S argues that the agency failed to consider the explanation that it provided to the agency during discussions that its rates were based on Service Contract Act (SCA) rates for employee categories covered by the SCA, and on [DELETED] survey rates for labor categories not covered by the SCA.

The record shows that the agency did, in fact, consider this information, but that it did not alleviate the agency's concerns about D&S's unrealistically low proposed rates. With respect to labor categories covered by the SCA, the record shows that D&S incorrectly mapped a substantial number of labor categories by mapping professional categories in many instances to clerical categories. Agency Report at 5. For example, the protester used the SCA labor category travel clerk III to cover a senior deployment manager, and a SCA test proctor to cover a test planner engineer. Interim Evaluation Report at 4-5. With respect to labor categories covered by the [DELETED] survey, the record shows that, in 55 instances, the protester's rates were below the survey rate and the protester justified the rate by stating simply that they were validated by the relevant subcontractor. Id. at 5. Given that D&S mismapped labor categories and offered rates below its own survey rates, we conclude that the agency could reasonably find that the proposed rates were unrealistic.

D&S asserts that, in evaluating its proposed rates, the agency relied on a government estimate that did not adequately take into consideration the size or geographical location of the contractor. The protester asserts that many of its

proposed labor rates that were considered unrealistic were rates for small businesses located in remote areas, and that this explains why its rates were so low.

The protester did not provide this information during discussions, even though it knew the specific rates that the agency considered too low and which subcontractors had offered them. The agency also specifically informed the protester that it considered that the unrealistic rates presented a very high risk for attracting and retaining the workforce, and asked the protester to demonstrate how it would recruit and retain a workforce. Despite the specificity of the agency's discussion question, however, the protester did not provide the explanation it now presents regarding the size and location of its proposed subcontractors. In the absence of such an explanation from D&S during discussions, the agency had no basis to determine whether the rates were realistic based on such considerations.²

The protest is denied.

Lynn H. Gibson
General Counsel

² D&S asserts that the agency failed to provide it with meaningful discussions because it did not specifically point out that its concerns were based on a comparison of D&S's rates with the government estimate. Discussions are meaningful where, as here, they lead an offeror into the area of its proposal with which the agency is concerned. New Breed, Inc., B-400554 et al., Dec. 5, 2008, 2009 CPD ¶ 4 at 6. The agency was not required to advise D&S that its proposed rates were considered low based on a comparison of the rates to the government estimate in order to apprise D&S of the agency's central concern that the rates were considered unrealistically low.