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Decision

Matter of: Cantu Services, Inc.

File: B-289666.2; B-289666.3

Date: November 1, 2002

Johnathan M. Bailey, Esq., Theodore M. Bailey Law Office, for the protester.

Lynn H. Patton, Esq., Ott & Purdy, for South Carolina Commission for the Blind, an intervenor.

Maj. Art J. Coulter, Department of the Army, for the agency.

Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under solicitation subject to Randolph-Sheppard Act preference (establishing priority for the blind in the award of contract for cafeteria services), agency reasonably determined to include proposal by state licensing agency for the blind (SLA) in the competitive range where it was one of two proposals submitted, and received a higher technical evaluation, notwithstanding the fact that the SLA's proposal's most probable cost was higher.

DECISION

Cantu Services, Inc. protests the award of a contract to the South Carolina Commission for the Blind, a state licensing agency for the blind (SLA), under request for proposals (RFP) No. DABT47-01-R-0001 issued by the Department of the Army for food services at Fort Jackson. Cantu asserts that the SLA's proposed cost was not reasonable and that the SLA's proposal was improperly included in the competitive range.

We deny the protest.

The RFP advised that this procurement would be conducted pursuant to the Randolph-Sheppard Act (RSA), which establishes priority for blind persons recognized and represented by SLAs, in the award of contracts for, among other things, the operation of cafeterias in federal facilities. 20 U.S.C. § 107b (2000); 34 C.F.R. § 395.33(a) (2002). Under Department of Defense regulations, if a designated SLA submits an offer found to be within the competitive range, award must be made to the SLA absent a high-level determination by the agency and

agreement by the Secretary of Education that, as applicable here, the SLA does not have the capacity to operate a cafeteria in such a manner as to provide food service at a cost and quality comparable to that available from other cafeteria services providers. 32 C.F.R. § 260.3(g)(1)(3) (2002). Here, the solicitation specifies that the applicable RSA priority requires that award be made to an SLA if its proposal is included in the competitive range, absent such a high-level agency determination and approval by the Secretary of Education. RFP amend. 3, at 9-10.

While Cantu has propounded a number of variations on its argument, the gravamen of Cantu's protest is that the SLA's proposal should not have been included in the competitive range because its proposed cost is unreasonably high in comparison with Cantu's proposed cost.

The RFP provided for the award of a cost-plus-award-fee contract on the basis of a "best value" determination under five specified technical evaluation factors which, in combination, were significantly more important than cost. *Id.* at 8-9.¹ Cantu and the SLA were the only offerors that submitted proposals. The SLA's proposal received a rating of "excellent" under management and food production, the most important technical factor, versus Cantu's rating of "good." The SLA's proposal received ratings of "good" under the other four factors; Cantu's proposal received ratings of "good" on those factors, with the exception of an "excellent" rating under the past performance factor, which was significantly less important than the management and food production factor. The SLA's proposal also received substantially more subfactor ratings of "excellent" than the Cantu proposal. The contracting officer concluded that while both technical proposals received overall ratings of "good," the SLA's higher rating of "excellent" under the significantly most important evaluation factor represented a technical advantage that caused him to assess the proposal as clearly superior to Cantu's proposal. Agency Report (AR) at 2.

Cantu's final proposed cost was \$49,632,275 and the SLA's final proposed cost was \$57,734,567. The independent government cost estimate was \$61,560,686. As provided for by the RFP, the agency performed most probable cost (MPC) evaluations, which resulted in an MPC of \$60,912,379 for Cantu, and an MPC of \$63,411,012 for the SLA. AR at 1. The agency decided to include both proposals in

¹ The agency had previously decided to award to the SLA, but had taken corrective action in response to a protest to our Office filed by Cantu, in the form of amending the RFP technical and cost evaluation criteria, soliciting proposal revisions, and performing a new evaluation. The agency took this corrective action because the evaluation had been performed on the basis of internal agency guidance that differed from the solicitation evaluation criteria, which also had not included notice of the RSA evaluation preference. While neither offeror elected to change either its technical or cost proposals as a result of the corrective action, the agency performed a new technical and cost evaluation for both proposals.

the competitive range, and determined that the SLA's proposed cost was fair and reasonable and that under the terms of the solicitation there was no basis to award to other than the SLA. AR, Tab Q, Price Negotiation Memorandum, at 7.

Cantu protests that it was irrational to include the SLA proposal in the competitive range because of its 17 percent (actually 16 percent) higher proposed cost, which Cantu asserts is unreasonable and establishes that the SLA's proposal had no reasonable chance of award. Protest at 9.

The evaluation of proposals and the determination of whether a proposal is in the competitive range are principally matters within the contracting agency's discretion, since agencies are responsible for defining their needs and for deciding the best method for meeting them. EAA Capital Co., L.L.C., B-287460, 2001 CPD ¶ 107 at 3-4. The criterion for inclusion in the competitive range is that a proposal must be one of the most highly rated, including cost and non-cost factors. SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33 at 7. Federal Acquisition Regulation § 15.306(c). This standard applies even where a procurement is subject to the RSA priority, and there is no requirement that in order to be included in the competitive range, an SLA's proposal must be rated as high technically as other competitive range proposals or be very close to them in price. See Centro Mgmt., Inc., B-286935, B-286935.2, Feb. 26, 2001, 2001 CPD ¶ 41 at 4. In this instance, where only two proposals were received, both of which were technically acceptable, there is no basis to question the agency's decision to include the SLA in the competitive range notwithstanding the 16 percent higher proposed cost, where technical factors were significantly more important than cost, both offerors' proposed costs were within IGCE, and the SLA's proposal was considered technically superior.²

² Cantu also objects to the SLA proposal's technical evaluation on the grounds that both proposals were previously evaluated overall as "good," and neither was changed in response to the corrective action. As explained above, the SLA's overall technical rating continued to be "good," even though the contracting officer considered that it presented technical advantages relative to Cantu's proposal, which received the same overall "good" rating. In any event, the agency performed a new evaluation as part of its corrective action and Cantu has not provided any specific basis for objecting to the results of this new technical evaluation. Even though there were no changes in the proposals, and the applicable evaluation criteria may have been unchanged, the mere fact that the predecessor evaluation may have been different, absent more, does not by itself provide any basis to question the current evaluation; Cantu has not provided the requisite "more." Accordingly, there is no basis to object to the technical evaluation of the SLA's proposal, which on its face appears reasonable.

As explained above, under Department of Defense regulations, where an SLA's proposal is included in the competitive range, the SLA must be awarded the contract (absent circumstances not present here). Id.; Mississippi State Dept. of Rehab. Servs., B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99 at 1-2. Cantu points out that if the SLA's cost is determined not to be reasonable, the regulations and the solicitation provide that the agency may follow a procedure that may eventually result in consulting with the Secretary of Education to seek approval not to award to the SLA. However, once the SLA's proposal has reasonably been included in the competitive range, the RSA and its implementing regulations vest the decision to award or not with the agency and the Secretary of Education, and that decision is not subject to review by our Office. See Centro Mgmt. Inc., supra, at 3.

In any event, in addition to finding the SLA's MPC reasonable, the contracting officer determined that the SLA's proposed cost was fair and reasonable by comparison with Cantu's proposed cost. AR, Tab Q, Price Negotiation Memorandum, at 7. In our view, the contracting officer's discretion in determining the cost reasonableness of an SLA proposal entitled to RSA priority should be at least as broad as that afforded a contracting officer in making the required price reasonableness determination as the predicate for an award to a small business under a small business setaside. Under a setaside, because of the analogous congressional policy favoring small businesses, a contracting officer has substantial discretion and our Office has found reasonable a contracting officer's determination that a price premium of as much as 51 percent over a "courtesy" large business offer did not warrant a finding that the small business' price was unreasonable. Hardcore DuPont Composites, L.L.C., B-287371, Jan. 20, 1998, 98-1 CPD ¶ 28 at 3. In the circumstances presented here, the 16 percent cost premium associated with the SLA's proposed cost does not provide any basis to conclude that the contracting officer was required to find the SLA's cost unreasonable, and the determination to award to the SLA is unobjectionable.³

The protest is denied.⁴

Anthony H. Gamboa
General Counsel

³ While Cantu styles its objection in terms of the SLA's cost reasonableness, as this discussion suggests, the actual objective of Cantu's protest is to require a cost/technical tradeoff in order to obtain the benefit of the lower proposed cost. As explained above, the RSA priority eliminates the requirement for a tradeoff.

⁴ Cantu raises a number of collateral issues and recast iterations of its issues, all of which we have considered and find without merit.