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Decision

Matter of: United Medical Systems-DE, Inc.

File: B-298438

Date: September 27, 2006

Tenley A. Carp, Esq., Cohen Mohr LLP, for the protester.
Dennis Foley, Department of Veterans Affairs, for the agency.
Peter Verchinski, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly evaluated protester's proposed price for laser system is denied where record shows that (1) evaluation was based on only firm, fixed unit price set forth in proposal, and (2) alternate pricing in proposal—which, contrary to solicitation's pricing scheme, consisted of a range of prices based on [deleted] different sized fibers used with the laser—would have resulted in even higher evaluated price, since evaluation would have to be based on highest-priced fiber in order to reflect potential cost to government.

DECISION

United Medical Systems-DE, Inc. (UMS) protests the Department of Veterans Affairs' (VA) award of a contract to AKSM Guild, Inc. under request for proposals (RFP) No. 246-06-02587, for the rental of urology equipment and a technician for the operating room at VA's medical center in Salem, Virginia. UMS primarily alleges that the agency unreasonably evaluated its proposed price.

We deny the protest.

VA first issued a solicitation for these services as a total small business set-aside (RFP No. 246-06-02422) in November 2005. UMS submitted a proposal, but VA excluded the proposal from the competition on the basis that UMS was not a small business. VA then made award to AKSM, the only other offeror. On December 14, UMS filed a challenge to AKSM's small business size status, and the Small Business Administration (SBA) subsequently found AKSM to be other than small. Despite this finding, VA determined that it was not in the best interests of the government to terminate AKSM's contract. UMS challenged this determination in a protest filed with our Office, in response to which VA took corrective action by terminating the

contract and recompeting the requirement. We thereafter dismissed UMS's protest as academic. (B-297940, Feb. 17, 2006).

On March 15, 2006, VA issued the current RFP, without the small business set-aside, which provided for award for a base year, with 2 option years, to the firm whose proposal offered the "best value" to the government, considering technical, past performance, and price factors. The price schedule called for offerors to fill in blanks with unit and total prices for three items: a Holmium YAG laser system, standby charges for the laser system, and an extracorporeal shock wave lithotripter (ESWL). The base and option year prices were to be added to determine a total evaluated price.

UMS and AKSM again were the only two firms to submit proposals. Regarding prices for the YAG laser system, UMS's proposal listed, in the appropriate blanks to the right of the item description, a unit price of \$1,325 for the system and a total price of \$15,900 (the price for 12 units) for the base year. In addition to the blanks next to the item description, the pricing sheet also contained another blank under the description, in which offerors were again to fill in the unit price for each item. Here, UMS did not write \$1,325 for the laser system, but instead wrote [deleted] (emphasis in original), and then added [deleted] additional lines containing prices for [deleted] different size fibers (ranging from [deleted] to [deleted]). UMS repeated this pricing scheme for the YAG laser system for each of the option years, changing only the total prices to reflect the different number of units in the option years (25 units for each year). In contrast, AKSM's proposal listed a unit price of \$900 for the YAG laser system in both the blank next to the description and the blank below the description. Regarding prices for the standby charges, UMS's proposal listed, in the appropriate blanks to the right of the item description, a unit price of \$250 for standby charges, and a total price of \$1,250 (the price for 5 units) for the base year. In the blank under the item description, UMS again listed \$250, but included the phrase [deleted] (emphasis in original) after the unit price. Again, UMS repeated this pricing for each of the option years, changing only the total prices to reflect the changed number of units (10 units for each year). In contrast, AKSM's proposal listed standby charges of \$475 in both blanks. Finally, for the ESWL, UMS listed a unit price of \$875 in the blank next to the item description and the blank below the item description. AKSM listed a price of \$1,400 in both places.

After determining that each firm deserved the highest possible score under the technical and past performance evaluation factors, VA selected AKSM for award based on its total price of \$102,675, which was lower than UMS's price of \$110,175.

UMS primarily alleges that VA performed an improper price evaluation. Specifically, whereas VA based UMS's total evaluated price on a unit price of \$1,325 for the YAG laser system, UMS alleges that this was not its lowest possible price; rather, its lowest price was the price listed under the item description--[deleted] for the least expensive fiber, for a total unit price of \$1,200. Since this price would have left UMS

as the low offeror, it concludes that the agency's price evaluation was materially flawed.

Where a protester challenges an agency's evaluation of proposals, including the evaluation of an offeror's proposed price, we will not reevaluate proposals; rather, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Liquidity Servs., Inc., B-294053, Aug. 18, 2004, 2005 CPD ¶ 130 at 5.

The price evaluation here was reasonable. Regarding the laser system, it was proper for the agency to use \$1,325 as the item price for evaluation purposes, given that \$1,325 was the unit price that UMS provided in the space to the right of the item description, and that it was the only firm, fixed unit price offered. In any case, even if UMS were correct that its range pricing should have been used in the evaluation, \$1,200 would not be the proper evaluated unit price. In this regard, where an offeror provides a range of prices where a single firm, fixed price is required, the evaluation must be based on the highest, not the lowest, price in the range, since this could be the ultimate cost to the government if award were made to that firm. See Tri-State Gov't Servs., Inc., B-277315.2, Oct. 15, 1997, 97-2 CPD ¶ 143 at 4-5. The highest unit price in UMS's proposed price range was [deleted] ([deleted] for the fiber). Accordingly, this price, not \$1,200, would be the appropriate price for the agency to use if it were to evaluate UMS's range pricing.

UMS asserts that the price analysis and best value determination were flawed because the agency did not evaluate the relative advantages of either UMS's standby price (that is, the fact that the agency would only be charged [deleted]) or its range of prices for fibers, including its lowest-priced fiber. This argument is without merit. Agencies are required to evaluate proposals based solely on the evaluation factors and subfactors included in the solicitation. Federal Acquisition Regulation (FAR) § 15.303(b)(4). Here, the solicitation did not provide for the pricing analysis the protester asserts was required, and it therefore would have been improper for the agency to take into consideration the factors UMS cites. The agency evaluated prices in accordance with the terms of the RFP, by calculating base year and option prices, and then combining these into a total price for evaluation purposes. Based on its determination that the proposals were technically equal, the agency then properly made award to AKSM based on its low evaluated price. FAR § 15.305(a)(1); Agency Report, Tab 9, at 2; see First Preston Housing Initiatives, LP, B-293105.2, Oct. 15, 2004, 2004 CPD ¶ 221 at 6.

UMS also alleges that VA failed to treat offerors fairly by entering into discussions with the awardee, but not UMS. In this regard, the agency contacted AKSM prior to award and inquired about the availability of the firm's lithotripter. UMS asserts that this exchange constituted improper discussions.

Exchanges between a procuring agency and an offeror that permit the offeror to materially modify its proposal generally constitute discussions. FAR § 15.306(d); Lockheed Martin Simulation, Training & Support, B-292836.8 et al., Nov. 24, 2004, 2005 CPD ¶ 27 at 8. Here, AKSM committed to performing the lithotripter-related work in its proposal; it took no exception to the requirement that it provide the equipment, and therefore was bound to do so. The information provided by AKSM in response to VA's exchanges confirmed that the contractor would have the necessary equipment to perform the work. Since this exchange merely confirmed what AKSM was already committed to do, and AKSM was not given the opportunity to revise or modify its proposal, the exchange constituted clarifications, and not discussions.

UMS further alleges that the contracting officer acted in bad faith throughout the procurement, demonstrating favoritism toward the awardee and bias toward the protester. UMS cites as evidence of this bias, for example, UMS's exclusion from the first competition, the agency's initial decision not to terminate AKSM's original contract, and the agency's delay in then terminating that contract.

Government officials are presumed to act in good faith, and a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Shinwa Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. Here, the protester has provided no evidence of bad faith; rather, it draws an inference from a series of facts to support its allegation. For example, while UMS cites its exclusion from the original competition as evidence of bad faith, it presents no evidence that its exclusion was motivated by agency bad faith; rather, it asks, essentially, that we assume bad faith. The protester's conclusion that these actions demonstrate bad faith constitutes speculation, and is insufficient to support a finding of bad faith.¹

The protest is denied.

Gary L. Kepplinger
General Counsel

¹ UMS's protest as filed contained a number of additional arguments: AKSM's equipment is unacceptable because it exceeds the decibel level allowed by law, AKSM should have been found nonresponsible due to an inspector general's investigation into a small business size miscertification, and AKSM was ineligible for award because it was not registered in the central contractor registration database at the time of award, as required by the solicitation. The agency addressed these arguments in its report, and UMS did not meaningfully respond in its comments; we therefore consider these arguments abandoned. See Symplicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 5 n.6.