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Decision

Matter of: Moore's Cafeteria Services d/b/a MCS Management

File: B-299539

Date: June 5, 2007

Sam Z. Gdanski, Esq., and Scott H. Gdanski, Esq., Gdanski & Gdanski, LLP, for the protester.

Lt. Col. Frank A. March, and Matthew C. Bowman, Esq., Department of the Army, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting officer was not required to apply definition of "fair and reasonable price" set forth in interagency statement of policy issued in response to Congressional directive in evaluating reasonableness of price offered by state licensing agency for the blind where at the time the procurement was conducted, the policy had not been implemented through the issuance of regulations.

2. Contracting officer reasonably determined price offered by state licensing agency for the blind to be fair and reasonable based on comparison to prices offered by other offerors with technically acceptable proposals and to government estimate.

DECISION

Moore's Cafeteria Services d/b/a MCS Management (MCS) protests the award of a contract to the Kentucky Office for the Blind (KOB), a state licensing agency for the blind (SLA), under request for proposals (RFP) No. W9124D-07-R-0012, issued by the Department of the Army for food services at Fort Campbell, Kentucky. The protester argues that the price offered by the KOB is not reasonable.

We deny the protest.

The RFP, which was issued on January 23, 2007, contemplated the award of a fixed-price contract for a 1-year period without options. The acquisition was set aside for Historically Underutilized Business Zone (HUBZone) small businesses, but also permitted the submission of offers by qualified SLAs in accordance with the Randolph-Sheppard Act. As initially issued, the solicitation advised prospective

offerors that the acquisition was “subject to exercise of the Department of Defense preference policy regarding qualified [SLAs] in accordance with the Randolph-Sheppard Act” and that “[a] technically acceptable offer from a qualified [SLA] [would] receive preference in accordance with the Joint Report to Congress, dated August 29, 2006.” RFP at 33. The RFP provided for award to the offeror of the lowest-priced technically acceptable proposal after consideration of the above preference. The RFP also noted that the government intended to award without discussions.

The Joint Report to Congress, dated August 29, 2006, referred to above, is a report issued jointly by the Department of Defense, the Department of Education, and the Committee for Purchase From People Who Are Blind or Severely Disabled in response to section 848 of the National Defense Authorization Act of Fiscal Year 2006, Pub. L. No. 109-163, which instructed the three entities to issue a joint statement of policy concerning application of the Randolph-Sheppard Act and the Javits-Wagner-O’Day Act to contracts for the operation and management of military dining facilities. The report included the following guidance regarding application of the Randolph-Sheppard Act:

METHOD OF AFFORDING THE RANDOLPH-SHEPPARD
“PRIORITY.”--Defense Department contracts for the operation of a military dining facility must be awarded as the result of full and open competition, unless there is a basis for direct negotiations When competing such contracts, contracting officers shall afford State licensing agencies a priority under the R-S Act when (1) the State licensing agency has demonstrated that it can provide such operation at a fair and reasonable price, with food of high quality comparable to that available from other providers of cafeteria services and comparable to the quality and price of food currently provided to military service members; and (2) the State licensing agency’s final proposal revision, or initial proposal if award is made without discussions, is among the highly ranked final proposal revisions with a reasonable chance of being selected for award. . . . The term “fair and reasonable price” means that the State licensing agency’s final proposal revision does not exceed the offer that represents the best value (as determined by the contracting officer after applying its source selection criteria contained in the solicitation) by more than five percent of that offer, or one million dollars, whichever is less, over all performance periods required by the solicitation.

Joint Report at 5.

Subsequent to issuance of the RFP, the contracting officer received an e-mail message from an SLA other than the KOB objecting to the solicitation language providing that a technically acceptable offer from a qualified SLA would receive

preference in accordance with the Joint Report. The SLA argued that the policy set forth in the Joint Report had not been properly implemented through the issuance of regulations and thus should not be regarded as in effect. The contracting officer determined that the complaint had merit, and the agency amended the solicitation to remove the language referring to the Joint Report.¹

Five offerors submitted proposals by the February 21 closing date. Three of the proposals were determined to be technically acceptable; the prices of those proposals were as follows:

Offeror	Price
Kentucky Office for the Blind	\$4,561,429
MCS Management	[deleted]
Offeror A	[deleted]

The government estimate for the work was [deleted]. The contracting officer determined that the price offered by the KOB was fair and reasonable based on comparison to the prices proposed in the other technically acceptable proposals and the government estimate. On February 27, the agency awarded a contract to the KOB.

MCS argues that, by finding the price offered by the KOB, which exceeded MCS's own price by [deleted] percent, to be reasonable, the agency acted contrary to the guidance furnished in the Joint Report, which defines a "fair and reasonable price" from an SLA as one that does not exceed the best value offer by more than 5 percent.

¹ As amended, the RFP provided:

Randolph-Sheppard Act Compliance: This solicitation is subject to exercise of the preference policy regarding qualified [SLAs] in accordance with the Randolph-Sheppard Act. A technically acceptable offer from a qualified [SLA] will receive preference in accordance with the Randolph-Sheppard Act. There have been conversations between the contracting office at Fort Knox and a qualified [SLA] in the State of Kentucky regarding interest in providing the services identified in this solicitation. This notice is not designed to discourage competition from HUBZone certified small businesses not eligible for the preference. This merely serves as notice that preference will be applied should a technically acceptable offer be received from a qualified [SLA].

RFP amend. 1, at 33-34.

While we recognize that the statement of policy in the Joint Report was issued at the instruction of Congress, we think that the contracting officer correctly concluded that adherence to the policy was not mandatory until it had been implemented through the issuance of regulations, which has not yet occurred. In our view, until such regulations are issued, the policy is the equivalent of internal agency guidance, which does not establish legal rights and responsibilities such that actions taken contrary to it are subject to objection. See, e.g., Indian Res. Int'l, Inc., B-256671, July 18, 1994, 94-2 CPD ¶ 29 at 3. We also note that the Joint Report itself, at 5, provides that “[t]he [p]arties will promptly implement complementary regulations reflecting the joint policy herein,” suggesting that those responsible for drafting the policy understood that the issuance of regulations would be required to implement it.

The protester further argues that the contracting officer did not conduct an adequate analysis of the reasonableness of the price offered by the KOB. MCS maintains that the contracting officer’s determination was based on a comparison of the KOB’s price to a government estimate that was “grossly inflated.” Protester’s Comments at 7. The agency responds that the government estimate was not faulty, and that, in any event, the contracting officer’s determination of price reasonableness was based not simply on a comparison of the KOB’s price to the government estimate, but also on a comparison to competitors’ prices. We see no basis to question the agency’s determination of price reasonableness.

Regarding the government estimate, MCS, the incumbent contractor on the current contract for these services, asserts that the government figure is based on inaccurate projections of operational days and meal counts at the facilities to be served. Specifically, MCS asserts that the government estimate is flawed because the estimates reflected in the RFP on which the government estimate is based are considerably higher than the actual requirements under the current contract. The agency responds that the estimate was prepared by Fort Campbell’s dining facility subject matter experts, who considered both possible future requirements and historical data in determining the number of operational days and personnel necessary to perform the required services. Since the RFP set out the estimated number of meals to be served per day, per facility, MCS’s challenge to the government estimate, based on MCS’s incumbent knowledge of the agency’s requirements, is in essence a challenge to the estimated requirements set out in the RFP; to be timely, it had to be raised prior to the time that proposals were due. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2007). Any challenge on this ground is untimely at this juncture and provides no basis to question the validity of the estimated requirements, or, consequently, the agency’s reliance on the government price estimate derived from those projections to determine the reasonableness of the awardee’s proposed price.

The agency also asserts that comparison to other offerors’ prices provided the contracting officer with a separate basis for finding the KOB’s price reasonable. We

agree. The Federal Acquisition Regulation (FAR) recognizes comparison of offerors' prices to one another as a permissible technique for determining price reasonableness. FAR § 15.404-1(b)(2)(i); U.S. Dynamics Corp., B-298889, Dec. 19, 2006, 2007 CPD ¶ 21. Given that the price offered by the KOB, while higher than the protester's, was lower than the price of the third technically acceptable offeror, the comparison of offerors' prices to one another clearly furnished the contracting officer with an additional valid basis for finding the awardee's price reasonable.

The protest is denied.

Gary L. Kepplinger
General Counsel