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Decision

Matter of: Central Texas College

File: B-309947

Date: October 12, 2007

James R. Lindley, Esq., Lindley, Wiley & Duskie, P.C., for the protester.
John S. Pachter, Esq., Jonathan D. Shaffer, Esq., and Lei B. Greenspan, Esq., Smith, Pachter, McWhorter, PLC, for Richard Milburn High School, Inc., an intervenor.
Peter F. Pontzer, Esq., Department of the Army, for the agency.
Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly could make award on basis of initial proposals where solicitation advised offerors of this possibility and contracting officer's decision not to engage in discussions was reasonable.
2. Protest challenging agency's rejection of protester's proposal because the protester submitted an unacceptable subcontracting plan is denied where the solicitation specifically stated that the quality and completeness of the subcontracting plan would be evaluated, and advised that no award would be made to an offeror whose proposal did not include an acceptable subcontracting plan.

DECISION

Central Texas College (CTC) protests the award of a contract to Richard Milburn High School, Inc. (RMHS) under request for proposals (RFP) No. W911SE7-07-R-0005, issued by the Department of the Army for foreign language training at various locations. The protester principally contends that the agency unreasonably determined that its subcontracting plan was unacceptable, and improperly elected not to hold discussions.

We deny the protest.

The RFP sought proposals to provide instructors for specifically listed languages and dialects and anticipated the award of a fixed-price indefinite-delivery requirements contract for a base year with four 1-year options. The RFP advised that award would be made to the lowest-priced technically-acceptable offeror with an acceptable

subcontracting plan (if applicable), and past performance presenting no higher risk than “moderate risk.” The RFP further advised offerors that proposals would be evaluated under the following equally-weighted factors: accreditation, technical approach, past performance and relevant experience, and small business subcontracting plan. RFP § M.2. The RFP specifically warned offerors that no award would be made to an offeror that did not have an acceptable subcontracting plan (if applicable). Id.

As relevant here, the RFP evaluation criteria stated that the quality and completeness of the subcontracting plan would be evaluated and that proposals would be rated either “acceptable” or “non-acceptable.” RFP § M.5. As part of this assessment, the RFP advised that the agency would review the offerors’ designation of small business subcontractors to support specific task areas, the percentage of total contract dollars allocated to small businesses, and the probability that the proposed plan would meet its goals. Id. The RFP also stated that the government would use price analysis techniques to determine reasonableness of prices. Id. Finally, the solicitation informed offerors that the government intended to evaluate proposals and award a contract without discussions and that, therefore, each offeror’s initial offer should contain its best terms from both a technical and price standpoint.

The agency received six proposals. The evaluation results with regard to the proposals of CTC and RHMS were as follows:

Offeror	Accreditation	Technical Approach	Past Performance	Small Business Plan	Price
CTC	Go	Go	Low Risk	Non acceptable	\$33.7 million
RMHS	Go	Go	Moderate Risk	Acceptable	\$30.3 million

Agency Report (AR) at 6.

With respect to the RFP’s subcontracting plan requirements, CTC’s proposal stated that it anticipated limited opportunities for subcontracting but would make every effort to involve Historically Black Colleges and Universities (HBCU) and Minority Institutions (MI) in any subcontracting opportunity. CTC Proposal, vol. IV at 1. CTC further stated that:

The requirements of this contract cannot be adequately provided by subcontractors who lack CTC’s experience and resources in providing services of this scope and nature. CTC does not plan to subcontract any of the services required by this contract; however, we realize that

from time to time we may have to request assistance from subcontractors to meet specific Government requests.

Id. CTC did identify the percentage of dollars to be subcontracted and advised that at least five percent of the total planned subcontracting dollars would be reserved for HBCUs and MIs. CTC did not, however, provide any detailed information concerning its proposed subcontracting efforts, as the RFP required.

The agency determined that CTC's subcontracting plan was not acceptable because of the following omissions:

- No goals for Small Businesses (SB) and Small Disadvantaged Businesses (SDB)
- No separate goals for the basic contract
- No flow-down provisions
- No indirect costs included or excluded
- No effort to ensure SB[s] & SDB[s] have an equitable opportunity to participate

AR, Tab 7, Prenegotiation Memo at 6.

As the RFP indicated, the agency conducted a price reasonableness analysis of both proposals and concluded that the prices could be considered reasonable given the existence of price competition. Additionally, the agency specifically determined that RHMS' proposed price was realistic in comparison with the independent government estimate. Award to RHMS was made based on the fact that RMHS received an acceptable rating for all evaluation factors, a moderate risk assessment for past performance/relevant experience, an acceptable rating for its small business subcontracting plan, and submitted the lowest priced proposal. Id. at 8. After receiving a debriefing, CTC filed this protest on August 2, 2007.

CTC essentially argues that it submitted an acceptable subcontracting plan, and contends, in the alternative, that even its plan was unacceptable, the agency was required to advise CTC of the problems with the plan and provide the company an opportunity to revise it.

Here, as explained above, the RFP required offerors to submit a detailed subcontracting plan, and listed "subcontracting plan" as one of four equally-rated technical evaluation factors. The RFP specifically stated that subcontracting plans would be evaluated to determine the extent to which offerors identify and commit to subcontracting with small businesses, the realism of the plan, the prior performance

of the offeror in complying with subcontracting requirements, and the extent of participation of subcontractors in terms of the value of the total acquisition and the ability to meet mandated goals. At the conclusion of this review, CTC's subcontracting plan was determined to be unacceptable because CTC failed to provide the requested information. CTC in its protest submissions does not argue that its plan was responsive to the RFP requirements, but rather, CTC argues that its subcontracting plan was identical to the plan it submitted in response to a previous solicitation and that the agency was required by the Federal Acquisition Regulation (FAR) 19.702 to allow CTC to clarify its subcontracting plan.¹

We do not agree. The record here shows that CTC submitted an inadequate subcontracting plan in that it was not responsive to the specific requirements of the RFP. Since the solicitation advised offerors that the agency intended to make award without discussions, the protester could not presume that it would have a chance to correct deficiencies and weaknesses through discussions. The burden was on CTC to submit an initial proposal, complete with a subcontracting plan that adequately demonstrated its merits, and the protester ran the risk of rejection by failing to do so. DRT Assocs., Inc., B-237070, Jan. 11, 1990, 90-1 CPD ¶ 47 at 2. There is no basis in this record for concluding that the decision to award without discussions was improper, or that the rejection of CTC's subcontracting plan was unreasonable.

Moreover, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. Here, even if CTC's subcontracting plan was rated acceptable, its evaluated price was higher than RHMS' price and the RFP specifically provided for award to be made to the technically-acceptable, low-priced offeror. Thus, CTC was not competitively prejudiced by any alleged errors in the evaluation of its subcontracting plan.

CTC also argues that RHMS' price is unreasonably low. With respect to a fixed-price award, a protester's claim that an offeror submitted an unreasonably low price—even a claim that the price is below the cost of performance—is not a valid basis for protest. An offeror, in its business judgment, properly may decide to submit a price that is extremely low. Diemaster Tool, Inc., B-238877, Apr. 5, 1990, 90-1 CPD ¶ 375

¹ Under FAR § 19.702(a) the requirement for an acceptable small and small disadvantaged business subcontracting plan is applicable to the “apparently successful offeror,” and on that basis, we have held that exchanges regarding the acceptability of a required small business subcontracting plan—even the submission of a revised plan—relate to an offeror's responsibility and therefore are not discussions. See General Dynamics Ordnance & Tactical Sys., Inc., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 at 9-10.

at 2. An agency decision that a firm can perform a contract at the offered price involves an affirmative determination of responsibility, which we will not review except in circumstances not alleged here. In addition, the agency here specifically concluded that RHMS' price was reasonable and realistic when compared with the government estimate.

Lastly, CTC questions the acceptability of the subcontracting plan of RHMS on the basis that two of RHMS' proposed subcontractors are non-accredited organizations. CTC also questions the agency's decision to award to RHMS notwithstanding that RHMS received a moderate risk rating under the past performance evaluation factor.

In reviewing protests of alleged improper evaluations and source selections, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. A protester's mere disagreement with the evaluation provides no basis to question the reasonableness of the evaluators' judgments. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 10-11.

The record shows that the agency determined that RHMS' plan was acceptable in that it provided the information required by the RFP, proposed acceptable goals, and identified small businesses RHMS believed would meet the agency's requirements. The RFP requirement was for the offerors to demonstrate that they were accredited by either a regional or national accrediting association recognized by the American Council of Education. RFP ¶ M.4. In response to a clarification request on this issue, the agency specifically advised offerors that only the prime contractor had to be accredited under the solicitation. RFP, amend. 4, question No. 24. The record shows that RHMS provided the appropriate accreditation. RHMS' Proposal, attach. A.

With respect to the reasonableness of the award to RHMS notwithstanding its moderate risk rating for past performance, the RFP specifically provided for award to the offeror determined to be technically acceptable with an acceptable subcontracting plan, and with past performance presenting no higher risk than "moderate risk." Based on our review of the record, there is no reason to question the acceptability of the awardee's subcontracting plan, or the agency decision to award to RHMS, as the lowest-priced, technically-acceptable, offeror. While CTC disagrees with the evaluation and award decision, its mere disagreement does not

show that the selection decision was unreasonable or otherwise inconsistent with the RFP award language.²

The protest is denied.

Gary L. Kepplinger
General Counsel

² To the extent CTC argues that the subcontracting plan should not have been a technical evaluation factor and that the wrong wage determination was included in the RFP, its protest is untimely. Under our Bid Protest Regulations, a protest based upon alleged improprieties in a solicitation, which are apparent prior to the time set for receipt of initial proposals, must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1)(2007). Lastly, the protester maintains that it is a MI in accordance with the present United States Department of Education guidelines and should be exempt from the RFP's requirement to provide a subcontracting plan. This issue was raised for the first time in the protester's comments to the agency report, and is therefore untimely. Under our regulations, to be timely, a protest must be filed within 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2).