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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Re-Engineered Business Solutions, Inc.

File: B-310301.5

Date: April 4, 2008

Wayne A. Keup, Esq., for the protester.

Michael A. Gordon, Esq., for Native American Contracting Services, LLC, an intervenor.

Maj. ChristinaLynn E. McCoy, Department of the Army, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Corrective action, taken by contracting agency in response to prior protests, of amending a solicitation and requesting revised proposals, is unobjectionable where the solicitation provided for the award of a cost reimbursement contract, but erroneously requested the offerors submit price (rather than cost) proposals and provided for a price (rather than cost realism) evaluation.

DECISION

Re-Engineered Business Solutions, Inc. (RBS) protests the amendment of request for proposals (RFP) No. W91QV1-07-R-0004, issued by the Army for public works and logistics services at Fort Hamilton in Brooklyn, New York. The Army issued the amendment to implement corrective action taken in response to previous protests.

We deny the protest.

The RFP provided for the award of a cost-plus-award-fee contract to the offeror submitting the proposal determined to represent the best value to the government, considering the evaluation factors of management ability, technical merit, past performance, and cost/price. RFP amend. 5, at 13. The RFP informed offerors that in determining which proposal represented the best value to the government, management ability would be considered more important than technical merit, and that technical merit would be considered more important than past performance. Id. at 14. The solicitation added that the “non-cost/price evaluation factors, when combine[d], are significantly more important than price.” Id.

Although the solicitation provided for the award of a cost-plus-award-fee contract, it did not provide for a cost realism evaluation by the agency. Rather, the RFP stated under the cost/price evaluation factor that “[t]he Government will evaluate each offeror’s proposed pricing to establish that it is reasonable,” and added that “[a]t the Contracting Officer’s discretion, price reasonableness may be presumed without further review based on adequate price competition.” Id. at 15. The RFP also provided here that “[t]he Government reserves the right to reject, without further consideration and without notice to the offeror, any offer where the proposal pricing is determined to be unreasonable.” Id.

The RFP included detailed proposal preparation instructions, and consistent with the solicitation’s statements regarding the evaluation of price (rather than cost), requested the submission of a “price proposal volume.” RFP at 122. In this regard, the solicitation requested that offerors complete a detailed price schedule, which set forth a number of contract line items (CLIN). Each of these CLINs, which contained the notation “unit price” and included the acronym “CPAF” (cost-plus-award-fee), provided for the insertion of a total “estimated cost,” including direct and indirect costs, base fee, and maximum award fee, for each of the contract line items (CLIN) included in the price schedule. RFP at 2-53. The RFP also requested that proposals include “[a] justification of proposed cost and price,” and added that “[a]ny inconsistency, whether real or apparent, between promised performance and price shall be explained in the proposal.” RFP at 122. The solicitation cautioned that “[a]ny significant inconsistency, if unexplained, raises a fundamental issue of the offeror’s understanding of the nature and scope of the work required and may be grounds for rejection of the proposal.” Id.

The agency received proposals from seven offerors, including RBS. Agency Report (AR), Tab 24, Source Selection Decision, at 1. The agency evaluated the proposals, and in doing so conducted a “review of the price reasonableness of the submitted pricing proposals containing Cost Plus Award Fee contract line items.” AR, Tab 20, Price Analysis Review of Proposals, at 1. The agency ultimately selected the proposal submitted by RBS for award.

Two other offerors, which had also submitted proposals in response to the solicitation, filed protests with our Office, challenging the propriety of the award to RBS. The agency subsequently informed our Office that it was taking corrective action in response to the protests, stating that it had determined that the protests “raise[d] new questions regarding the evaluation of proposed costs for realism.” Agency Request for Dismissal (Oct. 11, 2007), encl. 1, Contracting Officer’s Statement. In this regard, and as set forth above, the solicitation, while providing for the award of a cost reimbursement contract, provided for the submission of price proposals and stated that “price” would be evaluated. That is, it did not provide for the submission of cost proposals or inform offerors that their proposed costs would be evaluated for cost realism. As such, the agency stated that it had decided to take corrective action in response to the protests by amending the solicitation to reflect that a cost realism analysis will be conducted, allowing for the submission of revised

proposals, and making a new source selection. Id. Based upon these representations, our Office dismissed the protests on October 11, 2007.

RBS subsequently filed a protest with our Office, arguing that, although “it understands that the Army is reconsidering its proposed corrective action” and has “not yet made a final decision,” the “contemplated corrective action is entirely inappropriate.” RBS Protest (B-310301.3) at 2. Specifically, RBS contended that solicitation should not be amended, but rather, that the “Army should proceed in this procurement by performing a cost realism analysis of proposals already in their possession, and that if additional information is allowed from offerors, it be limited to providing clarification/detail of the total estimated costs already proposed.” Id. at 5.

In dismissing this protest as premature on December 19, our Office noted that the Army had not issued an amendment to the solicitation, nor had it requested the submission of any “additional information” from the offerors. We found that absent the issuance of the amendment, the corrective action remained “proposed,” and the precise nature and course of the corrective action remained unknown. We concluded that until the agency made a final determination concerning the terms of the amendment, and such amendment was issued, the protest anticipated that the agency would proceed in a manner that is impermissible; allegations such as this are considered premature and are not for review by our Office. See ITT Elec. Sys., Radar Systems-Gilfillan, B-299150 et al., Feb. 2, 2007, 2007 CPD ¶ 19 at 3.

The agency subsequently issued a series of amendments implementing its proposed corrective action. The amendments essentially replaced the RFP’s references to “price” with “cost,” which among other things resulted in the request for the submission of cost proposals rather than price proposals, and added the following paragraph to the solicitation’s proposal preparation instructions:

Offerors shall submit all supporting data for all rates and factors in their cost proposals; i.e., escalation of costs, G & A, Nonexempt Labor Rates, indirect rates, overhead costs, etc., necessary to perform cost realism. Offeror’s cost proposal should be such that sufficient information is provided for an adequate review of costs by Defense Contract Audit Agency (DCAA).

RFP amend. 9, at 5. The amendments also replaced the “price” evaluation factor with a “cost factor,” and informed offerors here that proposals would now “be assessed for completeness, reasonableness, and realism,” and that the “[c]ost evaluation will be performed on the total estimated costs (including fees), to include phase-in, basic performance period, and all option years.” Id. at 17. The amendments to the RFP added that the agency would calculate a “Most Probable Cost to the government . . . based on the Government’s cost realism analysis,” that “[t]he government’s most probable cost will be determined by adjusting each offeror’s proposal to reflect any addition or reductions in cost elements to realistic

levels based on the results of the Government's cost realism analysis," and that "[t]he Government's most probable cost may differ from the proposed cost and will reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal." Id.

RBS protests the agency's corrective action, arguing that because its total proposed price and the agency's adjectival ratings of its proposal were disclosed to the other offerors during their respective debriefings, RBS would suffer "severe competitive prejudice" if the offerors are permitted to submit revised proposals.¹ Protest (B-310301.3) at 3. RBS argues that offerors should have realized that the agency intended to evaluate proposals for cost realism, claiming that it "recognized" that a cost realism analysis would be performed by the agency, even though "the solicitation speaks in terms of price reasonableness rather than cost realism," and that "[o]ther offerors in this procurement should have done the same." Id. The protester points out that under the solicitation as previously issued, offerors were to provide "a justification of proposed cost and price," and asserts based upon its review of the record that it, as well as the two other offerors who had previously protested the award to RBS, submitted sufficient information in their proposals to allow for a cost realism evaluation of proposals by the agency. Protester's Comments (B-310301.3) at 5; Protest (B-310301.5) at 4. The protester adds that the corrective action proposed by the agency is improper because the agency has presented no evidence that other offerors were prejudiced by the solicitation's failure to request cost (rather than price) proposals and provide for a cost realism (rather than price) evaluation. The protester concludes that "[i]f any offeror did not submit sufficient information with its initial proposal to perform [a cost realism] analysis, the proposal should [be] rejected as unacceptable for failure to meet the requirements of the initial solicitation."² Protester's Comments (B-310301.5) at 13.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. It is not necessary for an agency to conclude that a protest is certain to be sustained before it may take corrective action; where the agency has a reasonable concern that there were errors in the procurement, even

¹ This protest filed by RBS and docketed by our Office as B-310301.5 "expressly incorporates by reference the full content" of RBS's previous protest that was docketed by our Office as B-310301.3.

² Although the protester had previously argued that if in performing its cost realism evaluation of the proposals already received the agency required further information from offerors it be somehow limited to "clarifications," Protest (B-310301.3), at 2, the protester now argues that proposals which lack the requisite information upon which to perform a cost realism evaluation should simply be rejected. Protest (B-310301.5), at 13.

if the protest could be denied, we view it as within the agency's discretion to take corrective action. An agency may amend a solicitation, and request and evaluate revised proposals where the record shows that the agency made the decision to take this action in good faith, without the specific intent of changing a particular offeror's technical ranking, or avoiding award to a particular offeror. We will not object to an agency's proposed corrective action where the agency concludes that the award, because of perceived flaws in the procurement process, was not necessarily made on a basis most advantageous to the government, so long as the corrective action taken is appropriate to remedy the impropriety. Patriot Contract Servs., LLC, et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4.

Here, we cannot find that the agency's corrective action was unreasonable or that the agency acted in other than in good faith. As set forth above, the RFP, while providing for the award of a cost reimbursement contract, requested the submission of price proposals and the performance of a price analysis.³ In this regard, although the proposal preparation instructions requested that offerors submit price proposals that, as pointed out by the protester, included a "justification of proposed cost and price," that statement must be considered in the context in which it appeared—a solicitation that clearly stated that the agency would evaluate the offeror's proposed price, rather than cost for realism.⁴ Offerors were not specifically required to submit a cost proposal setting forth their elements of cost as would be expected for the award of a cost reimbursement contract. As such, while it may be true that certain offerors submitted proposals that included some cost as well as price information, offerors were simply not required to submit cost proposals that included sufficient information to allow for the performance of a cost realism evaluation and calculation of the proposal's most probable cost to the government. Put another way, we fail to see how the agency, as suggested by the protester, could reasonably reject proposals as unacceptable for failing to include sufficient information to allow for the performance of a cost realism evaluation under a solicitation that expressly

³ We have repeatedly observed that there is a fundamental difference in the respective roles of the parties in fixed-price, as compared to cost reimbursement, contracts, in that a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor, whereas under a cost reimbursement contract the government is responsible for reimbursing a contractor its reasonable, allowable and allocable costs. WinStar Fed. Servs., B-284617 et al., May 17, 2000, 2000 CPD ¶ 92 at 9.

⁴ As pointed out by one of the firms that had submitted a proposal and had protested the propriety of the award to RBS, "RBS' protest continues to be premised on unreasonable speculation that all . . . offerors understood that the RFP meant something other than it said." Intervenor's Comments (B-310301.5) at 1.

requested the submission of price proposals and provided for the performance of a price analysis.⁵

With regard to RBS's argument that because offerors were informed of its price and ratings, amending the solicitation and reopening the competition will foster an auction and put RBS at a competitive disadvantage, we note that the Federal Acquisition Regulation does not prohibit auctions, and agencies are not otherwise prohibited from taking corrective action in the form of requesting revised price proposals where the original awardee's price has been disclosed. In this regard, the possibility that the contract may not have been awarded based on a fair determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than does the possibility that the original awardee will be at a disadvantage in the reopened competition. PCA Aerospace, Inc., B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65 at 4.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁵ As pointed out by the agency as well as another firm that had submitted a proposal in response to the solicitation and had protested the award to RBS, offerors may revise their technical, management, or price (now cost) proposals, given that approach is linked to cost, or revise the proposals to avoid most probable cost adjustments by the agency. AR at 9-10; Intervenor's Comments (B-310301.5) at 1.