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Washington, DC 20548

Comptroller General
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Decision

Matter of: Joint Venture Penauille/BMAR & Associates, LLC

File: B-311200; B-311200.2

Date: May 12, 2008

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DIGEST

Protest challenging price evaluation is sustained, where the procuring agency unreasonably determined that the protester's lower-priced line items for a small portion of the work created an "extremely high" performance risk and based its decision on an erroneous belief that the contractor could reject work that was ordered.

DECISION

Joint Venture Penauille/BMAR & Associates, LLC (JVPB) protests the award of a contract to Team BOS Sigonella (BOS) under request for proposals (RFP) No. N33191-07-R-0221, issued by the Naval Facilities Engineering Command, Europe and Support Services, for facilities support services. JVPB contends that the Navy improperly rejected its proposal as being unreasonably low in price.

We sustain the protest.

BACKGROUND

The RFP sought to procure "Base Operating and Support Services" at the Naval Air Station in Sigonella, Italy, under a fixed-price contract, with a combination of fixed-quantity and indefinite-quantity line items. The period of performance included a 45-day phase-in period, 1-year base period, and four 1-year option

periods.¹ RFP § F.1. The selected contractor was required to provide facility support, management and administration, and environmental services that were identified in the performance work statement (PWS). The facility support services included facility investment, janitorial services, pest control services, refuse collection and recycling, “Other (Minor Work),” grounds maintenance, street sweeping, and shuttle bus services. Id. § C, PWS, at 1. At issue in this protest is the minor work requirement of the facility support services, which the RFP defined as follows:

Minor work orders are used for minor construction, fabrication, alteration, maintenance, repairs, special events support and office moves requiring no more than € [Euros] 10,000 in labor, materials and equipment. Example of minor work jobs are: minor construction, special event site preparation, replace fire alarm panels, replace pumps, replace carpet, replace tiles, furniture moving, pump out man hole, etc.

Id. at 40. Minor work was further classified as either “priority” or “routine,” although neither term was identified in the RFP. The work was also grouped into “categories” based solely on the value of the work to be performed. Id.

Included with the RFP was an “Exhibit Line Item” (ELIN) schedule. For each of the required services in the PWS, including minor work, the ELIN schedule identified fixed-quantity and indefinite-quantity line items for which the offerors were to provide unit and total prices for identified or estimated quantities of work.² For minor work, the “[p]erformance standards” for both fixed-quantity and indefinite-quantity work were the same, except that offerors were guaranteed an identified quantity of fixed-quantity work, and indefinite-quantity work would only be ordered “if and when needed.” Id. at 43. With regard to minor work, the ELIN schedule for fixed-quantity work provided as follows (while we list here the categories for “priority” work, the categories for “routine” work were identical):

Category I, Priority Minor Work (from € 0.01 to € 2,000.00)
Category II, Priority Minor Work (from € 2,000.01 to € 5,000.00)
Category III, Priority Minor Work (from € 5,000.01 to € 7,500.00)
Category IV, Priority Minor Work (from € 7,500.01 to € 10,000.00)

¹ The phase-in period contained only fixed-quantity work, while the base and option periods contained both fixed-quantity and indefinite-quantity work.

² Identified quantities were provided for fixed-quantity line items, and estimated quantities were provided for indefinite-quantity line items.

RFP, attach. J-0200000-1.1, ELIN Schedule, at 10. For indefinite-quantity minor work, the ELIN schedule stated (again, while we list the information for “priority” work, the same statement was listed for the “routine” work categories):

Priority Minor Work (Category I) See Requirement 1503090 in Section C³
Priority Minor Work (Category II) See Requirement 1503090 in Section C
Priority Minor Work (Category III) See Requirement 1503090 in Section C
Priority Minor Work (Category IV) See Requirement 1503090 in Section C

Id. at 23.

The agency explains that the price ranges, listed above in the ELINs for fixed-quantity minor work, defined the categories of minor work. That is, minor work valued at € 0.01 to € 2,000.00 was designated as “Category I,” minor work valued at € 2,000.01 to € 5,000.00 was designated as “Category II,” etc. For fixed-quantity minor work, offerors could challenge the categorization of work, pursuant to the following PWS provision:

(3) Recategorization

If the contractor does not agree with the categorization of a minor work order, the contractor shall return the work order by letter to the [contracting officer] within (2) working days of issuance, annotated to indicate non-acceptance. The returned work order shall be accompanied by the contractor’s estimate or explanation. After reviewing the contractor’s estimate, the [contracting officer] will attempt to negotiate an agreement. If an agreement cannot be reached, the [contracting officer] may direct the contractor to proceed or arrange to have the work performed by other means . . .

If the Government agrees the work will exceed the category dollar ceiling, the minor work order will either be cancelled or recategorized.

RFP § C, PWS, at 41. Effectively, if the contractor believed that a particular “minor work” order should be paid at a higher rate, it could tell the contracting officer that the work fell into a higher (that is, a higher-priced) category. The agency interpreted this provision to also apply to the indefinite-quantity minor work.

The RFP provided for award on a “best value” basis, considering five equally-weighted technical factors and price. The technical factors were identified as organizational experience, organizational past performance, management approach, staffing plan and resources, and safety. The combination of the five technical factors was considered to be of equal importance to the price factor.

³ “Section C” refers to the PWS, which was located in section C of the solicitation.

For the price evaluation, the RFP stated that the “offeror’s total price for all line items for the phase-in and base period and four option periods will be compared to the total price of the other offerors as well as the Independent Government Estimate [IGE]. . . .” In addition, the RFP provided that “[p]rice proposals may be evaluated for realism, completeness, balance, and reasonableness.” RFP § M-2.

Five offerors responded to the solicitation, and the proposals of three offerors, including JVPB and BOS, were found to be in the competitive range. Discussions were held with each of the three offerors, after which all submitted revised proposals.⁴ A technical evaluation board (TEB) evaluated proposals and assigned “good” ratings to both JVPB’s and BOS’s proposals under each of the technical factors, except that BOS’s proposal was found to be superior under the organizational past performance factor and was rated “excellent” under this factor. AR, exh. 16, Final SSB Report, at 3.

A price evaluation board (PEB) evaluated the offerors’ proposed prices and noted that JVPB provided the lowest-priced proposal at € [DELETED], and BOS provided the next lowest-priced proposal at € 41,386,407. Based on a comparison of offerors’ prices to one another,⁵ the PEB determined that all offerors’ prices were “acceptable,” except that JVPB’s prices were found to be “unacceptable” for the indefinite-quantity portion of the minor work.⁶ AR, exh. 15, Final PEB Report, at 10. In support of this conclusion, the PEB noted that JVPB and BOS proposed the following prices for minor work:

⁴ During discussions, JVPB was asked to explain why its fixed-quantity prices were “so much higher” than its indefinite-quantity prices for minor work. See AR, exh. 15, Final PEB Report, at 3. In response, JVPB raised its indefinite-quantity prices, but did not provide any narrative explanation to the agency.

⁵ The PEB did not compare offerors’ prices to the IGE because it found that the IGE was “not a valuable tool in this particular acquisition.” The PEB explained that because services at Sigonella were being consolidated for the first time under this RFP, the IGE “may not have accurately taken [into] account the many benefits, such as economies of scale,” due to this consolidation. Rather, the IGE was based on historical data, where services were being procured under a variety of service contracts. AR, exh. 8, Initial PEB Report, at 3.

⁶ JVPB’s proposed fixed-quantity prices for minor work were found to be reasonable and acceptable.

Category	Price Range	JVPB Fixed Quantity	JVPB Indefinite Quantity	BOS Fixed Quantity	BOS Indefinite Quantity
Priority I	€ 0.01 - 2,000.00	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Priority II	€ 2,000.01 -- 5,000.00	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Priority III	€ 5,000.01 -- 7,500.00	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Priority IV	€ 7,500.01 -- 10,000.00	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Routine I	€ .01 -- 2,000.00	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Routine II	€ 2,000.01 -- 5,000.00	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Routine III	€ 5,000.01 -- 7,500.00	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Routine IV	€ 7,500.01 -- 10,000.00	[DELETED]	[DELETED]	[DELETED]	[DELETED]

AR, exh. 15, Final PEB Report, at 4-5.

The PEB determined that JVPB's proposed indefinite-quantity prices for the minor work were "unreasonable," and posed a "significant" and "extremely high level" of performance risk. *Id.* at 5, 10. In explaining this conclusion, the PEB noted that JVPB's indefinite-quantity prices were approximately [DELETED] percent lower than its own fixed-quantity prices, and were lower than other offerors' indefinite-quantity prices for the same work. The PEB also noted that JVPB's proposed indefinite-quantity prices were "below the price range established for each category of Minor Work, except Category I." *Id.* at 4. The PEB believed that JVPB's low prices would encourage the firm to reject orders for indefinite-quantity minor work to avoid losing money on low-priced orders. *Id.*; Agency Response to GAO's Interrogatories (Apr. 30, 2008), at 5. For these reasons, the PEB concluded that JVPB's proposal was unacceptable.

The TEB and PEB reported their findings to the source selection board (SSB), which agreed with and adopted the boards' findings. The SSB recommended award to BOS as the "best value" to the government, and the source selection authority (SSA) concurred. The SSA awarded the contract to BOS, and JVPB protested.

DISCUSSION

JVPB challenges the Navy's determination that its indefinite-quantity pricing for minor work was unreasonably low and unacceptable, arguing that the determination was based on a faulty price realism analysis.⁷

Before awarding a fixed-price contract, an agency is required to determine that the offered price is fair and reasonable. Federal Acquisition Regulation (FAR) § 15.402(a). An agency's concern in making a price reasonableness determination focuses on whether the offered prices are too high, not too low. Medical Matrix, LP, B-299526, B-299526.2, June 12, 2007, 2007 ¶ 123 at 9 n.6. Although not required, an agency may also provide for a price realism analysis in a solicitation for award of a fixed-price contract for the purpose of assessing an offeror's understanding of the requirements and the risk inherent in an offeror's proposal. L-3 Commc'ns, KDI Precision Prod., Inc., B-290091 *et al.*, June 14, 2002, 2002 CPD ¶ 155 at 5-6. In this regard, the risk of poor performance when a contractor is forced to provide services at little or no profit is a legitimate concern in evaluating proposals. Molina Eng'g, Ltd/Tri-J Indus., Inc. Joint Venture, B-284895, May 22, 2000, 2000 CPD ¶ 86 at 4. We will review the price evaluation conducted to determine whether it was reasonable and consistent with the RFP evaluation criteria. The Arora Group, Inc., B-277674, Nov. 10, 1997, 98-1 CPD ¶ 64 at 4.

Here, the record does not show that the agency performed a reasonable price evaluation. Although the Navy rejected JVPB's proposal on the basis of low indefinite-quantity pricing for minor work, the record does not provide any evidence that the agency considered whether this reflected a lack of understanding of the

⁷ JVPB also protests the agency's affirmative determination of responsibility with regard to BOS, based on JVPB's belief that one of BOS's team members did not comply with RFP requirements relating to the "Anti-Mafia and other Italian laws," and is not authorized to enter into contracts relating to this procurement. Suppl. Protest at 3; JVPB's Comments at 14. Because the determination that an offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO will generally not consider a protest challenging such a determination, except where the protest alleges that definitive responsibility criteria in the solicitation have not been met, or identifies evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c) (2008). Here, the record shows that the agency considered all of the submissions required by the RFP in reaching its responsibility determination, and was not aware of any information that would cause it to question the BOS team's responsibility. JVPB has not shown that further investigation of the issues raised in its protest was required, or that the responsibility determination was improper.

requirements, or that there was a credible risk to performance. The agency did not consult with the TEB to consider whether JVPB could perform the work at the prices proposed. In fact, the SSB concluded that JVPB “successfully demonstrated a good understanding of the requirements.”⁸ AR, exh. 16, Final SSB Report, at 4.

The agency explains that “significant” proposal risk stems from its belief that “under the [indefinite-quantity] portion [of minor work], the Contractor has the option of returning, and ultimately rejecting work if they do not agree with the Category the Government is issuing it under.” AR, exh. 15, Final PEB Report, at 4-5. In this regard, the agency is referring to the “Recategorization” provision of the PWS that allows the contractor to challenge the categorization of fixed-quantity minor work—that is, whether the work should be classified as category I, II, III, or IV. RFP § C, PWS, at 41. According to the agency, this provision also applies to indefinite-quantity minor work.

We first note that it is not evident from the record that the “Recategorization” provision applies to the indefinite-quantity minor work. The provision is not included or referenced in the indefinite-quantity portion of the PWS addressing minor work. Although the PWS for indefinite-quantity minor work incorporates by reference fixed-quantity “[p]erformance standards,” *id.* at 43, the “Recategorization” provision is not listed as a performance standard. Likewise, the ELIN schedule for indefinite-quantity minor work references “Requirement 1503090 in Section C” (*i.e.*, the PWS), but the “Recategorization” provision appears at 1503040 of the PWS.

Furthermore, in response to inquiries from our Office, the agency conceded that neither the “Recategorization” provision, nor any other provision of the RFP, permits the contractor to reject minor work orders issued by the contracting officer. Agency Response to GAO’s Interrogatories (Apr. 30, 2008), at 4. Thus, the reason given contemporaneously for rejecting JVPB’s proposal was conceded to be erroneous. The agency now argues that JVPB’s low indefinite-quantity pricing will encourage the firm to challenge categories (essentially arguing that it should be paid a higher price for the particular “minor work” to be performed), which will place a “significant administrative burden” on the agency in responding to these challenges. *Id.* at 5. Even though, as discussed above, it is not clear from the record that the “Recategorization” provision applies to the indefinite-quantity minor work, the fact

⁸ We recognize that the SSB concluded, without explanation, that the “weakness in [JVPB’s] price reasonableness suggests a lack of understanding of the [s]olicitation requirements.” AR, exh. 16, Final SSB Report, at 5. However, the SSB did not reconcile this conclusion with other statements it made with regard to the technical evaluation, such as: JVPB “successfully demonstrated a good understanding of the requirements,” “present[ed] a technical approach and capabilities that exceed[ed] the solicitation performance and capability standards,” and presented an “overall low degree of risk in meeting the Government’s requirements.” *Id.* at 4.

that a contractor may exercise a contract right is not a legitimate reason for rejecting its proposal.

Moreover, the indefinite-quantity portion of minor work represents only a small fraction of the overall contract and may never be ordered. See RFP § C, PWS, at 43 (indefinite-quantity minor work will be ordered only “if and when needed”). Thus, even if JVPB’s prices were considered too low for this aspect of minor work, this does not seem to support the agency’s conclusion that the performance risk to the overall contract is “extremely high.”

Also, if low prices “incentivize” a contractor to challenge minor work categories, as the agency now contends, then the awardee is similarly “incentivized.” As the record shows, BOS’s proposed prices for minor work were lower than JVPB’s for all of the fixed-quantity categories, and were just below the established ranges for all minor work categories (both fixed-quantity and indefinite-quantity), except for category I. As noted by the protester, because of its low prices, BOS may be even more “incentivized” to challenge categories for both fixed-quantity minor work (where order quantities are guaranteed) and indefinite-quantity minor work (where orders are placed only when needed). Indeed, it would appear that, since fixed-quantity orders will definitely occur, the likelihood of category challenges with fixed-quantity work is greater than with indefinite-quantity work. Thus, it is not apparent how the protester’s pricing of indefinite-quantity minor work will cause significantly more of an administrative burden to the agency under the “Recategorization” provision than the awardee’s pricing.

In sum, we sustain the protest because the Navy’s price evaluation of the protester’s proposal lacks a reasonable basis, and is not supported by the contemporaneous evaluation record. Under the circumstances, we recommend that the agency reevaluate proposals, conduct discussions if necessary, perform a price/technical tradeoff if required, and make a new source selection decision. The agency should also consider whether to clarify for offerors whether proposed prices for minor work must be within the category ranges stated in the ELIN schedule. In addition, we recommend that the agency reimburse JVPB the reasonable costs of filing and pursuing the protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1). JVPB’s certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel