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Decision

Matter of: Triumvirate Environmental, Inc.

File: B-406809

Date: September 5, 2012

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Jeanne S. Morris, Esq., Department of Veterans Affairs, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency unreasonably evaluated the protester's pricing as unbalanced and conducted a technical-price tradeoff without meaningfully considering the lower prices set forth in the protester's quotation.

DECISION

Triumvirate Environmental, Inc., of Somerville, Massachusetts, the incumbent contractor, protests the establishment of a blanket purchase agreement (BPA) with Clean Harbors Environmental Services, of Norwell, Massachusetts, by the Department of Veterans Affairs (VA), under request for quotations (RFQ) No. VA-241-12-R-0306, for hazardous waste removal in veterans integrated service network area 1 (VISN 1).

We sustain the protest.

BACKGROUND

The VA issued the RFQ on March 27, 2012, for the purpose of establishing a BPA pursuant to the terms of a single vendor's General Services Administration (GSA) Federal Supply Schedule (FSS) contract for hazardous waste removal services. The RFQ established a best value evaluation scheme considering price and two non-price factors (past performance and technical), and indicated that the non-price factors, when combined, "are significantly more important than price." RFQ at 51. The technical factor included three subfactors--management approach, licenses and education, and emergency response--but the RFQ advised that quotations would not be rated at the subfactor level; rather, the technical subfactors would be

considered in assigning an overall technical rating. Concerning price, the RFQ required firms to complete a price schedule by providing fixed unit prices for 174 line items for various labor categories, tasks, and other items based on estimated quantities set forth by the agency. The agency then evaluated price by adding together extended prices for all line items and quantities.

Additionally, the agency included its proposal evaluation guide as an attachment to the RFQ. The guide informed firms that:

Total price or cost to the Government will be evaluated and considered but will not be rated by the evaluation panel. Evaluators may also analyze the proposed price for reasonableness to determine whether it is realistic for the work to be performed; reflects a clear understanding of the requirements; and is consistent with the Offeror's Technical Proposal. Additionally, all offers with separately priced line items will be analyzed for unbalanced pricing.

Evaluation Guide at 4. The evaluation guide also provided for color/adjectival rating schemes for the past performance and technical factor. According to the evaluation guide, vendors' past performance would be assigned a risk rating of high risk, moderate risk, or low risk, while the technical factor would be rated on a color scale of blue, green, yellow, pink, and red. As relevant here, a blue technical rating indicated that the:

Proposal meets all solicitation requirements, demonstrates an excellent understanding of the requirements and has salient features that offer significant advantage to the Government. Excellent in all respects. Advantages/strengths not offset by disadvantages/weaknesses. Very good probability of success with overall very low degree of risk in meeting Government requirements.

Id. at 3. In contrast, a green technical rating indicated that the:

Proposal meets most solicitation requirements and demonstrates an adequate understanding of the requirements but does not offer significant advantages to the Government over basic RFQ requirements. Disadvantages/weaknesses are not significant, unless significant advantages are proposed that outweigh significant disadvantages. Where there were areas of concern, clarifications, given by contractor, were acceptable. Good probability of success with overall low degree of risk in meeting the Government requirements.

Id.

Three quotations, including the quotations of Triumvirate and Clean Harbors, were received in response to the RFQ, and were evaluated by a source selection evaluation board (SSEB) consisting of six VA technical evaluators. The evaluators individually evaluated the quotations before participating in a consensus discussion. The record reflects that, following this discussion, the SSEB assigned Clean Harbors' quotation consensus ratings of "low risk" for past performance and "blue" for the technical factor, while Triumvirate's quotation received consensus ratings of "low risk" for past performance and "green" for the technical factor. SSEB Synopsis at 1. Clean Harbors evaluated price was \$3,216,112.96, while Triumvirate's evaluated price was \$2,186,045.00. Price Abstract at 1. The evaluators considered both firms' prices to be reasonable. SSEB Synopsis at 1. The SSEB chairperson then reported the SSEB's evaluation results to the contracting officer (CO), and recommended selection of Clean Harbors' quotation based on its "dominance in technical performance and low risk." Consensus Worksheet at 1.

In the source selection decision document (SSDD), the CO reviewed the evaluation factors set forth in the RFQ and provided the following summary of his decision:

In accordance with FAR [§] 8.405-2 a best value determination was made. The SSEB completed individual examinations and then conducted a consensus discussion to facilitate the trade-off process. Through this process, it was determined that it is in the best interest of the government to award this contract to Clean Harbors Environmental Services due to a very strong technical proposal (rated highest overall in both past performance and technical) paired with a price proposal with rates below their GSA schedule rates. Although they did not offer the lowest rates, a trade-off decision was made due to their very strong technical and past performance ratings. Additionally, their pricing was found to be highly realistic when compared to market rates, historic rates, and the independent government estimate.

SSDD at 5. Concerning Clean Harbors' price, the CO stated:

Clean Harbor's price was found to be better than their GSA rates in every category, and is, therefore, reasonable. Although they did not have the lowest rates offered, the SSEB used historical pricing and current industry trends to show that their pricing was the most realistic. [DELETED]. This represents the potential for significant cost savings.

Id. at 6. Concerning Triumvirate's price, the CO stated:

Triumvirate's price was found to be reasonable, as their line item pricing was less than that of their GSA schedule pricing. However their pricing was highly unrealistic with fifteen line items being impossibly low (\$5.00) or left blank. [DELETED]. The Board's further analysis showed that as the incumbent Triumvirate appeared to be using their historical usage knowledge to give unbalanced pricing.

Id. at 7.¹

The VA informed Triumvirate that the BPA would be established with Clean Harbors on May 17, and Triumvirate requested a debriefing. A written debriefing was provided to Triumvirate on May 18. Triumvirate then filed this protest on May 29, challenging the VA's price evaluation, technical evaluation, and tradeoff decision.

DISCUSSION

Price Evaluation

Triumvirate first asserts that the agency's price analysis was unreasonable and incorrect as a matter of law. In this regard, the agency concluded that certain of Triumvirate's line item prices were "impossibly low" and showed that Triumvirate

¹ The CO stated that Triumvirate's pricing "was highly unrealistic with fifteen line items being impossibly low (\$5.00) or left blank." SSDD at 7. Our review indicates that Triumvirate entered "--" for 4 line items, and \$5 for 18 further line items. While Triumvirate entered "--" for 4 line items in the price schedule, there is no indication that the agency found this unacceptable. The agency evaluated Triumvirate's overall price quote as presented, indicating zero charge for the following items: lead recycling, driver hours, and removal of certain fluorescent bulb equipment. Concerning the 18 other line items priced at \$5, the agency apparently took issue with only 15 of these line items--stating in the debriefing that "line items 21 through 26, 40 through 45, 55, 56, 113 were all priced at \$5.00 each," which was "found to be three standard deviations away from the industry median price." Debriefing at 3. (We note for the record that Triumvirate actually quoted a price of \$35 for line item 43.) Additionally, in its comments on the agency report, Triumvirate explains that 5 of the \$5 line items are for tasks for which its current task order charges nothing, while an additional 8 line items are for certain oils, gas, or diesel, which are sought after waste streams in the waste disposal industry. Protester's Comments at 9.

“appeared to using their historical usage knowledge to give unbalanced pricing.”² SSDD at 7.

As a general matter, unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated. See, e.g., FAR § 15.404-1(g)(1);³ Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 7. Unbalanced pricing may increase risk to the government, but agencies cannot reject an offer solely because it is unbalanced. In this regard, low prices (even below-cost prices), are not improper and do not establish (or create the risk inherent in) unbalanced pricing. General Dynamics--Ordnance & Tactical Systems, B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 5; Diversified Capital, Inc., B-293105.4, B-293105.8, Nov. 12, 2004, 2004 CPD ¶ 242 at 2 n.1; Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 at 3. Thus, where an unbalanced offer is received, the agency is required to consider the risks to the government associated with the unbalanced pricing in making the award decision, including the risk that the unbalancing will result in unreasonably high prices for contract performance. FAR § 15.404-1(g)(2); Cherokee Painting LLC, B-311020.3, Jan. 14, 2009, 2009 CPD ¶ 18 at 3. Our Office will review for reasonableness both an agency’s determination whether a firm’s prices are unbalanced, and an agency’s determination as to whether a firm’s unbalanced prices pose an unacceptable risk. Semont Travel, Inc., B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 3.

According to the agency, in the evaluation of Triumvirate’s price quotation, the VA evaluators found numerous line items priced at \$5, which they believed were understated and indicated that Triumvirate was “engaging in unbalanced pricing as

² Although the SSDD also stated that Triumvirate’s price quotation was “highly unrealistic,” it is unclear whether the evaluation guide anticipated a price realism analysis (which concerns whether prices are too low) apart from the required price reasonableness analysis (which concerns whether prices are too high), stating only that “[e]valuators may also analyze the proposed price for reasonableness to determine whether it is realistic for the work to be performed; reflects a clear understanding of the requirements; and is consistent with the Offeror’s Technical Proposal.” Evaluation Guide at 4. Further, to the extent a realism analysis was contemplated, it apparently concerned vendors’ understanding of the RFQ requirements; there is no indication in the record that Triumvirate--the incumbent contractor with an evaluated low risk past performance--lacked understanding.

³ Although the procurement at issue was not conducted under FAR Part 15, to the extent the agency incorporated in the RFQ concepts set forth in FAR Part 15, such as those related to unbalanced pricing, we look to FAR Part 15 for guidance in analyzing the reasonableness of the agency’s actions.

they understood what line items could be priced lower based on historical usage.” CO Statement at 2. However, in this case, the RFQ set forth estimated quantities on which vendors based their prices, and the agency has not indicated that these estimates are incorrect. Thus, there is no basis to conclude that any unbalanced pricing, to the extent it exists, will result in the government actually paying higher prices. See Accumark, Inc., B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 at 4 (explaining that if estimates for task order contract are reasonably accurate, then evidence of mathematical unbalancing generally does not present a risk that the government will pay higher prices).

Further, in explaining to our Office his determination that there was unbalanced pricing, the CO engaged in a post hoc review of Triumvirate’s rates, procedures, and performance under prior task orders for hazardous waste removal as the incumbent contractor to justify the agency’s concerns regarding Triumvirate’s pricing. For example, in response to the protest, the CO alleged that invoices from prior task orders indicated that Triumvirate “will send two chemists when a chemist and technician will suffice,” “will charge for travel time to and from the site,” and will “spend an extraordinary amount of time on each site.” CO Statement at 3. Based on these considerations, the CO concluded that Clean Harbors’ quotation will save significant amounts of money (despite its higher evaluated price), and that Triumvirate may utilize “higher priced labor categories and travel time to offset reduced line item pricing.”⁴ Id.

In his explanation, the CO does not provide any documentation suggesting that Triumvirate’s prices for particular line items, such as the rates for chemists, were overstated.⁵ In this regard, it is not apparent how the agency could conclude that

⁴ The CO also notes that Clean Harbors’ facilities are closer in distance to many VISN 1 than Triumvirate’s facilities. Accordingly, the CO concludes that Clean Harbors will have less travel time for its chemists, which, coupled with Clean Harbors’ lower hourly rate for its chemists, as compared with the rate proposed by Triumvirate, will result in cost savings to the government. Although the CO does not quantify this asserted savings, it is apparent that any such savings would be insignificant when compared with Triumvirate’s total evaluated price advantage of more than \$1 million. In reaching this conclusion, we note that the estimated quantity for the Chemist labor category is stated as 750 hours per year (as noted above, the agency has not stated that its estimates are inaccurate) and the record reflects that the delta between Triumvirate’s higher unit prices and Clean Harbors’ lower unit prices for this labor category ranges from approximately \$19 per hour in the base year to less than \$14 per hour in the fifth option period.

⁵ While the record demonstrates that Triumvirate’s rate for chemists is higher than Clean Harbors’ rate, Triumvirate’s rate represents only a 5.7-percent increase over the prior task orders cited by the agency.

any particular line item prices were overstated, where the record reflects that the agency conducted its price reasonableness evaluation on a line item basis, and found Triumvirate's pricing to be "reasonable, as their line item pricing was less than that of their GSA schedule pricing." SSDD at 7. Rather, the CO's post hoc analysis here is apparently premised on the presumption that Triumvirate may perform inefficiently, thereby resulting in higher pricing. This presumption, which is not suggested in the contemporaneous record, has no basis in Triumvirate's pricing per se. Instead, the presumption is based on past performance concerns that are not contained in the contemporaneous evaluation record, and which appear to be inconsistent with Triumvirate's rating of "low" risk under the past performance factor.

Moreover, the agency's post hoc concerns do not reasonably support a finding that Triumvirate's pricing presented an unreasonable risk to the government. In this regard, there is no basis to conclude that estimates contained in the solicitation are inaccurate or that the BPA is subject to the type of manipulation presumed by the agency. As acknowledged by the CO, because the BPA merely establishes the unit prices for the schedule items to be ordered on a task basis, when the government requests quotes for future BPA orders, the agency will be in a position to specifically consider, before placing any order, whether the selected BPA holder will be using an appropriate level of effort and labor mix to perform the required work. CO Statement at 4.

In sum, we find that the CO failed to reasonably identify any risk to the government inherent in Triumvirate's quotation of multiple \$5 line items. It is also apparent that Triumvirate was prejudiced, where the SSDD in this procurement included a negative inference against Triumvirate's price quotation, noting that Triumvirate's pricing was "unbalanced." Accordingly, we conclude that the agency's price analysis was unreasonable, and sustain the protest on that basis.

Tradeoff Analysis

Triumvirate also contends that the agency's selection decision was flawed because the agency failed to reasonably and adequately consider Triumvirate's price advantage, and failed to sufficiently document a tradeoff analysis. We agree.

Where, as here, a procurement conducted pursuant to FAR subpart 8.4 provides for award on a "best value" basis, it is the function of the source selection authority to perform a price/technical tradeoff, that is, to determine whether one quotation's technical superiority is worth its higher price. InnovaTech, Inc., B-402415, Apr. 8, 2010, 2010 CPD ¶ 94 at 2, 6 n.8; The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 13. While we are mindful that, under simplified acquisition procedures, limited documentation of the source selection is permissible, the agency must at least provide a sufficient record to show that the source selection was reasonable. FAR § 13.303-5(e); see also FAR § 8.405-2(e) (minimum documentation requirements include documenting the rationale for any tradeoffs

when establishing a BPA or placing an order); e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 8 (even for procurements conducted under simplified acquisition procedures, an agency must have a sufficient record to allow for a meaningful review). Further, even in a competition where price is of less importance than the non-price factors, an agency must meaningfully consider cost or price in making its selection decision. See S. J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73 at 3.

The SSDD in this case provides that Clean Harbors was selected:

due to a very strong technical proposal (rated highest overall in both past performance and technical) paired with a price proposal with rates below their GSA schedule rates. Although they did not offer the lowest rates, a trade-off decision was made due to their very strong technical and past performance ratings.

SSDD at 5. However, neither the evaluated prices of the three quotations nor the differences between these prices are set forth in the SSDD's summary of the tradeoff decision. In fact, while the evaluated prices of the three quotations appear in an abstract of quotations, consideration of the actual difference in price between Clean Harbors' highest-rated quotation and Triumvirate's low-risk, green technical, lower-priced quotation is not apparent in the SSDD or elsewhere in the contemporaneous record.

Instead, the SSDD focuses almost exclusively on the question of price reasonableness as determined by comparison to the firms' GSA schedule pricing. According to the SSDD, pricing:

was evaluated on a per line item basis to ensure fair and reasonable pricing. All line items were compared to the offeror's GSA FSS schedule rates to ensure that all line items were either at or below FSS rates. Pursuant to FAR [§] 8.405, additional price reductions were sought and achieved. Pricing was evaluated, per the solicitation, to be reasonable or nonreasonable based on it being below GSA rates. Further, pricing was examined for its realism compared to current market and historical rates.

SSDD at 5. In its discussion of each vendor's pricing, the SSDD did not state the actual evaluated price, but only whether the price was found to be lower than or equal to the firms' GSA schedule prices, and therefore reasonable.

In response to Triumvirate's allegation, the agency does not provide additional information that shows that there was meaningful consideration of price. Instead, the agency seeks to further minimize the agency's consideration of any actual price differences in the source selection. For example, the agency's report suggests that

the differences in evaluated price were inconsequential since they were derived from estimated quantities and therefore merely theoretical--ignoring the fact that the price schedule, with estimated quantities provided by the agency, was set forth in the RFQ in order to provide a common basis for the evaluation of price. The agency also argues that:

Triumvirate's dispute over price does not, in and of itself, provide a legally sufficient basis for filing a protest because despite any questions raised by Triumvirate's pricing its price proposal was accepted by the SSA as "reasonable" making the issue moot.

Agency Report (AR) at 3. We fail to see how the agency's determination that Triumvirate's price was "reasonable" renders moot its contention that the agency failed to reasonably consider its 32 percent price advantage, or document the specific benefits associated with Clean Harbors' higher technically rated quotation.

The lack of any meaningful consideration given to price in the tradeoff decision is also reflected the following agency statement that:

both [offerors] begin with pricing that is deemed reasonable and realistic by virtue of being on the FSS and any discounts represent a competitive advantage only. Therefore, price is really a non-issue for both competitors under the circumstances of the Solicitation.

AR at 3, as well as the CO's statement that:

As stated in the solicitation and the solicitation's attached proposal evaluation guide, pricing would be evaluated for reasonableness. If an offeror's price was found to be equivalent or less than the offeror's GSA price schedule, it was reasonable. Under that evaluation criterion, both Triumvirate and Clean Harbor's were found to offer reasonable pricing. Effectively, pricing resulted in a tie as both offeror's were found to be fair and reasonable by the board and by the source selection authority.

CO's Statement at 2.

While the SSDD in this case acknowledged that Clean Harbors' quotation was not the lowest priced and therefore generally suggests that the agency valued the quotation's higher technical ratings, this general statement is insufficient in light of the entire evaluation record and the agency's subsequent statements in response to the protest, for our Office to conclude that the agency meaningfully considered Triumvirate's significant price advantage in making its selection decision. Accordingly, we sustain the protest on this basis.

Technical Evaluation

Triumvirate's protest presents a myriad of challenges to weak points noted in individual evaluator's worksheets. These "weak points," however, do not appear to be reflected in the SSEB's consensus color/adjectival ratings, much less the SSDD, and therefore need not be addressed further by our Office.⁶ As reviewed above, the SSEB consensus report assigned Triumvirate's quotation the best possible past performance rating of "low risk," and a "green" technical rating, indicating that the quotation "meets most solicitation requirements and demonstrates an adequate understanding of the requirements but does not offer significant advantages." In fact, the SSDD concludes that Triumvirate "met *all of the technical factors in the solicitation*" and that its "management approach [was] well adapted and molded to VISN 1's needs." SSDD at 6-7 (emphasis added).

The only weaknesses actually noted in the SSDD are that Triumvirate's quotation "often just mimicked the language in the solicitation and failed to actually provide a detailed response to their answers/solutions/systems in some technical areas." Although Triumvirate challenges the SSDD's assessment of these weaknesses, we conclude that they are consistent with the underlying evaluation record and Triumvirate's quotation. For example, Triumvirate's quotation devoted 50 of 79 total pages to acknowledgement of SOW tasks--consisting almost entirely of block quotes from the RFQ SOW, followed by acknowledgement paragraphs restating the SOW. We have no basis to find the agency's evaluation unreasonable in this regard.⁷

⁶ These issues appear to stem from the fact that the agency provided the protester with a poor debriefing, which did not review the source selection decision specifically, but rather provided an unorganized recitation of the individual evaluators notations and erroneously suggested that the listed "weak points" constituted significant weakness. This, however, was inconsistent with the actual evaluation ratings, which found that Triumvirate "met all of the technical factors in the solicitation," presented low risk, and warranted a "green" technical rating. SSDD at 6.

⁷ Although we have no basis to question the contemporaneous evaluation record as reflected in the SSDD, we note that the CO's statement, submitted in response to the protest, goes beyond the strengths and weaknesses identified in the SSDD in its comparison of the quotations. For example, the CO praised a Clean Harbors' computer program for providing many capabilities, while stating that Triumvirate's proposal did not offer the same capabilities. Although the underlying record indicates the evaluators found Clean Harbors to have presented the best "computerized record keeping," this strength was not actually incorporated in the SSDD, and the contemporaneous evaluation record does not reflect a determination that Triumvirate's computer system lacked similar capabilities. In fact, one evaluator noted that Triumvirate's quotation discussed an online system for

(continued...)

RECOMMENDATION

We recommend that the agency reevaluate price quotations in a manner that is consistent with the solicitation's evaluation criteria and the FAR's guidance on price analysis, and properly document its evaluation. See FAR § 15.404-1(b). Upon completion of the reevaluation, the agency should perform and document a new price/technical tradeoff analysis with rationale for any tradeoffs made, including the benefits associated with any price premium. If Clean Harbors' quotation is not found to represent the best value to the government, the agency should terminate its BPA and establish a BPA with the firm representing the best value to the government. We also recommend that Triumvirate be reimbursed its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2012). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel

(...continued)

manifests and inventory tracking, and our review of Triumvirate's quotation revealed that Triumvirate did describe a computer system with similar capabilities to the one set forth in Clean Harbors' quotation. [DELETED] Triumvirate Evaluation at 2; Triumvirate Technical Quotation, app. 6, at 1-2. The discrepancies between the strengths and weaknesses actually incorporated in the SSDD and the CO's protest response (and debriefing) are a matter that the agency should consider in implementing the corrective action recommended below.