

Decision

Matter of: Environmental Restoration, LLC

File: B-413781

Date: December 30, 2016

Russ Gulledge, Environmental Restoration, LLC, for the protester.
Kathleen Clever, Esq., Environmental Protection Agency, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a lowest-priced, technically acceptable procurement, exclusion of protester's proposal from competitive range was not improper where the agency reasonably concluded that the proposal had no reasonable prospect of award, and the protester suffered no prejudice.

DECISION

Environmental Restoration, LLC (ER), a small business located in St. Louis, Missouri, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. SOL-R7-16-00007, which was issued by the Environmental Protection Agency (EPA), for remediation of mine waste in Cherokee County, Kansas. The protester argues that the agency improperly established the competitive range based solely on price.

We deny the protest.

BACKGROUND

The RFP was issued on June 27, 2016, as a small business set-aside, and seeks the provision of personnel, materials and equipment for the excavation, consolidation, and disposition of mine waste and associated materials.¹ RFP, PWS

¹ The RFP calls for the remediation of mine waste at a sub-site located in the community of Treece, Kansas (referred to as the "Treece sub-site") which is part of the Cherokee County Superfund site, is situated along the Kansas-Oklahoma

at 1. The solicitation anticipates the award of a fixed-price contract for a base year, with two 12-month options. RFP at 2.

The RFP provides that award will be made using a lowest-priced, technically acceptable source selection process, considering the following two non-price factors, to be evaluated on a pass/fail basis: technical capability, and past performance. RFP § M-2(b)(iv). With regard to price, the solicitation provides that it will be evaluated by the agency based on the offeror's proposed prices for the base year and all options. RFP § M-2(b)(vii).

EPA received proposals from ten offerors, including ER.² COS at 1. The agency ranked the proposals from lowest-priced to highest-priced, and then conducted a price evaluation to assess the reasonableness of the prices submitted. Id. Specifically, the agency compared the prices to the market average,³ as well as the independent government estimate; AR,⁴ Tab 3, Price Evaluation, at 1.

The agency evaluated the two lowest-priced proposals for technical acceptability and concluded that both had a strong likelihood of being technically acceptable. COS at 1-2; AR at 4; AR, Tab 9, Competitive Range Det., at 2. Thereafter, the contracting officer decided to establish a competitive range in accordance with Federal Acquisition Regulation (FAR) § 15.306(c), and enter into discussions with the offerors that fell within that range. COS at 1-3.

In establishing the competitive range, the contracting officer reviewed the price proposals of all ten offerors. COS at 2; AR, Tab 9, Competitive Range Det., at 1. The contracting officer found that while the two lowest-priced offers were priced "very close to each other," the third lowest-priced offer "was substantially higher."

(...continued)

border, and covers approximately 1.5 square miles. RFP, Performance Work Statement (PWS) at 1.

² After the submission of initial proposals, the contracting officer learned that ER had also submitted a proposal to the agency. Contracting Officer Statement (COS) at 3. Because an investigation conducted by the agency revealed that ER timely submitted its proposal to the appropriate government portal, just under an incorrect tab in the portal, the contracting officer made the determination to accept ER's proposal into the competition. Id.; Agency Report (AR), Tab 6, Revised Abstract of Price Offers, at 1.

³ The agency calculated the market average by adding the offerors' total proposed prices, and dividing the sum by the total number of proposals received. COS at 1; AR, Tab 4, Revised Price Evaluation, at 1.

⁴ A protective order was not issued in this protest, but our Office was provided a complete copy of the record for our in-camera review.

AR at 2; AR, Tab 9, Competitive Range Det., at 1-2. The contracting officer explains that, “[b]ecause the two lowest offerors were so close in price and the difference between those offers and the third lowest” was substantial, and “because one or both of the two lowest-priced offerors” was likely to be found acceptable after discussions, she concluded that the higher-priced offerors, including ER, “did not have a reasonable chance of receiving the award.” COS at 2; AR at 4. Accordingly, the contracting officer decided to establish a competitive range consisting of the two lowest-priced offerors. Id.; AR, Tab 9, Competitive Range Det., at 1-2.

On September 15, the contracting officer entered into discussions with the two lowest-priced offerors. COS at 3. On September 16, the agency notified all other offerors, including ER, that they had been excluded from the competitive range. COS at 3; AR, Tab 10, Notice of Exclusion from Competitive Range, at 1. Thereafter, ER requested a pre-award debriefing. This protest followed.

DISCUSSION

ER challenges the exclusion of its proposal from the competitive range, arguing that the EPA failed to evaluate its proposal against all of the solicitation’s evaluation factors. Specifically the protester contends that the agency established the competitive range based solely on price, without considering the protester’s technical proposal. For the reasons discussed below, we conclude that the EPA’s exclusion of ER’s proposal from the competitive range was reasonable and a permissible exercise of the contracting officer’s discretion.⁵

In reviewing an agency’s evaluation of proposals and subsequent competitive range determination, we will not reevaluate the proposals, but will examine the record to ensure that the evaluation was reasonable and in accordance with the solicitation’s evaluation criteria and applicable statutes and regulations. Outreach Process Partners, LLC, B-405529, Nov. 21, 2011, 2011 CPD ¶ 255 at 3. Under FAR § 15.306(c)(1), the “contracting officer shall establish a competitive range comprised of all of the most highly rated proposals,” based on “the ratings of each proposal against all evaluation criteria,” unless the range is further reduced for purposes of efficiency. Agencies are not required, however, to retain in the competitive range a proposal that is not among the most highly rated or that the agency otherwise reasonably concludes has no realistic prospect of award. See SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5.

⁵ The protester raises other collateral arguments that are not discussed in this decision. We have reviewed all of the protester’s allegations and conclude that they are without merit.

Here, as noted above, the RFP provides that award will be made on a lowest-priced, technically acceptable basis, considering price (base year, plus option years), and technical acceptability (on a pass/fail basis). RFP § M-2. In this regard, the RFP provides that the “Government will select for award, the lowest priced, technically acceptable (LPTA) proposal,” and “intends to review only the lowest evaluated price of the proposals meeting or exceeding the acceptability standard for non-price factors.” Id. § M-2(a). The RFP further provides that, “[i]f that proposal is deemed to be technically acceptable, no further proposal evaluations will be performed,” and that “[o]fferors receiving an Unacceptable rating will not be considered for award.” Id. The solicitation also instructs offerors that “[w]hile the government intends to evaluate proposals and award a contract without discussions,” it “reserve[s] the right to hold discussions with offerors.” Id. at 52.

The record reflects that the contracting officer evaluated all price proposals submitted, and concluded that the two lowest-priced offers were priced “very close to each other,” while the third lowest-priced offer, and all other higher-priced offers, were priced “substantially higher.” AR at 2; AR, Tab 9, Competitive Range Det., at 1-2. Specifically, the contracting officer explains that the two lowest-priced offers were priced within 7 percent of each other, whereas the third lowest-priced offer was priced 30 percent higher than the lowest-priced offer. COS at 2. In addition, the record reflects that ER’s proposal, which was neither the third lowest-priced proposal, nor the fourth lowest-priced proposal, was approximately 80 percent higher than the lowest-priced offer. COS at 3; AR, Tab 6, Revised Abstract of Price Offers, at 1. In establishing the competitive range, the contracting officer concluded that this substantial break in the pricing array, “supports a competitive range consisting of the lowest and second lowest price proposals.” AR, Tab 9, Competitive Range Det., at 2. The contracting officer also found that the number of proposals received exceeded the number at which an efficient competition could be conducted, and concluded that “two proposals will permit an efficient competitive range.” Id.

In addition, the record reflects that the agency evaluated the technical proposals of the two lowest-priced offers, and found that each had only one minor technical issue, which the agency believed could be resolved with brief discussions to make either one or both technically acceptable. AR at 2; Tab 12, TEP Evaluation, at 159-60; Tab 13, TEP Evaluation, at 177. Indeed, on September 21, 2016, two days prior to the date the protester filed this protest, the agency evaluated the revised technical proposal submitted by the lowest-priced offeror in response to discussions, as technically acceptable. COS at 3; AR, Tab 14, TEP Evaluation, at 186-87.

The protester argues that a more in-depth technical evaluation was required for purposes of establishing the competitive range. Specifically, the protester asserts that the agency was required to compare ER’s technical pass/fail ratings to the technical pass/fail ratings received by the two lowest-priced offerors to determine which proposal is “more highly rated.” Protester’s Comments at 1-2. The agency

responds that “in a [low-price, technically acceptable procurement], there are no comparative evaluations of technical proposals, no ranking based on technical factors, and no tradeoffs.” AR at 2.

We agree that the agency is precluded by FAR § 15.101-2(b) in lowest-priced, technically acceptable procurements from conducting tradeoffs, or ranking proposals based on non-price factors. As such, it would have been improper for the agency to evaluate the technical proposals in the manner asserted by ER. Rather, as discussed above, the record reflects that the contracting officer based her determination that ER did not have a realistic chance of receiving the award, as well as the overall competitive range determination, on consideration of both price and non-price factors for all proposals. COS at 2; AR at 4; Competitive Range Det., at 1-2.

As noted above, agencies are not required to retain in the competitive range a proposal that the agency reasonably concludes has no realistic prospect of award, and in fact, even a technically acceptable proposal may be excluded from the competitive range if it does not stand a real chance of being selected for award. See SDS Petroleum Prods., Inc., *supra*; National Medical Staffing, Inc., B-259700, Mar. 6, 1995, 95-1 CPD ¶ 503 at 3. Indeed, cost or price not only is a proper factor for consideration, but may emerge as the dominant factor in determining whether proposals fall within the competitive range. National Medical Staffing, Inc., *supra*; B259700, Mar. 6, 1995, 91-1 CPD ¶ 503 at 3; Motorola, Inc., B-247937.2, Sept. 9, 1992, 92-2 CPD P 334 at 9. Here, we find nothing unreasonable or improper regarding the agency’s evaluation and competitive range determination. To the extent ER disagrees with the agency’s evaluation and competitive range determination, this disagreement, without more, is insufficient to establish that the agency acted unreasonably or otherwise establish a basis to sustain the protest. SPAAN Tech, Inc., B-400406, B-400406.2, Oct. 28, 2008, 2009 CPD ¶ 46 at 9.

Finally, we also find that the protester’s argument fails for a lack of prejudice. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (finding competitive prejudice is a necessary element of any viable bid protest, and where the protester fails to demonstrate prejudice, our Office will not sustain the protest). Although the protester argues that the agency failed to evaluate its technical proposal in considering whether ER’s proposal was among the “most highly rated,” the protester fails to point to any evidence to support its assertion that its competitive position was in any way negatively impacted by the agency’s alleged errors in establishing the competitive range. Rather, the record reflects that, for purposes of establishing the competitive range, the contracting officer essentially treated the higher-priced offerors, including ER, as technically acceptable. AR, Tab 9, Competitive Range Det., at 1-2; AR at 2. As noted above, however, ER’s proposal was not third, or even fourth, in line for award, and ER’s proposed price was more than 80 percent higher than the lowest proposed price. COS at 3; AR, Tab 6, Revised Abstract of Price Offers, at 1.

Further, as also noted above, the agency found the lowest-priced offeror's revised proposal to be technically acceptable after discussions. COS at 3. Importantly, the protester does not assert that, had its proposal been included in the competitive range, it would have lowered its proposed price, or otherwise revised its proposal in any way. See Protest at 1-6; Protester's Comments at 1-3. Accordingly, even had the agency conducted a more in-depth evaluation, with ER's proposal found technically acceptable, as the protester asserts, ER's significantly higher-priced offer would nevertheless have no realistic chance of award.⁶ As such, the protester has failed to demonstrate any prejudice as a result of its exclusion from the competitive range. McDonald-Bradley, B-270126, supra.

The protest is denied.

Susan A. Poling
General Counsel

⁶ Although ER initially asserted that the agency's pricing mechanism was "flawed," Protest at 5, and the agency responded regarding its price evaluation in the agency report, the protester did not further discuss these contentions in its comments responding to the report. Protester's Comments at 1-3. Accordingly, we conclude that the protester effectively abandoned these protest grounds, and therefore, will not consider them further. See Lynxnet, LLC, B-409791, B-409791.2, Aug. 4, 2014, 2014 CPD ¶ 233 at 4 n.3.