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Decision

Matter of: Four Horsemen International

File: B-403385.3; B-403385.4; B-403385.5

Date: December 17, 2010

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Debra J. Talley, Esq., and Leslie A. Nepper, Esq., Department of the Army, for the agency.

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DIGEST

Rejection of the protester's proposal following discussions was reasonable where the protester's final proposal revision offered contingent pricing for contract line items for which fixed prices were solicited.

DECISION

Four Horsemen International (FHI), of Arlington, Virginia, protests the award of a contract to SOC LLC, of Minden, Nevada, under request for proposals (RFP) No. W52P1J-10-R-0139, issued by the Department of the Army, U.S. Army Materiel Command, for mail service in Afghanistan.

We deny the protest.

BACKGROUND

The RFP, issued on May 29, 2010, contemplated the award of a contract with fixed-unit-price and cost reimbursable contract line items (CLINs) for mail service to Afghanistan for a base year and 4 option years.¹ RFP at 1, 2. The RFP provided that

¹ All CLINs, with the exception of a CLIN for Defense Base Act (DBA) insurance, requested fixed-unit prices. The DBA insurance CLIN was on a cost reimbursement basis. RFP at 47.

proposals would be evaluated on a best value basis using a two-step process. First, proposals were evaluated under the technical factor on a pass/fail basis. Then, proposals that passed the technical evaluation would be evaluated under the past performance factor and price. Past performance was significantly more important than price. Id. at 49.

The RFP required that proposals be submitted in three volumes: technical, past performance, and price. Id. at 44. Offerors were instructed that their proposals should be clear and detailed to allow evaluators to assess the proposals without the need for additional clarification. RFP at 45. The RFP advised that the government intended to award without discussions, but reserved the right to conduct discussions if needed. Id. at 47, 49.

The RFP provided a pricing matrix for offerors to complete, which identified estimated quantities of containers to be shipped for each CLIN. Agency Report (AR), Tab 12, Pricing Matrix. Offerors were advised that the quantities provided in the pricing matrix were estimates for evaluation purposes only, and cautioned that the quantity of containers/truckloads may vary due to troop surges and movements, and that the government expected the successful offeror to meet fluctuations in quantity at the established fixed-unit price. RFP at 2.

The RFP was amended eight times. Contracting Officer's (CO) Statement at 2. As relevant here, the agency answered a number of offerors' questions with regard to which estimates of container quantities to use for computing prices. See Questions and Answers (Q&A), June 4, 2010, at 2; Q&A, June 29, 2010, at 2, 8, 11.

The Army received proposals from nine offerors. CO's Statement at 2. Five proposals, including FHI's and SOC's, were found technically acceptable and were included in the competitive range. Id. As relevant here, FHI included in both its technical and past performance proposals the statement, "The Four Horsemen International (FHI) has no exceptions to any of the contract requirements specified in RFP W52P1J-10-R-0139." AR, Tab16-1, FHI Technical Proposal, at 1; Tab 16-2, FHI Past Performance Proposal, at 1.

The Army decided to conduct discussions with the competitive range offerors about their pricing. CO's Statement at 2. FHI was informed that the Army had identified no significant weaknesses or deficiencies in its proposal. Second AR (AR-2), Tab 20, FHI Discussion Letter, Aug. 5, 2010. In response, FHI elected not to revise its proposal. AR, Tab 13, FHI e-mail, Aug. 10, 2010. In contrast, the Army informed SOC that the agency had identified deficiencies pertaining to its pricing proposal. Third AR (AR-3), Tab 27, SOC Discussion Letter, Aug. 5, 2010, at 1. SOC revised its proposal but submitted it late, and the Army informed SOC that its proposal would not be further evaluated. AR-2, Tab 21, SOC Late Proposal Letter, Aug. 11, 2010.

On August 17, the agency notified SOC that it was materially amending the RFP, and reinstating SOC's proposal to the competitive range. AR-2, Tab 22, SOC

Reinstatement Letter, Aug. 17, 2010. On August 19, the contracting officer notified the five competitive range offerors—including SOC—that she was continuing discussions and issued amendment 7, which deleted two mail delivery routes from the RFP and requested final pricing proposal revisions (FPR), which were required to be submitted by August 26. CO's Statement at 2; RFP amend. 7, at 2. On August 24, the Army issued amendment 8 to provide additional clarifications and confirmed that FPRs were due by August 26. RFP amend. 8, at 2.

In FHI's letter transmitting its FPR, the protester stated that

[t]he revised prices that FHI presents to the Government are contingent on the realization of the average units for duration of standard figures. For example, the revised [pricing matrix] cites an average of 360 units (containers) will be required to be delivered from Bagram to Shank between the months of February and October. FHI assumes that the actual number of containers to be delivered from Bagram to Shank during these months will not deviate significantly from this cited average. However, if the Government during contract performance requires FHI to deliver only 300 containers then FHI would consider this a significant deviation from the agreed upon average. As such, the pricing we are submitting today is based on the assumption that if FHI is awarded this contract that FHI will be moving (and as such invoicing the [U.S. Government]) for the number of containers we have been given by the [Government] to base this pricing on.

AR, Tab 4, FHI Transmittal Letter, at 1.

Faced with the language in FHI's transmittal letter, the Army decided that FHI had stated a contingent price, and rejected FHI's proposal. Army Final Price Analysis, Aug. 30, 2010, at 2. The proposals of the remaining four competitive range offerors were found technically acceptable and were the subject of a cost/technical tradeoff analysis by the CO. AR, Tab 19, Source Selection Decision, at 20-22. The Army awarded the contract to SOC on September 13. CO's Statement at 3. Following a debriefing, FHI filed this protest.

DISCUSSION

FHI complains that the Army miscalculated its pricing proposal by improperly relying on the language in its transmittal letter. Protest at 3; Protester's Comments at 4. FHI argues that its pricing proposal did not take an exception to the terms of the RFP, and that its transmittal letter only intended to explain its pricing methodology, as well as to express concern about the Army's estimates of the average quantity of containers to be transported. Protest at 3; Protester's Comments at 5.

In a negotiated procurement, a proposal which fails to conform to one or more of an RFP's material terms or conditions is technically unacceptable and cannot form the basis for an award. Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 at 2. The requirement for fixed prices is a material term or condition of an RFP requiring such pricing, and a proposal that does not offer fixed prices cannot be accepted for award. Id. at 2-3.

Here, FHI's transmittal letter states that the firm's revised prices "are contingent on the realization of the average units for duration of standard figures" and further states that "if the Government during contract performance requires FHI to deliver only 300 containers then FHI would consider this a significant deviation from the agreed upon average." We find that the Army reasonably concluded that FHI was taking an exception to a material term of the solicitation and rejected FHI's proposal on that basis.² Where, as here, a solicitation requests offers on a fixed-price basis, an offer that is conditional and not firm cannot be considered for award. SunEdison, LLC, B-298583, B-298583.2, Oct. 30, 2006, 2006 CPD ¶ 168 at 5. To the extent that FHI is arguing that it did not intend to condition its proposed price, it is an offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. JBlanco Enters., Inc., B-402905, Aug. 5, 2010, 2010 CPD ¶ 186 at 3.

FHI also complains that the RFP was confusing concerning the quantities upon which offerors were to base their pricing and argues that it was therefore improper for the Army to reject FHI's revised proposal. Comments at 2-3. In this regard, FHI notes that the offerors asked a number of questions concerning the estimated quantities and contends that the agency's responses to those questions were inadequate. Id. This post-award challenge to the terms of the RFP is untimely. Under our Bid Protest Regulations, a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1) (2010).

² FHI disputes that its contingent pricing took exception to a material requirement, arguing that its purported contingency had nothing to do with the requirements of the RFP because neither FHI's pricing methodology nor the estimated number of containers are related to the requirements of the RFP. See Protester's Comments at 4. We find no merit to this argument, given that the requirement to submit fixed-unit prices is itself a material solicitation requirement. See Marine Pollution Control Corp., supra.

FHI also challenges the agency's conduct of discussions, variously arguing that the Army failed to conduct discussions or failed to conduct meaningful discussions with FHI. We find no merit to FHI's arguments in this regard.

Discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. Gas Turbine Engines, Inc., B-401868.2, Dec. 14, 2009, 2009 CPD ¶ 257 at 2. Where a proposal contains no technical uncertainties, a mere request for final proposal revisions will satisfy the discussions requirement. See Weinschel Eng'g Co., Inc., B-217202, May 21, 1985, 85-1 CPD ¶ 574 at 3.

Here, following the evaluation of initial proposals, the Army informed FHI that its proposal did not contain any significant weaknesses or deficiencies and several times requested revised proposals from FHI. Under these circumstances, the Army's request for FPRs constituted meaningful discussions.³

FHI also argues that, if the letter transmitting its FPR was ambiguous, the Army should have clarified this or conducted further discussions with the firm. In this regard, FHI contends that the Army's view that this letter took exception to the RFP was inconsistent with the statements that FHI made in its technical and past performance proposals where FHI stated that it took no exception to the RFP requirements.⁴ Protester's Comments at 7.

Federal Acquisition Regulation (FAR) § 15.306 describes a spectrum of exchanges that may take place between a contracting agency and an offeror during negotiated procurements. Clarifications are limited exchanges between the agency and offerors that may occur when contract award without discussions is contemplated; an agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. FAR

³ To the extent that FHI believes that the Army treated offerors unequally because the agency discussed more things with SOC than with FHI, this argument also has no merit. The record shows that the Army had more extensive discussions with SOC with respect to that firm's proposed pricing, because the agency identified significant weaknesses and deficiencies in SOC's initial proposal. In contrast, the Army did not identify any significant weaknesses or deficiencies in FHI's initial proposal, and therefore the agency's request for FPRs was sufficient. Weinschel Eng'g Co., Inc., *supra.*; see also KBM Group, Inc., B-281919, B-281919.2, May 3, 1999, 99-1 CPD ¶ 118 at 10.

⁴ We disagree that FHI's technical and past performance proposals, which generally state that the firm did not take exception to the solicitation requirements, created an ambiguity with regard to the firm's pricing contingency in its FPR.

§ 15.306(a); Satellite Servs., Inc., B-295866; B-295866.2, Apr. 20, 2005, 2005 CPD ¶ 84 at 2 n.2. By contrast, discussions—which are to occur after establishment of the competitive range—involve the agency indicating to each offeror the significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to materially enhance the proposal’s potential for award. FAR § 15.306(d)(3).

Where, as here, the agency establishes a competitive range to conduct discussions, the agency may conduct communications with an offeror to facilitate the agency’s understanding and evaluation of the offeror’s proposal or for the purpose of exploring whether a proposal should be included in the competitive range. See FAR § 15.306(b)(2). Such communications, however, cannot “be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal.” *Id.*; Battelle Mem’l Inst., B-299533, May 14, 2007, 2007 CPD ¶ 94 at 4. Rather, when an offeror is given the opportunity to remove an ambiguity from its proposal, especially where the information to be provided by the offeror is essential for determining the proposal’s acceptability, such an exchange constitutes discussions. Nu-Way, Inc., B-296435.5, B-296435.10, Sept. 28, 2005, 2005 CPD ¶ 195 at 7. We find that the Army could not have resolved FHI’s unacceptable pricing contingency through a clarification or other communication, as such an exchange would have constituted discussions.

With respect to FHI’s argument that the agency should have conducted further discussions regarding the firm’s price contingency, where proposal defects are first introduced either in response to discussions or in a post-discussion proposal revision, an agency has no duty to re-open discussions or conduct additional rounds of discussions. Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 10. Here, FHI’s price contingency first appeared in FHI’s FPR. No further discussions were conducted with any of the offerors after the receipt of FPRs, given that the Army determined that the other four competitive range offerors were acceptable.

In a supplemental protest filed after receipt of the agency’s report, FHI argued that discussions were on-going after the agency’s receipt of FPRs, because the agency did not state that discussions were closed and that no further revisions would be accepted, as required by FAR § 15.307(b). This argument is untimely. Our Bid Protest Regulations provide that a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Moreover, supplemental protest allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. Cedar Elec., Inc., B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 4. Here, FHI learned in its debriefing that the agency considered discussions closed as of September 3 and

knew that it had received no further discussions after the submission of FPRs.⁵ Thus, the record shows that when FHI filed its initial protest the protester knew the basis of its allegation that the agency had not properly closed discussions after receipt of FPRs but did not raise this ground of protest until after receipt of the agency's report.

FHI also protests the Army was not permitted to include SOC's proposal in the revised competitive range, because the agency had earlier eliminated SOC's proposal from the initial competitive range because it was received late. We find that FHI is not an interested party to raise this ground of protest.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2006), only an "interested party" may protest a federal procurement. That is, a protester must have a direct economic interest which would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a protester is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2. Where there is an intervening offeror that would be in line for award if the protester's challenge to the award were sustained, we consider the protester's interest to be too remote to qualify it as an interested party. Evans Sec. Solutions, Inc., B-311035, Mar. 19, 2008, 2008 CPD ¶ 58 at 2.

Here, FHI would not be in line for award, even if we accepted its argument that SOC's FPR could not be considered for award. That is, if award could not be made to SOC, as FHI argues, the FPRs of the remaining three technically acceptable competitive range offers would be considered for award, and not FHI's revised proposal.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁵ Offerors were informed that FPRs were due August 26, and the agency conducted no further discussions with offerors after that date. In its debriefing, FHI was informed that discussions closed on September 3. Protest, exh. 3, Debriefing Slides, at 6. There is no explanation in the record for this discrepancy. Nevertheless, in any case, FHI knew at the time it submitted its initial protest that discussions had closed after receipt of FPRs and that it had not received any discussions (or other communications) from the agency concerning its FPR.