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Decision

Matter of: United Terex, Inc. – Protest and Request for Costs

File: B-405070.3; B-405070.4

Date: September 27, 2011

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DIGEST

1. Protest of agency's past performance evaluation and source selection decision is denied where record reflects that evaluation and source selection were consistent with the terms of the solicitation and within the reasonable bounds of the agency's exercise of its discretion.
 2. Where agency proposed corrective action before filing administrative report and protest grounds were not clearly meritorious, there is no basis for GAO to recommend reimbursement of costs of pursuing the protest.
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DECISION

United Terex, Inc., of Fairview Village, Pennsylvania, protests the issuance of a purchase order to General Aviation Industries (GAI), of Weatherford, Texas, under request for quotations (RFQ) No. N00164-11-T-0084, issued by the Department of the Navy for aircraft tow bars. The protester contends that during a recent re-evaluation of quotations (undertaken by the agency as corrective action in response to the firm's earlier protest of the agency's initial selection of GAI for the purchase order), the agency unreasonably evaluated GAI's past performance; the protester contends that GAI, which has not previously manufactured the required item, lacks similar past performance experience to justify the favorable past performance rating its quotation received. United Terex also challenges as unreasonable the agency's price/past performance tradeoff in which the agency determined that GAI's substantially lower-priced quotation represented the best value to the agency; the protester contends that, since only United Terex has previously manufactured the

exact tow bars that are required here, its quotation presented the best value to the agency despite its approximately 50-percent higher price. United Terex also requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its prior protest concerning the agency's initial selection of GAI as the successful vendor under the RFQ.

We deny the protest and the request for costs.

BACKGROUND

The RFQ, a set-aside procurement for small businesses, was issued on February 17, 2011, requesting quotations for a fixed-price purchase order for 20 "ALBAR" aircraft tow bars; the solicitation materials included a complete technical data package (TDP) with drawings and specifications for the manufacture of the tow bars.¹ The RFQ, which provided for simplified acquisition procedures set out in Federal Acquisition Regulation (FAR) Part 13, did not require the submission of technical quotations or first article testing samples (although the RFQ advised that the agency reserved the right to inspect and/or test the items upon delivery).² RFQ at 3, 12. The RFQ also provided that where the vendor had not previously manufactured the required tow bar, inspection and acceptance would be conducted by the Defense Contract Management Agency. *Id.* at 4.

¹ The tow bars are used to move aircraft on the decks of aircraft carriers.

² The agency reports that, in accordance with FAR Part 13 and agency guidelines, it conducted the procurement under simplified acquisition procedures to maximize competition, improve opportunities for small businesses, and obtain alternate sources, in light of the agency's detailed TDP for the item (which was considered to be complete and lacking unique specifications). Agency Report (AR) at 4-5. In this regard, the record reflects the agency had concluded that experienced machine shop vendors, ones that had successfully performed contracts for similar equipment, including large metal stress and load-bearing equipment, would be able to manufacture the current ALBAR on a "build-to-print" basis. *Id.* While the agency's two most recent procurements of the ALBAR tow bar required here were obtained on a sole-source basis from United Terex (apparently based upon, at least in part, the protester's representations to the agency that the item was unsuitable for competition and that only United Terex had successfully manufactured the item) upon further review of a request that the current requirement be met by a sole-source purchase order to the protester, the agency determined no basis for a sole-source award existed, since United Terex was not the only approved source for the tow bar (which has no source qualification requirement) or for the ALBAR's required wheel assembly (for which there are six approved sources). The agency thus determined to issue the requirement as a competitive procurement.

As to the evaluation of quotations for selection, the RFQ anticipated the use of two evaluation factors, price and past performance (with past performance being significantly more important than price). For the purpose of evaluating past performance, vendors were instructed to submit references from a minimum of three government/state/local agencies where the vendor had provided “same/similar equipment.” Id. at 4.

The agency received five quotations in response to the RFQ (two of which were eliminated from the competition for exceeding the simplified acquisition dollar threshold); of the remaining three vendors, United Terex quoted a price of \$149,200, and GAI quoted a price of \$99,420 (the third quoter’s price was lower than the protester’s and higher than GAI’s). United Terex, which has manufactured the exact item required here, was credited for that experience and its quotation was rated as “favorable” for past performance.³ GAI, which has not yet manufactured the ALBAR tow bar, was credited for the firm’s successful performance of contracts regarding similar equipment, including other large metal stress and load-bearing assemblies and aircraft ground equipment, some of which required the same, or at least similar, machine shop processes and build-to-print work, and consistently favorable responses from past performance references contacted by the agency. The GAI quotation was rated as favorable for past performance. AR, Tab 3A, Simplified Acquisition Documentation Record, at 3-4.

After consideration of the relative merits of the quotations, the source selection authority determined that, although United Terex had more directly relevant past performance experience, as it had previously manufactured the required ALBAR tow bars, given the level of GAI’s technical competence shown by its favorable past performance evaluation, the approximate 50-percent price premium associated with the selection of United Terex for a purchase order under the RFQ was not warranted. Id. at 10. The agency, having determined that GAI’s quotation presented the best value, selected GAI as the successful vendor and issued a purchase order for the current ALBAR tow bar requirement to the firm.⁴ This protest followed.⁵

³ In evaluating past performance, the record reflects that the agency used the following adjectival rating scheme: favorable, neither favorable or unfavorable, and unfavorable.

⁴ This protest (B-405070.4) involves the agency’s re-evaluation of quotations after the agency decided to take corrective action in response to a prior protest (B-405070, B-405070.2, dismissed by our Office as academic on June 8, 2011) filed by United Terex challenging the agency’s initial selection of GAI under the RFQ.

⁵ The protester also challenges the award arguing that GAI quoted an unreasonably low price. Since the solicitation provided for vendors to submit fixed-prices, and there is no prohibition against an agency issuing a purchase order based on a below-cost quotation, the allegation that GAI submitted a below-cost quotation does not
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DISCUSSION

Past Performance

United Terex challenges the agency's past performance evaluation, contending that, since GAI has not yet manufactured the precise item required here, or other aircraft tow bars for use aboard aircraft carriers, it was unreasonable for the agency to determine that GAI had "favorable" past performance concerning "similar" equipment. The evaluation of past performance is a matter within the discretion of the contracting agency, which our Office will review only to ensure that the agency's judgment was reasonable and consistent with the solicitation criteria and applicable statutes and regulations. Sterling Servs., Inc., B-286326, Dec. 11, 2000, 2000 CPD ¶ 208 at 2-3. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals or quotations does not establish that the evaluation was unreasonable. Champion Serv. Corp., B-284116, Feb. 22, 2000, 2000 CPD ¶ 28 at 4. As discussed below, the record provides no basis to object to the evaluation of GAI's past performance.

As an initial matter, to the extent United Terex suggests that the RFQ required only ALBAR or other aircraft carrier tow bar experience, we disagree. As noted above, the solicitation merely provided that the agency would consider vendors' prior contracts for the provision of the same or similar equipment. The RFQ did not state how similarity would be determined or measured nor did it state that a firm's experience with the same equipment would be considered materially more important than a firm's experience with similar equipment. Given the general wording of the RFQ's past performance evaluation criterion, there is no basis for the type of stringent evaluation advanced by the protester. See JXM Inc., B-401641.2, Feb. 23, 2010, 2010 CPD ¶ 56 at 3 (where RFQ does not define with any specificity how the

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constitute a valid basis of protest. See Shel-Ken Properties, Inc.; McSwain and Assocs., Inc., B-261443, B-261443.2, Sept. 18, 1995, 95-2 CPD ¶ 139 at 3. To the extent the protester questions GAI's ability to perform the contract at its quoted price, that allegation concerns GAI's responsibility, a matter which our Office will review only in limited circumstances (where it is alleged a definitive responsibility criterion has not been met, or where a protester identifies evidence raising serious concerns that the agency failed to consider available relevant information or otherwise violated statute or regulation) not present here. 4 C.F.R. § 21.5(c) (2011). The RFQ contained past performance evaluation terms, not definitive responsibility criteria; further, the protester has not shown the agency failed to consider information United Terex provided regarding terminated ALBAR procurements that, the agency points out, did not, in any event, involve GAI.

relevance of past performance information will be evaluated, the agency has a wide degree of discretion in its evaluation).

The record reflects, as noted above, that the agency gave United Terex credit for the firm's successful performance of recent orders for the same ALBAR tow bars required under the solicitation and, based on this review, assigned United Terex a favorable past performance rating. Unlike United Terex, GAI had not manufactured the ALBAR tow bars; thus, the agency reviewed past performance information it obtained for GAI regarding past and current contracts, which the agency deemed to be for similar equipment. In assessing the similarity of GAI's references, the record reflects that the agency reviewed the type of work performed to determine if the end items were manufactured in a manner similar to the solicited tow bars, including build-to-print projects and those using similar skills and materials. AR, Tab 3A, Simplified Acquisition Record, at 8.

More specifically, our review of the record confirms that the agency obtained and considered performance information for GAI concerning 14 prior projects, including projects providing various aircraft ground support equipment, including other large metal stress and load-bearing equipment (such as aircraft maintenance platforms, slings, trailers and dollies) which, in the agency's judgment, involved the firm's extensive machine shop experience with the same or similar manufacturing processes needed to perform the requirements of this solicitation. Id. at 3-5. The agency's review noted that GAI had successfully provided other types of tow bars and tow bar components in the past, and the firm was reported by past performance references to have met, and often exceeded, contract requirements, including projects involving build-to-print work. Id. GAI was reported to have delivered items of good quality, and to have done so in a timely fashion [deleted]; each past performance reference confirmed it would work with GAI again. The record also reflects that GAI had confirmed its familiarity and experience working with related materials (such as extruded aluminum alloy) and machine shop processes for stress and load-bearing aircraft ground support equipment, and received consistently favorable past performance reference reports (not only in terms of overall successful performance of work, but also in terms of the quality of the items delivered and high levels of customer satisfaction achieved). Id. at 3-5, 8. Concluding that GAI had "successfully delivered similar items, utilizing the same manufacturing processes with the same materials required for this requirement," the agency also assigned GAI a favorable past performance rating. Id. at 8.

Throughout its protest, United Terex expresses its disagreement with the agency's conclusion that GAI's past performance was "similar" and argues that there was no basis to reasonably conclude that GAI would be able to manufacture the tow bars on a build-to-print basis from the detailed TDP. In this regard, the protester generally contends that manufacturing ALBAR tow bars, including working with extruded aluminum alloy materials, is more complex than manufacturing the other aircraft ground support equipment provided by GAI. Thus, in the protester's estimation, it was unreasonable for the agency to have concluded that GAI's past performance was

similar to the ALBAR requirement. As noted above, the agency specifically considered all the past performance information provided for GAI and concluded that the information demonstrated similar and favorable past performance. While the protester may ultimately disagree with the agency's analysis regarding the similarity of GAI's past performance information, such disagreement with the agency's fully documented considered judgments and exercise of discretion in evaluating GAI's past performance information does not provide a basis for our Office to conclude that the agency's evaluation was unreasonable. See *Champion Serv. Corp.*, B-284116, *supra*.

Best Value Decision

The protester also challenges the reasonableness of the agency's tradeoff determination in which the source selection authority concluded that, despite the protester's more directly relevant experience manufacturing the precise item required here, given the level of GAI's technical competence to manufacture the item, as demonstrated by the information revealed and considered during the firm's past performance evaluation, the payment of the substantial price premium associated with the selection of United Terex is not warranted. It is well-settled that, even where price is the least important evaluation factor, an agency properly may award a contract to even a lower technically rated firm where it reasonably concludes that the price premium involved in selecting the higher-rated quotation is not justified in light of the acceptable level of technical competence available at a lower price. See *General Dynamics--Ordnance & Tactical Sys.*, B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 8. Here, the record shows that the source selection authority reviewed the past performance evaluation record, recognized past performance was more important an evaluation factor than price, and that United Terex's quotation demonstrated more directly relevant past performance experience (with the same equipment) as compared with GAI's quotation (which showed experience with similar equipment). The source selection authority, however, concluded that the payment of a 50-percent price premium for United Terex to do the work, was not justified. We see no basis to object to this determination. See *FN Mfg., LLC*, B-402059.4, B-402059.5, Mar. 22, 2010, 2010 CPD ¶ 104 at 15.

Request for Entitlement to Costs

As a final matter, United Terex requests that we recommend it be reimbursed its costs of pursuing its earlier protests (B-405070 and B-405070.2), which were dismissed as academic after the agency advised our Office that it was taking corrective action. We will recommend the reimbursement of protest costs where an agency takes corrective action in response to a protest only where the agency unduly delayed taking such action in the face of a clearly meritorious protest. See *Information Ventures, Inc.--Costs*, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234 at 2. Here, the agency took prompt corrective action, prior to the due date for its report in response to the protest; additionally, since deciding the protest would have required

development of the protest record and further legal analysis, there is no basis to conclude the protest was clearly meritorious. See The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3.

The protest and request for costs are denied.

Lynn H. Gibson
General Counsel