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Decision

Matter of: AHTNA Logistics, LLC

File: B-420677; B-420677.2

Date: June 30, 2022

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Jonathan L. Kang, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the evaluation of the awardee's proposal and the conduct of discussions with the protester is dismissed where the protester's arguments do not establish that its proposal would be next in line for award ahead of a third offeror whose proposal offered a lower price and was more highly rated under the non-price factors as compared to the protester's proposal.

DECISION

Ahtna Logistics, LLC, of Anchorage Alaska, protests the award of a contract to Akima Infrastructure Protection, LLC (AIP), of Herndon, Virginia, by the Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), under request for proposals (RFP) No. 70CDCR21R00000007, for comprehensive detention services at the Port Isabel Detention Center (PIDC), in Los Fresnos, Texas. The protester argues that the agency unreasonably evaluated the awardee's technical proposal, past performance, and price; conducted misleading discussion with the protester; and made an unreasonable award decision.

We dismiss the protest because Ahtna is not an interested party to challenge the award to AIP.

BACKGROUND

ICE issued the solicitation on August 21, 2021, seeking proposals to “operate the government-owned detention facility, PIDC, to house detainees, both male and female, on a twenty-four (24) hours per day, seven (7) days per week, 365 days per year basis.” Agency Report (AR), Tab 3, Performance Work Statement (PWS) at 9.¹ The competition was limited to participants in the Small Business Administration’s 8(a) program.² AR, Tab 2, RFP at 59.

As relevant here, the solicitation provided that proposals would be evaluated based on the following five factors, listed in descending order of importance: (1) technical capability/management approach; (2) staffing plan and procedures; (3) transition plan; (4) past performance; and (5) price. *Id.* at 92. For purposes of award, the non-price factors were “significantly more important” than price. *Id.* at 95.

The agency received proposals from three offerors by the closing date for receipt of proposals of October 1: Ahtna, AIP, and a third offeror (Offeror 3). Contracting Officer’s Statement (COS) at 8. The agency evaluated proposals as follows:

	AHTNA	AIP	OFFEROR 3
Technical Capability/ Management Approach	High Confidence	High Confidence	High Confidence
Staffing Plan and Procedures	High Confidence	High Confidence	High Confidence
Transition Plan	High Confidence	High Confidence	High Confidence
Past Performance	High Confidence	High Confidence	High Confidence
Price	\$245,744,501	\$210,968,921	\$222,161,480

AR, Tab 67, Source Selection Decision Document (SSDD) at 12.

The contracting officer, who was also the source selection authority (SSA), concluded that AIP’s proposal offered “superior solution/approach and merits a higher price,” but also that AIP “offer[ed] the lowest price.” *Id.* at 25. Based on these findings, the contracting officer selected AIP’s proposal for award. *Id.* at 25-26.

¹ Citations to the agency report and to the parties’ briefings are to the Adobe PDF pages for those documents.

² Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation 19.800. This program is commonly referred to as the 8(a) Business Development program (or simply “8(a) program”).

On April 11, 2022, Ahtna filed a protest with our Office raising the following four primary challenges to the award to AIP: (1) the awardee's proposal should have been found unacceptable under each of the evaluation factors, and therefore ineligible for award; (2) the agency engaged in misleading and disparate discussions with Ahtna regarding price; (3) the agency treated Ahtna and AIP disparately and relaxed solicitation requirements for AIP; and (4) the agency's award decision was unreasonable because it was based on a flawed evaluation, failed to explain why Ahtna's proposal did not warrant a price premium, and failed to look behind the evaluation ratings. Protest at 8-30.

ICE filed its report responding to the protest on May 11. In addition to addressing the merits of the protester's arguments, the agency also requested that we dismiss the protest, arguing that even if the protester's arguments regarding the evaluation of AIP's proposal had merit, Offeror 3, and not Ahtna, would be next in line for award. Agency Memorandum of Law (MOL) at 8-10. In support of its request, the agency argued that the record showed that Offeror 3's proposal was rated more highly than the protester's under the non-price factors, and that Offeror 3's price was lower than the protester's price. *Id.* at 9-10.

The protester and intervenor filed comments on the agency report on May 23. Both parties addressed the agency's request for dismissal of the protest based on Ahtna's interested party status. Ahtna also raised two supplemental protest grounds concerning the evaluation of the awardee's proposal: (1) the agency unreasonably found that AIP's price for contract line item No. X002 was fair and reasonable; and (2) the awardee's proposal failed to meet a material requirement for key personnel, and should have been found unacceptable and ineligible for award. Comments & Supp. Protest at 37-39.

On May 24, our Office instructed the protester to address additional questions from our Office regarding its status as an interested party. Electronic Protest Docket System, (Dkt.) 24. On May 31, we instructed the agency to address additional questions, and provided the protester and intervenor an opportunity to comment. Dkt. 26.

DISCUSSION

ICE requests that we dismiss the protest because Ahtna is not an interested party to challenge the award to AIP. For the reasons discussed below, we agree and dismiss the protest.

As a general matter, under the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3557, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 31 U.S.C. § 3551(2); 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011,

2011 CPD ¶ 211 at 2. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. *Id.* A protester is an interested party to challenge the agency's evaluation of proposals where there is a reasonable possibility that the protester would be next in line for award if its protest were sustained. *SRA Int'l, Inc.; NTT Data Servs. Fed. Gov't, Inc.*, B-413220.4 *et al.*, May 19, 2017, 2017 CPD ¶ 173 at 28; *Ridoc Enter., Inc.*, B-292962.4, July 6, 2004, 2004 CPD ¶ 169 at 9. In this regard, where there is an intervening offeror who would be in line for the award even if the protester's challenges were sustained, the intervening offeror has a greater interest in the procurement than the protester, and we generally consider the protester's interest to be too remote to qualify it as an interested party. See *SRA Int'l, Inc.; NTT Data Servs. Fed. Gov't, Inc.*, *supra*.

Here, ICE notes that Offeror 3's proposal was assigned the same adjectival ratings for the non-price factors as AIP and Ahtna, and was second in price--higher than AIP but lower than Ahtna. MOL at 8-10. The agency's tradeoff analysis identified advantages in AIP's proposal for the technical capability/management approach and the staffing plan and procedures evaluation factors. AR, Tab 67, SSDD at 25. Similarly, the SSA identified advantages in Offeror 3's proposal for the technical capability/management approach evaluation factor, but the agency identified no advantages for Ahtna's proposal under any of the evaluation factors. *Id.*

In this regard, the SSDD stated that for technical capability/management approach, which was the most heavily weighed factor, "AIP and [Offeror 3] offered superior ability and benefits of successful contract performance that would merit a higher price." *Id.* Specifically, the SSDD stated that AIP's and Offeror 3's proposals "offered the detainee management tracking system," and that AIP is also offering the compliance and operations system which both warrant a higher price." *Id.* For staffing plan and procedures evaluation, which was the second most heavily weighted evaluation factor, the agency found that "AIP was considered to have offered superior ability and benefits of successful contract performance that merits a higher price." *Id.* For the remaining two evaluation factors, transition plan and past performance, the agency found "no superior solution/approach, as determined by the evaluation factors, merited a higher price from any of the offerors." *Id.*

In response to the protest, the contracting officer states that Offeror 3's proposal was superior to Ahtna's proposal under the non-price factors for purposes of the best-value tradeoff, and that Offeror 3 would have been selected as the best value based on this advantage and its lower proposed price. The contracting officer asserts:

Based on the overall assessment of all factors, the third offeror did have one part of their proposal that warranted a higher price in Factor 1. However, AIP's other benefits made them the superior proposal. Ahtna did not have any parts of their proposal that warranted a higher price.

Therefore, but for AIP, the third offeror would have been determined the best value to the Government.

COS at 21.

In its comments on the agency report, and in response to questions from our Office, Ahtna argues that it is an interested party to challenge the award to AIP. First, the protester contends the agency's argument that AIP would be in line for award ahead of Ahtna is an improper *post-hoc* position that is not reflected in the contemporaneous record. Our Office generally accords lesser weight to post-hoc arguments or analyses made in response to protest allegations because we are concerned that new judgments made in the heat of an adversarial process may not represent the fair and considered judgment of the agency. *Wolff & Mueller Gov. Servs. GmbH & Co. KG*, B-419181, B-419181.2, Dec. 28, 2020, 2021 CPD ¶ 12 at 4. In contrast, we will consider agencies' explanations that provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. *Native Energy & Tech., Inc.*, B-416783 *et al.*, Dec. 13, 2018, 2019 CPD ¶ 89 at 4.

The protester contends that the contemporaneous record, including the SSDD, does not state that Offeror 3 was ranked ahead of Ahtna under the non-price factors. Comments & Supp. Protest at 4. Specifically, the protester argues that the SSDD "does not contain any direct comparison between Ahtna Logistics and the third offeror demonstrating the Agency found the third offeror's proposal to be superior to that of Ahtna Logistics' proposal--let alone that the third offeror would have been the best value to the Agency." *Id.* The protester further contends that "[t]he only evidence the Agency cites to in support of its argument that the third offeror would allegedly be next in line, is a *post hoc* statement in the Contracting Officer's Statement of Facts." *Id.*; see also Protester's Response to GAO Questions at 4.

As discussed above, the contemporaneous record shows that the agency conducted a tradeoff analysis that considered the proposals of AIP, Ahtna, and Offeror 3. AR, Tab 67, SSDD at 24-25. The agency identified specific strengths for the proposals of AIP and Offeror 3 under the most heavily-weighted evaluation factor (technical capability/management approach) regarding their respective proposals to provide a detainee management tracking system. *Id.* at 25. In contrast, the agency did not identify any features of Ahtna's proposal that showed merit for purposes of the best-value tradeoff. *Id.* Thus, contrary to the protester's argument, we find that the contemporaneous record clearly shows that the agency compared the offerors' proposals and found both AIP and Offeror 3's proposals to be superior to Ahtna's under the non-price factors.³

³ Ahtna also argues that our Office should not find that Offeror 3's proposal is in line for award ahead of the protester's proposal, because the agency has not disclosed the identity of that offeror. Protester's Response to GAO Questions at 4. The agency,

Next, Ahtna notes that it has identified what it contends are errors in the evaluation of AIP's proposal, and generally contends that "[t]here's every reason to believe these errors permeated the evaluation of" Offeror 3. Comments & Supp. Protest at 4. The protester contends, therefore, that it has raised challenges regarding Offeror 3 that, if meritorious, would place it in line for award.

Ahtna's initial challenges argued that AIP's price, which was lower than the protester's, reflected a lack of understanding of or deviation from the solicitation requirements. See Protest at 7-14, 25-26. The protester's comments and supplemental protest similarly focused on specific alleged defects in the awardee's proposal and agency's failure to evaluate them. See Comments & Supp. Protest at 5-29, 30-35, 37-39. Ahtna does not explain, however, why the protester's arguments concerning the awardee's proposal demonstrate that the agency unreasonably evaluated Offeror 3's proposal. For example, the protester does not challenge the specific basis on which the agency found Offeror 3's proposal to offer advantages under the technical capability/management approach factor that were not offered by Ahtna's proposal. See AR, Tab 67, SSDD at 25. We therefore see no basis to conclude that the protester's arguments regarding the evaluation of AIP's proposal provide a basis to conclude that the protester has filed a protest challenging the agency's evaluation of Offeror 3's proposal. See 4 C.F.R. § 21.5(f) (protests that fail to clearly state legally sufficient grounds of protest will be dismissed).

Next, Ahtna argues that although Offeror 3 proposed a lower price as compared to the protester, the protester's arguments concerning discussions establish that it would have lowered its price below that of Offeror 3. Protester's Response to GAO Questions at 9-10. Ahtna initially argues that the agency misled the protester into increasing its proposed price of \$222,859,412, to \$249,215,450. Protest at 18. The protester contends that the agency's discussions were misleading and unequal, and that the agency should not have induced the protester to increase its price. See *id.* Similarly the protester's comments argue that there was no basis for the agency to direct the protester to increase its price. See Comments & Supp. Protest at 29-30. The protester, however, did not argue in its protest or supplemental protest that it would have lowered its price during discussions below its initially proposed price of \$222,859,412, which is higher than that of Offeror 3, had the agency not misled it into raising its price. Protest at 16-19; Comments & Supp. Protest at 29-30. Ahtna only raises this argument, for the first time, in response to questions from our Office concerning the protester's interested

however, provided an award decision that explained the tradeoffs between the three offerors' proposals, including the strengths that differentiated them. AR, Tab 67, SSDD at 24-25. The only redactions to this relevant information was the name of Offeror 3. In light of the otherwise detailed tradeoff decision provided by the agency, and the manner in which the agency compared proposals, we think that the information provided was sufficient to inform the protester of the basis on which the agency argues that it was not an interested party.

party status. As our Bid Protest Regulations provide, a protester must “[s]et forth all information establishing that the protester is an interested party for the purpose of filing a protest.” 4 C.F.R. § 21.1(c)(5).

To the extent the protester now seeks to raise a different or alternative argument regarding why it believes the agency’s discussions were improperly, such an argument is untimely because it was not raised within 10 days of when the protester knew or should have known of its basis.⁴ See 4 C.F.R. § 21.2(a)(2). Moreover, our regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific legal arguments missing from earlier general allegations of impropriety. *CapRock Gov’t Sols., Inc.; ARTEL, Inc.; Segovia, Inc.*, B-402490 *et al.*, May 11, 2010, 2010 CPD ¶ 124 at 24. For these reasons, we conclude that even if the protester’s arguments that the agency misled it into raising its proposed price had merit, the protester does not establish that it could have been prejudiced because its initially-proposed price of \$222,859,412 was higher than Offeror 3’s price of \$222,161,480.

Finally, Ahtna also notes that the debriefing provided by the agency stated: “No ranking was developed by ICE during the source selection.” AR, Tab 69, Ahtna Debriefing at 1. The protester contends that this statement shows that the agency did not rank proposals for purposes of award, and that there is no basis to conclude that Offeror 3’s proposal should be considered in line for award ahead of Ahtna’s proposal. As discussed above, we agree with the agency that the record clearly shows that ICE found Offeror 3’s technical proposal to be superior to Ahtna’s proposal. See AR, Tab 67, SSDD at 24-25. We, again, find that the protester’s arguments do not challenge the fact that Offeror 3’s proposed price was lower than Ahtna’s initial price, prior to discussions. For these reasons, we agree with the agency that the contemporaneous record does not show that the protester’s proposal would be in line for award--even if we were to find merit to the protester’s challenges to the evaluation of AIP’s proposal. We, therefore, conclude that Ahtna is not an interested party to challenge the award to AIP. See *SRA Int’l, Inc.; NTT Data Servs. Fed. Gov’t, Inc.*, *supra*.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

⁴ In this regard, we note that the protester does not specifically request that our Office recommend that the agency reopen discussions; rather the protester requests that we recommend that the agency reevaluate proposals consistent with the solicitation and make a new award decision. See Protest at 30-31; Comments & Supp. Protest at 40-41.