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Decision

Matter of: PricewaterhouseCoopers Public Sector LLP

File: B-415129.3

Date: July 31, 2018

Tina D. Reynolds, Esq., Sandeep Nandivada, Esq., and Cynthia Akatugba, Esq., Morrison & Foerster LLP, for the protester.

Jonathan M. Baker, Esq., Daniel R. Forman, Esq., James G. Peyster, Esq., Christian N. Curran, Esq., and Hart W. Wood, Esq., Crowell & Moring LLP, for KPMG LLP, the intervenor.

Robyn Littman, Esq., and Douglas Kornreich, Esq., Department of Health and Human Services, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the agency failed to perform a price realism evaluation and failed to consider the technical risks resulting from the awardee's low price is dismissed, where the solicitation did not obligate the agency to perform a price realism evaluation.
 2. Protest asserting that the agency failed to meaningfully consider both the awardee's alleged adverse past performance and its alleged organizational conflict of interest is dismissed where the allegations do not rise above the level of inference or speculation.
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DECISION

PricewaterhouseCoopers Public Sector LLP (PWC), of McLean, Virginia, protests the issuance of a task order to KPMG LLP, of McLean, Virginia, under request for quotations (RFQ) No. 170836, issued by the Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS), for procurement integrity and financial oversight services. The protester contends that the agency failed to conduct a price realism analysis, improperly evaluated KPMG's quotation under the non-price factors, failed to meaningfully consider whether the awardee has an organizational conflict of interest (OCI), and conducted a flawed best-value tradeoff determination.

We dismiss the protest.

BACKGROUND

On April 17, 2017, HHS issued the RFQ to General Services Administration's Financial and Business Solutions Federal Supply schedule holders for procurement integrity and financial oversight services in support of CMS's Center for Consumer Information and Insurance Oversight, Payment Policy and Financial Management Group. The solicitation anticipated the issuance of a time-and-materials task order with a base year and two 1-year option periods. RFQ at 1. The RFQ contemplated award on the basis of a best-value tradeoff considering price and the following four non-price factors, listed in descending order of importance: (1) technical understanding and approach; (2) management plan, quality assurance, and staffing plan; (3) personnel qualifications and corporate experience; and (4) past performance. Id. at 12. The non-price factors, when combined, were significantly more important than price. Id.

On April 6, 2018, PWC submitted a final revised quotation in response to the solicitation that quoted a total price \$15,313,087. Protest at 3. On May 22, HHS notified PWC that it had issued the task order to KPMG. Protest, Ex. 13, Award Notice, at 1. The award notice stated that the total task order value was \$10,684,790. Id. The notice explained that KPMG was "rated technically equal to" PWC, and was found to represent the best value to the government. Id.

On May 25, PWC received a written explanation for the basis of award containing further information on the evaluation of its quotation. On June 1, PWC filed this protest with our Office.

DISCUSSION

PWC contends that the solicitation contemplated a price realism analysis to assess whether vendors had an adequate understanding of the requirements, but HHS failed to conduct such an assessment. In support of this assertion, the protester notes that the solicitation stated that the agency would consider "[t]he level of effort, amount of labor, and other costs quoted" when evaluating "whether the total price is reasonable." RFQ at 15. PWC further notes that the technical evaluation criteria anticipated the evaluation of the proposed level of effort, labor mix, and innovativeness of each vendor's solution.

While an agency may conduct a price realism analysis in awarding a fixed-price or time-and-materials contract for the limited purposes of assessing whether an offeror or vendor's low price reflects a lack of technical understanding or risk, vendors or offerors must be advised that the agency will conduct such an analysis. See Pricewaterhouse Coopers LLP; IBM U.S. Fed., B-409885 et al., Sept. 5, 2014, 2014 CPD ¶ 289 at 16 n.13. In the absence of an express price realism provision, we will conclude that a solicitation contemplates a price realism evaluation only where the solicitation expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and where the solicitation states that a quotation can be rejected for offering low prices. IBM U.S. Fed., a Div. of IBM Corp.;

Presidio Networked Solutions, Inc., B-409806 et al., Aug. 15, 2014, 2014 CPD ¶ 241 at 17. Absent such a solicitation provision, agencies are neither required nor permitted to evaluate price realism in awarding a fixed-price or time-and-materials contract. Id.

Here, reasonably read, the solicitation did not contain a provision advising vendors that the agency would conduct a price realism assessment. While the protester notes language stating that the level of effort would be considered within the context of the agency's price reasonableness and technical evaluations, such considerations are fundamentally distinct from a price realism evaluation, which considers whether prices are so low as to reflect a lack of technical understanding. In addition, we note that the RFQ did not advise vendors that a quotation could be rejected for offering low prices. Accordingly, we conclude that the solicitation neither required, nor permitted, the agency to conduct a price realism assessment. See DKW Commc'ns, Inc., B-411853.2 et al., Jan. 8, 2016, 2016 CPD ¶ 17 at 3-4 (concluding that solicitation references to the evaluation of the level of effort and labor mix did not envision an evaluation of price realism).

The protester relatedly contends that HHS unreasonably evaluated KPMG under three of the technical evaluation factors, because KPMG's low price indicates that its approach for these factors was inadequate. Here, we find that although these challenges are styled as challenges to the agency's technical evaluation, they are, in actuality, price realism arguments, i.e., arguments that the agency should have assessed technical risks based on the awardee's unrealistically low price. See NJVC, LLC, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 8 (noting that an allegation that the agency failed to consider the awardee's low price as part of the agency's technical analysis is an allegation that the agency failed to conduct a price realism analysis). As noted above, however, the solicitation did not provide for a price realism assessment. The solicitation also did not require the agency to consider a vendor's price in the agency's technical evaluation. Accordingly, we find that these arguments lack a valid basis of protest and are dismissed. See 4 C.F.R. § 21.1(f) and (i).

For the remainder of PWC's protest grounds, we find the arguments alleged by the protester to be legally insufficient. In this regard, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(c)(4) and (f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Pacific Photocopy & Research Servs., B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4. Where a protester relies on bare assertion, without further supporting details or evidence, our Office will find that the protest ground essentially amounts to no more than speculation and does not meet the standard contemplated by our Regulations for a legally sufficient protest. enrGies, Inc., B-408609.9, May 21, 2014, 2014 CPD ¶ 158 at 6.

PWC contends that the agency erred in assigning KPMG an excellent past performance rating because another agency, the Social Security Administration (SSA), chose to forgo the last two option periods of its contract with KPMG and instead resolicited its requirement. According to the protester, the SSA's decision not to exercise the contract option "is a strong indicator that KPMG had performed subpar work under the SSA contract." Protest at 14. We do not agree. In our view, the simple fact that the SSA failed to exercise an option under KPMG's contract, without more, does not provide a sufficient factual basis for the protester's assertion that KPMG performed poorly under that contract and that another agency, HHS, erred in failing to consider this poor performance. An agency's decision not to exercise an option is a discretionary one, cf. InGenesis, Inc., B-412101.2, Mar. 28, 2016, 2016 CPD ¶ 102 at 5, and an agency may choose not to exercise an option for reasons unrelated to poor performance. Here, the protester has not provided a sufficient basis for its assumption that the SSA's failure to exercise the relevant option was related to KPMG's poor performance. Indeed, the protester has provided no specific information regarding the quality of KPMG's performance under the SSA contract. In sum, we find these assertions to be too tenuous to give rise to a viable protest ground.

Finally, PWC contends that, based on its understanding, KPMG has an impaired objectivity OCI, which the agency failed to meaningfully consider. An "impaired objectivity" OCI arises when a contractor's judgment and objectivity in performing a contract's requirements may be impaired due to the fact that the substance of the contractor's performance has the potential to affect other interests of the contractor. Alion Sci. & Tech. Corp., B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 at 6. In support of its allegation, the protester asserts that KPMG has a current business advisory relationship with a contractor that KPMG, as the awardee for the current requirement, will be tasked with reviewing.

The Federal Acquisition Regulation (FAR) requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505. When asserting an OCI, a protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. Arrington Dixon & Assocs., Inc., B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 5 n.4.

Here, we find that the protester has not identified any hard facts indicating the existence or potential existence of a conflict of interest. In this regard, while PWC alleges that KPMG has a current business relationship with a contractor it would be tasked with reviewing under the instant requirement, the protester has failed to provide any specific facts or allegations supporting this assertion or detailing the nature of the alleged

business relationship.¹ The protester has also not provided information regarding the source of this allegation, other than to generally assert it is based on PWC's understanding. In light of the absence of such information, we conclude that this bare allegation does not provide the "hard facts" required under our standard. Arrington Dixon & Assocs., Inc., supra.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

¹ KPMG, for its part, submitted a declaration from a partner in its federal advisory practice denying that the identified contractor is a current client of KPMG, and asserting that KPMG has not received revenue from the contractor since fiscal year 2015.