



Decision

Matter of: Buffalo Computer Graphics, Inc.

File: B-416244

Date: July 17, 2018

Kevin Williams, Buffalo Computer Graphics, for the protester.
Gabriel D. Soll, Esq., and William H. Butterfield, Esq., Department of Homeland Security, for the agency.
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DIGEST

1. Protest that agency ignored awardee's proposed prices that were allegedly too low is dismissed where solicitation for fixed-price contract did not provide for price realism assessment, and therefore protest allegations did not state a valid basis of protest.
 2. Protest that solicitation created unfair competition where under earlier canceled solicitation protester's price had been released to competitors is dismissed as untimely where protest was filed after award of new contract, rather than before the closing date for submission of proposals.
 3. Protest that agency misevaluated proposals is denied where evaluation was reasonable and consistent with evaluation criteria in solicitation.
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DECISION

Buffalo Computer Graphics, Inc., of Blasdell, New York, a small business, protests the award of a contract to NAVSIM Services, Inc., of Buffalo, New York, also a small business, under request for proposals (RFP) No. 70Z02318RP0400100, issued by the Department of Homeland Security, United States Coast Guard (USCG), to supply one or more commercial ship's navigation simulators for the USCG Academy, in New London, Connecticut. Buffalo argues that the USCG improperly released its pricing information to competitors, misevaluated the firm's technical proposal, misevaluated all proposals under the price/cost factor, and misevaluated the awardee's proposal with respect to the limitations on subcontracting clause.

We dismiss the protest in part and deny it in part.

BACKGROUND

The protest concerns USCG's second effort to award a contract for the ship control and navigation training system (SCANTS) at issue here. The first was conducted under a different solicitation. Following the evaluation of proposals, USCG awarded a contract to Buffalo. After USCG announced the award, including the contract price, multiple competitors filed protests with the agency. In response, the agency took corrective action by canceling that contract and solicitation.¹

USCG then revised the solicitation as part of its corrective action, and issued the second RFP on January 17, 2018,² seeking proposals from eligible small businesses to supply up to five commercial off-the-shelf simulator systems under a single fixed-price indefinite-delivery, indefinite-quantity (IDIQ) contract. Consistent with the identification of the RFP as being set aside for small business, it incorporated by reference the clause at Federal Acquisition Regulation (FAR) § 52.219-14. RFP at 6, 31. That clause provides that the contractor agrees to perform a specified percentage (which depends on the classification of the contract³) of the cost of the contract using the contractor's own employees. Id.

The RFP described the requirements for the simulators in a PWS. At issue here, the PWS specified that the simulator include "two (bridge wing) 'active scene' alidades to enable 360 degree bearings." PWS at 6 (¶ 5.2). The PWS further specified that the alidades were to be "[s]tandard Navy-type pelorus/alidades with a stimulated independent viewfinder built-in display to enable plotting of bearing lines for navigation fixes and to ascertain bearing drift of contacts." Id. at 7 (¶ 5.2.5). An alidade is a piece of equipment used to plot a ship's course and get the geographic bearings of the ship to assist with navigation. AR at 3. As the agency explains, USCG personnel have to be able to move all around the alidade when getting measurements. Id.

The solicitation anticipated that award would be based on a best-value tradeoff among three factors, listed in descending order of importance: technical approach, past performance, and price. RFP at 51. Under the technical approach factor, the RFP identified four equally-weighted "areas of emphasis" that were expressly not subfactors:

¹ USCG explains that in reviewing those protests, it determined that the "price structure and evaluation process were flawed," which resulted in an invalid contract award. Agency Report (AR) at 2.

² The solicitation was amended three times. Citations to the RFP and performance work statement (PWS) in this decision are to the conformed amended versions provided in the agency report, issued as RFP amendment 3 on February 15.

³ The clause provides different standards for services that are not construction, for supplies (other than from a non-manufacturer), for general construction, and for special trade construction. FAR clause 52.219-14(c). The record is thus unclear about the type of contract at issue here.

overall technical approach, model fidelity, form/fit/function of design integration, and life-cycle maintenance. Id. at 49-50. The past performance factor is not at issue here. Price was to be evaluated by adding all base and optional line item prices. Id. at 53. The total price would then be assessed for reasonableness and for balance. Id.

Buffalo's proposal included a close-up photograph of a virtual bearing alidade mounted on a pelorus stand, and stated that the alidade "can be rotated 360 degrees." AR Tab 3, Buffalo Technical Proposal Excerpts, at 15. The proposal also included drawings of the base requirement SCANTS, which included a "plan view" (i.e., an overhead floorplan) and a 3-D view. Both drawings showed each virtual bearing alidade mounted to the bridge bulkhead; that is, on the inside wall of the bridge area. Id. at 24-25. For the four optional SCANTS, the corresponding drawings similarly showed essentially the same alidade mounting approach: each alidade appeared to be bracket-mounted to the bridge bulkhead or to a wall. Id. at 29, 31-32.

The evaluators identified Buffalo's approach to providing the alidades as inconsistent with the RFP requirement. In particular, mounting the alidades to a bulkhead or wall would make it difficult for a user to take a bearing over the full 360 degrees as the RFP specified. AR Tab 6, Pre-Negotiation Memorandum, at 13. The evaluators therefore assessed a significant weakness to Buffalo's technical approach. Considering the evaluation as a whole (which showed 12 strengths, 3 weaknesses, and one significant weakness), the evaluators rated Buffalo's overall technical approach as satisfactory. Id.

The final ratings and evaluated prices for Buffalo and NAVSIM were as follows:

Offeror	Technical Approach	Past Performance	Total Evaluated Price
Buffalo	Satisfactory	Superior	\$5.6 million
NAVSIM	Good	Superior	\$3.1 million

Id. at 9.

After reviewing the evaluation results, the contracting officer determined that NAVSIM's proposal provided the best value and selected it for award. After Buffalo was informed of the evaluation results and award decision, it filed the instant protest.

PROTEST

Buffalo raised numerous protest grounds. The protest arguments, in summary, are that the competition was unfair because upon awarding a contract to Buffalo under the first solicitation for SCANTS, USCG had revealed Buffalo's price to competitors, that USCG unreasonably assigned a significant weakness in evaluating Buffalo's proposal that was not identified in the earlier evaluation, that the RFP failed to include criteria for consideration of price realism, and that USCG failed to consider the failure of NAVSIM's

proposal to comply with the limitation on subcontracting clause.⁴ Protest at 2; Protester's Response to Dismissal Request at 1. We have reviewed all of Buffalo's arguments, and find that none has merit. We discuss the most significant arguments, beginning with two grounds that we dismiss.

First, Buffalo argues that the price evaluation should have included an assessment of price realism because NAVSIM opted to "buy into" the contract, and the agency failed to consider the risk posed by NAVSIM's price being "too low." Protest at 2. Arguments that an agency did not perform an appropriate analysis to determine whether an awardee's price was allegedly too low, such that it posed a risk of poor performance, raise concerns about price realism. SDV Sols., Inc., B-402309, Feb. 1, 2010, 2010 CPD ¶ 48 at 4. However, a price realism evaluation is not required where, as here, the solicitation provides for the award of a fixed-price contract and does not include a requirement for price realism. Id. Thus, Buffalo's assertion does not provide a valid basis for protest and is, accordingly, dismissed. 4 C.F.R. § 21.1(c)(4), (f).

Second, Buffalo argues that the competition was unfair because competitors in the first procurement learned its price. Protest at 2. We need not decide the issue because this ground of protest is untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that 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); see AmaTerra Envtl. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. Here, although Buffalo knew or should have known that its price under the earlier solicitation had been disclosed before it submitted a proposal, it did not raise this issue with our Office until after the award decision. As a result, this ground of protest is dismissed as untimely.

Buffalo's remaining arguments are that USCG unreasonably evaluated its allegations as a significant weakness, and overlooked whether NAVSIM will comply with the RFP's limitation on subcontracting clause. The record does not support either argument.

Buffalo argues that the assessment of the significant weakness in the evaluation of its proposal was unreasonable.⁵ The protester notes that its proposal included a

⁴ Buffalo withdrew an argument that NAVSIM failed to comply with Buy American Act requirements. Protester's Response to Dismissal Request at 2.

⁵ In part, Buffalo argues that the evaluation of its proposal under the earlier solicitation, which it argues had essentially the same specifications, did not identify any significant weaknesses or deficiencies, so the assessment of a weakness here was unreasonable. An agency may reach a different evaluation judgment from one it has reached under a
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photograph depicting the alidade on a pelorus stand, expressly labeled as such, and argues the evaluation of a significant weakness was thus invalid. Id. Buffalo also emphasizes that its proposal expressly described the alidades as being capable of 360 degree rotation, and capable of providing corresponding views over 360 degrees, as required by the RFP. Additionally, the firm argues that its proposal never described the alidades as being mounted on a bulkhead or having a restricted field of view.

USCG agrees that Buffalo's proposal showed an alidade on a pelorus stand, and stated that the alidade would provide 360 degree viewing, but argues that Buffalo's plan drawings of the SCANTS nevertheless showed that each alidade would be mounted against a bulkhead or wall, not on a free-standing pelorus stand. AR at 5. In each plan drawing, USCG argues, the design showed the alidade mounted to a wall or bulkhead, such that a student would be unable to move completely around the device to take bearings from all angles, as the RFP required. Id. Thus, even though Buffalo showed a photograph of an alidade on a pelorus stand, the proposal did not actually show a SCANTS design that used a pelorus stand--a free-standing mounting--for the alidades. Id. at 5-6. Given that departure from the RFP requirement, the USCG argues that the assessment of a significant weakness was reasonable. Id. at 6.

In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate the proposals or substitute our judgment for that of agency evaluators; rather, we review the record to determine whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria, as well as applicable statutes and regulations. Veterans Evaluation Servs., Inc. et al., B-412940 et al., July 13, 2016, 2016 CPD ¶ 185 at 6.

Our review of the record here supports the reasonableness of USCG's evaluation of Buffalo's proposal. As described above, both the plan (overhead) and 3-D drawings for each SCANTS design appear to show each of the alidades mounted on a shelf or bracket attached to the bulkhead or wall, rather than on a pelorus stand. Accordingly, the evaluation judgment that Buffalo's design did not meet the RFP requirement, and should be assessed a significant weakness, is supported by the record. In short, neither the photograph and description of a pelorus stand in Buffalo's proposal, nor its arguments in this protest, show that USCG's evaluation judgment was unreasonable. Accordingly, we deny this ground of protest.

Buffalo's final argument is that USCG overlooked NAVSIM's failure to comply with the limitation on subcontracting clause. Protest at 4. Buffalo argues that NAVSIM was

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different solicitation, so long as the evaluation being challenged is reasonable. Each procurement stands on its own, so evaluation ratings under a previous solicitation are not probative of the alleged unreasonableness of the evaluation ratings under the present RFP. Parmatic Filter Corp., B-285288, B-285288.2, Aug. 14, 2000, 2000 CPD ¶ 185 at 7.

founded by former employees of Buffalo, and that the firm lacks the staff or resources to perform the contract. Buffalo contends that NAVSIM instead proposed a subcontractor that Buffalo alleges has performed major portions of contracts while serving as an ostensible subcontractor. Email from Buffalo President to GAO, Apr. 26, 2018, at 1.

USCG counters that Buffalo's allegations are speculative, and that the record provides no basis for USCG to conclude that NAVSIM would not comply with the limitation on subcontracting clause. The agency contends that NAVSIM's proposal shows that the company will comply with the requirement. AR at 6-7.

An agency's judgment about whether an offeror will comply with the subcontracting limitation clause is a matter of responsibility, and the contractor's actual compliance is a matter of contract administration. Neither issue is one that our Office generally reviews. See 4 C.F.R. § 21.5(a), (c). However, as our Office has consistently explained, where a proposal, on its face, should lead an agency to conclude that an offeror has not agreed to comply with the subcontracting limitation, the matter concerns the proposal's acceptability. This is because the limitation on subcontracting is a material term of the solicitation, and a proposal that fails to conform to a material term or condition of a solicitation is unacceptable and may not form the basis for an award. Mainstream Eng'g Corp., Snowbird Envtl. Sys. Corp., B-415524 et al., Jan. 16, 2018, 2018 CPD ¶ 31 at 7.

Although Buffalo was not represented by counsel who could view proprietary and source-selection sensitive information under the terms of a GAO protective order, our review of the protest has included the full record, including portions of USCG's arguments describing its consideration of this issue, and portions of NAVSIM's proposal that could not be provided to the protester.

In addition, our review of the record supports USCG's judgment. First, NAVSIM's proposal expressly recognized the importance of complying with the requirements of the limitation on subcontracting clause. AR Tab 5, NAVSIM Proposal Excerpt, at 8. The proposal also identified the tasks that NAVSIM would perform, and those that the subcontractor would perform to show compliance with the limitation on subcontracting. Id. at 1. As a result, notwithstanding Buffalo's arguments, the record provides no basis to conclude that NAVSIM did not agree to comply with the limitation on subcontracting clause.

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel