



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Decision

Matter of: Crosstown Courier Service, Inc.

File: B-416261

Date: July 19, 2018

Joseph A. Camardo, Esq., Nancy M. Camardo, Esq. Justin T. Huffman, Esq., Camardo Law Firm, PC, for the protester.

Donald C. Mobly, Esq., Deborah K. Morrell, Esq., Department of Veterans Affairs, for the agency.

Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging terms of solicitation because they do not require labor cost breakdowns from vendors to assess compliance with the requirements of the solicitation is denied where the selected evaluation criteria are reasonable.
 2. Protest alleging that a solicitation is defective for failing to provide for the evaluation of fixed prices for price realism is denied where the agency has wide discretion when deciding whether to include a realism evaluation provision in a solicitation for the award of a fixed-price contract.
-

DECISION

Crosstown Courier Service, Inc., a service-disabled veteran-owned small business (SDVOSB) of Chicopee, MA, protests the terms of request for quotations (RFQ) No. 36C25018Q0547 issued by the Department of Veterans Affairs for courier services in support of several medical centers and clinics in Virginia. The protester alleges that the solicitation is defective because it does not require vendors to provide detailed information concerning their labor costs, and because it does not require the agency to perform a price realism evaluation.

The protest is denied.

BACKGROUND

The RFQ contemplates the purchase of commercial transportation services on a fixed-price basis using the simplified acquisition procedures of Federal Acquisition Regulation (FAR) part 13. Agency Report (AR), Memorandum of Law (MOL) at 1, 5. Because the procurement is for services, it is subject to the service contract labor standards set forth in the Service Contract Act (SCA), 41 U.S.C. §§ 6701-6707. In this regard, the RFQ provides relevant SCA wage determinations, and requires that vendors: (1) comply with the SCA wage determinations in paying wages to non-exempt¹ employees; and (2) make certain certifications concerning employees who are exempt from the SCA. AR, Tab 3, RFQ at 27, 55-56; AR, Tab 7, Wage Determinations. Additionally, while the RFQ requires vendors to propose pricing on a schedule of services that includes a cost breakdown by contract line item, it does not require a further breakdown of costs by labor category. RFQ at 40; AR, Tab 4, Schedule of Services. The RFQ also provides that “[e]ach proposal must include an offer to provide all basic services/supplies required and be in [sic] compliant with Wage Determination for the appropriate county.” RFQ at 40. Of note, the RFQ does not explicitly provide for a price realism evaluation.

The agency initially issued a RFQ for this requirement on March 5, 2018, and on March 13, Crosstown protested the terms of that RFQ on the basis that it did not include adequate evaluation criteria or require sufficient detail from vendors to show their intent or ability to meet various requirements of the solicitation, including compliance with the SCA and subcontracting limitations. Protest at 1-2. On March 27, the agency took corrective action, subsequently cancelling, revising, and reissuing the RFQ on April 4. Id. at 3. As a result, we dismissed Crosstown’s protest as academic on April 3, 2018. Crosstown Courier Service, Inc., B-416129, Apr. 3, 2018 (unpublished decision). Of note, in the revised RFQ, the agency clarified certain terms relating to the SCA, and provided an SDVOSB self-performance worksheet for vendors to show the work split between the prime contractor and any subcontractors. MOL at 4-5. This protest followed.

DISCUSSION

The protester alleges that the RFQ is defective because it does not require vendors to provide a breakdown of their labor costs. As a consequence, the agency will be unable to evaluate whether vendors intend to pay wage rates consistent with the SCA. Protest at 3. Additionally, the protester argues that the agency erred by failing to include language in the RFQ providing for a price realism evaluation. Protest at 4-6. We deal with each argument in turn.

¹ Some categories of employees, such as certain executives, are exempt from the wage determinations of the SCA. See, e.g., 29 C.F.R. part 541.

Labor Costs Breakdown

Crosstown argues that the solicitation does not require vendors to provide enough cost information to allow the agency to evaluate whether vendors will be capable of paying employees the appropriate SCA wages. Protest at 3. Given that the RFQ requires vendors to take SCA wage rates into account in preparing their pricing, the protester contends, the agency's evaluation criteria should allow them to verify that vendors will be paying the appropriate wage rates. Response to Agency's Request for Dismissal at 2. According to the protester, the RFQ should be amended to require vendors to provide a breakdown of wage costs by labor category. Protest at 3. In this connection, the protester alleges that failing to evaluate how vendors will comply with the SCA is unreasonable because of a "long history" of previous contracts that have been awarded to firms with low pricing that did not cover SCA and other mandatory costs. Id.

Agency acquisition officials have broad discretion in the selection of evaluation criteria that will be used in an acquisition, and we will not object to the absence or presence of a particular criterion as long as the method chosen reasonably relates to the agency's needs in choosing a contractor and is not otherwise contrary to law or regulation. Logistics Management International, Inc., B-412837, June 6, 2016, 2016 CPD ¶ 159 at 3. Moreover, a protester's disagreement with an agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment regarding the selection of evaluation criteria is unreasonable. Id.

As a preliminary matter, the protester's allegations concerning prior contracts are entirely unsupported by specific evidence. The protester does not identify any procurements, vendors, or dates in support of its claims. Furthermore, even assuming the allegation to be true, the protester appears to misconceive the impact of vendor pricing in the context of a fixed-price contract. There is nothing inherently objectionable about low pricing, or even below-cost pricing, in fixed-price contracts, because the risk and responsibility for contract costs is on the contractor. See, e.g., Crosstown Courier Service, Inc., B-415818, Mar. 27, 2018, 2018 CPD ¶ 129 at 3 (in the context of a contract subject to the SCA, an agency is not prohibited from entering into a contract that is below the cost of performance); Optex Sys., Inc., B-408591, Oct. 30, 2013, 2013 CPD ¶ 244 at 5-6. Accordingly, even a quotation that includes a price that would not cover the SCA wage rates is not necessarily improper, provided the appropriate wages are actually paid during contract performance.²

While additional labor cost breakdowns might provide the agency with greater confidence that a vendor has fully considered the impact of SCA wage rates in preparing its quotation, the agency's approach in this case--advising vendors of the requirements and requiring relevant certifications--is not inconsistent with law or

² The question of whether such wages are paid during the performance of the contract is a question of contract administration that is not for resolution by our Office. 4 C.F.R. § 21.5(a).

regulation, or otherwise unreasonable.³ The protester's arguments amount to nothing more than disagreement with the agency's selection of evaluation criteria, and this argument is, accordingly, denied.

Price Realism

The protester also argues that the agency erred in failing to provide for a price realism⁴ evaluation in the RFQ.⁵ Protest at 4-6. As a variation on the theme of its initial protest allegation, the protester argues that, absent such an evaluation, the agency will be unable to assess whether vendors will be able to comply with the terms of the RFQ,

³ The protester advanced a collateral argument in its comments on the agency report, alleging that the agency's decisions were not entitled to deference in this case because the agency violated regulation by failing to prepare a written acquisition plan. Comments at 1-3 (citing FAR §§ 7.102 and 7.105). However, the FAR provides that "[a] written plan shall be prepared for cost reimbursement and other high-risk contracts other than firm-fixed-price contracts" (emphasis added), although agency heads may require written plans for fixed-price contracts as appropriate. FAR § 7.103(e). The portion of the Veterans Affairs Acquisition Regulation (VAAR) governing acquisition planning does not impose a requirement for written acquisition plans for fixed-price contracts. See VAAR part 807. Because the preparation of a written acquisition plan is not necessarily required for fixed-price procurements, such as this one, and the protester has not identified any law or regulation which would require it in this context, this argument is dismissed as legally insufficient. 4 C.F.R. § 21.1(f).

⁴ In its initial protest, the protester characterized its allegation as a failure to provide for a price reasonableness evaluation. Protest at 4-6. However, in subsequent pleadings, the protester reframed its argument to refer to price realism. Response to Request for Dismissal at 2-3; Comments at 1-3.

⁵ In its response to the agency's request to dismiss the protest, the protester, inexplicably, advanced an alternative argument that the RFQ, as written, already included an implied requirement for a price realism evaluation. Response to Agency Request to Dismiss at 2-3. In the absence of an express price realism provision, our Office will only conclude that a solicitation contemplates a price realism evaluation 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 proposal can be rejected for offering low prices. See PricewaterhouseCoopers Public Sector, LLP, B-415504, B-415504.2, Jan. 18, 2018, 2018 CPD ¶ 35 at 12; DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. However, there is no such language in the RFQ provisions here. The RFQ merely indicates to offerors that their prices should reflect all services to be provided and the relevant SCA wage rates, not that prices which are too low will be scrutinized or rejected on that basis. RFQ at 40. Irrespective of the protester's argument, we see no basis to conclude that the RFQ in this case includes an implied requirement for a price realism evaluation.

including paying the appropriate SCA wage rates. Id. The protester alleges that the agency has, in the past, failed to “police” whether contractors actually pay SCA wages as required by accepting offers or quotations at unrealistically low prices, and that the failure to include a price realism evaluation in this case will perpetuate that trend.⁶ Id. at 6. The protester additionally identified several FAR provisions, such as FAR §§ 12.209, 14.408-2, and 15.404-1, that purportedly require the agency to conduct such an evaluation. Id. at 4-6.

The purpose of a price realism⁷ evaluation is to determine whether quoted prices are too low, such that there may be a risk of poor performance, or to confirm a vendor’s understanding of the requirements of the solicitation. FAR § 15.404-1(d); C.L. Price & Assocs., Inc., B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3. Agency acquisition officials have broad discretion in the selection of evaluation criteria that will be used in an acquisition, and we will not object to the absence or presence of a particular criterion as long as the method chosen reasonably relates to the agency’s needs in choosing a contractor and is not otherwise contrary to law or regulation. Logistics Management International, Inc., supra at 3. Where an agency is using the simplified acquisition procedures provided for in FAR part 13, the FAR provides that the evaluation procedures outlined in FAR parts 14 and 15 are not mandatory, but may be used as appropriate. FAR § 13.106-2(b)(1).

Here, the protester has not identified any laws or regulations, which would compel the agency to incorporate a price realism evaluation provision as the protester has argued. On the contrary, FAR § 15.404-1(d)(3) makes clear that a price realism evaluation is not required for fixed-price contracts, such as the contemplated contract, but, rather, a contracting officer “may ... in exceptional cases,” provide for a price realism evaluation, but is not required to do so. FAR § 15.404-1(d)(3); see also Ripple Effect Communications, Inc., B-413722.2, January 17, 2017, 2017 CPD ¶ 27 at 3-4; Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 8 n.7. Regarding the FAR provisions identified by the protester in support of its argument, they actually govern price reasonableness evaluations, which are concerned with whether a price is too high. See FAR §§ 12.209, 14.408-2, and 15.404-1; see also Iron Vine Security, LLC, B-409015, Jan. 22, 2014, 2014 CPD ¶ 193 at 6 n. 5. Thus, the cited regulations are entirely inapplicable to the question of whether the agency must include a price realism evaluation provision in the solicitation. Finally, other than the protester’s vague representations concerning prior unrealistic quotes or proposals, the protester

⁶ Again, the protester provides no specific examples or supporting evidence on this point beyond the bare allegation.

⁷ Although the FAR does not use the term “price realism,” we have consistently used that term to describe the type of analysis provided for in FAR § 15.404-1(d)(3), which involves assessing the realism of fixed-price proposals. See, e.g., IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 at 11.

has not identified any facts that would suggest that the agency erred in failing to include a price realism evaluation in the RFQ. Given the agency's broad discretion to decide whether to include a price realism evaluation in this instance, we have no basis to conclude that the agency's decision was unreasonable. Ripple Effect Communications, Inc., supra; Ball Aerospace & Techs. Corp., supra.

The protest is denied

Thomas H. Armstrong
General Counsel