U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Regency Enterprises Services, LLC

File: B-418448; B-418448.2

Date: May 6, 2020

James Wallis, Regency Enterprises Services, LLC, for the protester.
Eric Freeman, Esq., and Christopher S. Colby, Esq., Defense Logistics Agency, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a lowest-price, technically acceptable procurement, exclusion of protester's proposal from competitive range was not improper where the agency reasonably concluded that the proposal had no realistic prospect of award.

DECISION

Regency Enterprises Services, LLC, a small business of St. Louis, Missouri, challenges its exclusion from the competitive range under Solicitation No. SPE602-20-R-0702, issued by the Defense Logistics Agency for fuel transportation services to various locations in Kuwait. The protester alleges that the agency erred in finding its proposal technically unacceptable, should have referred the company to the Small Business Administration (SBA) for a certificate of competency (COC) rather than excluding it from the competition, and erred in establishing a competitive range based on price.

We deny the protest.

BACKGROUND

On November 19, 2019, the agency issued the request for proposals (RFP) for tank truck transportation services in Kuwait. Memorandum of Law (MOL) at 1-2. The RFP contemplated award on a lowest-price, technically acceptable (LPTA) basis. Agency Report (AR), Tab 1, RFP at 66. The technical evaluation factor was divided into three subfactors: (1) general provisions and performance requirements; (2) quality assurance and quantity requirements; and (3) deliverables. *Id.* The RFP also provided that offerors must receive acceptable ratings for each subfactor to be technically acceptable

overall. *Id.* Relevant to this protest, the RFP required offerors to include various licenses and permits in their proposals, such as a permit to transport fuel in Kuwait. *Id.* at 64. Finally, the RFP noted that "[f]ailure to provide the information requested in any of the evaluation factors may be considered a 'No response' and a rating of UNACCEPTABLE will be given to the applicable factor or sub-factor." *Id.* at 63.

The government received several timely offers, including one from Regency.[1] MOL at 5-6. The agency evaluated the offers, and concluded that all the offers it received were technically unacceptable. *Id.* However, the evaluators also noted that there was a substantial break in offer prices. *Id.* That is to say, one group of lower-priced offers were similar to the internal government cost estimate (IGCE), while a group of higher-priced offers were more than double the IGCE and significantly exceeded the average market price. *Id.* Because the RFP contemplated award on an LPTA basis, the contracting officer established a competitive range including only the lower-priced offerors. MOL at 6. This protest followed.

DISCUSSION

The protester challenges its exclusion from the competitive range on several bases. First, the protester contends that the agency erred in finding its proposal technically unacceptable. Comments at 6-10. Second, the protester argues that, even if its proposal was technically unacceptable, the agency's evaluation constituted a *de facto* responsibility determination, and the agency should have referred the protester to the SBA for a COC. Comments at 11-14. Finally, the protester argues that the agency's decision to establish a competitive range on the basis of price was flawed and inadequately documented. Comments at 2-6, 14-17. We address these arguments in turn.[2]

Technical Evaluation and COC

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency; we will examine the record to determine whether the agency's judgment was reasonable and consistent with

[1] Because Regency proceeded without counsel in this protest, and therefore no protective order was issued, protected information cannot be included in this decision. Accordingly, some aspects of our discussion will necessarily be general in nature to avoid reference to non-public information. Our conclusions, however, are based upon our review of the entire record, including non-public information.

[2] The protester makes numerous other arguments not addressed in this decision. For example, the protester alleges that the agency's establishment of a competitive range impermissibly relied on a tradeoff methodology. Comments at 3. However, there is no evidence in the record that the agency performed any manner of tradeoff in establishing the competitive range. We have considered each of the protester's additional arguments and conclude that none provide a basis to sustain the protest.

the stated evaluation criteria and applicable statutes and regulations. *Team Systems International*, B-411139, May 22, 2015, 2015 CPD ¶ 163 at 5. It is an offeror's burden to submit an adequately written proposal for the agency to evaluate; otherwise it runs the risk of having its proposal found technically unacceptable. *Id.*, *citing Menendez-Donnell & Assocs.*, B-286599, Jan. 16, 2001, 2001 CPD ¶ 15 at 3.

In this case the agency concluded that the protester's proposal was technically unacceptable on several distinct bases, each of which related to required documents or information that was not included in the protester's proposal. MOL at 4-5. Here, the solicitation clearly provided that a rating of unacceptable in any subfactor would result in an overall rating of unacceptable, and that failure to provide required information would also result in a rating of unacceptable. RFP at 63, 66. As a result, any one of the agency's several findings[3] would have been sufficient for the agency to conclude that the protester's proposal was technically unacceptable.

For example, the solicitation specifically required offerors to include copies of permits for transporting fuel in Kuwait. RFP at 64. In this case, the protester does not contest that its proposal did not include the relevant permits. Comments at 6-7, 9. Instead, the protester argues that the government of Kuwait only issues such permits to existing contract holders, so it would be impossible for any company other than an incumbent to include those permits in its proposal. *Id.*

Setting aside whether this argument is correct--and the agency contends that it is not--this argument is clearly an untimely challenge to the terms of the solicitation. That is to say, the protester's argument identifies an alleged defect in a solicitation which should have been raised prior to the time for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Because the protester concedes that they did not provide documentation specifically required by the solicitation, we see no basis to question the agency's conclusion that the protester's proposal was technically unacceptable.

Furthermore, the protester's argument that the agency's technical evaluation was a *de facto* responsibility determination, and that the agency should have referred the protester to SBA for a COC, is likewise without merit. Preliminarily, the agency's exclusion of Regency from the competitive range in this case was entirely based on Regency's offered price, not on the agency's assessment that Regency was technically unacceptable. MOL at 6. Second, even if the agency had excluded Regency because its proposal was found to be technically unacceptable, the agency's conclusion that the protester was technically unacceptable was largely premised on the protester's failure to

[3] Among other faults, the agency found that Regency's proposal did not include several required permits and licenses, or any of five distinct plans required by the solicitation. MOL at 4-5. In some cases the protester's proposal suggested that the required documents would be made available at time of award, but in other cases the proposal suggested the documents were attached, but they were not included in the proposal attachments. *Id.*

provide required information in its proposal; such a finding does not constitute a responsibility determination. *Id.* at 4-5.

Our decisions have consistently concluded that, where an agency finds a proposal to be unacceptable based on an offeror's failure to submit required information, that finding does not constitute a determination that the offeror is not a responsible prospective contractor, even if the evaluation in question was arguably related to responsibility. *See Sea Box, Inc.*, B-414742, Sept. 6, 2017, 2017 CPD ¶ 279 at 4; *Eagle Aviation Services and Technology, Inc.*, B-403341, Oct. 14, 2010, 2010 CPD ¶ 242 at 4-5. Accordingly, in this case, the agency was not required to refer the protester to the SBA for a COC. *Id.*

Price and Competitive Range

The protester contends that the agency erred in its decision to establish a competitive range. Specifically, the protester argues that when, as here, all offerors were technically unacceptable, the agency was required to either open discussions with all offerors or resolicit. Comments at 2-6. Alternatively, the protester suggests that the offerors included in the competitive range proposed unrealistically low prices, and the agency erred by failing to perform a price realism analysis before establishing the competitive range. *Id.* at 14-17. Relatedly, the protester contends that the agency's conclusion that the higher priced offerors proposed unreasonably high prices was inadequately documented. *Id.*

We reject the protester's first contention that the agency was required to open discussions with all offerors or resolicit. Agencies are not required to retain in the competitive range a proposal that the agency reasonably concludes has no realistic prospect of award, and in fact, even a technically acceptable proposal may be excluded from the competitive range if it does not stand a real chance of being selected for award. *See National Medical Staffing, Inc.*, B-259700, Mar. 6, 1995, 95-1 CPD ¶ 133 at 3. Indeed, cost or price not only is a proper factor for consideration, but may emerge as the dominant factor in determining whether proposals fall within the competitive range. *Id.*; *Motorola, Inc.*, B-247937.2, Sept. 9, 1992, 92-2 CPD ¶ 334 at 5.

Furthermore, our decisions have specifically concluded that, in an LPTA context, an agency may establish a competitive range on the basis of price where all offerors included are technically unacceptable. *Environmental Restoration, LLC*, B-413781, Dec. 30, 2016, 2017 CPD ¶ 15 at 4-5 (establishment of competitive range on the basis of price in LPTA procurement was unobjectionable even where both offerors included in the competitive range required proposal revisions to become technically acceptable). In this case, as in *Environmental Restoration*, there was a significant break in prices, and the agency's decision to establish a competitive range on that basis and open discussions with the lower-priced group of offerors is unobjectionable.

With respect to the protester's price realism argument, it is unclear that the agency was required to perform a price realism analysis at this stage of the evaluation (or at all). While the solicitation indicated that the agency reserved the right to perform a price

realism analysis, the RFP did not indicate that the agency must do so. RFP at 68. Additionally, even assuming that such an analysis were required, the analysis the agency performed as part of establishing the competitive range was a reasonable method of assessing realism. For example, the agency received a significant number of offers in this procurement, and the agency assessed the offered prices against each other, the IGCE, and the agency's market research.[4] AR, Tab 4, Competitive Range Determination Document at 1-4.

Adequate price competition, comparison to an IGCE, and market research are all permissible methods of price analysis contemplated by the Federal Acquisition Regulation (FAR). *See* FAR 15.404-1. In this case, the agency's analysis reasonably determined that the lower-priced group of offers included prices that were comparatively close to each other and to the IGCE. *Id.* In sum, we see no basis to conclude that the agency was required to conduct a price realism analysis, but, in any case, the analysis the agency actually performed was sufficient to establish realism.

The protester's price reasonableness argument is without merit for similar reasons. Here, the offers above the significant break in prices were priced significantly higher than the lower-priced offerors, the IGCE, and the market average price. AR, Tab 4, Competitive Range Determination Document at 1-4. Again, these methods of price analysis are specifically contemplated by the FAR, and the agency's analysis appears reasonable. *See* FAR 15.404-1. We see no basis to question the agency's determination that the higher-priced group of offerors were unreasonably high, or the agency's related conclusion that those offerors had no realistic prospect of award in this LPTA procurement.

The protest is denied.

Thomas H. Armstrong
General Counsel

[4] While the agency notes that its analysis included some errors in computing percentage differences, the agency argues that the errors did not have a meaningful effect on the outcome of the analysis. MOL at 6 n.5. Based on our review of the record, we agree that the errors in question were minor and clerical in nature, and did not meaningfully affect the outcome of the evaluation.