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Decision

Matter of: Verestar Government Services Group

File: B-291854; B-291854.2

Date: April 3, 2003

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John S. Pachter, Esq., Jonathan D. Shaffer, Esq., Richard C. Johnson, Esq., Edmund M. Amorosi, Esq., Smith Pachter McWhorter & Allen, and Nicholas M. Beizer, Esq., WorldCom Inc., for WorldCom Government Markets, an intervenor. Mark Langstein, Esq., and Joan Maginnis, Esq., Department of Commerce, for the agency.

Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation that agency improperly made affirmative determination of responsibility does not raise serious concern that the contracting officer failed to consider available relevant information where the developed record establishes that extant adverse information cited in protest as evidencing the impropriety of the determination was considered by the contracting officer, who concluded that it did not warrant a nonresponsibility determination in light of an array of mitigating information that was also assessed by the contracting officer.
2. Cost realism analysis of proposal for fixed-price contract was not required where the solicitation provided for waiver where, as here, more than one acceptable proposal was received; to the extent such an analysis was performed, agency reasonably concluded that awardee's particular technical approach and industry cost trends established realism of proposed price, even though that price is substantially below both the protester's price and the price at which the awardee/incumbent is currently performing the requirement.

3. Under a “best value” procurement in which non-price factors are more important than price factors, award on the basis that the significantly lower priced proposal represents the best value to the government is unobjectionable because it is consistent with the evaluation criteria where the proposals were reasonably evaluated as essentially equal overall under the non-price factors.

DECISION

Verestar Government Services Group protests the award of a contract to WorldCom Government Markets under request for proposals (RFP) No. 52-DGNW-2-91006 issued by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) for the provision and operation of the International Satellite Communications Service (ISCS) to disseminate weather information and warnings to the international community. Verestar protests that the agency improperly determined that WorldCom was a responsible offeror. Verestar also asserts that the agency failed to conduct a proper cost realism analysis and improperly made an award determination on the basis of the low-price technically acceptable proposal, in derogation of the RFP award criteria.

We deny the protest.

BACKGROUND

The RFP, issued on February 17, 2002, provides for the award of a fixed-price contract for a one-year base period with six one-year options, on the basis of a “best value” determination.¹ The RFP sets forth technical, management, past performance and price as evaluation factors, and provides that the non-price evaluation factors are significantly more important than price, but that price would become more important as the offerors’ relative non-price evaluations became more equal. RFP § M.1.3.

By the April 17 closing date for the submission of initial proposals, NOAA received proposals from WorldCom (the incumbent contractor that has performed the ISCS operations requirement for the past 8 years), and Verestar. Under the initial evaluation, the agency’s technical advisory committee (TAC) gave a slight point edge to Verestar’s technical proposal, and a slight edge to WorldCom’s proposal under the management factor. The TAC concluded that the two proposals were very close under the overall non-price evaluations, and that both offerors were capable of providing the required services. Agency Report (AR), Tab 11, Competitive Range Determination, at 12. Verestar’s initial proposed total price was \$21,189,686 and WorldCom’s total price was \$4,288,146. *Id.* at 8. On June 3, the contracting officer

¹The RFP invited offerors to submit proposals for one or more of three subsystems, or for the whole system; both WorldCom and Verestar submitted proposals only on the basis of an award of the whole system.

determined to include both proposals in the competitive range. Discussions were conducted, after which offerors submitted final proposal revisions (FPR) on July 10. The TAC performed a reevaluation based on the basis of the FPRs, which resulted in point scores of 690 for each technical proposal, and total non-price scores of 1,557 for the WorldCom proposal, and 1,542 for the Verestar proposal. WorldCom's final proposed total price was \$3,877,617 and Verestar's price was \$12,423,441. AR, Tab 17, Source Evaluation Board Report, at 7.

On November 5, the source selection official (SSO) selected WorldCom for award. The SSO adopted the Source Evaluation Board (SEB) determination that the non-price proposals were substantially equal, as a result of which the WorldCom proposal represented the best value to the government on the basis of its substantially lower price. AR, Tab 18, Source Selection Decision Memorandum. Because WorldCom had filed for Chapter 11 bankruptcy reorganization, the contracting officer gave extensive consideration to the circumstances of that filing and to related information and then determined that WorldCom was a responsible offeror. The agency awarded the contract to WorldCom on December 9. After receiving a debriefing, Verestar filed its protest with our Office on January 13, 2003, and filed a supplemental protest after receiving the agency report.

PROTEST ALLEGATIONS

Verestar alleges that NOAA made an improper affirmative determination of responsibility with respect to WorldCom, and that WorldCom had failed to meet an RFP requirement to submit certain certified financial statements. Verestar also alleges that NOAA failed to properly "cost realize" and substantially increase the most probable cost of WorldCom's unrealistically low price proposal, and improperly concluded that WorldCom could meet the RFP technical requirements in view of WorldCom's unreasonably low proposed price. Protest at 3. Finally, Verestar asserts that NOAA failed to perform a proper cost/technical tradeoff, and instead improperly made the award on the basis of the low cost technically acceptable proposal, contrary to the RFP award provision which calls for a best-value award under which non-price factors are more important than price. Id.

AFFIRMATIVE DETERMINATION OF RESPONSIBILITY

Verestar's primary protest allegation is "[i]f NOAA had properly performed an analysis of WorldCom's abject financial condition and lack of integrity . . . it would have concluded that WorldCom was not responsible, and was therefore ineligible for award." Id. Because the determination that an offeror is capable of performing a contract is largely committed to the contracting officer's discretion, GAO will generally not consider a protest challenging an affirmative determination of responsibility except under limited, specified exceptions. 4 C.F.R. § 21.5(c) (2003). Our Office recently amended our Regulations in this regard (effective for protests such as this one, filed on or after January 1, 2003), to add as a specified exception

“protests that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.” Bid Protest Regulations, 67 Fed. Reg. 79,833, 79,835-36 (2002) (to be codified at 4 C.F.R. § 21.5(c)). Verestar asserts that its protest allegation falls within this exception. We disagree.

Verestar’s allegations regarding WorldCom’s responsibility are essentially a recitation of adverse published reports concerning the events leading up to and surrounding WorldCom’s July 21, 2002 filing for Chapter 11 bankruptcy protection, of which Verestar remarks “most of the Western World is aware.” Protest at 11. In conjunction with this allegation, Verestar makes what it characterizes as a separate objection that WorldCom failed to provide the certified financial information that was required by section L.7.3.3 of the RFP. *Id.* Verestar concludes that “[g]iven the plethora of information raising serious questions about WorldCom’s integrity and business ethics and the admitted lack of credibility concerning its financial condition, it is clear that the Contracting Officer failed to consider a host of evidence that should have led him to conclude that WorldCom was not a responsible contractor and should have been eliminated from the competition.” Protest at 14.

As our Office explained in the preamble to our revised regulations, the revision is “intended to encompass protests where, for example, the protest includes specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible.” 67 Fed. Reg. 79,833, 79,834 (2002).

In this instance, Verestar is correct that there was an abundance of readily available adverse information that by its nature could reasonably be expected to be relevant to a determination of whether WorldCom should be found responsible. However, as the record developed, it became abundantly clear that the contracting officer was well aware of the adverse information referenced by Verestar, and recognized that it was relevant to a determination of WorldCom’s responsibility. Rather than ignoring this information, the contracting officer specifically considered it in making his determination. In this regard, the contracting officer stated his concern that WorldCom had filed for bankruptcy “amid much concern about their internal financial practices, improper reported earnings for the preceding two years, and other ethical issues.” AR, Tab 20, Post Negotiation Memorandum, at 19. The contracting officer indicates that “[a]s part of the [resulting] research into the responsibility determination, a [General Services Administration (GSA)-conducted] WorldCom [b]ankruptcy summit conference was attended to gain current and long term-feel for WorldCom’s capabilities,” along with other research. *Id.* at 17. The contracting officer took notice that GSA had exercised its FTS (Federal Technology Service) option with WorldCom, that WorldCom still maintains its large infrastructure, communication licenses and key personnel, that WorldCom personnel who acted illegally and irresponsibly have been removed, that the company is

currently under close oversight and scrutiny of its business decisions and practices, and that the new leadership of WorldCom has a history of business integrity and honesty. Id. The contracting officer also considered WorldCom's record of 8 years of satisfactory performance of this contract and that WorldCom had the wherewithal to provide service in this follow-on requirement. Id. Additionally, the contracting officer considered that other agencies such as the Federal Aviation Administration recently awarded WorldCom a new contract, and that WorldCom provides communications services to many sensitive Department of Defense (DOD) activities, as a result of which it was considered highly unlikely that DOD would allow the demise of WorldCom. Id. at 19.

With respect to the certified financial information for the past three annual accounting periods which section L.7.3.3 of the RFP required as part of the proposal submission (not as a performance requirement, but obviously for its relevance in determining offeror responsibility), the record is clear that WorldCom did submit the required financial information in its proposal. AR, Tab 8, WorldCom proposal, at F-1-55. When WorldCom filed for bankruptcy, it announced that it was reviewing its financial statements which would result in restated financials. As a result, in making his responsibility determination, the contracting officer explicitly recognized the inaccuracy of this financial information and researched and considered other information in order to assess WorldCom's financial responsibility, as outlined above. AR, Tab 20, Post Negotiation Memorandum, at 17.

In sum, the record establishes that the contracting officer had before him the adverse information that Verestar asserts he failed to consider. More important, the record is also clear that the contracting officer specifically considered the significance of this information in conjunction with other information that he obtained and which he viewed as ameliorating the concerns and risks that had been raised, whereupon the contracting officer made the considered affirmative determination that WorldCom was responsible and could perform. Accordingly, in light of the developed record, the protest does not raise a serious concern that the contracting officer unreasonably failed to consider relevant information or otherwise violated statute or regulation.

PRICE REALISM ANALYSIS

Verestar alleges that WorldCom's proposal is "underpriced," and that NOAA "failed to properly cost realize WorldCom's proposal and improperly concluded that WorldCom could meet the RFP's technical requirements for its proposed price." Protest at 3. Verestar points out that WorldCom's price is more than 50 percent lower than its current contract price under an RFP that requires system upgrades. Verestar points out that the solicitation calls for a cost realism analysis and reserves the government's right to adjust the offerors' most probable cost on the basis of this analysis. Protest at 7. Verestar further asserts that had the agency performed a proper cost realism analysis it would have adjusted WorldCom's price to a level that

would have made Verestar's proposal lower priced. Protest at 15-16. Where an agency evaluates proposals for award of a cost-reimbursement contract, an offeror's proposed estimated costs are not controlling since, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 11. Accordingly, a cost realism analysis must be performed to determine the probable cost of performance for each offeror when a cost-reimbursement contract is contemplated. Federal Acquisition Regulation (FAR) § 15.404-1(d)(2). This concern is not present in the evaluation of proposals when a fixed-price contract is to be awarded, as here, since the government's liability is fixed and the risk of cost escalation is borne by the contractor. PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381 at 5. However, since the risk of poor performance when a contractor is forced to provide services at little or no profit or with an inadequate or undercompensated workforce is a legitimate concern in evaluating proposals, an agency may provide for a price realism analysis for the purpose of assessing the risk inherent in an offeror's proposal. Sabreliner Corp., B-284240.2, B-284240.6, Mar. 22, 2000, 2000 CPD ¶ 68 at 6.² The nature and extent of an agency's price realism analysis are matters within the agency's discretion, and our review of an agency's price realism evaluation is limited to determining whether it was reasonable and consistent with the solicitation's evaluation criteria. AST Envtl., Inc., B-291567, Dec. 31, 2002, 2002 CPD ¶ 225 at 2.

Here, the solicitation provided for a cost/price realism analysis, (the RFP uses the terms price and cost interchangeably), and as the protester notes, reserved the government's option to use the analysis to adjust the offer to a most probable cost. RFP § M.1.3(4).³ However, the RFP also recognized that: "FAR section 15.305 permits waiving a price analysis and a cost analysis when solicitations will be a firm-fixed price competitive proposal. No analysis will be performed if multiple, acceptable fixed-price proposals are received." RFP § M.5. In this instance, the agency did receive more than one acceptable proposal, and "a determination was made that a cost analysis is unwarranted because sufficient competition exists to make an award based upon financial and technical capabilities of the Offerors." AR,

² Verestar points out that FAR § 15.404-1(d)(3) permits the use of cost realism analyses for certain fixed-price contracts. In the first instance, the provision is only applicable to fixed-price incentive contracts or to exceptional cases such as when new requirements may not be fully understood by competing offerors, which are inapposite here. In any case, even under this exception, no price adjustment could be warranted since the provision explicitly provides that "the offered prices shall not be adjusted as a result of the analysis." Id.

³ In our view, such an adjustment would have been impermissible here since the RFP calls for award of a fixed-price contract, without a mechanism for an upward adjustment of prices. PHP Healthcare Corp, supra, at 5.

Tab 15, Business Advisory Committee Final Report, at 9. Accordingly, the RFP did not require that the agency perform a cost/price realism analysis in the circumstances that are present here.

Nonetheless, the record reflects that the agency did take cognizance of WorldCom's relatively low price and considered whether it was realistic. In this regard, the agency recognized that WorldCom's technical solution was significantly different from Verestar's in ways which are substantially less expensive. WorldCom proposed to reuse the existing hardware with minimal replacement (as was permitted under the RFP), which represented substantial savings in nonrecurring costs in comparison with Verestar's proposal to [DELETED]. AR, Tab 17, SEB Report, at 8. With respect to recurring operations, Verestar proposed to [DELETED], while WorldCom proposed a dynamic bandwidth system which permitted the entire network to be shared with other users during idle times or periods with low ISCS traffic, which is efficient and lower in cost than both Verestar's [DELETED], and the configuration under WorldCom's incumbent contract network which includes shared and unshared segments. *Id.* The agency also recognized that there was a downward trend in pricing because of the competitive environment within the industry. AR, Tab 20, Post Negotiation Memorandum, at 14. Under the circumstances presented here, we see no basis to question the propriety of the agency's price realism assessment.

AWARD DETERMINATION

Verestar contends that the agency improperly failed to do a cost/technical tradeoff and instead awarded on the basis of the low-priced, technically acceptable proposal in contravention of the RFP award criteria which called for a best value tradeoff in which non-price factors were more important than price. Protest at 3. Here, the RFP evaluation scheme explicitly provides that price would increase in importance as the non-price proposals became close to equal. In a negotiated procurement with a best value evaluation plan where selection officials reasonably regard proposals as being essentially equal technically, price can become the determining factor in making award notwithstanding that the evaluation criteria assigned price less importance than technical factors. *M-Cubed Info Sys., Inc.*, B-284445, B-284445.2, Apr. 19, 2000, 2000 CPD ¶ 74 at 8. While Verestar's argument posits the non-price superiority of its proposal, in fact, the record reflects that the Verestar proposal was evaluated as substantially equal to WorldCom's. Accordingly, Verestar's objection that by considering price to be determinative, the agency improperly converted the procurement into one in which award was made on the basis of the low-cost

technically acceptable proposal is without merit; rather, the agency's decision to use low price as the determining factor between two equally rated proposals was fully consistent with the RFP award criteria.⁴

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ Verestar has raised a number of other issues and reformulations of issues, none of which provide a basis to sustain the protest. Some of these issues, such as Verestar's protest of the agency's evaluation of weaknesses in its proposal, and the agency's alleged failure to bring these weaknesses to Verestar's attention during discussions are untimely. Verestar first raised these issues in its supplemental protest, which was untimely filed more than 10 days after the debriefing at which it received detailed information outlining the evaluated weaknesses, as a result of which Verestar knew or should have known these bases for protest. 4 C.F.R. § 21.2(a)(2) (2003). Verestar's objections to aspects of WorldCom's proposal evaluation reflect the protester's mere disagreement with the agency's evaluation, which does not render it unreasonable. CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454 at 5. Other WorldCom proposal evaluation allegations arise from Verestar's objection that WorldCom unfairly benefited from its incumbency status. It is common for an incumbent to possess and receive evaluation credit for unique advantages which the government is not required to neutralize, and this advantage does not constitute an unfair competitive advantage or represent preferential treatment by the agency. Crofton Diving Corp., B-289271, Jan. 30, 2002, 2002 CPD ¶ 32 at 6. Finally, Verestar raises issues which do not constitute valid bases for protest, such as its contention that in light of the evaluation posture after initial evaluation, it was improper for the agency to include Verestar's proposal in the competitive range. Champion Bus Servs., Inc., B-290556, June 25, 2002, 2002 CPD ¶ 109 at 2. In this regard, we also note that Verestar acknowledges that it was explicitly advised by the agency during discussions that in order "to remain competitive, it would have to reduce its price by 75%," and Verestar elected not to do so because it "interpreted [this] statement as a negotiation tactic to try to reduce its price." Protester's Supplemental Comments, at 13. We have considered all of Verestar's other protest allegations and find them without merit.