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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Kaneohe General Services, Inc.

File: B-293097.2

Date: February 2, 2004

Timothy H. Power, Esq. for the protester.

Peter J. Lenhart, Esq., for KN Lawn Service, Inc., an intervenor.

Damon Martin, Esq., Richard G. Welsh, Esq., Robert Little, Esq., and Ron R. Ashlock, Esq., Department of the Navy, Naval Facilities Engineering Command, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly induced offeror to increase its price during discussions is denied where record shows discussions were proper and that protester increased its price in an exercise of its own business judgment.

DECISION

Kaneohe General Services, Inc. protests the propriety of discussions held with the firm under request for proposals (RFP) No. N62742-02-R-2211, issued as a competitive section 8(a) set-aside by the Department of the Navy, Naval Facilities Engineering Command, for grounds and tree maintenance services at Pearl Harbor, Hawaii. The protester contends that by releasing government estimate information during discussions, and noting that some of Kaneohe's line item prices differed from the agency's estimates, the agency unfairly misled it into believing its prices were unreasonably low, and thus improperly induced the firm to increase its overall price beyond the price of the contract ultimately awarded to KN Lawn Service, Inc. under the RFP.

We deny the protest.

The RFP called for award of a fixed-price contract with an indefinite-quantity item for a base year and 4 option year periods. The two equally weighted factors for award were price and technical (which included two equally weighted subfactors, past performance/experience and execution).

Eight proposals were received in response to the RFP. Two rounds of discussions were conducted and final proposal revisions were received from five firms. Kaneohe submitted the second lowest priced proposal, at \$11,988,000 (including option periods). KN submitted the lowest priced proposal, at \$10,395,686.75. KN's proposal's technical evaluation ratings were higher overall than those assigned to the Kaneohe proposal. Determining that KN submitted the proposal that offered the best value to the government, the agency awarded a contract under the RFP to KN on October 17, 2003. This protest followed.

Kaneohe contends that the agency misled it into believing that some of its line item prices were unreasonably low and unfairly induced it to increase its overall price during discussions to an amount only slightly higher than that proposed by the awardee. The protester alleges that if it had not been induced to increase its price, its proposal, at its initial price, would have been found to offer the best value to the agency.

Specifically, Kaneohe contends that it was improper for the agency during the first round of discussions to inform the protester that several of its line item prices were noticeably higher or lower than the government's estimates for those items. In response to the first discussion letter of September 12, Kaneohe increased its price for the work by more than \$[deleted] a year for the 5 years of performance contemplated under the RFP. The protester further argues that the agency's release of the government's estimates during the second round of discussions with the firm, by letter of October 1, confirmed for Kaneohe that it had properly increased its price during the first round of discussions, since it appeared to Kaneohe that the agency would evaluate prices for award by comparison to the agency's estimates. Kaneohe did not revise its pricing during the second round of discussions.

The agency contends that it conducted discussions with all offerors on an equal basis, as all offerors were notified during the first round of discussions about line item prices which were noticeably different from the agency's estimates (that is, prices which varied from the government estimates by approximately 20 percent or more), and all offerors received the agency's estimates during the second round of discussions. In this regard, the agency reports that it released its estimates pursuant to Federal Acquisition Regulation § 15.306(e)(3), which generally provides that an agency may, in its discretion, release prices it has identified as reasonable for an anticipated acquisition. The agency emphasizes, however, that all offerors were notified that the government's estimates would not be controlling in a determination of price reasonableness, since the price analysis of proposals was to be based on a comparison of the offerors' prices proposed under the RFP.

As stated above, in its first discussion letter, the agency informed Kaneohe that some of its prices were higher than, and others were lower than, the agency's estimates. Kaneohe was specifically advised, as were all offerors in their own discussion letters from the agency, not only that the comparisons reflected "variance with the

Government Estimate only and not variance with other prices received,” but that the firm should “[r]eview [its] proposal carefully to ensure [it] can perform the work specified at the price proposed.” Kaneohe Discussion Letter, Sept. 12, 2003, at 5. In the agency’s second discussion letter of October 1, Kaneohe, and all other offerors, received the agency’s estimates, along with a notice that the estimates “in no way [relate] to other offerors’ prices.” Kaneohe Discussion Letter, Oct. 1, 2003 at 1. The agency also reminded the firm that award was to be made to “the responsible offeror whose offer provides the best value to the Government, price and other factors considered . . . [and that as] a result, the Government performs price analysis by comparison of proposed prices.” Id.

It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. Trusted Hand Serv., Inc., B-285355, Aug. 21, 2000, 2000 CPD ¶ 136 at 4. Specifically, an agency may not, even inadvertently, mislead an offeror—through the framing of a discussion question or a response to a question—into responding in a manner that does not address the agency’s concerns; misinform the offeror concerning a problem with its proposal; misinform the offeror about the government’s requirements; or, as is pertinent to this case, mislead an offeror into raising its price. Id.; SIMSHIP Corp., B-253655.2, Dec. 2, 1993, 93-2 CPD ¶ 293 at 4.

Our review of the record here does not support the protester’s contention that the agency misled it into increasing its price. Although the agency identified for Kaneohe and all other offerors during the first round of discussions several instances where their prices differed from the agency’s estimates, and then released its government estimates to all offerors during the second round of discussions, the record does not indicate that Kaneohe or any other offeror was requested or advised to change its prices in any way. Rather, it is clear from the record that the agency’s release of the government estimates was for informational purposes to assist offerors in their proposal preparation. All offerors were provided the government estimates and were advised to use the information to review and confirm the accuracy of their prices; again, no offeror was advised to revise its prices in any way. Further, all offerors were told not only that the agency’s price analysis would be conducted by comparison to proposed prices (i.e., not by comparison to the agency’s estimates), but that price would be an important factor for award, as the RFP gave it equal weight to all technical factors combined. In this regard, we believe the agency’s discussion letters should have provided an incentive to all offerors, including Kaneohe, to submit their lowest possible prices to remain competitive under the RFP. We thus do not find persuasive the protester’s position that the agency’s discussion letters unfairly induced it to increase its price in any way. Rather, we conclude that the protester’s decision to increase its overall price during

discussions can be attributed only to an exercise of its own business judgment, and not to any improper action on the agency's part.

The protest is denied.

Anthony H. Gamboa
General Counsel