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Decision

Matter of: Optex Systems, Inc.

File: B-408591

Date: October 30, 2013

Albert B. Krachman, Esq., Brian S. Gocial, Esq., and Lucas T. Hanback, Esq., Blank Rome LLP, for the protester.

David C. Hammond, Esq., and Grant J. Book, Esq., Crowell & Moring, LLP, for Seiler Instrument and Manufacturing Company, an intervenor.

Wade L. Brown, Esq., and Benjamin A. Netzky, Esq., Department of the Army, U.S. Army Materiel Command, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. While there generally is no requirement for agencies to review prices for realism before competitively awarding a fixed-price contract, where a solicitation provides that the agency may reject proposals for offering prices that are too low, the agency is imposing on itself an obligation to review prices for realism.
 2. Where the terms of a solicitation commit an agency to review prices for realism in connection with the award of a fixed-price contract, protest that agency essentially failed to a conduct cost realism evaluation of proposed prices is denied; although the Federal Acquisition Regulation provides authority to conduct such an analysis in "exceptional" cases when evaluating fixed-price proposals, nothing in the terms of the solicitation required the agency to perform such an analysis.
 3. Protest that agency miscalculated awardee's proposal is denied where record shows that agency's evaluation was reasonable and in accordance with the terms of the solicitation and applicable procurement statutes and regulations; protester's disagreement with the agency's evaluation does not provide a basis to sustain its protest.
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DECISION

Optex Systems, Inc., of Richardson, Texas, protests the award of a contract to Seiler Instrument and Manufacturing Company, of St. Louis, Missouri, under

request for proposals (RFP) No. W56HZV-12-R-0259, issued by the Department of the Army for the manufacture of a quantity of M2A2 aiming circles. Optex maintains that the agency failed to perform an adequate price realism review, otherwise misevaluated Seiler's proposal, and made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The RFP contemplated the award, on a "best value" basis, of a fixed unit price, indefinite-delivery, indefinite-quantity contract to fabricate up to 3,000 M2A2 aiming circles. The aiming circle is an instrument used to orient cannon batteries or lay weapons on the azimuth of fire, and to measure the azimuth and elevation angles of a ground or aerial target with respect to a preselected base line. Contracting Officer's Statement at 1 n.1.

The RFP stated that the Army was to consider two factors in its award decision, experience and price, with the experience factor deemed significantly more important than price. Price was to become relatively more important as technical proposals were determined to be comparatively equal. RFP at 72. In terms of the experience factor, the RFP provided that the agency was to evaluate recent, relevant contracts performed by the offerors, and to assign confidence ratings to the proposals based on that evaluation.

In terms of price, the RFP contemplated that offerors could propose "range" pricing for the production units, thereby allowing them to propose different unit prices based on differing quantities. The RFP also contemplated that offerors would propose a fixed price for first article testing (FAT) of their units that was not subject to range pricing. The RFP included a weighting scheme for the range pricing that the Army used to calculate an overall estimated price for each offeror. RFP at 72-74. The offerors' total evaluated prices were to include the calculated overall price for the production units, plus the price for FAT. Id. The RFP also stated that the Army would evaluate prices to ensure that they were consistent with proposed performance and not unbalanced. Id. In addition, the RFP reserved the right to reject any proposal that reflected a lack of technical competence, or a failure to understand the complexity or risks involved, due to a price that was too high or too low. Id. at 71.¹

The Army received proposals from Optex and Seiler. After evaluating initial proposals, the agency engaged in discussions with both firms, and requested and

¹ As we discuss below, the parties disagree as to whether this language in the RFP called for the evaluation of prices for realism.

received final proposal revisions. The agency ultimately assigned both proposals a rating of substantial confidence under the experience factor. Seiler's total evaluated price was \$7,285,438, while Optex, the incumbent here, had a total evaluated price of \$11,167,872. Agency Report (AR), exh. C, Source Selection Decision Document at 4. The agency found that both proposals were approximately equal under the experience factor and, therefore, that price would be the controlling consideration. The agency concluded that Seiler's lower-priced proposal represented the best value to the government. Id. at 6-7. After being advised of the award decision, and after requesting and receiving a debriefing, Optex filed this protest.

PROTEST

Optex challenges the Army's evaluation of Seiler's proposal for numerous reasons. We have carefully considered all of Optex's contentions and find none of them meritorious. We discuss Optex's principal allegations below.

We note at the outset that, in considering protests relating to an agency's evaluation, we do not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. A protester's disagreement with the agency's evaluation conclusions does not provide a basis for our Office to object to the evaluation. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 6.

Price Evaluation

The protester contends that the RFP required the agency to perform a price realism evaluation of the offerors' proposals. According to Optex, Seiler submitted an unrealistically low price and, had the agency conducted an adequate price realism evaluation, it would have discovered that Seiler could not perform the requirement for the price it offered.

The Army maintains that the RFP did not require it to conduct a price realism evaluation but that, in any event, it adequately evaluated the offerors' proposed prices and concluded that Seiler's price was realistic.

As a general matter, when awarding a fixed-price contract, an agency is only required to determine whether offered prices are fair and reasonable. Federal Acquisition Regulation (FAR) § 15.402(a). Since the government's liability is fixed when it awards a fixed-price contract--the contractor bears the risk and responsibility for actual performance, see FAR § 15.404-1(a)--an agency need not concern itself with the contractor's actual costs of performance when awarding a fixed-price contract. It may, nonetheless, include in a solicitation a provision which provides for a price realism evaluation for the purpose of assessing whether an

offeror's low price reflects on its understanding of the contract requirements. Grove Resource Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5.

As noted, the parties disagree whether a price realism evaluation was required here because RFP did not expressly provide for one. However, even where a solicitation does not expressly require a price realism evaluation, we will conclude that such an evaluation is required where (1) the RFP expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and (2) the RFP states that a proposal can be rejected for offering low prices. DynCorp Int'l, LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ ___, at 9; see also, Flight Safety Servs., Corp., B-403831, B-403831.2, Dec. 9, 2010, 2010 CPD ¶ 294 at 5.

While it appears from its protest pleadings that the Army did not intend to include a solicitation requirement for a price realism evaluation, we nonetheless find that the RFP includes language requiring the agency to consider the realism of the offerors' proposed prices. In this connection, the RFP provided that the agency could reject any proposal that:

Reflects an inherent lack of technical competence or a failure to comprehend the complexity and risks required to perform RFP requirements due to submission of a proposal that is unrealistically high or low in price and/or unrealistic in terms of technical or schedule commitments

RFP at 71. Based on the solicitation language quoted above, the RFP here gave the agency discretion to reject a proposal that included unrealistically low prices that reflected the offeror's inherent lack of technical understanding. This language effectively required the agency to review the realism of these prices. DynCorp Int'l, LLC, supra.; Flight Safety Servs., Corp., supra.

Turning to the substance of the agency's price evaluation, the record shows that, although no particular information regarding price was originally required under the terms of the RFP, during discussions, the agency solicited and obtained information from the offerors to demonstrate the cost elements of their proposed prices, including the number of labor hours (and labor rates) necessary to fabricate the aiming circles, the offerors' material costs, as supported by vendor quotes where applicable, and any other significant cost elements of the offerors' proposed prices. AR, exhs. L-1, N-1, O-1 (Discussion Questions for Seiler); T-0 (Discussion Question for Optex). The record shows that the agency analyzed this information and found that the principal difference between the offerors's prices was attributable to differences in their respective material costs and their profit rates. AR, exh. K-1, Agency Cost Analysis, at 1. The agency did not find that either firm's price posed a risk to successful performance or demonstrated a lack of technical understanding.

Optex argues first that the agency's price evaluation overlooked the fact that Seiler's proposed price did not include elements of labor overhead and general and administrative (G&A) costs. As noted above, during discussions, the agency solicited detailed supporting cost information to demonstrate the basis of their proposed prices. According to the protester, since Seiler did not provide information relating to its labor overhead and G&A costs, it must not have included these elements in its price and, therefore, its price must be unrealistically low.

While we agree that the language of the RFP required some sort of a review of prices for realism, and while the record shows that the agency elected to request and review information supporting the underlying cost elements of the offerors' prices, the protester here seeks a far more detailed level of review than the pertinent regulations--or the terms of the RFP--impose.² The protester's identification of particular cost elements that may not have been reviewed by the agency--or may not even have been included by Seiler in its price--provides no basis, standing alone, to conclude that the agency's evaluation of Seiler's price was unreasonable.

Here, the record shows that, although Optex elected to break out its indirect cost elements for the agency in providing supporting data for its price, AR, exh. T-2, Optex Discussion Response, at 1-2, Seiler did not provide its information in a similar format. AR, exh. M-1, M-4, Seiler Discussion Response. Nonetheless, there is nothing in the record to demonstrate that Seiler's prices do not include its indirect costs.

In view of the fact that this is a fixed price contract, the agency was under no obligation to verify each and every element of the costs used by Seiler to generate its fixed prices. As we have noted, the depth of an agency's evaluation in this regard is a matter within the sound exercise of the agency's discretion. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 4-5. Indeed, nothing about an obligation to review prices for realism bars an offeror from proposing--and an agency from reasonably deciding to

² The FAR contemplates the use of various price analysis techniques in connection with the typical evaluation of fixed-price proposals. FAR § 15.404-1(b). The FAR also provides authority to use cost realism analyses techniques in connection with the evaluation of fixed price proposals in "exceptional" cases. FAR § 15.404-1(d)(3) ("Cost realism analyses may also be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price-type contracts . . ."). However, in the absence of a solicitation provision expressly advising offerors that the agency intends to use such analyses, there is no basis for our Office to require the agency to perform the cost realism type evaluation that the protester argues was required here.

accept--a below-cost offer. Network Innovations, Inc. B-408382, B-408382.2, Sept. 14, 2013, 2013 CPD ¶ 220 at 5; Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 3; Wright Tool Co., B-276416, June 10, 1997, 97-1 CPD ¶ 210 at 3; Mesa, Inc., B-220657, Dec. 27, 1985, 85-2 CPD ¶ 724 at 3.

Optex next argues that the assembly process for the aiming circles is labor intensive, and that Seiler's proposal did not include adequate labor hours to perform the requirement. Optex contends that, had the agency performed an adequate price realism review, it would have discovered that Seiler's low proposed price was due to its failure to include adequate labor hours to perform the requirement; Optex maintains that it proposed adequate labor hours to perform the requirement.

This argument is refuted by the record. As noted, during discussions, the Army solicited detailed information relating to the labor hours required to perform the requirement. Id. Both offerors responded to this request. The record shows that, contrary to Optex's position, both firms proposed almost identical labor hours for fabrication of the aiming circles, with Optex proposing to perform using [deleted] hours per unit, AR, exh. T-2, Optex Response to Discussions, at 1, and Seiler proposing to use [deleted] hours per unit. AR, exh. M-1, Seiler Response to Discussions, at 2. Thus, the factual premise of Optex's allegation--that Seiler did not propose adequate hours to perform the requirement, but that Optex did--is not supported by the record.³

Finally, Optex argues that the agency's price evaluation was unreasonable because it was based on a mechanical comparison of the prices to an unreasonably low independent government estimate (IGE). The protester asserts that the IGE was prepared based, in part, on historical prices it proposed under the predecessor contract. Optex maintains that its prices on the predecessor contract do not reflect the actual cost of performance under that contract because the agency's previous technical data package was defective and required numerous engineering change proposals. Optex states that the costs associated with those engineering changes

³ In its comments responding to the agency's report, Optex alleged that the agency never considered the breakdown of the total labor hours between assembly time and time devoted to other tasks, and therefore asserts that the fact that both offerors proposed similar total labor hours to perform the requirement obscures differences in the time each offeror devoted to assembly. Optex offers no support for this assertion other than its self-serving statements. In any event, the nature and extent of an agency's price realism evaluation is a matter within the sound discretion of the agency. Citywide Managing Servs. of Port Washington, Inc., supra.; see also Networking & Eng'g. Tech's., Inc., B-405062.4, et al., Sept. 4, 2013, 2013 CPD ¶ 219 at 5. Simply stated, the fact that the agency did not consider the breakdown of labor hours by task does not provide a basis for our Office to object to its price evaluation here.

are the subject of an ongoing claim it currently has pending at the Armed Services Board of Contract Appeals (ASBCA).

We find no merit to this aspect of Optex's protest for two reasons. First, the record shows that the agency's price evaluation relied principally on a detailed review of the cost elements making up the offerors' prices for the current requirement. AR, exh. K-1 Agency Cost Analysis. The record shows that the principal difference between the two proposals in terms of price was attributable to differences in [deleted] and [deleted]. Optex proposed \$[deleted] in [deleted] per unit, whereas Seiler proposed [deleted] of just \$[deleted] per unit. Id., at 1. Similarly, Optex proposed a [deleted] of [deleted] percent, whereas Seiler proposed a [deleted] of just [deleted] percent. Id. Optex has raised no challenge to the agency's price evaluation relating to these cost elements.

Second, to the extent Optex argues that the agency used a flawed IGE, Optex provides no basis for this conclusion. Optex's claim that the true cost of manufacturing the aiming circles is more accurately reflected in its cost experience under the predecessor contract does not demonstrate that the agency's IGE is unrealistically low. Rather, it demonstrates only that Optex claims to have experienced significant costs beyond those it originally included in its prices for the predecessor contract. Optex has not demonstrated that the government is responsible for these additional costs; rather, it has shown only that it has a pending claim for these costs at the ASBCA that has yet to be adjudicated. There is no basis for our Office to conclude that a pending--but as yet unadjudicated--claim is probative of the prospective costs that may be incurred under the current requirement. Simply stated, we disagree that the pending claim demonstrates that the IGE here is unrealistically low.

Experience Evaluation

Optex argues that it was unreasonable for the Army to have assigned both proposals substantial confidence ratings under the experience evaluation factor. In support of its position, Optex contends that Seiler has never performed a contract under which it was required to pass FAT in connection with its fabrication of an aiming circle, whereas Optex passed FAT under its predecessor contract. According to the protester, passing FAT is a "major hurdle" to successful performance of the current requirement, and provides a sound basis to distinguish between the offerors' proposals. Optex also contends that the agency generated its experience rating for Seiler by relying on contracts that were not as complex as the current requirement. Thus, Optex argues that it was unreasonable for the agency to give the Seiler proposal the same rating as it gave to the Optex proposal.

We find no merit to this aspect of Optex's protest. As an initial matter, the RFP here did not contemplate considering whether an offeror had passed FAT in connection with its evaluation of proposals under the experience factor. In this regard, the RFP

provided that the agency would evaluate the relevance of the offerors' prior contracts based solely on the following consideration:

The relevance of prior Contracts will be assessed based on present or past effort involving the same or similar scope and magnitude of effort and complexities this solicitation requires, including experience with the M2A2 Aiming Circle System Technical Data Package (TDP) 11785090 and Specification MIL-F-13926.

RFP at 72. The RFP thus did not state that the agency would consider whether a firm had manufactured an aiming circle that had passed FAT. In fact, based on the language of the RFP, it would have been improper for the agency to give evaluation credit for this issue.

Moreover, the record shows that the agency's evaluation was consistent with the terms of the RFP. Seiler included three contracts in its proposal to demonstrate its experience. First, Seiler included a contract under which it had manufactured M2A2 aiming circles identical to the ones being acquired here as a subcontractor in connection with a foreign military sales contract. AR, exh. H-8, Seiler Experience Proposal, at 1. The agency reviewed this contract, and concluded that it was very relevant because it demonstrated that these aiming circles met the exact same complexity and magnitude of the M2A2 Aiming Circle System, TDP 11785090 and Specification MIL-F-13926, paragraph 3.2.2, Special Accuracy. AR, exh. H, Seiler Technical Evaluation Report, at 2.

Seiler's second contract was for the repair, overhaul/refurbishment, and upgrade of preexisting M2A2 aiming circles. AR, exh. H-8, Seiler Experience Proposal, at 2. The agency evaluators concluded that this contract also was very relevant because this contract also required Seiler to perform in accordance with TDP 11785090 and Specification MIL-F-13926, paragraph 3.2.2, Special Accuracy, and because all assembly related shop floor instructions, fabrications, and tests and inspection methods are the same as those called for under the current requirement. AR, exh. H, Seiler Technical Evaluation Report, at 2-3.

Finally, Seiler's third contract was for the fabrication of a suite of instruments that collectively make up the optical fire control system for the M777 155 mm lightweight towed howitzer. AR, exh. H-8, Seiler Experience Proposal, at 2. The evaluators concluded that this contract also was very relevant because these items were closely comparable in complexity to the M2A2 Aiming Circle TDP and have assembly requirements for the contractor to meet Military Specification MIL-F-13926, paragraph 3.2.2, Special Accuracy. AR, exh. H, Seiler Technical Evaluation Report, at 3. The evaluators further concluded that the items required the detailed shop floor instructions and comparable assembly and test methods, including drilling/pinning, optical alignment, and hand-fit and select assembly, that are required under this RFP. Id.

In the final analysis, this aspect of Optex's protest amounts to an assertion that Seiler could not have been assigned a substantial confidence rating because it lacks the identical experience that Optex possesses. We see nothing unreasonable about the agency's conclusion that these contracts provide substantial confidence that Seiler will be able to perform the requirements of this contract. Optex's position amounts to no more than disagreement with the evaluation conclusions of the agency's technical evaluators. Such disagreement, without more, does not provide our Office with a basis to object to the agency's evaluation of proposals. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 6. We therefore deny this aspect of Optex's protest.

Lack of Required Statement

Finally, Optex contends that the Army should have rejected Seiler's proposal out of hand for failing to include a statement (called for under the RFP) either that the firm agreed with all terms, conditions and provisions of the RFP, or that it was taking exception to one or more solicitation provisions, and to identify those exceptions. RFP at 63.

We see nothing unreasonable about the agency's decision to accept this proposal, despite Seiler's failure to include a separate, stand-alone statement that it was agreeing to the terms, conditions and provisions of the RFP. First, the record shows that Seiler included a complete, executed copy of the solicitation with its proposal. AR, exh. H-1, Seiler Proposal, RFP Complete. This submission includes the portion of the RFP that calls for the statement, and including that provision with its proposal essentially was tantamount to separately making the statement.

Second, Optex has not identified any aspect of the Seiler proposal that actually takes exception to a solicitation requirement. As a result, there is no showing that Seiler did not agree with all of the solicitation's requirement.

Finally, beyond alleging that Seiler's elimination from the competition would result in Optex being the sole remaining offeror entitled to award, Optex has not alleged or demonstrated that it was prejudiced by the agency's acceptance of the Seiler proposal without this stand-alone statement. Even in cases where the record shows that the agency arguably may have relaxed a solicitation requirement, the protester still must show that it was prejudiced by the agency's actions, since prejudice is an element of every viable protest. However, a protester cannot demonstrate prejudice by showing only that the awardee would have been unsuccessful had the agency not waived the requirement; rather, the pertinent question is whether the protester would have submitted a different proposal, had it known that a requirement would be waived. Orion Tech., Inc., Chenega Integrated Mission Support, LLC, B-406769, et al, Aug. 22, 2012, 2012 CPD ¶ 268 at 7-8.

Optex has not alleged or demonstrated that it would have submitted a different proposal had it been aware of the agency's alleged waiver of this requirement. We therefore deny this aspect of Optex's protest.

The protest is denied.

Susan A. Poling
General Counsel