

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Lulus Ostrich Ranch

File: B-408993.2

Date: February 21, 2014

William R. Hayward, Lulus Ostrich Ranch, for the protester.
James L. Weiner, Esq., and Sarah T. Zaffina, Esq., Department of the Interior, for the agency.
Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is dismissed where a challenge to the solicitation's past performance evaluation methodology was not filed until after the agency had received responses, completed its review, and issued the purchase order.
 2. Protest arguing that the awardee's price is too low is denied where the solicitation provided for the award of a fixed-price purchase order and did not provide for the evaluation of the realism of prices.
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DECISION

Lulus Ostrich Ranch of San Marcos, Texas, protests the issuance of a purchase order to Durham Communications, Inc., of Mesa, Arizona, by the Department of the Interior, National Park Service (NPS), under request for quotations (RFQ) No. 513027 for the design and implementation of a turnkey radio system to deliver voice (radio) to NPS areas on the islands and surrounding waters of Ta'u and Ofu in American Samoa. Lulus contends that the solicitation was defective because it did not contain the past performance questionnaire forms, and also contends that the awardee submitted an unreasonably low price.

We dismiss in part, and deny in part, the protest.¹

¹ Our Office did not issue a protective order in connection with this protest because Lulus did not elect to retain counsel. A full version of the agency report was

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BACKGROUND

NPS issued the solicitation on July 19, 2013, through the FedBid website, as a total small business set-aside pursuant to Federal Acquisition Regulation (FAR) Part 12, Acquisition of Commercial Services, and Part 13, Simplified Acquisition Procedures.² RFQ at 1, 3. The solicitation anticipated the issuance of a fixed-price purchase order to design and implement a turnkey radio system capable of delivering voice (radio) communications to NPS areas between the islands of Ta'u, Ofu and Tutuilla.³ RFQ, SOW at 4. The solicitation was amended four times. The RFQ advised bidders that the agency's "Target Price" was \$60,000. RFQ at 1.

The solicitation notified bidders that FedBid would rank the bids by price, but also stated that award would be made to the responsible bidder whose bid conformed to the solicitation requirements and was "[the] most advantageous to the Buyer on the basis of price, technical capability, delivery, and past performance." RFQ at 2.

The agency received three bids by the August 15, deadline. Contracting Officer's Statement at 2. The bids of Lulus and Durham were included in the competitive range; the third bid was excluded from the competitive range because it was found to have an unreasonably high price of \$24.7 million. The agency provided clarification to Lulus and Durham on September 3, with responses due by September 4.⁴ Agency Report (AR), Tab 7, Lulus Clarification Request (Sept. 3,

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provided to our Office, while a redacted version of the report was furnished to the protester. We have reviewed the entire unredacted record in camera.

² FedBid, Inc., is a commercial online procurement services provider that runs a website at FedBid.com, which, among other things, hosts reverse auctions. FedBid refers to procurements conducted through its system as "buys" and a participant in the reverse auction is said to submit a "bid." See FedBid FAQs (available online at www.fedbid.com/buyers/getting-started/). In their filings, the parties refer to the reverse auction at issue here as a buy, and refer to the competitors' submissions here as bids. Although the solicitation sought quotes, we refer to the submissions as bids for the sake of consistency and because the difference between a bid and quote has no effect on the outcome of this decision.

³ The site(s) will house NPS radio repeater and base station antenna equipment that would fully communicate with NPS radio repeater and base station located at Mt. Alava on the island of Tutuila. The system will enable communication between Ta'u, Ofu, and Tutuila. RFQ, Statement of Work (SOW) at 1.

⁴ The agency requested that Lulus address the agency's concerns that its proposed price of \$688,040 was "significantly higher than the government estimate," and that
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2013); Tab 8, Durham Clarification Request (Sept. 3, 2013). Durham submitted a timely response to the clarification questions, and its proposal was determined to be technically acceptable. AR, Tab 10, Durham Clarification Response (Sept. 4, 2013); Tab 11, Source Selection Decision, at 2. Lulus' response to the clarification questions was not submitted by the required time. AR, Tab 7, Lulus Clarification Response (Sept. 6, 2013). As a result, Lulus' bid was found to be technically unacceptable. AR, Tab 11, Source Selection Decision, at 2.⁵ Durham submitted the lowest priced technically acceptable bid of \$59,897, and the firm was selected for award. Id.

Lulus requested a debriefing, which was provided on September 26. AR, Tab 15, Lulus Debriefing (Sept. 26, 2013). Lulus filed agency-level protests on September 26 and 27 respectively, maintaining that the solicitation failed to provide past performance questionnaires, and that the agency's use of FedBid permitted bidders to submit unreasonably low prices. AR, Tab 16, Lulus First Agency-Level Protest (Sept. 26, 2013); Tab 17, Lulus Second Agency-Level Protest (Sept. 27, 2013).⁶ After its agency-level protests were denied on November 8, Lulus filed this protest with our Office on November 14.⁷

DISCUSSION

First, Lulus argues that the agency improperly failed to include past performance questionnaires in the solicitation. We find that this contention is untimely. If Lulus was concerned that the solicitation lacked past performance questionnaires, it should have raised its objection prior to the deadline for submitting bids; protests of alleged solicitation improprieties such as this must be filed no later than the time

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its "frequency plan remains unclear as to whether it will work." AR, Tab 10, Lulus Clarification Request (Sept. 3, 2013).

⁵ The evaluators checked for past performance information regarding Lulus in the Past Performance Information Retrieval System (PPIRS) and through local park contacts and finding none gave Lulus a "neutral" rating. Contracting Officer's Statement at 6; AR, Tab 10, Selection Comments, at 1.

⁶ Lulus' two agency-level protests are similar and raised identical issues, however the second contained various attachments. AR, Tab 16, Lulus First Agency-Level Protest (Sept. 26, 2013); Tab 17, Lulus Second Agency-Level Protest (Sept. 27, 2013).

⁷ Although Lulus' bid was rejected by NPS because the protester failed to timely respond to the request for clarification, we find that Lulus is an interested party to challenge the award to Durham because it argues that the awardee's bid should have been rejected, and because there were no other acceptable bidders.

that bids were due. Bid Protest Regulations, 4 C.F.R. § 21.1(a)(1) (2013). Since Lulus did not raise this argument until after award, we dismiss this protest argument as untimely.

Next, Lulus argues that the agency's use of FedBid did not prevent Durham from submitting an unreasonably low bid.⁸ In essence, the protester argues that the agency should have rejected Durham's proposed price as too low.

As discussed above, the solicitation anticipated the award of a fixed-price purchase order. Although an agency is required to determine that offered prices are fair and reasonable before awarding a fixed-priced contract, the purpose of a price reasonableness evaluation in a fixed-price environment is to determine whether prices are too high, as opposed to too low, because it is the contractor and not the government that bears the risk that an offeror's low price will not be adequate to meet the costs of performance. Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. Arguments that an agency did not perform an appropriate analysis to determine whether prices are too low, such that there may be a risk of poor performance, concern price realism. SDV Solutions, Inc., B-402309, Feb. 1, 2010, 2010 CPD ¶ 48 at 4. However, a price realism evaluation is not required where, as here, the solicitation provides for the award of a fixed-price contract and does not include a requirement for price realism. Id. Thus, we deny the protester's assertion that the agency failed to consider whether the awardee's prices were too low.

Finally, Lulus argues that the agency was biased towards Durham and "wanted all along to award this bid to Awardees." Protest at 2. This allegation is untimely as it was not raised in either of Lulus' agency-level protests and was raised for the first time in Lulus' protest to GAO. Under our Bid Protest Regulations, protests other than those based on alleged solicitation improprieties generally must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Since Lulus has made no showing that its challenge regarding the agency's alleged bias towards Durham was based on new information learned after the debriefing and thus could not have been raised in its agency-level protests, its failure to raise this protest ground within 10 days of the debriefing in its agency-level protests renders untimely the

⁸ To the extent that Lulus challenges the agency's use of FedBid as a contract vehicle for this procurement, this argument concerns an alleged solicitation impropriety, and is untimely because it was not raised before the deadline for the submission of bids. 4 C.F.R. § 21.1(a)(1).

subsequent assertion of this protest ground in its protest to our Office.⁹ Foundation Eng'g Scis., Inc., B-292834, B-292834.2, Dec. 12, 2003, 2003 CPD ¶ 229 at 3 n.2.

The protest is dismissed in part, and denied in part.

Susan A. Poling
General Counsel

⁹ In any event, government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8; Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. Lulus' allegation fails to meet these threshold requirements for consideration and will not be considered further. See International Garment Processors, B-299674 et al., July 17, 2007, 2007 CPD ¶ 130 at 4-5 n.6.