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Decision

Matter of: B&B Medical Services, Inc.; Ed Medical, Inc.

File: B-409705.7; B-409705.8

Date: December 8, 2015

Richard L. Moorhouse, Esq., and Ryan C. Bradel, Esq., Greenberg Traurig, LLP, for B&B Medical Services, Inc.; Bryan R. King, Esq., Todd R. Overman, Esq., and Richard W. Arnholt, Esq., Bass Berry & Sims, PLC, for Ed Medical, Inc., the protesters.

Michael A. Hordell, Esq., Kristopher Berr, Esq., and Andrew J. Victor, Esq., Pepper Hamilton LLP, for First Community Care, LLC, the intervenor.

Tracy Downing, Esq., Department of Veterans Affairs, for the agency.

Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency price realism evaluation is denied where the agency reviewed awardee's pricing for each contract line item number (CLIN); compared pricing to offerors' proposed pricing, contract pricing for similar home oxygen services, the independent government estimate, and Medicare pricing; determined that the awardee's pricing, while substantially lower overall, was "in line with market conditions," including protesters' pricing for many of the CLINs; and concluded that in view of the awardee's clear understanding of the solicitation requirements, and satisfactory performance of a contract for similar services but for nearly twice as many patients, there was no significant risk of poor performance as a result of awardee's lower pricing.

DECISION

B&B Medical Services, Inc. (B&B), of Oklahoma City, Oklahoma, and Ed Medical, Inc. (EMI), of Hendersonville, Tennessee, protest the Department of Veterans Affairs' (VA) award of contracts for three service locations to First Community Care, LLC (FCC), of Midland, Michigan, under request for proposals (RFP) No. VA249-14-R-0173, for home oxygen supply. The protests challenge the corrective action taken by the agency following our decision sustaining B&B's and EMI's protests in B&B Medical Services, Inc.; Ed Medical, Inc., B-409705.4, B-409705.5, June 29, 2015, 2015 CPD ¶ 198. The protesters assert that the awardee's proposed prices were

unrealistically low and that the agency did not conduct an adequate price realism evaluation.

We deny the protests.

BACKGROUND

The RFP, issued on March 11, 2014, as a total small business set-aside, provided for the award of indefinite-delivery/indefinite-quantity contracts, with a 1-year base period and four 1-year options, for the provision of home oxygen services to patients in Veterans Integrated Service Network 9 (VISN 9), including, as relevant here, medical centers in Mountain Home, Tennessee; Memphis, Tennessee; and Nashville, Tennessee (Tennessee Valley Healthcare System (TVHS)). RFP at 6. Award for each location was to be made to the offeror whose proposal represented the best value to the government considering: (1) technical capability, (2) past performance, (3) socioeconomic status, and (4) price. RFP at 59, 66. All non-price factors when combined were significantly more important than price. Id.

Relevant here, the RFP included the following provision with regard to price realism:

Proposals unrealistically high or low in price, when compared to the Government estimate, and market conditions evidenced by other competitive proposals received, may be indicative of an inherent lack of understanding of the solicitation requirements and may result in proposal rejection without discussion.

RFP at 65.

B&B submitted proposals for all three locations relevant here, while EMI submitted a proposal for the TVHS location only.¹ In its initial source selection decisions, VA found FCC's proposal to be the best value for the TVHS, Mountain Home, and Memphis locations. Award was made in March 2015 to FCC for all three locations at a cumulative award price of \$18,299,125. B&B Medical Services, Inc.; Ed Medical, Inc., B-409705.4, B-409705.5, at 2-5.

In their subsequent protests against the awards to FCC, B&B and EMI asserted that the agency's price realism analysis was inadequate and that the agency

¹ The solicitation here also sought proposals for other locations in VISN 9, which are not at issue here. In B&B Medical Services, Inc., B-409705.2, Apr. 17, 2015, 2015 CPD ¶ 142, and SS Medical, Inc., B-409705.3, Apr. 17, 2015, 2015 CPD ¶ 143, we denied protests regarding awards to Greene Respiratory for locations in Lexington and Louisville, Kentucky, and Huntington, West Virginia.

unreasonably failed to find that FCC's pricing was unrealistically low. See generally B&B Medical Services, Inc.; Ed Medical, Inc., B-409705.4, B-409705.5, supra. Both protesters pointed to the discrepancy between FCC's prices and the prices of the other offerors, as well as the government estimate, concluding that either the VA failed to perform the price realism analysis provided for under the solicitation, or performed an inadequate analysis which led to an unreasonable conclusion that FCC's pricing was realistic. Id. at 7-8.

We sustained the protests, finding that no price realism evaluation was documented in the acquisition file:

While the agency generally claims that FCC's pricing was "realistic," the record contains no indication of how the agency reached this conclusion, given that FCC's pricing was so significantly below all of the other prices, including those proposed under this solicitation and those paid under the incumbent contracts. Simply put, there is no support in the record for the agency's claim that FCC's prices were realistic for the work to be performed, or that the agency even meaningfully considered the realism of FCC's low prices. Again, where an agency fails to document its evaluation, it bears the risk that there may not be an adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its source selection decision.

B&B Medical Services, Inc.; Ed Medical, Inc., B-409705.4, B-409705.5, supra, at 11. We recommended "that the VA evaluate the realism of FCC's prices, as well as those of the other offerors, consistent with our decision; document its consideration of realism; and make a new best value determination." Id. at 12.

In response to our recommendation, VA undertook a price realism analysis, and prepared a new source selection decision, with the same evaluation ratings as before, as shown below:

Competition for TVHS Location

| Offeror | Technical Capability | Past Performance | Socioeconomic | Price |
|-----------------------|-----------------------------|-------------------------|----------------------|--------------|
| FCC | Good | Significant Confidence | No Credit | \$7,717,775 |
| Offeror 1 | Acceptable | Significant Confidence | No Credit | \$9,677,520 |
| EMI | Acceptable | High Confidence | No Credit | \$10,737,870 |
| Offeror 2 | Acceptable | Significant Confidence | Full Credit | \$11,221,150 |
| B&B | Good | Significant Confidence | No Credit | \$11,291,052 |
| Offeror 3 | Acceptable | Neutral | Full Credit | \$12,015,140 |
| Gov't Estimate | | | | \$16,768,434 |

Source Selection Decision Document (SSDD) at 14.

Competition for Mountain Home Location

| Offeror | Technical Capability | Past Performance | Socioeconomic | Price |
|-----------------------|-----------------------------|-------------------------|----------------------|--------------|
| FCC | Good | Significant Confidence | No Credit | \$7,939,700 |
| Offeror 1 | Acceptable | High Confidence | No Credit | \$9,486,492 |
| Offeror 2 | Acceptable | Significant Confidence | No Credit | \$9,626,200 |
| Offeror 3 | Acceptable | Neutral | Full Credit | \$10,151,933 |
| Offeror 4 | Acceptable | Significant Confidence | No Credit | \$10,714,000 |
| B&B | Good | Significant Confidence | Some Credit | \$11,616,870 |
| Offeror 5 | Acceptable | Significant Confidence | Full Credit | \$12,242,000 |
| Gov't Estimate | | | | \$11,752,053 |

SSDD at 14.

Competition for Memphis Location

| Offeror | Technical Capability | Past Performance | Socioeconomic | Price |
|----------------|----------------------|------------------------|---------------|-------------|
| FCC | Good | Significant Confidence | No Credit | \$2,641,650 |
| Offeror 1 | Acceptable | Significant Confidence | Full Credit | \$3,879,525 |
| B&B | Good | Significant Confidence | No Credit | \$3,964,784 |
| Offeror 2 | Acceptable | Significant Confidence | No Credit | \$3,971,420 |
| Offeror 3 | Acceptable | Neutral | Full Credit | \$4,368,270 |
| Gov't Estimate | | | | \$4,101,879 |

SSDD at 14.

In the updated SSDD, the source selection authority (SSA) noted that a “further” price realism evaluation had been conducted by the agency in response to our prior decision, using data from the following “six resources” “as a method of determining current market conditions”:

1. All proposed pricing under the current solicitation
2. Medicare pricing for calendar year 2015
3. Contract pricing for VISN 4 (VA244-15-D-0253)
4. Independent Government Cost Estimates
5. Contract pricing for VISN 11 (VA251-14-D-0114), awarded to FCC
6. Contract pricing for VISN 20 (VA260-13-D-0104)

Updated SSDD (USSDD) at 6. The SSA indicated that “[e]ach CLIN [Contract Line Item Number] has been individually addressed for realism,” and specifically addressed in the USSDD FCC’s pricing for each CLIN in relation to the relevant “resource” pricing. USSDD at 6-13. In this regard, the SSA concluded as follows:

While First Community Care’s (FCC) overall pricing is substantially lower, which could be an indication of potential poor performance, when the line by line analysis was conducted it showed FCC’s pricing is in line with market conditions based upon offers received with the exception of CLINs [deleted]. . . . FCC shows clear understanding of the requirements and mitigates any perceived risk to performance.

Moreover, FCC is performing at a satisfactory level in a similar requirement serving 6,000 Veterans in VISN 11 which is near double VISN 9's requirement of 3,100 Veterans.

USSDD at 6.

The SSA further found, based on a "comparison of the proposals," including the findings of the Source Selection Evaluation Board with respect to "strengths, weaknesses, significant weaknesses and deficiencies," that FCC's proposal represented the best value for the TVHS, Mountain Home and Memphis locations. USSDD at 15. Upon learning of the reevaluation results, B&B and EMI filed these protests with our Office.

DISCUSSION

B&B and EMI assert that the agency's revised price realism analysis is inadequate and does not show that FCC's prices overall are realistic. B&B Protest at 2; EMI Protest at 7, 9-10. In this regard, B&B notes that FCC's overall prices were lower than the prices proposed by all other offerors competing for the three VAMC's at issue, as well as lower than the VA's independent government cost estimate (IGCE). B&B Protest at 2.

The agency responds that the renewed protests are based wholly on pricing, and that low pricing "does not automatically render an offeror's pricing in fact unrealistic." Agency Report (AR) at 5. In addition, the agency maintains that it "verified FCC's proffered pricing," and that, moreover, its technical evaluation indicated that "FCC does in fact have a clear understanding of this requirement." Id. at 6.

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). Price realism need not necessarily be considered in evaluating proposals for the award of a fixed-price contract, because these contracts place the risk of loss upon the contractor rather than the government. Indeed, low- or below-cost price proposals are neither prohibited nor discouraged. See Lilly Timber Servs., B-411435.2, Aug. 5, 2015, 2015 CPD ¶ 246 at 4; JCMCS, B-409407, Apr. 8, 2014, 2014 CPD ¶ 125 at 2 (below-cost prices are not inherently improper when vendors are competing for award of a fixed-price contract). Nonetheless, an agency may 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 and/or the risk inherent in a proposal. FAR § 15.404-1(d); General Dynamics One Source, LLC; Unisys Corp., B-400340.5, B 400340.6, Jan. 20, 2010, 2010 CPD ¶ 45 at 9. Where a solicitation provides for a price realism evaluation, as here, 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. The FAR recognizes a number of price analysis techniques that may be used to determine whether prices are reasonable and realistic, including a comparison of proposed prices with each other and with an independent government estimate. See FAR §§ 15.404-1(b)(2)(i), (ii), (iv); Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 at 2. In reviewing protests challenging price realism evaluations, our focus is on whether the agency acted reasonably and in a manner consistent with the solicitation's requirements. General Dynamics One Source, LLC; Unisys Corp., *supra*.

Here, there is no dispute that FCC's prices, both overall and with regard to a number of CLINs, were lower than various comparable price measures, consistent with FCC's overall position as the lowest-priced offeror. However, as noted in the agency's price realism evaluation, the pricing data considered by the agency indicated that FCC's pricing was substantially in line with market conditions. For example, the agency notes that FCC's pricing on almost half of the CLINs was the same or higher than the protestors' pricing. AR at 10. Further, the agency noted with regard to CLIN 1, for medical oxygen concentrator systems, 5 liter, the single highest quantity item under the contract, that the incumbent contractor for the Mountain Home location (Medical Comfort) offered a price ([deleted] per unit) [deleted] percent lower than FCC's price ([deleted]). USSDD at 7-8; AR at 13.

Likewise, for CLIN 2, portable tanks, the incumbent contractor for the Mountain Home location (Medical Comfort) offered the [deleted] price ([deleted] per unit), while EMI's price ([deleted]) and the average price ([deleted]) were [deleted] than FCC's price ([deleted]), and the internal government estimate ([deleted]) was only slightly [deleted]. USSDD at 7-8; AR at 14. Likewise, for CLIN 3, conserving devices, the agency observed that 4 offerors including [deleted] and [deleted] offered [deleted] per unit. USSDD at 8; AR at 14. The agency also noted that for CLIN 4, liquid oxygen systems, while FCC's price ([deleted]) was the [deleted], the internal government estimate ([deleted]) and FCC's VISN 11 contract price ([deleted]) were only slightly [deleted]. *Id.* The agency further noted that for CLIN 5, liquid oxygen system refills, while FCC's proposed price ([deleted] per pound) was the [deleted], FCC's incumbent VISN 11 contract price was [deleted] per pound [deleted] while the VISN 20 contract price was [deleted]. *Id.*

Further, the agency noted with regard to CLIN 6, portable liquid oxygen conserving devices, that B&B's and EMI's proposed prices ([deleted]) were the [deleted], while FCC's ([deleted]) was the second [deleted]. *Id.* In addition, while FCC proposed the lowest price ([deleted]) for CLIN 7, monthly rental for contractor-owned ventilators, the agency emphasized that its price was [deleted] than the price under its VISN 11 contract, on which FCC was successfully performing. USSDD at 8-9; AR at 15. Also, the agency noted that for CLIN 12, a high volume compressor, EMI's price

([deleted]) was [deleted] than FCC's price ([deleted]) and the median price ([deleted]); B&B's price was [deleted] as FCC's price ([deleted]) for CLIN 14, portable compressor unit rental; and B&B's and EMI's prices for CLIN 19, portable tank refills, were "[deleted]" with FCC's price ([deleted]), and all were [deleted] with the median price ([deleted]). USSDD at 10-12; AR at 15-16.²

In sum, the record before the agency included significant data tending to support the agency's position that FCC's pricing, while "substantially lower" overall, was "in line with market conditions," including B&B's and EMI's pricing, for many of the CLINs. See USSDD at 6. While the agency recognized that this was not true for all of the CLINs, it concluded from its detailed review of FCC's proposal, both technical and price, that "FCC shows clear understanding of the requirements," which "mitigates any perceived risk to performance." USSDD at 6. In addition, the agency emphasized FCC's satisfactory performance of its VISN 11 contract, for similar services but for a nearly twice as many patients (6,000 veterans versus the 3,100 veterans in VISN 9), as further mitigating risk. Id. While the protesters focus on the differences in pricing, they have not shown that the agency was unreasonable in concluding from its detailed review of FCC's proposal that in the circumstances here, there was not a significant risk of poor performance as a result of FCC's lower pricing.

EMI also asserts that the agency failed to acknowledge its "High Confidence" past performance rating in the best value analysis for the TVHS location. According to EMI, while the "[t]he Solicitation made it clear that the Past Performance Factor was of equal importance as the Technical Capability Factor," and it received the highest overall past performance rating of high confidence, the source selection decision failed to discuss or acknowledge that the past performance and technical capability factors were of equal weight, or that EMI's rating under the past performance factor was higher. EMI Protest at 12.

EMI's argument does not furnish a basis for questioning the source selection decision. As an initial matter, EMI is mistaken in its assertion that the past performance factor was of equal importance to the technical capability factor. In this regard, the RFP described the evaluation factors as follows:

The below factors are in descending order of importance:

² Although EMI asserts that VA improperly failed to include VISN 9 contracts in its analysis, see EMI Protest at 7, we find unobjectionable the agency's rationale that the VISN 9 pricing was inflated due to the necessity to employ short-term contracts over several years. AR at 3, 16 ("[G]iven all the protests that have been filed over the past six years after both protesters' original contracts expired in 2009, VISN 9's 'current' prices are 11-plus years old and are arguably more than out of date.").

Factor 1 – Technical Capability

Factor 2 – Past Performance

Factor 3 -- Socioeconomic Status

Factor 4 – Price

All non-cost factors, when combined are **significantly more important** than Price.

RFP § E.2, at 59 (emphasis in original). While the solicitation as issued also included language indicating that “[a]ll non-cost factors are of equal importance but when combined are significantly more important than Price,” RFP § E.2, at 66, amendment A0006 changed this language to read instead that: “All non-cost factors when combined are significantly more important than Price,” RFP, Amend. A0006 at 3. Thus, the solicitation as amended provided without qualification that the technical capability factor was more important than the past performance factor.

Here, FCC received a good rating under the technical capability factor (the most important evaluation factor), a significant confidence rating for past performance (the second most important factor), and a “no credit” socioeconomic rating, while EMI received an acceptable rating for technical capability, a high confidence rating under the past performance factor, and a “no credit” socioeconomic rating. In addition, FCC’s price (\$7,717,775) was significantly lower (approximately 28%) than EMI’s (\$10,737,870). As a result of FCC’s advantage under the non-price factors, where both offerors had an advantage under one of the factors but FCC’s advantage was under a more important (and indeed the most important) evaluation factor, and given FCC’s significantly lower price, the SSA concluded that no tradeoff analysis was required. USSDD at 13. EMI has shown no basis to question either this conclusion or the resulting selection of FCC’s proposal as the best value for the TVHS location.

The protests are denied.

Susan A. Poling
General Counsel