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Decision

Matter of: AGE Logistics Corporation

File: B-412049

Date: December 9, 2015

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Christopher S. Cole, Esq., Department of the Air Force, for the agency.

Elizabeth Witwer, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the evaluation of the awardee's price is denied where the agency determined that the price was fair and reasonable based on adequate price competition, and was not required to perform a price realism analysis because the solicitation did not provide for such an analysis.

DECISION

AGE Logistics Corporation (AGE), a small business, of Monrovia, California, protests the award to East/West Industries, Inc. (East/West), a small business, of Ronkonkoma, New York, under request for proposal (RFP) No. FA8533-14-R-30933, which was issued by the Department of the Air Force for Multi Aircraft Canopy Cranes. AGE asserts that the Air Force failed to reasonably evaluate whether East/West's price was too low.

We deny the protest.

BACKGROUND

The RFP, which was issued on March 18, 2015, as a small business set-aside, contemplated the award of a fixed-price requirements contract, consisting of a base year and four 1-year options, for Multi Aircraft Canopy Cranes with a lifting capacity of at least 1500 pounds. RFP at 1, 3, 88. The best estimated quantity (BEQ) identified a projected total acquisition of 186 cranes. *Id.* at 3.

The RFP informed offerors that the award would be made using the tradeoff source selection procedures in accordance with Federal Acquisition Regulation (FAR) subpart 15.3. RFP at 66. Two factors, of equal importance, would be evaluated in making an award: past performance and cost/price. Id. at 66-67.

With respect to past performance, the RFP instructed offerors to provide data on three active or completed contracts, performed within the last 5 years, that the offeror considered relevant in demonstrating its ability to manufacture the cranes required by the subject acquisition. Id. at 63. The Air Force was to evaluate each submitted contract for recency, relevancy, and quality of performance. Id. at 67. Based on its evaluation, the Air Force was to assign an overall confidence assessment rating of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral). Id. at 70.

With respect to the cost/price factor, the RFP stated that the Air Force would evaluate proposals for reasonableness, balance, and total evaluated price. Id. at 71-72. Of relevance to AGE's challenge to the Air Force's price evaluation, the RFP provided that "[t]he existence of adequate price competition is expected to support a determination of reasonableness." Id. at 71.

The Air Force received proposals from three offerors, including AGE and East/West. Agency Report (AR), Tab 24, Source Selection Decision Document, at 1-2. The Air Force conducted discussions with all three offerors and received final proposals. Id. at 2. A Final Performance Report and a Final Price Comparison Memorandum were prepared to document the evaluation of proposals. Id.

As relevant here, Air Force performed a price reasonableness analysis, as required by the RFP, by comparing proposed prices to find adequate price competition. RFP at 71; AR, Tab 24, Source Selection Decision Document, at 4-5; Tab 21, Final Price Competition Memorandum, at 2, 5. To ensure that proposals were accurate and free of errors, after the submission of initial proposals, the Air Force evaluated whether offerors' contract line item numbers (CLIN) prices were more than 25 percent above or below the average proposed price for that CLIN. AR, Tab 21, Final Price Competition Memorandum, at 5. The agency concluded that all three offerors' prices were outside the 25 percent average for one or more of the CLINs, and provided the offerors an opportunity to revise or confirm their prices. Id. at 5-7.

Of relevance to AGE's protest, East/West reviewed and confirmed that its proposed price for the CLIN in question was accurate. Id. at 5-6. East/West further responded that, upon investigation of its price, it was confident that it had the staff, capability, and experience necessary to perform the CLIN at the price proposed. Id. at 6.

In evaluating East/West’s final proposal revision, the Air Force determined that “[w]hen a comparison of East/West’s [total evaluated price] is made with the other offerors, it is considered to be within the range that is reasonable.”¹ Id. The Air Force reached the same conclusion with respect to AGE and the third offeror’s total evaluated prices. Id. at 5, 7. As a result, the Air Force concluded that, based on adequate price competition, all three offerors proposed prices that were reasonable. AR, Tab 24, Source Selection Decision Document, at 8. See also Contracting Officer’s (CO) Statement at 17 (“The existence of adequate price competition supports a determination of reasonableness.”).

The Air Force’s evaluation results are summarized as follows:

	AGE	East/West	Offeror 3
Confidence Assessment	Substantial Confidence	Satisfactory Confidence	Unknown Confidence
Total Evaluated Price	\$9,639,305	\$7,311,975	\$9,818,129

AR, Tab 24, Source Selection Decision Document, at 5-6.

The source selection authority (SSA) determined that East/West’s proposal represented the best overall value to the government. Id. at 8-9. In reaching this conclusion, the SSA recognized that, although AGE received a more favorable past performance rating, East/West’s price was \$2,327,330 lower than AGE’s price-- a differential of 31.83 percent. Id. at 8. Acknowledging that the past performance factor was approximately equal to the cost/price factor, the SSA concluded that “[a] \$2.33M premium for AGE Logistics’ proposal is not warranted in order to obtain a higher confidence rating.” Id. at 9. The SSA’s conclusion was further supported by the fact that he determined the requirement to be a “‘build to print’, commercial, non-complex acquisition” for cranes that East/West had previously demonstrated the technical capacity to manufacture. Id. at 8-9. Accordingly, the SSA found that “the Government has an expectation [East/West] will successfully perform this requirement for Cranes.” Id. at 9.

¹ It is unclear from the record whether the Air Force applied the same 25 percent range in evaluating the final total evaluated price. In any event, East/West’s final total evaluated price of \$7,311,975 is less than 25 percent lower than the average evaluated price for the three offerors of \$8,923,136.

The contract was awarded to East/West on August 28. AR, Tab 26, Contract No. FA8533-15-D-0004. AGE requested and received a debriefing on September 2. AR, Tab 29, Debrief. This protest followed.

DISCUSSION

AGE raises two related challenges to the Air Force's evaluation of East/West's allegedly "unrealistically" low price. First, AGE argues that the Air Force engaged in a defective price reasonableness analysis because it found East/West's "unrealistically" low price to be reasonable. AGE's Comments at 2, 4. Second, AGE argues that East/West is attempting--improperly and in violation of procurement regulations--to "buy in" to this contract by submitting an offer that is below anticipated costs. Protest at 2. For the reasons discussed below, we find no basis to sustain the protest.²

AGE argues that the Air Force's price reasonableness evaluation was defective because the agency allegedly failed to perform sufficient analysis to determine whether the East/West's price was too low. Comments at 2. AGE contends that the Air Force should have analyzed East/West's "pricing data." Id. at 4.

As our Office has held, when awarding a fixed-price contract, an agency is only required to determine whether the offered prices are fair and reasonable. FAR § 15.402(a); Per Aarsleff A/S et al., B-410782 et al., Feb. 18, 2015, 2015 CPD ¶ 86 at 17. An agency's concern in making a price reasonableness determination is whether the offered prices are too high, rather than too low. Vital Link, Inc., B-405123, Aug. 26, 2011, 2011 CPD ¶ 233 at 6. Arguments that the 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 not price reasonableness; price realism is not required to be evaluated by the agency unless the solicitation provides for such an analysis. Indtai Inc., B-298432.3, Jan. 17, 2007, 2007 CPD ¶ 13 at 4; Dismas Charities, Inc., B-289575.2, B-289575.3, Feb. 20, 2004, 2004 CPD ¶ 66 at 4. Here, the RFP did not provide for a price realism analysis, see RFP at 71, and the Air Force, therefore, was not required to perform such an analysis.

² In its protest, AGE also argued that the Air Force unreasonably evaluated the past performance of both AGE and East/West. Protest at 4-6. The Air Force provided a detailed response to AGE's contentions in its report, see Legal Memorandum at 2-3, 5-14; CO's Statement at 8-16, and AGE did not reply to the agency's response in its comments. See generally, AGE's Comments. Accordingly, we consider these arguments abandoned and dismiss them. See Noble Supply & Logistics, B-410788.4 et al., July 29, 2015, 2015 CPD ¶ 243 at 6 n.3.

Moreover, where a solicitation does not provide for a price realism analysis, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to perform the contract successfully at its offered price, which is not a matter that our Office will review. 4 C.F.R. § 21.5(c); Inchcape Shipping Servs. Holding, Ltd., B-403399.3, B-403399.4, Feb. 6, 2012, 2012 CPD ¶ 65 at 5; Milani Constr., LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87 at 4-5; Laerdal Med. Corp., B-297321, B-297321.2, Dec. 23, 2005, 2006 CPD ¶ 12 at 7 n.6.

Next, AGE argues that the East/West is attempting to "buy in" to the contract by submitting a below-cost price. Protest at 2. AGE cites to East/West's past prices on competitive procurements and its public General Services Administration schedule price listings for similar cranes--all of which AGE contends are significantly higher than the price proposed here by East/West. *Id.* at 8; AGE's Comments at 5. AGE concludes, therefore, that East/West has improperly submitted a proposed price that is below its anticipated costs. AGE's arguments are unavailing.

FAR § 3.501-1 defines "buying-in" as submitting an offer below anticipated costs, expecting to (1) increase the contract amount after award (*e.g.*, through unnecessary or excessively priced change orders); or (2) receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract. Although the FAR cautions agencies, as a matter of policy, to be cognizant of the practice because of the risk that it may decrease competition or result in poor contract performance, the FAR does not expressly prohibit buying-in.³ FAR § 3.501-2. Rather, contracting officers are instructed to take appropriate action to ensure buying-in losses are not recovered by the contractor through change orders or follow-on contracts subject to cost analysis. *Id.*

One such method to decrease the risk associated with buying-in is to seek a "price commitment covering as much of the entire program concerned as is practical[.]" FAR § 3.501-2(b). As the contracting officer explains, the resultant contract in this matter is a fixed-price contract through which the Air Force obtained a firm price commitment from East/West for the entire requirement of 186 cranes, including option years. CO's Statement at 18. Moreover, the contracting officer represents that any requirements exceeding the BEQ of 186 cranes "would not be obtained under this contract," but "through the use of a new competitive acquisition." *Id.* Accordingly, the Air Force contends that it has implemented methods to minimize the opportunity for buying-in and that "[t]his acquisition and the resultant contract

³ AGE appears to recognize this principle when it states that a buy-in offer "may not be illegal per se." AGE's Comments at 7. See also Protest at 7 (buying-in "is strongly discouraged by procurement regulations and case law") (emphasis added). In other places, however, AGE states that buying-in "violates federal procurement laws" and is "an unfair competitive practice." Protest at 8.

provide neither an opportunity for East/West to increase the contract amount after award nor does it provide [] an opportunity to receive follow-on contracts at artificially higher prices.” Id.; Legal Memorandum at 15.

As our Office has held, a fixed-price contract places the risk and responsibility for contract costs and resulting profit or losses on the contractor; for this reason, an agency’s use of a fixed-priced contract addresses the concern raised in the FAR regarding buying-in. See SoniTech NDT, B-407115, Nov. 2, 2012, 2012 CPD ¶ 311 at 3. Moreover, even assuming that East/West did submit an offer that is below anticipated costs, there is no prohibition against an agency accepting below-cost prices on a fixed-price contract. Inchcape Shipping Servs. Holding, Ltd., supra; IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 at 13 n.17; All Phase Env’tl., Inc. B-292919.2 et al., Feb. 4, 2004, 2004 CPD ¶ 62 at 8; McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. Rather, “[t]he fact that a firm, in its business judgment, submits an offer that may not include any profit or be below-cost, or may be an attempted buy-in, does not render the firm ineligible for award.” IBM Corp., supra (citations omitted). To the contrary, an agency may not withhold an award from a responsible offeror merely because its low offer is, or may be, below cost.⁴ McDonnell Douglas Corp., supra.

We deny the protest.

Susan A. Poling
General Counsel

⁴ For this reason, AGE’s reliance on FCN, Inc. v. United States, 115 Fed. Cl. 335 (2014), is unavailing. AGE’s Comments at 6-8. The language of the solicitation at issue in FCN is markedly distinct from the language of the RFP at issue here. In FCN, the solicitation expressly required the agency to conduct a price realism analysis, stated that the agency would determine whether any proposed prices represented a “buy-in,” and mandated that the agency “examine price proposals for artificially low unit prices.” FCN, Inc., 115 Fed. Cl. at 343-44. AGE points to no such language in the subject RFP, nor do we identify any.