



Decision

Matter of: IDEAL Industries, Inc.

File: B-416416

Date: July 26, 2018

James W. Kim, Esq., McDermott Will & Emery LLP, for the protester.
Wade L. Brown, Esq., and Misty L. Caldwell-Colen, Esq., Department of the Army, for the agency.
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DIGEST

Protest of corrective action taken in response to a post-award, agency-level protest is denied where the corrective action was within the agency's discretion and appropriate to remedy the concerns raised in the agency-level protest.

DECISION

IDEAL Industries, Inc., of Sycamore, Illinois, protests the corrective action taken by the Department of the Army, Army Materiel Command, in response to an agency-level protest filed by another offeror (Offeror A) against the award of a contract to IDEAL under request for proposals (RFP) No. W56HZV-16-R-0092 for tool kits. The protester alleges that the agency's corrective action--which consisted of terminating IDEAL's contract, and reopening and amending the RFP--was unreasonable. The protester also complains that the release of its pricing information from the original contract without releasing the pricing of other offerors improperly puts IDEAL at a material disadvantage.

We deny the protest.

BACKGROUND

The RFP, issued on October 30, 2017, sought proposals for a contractor to supply general mechanics tool kits (GMTKs), which are military-use containers packed with specialized hand tools for the maintenance of vehicle platforms. Agency Report (AR), Tab 4, RFP, at 2; AR at 1 n.1. The RFP contemplated the award of a single, fixed-price, indefinite-delivery, indefinite-quantity (IDIQ) contract with five 1-year ordering periods. RFP at 1; AR at 1.

The RFP stated that award would be made on a lowest-price, technically acceptable basis and proposals would be evaluated based on two factors: technical and price. RFP at 56. The RFP advised that each proposal would be evaluated to determine a total evaluated price, which would include an assessment of price reasonableness. Id. The RFP further advised that the agency would then conduct a technical evaluation on an acceptable/not acceptable basis on the lowest-priced proposal only, continuing until it found the lowest-priced offeror with a technically acceptable proposal. Id.

Of relevance here, section L.4.2 of the RFP instructed offerors to submit “data other than certified cost or pricing data,” which the agency intended to use to evaluate the proposed prices for reasonableness, and section L.4.3 required offerors to provide certain information “used in the calculation of the out-year prices.” RFP at 54. While section M.2.1 warned that offerors “must carefully read, and provide all the information requested,” it advised that the agency “may reject any or all proposals if such action is in the [agency’s] best interest.” Id. at 55.

On or before December 1, 2017,¹ the agency received five proposals. AR at 2. The source selection evaluation board (SSEB) first reviewed the lowest-priced proposal, which was from Offeror A, rejected it for not including the information required by sections L.4.2 and L.4.3, and did not evaluate its price for reasonableness or its technical proposal for acceptability. AR at 2; see RFP at 54. The SSEB moved on to the next lowest-priced proposal that could be evaluated for price reasonableness and technical acceptability; upon completion, the SSEB presented its evaluation results, including the results of the compliance review, to the source selection authority. AR at 3. On February 8, 2018, the agency selected IDEAL for award and issued an IDIQ contract with an estimated value of \$49,525,324 and a first delivery order of \$1,769,728. Id.; see also AR, Tab 6-3, Federal Business Opportunities (FBO) Public Award Notice, Feb. 8, 2018, at 1.

After receiving a debriefing, Offeror A filed an agency-level protest on March 13, challenging the award to IDEAL on the basis that the agency had improperly excluded Offeror A’s proposal from consideration. AR at 3. Offeror A argued that the agency could have evaluated its proposal for price reasonableness based on adequate price competition instead of the missing information. Id.

In reviewing the procurement, the agency found that price reasonableness could have been determined based on adequate price competition and without the information required by sections L.4.2 and L.4.3 of the RFP. AR, Tab 6-1, Corrective Action Memorandum for Record (redacted partially), at 1, citing Federal Acquisition Regulation (FAR) § 15.402(a)(2). The agency also found that the RFP did not put offerors on

¹ While proposals were initially due by November 21, amendments extended the deadline to December 1. AR, Tab 4-2, RFP Amendment 1, at 2; AR, Tab 4-3, RFP Amendment 2, at 2.

notice that the agency would conduct a pass/fail compliance check to determine whether offerors had prepared their proposals in strict conformance with the RFP's instructions, nor did it state that the agency would reject proposals for failure to provide the required supporting documentation. Id., citing McCann-Erickson USA, Inc., B-414787, Sept. 18, 2017, 2017 CPD ¶ 300 (sustaining protest where record shows that proposal was eliminated based on considerations not contemplated by solicitation's evaluation criteria).

On April 30, the agency decided to take corrective action, which included terminating for convenience IDEAL's contract, amending the terms of the RFP based on the issues raised in the agency-level protest and changes in the agency's requirements, obtaining revised proposals from the original offerors based on the amended RFP, and issuing a new award decision. AR at 3. On May 11, the agency dismissed Offeror A's agency-level protest as academic. Id. at 4. On May 18, the agency terminated IDEAL's contract and issued Amendment 6 to the five offerors, which reopened the RFP and incorporated several changes, including but not limited to: revising sections L and M, increasing the maximum quantity requirements, updating several of the contract line item numbers (CLINs), and revising the scope of work described in the performance work statement (PWS). See AR, Tab 4-7, RFP Amendment 6, at 2. On May 25, IDEAL filed this protest with our Office.

DISCUSSION

IDEAL protests the agency's corrective action and release of its pricing information.² First, IDEAL contends that the agency's corrective action was unreasonable "where no rationale for corrective action is provided and no material change to the solicitation is made that justifies a reopening of the solicitation." Protest at 1 (emphasis omitted). In IDEAL's view, Offeror A's agency-level protest "do[es] not show any actual impropriety in the original evaluation that would justify the corrective action taken by the agency[,] and, further, any other changes are "immaterial." Comments at 4-5.

The agency responds that none of IDEAL's assertions have merit and, to the contrary, the agency's decision to take corrective action was "reasonable and appropriate to remedy the concerns raised by" Offeror A's agency-level protest. AR at 4-5. The agency identified issues with its price reasonableness evaluation process, concluded

² IDEAL has raised other arguments that are in addition to, or variations of, those specifically discussed herein. We have reviewed all of IDEAL's arguments and find no basis to sustain its protest. For example, IDEAL alleges that Offeror A's agency-level protest was untimely filed and, thus, does not support the agency's corrective action. Protest at 7-8; Comments at 1-3. We note that whether an agency-level protest was timely filed does not establish a valid basis to challenge the agency's corrective action resulting from that protest, as such rules are procedural in nature and have no bearing on the propriety of the corrective action itself. See, e.g., C2C Solutions, Inc.; TrustSolutions, LLC, B-401106.6, B-401106.7, June 21, 2010, 2010 CPD ¶ 145 at 5-6.

that price reasonableness could have been determined based on adequate price competition and without the data required by the RFP, and issued Amendment 6 to reopen the RFP and revise sections L and M accordingly. Id. Further, the agency explains that Amendment 6 also “(1) increased the quantity of GMTKs by 33 [percent] due to backorders . . . ; (2) updated the CLIN structure to prevent confusion about the materials for which offerors were required to submit pricing information . . . ; and (3) revised the PWS to provide further clarity regarding the method of storing the wrenches[.]” AR at 8, citing RFP Amendment 6 and Corrective Action Memorandum for Record. In the agency’s view, all of these changes were “valid and significant material changes in the [agency’s] requirements.” Id.

As a general rule, agencies have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure fair and impartial competition. MSC Indus. Direct Co., Inc., B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5; Zegler, LLC, B-410877, B-410983, Mar. 4, 2015, 2015 CPD ¶ 168 at 3. The details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. DGC Int’l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3.

Here, the termination of IDEAL’s contract, reopening of the RFP, and changes made by Amendment 6 are well within the agency’s broad discretion to take corrective action. The changes to sections L and M with respect to the agency’s price reasonableness evaluation appear appropriate to remedy the concerns raised by Offeror A’s agency-level protest. To the extent IDEAL complains that other changes in Amendment 6 were immaterial, we agree with the agency’s view that these changes were material. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. Seaboard Elecs. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115 at 3. Therefore, we deny this basis of protest.

Finally, IDEAL complains that the agency’s release of its pricing information from the original contract award “significantly and materially disadvantages IDEAL’s competitive position” where the agency “improperly failed to release the pricing of other offerors.” Protest at 1, 8.

As a general matter, agencies are not required to equalize the possible competitive advantage flowing to other offerors as a result of the release of information in a post-award setting where the release was not the result of preferential treatment or

other improper action on the part of the agency.³ Nova Techs., B-403461.3, B-403461.4, Feb. 28, 2011, 2011 CPD ¶ 51 at 4.

Here, IDEAL's price was properly released to its competitors in the context of a post-award notice as required by FAR § 15.503(b) and a post-award debriefing as contemplated by FAR § 15.506(d)(2), and not as a result of preferential treatment or other improper action on the part of the agency. See AR at 3, 9; see also FBO Public Award Notice at 1. Therefore, the agency was not required to equalize any competitive advantage that may have resulted from the release of IDEAL's price.

The protest is denied.

Thomas H. Armstrong
General Counsel

³ Moreover, agencies are not prohibited from taking corrective action in the form of a new competition where the original awardee's prices have been disclosed. Jackson Contractor Grp., Inc., B-402348.2, May 10, 2010, 2010 CPD ¶ 154 at 3. The possibility that the contract may not have been awarded based on a fair determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than does the possibility that the original awardee will be at a disadvantage in the reopened competition. Partnership for Response and Recovery, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 at 3-4; PCA Aerospace, Inc., B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65 at 4.