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Decision

Matter of: First Preston Housing Initiatives, LP

File: B-293105.2

Date: October 15, 2004

J. Alex Ward, Esq., Kali N. Bracey, Esq., and Ayodele T. Carroo, Esq., Jenner & Block, for the protester.

Margaret A. Dillenburg, Esq., for Michaelson, Connor & Boul, Inc., an intervenor.
Carolyn Fiume, Esq., and Rachael Blackburn, Esq., Department of Housing & Urban Development, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency misled protester into raising its prices during discussions is denied where record shows that, while agency provided guidance regarding proposed pricing, protester's pricing revisions were based on its own business judgment.
 2. In evaluating proposals, agency was not required to consider differences among offerors' proposed pricing structures, since solicitation did not provide for such an analysis.
 3. Protest that agency misevaluated one aspect of the protester's proposal is denied where the unambiguous language of the proposal supports agency's evaluation conclusion.
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DECISION

First Preston Housing Initiatives, LP protests the award of a contract to Michaelson, Connor & Boul, Inc. (MCB) under request for proposals (RFP) No. R-OPC-22505, issued by the Department of Housing and Urban Development (HUD) to obtain management and marketing services in connection with the disposition of single-family homes and other property owned by HUD. First Preston maintains that the agency engaged in misleading discussions and improperly misevaluated proposals.

We deny the protest.

The solicitation contemplated the award of indefinite-delivery, indefinite-quantity, fixed-unit-price contracts in 24 geographic regions for management and marketing services in connection with the disposition of single-family homes owned by, or in the custody of, HUD. At issue in this protest is the contract for the Denver Area 1, which covers properties located in Montana, Wyoming, Utah and Colorado.¹ The RFP advised offerors that the agency would make award on a “best value” basis, considering both price and non-price factors, with the non-price factors considered significantly more important than price. For the non-price considerations, the RFP provided that proposals would be evaluated using six criteria (in descending order of importance): management capability and quality of proposed management plan, past performance, prior experience, proposed key personnel, subcontract management, and small business subcontracting participation.

Offerors were required to submit unit prices (expressed as a lump-sum fee, but payable in four equal monthly installments) for their property management fee and their vacant lot management fee (contract line item numbers (CLIN) 0001 and 0002); a price for the firm’s marketing fee (expressed as a percentage of the net sale price of a single-family home) (CLIN 0003); a monthly fee for maintenance of “held off market” properties, that is, properties which, due to unusual circumstances, are not being marketed by the contractor (CLIN 0004); and a monthly fee for maintenance of properties not owned, but held in custody, by HUD (CLIN 0005). For purposes of calculating the offerors’ total evaluated prices, fixed unit prices were to be multiplied by the estimated quantities included in the solicitation.² Prices also were to be evaluated for reasonableness.

The agency received numerous proposals for the Denver Area 1 requirement, including the protester’s and the awardee’s. After the initial evaluation and the

¹ These properties are acquired or retained in custody by HUD pursuant to the Federal Housing Authority’s (FHA) role in administering the single-family home mortgage insurance program. FHA insures approved lenders against the risk of loss on loans extended to home buyers; in the event of a default on a loan insured by the FHA, the lender acquires title to the property through foreclosure or other procedure, and then conveys the title to HUD in exchange for the payment of insurance benefits. As a result of this program, HUD has a sizable inventory of single-family homes that it needs to maintain and dispose of through sale. The solicitation was issued to meet HUD’s requirement to maintain and sell these properties.

² For the Denver Area 1, the agency multiplied proposed CLIN 0001 prices by 3,150 single-family housing units; the CLIN 0002 prices by 32 vacant lot units; the CLIN 0003 percentages by an average selling price of \$84,804, and the resulting figure by 3,150 single family housing units; and the CLIN 0004 and 0005 prices by an estimated 24 units each.

establishment of a competitive range, the agency engaged in two rounds of discussions and requested and obtained final proposal revisions (FPR). Based on the FPR evaluation, the agency rated both First Preston's and MCB's proposals excellent with very low risk, with First Preston's receiving excellent ratings in all areas except under small business subcontracting plan, where it was rated good, and MCB's receiving all excellent ratings except under past performance, where it was rated good. The agency concluded that the two proposals were essentially technically equal, and thus made award to MCB based on its lower evaluated price--\$63,033.973.16 versus First Preston's \$65,001,465.

DISCUSSIONS

First Preston contends that the agency improperly induced it during discussions to raise its proposed prices. According to First Preston, during the two rounds of discussions, the agency encouraged the firm to raise its prices by suggesting that they were too low, and thereafter made award to MCB at prices below First Preston's. First Preston maintains, in this connection, that the agency relied upon an unreasonably high government estimate as the basis for its discussion questions, and then effectively abandoned the estimate in making award to MCB.

In negotiated procurements, where an agency conducts discussions those discussions must be meaningful, that is, firms must be provided a reasonable opportunity to address the agency's concerns with their proposals. In doing so, agencies may not, inadvertently or otherwise, prejudicially mislead offerors into revising their proposals in a manner that does not address the agency's concerns. Hago-Cantu Joint Venture, B-279637.2, July 20, 1998, 98-2 CPD ¶ 99 at 4.

The record shows that, after the agency received initial proposals, it evaluated the offerors' proposed prices for reasonableness by comparing the prices both to the government estimate and to one another. Agency Report (AR), exh. 8, at 2-7. On the basis of those comparisons, the agency reached certain conclusions relating to the offerors' proposed pricing. For First Preston, the agency found, for example, that its price for CLIN 0001 was low compared to both the government estimate and the other offers. Id. at 6. Based on its conclusions, the agency provided the following discussion question to First Preston:

The prices you submitted for CLIN 0001-Property Management and CLIN 0002-Vacant Lot Management appear low. Please review your prices in these areas to ensure that you have included all costs to perform the work. The prices you submitted for CLIN 0003 Marketing Fee and CLIN 0005-Custodial Fee should be reviewed to ensure that all costs

have been included. Your price for CLIN 0004-Held Off Market is considered high; please review for possible reduction.

AR, exh. 10, at 3.³

In response, First Preston raised its price for CLIN 0001 to cover the additional cost associated with services that it apparently did not include in its initial pricing calculations. In this regard, First Preston responded that “[t]he initial reviews of the models indicate that a small increase to the [CLIN 0001] Property Management fee to cover [deleted] is in order.” AR, exh. 14, at 15. First Preston increased its proposed CLIN 0001 price from [deleted] to [deleted] per unit to cover this cost; this increase accounted for the majority of its proposed price increase. Compare, AR, exh. 27, at 4; AR, exh. 27, at 15. Regarding CLIN 0002, notwithstanding the agency’s suggestion that First Preston’s pricing appeared low, the firm did not increase its pricing for this CLIN. Compare AR, exh. 27, at 4 with AR, exh. 27, at 15. Further, although the agency did not suggest that the firm’s price for CLIN 0003 appeared low, First Preston raised its price for this CLIN from [deleted] to [deleted]. (This change accounted for the remainder of the total price increase in First Preston’s revised pricing not accounted for by the increase in its price for CLIN 0001.) First Preston reduced its proposed pricing for CLIN 0004, in line with the agency’s comment that its pricing in this area was considered high. Compare AR, exh. 27, at 4 with AR, exh. 27, at 15. Finally, First Preston made no change to its pricing for CLIN 0005, suggesting that it determined that its initial price included all costs.

During the second round of discussions, the agency again questioned First Preston regarding its pricing, as follows: “Your CLIN pricing for all CLINs appears to be a little low. Please review your pricing and ensure that all costs required to perform the work have been considered.” AR, exh. 17 at 1.⁴ In response, First Preston made

³ The agency provided MCB a similarly-worded question, albeit reflecting differences in its pricing proposal:

Your pricing for CLIN 0001 Property Management, CLIN 0004 Held Off Market, and CLIN 0005-Custodial Fees are considered to be high; please review your pricing in each CLIN for possible reduction. Your pricing for CLIN 0002-Vacant Lot Management and CLIN 0003-Marketing Fee are extremely low; please review your pricing in each CLIN to ensure you have included all costs required to perform the work.

AR, exh. 11 at 4.

⁴ As with the first round of discussions, MCB was advised that certain of its prices were high and certain prices were low. AR, exh. 18.

no revisions, stating: “We have reviewed the pricing models and have determined that our fees are in line with what we believe to be appropriate pricing for this contract. As a result, we would like to maintain the prices [previously] submitted” AR, exh. 20, at 1.

There was nothing improper in the discussions here. While an agency may not coerce or mislead an offeror into raising its price, Research Analysis and Maint., Inc., B-272261, B-272261.2, Sept. 18, 1996, 96-2 CPD ¶ 131 at 11, the agency did not do that here. Rather, the agency's statements (to both the protester and the awardee) merely reflected its reasonable concern that, because some of First Preston's and MCB's prices were low compared to the estimate and the other prices received, they might not include enough to cover the cost of performing all requirements. The offerors were simply given the opportunity to review their pricing, and their decisions to revise certain prices upward or downward reflects the exercise of the firms' business judgment, not improper conduct by the agency. Professional Landscape Mgmt. Servs., Inc., B-286612, Dec. 22, 2000, 2000 CPD ¶ 212 at 5. We note, furthermore, that the agency's expressed concerns about First Preston's pricing were based, not solely on a comparison to the government estimate, as the protester alleges, but on a price reasonableness evaluation that also took into account a comparison among offerors' proposed prices, which showed that First Preston's pricing was low. AR, exh. 27, at 8-14.

In any case, even if we agreed with First Preston that the agency's discussion questions were misleading in nature, there is no indication that First Preston was misled. With respect to CLIN 0001, First Preston raised its price because it had failed to include certain costs in its initial offer; in other words, First Preston reviewed its pricing in response to the discussions and apparently agreed with the agency's concern that its CLIN 0001 price was too low. Under CLIN 0002, the other area where the agency had stated that its pricing was low, First Preston ignored the agency's concern and made no change to its pricing. As for CLIN 0003, First Preston raised its price during the first round of discussions, notwithstanding that the agency had made no comment regarding whether its price appeared high or low. And finally, during the second round of discussions, when First Preston was advised that all of its proposed CLIN prices appeared a little low, the firm elected to make no changes to its pricing. We conclude that it was First Preston's business judgment, rather than the content of the agency's discussion questions, that led it to raise its pricing from its initial proposal. Hago-Cantu Joint Venture, supra, at 10.

PRICING STRUCTURE

First Preston asserts that, by virtue of the fact that the RFP called for a “best value” award, HUD was required to consider the relative advantages of the offerors' pricing structures. In this regard, First Preston maintains that its pricing structure is more beneficial to the agency because the majority of its compensation for each housing unit would be in the form of the marketing fee, payable only if and when it sold a

property; it would receive relatively little compensation under the flat fee compensation components (*i.e.*, the property management fees). First Preston maintains that, in contrast, under MCB's pricing structure, the firm would receive the majority of its compensation in the form of the flat fees, that is, without regard to its success at selling the properties.

We find no merit to this aspect of First Preston's protest. Agencies are required to evaluate proposals based solely on the evaluation factors and subfactors included in the solicitation. 41 U.S.C. § 253b(d)(3); Federal Acquisition Regulation (FAR) § 15.303(b)(4). Here, the solicitation's price evaluation provision did not provide for the analysis First Preston suggests was required; rather, the RFP provided only that price would be evaluated for reasonableness. RFP at 279. Under these circumstances, there was no basis for the agency to evaluate the offerors' proposed pricing structures.⁵

INAPPROPRIATE DISCUSSIONS

First Preston asserts that the agency acted improperly by helping MCB to improve the quality of its technical proposal through discussions. In this regard, MCB's initial proposal was scored below First Preston's and, according to First Preston, the agency provided extremely detailed information to MCB during discussions, which allowed MCB to improve the quality of its technical proposal to such a degree that it ultimately was evaluated as technically equivalent to First Preston's.

There was nothing improper in the agency's actions. Rather, as outlined by the protester, the agency provided MCB with discussions that pointed out, and provided the firm an opportunity to respond to, the proposal weaknesses and deficiencies identified in its proposal during the evaluation. This is what agencies are required to do when conducting discussions. See FAR § 15.306(d)(3); see also SWR, Inc., B-286161.2, Jan. 24, 2001, 2001 CPD ¶ 32 at 6-7 n.7 (discussions should be as specific as practicable under the circumstances). We note that First Preston likewise was afforded detailed discussions in which the agency identified 8 weaknesses and provided the firm some 12 detailed discussion questions. AR, exh. 10. The fact that MCB's responses to the questions resulted in an improved evaluation rating does evidence some impropriety; rather, such improvement is precisely what the discussion process envisions.⁶

⁵ To the extent that First Preston is arguing that the RFP should require the evaluation of the offerors' price structure, its protest in this respect is untimely. Protests relating to improprieties apparent on the face of a solicitation must be filed prior to the deadline for submitting proposals. 4 C.F.R. § 21.2(a)(1) (2004).

⁶ First Preston asserts that the agency's actions, culminating in a finding that the proposals were equivalent, amounted to a conversion of the basis for award from best value to lowest-priced, technically acceptable. This argument is without merit.

(continued...)

SMALL BUSINESS SUBCONTRACTING

First Preston asserts that the agency improperly assigned its proposal a rating of only good under the small business subcontracting participation evaluation factor. According to the protester, the agency misinterpreted its proposal as offering to subcontract only [deleted] percent of the total dollar value of the requirement to small businesses when, in fact, it actually proposed a figure of [deleted] percent.

The record shows that the agency properly interpreted First Preston's proposal as offering to subcontract [deleted] percent of the total dollar value of the requirement to small businesses. In this regard, the First Preston final proposal revision (FPR) expressly provides:

First Preston proposes that [deleted] percent of *subcontracting dollars* will go to small businesses With respect to the request to express First Preston Small Business Subcontracting Plan as a percentage of total contract dollars, First Preston represents that based on the current proposed pricing structure, First Preston will commit to a subcontracting goal of [deleted] percent of *total contract dollars*.

AR, exh. 20, at 175 (italics supplied).

While First Preston would have the last sentence of the quoted language read as proposing to subcontract with small businesses for [deleted] percent of the total dollar value of the contract, that sentence, in fact, only commits to a "subcontracting goal" of [deleted] percent of the total dollar value of the contract. We agree with the agency that the first sentence of the quoted language, read together with the second sentence, clearly provides that "[deleted] percent of [those] subcontracting dollars will go to small businesses." Thus, the agency reasonably concluded that First Preston committed to subcontract with small businesses for only [deleted] percent ([deleted] percent) of the contract's total dollar value. (This interpretation also is consistent with the

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A finding by an agency that two proposals are technically equivalent--leading to award based on lowest price--does not demonstrate that the agency abandoned a best value evaluation in favor of selecting the lowest-priced, technically acceptable proposal. Rather, technical equivalence is an evaluation conclusion that an agency legitimately may reach based on application of the evaluation factors set forth under a best value evaluation scheme. The record shows that this is what happened here.

firm's subcontracting plan, also submitted with its FPR, which expressly provided: "Small Business Concerns: [deleted] of total planned subcontracting dollars under this contract will go to subcontractors who are Small Business Concerns." AR, exh. 20, at 176.)⁷

We deny the protest.

Anthony H. Gamboa
General Counsel

⁷ First Preston also challenges the agency's conclusion that MCB's proposal was technically equivalent to First Preston's on grounds that the MCB proposal was assigned a good (as opposed to excellent) rating under the past performance factor--the second most important factor--while First Preston's proposal was assigned a good (as opposed to excellent) rating under the small business subcontracting plan factor--the least important factor. However, as we have long held, technical evaluation scores, whether numeric, color or adjectival, are only guides to intelligent decision making; agencies may properly view proposals as essentially technically equivalent even where, as here, there are differences in the scoring among them. Teledyne-Commodore, LLC, B-278408.5, B-278408.6, Mar. 8, 1999, 99-1 CPD ¶ 60 at 7. The agency determined that the technical difference between the proposals due to the different factors under which they were downgraded was not significant. This judgment was well within the agency's discretion, and the protester has not shown that it was unreasonable.