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Decision

Matter of: SYMVIONICS, Inc.

File: B-293824.2

Date: October 8, 2004

Charlotte Rothenberg Rosen, Esq., Dickstein, Shapiro, Morin & Oshinsky, for the protester.

Damon A. Martin, Esq., Department of the Navy, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where the agency provided material information concerning solicitation requirements to a single competitor in a post-award debriefing and the agency subsequently reopened the competition without providing the other competitors with the same information.
 2. Agency's decision not to release prices of all competitors in reopened competition after the protester's prices had been disclosed was not improper since the disclosures were made pursuant to the debriefing requirements set forth in the Federal Acquisition Regulation; disclosure of an awardee's prices under these circumstances did not create an improper competitive advantage.
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DECISION

SYMVIONICS, Inc. protests the actions of the Department of the Navy, Naval Facilities Engineering Command, in connection with request for proposals (RFP) No. N68711-03-R-2206 for various military family housing maintenance and repair services. SYMVIONICS challenges the agency's conduct of a reopened competition, arguing that the agency was required to provide all offerors with information concerning the RFP's requirements that was released to a single offeror during an earlier post-award debriefing. SYMVIONICS further contends that the agency is required to release all of the competitors' earlier prices in the reopened competition because its price information had been disclosed in an earlier post-award debriefing.

We sustain the protest in part and deny it in part.

On July 16, 2003, the agency issued the subject solicitation for military family housing maintenance and repair services at the Naval Weapons Station, Seal Beach, California. The RFP anticipated the award of a combination fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contract for a base year and two 1-year options to the firm submitting the lowest cost, technically acceptable offer.¹ RFP § L.9.

As it relates to the subject protest, the RFP required the submission of extensive pricing information on exhibit line item numbers (ELIN) for both the fixed-price and ID/IQ requirements. The fixed-price ELINs sought prices for recurring maintenance work while the ID/IQ ELINs, as a general matter, sought prices for other miscellaneous services that would be ordered on a task order basis. Each ELIN included a description of the work required at a location that was either “on station” or “off station” (presumably meaning at a location either on the military installation or at a site that was not on the installation), a quantity (or an estimated quantity for the ID/IQ items), and a place for the offerors to include their unit and total prices for the work item. Offerors were also required to calculate and include their total prices for the fixed-price work for the base year and each of the two option years as well as their total prices for ID/IQ work for the base and option years. RFP § L.9.

With regard to pricing, the RFP required offerors to separately price “all overhead costs, direct costs and profit” for “each housing site (‘on base’ and ‘off base’)” because “the government may elect to remove the entire site or a part of the housing site . . . from [the] contract in order to place them in the PPV [Public Private Venture] program.”² RFP § C2.7. The RFP advised that if a section was placed in the PPV program it would be removed from the contract by unilateral contract modification and that the government would not negotiate any costs associated with the reduction in work. Id.

After receiving eight proposals by the September 5, 2003 deadline, the agency determined that SYMVIONICS had submitted the lowest-priced, technically acceptable proposal. However, before making award to SYMVIONICS, the agency realized that it had included the wrong Davis-Bacon Act wage determination in the

¹ Throughout their submissions, the parties distinguish between “fixed-price” and ID/IQ requirements. We recognize that this distinction is misleading since the RFP actually provides for the award of a contract with definite-quantity items and ID/IQ items, both of which are fixed-price. For the sake of consistency with the record, however, we adopt the parties’ terminology throughout our decision.

² The RFP advises offerors that under the Public Private Venture (PPV) program, the Department of Defense has statutory authority to effectively privatize military housing by working with the private sector to build, renovate, and manage military housing. RFP § C2.7.

solicitation and that it needed to correct the error.³ Without informing the other offerors of the issue, the agency asked SYMVIONICS to review the changed wage determination and to notify the agency if the changes had any effect on its proposal. Agency Report, Tab 3, E-mail Message from the Navy to the President/CEO of SYMVIONICS, Mar. 4, 2003. SYMVIONICS responded the same day, [deleted]. The next day, the agency made award to SYMVIONICS at a total price of \$3,166,566.

After receipt of the notice of award, which included the protester's total price, Eastern Maintenance & Services, Inc. requested a debriefing as an unsuccessful offeror. During the debriefing the agency revealed the protester's totals for the fixed-price work and the ID/IQ work for the base and 2 option years (six prices altogether). Upon learning these prices, Eastern alleged, during the debriefing, that SYMVIONICS had improperly front-loaded the fixed-price work "knowing that PPV is to take over this contract." AR, Tab 7, Memorandum of Eastern's Debriefing. The contracting officer responded by informing Eastern that "PPV would probably not happen as scheduled," adding that the agency would "then have to exercise the two option years and, based on the past [indefinite quantity] ordering history, [it] would be ordering [a] substantial amount of [indefinite quantity work] so in the end [it] would not be paying more under SYMVIONICS' contract." Id.

Eastern then filed a protest with our Office alleging that pricing in the proposal submitted by SYMVIONICS was unbalanced and that Eastern should have received the award. In response, the agency indicated that it would reevaluate proposals for the purpose of determining whether proposed prices were balanced.⁴ Based on the agency's corrective action, our Office dismissed the protest as academic. Following the reevaluation, the agency determined that it was necessary to amend the solicitation, conduct discussions with the offerors, and seek revised proposals. The Navy amended the solicitation to include the correct wage determination and modified the RFP's language concerning the evaluation of price.⁵ The solicitation

³ The original solicitation included a wage determination applicable to "Building Construction Projects; Dredging Projects; Heavy Construction Projects; and, Highway Construction Projects." RFP Attach. J-9, at 361-82. According to the agency, the solicitation should have included the wage determination applicable to "Residential Construction Projects (consisting of single family homes and apartments up to and including 4 stories)." AR at 2 n.2.

⁴ The agency also indicated it had made a mathematical error during its evaluation of Eastern's proposal, necessitating a reexamination of Eastern's proposed price.

⁵ The initial solicitation had indicated that price proposals would be evaluated for reasonableness in relation to "resources proposed"; however, because the RFP did not require offerors to propose any resources, the reference was struck from the solicitation. In addition, the Navy amended the solicitation language regarding unbalanced pricing. Specifically, the solicitation had provided that unbalanced

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was later amended again to include an updated Service Contract Act wage determination. Final proposal revisions were due by July 6, 2004.

During discussions, the agency informed SYMVIONICS that [deleted]. AR, Tab 11, Agency Discussion Letter to SYMVIONICS, June 3, 2004. SYMVIONICS responded by explaining [deleted]. AR, Tab 14, SYMVIONICS Discussion Response Letter, June 24, 2004.

In addition to responding to the agency's discussion questions, SYMVIONICS requested that the agency reveal the pricing information of the other offerors. SYMVIONICS maintained that it would be disadvantaged in the reopened competition if it did not know its competitors' prices since its prices had been disclosed after the initial award.⁶ The agency denied the request and this protest ensued before the closing date set for final proposal revisions.

When SYMVIONICS filed its protest, it principally challenged the agency's decision not to release its competitors' prices in the recompetition. However, upon receipt of the Navy's report, which was submitted under a protective order issued by our Office, counsel for SYMVIONICS obtained additional information about the procurement. Specifically, protected documents in the report revealed that the Navy had provided Eastern with information about the PPV program during a post-award debriefing. Based on this information, the protester's comments on the agency report included the allegation that the Navy had provided Eastern with an unfair competitive advantage in the reopened competition when it informed Eastern, during its post-award debriefing, that the RFP requirements would probably not be removed under the PPV program during the life of the contract. According to the protest, the Navy should have disclosed this information to all the offerors when it reopened the competition.⁷ While, as explained below, we conclude that the

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offers could be rejected "either on the basis the offeror does not understand the requirement or the offeror has made an unrealistic proposal." The Navy revised the solicitation to simply state that unbalanced offers could be eliminated from the competition.

⁶ When SYMVIONICS raised this issue with the agency, it did not know how many firms were in the competition or what pricing information they had received.

⁷ SYMVIONICS also argues that the Navy provided Eastern with an unfair competitive advantage when it informed Eastern during its debriefing that based on its past ordering history, the agency anticipated ordering substantial quantities of ID/IQ work. We do not see how such information provides Eastern with a competitive advantage. The agency's use of the term "substantial quantity" during Eastern's debriefing did not, on its face, provide Eastern with any additional material
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gravamen of the protest is without merit, we find that the protest is correct with respect to this issue, and we therefore sustain this protest ground.

It is a fundamental principle of competitive negotiations that offerors must be provided with the same statements of the agency's requirements so as to provide a common basis for the submission of proposals. Union Carbide Corp., B-184495, Feb. 26, 1976, 76-1 CPD ¶ 134. The Navy asserts that the information it provided Eastern did not in any way change the terms of the solicitation since the solicitation did not discuss the PPV schedule and thus that it did not provide Eastern with a competitive advantage.

The information given to Eastern concerning the PPV program, however, was clearly material for purposes of proposal preparation since it provided additional information concerning an important aspect of the agency's requirements.⁸ The RFP expressly identified the risks associated with the PPV program--the fact that contract requirements may be eliminated--and warned offerors that the costs of eliminating requirements due to the PPV program would not be negotiated. Thus, as SYMVIONICS notes, a reasonable offeror would have factored the risk of PPV implementation into its prices. [Deleted]. SYMVIONICS further notes that the Navy has eliminated hundreds of housing units under two SYMVIONICS contracts as well as an entire contract for 3,300 housing units, as a result of the PPV program. Because Eastern knows that the risk associated with the PPV program is minimal in this instance, it can more accurately reflect this risk in its pricing in the recompetition.

Since the agency provided the information in the context of a post-award debriefing, there was no need at that time to share the information with the other offerors. However, after the agency decided to re-open the competition and seek revised proposals, it was incumbent upon the agency to ensure that all the offerors had the same information concerning the PPV program so that they could compete with the same understanding of the agency's requirements and we sustain this basis of protest. See EMS Dev. Corp., B-242484, May 2, 1991, 91-1 CPD ¶ 427 at 2-3.

We deny, however, the initial protest issue raised by SYMVIONICS. As noted above, when SYMVIONICS first filed its protest it argued that the agency should disclose the prices of its competitors in the recompetition since its competitors maintain a

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information concerning the estimated quantities for the ID/IQ work that were disclosed to all the offerors in the RFP.

⁸ While the Navy maintains that PPV could occur during performance, it does not assert that the information provided to Eastern--that PPV would probably not occur--was in any way incorrect.

competitive advantage by knowing its prices, which were disclosed after the initial award decision. The agency contends that the protester's pricing information was disclosed as required by law and regulation in a post-award setting (specifically, in notice of award letters to unsuccessful offerors and in the context of a required debriefing to Eastern) and, as a consequence, it is not required to equalize any competitive advantage associated with the release of the protester's prices. In addition, the agency maintains that any competitive advantage associated with the unequal disclosure of price information is diminished by the fact that prices were of little value since they were 10 months old when the agency initiated the recompetition, new wage determinations have been incorporated in the solicitation, and the price evaluation terms have changed. Moreover, the agency expressed concern that release of prices "could effect an auction atmosphere in which offerors proposed unrealistically low prices, merely to undercut the known prices of [their] competitors." AR at 4.

As a general matter, an agency is not required to equalize the possible competitive advantage flowing to other offerors as a result of the release of pricing 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. See, e.g., PCA Aerospace, Inc., B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65 at 4; Alatech Healthcare, LLC--Protest; Custom Servs. Int'l, Inc.--Costs, B-289134.3, B-289134.4, Apr. 29, 2002, 2002 CPD ¶ 73 at 4; Norvar Health Servs.--Protest and Recon., B-286253.2 et al., Dec. 8, 2000, 2000 CPD ¶ 204 at 4. Because the SYMVIONICS prices were not disclosed as a result of preferential treatment or any improper action on the part of the agency--they were disclosed in letters to the unsuccessful offerors and in the context of a post-award debriefing as contemplated by Federal Acquisition Regulation (FAR) § 15.506(d)(2)--the Navy was not required to equalize any competitive advantage that may have been afforded to the protester's competitors as a result of the release of its prices.⁹

⁹ SYMVIONICS asserts that the release of its fixed-price and ID/IQ totals for the base and each option year during Eastern's post-award debriefing constituted preferential treatment with regard to Eastern. However, because the information was provided in the context of a required debriefing pursuant to FAR § 15.506(d)(2), which expressly provides for the disclosure of the successful offeror's evaluated price including unit prices, the disclosures could not be considered preferential. The Navy further notes that by not disclosing the protester's unit pricing, it provided substantially less pricing information in the debriefing than called for under the debriefing rules.

SYMVIONICS further maintains that the Navy improperly disclosed its option year pricing, citing the decision in McDonnell Douglas Corp. v. United States Dep't of the Air Force, 375 F.3d 1182 (D.C. Cir. 2004). The McDonnell Douglas case, however, is distinguishable. First, McDonnell Douglas concerned the disclosure of option prices under the Freedom of Information Act, 5 U.S.C. §§ 551 et seq. (2000), not FAR

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While we cannot conclude that the Navy is required to do so in this case, and we therefore deny this protest ground, an agency may decide to release offerors' prices in a recompetition in an effort to remedy the potential competitive advantage (even if not improperly obtained) held by the other offerors in the competition whose prices were not disclosed. See, e.g., Ocean Servs, LLC, B-292511.2, Nov. 6, 2003, 2003 CPD ¶ 206 at 4-6; Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3; The Cowperwood Co., B-274140.2, Dec. 26, 1996, 96-2 CPD ¶ 240 at 2-3.

The facts suggest that this approach--while not required--may be the preferable approach here, especially given that we are sustaining the protest on another ground and recommending submission of revised proposals. In this regard, we note that while the Navy decided not to disclose the pricing information of the firms in the competition because it believed the information was of little value given the passage of time and the changes to the solicitation, its concern could also be viewed as an argument in favor of disclosure since the less valuable the pricing information, the less harm would result from its release. Moreover, the agency's cited concern about fostering an "auction" situation by releasing the prices of the other competitors ignores the fact that an auction-like situation already exists by virtue of the recompetition, since the RFP provides for award to the firm submitting the lowest cost, technically acceptable proposal and the other competitors know the price submitted by SYMVIONICS in the initial competition.

We recommend that the Navy provide all the firms in the recompetition with the same information about the likely impact of the PPV program on the subject requirements that it provided Eastern in its post-award debriefing and allow for the submission of revised proposals. To the extent that the information it provided to Eastern is not accurate, the Navy should advise the offerors accordingly. We further recommend that the Navy reimburse SYMVIONICS for the costs of filing and pursuing the protest ground alleging that the Navy was required to provide all the competitors in the recompetition with the PPV information that it had shared with Eastern in its debriefing.¹⁰ The protester's certified claim for costs, detailing the time

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§ 15.506. Second, the case involved the release of unit prices for option years, while in this case the Navy did not disclose the protester's option year unit pricing, but rather its total option year prices for the fixed-price and ID/IQ work.

¹⁰ As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9; Price Waterhouse--Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3; Data Based Decisions, Inc.--Claim for Costs, B-232663.3, Dec. 11, 1989, 89-2 CPD ¶ 538 at 4. We are limiting our recommendation as to the protester's costs in this case, however, because the bulk of the protest concerned an issue we deny and because the issue we sustain

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spent and the costs incurred on this issue, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2004).

The protest is sustained in part and denied in part.

Anthony H. Gamboa
General Counsel

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was predicated on a different legal and factual basis. See Department of the Army--Modification of Remedy, B-292768.5, Mar. 25, 2004, 2004 CPD ¶ 74.