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**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** Milani Construction, LLC

**File:** B-401942

**Date:** December 22, 2009

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Adrian L. Bastianelli, III, Esq., and Lori Ann Lange, Esq., Peckar & Abramson, PC, for the protester.

Timothy J. McEvoy, Esq., Cameron/McEvoy, PLLC, for Corinthian Contractors, Inc., an intervenor.

Pamela Reiner Waldron, Esq., and James L. Weiner, Esq., Department of the Interior, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Under solicitation calling for award of fixed-price contract, protest challenging agency's reliance in best value tradeoff on conclusion that protester's proposed price is unrealistically low is sustained where solicitation lacked any evaluation criteria that reasonably would have put offerors on notice that agency intended to consider realism of offerors' prices as reflecting lack of understanding or risk associated with the proposal.

2. Protest challenging evaluation of offerors' technical proposals is denied where agency's evaluation is reasonable and supported by the record.

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### DECISION

Milani Construction, LLC, of Washington, D.C., protests the award of a contract to Corinthian Contractors, Inc., of Arlington, Virginia, under request for proposals (RFP) No. N20510900086, issued by the National Park Service (NPS), Department of the Interior (DOI), for the rehabilitation of Anacostia Park, Washington, D.C. Milani protests the agency's evaluation of its price and technical proposals.

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

The RFP, issued on July 29, 2009, contemplated the award of a firm-fixed-price contract for the rehabilitation of Anacostia Park, Washington, D.C. In general terms the solicitation required the successful offeror to provide all personnel, materials,

and equipment necessary to perform the RFP's project specifications, including the demolition of the roadway, removal of existing light poles and wiring, the complete rehabilitation of the road, realignment of a section of road, and replacement of street lights in the park. RFP, attach. 2, Project Specifications, at 1. The solicitation established three evaluation factors: technical, past performance, and price. The technical factor in turn consisted of three subfactors: experience, project management, and personnel. The RFP stated that all nonprice factors when combined were approximately equal in importance to price.<sup>1</sup> Award was to be made to the responsible offeror whose proposal represented the best value to the government, all factors considered.

With respect to price, the RFP requested only that offerors provide fixed prices for nine contract line items (CLIN) that comprised various aspects of the demolition and new construction work. RFP, attach. 4, Proposal Submission Package, at 4. For example, CLIN 0002 represented paving requirements, and included all excavation, grading, aggregate, and milling work. The RFP requested no cost data or other information explaining offerors' proposed prices for these CLINs, and included no sub-CLINs. With regard to the price evaluation factor, the RFP stated:

A price evaluation will be performed to determine the reasonableness of the proposed price. Reasonableness will be determined considering other offered prices received and comparison to the Independent Government Cost Estimate [IGE]. If multiple contract line items are included in the price schedule, prices will also be evaluated to determine whether any line items are unbalanced.

Id., § M.1.C.

Ten offerors, including Corinthian and Milani, submitted proposals. An agency technical evaluation panel (TEP) evaluated offerors' proposals under the technical and past performance factors using an adjectival rating scheme: exceptional, acceptable, marginal, unacceptable, and, with regard to past performance, neutral.

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<sup>1</sup> The RFP failed to clearly state the relative importance of the technical factors (and subfactors) and the past performance factor. See RFP § M.1.D (stating that the “[t]echnical factors are listed in descending order of importance,” without indicating whether the reference to “technical factors” was intended to include the past performance factor, or referred solely to the three subfactors under the technical factor). As part of its evaluation, the agency considered the technical subfactors to be in descending order of importance; the record is unclear whether the agency considered the technical and past performance factors to be equal, or in descending order of importance. See Agency Report (AR), Tab 13, Technical Evaluation Panel Report, at 2.

The TEP ratings of the Milani and Corinthian proposals, by individual evaluator, were as follows:<sup>2</sup>

	<b>Factors/Subfactors</b>			
	Experience	Project Management	Personnel	Past Performance
<b>Corinthian</b>	Acceptable	Acceptable	Acceptable	Acceptable
	Exceptional	Acceptable	Exceptional/ Acceptable	Acceptable/ Exceptional
	Acceptable	Exceptional	Exceptional	Acceptable
<b>Milani</b>	Acceptable	Acceptable	Acceptable	Acceptable
	Acceptable/ Exceptional	Acceptable	Acceptable	Acceptable
	Acceptable	Acceptable	Acceptable	Marginal

AR, Tab 13, TEP Report, at 3-4.

The TEP also detailed the various strengths and weaknesses that it found in support of the ratings assigned to the offerors' proposals. Specifically, with regard to Corinthian's proposal (the highest technically rated), the TEP found the offeror had demonstrated high ability and experience with road construction within the District of Columbia. *Id.* at 6. Milani's proposal received the third highest technical rating.

Among those offerors whose proposals were found to be technically acceptable, Milani submitted the lowest price of \$4,480,000, and Corinthian submitted the next low price of \$4,921,583, a difference of \$441,583 (approximately 9.8%). *Id.* at 5. The IGE was \$6.8 million. *Id.*, Tab 3, IGE, at 1-4. The TEP concluded that Milani's price was unreasonably low, stating that:

Milani's price while lower than Corinthian's, was considered a higher risk when compared to the government estimate. Additionally, their price was closer to [the prices of the two offerors whose proposals] were not considered technically qualified. The TEP reviewed the price schedule breakdown of both Milani and Corinthian and was concerned with the difference between Milani's paving and landscaping costs when compared to Corinthian and the government estimate.

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<sup>2</sup> Although the agency's evaluation report stated that the "[r]atings of the [three individual evaluators] were finalized and agreed to among all panel members," AR, Tab 13, TEP Report, at 3, the record does not include consensus evaluation ratings for the offerors' proposals.

Id., Tab 13, TEP Report, at 5. The TEP also concluded that Milani's low price for the paving CLIN, when combined with the offeror's lack of experience in this area, indicated that Milani might not completely understand the paving requirements. Contracting Officer's Statement, Oct. 16, 2009, at 11. The agency did not conduct discussions with offerors, and Milani was not asked to verify its price.

The evaluation results were provided to the source selection authority (SSA), who adopted verbatim the TEP's conclusions regarding Milani's price quoted above. Id., Tab 14, Source Selection Decision, at 6. The SSA determined that Corinthian's highest technically rated, higher-priced proposal represented the best value to the government; to the extent the SSA considered Milani's lower price as part of her best value tradeoff determination, it was viewed as a disadvantage. Id. This protest followed.<sup>3</sup>

Milani disputes the agency's determination that the firm's proposed price was unreasonably low, reflected a lack of understanding of the project requirements, and posed a performance risk. In this respect, Milani argues that it was improper for the agency to perform a price realism analysis because doing so in effect constituted application of an unspecified evaluation criterion; that Milani's prices—both by CLIN and overall—were not unrealistically low; and that the agency's price realism analysis was based on such limited information as to make its conclusions unreasonable. Comments, Oct. 29, 2009, at 8-22. As detailed below, we find the agency's decision to use a price realism analysis as part of the source selection to be improper.

Before awarding a fixed-price contract, an agency is required to determine that the price offered is fair and reasonable. Federal Acquisition Regulation (FAR) § 15.402(a). An agency's concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted. See McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. Although not required, an agency may also provide for a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror's low price reflects on its understanding of the contract requirements or the risk inherent in an offeror's approach. Grove Resource Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5. However, where there is no relevant evaluation criterion pertaining to realism or understanding, a determination that an offeror's price on a fixed-price contract is too

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<sup>3</sup> On December 11, after developing the record, the GAO attorney responsible for the protest conducted an "outcome prediction" alternative dispute resolution conference and provided the parties with full detail regarding the merits of the issues raised by Milani as well as the protest's likely outcome (*i.e.*, that the agency's price realism analysis was improper, and that the protest would be sustained in part). Notwithstanding the predicted outcome, the agency elected not to take corrective action.

low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to successfully perform the contract at its offered price. See J.A. Farrington Janitorial Servs., B-296875, Oct. 18, 2005, 2005 CPD ¶ 187 at 4; CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 4-5.

Here, there was no technical or price evaluation factor providing for the evaluation of the offerors' understanding of the requirements such that a price realism analysis was reasonably foreseeable by the offerors. In this regard, the price evaluation factor provided only for the evaluation of the "reasonableness" of the proposed price (that is, whether the offeror's price was unreasonably high), and whether the price proposal was unbalanced, which is not contended here. See RFP § M.1.C. Moreover, the RFP did not request cost or pricing information or any other information that would allow the agency to reasonably determine that a low proposed price reflected a lack of understanding of the project requirements.

While the agency contends that the price realism analysis was proper in light of certain language in the RFP,<sup>4</sup> see DOI Email to GAO, Dec. 14, 2009, we disagree.<sup>5</sup> In our view, the solicitation provisions to which the agency refers did not provide offerors with adequate notice that NPS intended to perform a price realism analysis, especially since the price evaluation factor—under which such notice would logically appear—did not in any way suggest that a price realism analysis would be performed and offerors were not required to submit any cost or pricing information that could be used in such an analysis. The reference in RFP § M.1.B to "assessing the degree of risk associated with the proposal," is simply too general to constitute adequate notice that the agency would consider price realism in the source selection decision. In this regard, since the submission of even a "below-cost" price is not by itself improper, see Arctic Slope World Servs., Inc., B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75 at 13, offerors competing for award of a fixed-price contract must be

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<sup>4</sup> The RFP stated, as part of the project management subfactor, that the agency would assess offerors' preliminary project schedules for, among other things, the offerors' understanding of the project requirements. RFP § M.1.C. The RFP also stated that after the technical and price evaluations were completed, the SSA would then "consider all technical and price factors, including assessing the degree of risk associated with the proposal, to determine the proposal that provides the best value to the government." Id., § M.1.B.

<sup>5</sup> This is the agency's most recent position in defense of the evaluation here. See DOI Email to GAO, Dec. 14, 2009. In earlier filings, the agency first argued that its price realism analysis was proper because the RFP advised offerors that it would evaluate prices for reasonableness. AR, Oct. 19, 2009, at 7-8. The agency next contended that price realism was not an evaluation factor, and was not in fact considered by the agency in its evaluation. AR, Nov. 9, 2009, at 3-4. As indicated in the discussion above, we find neither of these prior positions persuasive.

given reasonable notice that a business decision to submit a low-priced proposal will be considered as reflecting on their understanding or the risk associated with their proposal. See CSE Constr., supra. The RFP here did not meet this standard of reasonable notice.

The record establishes that Milani was prejudiced by the agency's reliance on its realism analysis of Milani's proposed price. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see also Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Specifically, the record shows that the SSA did not give meaningful consideration to Milani's proposal based in substantial part upon her judgment that Milani's price was so low as indicate a lack of understanding and/or pose a performance risk. See AR, Tab 14, Source Selection Decision, at 6; Contracting Officer's Statement, Oct. 16, 2009, at 5, 13. Further, in performing the price/technical tradeoff required by the RFP, the SSA did not consider Milani's lower price to be an advantage to be weighed against the awardee's higher technical rating. Based on the record here, we think that if Milani's price advantage had been properly weighed in the agency's price/technical tradeoff analysis, the firm would have had a reasonable possibility of being selected for award. Accordingly, we sustain Milani's protest on this basis.

Milani also protests the agency's evaluation of its technical proposal under the experience, project management, and personnel subfactors. Among other things, the protester challenges the TEP's determination that Corinthian's proposal was superior to Milani's under the experience subfactor generally and in the area of paving experience specifically.

In reviewing an agency's evaluation, we will not reevaluate technical proposals; instead, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and procurement statutes and regulations. Urban-Meridian Joint Venture, B-287168, B-287168.2, May 7, 2001, 2001 CPD ¶ 91 at 2. An offeror's mere disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7. The record here shows that the agency's evaluation of Milani's technical proposal—including the determination that Corinthian's proposal demonstrated both greater paving experience and overall road construction experience than Milani's—is unobjectionable: the evaluation was reasonable and consistent with the stated evaluation criteria, or the protester has not demonstrated it was prejudiced by the alleged errors.

In sum, we conclude that the agency improperly relied on its realism analysis of Milani's proposed low price in making its source selection decision. Accordingly, we recommend that the agency perform a new price/technical tradeoff, giving appropriate consideration to Milani's proposed price consistent with our decision here. If, as a result, a firm other than Corinthian is selected for award, Corinthian's contract should be terminated and award made to that other firm. Alternatively, if

the agency decides that consideration of the realism of offerors' proposed prices is necessary, the agency should amend the RFP to so indicate, allow submission of revised proposals, reevaluate the revised proposals received, and make a new source selection decision.

To the extent the agency does not amend the RFP but continues to have concerns that Milani's price is too low, as noted above, these concerns relate to the firm's responsibility, that is, whether Milani could satisfactorily perform at its proposed price. Since Milani is a small business concern, if the agency concludes that Milani cannot satisfactorily perform the contract at its proposed price, the agency must refer this finding of nonresponsibility to the Small Business Administration for that agency's review under the certificate of competency procedures. If the agency believes that Milani may have made a mistake in its proposed price, the matter should be handled in accordance with FAR § 15.306(b)(3)(i), which incorporates the mistake in bid rules of FAR § 14.407-3 (providing that contracting officer should obtain sufficient information to be reasonably assured that the bid confirmed is without error).

We also recommend that Milani be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2009). Milani should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of this decision.

The protest is sustained in part and denied in part.

Lynn H. Gibson  
Acting General Counsel