

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Esegur-Empresa de Segurança, SA

File: B-407947; B-407947.2

Date: April 26, 2013

Miguel Morna, Esegur-Empresa de Segurança, SA, for the protester.
Marvin K. Gibbs, Esq., Department of the Air Force, for the agency.
Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest arguing that awardee's proposal should have been rejected as unacceptable on the basis that its price was too low is sustained where the solicitation established that the agency would evaluate whether offeror's prices were unrealistically low, and the record reflects that the agency failed to perform a price realism evaluation of the awardee's low price.

DECISION

Esegur-Empresa de Segurança, SA (Esegur), protests the award of a contract to Securitas, S.A., by the Department of the Air Force under request for proposals (RFP) No. FA4486-12-R-0017 for a contractor to provide unarmed security guard services at military family housing areas located in Portugal. Esegur challenges the agency's evaluation of the awardee's proposed price.

We sustain the protest.¹

BACKGROUND

The RFP, issued on July 13, 2012 as a commercial item acquisition under Federal Acquisition Regulation (FAR) part 12, provided for the award of a fixed-price, performance-based contract for all labor, tools, equipment, materials, and

¹ Because a protective order was not issued in connection with this protest, our decision is necessarily general.

supervision necessary to perform unarmed crime prevention patrols of the military family housing areas adjacent to Lajes Field Airbase, in Portugal. RFP at 74. The anticipated contract is for a 1-year base period and four 1-year option periods. Id. at 34-35.

The RFP informed offerors that award would be made on a lowest-priced technically acceptable basis considering the following three factors: technical, past performance, and price. RFP at 71-72. In this regard, the RFP established that the agency would first evaluate offerors' prices, and then evaluate the apparent lowest-priced proposal for acceptability under the technical and past performance factors. If the lowest-price offeror was evaluated as unacceptable, the agency would then consider the acceptability of the next lowest-price offeror, continuing this process as necessary. Id. at 72.

As it relates to the protest, regarding the evaluation of price, the solicitation provided as follows:

Unrealistically high, low, or unbalanced prices may serve as a basis for rejection of the proposal. The price evaluation will document the reasonableness and completeness of the total evaluated price.

RFP at 69-70.

Eight offerors, including Esegur and Securitas, submitted timely proposals.² The agency evaluated initial proposals and conducted two rounds of written discussions with each offeror. Final revised proposals were requested and received by December 10, 2012. CO Statement at 2-3. Securitas' total price of €843,198.00 was the lowest and its final revised proposal was rated acceptable under the technical and past performance factors. The record reflects that Securitas' price was approximately 17 percent lower than the independent government estimate, and that the agency found Securitas' price "to be fair and reasonable" based on adequate price competition and a comparison with historical prices, citing Federal Acquisition Regulation (FAR) §§ 15.404-1(b)(2)(i) and (ii). Agency Report (AR) exh. 24, Source Selection Decision, at 2; AR, exh. 27, Determination of Price Reasonableness. On January 16, 2013 the agency made award to Securitas with performance scheduled to begin on January 20. AR exh. 29, Notice of Award. The same day, the agency provided the protester with notice of the award decision. Id. exh. 30, Notice to Unsuccessful Offeror. This protest followed.

² Esegur currently provides security services as the incumbent contractor. The agency reports that the contract awarded to Esegur expired on September 19, 2012 but the contract was extended until January 19, 2013 to give the agency time to evaluate proposals submitted and make an award pursuant to this solicitation. Contracting Officer (CO) Statement at 2.

DISCUSSION

Esegur essentially argues that the agency's evaluation of the awardee's low price proposal was improper. According to the protester, the awardee's price is lower than the minimum price an offeror could possibly propose to provide the solicited services, and, as a consequence, the awardee should have been found unacceptable on the basis that its price was too low.³ Protest at 2-3; Protester's Comments at 2-9. In responding to the protest, the Air Force does not argue that it properly considered whether the awardee's price was too low. Rather, the agency contends that it was not required to evaluate whether the awardee's price was too low because the solicitation did not require a price realism evaluation. The solicitation only required the agency to evaluate prices for reasonableness (whether the awardee's price was too high), and it properly conducted this analysis. According to the agency, a price realism evaluation was entirely optional under the terms of the solicitation, to be performed solely within the agency's discretion.

Before awarding a fixed-price contract, an agency is required to determine whether the price offered is fair and reasonable. Federal Acquisition Regulation § 15.402(a). An agency's concern in making this determination in a fixed-price environment is primarily whether the offered prices are too high, as opposed to too low, because it is the contractor and not the government that bears the risk that an offeror's low price will not be adequate to meet the costs of performance. Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3; CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 4. Although not required, an agency may choose to 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 reflected its understanding of the contract requirements or to avoid the risk of poor performance from a contractor that is forced to provide services at little or no

³ To the extent Esegur alleges that Securitas does not intend to pay its employees the minimum wages required under Portuguese labor laws, this allegation does not provide a basis to sustain the protest since the protester has not alleged, and there is no factual basis to conclude, that Securitas' proposal took exception to compliance with applicable labor laws. See, e.g., McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 2 (explaining that an agency may award a contract to an offeror whose proposal indicates that its price is based on hourly rates below those required by the Service Contract Act so long as the offeror does not take exception to the terms of the solicitation, such that it will be obligated under the contract to pay the applicable labor rates). Ultimately, the responsibility for the administration and enforcement of applicable labor laws is within the purview of the relevant governing bodies in Portugal. See, e.g., Bering Straits Logistics Servs., LLC, B-403799, B-403799.3, Dec. 15, 2010, 2011 CPD ¶ 9 at 3-4.

profit. See The Cube Corp., B-277353, Oct. 2, 1997, 97-2 CPD ¶ 92 at 4; Ameriko, Inc., B-277068, Aug. 29, 1997, 97-2 CPD ¶ 76 at 3.

Here, notwithstanding the agency's argument to the contrary, the solicitation contemplated a price realism evaluation of the awardee's low price by the Air Force. As noted above, regarding the evaluation of price, the solicitation advised offerors that "unrealistically" low prices may serve as a basis for rejection of a proposal. RFP at 69. Implicit in the solicitation's reference to "unrealistically" low prices is the presumption that the agency would actually consider whether an offeror's price is in fact unrealistic and, as a consequence, unacceptable.

To the extent the Air Force believes that the evaluation of prices for realism was optional because the solicitation indicates that unrealistically low price proposals "may" be found unacceptable, see Agency's Memorandum of Law, at 6, the Air Force's belief is based on an unreasonable reading of the solicitation. The RFP's use of the term "may" in this instance refers to the agency's discretion to reject an unrealistically low price, as opposed to reserving to the agency the right to evaluate prices for realism in the first instance. See Halfaker & Associates, LLC, B-407919, B-407919.2, Apr. 10, 2013, 2013 CPD ¶ ___ at ___ (rejecting agency's argument that solicitation did not require a realism evaluation where the solicitation provided that "[u]nrealistic rates, as determined by the Contracting Officer, may also be considered in risk assessment"); Waterfront Techs., Inc., B-401948.16, B-401948.18, June 24, 2011, 2011 CPD ¶ 123 at 15 n.16 (finding that solicitation, which indicated that "[t]he Government may reject any proposal that is evaluated to be unrealistic," required the agency to evaluate prices for realism); Cf. Guident Technologies, Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 13 n.9 (holding that agency was not required to perform a price realism evaluation where the solicitation advised that the "Government reserves the right to conduct a price realism analysis to determine whether an offeror's proposed prices are realistic for the work to be performed").⁴ Accordingly, we sustain the protest because the

⁴ Esegur also raises several other arguments that do not provide a basis for sustaining its protest. For example, the protester complains that the agency's award notification, which was provided to the protester 3 days before performance was to begin, was not sufficient time for the protester to shut down its operations. Protest at 1-2. Because notification of award to unsuccessful offerors is a procedural matter which has no effect on the evaluation of proposals or the validity of the agency's determinations, this basis of protest will not be considered. See e.g., American Identification Prods., Inc., B-227599, July 13, 1987, 87-2 CPD ¶ 42 at 2. The protester's allegation that the awardee will not provide the personnel required by the solicitation also does not state a valid basis of protest. Protester's Supp. Protest. Whether Securitas ultimately complies with the personnel requirements of the RFP is a matter of contract administration that is the responsibility of the contracting agency, not our Office. Bid Protest Regulations, (continued...)

agency failed to contemporaneously evaluate whether the awardee's low price, which was 17 percent below the government's estimate, was realistic, as it was required to do by the terms of the solicitation.⁵

RECOMMENDATION

We recommend that the Air Force reopen the record and evaluate awardee's low price for realism. If, based on this evaluation, the agency concludes that the awardee's proposal is unacceptable, we recommend that the agency terminate the awarded contract and make a new award decision consistent with the terms of the solicitation. Finally, we recommend that the Air Force reimburse Esegur's costs of filing and pursuing its protest. 4 C.F.R. § 21.8(d)(1). Esegur's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the Air Force within 60 days after this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel

(...continued)

4 C.F.R. § 21.5(a) (2013). In any event, the protester abandoned these arguments when it failed to address in its comments the agency's substantive response to these issues in the agency report. 4 C.F.R. § 21.3(i); Knowledge Connections, Inc., B-297986, May 18, 2006, 2006 CPD ¶ 85 at 2 n.2.

⁵ In its defense, the agency cites statements from the awardee, which were prepared during the course of the protest attesting to the validity of its price. These statements were not, however, provided to the agency at the time of its price evaluation and award decision, nor do they in fact reflect the agency's independent contemporaneous consideration of the awardee's proposed price. Accordingly, we give little weight to any such assertions or assessments made in the heat of litigation. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.