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Decision

Matter of: Pontiac Flying LLC

File: B-414433; B-414433.2; B-414433.3

Date: June 12, 2017

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Scott L. Mandel, Esq., and Allison M. Collins, Esq., FosterSwift, for Albert E. and Michael D. Schiffer, dba Al's Aerial Spraying, LLC, the intervenor.

Antonio T. Robinson, Esq., United States Department of Agriculture, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency held unequal discussions with eventual awardee by asking for confirmation that agency interpretation of alternate pricing was correct, and for price verification, is denied because these inquiries, without more, constituted clarifications, not discussions.

2. Protest that agency miscalculated awardee's proposal, treated offerors unequally, and made an unreasonable source selection decision is denied where record shows that agency's evaluation was reasonable and treated offerors equally, and that the agency rationale for selection of higher-rated and lower-priced proposal was consistent with the terms of the solicitation.

DECISION

Pontiac Flying LLC, of Pontiac, Illinois, a small business, protests the award of a contract to Albert E. and Michael D. Schiffer, doing business as Al's Aerial Spraying, LLC (awardee), of Ovid, Michigan, also a small business, by the United States Department of Agriculture, Forest Service, under request for proposals (RFP) No. AG-56A1-S-17-0001, for aerial spraying of gypsy moth mating disruptant. Pontiac argues that the awardee's proposal was unacceptable, that the agency held unequal discussions with the awardee, and that the agency improperly awarded the contract to the awardee based only on its lower price.

We deny the protest.

BACKGROUND

The RFP, issued as a commercial item solicitation on December 30, 2016, sought fixed-price proposals, for a base year and four option years, to supply and apply disruptant to treat approximately 400,000 acres in specific areas as part of the Slow the Spread program.¹ RFP at 14, 25, 31. The RFP, set aside for small businesses, divided the requirement into two areas and permitted offerors to propose for either area, or both. Id. at 25. Correspondingly, the Forest Service could award two contracts (one for each area) or one contract for both,² to whichever offeror provided the best value to the government, based on a tradeoff among three factors: technical capabilities, past performance, and price. Id. at 20. The technical capabilities and past performance factors were equally weighted and, when combined, were significantly more important than price. Id.

The RFP incorporated by reference the Federal Acquisition Regulation (FAR) provision at section 52.212-1, which expressly encourages offerors to submit multiple offers with alternate terms and conditions. Id. at 1, 20. Proposals were to be submitted in separate technical and pricing volumes. Id. at 23. Under the technical capabilities factor, offerors were to provide information about five equally-weighted subfactors: relevant experience, team qualifications, equipment, operations approach, and safety. Id. at 23-24. Under the past performance factor, offerors were to provide additional information about at least three (but not more than five) of the projects identified by the offerors as relevant experience, including contact information for performance evaluations. Id. at 24.

As relevant here, under the team qualifications subfactor, offerors were instructed to “[i]dentify the owners, managers, pilots and other staff, including subcontractors, that will be assigned to this project and provide specific, relevant training and experience to the type of services each would provide,” among other things. Id. at 23. Under the equipment subfactor, offerors were to identify the equipment “including but not limited to the aircraft, dispersal system(s), [differential global positioning system equipment] and [automated flight following]” including a description of the offeror’s dispersal systems and the safety and suitability of the firm’s aircraft. Id.

¹ The RFP also provided for an economic price adjustment to the offered prices based on changes to the cost of jet fuel or aviation gas. RFP at 15.

² The record indicates that the Forest Service hoped that allowing separate contracts for each area might encourage more small business participation. Agency Report (AR) Tab 14, SSA Award Record, at 3.

An accompanying exhibit required detailed information about the offeror's dispersal systems. RFP exh. 12 (Dispersal System Requirements) at 1. Another exhibit provided detailed requirements for the contractor's aircraft operations, which included requirements regarding pilot qualifications. Among the qualifications were that the "Application and Observation [Pilot-in-Command] must be airplane instrument rated," that each pilot had to hold both an Federal Aviation Administration commercial pilot certificate and a valid aerial pesticide application certificate from each state where that pilot would be spraying the disruptant. RFP exh. 2 (Aircraft Operations Requirements) at 11.

The RFP required that pricing be based on acreage estimates for a low-dose application (covering a majority of the acreage under the area), and for a high-dose application (covering a smaller area), and requested per-acre and extended prices for each. The RFP also provided estimates for the use of observation aircraft, and requested per-hour and extended pricing. RFP at 26-28. Below the pricing schedule, the RFP provided a table that directed the offeror to identify for each item the disruptant offered (under a column heading of "Disrupt or SPLAT"³), along with a price per kilogram, and noted that this pricing was to be used "in the event of a government buy-back of excess disruptant (see clause in solicitation)."⁴ Id. at 28.

The agency received proposals from three firms, including Pontiac and the awardee, which is the incumbent contractor. As relevant here, the awardee proposal described the firm's experience using both Disrupt and SPLAT, and the specialized equipment for handling and spraying each. AR Tab 5, Awardee Technical Proposal, at 7, 21. The awardee's proposal identified [DELETED] application pilots and [DELETED] alternates, plus [DELETED] observation pilots and [DELETED] alternates. Id. at 12. The firm listed each pilot's license and ratings, date of medical clearance, and flying hours for both agricultural and forestry work. Id. at 16-17. The awardee's proposal also provided two sets of the RFP's pricing schedule pages. The first set was completed with line item prices and totals, and the awardee listed both Disrupt and SPLAT and a price per kilogram for each. AR Tab 6, Awardee's Price Proposal, at 8-10. The second set was marked at the top of each page "Alternate Item 1 and Item 2 Combination," and also

³ Disrupt and SPLAT, manufactured by Hercon Environmental, and ISCA Technologies, respectively, are trade names for two commercially-produced controlled-release formulations used to disrupt mating in low-density gypsy moth populations. The RFP specified that these are the only products registered and approved for use under the contract. Id. at 31; RFP exh. 13 (products and application procedures document).

⁴ The RFP provided for the agency to purchase excess disruptant at the offeror-specified price resulting from "the government's estimate of the host type within the application block estimate being +/- 5 percent," and for the contractor to pay the same price "if disruptant is supplied to the contractor as Government Furnished Property." Id. at 15.

provided prices and totals, and again listed both Disrupt and SPLAT and a price per kilogram for each. Id. at 11-13.

During the evaluation of proposals, the contracting officer (CO) sent an email to the awardee regarding the two pricing schedules in its proposal and its prices for the alternate price schedule, as follows:

[W]hile the evaluation team is working on the technical ratings, I just wanted to clarify my understanding of the two bid schedules submitted with your price proposal. The first schedule that doesn't have any writing on the top, would be your price for each item in the event that you were awarded only one item? The second schedule that says Alternate Item 1 & Item 2 Combination would be your price if you receive both items. Is that correct?

Could you please review your pricing and verify that it is correct, there is a large price differential between the two schedules and I want to be sure there are no mistakes. Thanks.

AR Tab 13, Email from CO to awardee, Feb. 13, 2017, at 1.

Less than an hour later, the awardee responded to the CO's inquiry in the affirmative, thus:

You are correct in the schedules and the numbers are correct. Unless you want us to put in a higher number.

AR Tab 13, Email from awardee to CO, Feb. 13, 2017, at 1.⁵

Three evaluators reviewed the proposals, and prepared individual comments and ratings for each offeror. The three evaluators then met as a technical evaluation board to reach the following final consensus adjectival ratings, which were provided to the source selection authority (SSA):

⁵ The awardee's comment about raising its price, if desired, appears to have been intended as a joke, as indicated by a colloquial expression that immediately followed it.

	Offeror A	Pontiac	AI's Aerial Spraying
Factor 1 – Technical Capabilities	Unacceptable	Exceptional	Exceptional
Relevant Experience	Unacceptable	Exceptional	Exceptional
Team Qualifications	Unacceptable	Exceptional	Exceptional
Equipment	Marginal	Exceptional	Exceptional
Operations Safety	Unacceptable	Exceptional	Exceptional
Safety	Marginal	Exceptional	Exceptional
Factor 2 – Past Performance	Very Good	Exceptional	Exceptional
Quality	Exceptional	Very Good	Exceptional
Schedule	Very Good	Exceptional	Exceptional
Cost Control	Very Good	Exceptional	Exceptional
Management	Very Good	Very Good	Exceptional
Regulatory Compliance	Very Good	Exceptional	Exceptional
Total Price	\$9.2 million	\$11.5 million	\$8.0 million

AR Tab 11, Technical Evaluation Board Report, at 3⁶; AR Tab 14 SSA Award Record, at 10-11.

After reviewing the evaluation results and the prices, the SSA selected the awardee's proposal for award on the basis that its \$3.5 million price difference was significant, that the awardee's and Pontiac's non-price proposals were similarly exceptional, and that the awardee was "very capable of performing this work and there is little doubt that the project will be completed successfully." *Id.* at 11. After receiving notice of the award and a debriefing, Pontiac filed this protest.

ANALYSIS

Pontiac raises challenges to several aspects of the evaluation of the awardee's proposal, and to the source selection rationale. We have reviewed all of Pontiac's protest grounds and, as explained below, we dismiss one ground of protest and deny the remaining grounds because the record demonstrates that the evaluation was reasonable and consistent with the RFP, and that the Forest Service made a reasonable source selection decision.

⁶ The consensus evaluation first rated Pontiac as "very good" under the past performance factor. AR Tab 10, Consensus Rating Sheets, at 12. However, as shown above, the evaluation board report ultimately changed the rating to exceptional, which the report stated had taken into account that the firm's performance was successful despite certain problems, and the record contained "many positives" under the quality and management subfactors. AR Tab 11, Technical Evaluation Board Report, at 13-14.

Awardee's Low Price

In its initial protest, Pontiac argued that the awardee's price was so low that it was either fictitious or evinced a plan to deceive the Forest Service through a bait-and-switch scheme. Protest at 12-13. Pontiac based its argument on a recalculation of the awardee's price on a per-acre basis, which it compared to the per-acre price that the awardee had charged under the incumbent contract. Id. at 12. By Pontiac's calculations, the awardee's price is almost half the price it charged under the awardee's incumbent contract. Id. Pontiac reasons that the awardee does not intend to perform in the manner required by the RFP (resulting in an alleged bait-and-switch), or else it intends to demand price increases from the Forest Service during performance. Id. at 13.

In our view, these allegations do not state a valid ground of protest. In the context of a fixed-price contract, a bidder or offeror, in its business judgment, may properly decide to submit a price that is extremely low--even below the cost of performance. Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶ 124 at 4. As a result, we dismiss this basis of protest.

Communication Regarding Pricing Schedules

During Pontiac's debriefing, the CO acknowledged that the evaluation of the awardee's pricing identified the potential that the firm had made a mistake,⁷ and that the agency communicated with the firm to obtain clarification of whether its pricing was correct. Pontiac contends that the communication constituted discussions, and that such discussions were improperly unequal because Pontiac was not provided discussions or an opportunity to revise its proposal. Protest at 9. The agency contends that the communication was permissible because it was limited to clarifying that the agency had properly interpreted the awardee's alternate price schedule as being applicable if both items were awarded to the firm, and clarifying whether the awardee's pricing was mistaken. AR at 5-8. Furthermore, the agency argues, the awardee's brief response, which stated that both the prices in its proposal and the agency's interpretation of the alternate pricing schedule were correct, further confirms that the agency did not conduct discussions. Id. at 7-8.

The FAR describes a spectrum of exchanges that may take place between a contracting agency and an offeror in a negotiated procurement. See FAR § 15.306. In that regard, clarifications involve a limited exchange with an offeror that gives an opportunity to clarify certain aspects of a proposal or resolve minor or clerical errors. FAR § 15.306(a). Such communications "shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal." FAR § 15.306(b)(2)-(3). Discussions occur when an agency seeks information essential to determine the acceptability of a

⁷ Pontiac states that the CO used the term "red flag" to describe this concern.

proposal, or provides the vendor with an opportunity to revise or modify its proposal in some material respect. In contrast, where an agency simply seeks confirmation of its understanding of the proposal, it is merely obtaining a clarification.

PricewaterhouseCoopers Public Sector, LLP, B-413316.2, B-413316.3, Dec. 27, 2016, 2017 CPD ¶ 12 at 13-14; see FAR § 15.306(d).

The record does not support the protester's arguments that the meaning of the awardee's pricing schedules required revision to be sufficiently clear, or that the agency's communications otherwise permitted the firm to revise its proposal. Rather, the record reflects that before communicating with the awardee, the agency concluded that the awardee's pricing schedules permitted the award of either item to the firm under the prices listed on one set of schedules, or the award of both items combined under the other set of schedules. When the agency communicated with the awardee, the contracting officer simply asked for confirmation of that understanding, and for price verification, which the awardee then provided in simple terms. Since the awardee was not permitted to revise its proposal, the record does not support Pontiac's claim that the agency improperly held discussions only with the awardee.

Evaluation of Awardee's Proposal

Pontiac also argues that the Forest Service misevaluated several aspects of the awardee's proposal because the evaluators (among other alleged errors): minimized one pilot's lack of a required qualification; failed to downgrade the awardee for a safety issue; and overlooked the awardee's alleged lack of sufficient experience in the use of one of the disruptant products while improperly permitting the awardee to offer both disruptant products.

With respect to the qualifications of one of the awardee's pilots, Pontiac argues that the awardee's proposal indicated that all but one of the pilots had an instrument rating. That pilot's qualifications listed a commercial pilot's license, SMEL (that is, single- and multi-engine land) qualification, and rotorcraft qualification. AR Tab 5, Awardee's Technical Proposal, at 16. The evaluators identified the apparent lack of instrument rating for this pilot and initially designated it as a weakness, but recharacterized it as simply something to be clarified or discussed. AR Tab 10, Consensus Rating Sheets, at 2; AR Tab 11, TEB Report, at 5. Pontiac argues that the Forest Service could not reasonably rate the awardee's proposal exceptional when one of its pilots did not have an instrument rating. Second Supplemental Protest at 3-4. The Forest Service acknowledges that an instrument rating was not included in the listing of that pilot's qualifications, but argues that the awardee's other pilots were more than sufficient to meet the solicitation requirements. Supplemental AR at 2-3. As a result, the agency maintains that it reasonably concluded that the awardee's proposal had no weaknesses and should be rated exceptional under both the team qualification subfactor and overall. Id.

In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency's evaluation was reasonable and

consistent with the solicitation's evaluation criteria, as well as applicable statutes and regulations. ManTech Advanced Sys. Int'l., Inc., B-413717, Dec. 16, 2016, 2016 CPD ¶ 370 at 3. The contemporaneous record confirms that the evaluators identified the missing qualification for one of the awardee's pilots, and that they ultimately determined that the lack of a required qualification for one pilot did not merit downgrading its proposal. In response, Pontiac has not shown that the RFP required a specific number of pilots, or that the remaining primary and alternate pilots listed by the awardee would be inadequate to perform the work, so we defer to the Forest Service's evaluation judgment.

Next, Pontiac argues that two safety incidents documented in the awardee's proposal should have resulted in a downgrade under the safety subfactor. Second Supplemental Protest at 7-8. In one, the awardee was cited for allowing sprayed material to drift onto neighboring land, and in another, an aircraft was involved in a ground collision during taxiing at an airshow. Id. The agency explains that its evaluators considered both incidents and ultimately determined that both had been addressed in the awardee's proposal. Supplemental AR at 5. Although the evaluators initially identified these two incidents as meriting a weakness under the safety factor, after further discussion, they determined that they should not be considered a weakness because the incidents appeared to be isolated, and the firm's comprehensive safety culture gave the agency confidence that the incidents did not indicate unsafe practices or a heightened risk of future incidents. Id. at 5-6.

The contemporaneous record documents that the evaluators considered these safety issues and reached a consensus that they did not reflect a weakness in the firm's approach under the safety subfactor. Although Pontiac argues that the incidents should have resulted in a lowered evaluation for the awardee, its argument simply reflects disagreement with the judgment of the evaluators. Our Office will not question an agency's evaluation judgment absent evidence that it is unreasonable or contrary to the stated evaluation criteria. Advanced Env'tl. Sols., Inc., B-401654, Oct. 27, 2009, 2010 CPD ¶ 7 at 5.

Third, Pontiac notes that the awardee proposed to perform the contract using both Disrupt and SPLAT, and argues that the RFP required offerors to specify one or the other. Pontiac also argues that the awardee's proposal should have been downgraded for having less experience in spraying SPLAT. Second Supplemental Protest at 4-5, 8-9. The Forest Service responds that while the RFP specified Disrupt and SPLAT as the only acceptable disruptant products, it did not preclude an offeror from proposing the use of both. Supplemental AR at 3-4. Accordingly, the agency argues that it reasonably evaluated the awardee's proposal to supply both products favorably. Id. at 6-8. Additionally, the Forest Service notes that the awardee's proposal described its experience with both Disrupt and SPLAT, explained how the firm had improved its equipment to handle and to spray SPLAT, and was bolstered by data showing that its equipment could spray the product accurately. See, e.g., AR Tab 5, Awardee's Technical Proposal, at 7, 11, 31-32, 38-40.

In our view, the RFP cannot be read to preclude an offeror proposing to supply both products. The price schedule permits offerors to enter prices for two disruptant products under each item, and the awardee did so--listing Disrupt on one line, and SPLAT on the other, and doing the same again under item 2. It did likewise in both its base pricing proposal and its combined items proposal. Accordingly, we see no basis to question the evaluation of the awardee's proposal to provide both products. Similarly, the record supports the agency's evaluation of the awardee's experience and equipment favorably because the proposal addressed both the firm's experience and ability to use both products successfully.

Unequal Treatment

Lastly, Pontiac asserts that the agency initially identified at least one weakness in the awardee's proposal (the pilot instrument rating issue), but did not downgrade the awardee's adjectival rating under the team qualification subfactor, while Pontiac's ratings under the past performance quality and management subfactors were downgraded based on evaluated weaknesses. Second Supplemental Protest at 9-10. Pontiac has not shown that the proposals had similar weaknesses that were treated differently; rather, the record shows that the evaluators made reasonable judgments about the significance of each weakness originally identified in the context of each offeror's proposal, and the differing criteria applicable under the evaluation factors and subfactors at issue. As discussed above, the evaluators reasonably concluded that none of the issues originally identified as weaknesses under the technical capabilities evaluation was a reason to downgrade the awardee's proposal. On the other hand, the weaknesses in Pontiac's proposal were under the past performance factor, and are distinct for that reason alone. In short, Pontiac has not demonstrated unequal treatment because it has not shown that the differences in the ratings were the result of anything other than differences in the proposals. See Northrop Grumman Sys. Corp., B-406411, B-406411.2, May 25, 2012, 2012 CPD ¶ 164 at 8. Accordingly, we deny this ground of protest.

Source Selection Decision

Finally, Pontiac argues that the agency did not make the required best-value tradeoff, but instead selected the awardee's proposal simply because it was the lowest-priced technically acceptable proposal. Pontiac argues that the agency failed to document whether the advantages of its proposal outweighed the advantage of the awardee's lower price, and instead described the price difference as "the determining factor" during the debriefing. Protest at 10-11.

The record here shows that the source selection decision acknowledged the strengths in the awardee's proposal that had been identified by the technical evaluation board, and that the board identified no weaknesses or risks. AR Tab 14, Source Selection Decision Document, at 11. The record also shows that both the awardee's and Pontiac's proposals received the highest possible overall factor ratings, but that Pontiac's price was approximately \$3.5 million higher than the awardee's. Id. The SSA

selected the awardee because it was “very capable of performing this work and there is little doubt that the project will be completed successfully.” Id.

Where, as here, the highest-rated, lowest-priced proposal is selected for award, a tradeoff is not required. Dell Servs. Fed. Govt., Inc., B-412340, B-412340.2, B-412340.3, Jan. 20, 2016, 2016 CPD ¶ 43 at 7 n.6; Alliance Tech. Servs., Inc., B-311329, B-311329.2, May 30, 2008, 2008 CPD ¶ 108 at 3. The SSA here considered that both the awardee’s and Pontiac’s proposals received adjectival ratings of exceptional under the technical capabilities and past performance factors, and that the awardee’s proposal was lower priced. Under these circumstances, a tradeoff was not required for the agency to select the lower-priced proposal for award.

The protest is denied.

Susan A. Poling
General Counsel