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Decision

Matter of: Global, A 1st Flagship Company

File: B-297235; B-297235.2

Date: December 27, 2005

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Robert J. McMullen, Esq., and Lori S. Chofnas, Esq., Department of the Navy, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In procurement that placed greater importance on technical factors, agency’s establishment of a competitive range of one, which consisted of the awardee’s technically unacceptable initial proposal and which excluded protester’s “highly acceptable” technical proposal, on the basis that protester’s evaluated cost/price was 15 percent higher than the awardee’s, was not reasonable where the agency’s cost/price evaluation reflected various flaws and erroneous assumptions.

DECISION

Global, A 1st Flagship Company protests the Department of the Navy’s award of a contract to George G. Sharpe, Inc. under request for proposals (RFP) No. N00140-05-R-0042. The solicitation sought proposals to operate and maintain East Coast inactive ships for the Naval Inactive Ship Management Office (NISMO) in Philadelphia, Pennsylvania. Global maintains that the agency’s establishment of a competitive range consisting of only Sharpe’s proposal reflected various evaluation errors and lacked a reasonable basis.

We sustain the protest.

BACKGROUND

In May 2005, the agency issued solicitation No. N00140-05-R-0042 seeking proposals to operate and maintain East Coast inactive ships under a cost-reimbursement contract for a base period and four 1-year option periods. The solicitation provided that the successful offeror will furnish direct labor, supervision, administrative support, and (with the exception of government furnished property) all materials necessary to perform the solicitation's requirements. RFP at 16. Global is the incumbent contractor for the protested procurement; Sharpe holds a similar contract for operation and maintenance of inactive ships on the West Coast.

The solicitation stated that proposals would be evaluated on the basis of cost/price and the following technical evaluation factors which were listed in descending order of importance: technical and management approach; corporate experience; past performance;¹ personnel resources, and small business participation. RFP at 106. Offerors were advised that technical factors were more important than cost/price. Id. The solicitation further provided that "[i]f [an] offeror's proposal is determined unacceptable in any of the technical evaluation factors and/or subfactors, the proposal may not be considered for award." RFP at 107.

With regard to cost/price proposals, the solicitation listed the government's estimated levels of required staffhours, by labor category and contract period;² offerors were required to propose labor rates, by contract period, for the various labor categories. With regard to costs for materials, the solicitation contained what the contracting officer described as "plug-in" numbers, Hearing Transcript (Tr.) at 21;³ that is, numbers that, for purposes of the cost/price evaluation, would be applied to all offerors' proposals.⁴ However, the solicitation did not specifically identify the items the government intended to be reflected in the materials "plug-in" numbers.⁵ In this regard, the solicitation stated: "the term 'material' includes

¹ The solicitation provided that corporate experience and past performance were of equal importance.

² Total estimated staffhours for the base period and four option periods were 197,400, 176,720, 197,400, 165,440, and 139,120, respectively. RFP at 7-8.

³ Our Office conducted a hearing in connection with this protest, during which testimony was provided by the contracting officer.

⁴ The "plug-in" numbers for materials, by contract period, were: \$2,616,520, \$2,147,833, \$2,147,833, \$1,313,900, and \$760,000. RFP at 107.

⁵ At the GAO hearing, the contracting officer acknowledged that, during the procurement, he believed the "plug-in" numbers reflected the historical annual costs for materials. Tr. at 22, 58. However, he also acknowledged that, following
(continued...)

supplies, equipment, hardware, automatic data processing equipment, and software.” RFP at 62. However, the solicitation also stated, “The Government shall furnish all [necessary] tools/equipment/vehicles/ property/ADP/other equipment, as specified in Attachments 6, 7, 8 and 9. . . . In the event the material is not available, the Contractor is authorized to procure material which will be reimbursed as an Other Direct Cost (ODC).” RFP at 29. The agency declined to provide further information regarding the items contemplated by the materials “plug-in” numbers, publishing the following question and answer in a solicitation amendment:

Question: . . . Would the government please provide a breakdown of the . . . Material costs that it has provided?

Answer: The solicitation is clear on its face.

Agency Report, Tab 3, RFP amend. 1, at 10.

Eight offerors, including Global and Sharpe, submitted proposals by the June 23, 2005 closing date; the proposals were subsequently evaluated with regard to cost/price and technical factors.⁶ Five of the other offerors’ technical proposals were rated “U(b)”–that is, “unacceptable, not capable of being made acceptable”–and were not further considered for award.⁷ Agency Report at 5. Global’s technical proposal was rated [deleted] under [deleted] and “HA” overall. Id. Sharpe’s proposal was rated [deleted] under [deleted];⁸ overall, Sharpe’s proposal was rated “U(a).”⁹ Agency Report at 6.

(...continued)

submission of Global’s protest, he learned that these “plug-in” numbers were significantly higher than the historical annual costs for materials. Tr. at 49, 95.

⁶ Technical proposals were evaluated using adjectival ratings of “highly acceptable” or “HA”; “acceptable” or “A”; “unacceptable, but capable of being made acceptable” or “U(a)”; and “unacceptable, not capable of being made acceptable” or “U(b).” Agency Report at 5 n.3.

⁷ The other proposal not at issue here was rated “U(a).” None of the other offerors have protested any aspect of this procurement; accordingly, our decision does not further discuss their proposals.

⁸ [deleted]

⁹ As noted above, the solicitation expressly provided that “[i]f [an] offeror’s proposal is determined unacceptable in any of the technical evaluation factors and/or subfactors, the proposal may not be considered for award.” RFP at 107.

In comparing Global's and Sharpe's technical proposals, the agency concluded that [deleted]^{10,11}; and that, overall, Global's "highly acceptable" technical proposal was superior to Sharpe's "unacceptable, but capable of being made acceptable" proposal. Id.

In evaluating the cost/price proposals, the contracting officer performed a cost realism analysis, making various adjustments for purposes of the evaluation. For example, in evaluating Sharpe's proposal, the agency found that Sharpe had failed to propose any labor costs under [deleted] labor categories for option years [deleted].¹² The contracting officer concluded that this omission was a clerical error on Sharpe's part, and, in evaluating Sharpe's cost/price, he projected costs in those categories for the periods omitted from Sharpe's proposal. In evaluating Global's cost/price proposal, the contracting officer, among other things, compared the costs that Global had proposed for specific ODCs against the amounts that Global had billed for similar items under the prior contract during fiscal year 2004 (FY 04). For items where the FY 04 costs were higher than those proposed, the contracting officer increased Global's proposed costs to the FY 04 levels; for items where the FY 04 costs were lower than those proposed, the contracting officer applied the proposed amounts. Tr. at 83-85. Overall, after various adjustments, the evaluated cost/price associated with Sharpe's technically unacceptable proposal was \$36,364,589; the evaluated cost/price for Global's highly acceptable technical proposal was \$41,882,892.¹³ Agency Report, Tab 12, Competitive Range Determination, at 9.

¹⁰ [deleted]

¹¹ [deleted]

¹² Sharpe's proposal did not include labor costs in option years [deleted] for the labor categories of [deleted]. Agency Report, Tab 9, at 24, 26, 28. The government's total estimated hours for these labor categories during these contract periods were [deleted], respectively. Id.

¹³ The government's estimated value for this contract was \$48,853,170. Agency Report, Tab 8, at 3.

Based on the technical and cost/price ratings, the contracting officer established a competitive range consisting of only Sharpe's proposal. In excluding Global's higher-technically-rated proposal from the competitive range, the contracting officer relied on the evaluated cost/price difference between the two proposals, stating: "[T]he technical benefit associated with Global is greatly outweighed by the significant difference in realistic cost (Global is 15.2% / \$5,518,303.30 higher than Sharpe.) Therefore, Global's combined technical and cost/price proposal would not be considered among the most highly rated." Agency Report, Tab 12, at 11. The contracting officer added, "[T]here is no reasonable expectation that Global would submit a FPR [final proposal revision] with a significantly lower cost realistic price." Id. At the GAO hearing, the contracting officer further testified that, based on Global's evaluated cost/price being 15 percent higher than Sharpe's, he concluded that Global had no reasonable chance for award. Tr. at 29.

Thereafter, the agency conducted discussions with Sharpe, during which Sharpe revised its proposal in a manner that complied with the solicitation requirements regarding [deleted] and submitted proposed costs for the labor categories it had omitted from its initial proposal. Following these revisions, the agency evaluated Sharpe's revised proposal as "highly acceptable" and awarded a contract to Sharpe. This protest followed.

DISCUSSION

Global protests that the contracting officer's determination to exclude Global's proposal from the competitive range was based on various errors and lacked a reasonable basis. We agree.

The Federal Acquisition Regulation (FAR) provides that an agency "shall establish a competitive range comprised of all of the most highly rated proposals." FAR § 15.306(c)(1). Although agencies are not required to retain proposals in the competitive range that the agency reasonably concludes have no realistic chance for award, SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5, where, as here, a determination to exclude a proposal is based entirely on the proposal's higher evaluated cost, the agency's cost realism analysis must be reasonably thorough, accurate and complete. See SGT, Inc. B-294722.4, July 28, 2005, 2005 CPD ¶ 151. Where an agency's cost realism analysis reflects material errors or flawed assumptions it cannot be considered reasonable. Future-Tec Mgmt. Sys, Inc., B-283793, Mar. 20, 2000, 2000 CPD ¶ 59.

Here, as discussed in more detail below, the record establishes that the agency's cost realism analysis and its cost/price evaluation contained various errors and, as a result, the agency's competitive range determination lacked a reasonable basis. Further, the record does not reasonably support the contracting officer's determination that Global could not significantly lower its evaluated cost/price in response to discussions.

We initially note that, in this procurement, there is no dispute that the direct labor costs proposed by Global and Sharpe--which constitute the most significant portion of this services contract--were very nearly the same,¹⁴ Agency Report, Tab 8 at 10, 16; accordingly, in assessing the bases for the overall cost/price difference between the two proposals, direct labor costs are not a material part of that difference. The contracting officer also acknowledged that the cost/price difference between the two proposals did not flow from some unique aspect of the offerors' technical proposals (for example, a unique efficiency incorporated in Sharpe's proposal or a unique inefficiency attributable to Global's proposal). Tr. at 31-33, 79-80. Rather, the contracting officer testified that there were two primary cost/price elements that formed the basis for the difference in the offerors' evaluated cost/price: other direct costs (ODCs) and fee. Tr. at 32. With regard to fee, Global proposed a total fee of [deleted], which the agency assigned an evaluated cost/price value of [deleted]. Agency Report, Tab 18, at 1; Tab 8, at 10. Sharpe proposed a total fee of [deleted], which the agency assigned an evaluated cost/price of [deleted]. Agency Report, Tab 19, at 1, 2; Tab 8, at 16.

With regard to ODCs, Global proposed [deleted], which reflected the costs for various specifically described items, as required by the solicitation;¹⁵ Global's cost/price proposal also reflected the "plug-in" numbers for materials. Agency Report, Tab 8, at 10. In contrast, Sharpe proposed [deleted]. Agency Report, Tab 8, at 16. Following its debriefing, Global protested that either several of the items Global proposed as ODCs represented costs that Sharpe would, of necessity, incur and that these costs were improperly omitted from Sharpe's proposal or, alternatively, that the agency believed the costs for many of Global's itemized ODCs were covered under the materials "plug-in" number, in which case the agency should have conducted discussions and permitted Global to revise its proposal to eliminate double-counting of costs.

The agency does not dispute that many of the items proposed by Global as ODCs reflect costs that both offerors are likely to incur. Nonetheless, the agency initially took the position that all of the ODC costs proposed by Global were covered in Sharp's indirect cost pools.¹⁶ Agency Report, Tab 8, at 33. Upon further development

¹⁴ A collective bargaining agreement is in place with regard to much of the direct labor that either offeror will use to perform this contract. Tr. at 12.

¹⁵ The solicitation provided that, in proposing ODCs, an offeror "shall include an itemization of those costs." RFP at 104.

¹⁶ The agency states that Sharpe holds various other government contracts and, accordingly, maintains various indirect cost pools; in contrast, Global holds only this government contract and, accordingly, direct charges some costs that Sharpe would apply to an indirect cost pool. Agency Report at 11; Tr. at 26.

of the protest record, the agency acknowledged that some of the costs it initially asserted were covered within Sharpe's indirect cost pools were, in fact, routinely billed as ODCs under Sharpe's similar West Coast contract. Tr. at 105-06, 116. Based on disclosure of this information, the agency now concedes that Sharpe's evaluated cost/price should have been higher. Agency Report at 17; Agency Post-Hearing Brief at 12.

Next, as discussed above, in performing its cost realism analysis of Global's proposal, the agency compared Global's proposed ODC's to the levels Global had incurred in FY 04. However, the record establishes that the level of direct labor performed by Global during FY 04 was significantly higher than the level of direct labor projected for each of the five contract periods. Further, the agency acknowledges that the amount of costs that will be incurred for several of the ODC categories proposed by Global are directly related to the levels of labor hours that are performed. Accordingly, following development of the protest record, including the GAO hearing, the agency acknowledged that the costs Global proposed for such related ODC categories "should not have been raised for cost realism purposes." Agency's Post-Hearing Brief at 12.

The record also establishes that in performing the cost realism analysis of Sharpe's cost/price proposal, prior to the competitive range determination, the contracting officer understated Sharpe's evaluated cost/price with regard to fee. Specifically, as discussed above, Sharpe's initial proposal failed to include labor costs for various labor categories that were required by the solicitation. Based on his determination that this was a clerical error, the contracting officer projected the labor costs that Sharpe's proposal should have included; however, in making this projection, the contracting officer failed to apply any fee to the projected labor costs—[deleted]. The agency acknowledges that the contracting officer mistakenly "failed to include" any fee associated with the projected labor costs. Agency Post-Hearing Brief at 13.

As a result of the agency's various mistakes and erroneous assumptions, the agency acknowledges that the \$5.5 million difference in evaluated cost/price of the two offerors was overstated. In its report responding to Global's protest, the agency suggested that the properly evaluated cost/price difference between the two proposals should have been \$4.5 million. Agency Report at 17. Following the GAO hearing, the agency further lowered its calculation of the proper differential, stating that the evaluated cost/price difference between the two proposals should have been [deleted].¹⁷ Agency Post-Hearing Brief at 2 n.2. Nonetheless, the agency asserts that

¹⁷ Specifically, the agency stated: "The net impact of correcting for mistakes and considering new issues raised during the protest amounts to a cost realistic reconciliation of approximately [deleted]. . . . This still results in a cost realistic difference of approximately [deleted] between the two offerors." Agency Post-Hearing Brief at 2 n.2.

this [deleted] cost/price difference between the two proposals (which constitutes a difference of approximately [deleted] percent) would still have resulted in exclusion of Global's proposal from the competitive range. Accordingly, the agency maintains that Global's protest should be denied despite the agency's various cost/price evaluation errors. We reject the agency's argument.

In light of the multiple errors in the agency's cost/price evaluation, we find no reasonable basis for the agency's exclusion of Global's proposal from the competitive range. Further, we give no weight to the agency's post-protest assertions that a cost/price differential of [deleted] percent between the two proposals would have reasonably led to the same result.¹⁸ As a general rule, an agency's post-protest arguments that are based on judgments the agency asserts it would have made are afforded little weight where, as here, such judgments are made in the heat of litigation and based on facts that were not previously considered and that are materially different from those on which the agency relied in making the original decision. KEI Pearson, Inc., B-294226.3, B-294226.4, Jan. 10, 2005, 2005 CPD ¶ 12 at 8 n.13; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1977, 97-2 CPD ¶ 91 at 15.

In addition to the agency's flawed cost/price evaluation, the record does not reasonably support the contracting officer's conclusion that, if Global had been included in discussions, it could not have been reasonably expected to significantly lower its evaluated cost/price. Agency Report, Tab 12, at 11.

First, as discussed above, the record establishes that one of two primary bases for the cost/price difference between the two proposals was the difference in the offerors' respective fees. Global proposed an evaluated fee of [deleted]; Sharpe proposed an evaluated fee of [deleted]. Agency Report, Tab 8, at 10, 16. Global maintains that, had discussions been conducted, it would have lowered its proposed cost/price in various ways, including reducing its proposed fee. Declaration of Global President, Oct. 27, 2005, at 1, 3. The contracting officer expresses doubt that Global would have lowered its fee during discussions, noting that he would not have

¹⁸ Even if the agency's cost/price evaluation did not reflect multiple errors, it is not clear, based on the facts presented, that the agency could reasonably have created a competitive range consisting of only Sharpe's technically unacceptable proposal, and excluding Global's highly acceptable proposal, based solely on a 15-percent higher evaluated cost/price without some basis for concluding that a cost/price reduction would negatively affect its technical approach. Cf. Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114 (protest of exclusion from competitive range denied where protester's proposal offered a 30-percent higher evaluated cost/price, and protester might well have been required to reduce the quality of its proposed labor mix or weaken the favorable technical aspects of its offer in order to reduce the 30-percent cost/price differential).

raised the issue of fee, specifically--or of costs, generally--with Global during discussions.¹⁹ In that regard, the contracting officer further testified that it's "not my job" to "get every dime on the price or the fee in this case."²⁰ Tr. at 138.

Similarly, in support of Global's assertion that it would have lowered its cost/price during discussions, Global identified specific portions of its cost/price proposal (none of which would have affected its technical approach) that would have been revised. For example, Global provided information indicating that, shortly after submission of its proposal, Global successfully negotiated [deleted], asserting that, had the agency conducted discussions, it would have revised its proposal to reflect the lower rates. Declaration of Global President, Oct. 27, 2005, at 1-2. In discussing this issue during the GAO hearing, the contracting officer asserted that the information Global had provided was not "germane." In this regard, he testified: "The Navy may have benefited from that [reduction in Global's [deleted] costs] but that's not germane to the decision. I wasn't trying to project so much what happened but say what's right in front of me." Tr. at 59.

¹⁹ In this regard, the following exchange with the contracting officer took place:

Q. I guess the question is more directly, couldn't Global have lowered its fee had they been included in discussions?

A. Global may have. [However] . . . if I had gone out in discussions with Global, I would not have told Global, ["Dear Global, I would like you to lower your fee."] I would not have done that. . . .

Q. . . . [B]ut had you gone out . . . and conducted discussions, you certainly would have said ["Dear Global, your price is too high,"] wouldn't you?

A. No, sir.

Tr. at 34-35.

²⁰ Again, the following exchange with the contracting officer took place during the GAO hearing:

Q. [A]bsent knowing that [Global] wouldn't [lower their fee], why didn't you include them in the competitive range?

A. . . . It's not my job -- I don't know if it was ever my job but I don't think my peers and my professionals and everybody thinks it's my job to go out and get every dime on the price or the fee in this case and get the cheapest fee. That's not my job, I would suggest with all due respect.

Tr. at 137-38.

The purpose and responsibility of a procuring agency in conducting discussions is to lead offerors into areas of their proposals that need revision. See, e.g., Creative Mgmt. Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61. More specifically, in conducting meaningful discussions, agencies should point out aspects of an offeror's proposal which, unless addressed, will prevent that offeror from having a reasonable chance for award. See, e.g., Northrop Grumman Info. Tech., Inc., B-290080 et al., June 10, 2002, 2002 CPD ¶ 136.

We cannot, of course, reach a definitive conclusion as to what the result of discussions with Global would have been. The record is clear, however, that at the time of the competitive range determination, Global's higher evaluated cost/price was the only aspect of its proposal precluding its selection for award. Accordingly, particularly in a procurement such as this that emphasized technical factors over cost/price, discussions with Global would have required that the contracting officer raise the issue of Global's cost/price in order for those discussions to be meaningful and legally adequate. Id. Based on our review of the entire record, we find inadequate support for the contracting officer's determination that Global could not have sufficiently lowered its cost/price or fee in response to discussions to make it competitive for award. Accordingly, we conclude it was unreasonable for the agency to establish a competitive range consisting of only Sharpe's technically unacceptable proposal, and excluding Global's "highly acceptable" proposal, solely on the basis of what the agency now acknowledges was only a [deleted] percent difference between the offerors' cost/price proposals.

The protest is sustained.

RECOMMENDATION

In light of our conclusion above that, based on the facts presented here, the agency could not reasonably exclude Global's proposal from the competitive range based solely on the cost/price differential between Sharpe's and Global's proposals, we recommend that the agency reopen negotiations, include Global's proposal in the competitive range, conduct discussions with Sharpe and Global, request revised proposals, and make a new source selection decision, fully documenting the basis for that decision in order to facilitate subsequent review. If Global's proposal is selected for award, the agency should terminate Sharpe's contract and award a contract to Global. We also recommend that Global be reimbursed its reasonable costs of filing and pursuing this protest. 4 C.F.R. § 21.8(d)(1) (2005). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel