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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Al-Tahouna Al-Ahliyah General Trading & Contracting Company, WLL; Wadi Al-Sajaa Scrap & Metal Waste Trading Company, LLC; Royal Bridge International General Trading & Contracting Company, WLL

File: B-412769; B-412769.2; B-412769.3

Date: May 9, 2016

Mishaal Al-Otaibi for Al-Tahouna Al-Ahliyah General Trading & Contracting Company, WLL; Pretesh Soni for Wadi Al-Sajaa Scrap & Metal Waste Trading Company, LLC; and Roy George for Royal Bridge International General Trading & Contracting Company, WLL, the protesters.

Robin Walters, Esq., Defense Logistics Agency, for the agency.

Paula J. Haurilesko, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging rejection of firms' bids for sale of scrap materials as unbalanced are denied, where a solicitation provision granted broad authority to reject bids based on unfairness to the government; the agency reasonably found the bids to be unbalanced based on a significantly overstated line item and reasonably concluded that the unbalanced bids presented unacceptable risk to the government given the lack of historical information on in-country sales upon which the agency's quantity estimates were based.

DECISION

Al-Tahouna Al-Ahliyah General Trading & Contracting Company, WLL (Al-Tahouna), of Hawally, Kuwait; Wadi Al-Sajaa Scrap & Metal Waste Trading Company, LLC (Wadi Al-Sajaa), of Sharjah, United Arab Emirates; and Royal Bridge International General Trading & Contracting Company, WLL (Royal Bridge), of Doha, Qatar, protest the award of contracts to Asahi General Trading & Contracting Company (Asahi), of Safat, Kuwait; and Madinat Al-Meezan Company (Madinat), of Doha, Qatar, under invitation for bids (IFB) No. 39-6702, issued by the Defense Logistics

Agency (DLA) for the sale of foreign excess personal property in Qatar.¹ Al-Tahouna and Wadi Al-Sajaa argue that DLA improperly rejected their bids as unbalanced. Royal Bridge argues that the awardees' prices are unreasonably high and unbalanced.

We deny Al-Tahouna's and Wadi Al-Sajaa's protests and dismiss Royal Bridge's protest.

BACKGROUND

The IFB, posted on the DLA Disposition Services web site, sought bids for the purchase of metallic and non-metallic scrap materials located primarily at Al-Udeid Air Base and Camp As Sayliyah, Qatar, for one base year and two option years. IFB at 4, 6. The IFB anticipated awarding multiple requirements contracts to the highest-priced, responsive, responsible bidders. Id. at 13. The IFB advised bidders that the evaluated price would be calculated as a weighted cumulative average of line item prices for six types of scrap materials,² and provided the following formula for the evaluation of bids:

Item 1 bid price/pound * 15 = A

Item 2 bid price/pound * 15 = B

Item 3 bid price/pound * 15 = C

Item 4 bid price/pound * 10 = D

Item 5 bid price/pound * 25 = E

Item 6 bid price/pound * 20 = F

¹ As a general matter, sales of foreign excess personal property by a federal agency are not procurements of property or services, and are therefore not within our Office's bid protest jurisdiction. See 31 U.S.C. § 3551(1)(a). We will, however, consider protests concerning sales by a federal agency if that agency has agreed in writing to have such protests decided by our Office. Bid Protest Regulations, 4 C.F.R. § 21.13(a). DLA, by letter dated January 13, 1987, has expressly agreed to have protests concerning scrap sales decided by our Office.

² The IFB contained line items for six types of scrap material: tires, plastics and rubber residue, electronics, metals, vehicles and vehicular related components, and metallic and non-metallic non-vehicular related scrap. The purchaser is required to demilitarize and/or mutilate the first five types of scrap material; the U.S. government is required to do the same for the sixth type of scrap. IFB at 5.

$$\frac{A + B + C + D + E + F}{6} = \text{Cumulative average}$$

Id. at 12. The IFB also provided estimates of the minimum and maximum quantities (in pounds) to be sold:

	Item 1	Item 2	Item 3	Item 4	Item 5	Item 6
Minimum	15,000	5,000	23,000	23,000	23,000	23,000
Maximum	50,000	50,000	80,000	5,000,000	15,000,000	5,000,000

IFB at 15,18, 21, 25, 28, 31.

The IFB incorporated specific sections of DLA’s Sale by Reference pamphlet, which contained instructions, terms, and conditions applicable to DLA sales of personal property, including Part 2 of the pamphlet, “Sale of Government Property General Sale Terms and Conditions.” Id. at 39. As relevant here, paragraph 3 of Part 2 stated that “The Government reserves the right to reject any or all bids, including bids under which a Bidder would take unfair advantage of the Government or other Bidders . . . when in the best interest of the Government.” Agency Report (AR), Tab 4, Sale by Reference, at 4. The IFB also contained a provision for either party to terminate the contract upon 60 days written notice, during which the government could require additional removals of scrap metal. IFB at 43.

DLA received bids from 17 firms, including the protesters. DLA calculated the cumulative average for each bid as follows:

Bidder	Item 1	Item 2	Item 3	Item 4	Item 5	Item 6	Cum. Avg.
Asahi	\$0.750	\$1.650	\$1.920	\$0.011	\$0.010	\$0.012	\$10.90
Madinat	0.400	1.000	2.500	0.010	0.009	0.010	9.84
Bidder A	0.530	0.800	2.000	0.008	0.008	0.008	8.40
Bidder B	0.400	0.044	0.400	0.962	0.486	0.451	7.24
Bidder C	0.030	0.033	0.019	0.088	0.380	1.564	7.15
Bidder D	0.040	0.450	0.380	0.950	0.460	0.214	6.39
Bidder E	0.038	0.045	0.039	0.096	0.476	0.420	3.85
Bidder F	0.020	0.022	0.009	0.068	0.188	0.564	2.90
Bidder G	0.015	0.018	0.007	0.048	0.189	0.279	1.90
Royal Bridge	0.001	0.001	0.001	0.008	0.050	0.050	0.40
Non-Responsive Bids							
Al-Tahouna	0.001	11.000	0.001	0.002	0.003	0.003	27.53
Wadi Al-Sajaa	0.002	10.550	0.001	0.002	0.003	0.001	26.40

AR, Tab 3, Bid Abstract.

Although Al-Tahouna and Wadi Al-Sajaa submitted the bids with the highest evaluated prices, the contracting officer found their bids to be unbalanced and to present unacceptable risks to the government. On this basis, the contracting officer rejected the bids as non-responsive and awarded contracts to the two firms with the next highest-priced bids, Asahi and Madinat. AR, Legal Memorandum, at 5. Royal Bridge's evaluated price was the lowest of the 10 responsive bidders. See AR, Tab 3, Bid Abstract. These protests followed.

DISCUSSION

Al-Tahouna and Wadi Al-Sajaa challenge the rejection of their bids as unbalanced. Al-Tahouna raises additional objections to the award of contracts to Asahi and Madinat. Royal Bridge primarily argues that the awardees' bids were materially unbalanced and therefore ineligible for award. We have considered all of the protesters' arguments, and find that none provide a basis to sustain the protests. We present the primary arguments below.

Al-Tahouna and Wadi Al-Sajaa

Al-Tahouna and Wadi Al-Sajaa argue that the contracting officer erred in finding their bids to be unbalanced. Wadi Al-Sajaa contends that the solicitation did not provide for bids to be rejected for unbalanced pricing. Wadi Al-Sajaa Protest at 2.

Al-Tahouna argues that its bid continues to provide the highest value to the government based on scenarios in which the government sells 25, 50, 75, and 100 percent of the maximum quantity. Al-Tahouna Protest at 4. Al-Tahouna also asserts that it could provide a bank guarantee for the price of purchasing the maximum quantity indicated by the solicitation. Id. at 4-5.

Neither the Competition in Contracting Act of 1984 (CICA) nor the Federal Acquisition Regulation (FAR) apply to sales of government property. Where, as here, CICA and the FAR do not apply to procurements that are otherwise within our jurisdiction, we review the record to determine if the agency's actions were reasonable and consistent with any statutes or regulations that do apply. See, e.g., Open Spirit, LLC, B-410428, B-410428.2, Dec. 15, 2014, 2014 CPD ¶ 373 at 6; Great S. Bay Marina, Inc., B-293649, May 3, 2004, 2004 CPD ¶ 108 at 2-3. Moreover, although the FAR is not applicable to sales contracts, our Office, where appropriate, will refer to it for guidance in reviewing protests involving sales contracts. See Alamo Aircraft Supply, Inc.; Merchants World Surplus Enters., Inc.; Associated Aircraft Mfg. & Sales, Inc.; Blazer Surplus; Dixie Air Parts Supply, Inc., B-278215.4, Mar. 11, 1998, 98-1 CPD ¶ 76 at 5 n.5.

DLA contends that rejecting unbalanced bids is encompassed within the broad authority to reject bids granted under the terms of the IFB. DLA states that the IFB advised bidders that the contracting officer had the discretion to reject any and all bids, including bids under which a bidder would take unfair advantage of the government or other bidders. AR Legal Memorandum at 6-7.

An agency is required to evaluate proposals in accordance with the terms of the solicitation. See Systems Research & Applications Corp., B-407224.3, Dec. 17, 2012, 2012 CPD ¶ 352 at 7. In evaluating offerors' proposals, an agency may properly consider specific, albeit not expressly identified, matters that are logically encompassed by or related to the stated evaluation factors. ITT Electronic Sys. Radar, Reconnaissance & Acoustic Sys., B-405608, Dec. 5, 2011, 2012 CPD ¶ 7 at 10.

The IFB here stated that "The Government reserves the right to reject any or all bids, including bids under which a Bidder would take unfair advantage of the Government or other Bidders . . . when in the best interest of the Government." AR, Tab 4, Sale by Reference, at 4. As discussed below, an offer properly may be rejected if the contracting officer determines that the lack of balance in the bid or offer poses an unacceptable risk to the government. FAR § 15.404-1(g)(3); L. W. Matteson, Inc., infra at 3. In our view, the risk to the government posed by an unbalanced bid, where the risk is unacceptably high, is reasonably related to the concept of fairness and the best interests of the government. Therefore, we conclude that the IFB's language encompasses the rejection of unbalanced bids where the bid poses an unacceptable risk to the government.

DLA explains that it concluded that Al-Tahouna's and Wadi Al-Sajaa's bids were unbalanced based on a comparison with the five highest bids and historical information. DLA states that both firms bid significantly higher than the average bids of their five nearest competitors for the plastics and rubber residue in line item 2, and significantly lower on the other five line items. For example, the protesters bid \$11.00 and \$10.55 per pound for item 2, respectively, compared with an average of \$0.70 per pound for the remaining top five bidders--amounting to more than 15 times higher. Al-Tahouna and Wadi Al-Sajaa bid \$0.001 and \$0.002 per pound for scrap tires in item 1, compared to an average bid \$0.42 per pound by the top five bidders--or 420 and 210 times lower. AR Legal Memorandum at 8. DLA also states that, with respect to item 2, historical data from the sale of plastics and rubber residue in Kuwait showed that bids ranged from \$0.010 to \$0.317 per pound, compared to the protesters' bids of \$11.00 and \$10.55 per pound.³ See id. at 8 n.6.

DLA states that the unbalanced bids of Al-Tahouna and Wadi Al-Sajaa put the government at risk in two ways. First, there is a risk that a contractor who receives award based on an unbalanced bid would terminate the contract because it was unable to continue paying the high prices for item 2. As a result, the government would likely permit the contractor to continue to buy and remove the lower-priced scrap materials until another contractor could perform. Id. at 10-12. Second, DLA states that the government would be at risk of not receiving the overall highest price from the protesters' unbalanced bids if the percentages allocated to each line item varied by even 10 percentage points from the percentages that formed the basis for the evaluated price. Id. at 9-10, 12. DLA explains that it has a limited history of selling scrap materials in Qatar, and therefore based its estimates on its experience with scrap sales in Kuwait.

Section 14.404-2(g) of the FAR provides that "[a]ny bid may be rejected if the prices for any line items or subline items are materially unbalanced (see 15.404-1(g))." FAR § 14.404-2(g). Section § 15.404-1(g)(1) of the FAR provides that unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated, as indicated by the application of cost or price analysis techniques. While unbalanced pricing may increase risk to the government, agencies are not required to reject an offer solely because it is unbalanced. L. W. Matteson, Inc., B-290224, May 28, 2002, 2002 CPD ¶ 89 at 3. An offer properly may be rejected if the contracting officer determines that the lack of balance in the bid or offer poses an unacceptable risk to the government. FAR § 15.404-1(g)(3); L. W. Matteson, Inc., supra at 3. Our Office will review for reasonableness both an agency's determination as to whether an

³ DLA states that it used historical information from sales in Kuwait because the requirement for sales in Qatar is fairly new and there have been limited removals under the current contract. AR Legal Memorandum at 8.

offeror's prices are unbalanced, and an agency's determination as to whether an offeror's unbalanced prices pose an unacceptable risk to the government. Semont Travel, Inc., B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 3; L. W. Matteson, Inc., *supra*, at 4; Enco Dredging, B-284107, Feb. 22, 2000, 2000 CPD ¶ 44 at 6.

The record shows that, with respect to item 2, plastics and rubber residue, the protesters' bids were more than 15 times higher than the average bids of the next five highest bidders. With respect to the remaining line items, the protesters' bids were significantly lower than average bids of the next five highest bidders, and either equal to or lower than the lowest bids from other bidders. *See* AR, Tab 3, Bid Abstract. As noted above, unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated. FAR § 15.404-1(g)(1). Given the disparity between the two firms' bids and the average of the nearest five bids, DLA reasonably concluded that Al-Tahouna's and Wadi Al-Sajaa's bids for line item 2 were significantly overstated in comparison to competitors' bid and therefore unbalanced.

We also find that the contracting officer reasonably considered the risks to the government of the unbalanced bids. DLA put forward two bases explaining why the protesters' bids present unacceptable risk to the government. DLA's first argument centered around the risks that a contractor would be unable to pay the high prices for line item 2 and would cease performance in that area or terminate the contract as permitted by the IFB. The IFB included a provision permitting either party to terminate the contract upon 60 days written notice. IFB at 43. Because contractors must obtain the appropriate licenses for conducting business in Qatar and to use the equipment needed to demilitarize scrap materials, the government would have to permit the contractors to continue to purchase the lower-priced items until a replacement contractor is found. In that scenario, the government would not receive the highest prices for its scrap materials. AR Legal Memorandum at 10-12. Although Al-Tahouna contends that it could provide a letter of credit from its bank to cover the full amount were the maximum quantities to be sold, the IFB did not require offerors to provide such information.

In any event, we find DLA's second reason for finding unacceptable risk in the unbalanced bids to be reasonable. We understand DLA's second argument with respect to risk to mean that the agency evaluated bids based on an estimate of the relative amounts it expects to sell of each type of scrap material. The contracting officer stated that DLA has a limited history of selling scrap materials in Qatar and therefore based its estimate on its experience with scrap sales in Kuwait. If DLA's estimate is incorrect, the government is at risk of receiving significantly less money for the scrap materials than indicated by the evaluation of bid prices. *Id.* at 9-10, 12. Since DLA has little historical information on selling scrap materials in Qatar, the agency's concern is that accepting the protesters' unbalanced bids would put the government at risk of not receiving the highest price for scrap materials. Where, as here, the issue of unbalancing arises in the context of a requirements contract, the

accuracy of the solicitation estimates is critical, and where an agency has reason to believe that its actual needs may vary significantly during performance from the solicitation estimates, it may reasonably view an unbalanced bid as not representing the most advantageous cost to the government. See, e.g., Burney & Burney Construction Co., Inc., B-292458.2, Mar. 19, 2004, 2004 CPD ¶ 49 at 2 (unbalanced bid reasonably rejected where agency determined that, due to uncertainty in estimated quantities, bid posed risk that the government would pay an unreasonable price for contract performance).

Al-Tahouna also argues that the awardees' bids are unbalanced and DLA gave Asahi preferential treatment based on prior contracts. Al-Tahouna Protest at 1, 5.

In GAO's bid protest forum a protester must be an "interested party" to protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1). By contrast, a firm is not an interested party where it would be ineligible to receive award under the protested solicitation if its protest were sustained. Acquest Dev., LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 6. Because we have concluded that DLA did not err in finding Al-Tahouna's bid to be unbalanced and other bidders are eligible for award, the protester is not an interested party to raise this protest ground. See ECI Defense Group, B-400177; B-400177.2, July 25, 2008, 2008 CPD ¶ 141 at 5 (protester is not an interested party to challenge the evaluation of the awardee's proposal where the agency reasonably found the protester ineligible for award).

Royal Bridge

Royal Bridge argues that the awardees bid unreasonably high prices for line items 1, 2 and 3. Royal Bridge states that, in prior procurements, its bids were rejected for being unreasonably high, and therefore the awardees in this procurement should also be rejected on that basis. Royal Bridge Protest at 5. Royal Bridge also argues that the awardees have no experience with demilitarization and mutilation of U.S. military items and therefore should have been found nonresponsible. Id. at 11.

Again, only an "interested party" may protest a federal procurement. See 4 C.F.R. § 21.1(a). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Where there is an intervening offeror that would be in line for award if the protester's challenge to the award were sustained, the protester does not have the requisite interest to qualify as an interested party. CACI Dynamic Sys., Inc., B-406130, Feb. 28, 2012, 2012 CPD ¶ 77 at 8. Here, seven bidders were found to have submitted higher-priced evaluated bids than Royal Bridge, and therefore would be in line for award before Royal Bridge. See AR, Tab 3, Bid Abstract. As Royal Bridge did not meaningfully

challenge the evaluation of the intervening bidders, we conclude that Royal Bridge is not an interested party to protest the awards to Asahi and Madinat.⁴

The protests of Al-Tahouna and Wadi Al-Sajaa are denied; the protest of Royal Bridge is dismissed.

Susan A. Poling
General Counsel

⁴ In its comments, Royal Bridge challenges the calculations DLA used to determine the highest-priced bids. The protester states that calculating the evaluated price based on the maximum and minimum quantities identified in the IFB shows that the awardees were not the highest-priced bids. Royal Bridge Comments at 3, 8. Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Pacific Photocopy & Research Servs., B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4. Here, the IFB did not provide for evaluation of bids on the basis put forward by Royal Bridge; rather, the IFB stated that bids would be evaluated using the average of the per-unit prices of each line item multiplied by the weighting assigned to each line item. See IFB at 12. Accordingly, to the extent that Royal Bridge challenges the evaluation of the intervening offerors' bid prices on the basis of its calculations involving minimum and maximum quantities, the protester fails to state a valid basis for protest.