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Decision

Matter of: Bering Straits Logistics Services, LLC

File: B-403799; B-403799.3

Date: December 15, 2010

William K. Walker, Esq., Walker Reausaw, for the protester.

Johnathan M. Bailey, Esq., Bailey & Bailey, PC, for the intervenor.

Timothy A. Raezer, Esq., and Gregory Zagorin, Esq., Defense Logistics Agency, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's low price was based on labor rates below those required under the Service Contract Act (SCA) and applicable collective bargaining agreement (CBA) is denied where a fixed-price contract was awarded and awardee did not take exception to applicable SCA or CBA requirements.
 2. Protest that awardee's proposal will violate the Service Contract Act is a matter for consideration by the Department of Labor, not GAO.
 3. Protest that awardee's proposed personnel do not meet the experience requirements of the solicitation is denied where the record demonstrates that the agency's evaluation was reasonable.
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DECISION

Bering Straits Logistics Services, LLC (BSLS), of Anchorage, Alaska, protests the award of a contract to Defense Contracting Services, Inc. (DCSI), of Leander, Texas, by the Defense Logistics Agency (DLA) under request for proposals (RFP) No. SP0600-10-R-0506, for fuels management services at Tyndall Air Force Base, Florida.

We deny the protest.

DLA issued the RFP on January 25, 2010, to acquire fuel-related services including receipt, storage, and distribution of various fuel products and liquid oxygen. The RFP provided that proposals would be evaluated on the basis of technical capability,

past performance, and price. RFP at 14-15. The RFP explained that the evaluation factors were listed in descending order of importance, and that the combined non-price factors were significantly more important than price. Id. at 30. The technical capability factor was further divided into five equally important subfactors: fuels operation management and support, safety, operation of the Fuels Information Service Center, maintenance of equipment and facilities, and compliance and environmental. Id. Additionally, the RFP included Defense Energy Support Center clause 52.222-9F05, “Wage Determination,” advising offerors that the procurement was subject to a wage determination under the Service Contract Act (SCA), 41 U.S.C. §§ 351-358, as well as a collective bargaining agreement (CBA). Id. at 29.

DLA received 14 proposals in response to the RFP, and established a competitive range consisting of the 11 most highly-rated proposals, including the proposals submitted by BSLS and DCSI. DLA then conducted written and oral discussions with the offerors, and received final revised proposals in July 2010.

After evaluation, BSLS’s final revised proposal was rated marginal under the technical capability factor and very good under the past performance factor,¹ with an evaluated price of \$11,588,544. Source Selection Decision (SSD) at 3. DCSI’s final revised proposal was rated excellent under the technical capability factor and very good under the past performance factor, with an evaluated price of \$10,114,156.08. Id. DLA conducted a price/technical trade-off between the proposals of DCSI and one higher-rated, higher-priced offeror, and determined that DCSI’s proposal represented the best value to the agency. Id. at 5-6. DLA made the award to DCSI on August 31. This protest followed on September 7.

BSLS alleges that DCSI’s proposal ignored job classification requirements mandated by the CBA applicable to the contract, and that the job classifications actually set forth in DCSI’s proposal demonstrate that DCSI failed to comply with personnel qualifications and experience requirements set forth in the RFP. BSLS also alleges that DLA engaged in inadequate and misleading discussions regarding several technical areas of BSLS’s proposal.

With regard to the evaluation of DCSI’s proposal, BSLS specifically asserts that DCSI achieved its low pricing by improperly classifying some positions under certain CBA job classifications—accountant, vehicle dispatcher, and commercial driver’s license (CDL) driver—rather than under the higher-wage CBA classifications of fuels accountant and fuels technician. BSLS argues that, under the terms of CBA, the fuels accountant and fuels technician classifications are the appropriate

¹ DLA evaluated the proposals using an adjectival rating system consisting of the ratings excellent, acceptable, marginal, and unacceptable for technical capability, and exceptional, very good, satisfactory, marginal, and unsatisfactory for past performance.

classifications, and contends that DLA should have upwardly adjusted DCSI's proposed price, downgraded its technical rating, or found its proposal unacceptable. BSLS asserts that DCSI's proposal of, for example, CDL drivers, rather than fuels technicians, indicates that DCSI's proposed employees do not meet the personnel qualifications and experience requirements of the RFP.

In response, DLA points out that, while it reviewed the resumes and qualifications of proposed key personnel, as well as the offerors' fuels operation management and support plans and staffing approaches, in order to ensure that offerors had sufficient staffing and understood the nature and scope of the work required, it was not required under the RFP to review proposals for compliance with the job classification and wage rate terms of the SCA or CBA. Rather, the RFP required each offeror to submit a statement of compliance with the SCA and CBA. RFP at 14. Accordingly, DLA did not solicit position description or labor rate information from offerors, and contends that it reasonably accepted and relied upon the offerors' acknowledgements that their proposals were in compliance.

We agree. First, with respect to BSLS's argument that DLA should have adjusted DCSI's price, where, as here, the RFP provides for the award of a fixed-price contract, the contracting agency may not adjust offerors' prices for purposes of evaluation. Federal Acquisition Regulation § 15.404-1(d)(3); Powersolv, Inc., B-402534, B-402534.2, June 1, 2010, 2010 CPD ¶ 206 at 12. Similarly, given that the RFP here does not specifically call for a price realism analysis, the agency was not required to perform a detailed price analysis. See SAGE Sys. Techs., LLC, B-310155, Nov. 29, 2007, 2007 CPD ¶ 219 at 3. In any event, below-cost offers are not prohibited, see Group GPS Multimedia, B-310716, Jan. 22, 2008, 2008 CPD ¶ 34 at 4, and even where an offeror bases its prices on labor rates lower than those specified in accordance with the SCA, the firm is eligible for award if it does not take exception to the SCA requirements. K.G., Inc., B-281948, May 10, 1999, 99-1 CPD ¶ 91 at 3. The record here shows that DCSI took no exception to the SCA and CBA requirements. Accordingly, DCSI will be required to perform the specified fuels services in compliance with the terms of the RFP, including compensation of its employees at the required rates, at the price that it proposed. Group GPS Multimedia, *supra*.

Second, BSLS's argument that DCSI's proposal should have received a lower technical rating or been found technically unacceptable for its alleged failure to comply with the job classification terms of the CBA is without merit. As the agency points out, the RFP did not call for the agency to review proposals for compliance with the job classification or wage rate terms of the SCA or CBA. In this regard, the determination of prevailing wages and fringe benefits, and the issuance of appropriate wage determinations under the SCA, are matters for the Department of Labor (DOL). Concerns with regard to establishing proper wage rate determinations or the application of the statutory requirements should be raised with the Wage and Hour Division in DOL, the agency that is statutorily charged with the implementation of the Act. SAGE Sys. Techs., LLC, *supra*. Thus, BSLS's contention that DCSI may

misclassify its employees or fail to compensate some employees at rates required under the SCA or CBA is not a matter for our consideration, since the responsibility for the administration and enforcement of the SCA is vested in DOL, not our Office, and whether contract requirements are met is a matter of contract administration, a function of the contracting agency. K-Mar Indus., Inc., B-400487, Nov. 3, 2008, 2009 CPD ¶ 159 at 6.

Finally, the record does not support BSLS's allegation that the job classifications set forth in DCSI's proposal demonstrate a failure to comply with the personnel qualifications and experience requirements of the RFP. The RFP calls for offerors to demonstrate a technical approach that meets the requirements of the performance work statement (PWS); regarding proposed personnel, the RFP requires that offerors submit a "staffing approach/matrix" as part of their fuels operations management and support plan. RFP at 14. With respect to compliance with the SCA and CBA, the RFP requires only that offerors provide a statement acknowledging that the prices proposed for labor covered by the SCA or CBA "were formulated using the current CBA that specifies the minimum labor rate and fringe benefit." *Id.* In its proposal, DCSI provided a staffing approach/matrix as well as the required statement indicating compliance with the SCA and CBA requirements. DCSI Proposal at 29-30. Further, the record shows that in the narrative portion of its technical proposal, DCSI clearly expressed its understanding of, and agreement to, the requirement to use qualified employees. For example, the PWS requires that the contractor ensure that employees have current and valid professional certifications before starting work, and "[a]t least two (2) years documented experience (military/civilian) is required within the area in which that individual will be placed, i.e. operation of fuels storage and dispensing systems, aircraft servicing, laboratory operation, cryogenics operations, and accounting and administration." RFP at 22-23. In response, DCSI affirmatively stated in its proposal that it is "intimately familiar with the fuels management requirements and will hire only experienced, qualified, and certified (2FOX1 equivalent) fuels management specialists . . . whose formal training and experience exceed the minimum PWS 2-years of documented skill-level requirements." DCSI Proposal at 6.

To the extent BSLS argues that DCSI's proposal of, for example, CDL driver positions indicates that DCSI's employees will not possess the qualifications required by the RFP, its argument represents a significant misreading of DCSI's proposal.² Our review of the relevant areas of DCSI's proposal demonstrates that DCSI

² BSLS also objects to DCSI's proposed use of employees within the "accountant" and "vehicle dispatcher" job classifications. We have reviewed the record and find no reason to question whether employees within these classifications could meet the experience requirements of the RFP. Further, as discussed above, suspected misclassification of employees under the SCA is not an issue for consideration by our Office.

proposed “aircraft servicers” to perform the fuel distribution tasks required by the RFP. *Id.* at 29. However, because aircraft servicer is not a recognized position under the CBA, for wage determination purposes DCSI classified its aircraft servicers as CDL drivers; that position corresponds to the position of “Truck Driver – Tractor Trailer” under the CBA, with a higher wage rate than that specified for aircraft servicers under the SCA wage determination.³ *Id.* at 30. With regard to whether, for wage determination purposes, DCSI should have (as BSLs did) classified its aircraft servicers as fuels technicians—a significantly higher-wage CBA position—again, DCSI’s compliance with the SCA and CBA is not a matter for consideration by our Office.⁴ Accordingly, after review of the record, we see no basis on which to question the reasonableness of DLA’s evaluation of DCSI’s proposal.

Having found no basis to object to the evaluation of DCSI’s proposal, we need not consider BSLs’s arguments regarding DLA’s evaluation of its own proposal because BSLs cannot demonstrate that it was prejudiced by any alleged error in this area. Prejudice is an essential element of every viable protest; we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions. In effect, a protester must show that, but for the agency’s actions, it would have had a substantial chance of receiving the award. Armorworks Enters., LLC, B-400394.3, Mar. 31, 2009, 2009 CPD ¶ 79 at 3. BSLs cannot make this showing with regard to DLA’s evaluation of its technical proposal, since, even if BSLs’s technical evaluation were revised to the highest possible rating, excellent, it would only equal DCSI’s overall technical ratings, while its price would remain significantly higher.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

³ Under the SCA, an aircraft servicer “operates service vehicles to replenish fuel, oil, water . . . [and] oxygen” SCA Directory of Occupations, Fifth Ed., at 73. In DLA’s view, DCSI’s aircraft servicers most closely conform to the Truck Driver -- Tractor Trailer” position under the CBA. Supp. Agency Report at 9.

⁴ Our review of the record shows that while BSLs proposed cross-trained, high-skill employees requiring higher labor rates, DCSI proposed a functional organizational approach utilizing specific, separate, and lower-skill employees in some functional areas, supplemented by a smaller number of specialized, higher-skill employees in other functional areas. To the extent the protester’s arguments in this area are essentially an attempt to require that DCSI’s technical approach match the protester’s, there clearly is no support in the RFP for such a position.