



Decision

Matter of: Trade Links General Trading and Contracting, WLL

File: B-412364.3; B-412364.5

Date: July 1, 2016

Jafer Tanda, for the protester.

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

Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation and selection of lower-rated, lower-priced proposal is denied where the record shows that the agency's evaluation and selection were reasonable and consistent with the solicitation.

DECISION

Trade Links General Trading and Contracting, WLL (Trade Links), of Ardiya, Kuwait, protests the award of a contract to Al-Tahouna Al-Ahliyah General Trading and Contracting Company, WLL (Al-Tahouna), of Hawally, Kuwait, under request for proposals (RFP) No. SP4510-15-R-0004, issued by the Defense Logistics Agency (DLA), for equipment repair and maintenance services at Camp Arifjan, Kuwait. Trade Links challenges the evaluation of Al-Tahouna and the source selection decision.

We deny the protest in part and dismiss it in part.

BACKGROUND

The RFP,¹ issued on October 9, 2015 under Federal Acquisition Regulation (FAR) part 12, contemplated the award of a single, fixed-price and time-and-materials contract, with a 12-month base period and two 12-month options. RFP

¹ The solicitation was amended five times. All citations to the solicitation are to the final version, as amended on February 23, 2016.

at 1, 30, 52. Award was to be made on a best-value basis, considering the following factors: past performance and price. Id. at 30. The solicitation stated that past performance was significantly more important than price. Id.

As relevant here, past performance proposals were required to provide “current relevant information regarding the level of performance, in terms of delivery and quality achieved under either [g]overnment or commercial contracts for the same or similar services for performance in Kuwait within the last 2 years.” Id. at 28. Offerors were also required to provide past performance information on no more than three projects. Id. In this regard, the solicitation stated that offerors were required to provide a past performance survey to those references that were expected to complete the survey and independently submit it to the contracting officer on behalf of the offeror. Id.

The solicitation stated that the quality of the offeror’s past performance would be evaluated on an adjectival scale² and be used as a means of evaluating the probability of the offeror’s success. Id. at 29. The solicitation also stated that offerors lacking relevant past performance would not receive negative or positive consideration in the evaluation. Id.

The RFP also incorporated Defense Logistics Agency Directive clause 52.215-9023, Reverse Auctions (OCT 2013), which stated that the contracting officer “may utilize on-line reverse auctioning as a means of conducting price discussions.” Id. at 51. The clause also stated that an offeror’s final auction price at the close of the reverse auction would be considered its final proposal revision (FPR), unless the contracting officer decided that further discussions were needed and FPRs were again requested in accordance with FAR § 15.307, or the contracting officer determines that it would be in the best interest of the government to reopen the auction. Id.

The agency received fifteen proposals. AR, Combined Contracting Officer Statement of Facts and Memorandum of Law (COSF/MOL) at 4;

² The available past performance confidence ratings were substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence. See Agency Report (AR), Tab 20, Acquisition Planning Documents at 3. As relevant here, substantial confidence was defined as “[b]ased on the offeror’s recent/relevant performance record, the Government has a high expectation that the offeror will successfully perform the required effort” and satisfactory confidence was defined as “[b]ased on the offeror’s recent/relevant performance record, the Government has a reasonable expectation that the offeror will successfully perform the required effort.” See id.; Past Performance Evaluation Factor, Relevancy and Performance Confidence Assessment Ratings at 2.

AR, Tab 17, Source Selection Decision Document (SSDD) at 2.³ A competitive range was established, which included Trade Links and Al-Tahouna. Id. The firms in the competitive range were invited to participate in a reverse auction that was conducted on December 17, 2015. Id.

On February 11, 2016, the contracting officer sent an offer of contract to one of the competitive range offerors and requested that the contract be signed the same day. DLA Emails of May 27, 2016, June 6, 2016.⁴ That company did not sign the contract as requested. Id. That company instead advised the contracting officer that it bid lower than intended during the reverse auction process and sought advice. Id.; Statement of Contracting Officer ¶ 2.

The next day, the contracting officer was contacted by the program office requesting that the scope of contract be changed to add requirements for emergency mechanic services in Qatar and Bahrain. Id. The agency subsequently issued an amendment to the solicitation on February 23, 2016 to add emergency mechanic services in Qatar and Bahrain. See AR, Tab 7, Amendment 0005.⁵ While the agency reopened discussions and requested that offerors in the competitive range, including Al-Tahouna and Trade Links, submit responses to the revised bid schedule which constituted their FPRs, the agency did not reopen the auction. The agency did not conduct any discussions or negotiations with the company that was initially selected for award between February 11, 2016 and February 23, 2016. DLA Emails of May 27, 2016, June 6, 2016; Statement of Contracting Officer ¶ 2. As relevant here, Trade Links acknowledged the amendment and submitted its revised pricing. See generally Trade Links Volume I, Proposal Certification and Price Schedule, Feb. 24, 2016.

The evaluation results of Al-Tahouna and Trade Links were as follows:

	Al-Tahouna	Trade Links
Past Performance	Satisfactory Confidence	Substantial Confidence
Total Evaluated Price	\$1,720,062	\$2,525,160

AR, Tab 17, SSDD at 3.

³ Citations to the SSDD refer to the electronic page numbers in the absence of any numbers that appear on the face of the pages.

⁴ These two emails were submitted in response to GAO requests for information.

⁵ While this was the fifth amendment that was issued, it was mislabeled as Amendment 0003. See AR, Tab 7, Amendment 0005; DLA Email of May 27, 2016.

For the past performance factor, the agency first assessed the relevancy of the past performance references submitted by the offerors (as relevant or not relevant) and then assigned an overall confidence rating. See AR, Tab 20, Acquisition Planning Documents at 3. As relevant here, the agency received one past performance survey for a contract under which Al-Tahouna performed the maintenance of SUV vehicles, material handling equipment (MHE), cranes, and generators used in construction sites for “MCC government house construction work.” See AR, Tab 8, Past Performance Proposal for Al-Tahouna; AR, Tab 9, Past Performance Surveys for Al-Tahouna; AR, Tab 10, Past Performance Evaluation for Al-Tahouna. In finding this contract to be relevant, the contracting officer who performed the evaluation and also served as the source selection authority (SSA) found the past performance reference contract to be relevant⁶ because it was performed in Kuwait, had a similar contract value,⁷ and generally had a similar scope of work performing maintenance on the same types of equipment (vehicles, MHE, and generator) as that of the solicitation. See AR, Tab 10, Past Performance Evaluation for Al-Tahouna.

In this regard, the contracting officer noted that the information provided by Al-Tahouna was “broad to a level that makes a direct comparison [to the solicitation] difficult . . . [and did] not include a direct statement that Al-Tahouna managed parts, performed maintenance on A/C units, provided roadside assistance, or repaired light sets; all of which are requirements under the solicitation.” Id. The respondent to the survey rated Al-Tahouna’s performance on this contract as very good overall.⁸ See id.; see also AR, Tab 9, Past Performance Surveys for Al-Tahouna at 2. Based on this information, the contracting officer rated Al-Tahouna’s past performance as overall satisfactory confidence. See AR, Tab 10, Past

⁶ Relevant was defined as “[p]resent/past performance effort involved similar scope and magnitude of effort and complexities this solicitation requires.” See AR, Tab 20, Acquisition Planning Documents at 3; Past Performance Evaluation Factor, Relevancy and Performance Confidence Assessment Ratings at 1.

⁷ The annual value of the reference contract was \$860,198. See AR, Tab 9, Past Performance Surveys for Al-Tahouna at 1. Because the protester was not represented by counsel, certain documents that contained source selection information of the awardee were not produced to the protester. We note that the annual value of this Al-Tahouna contract that was released to the protester incorrectly notes that the value of this contract was \$860,198,675. See AR, Tab 10, Past Performance Evaluation for Al-Tahouna.

⁸ Very good was defined as “[p]erformance meets contractual requirements and exceeds some to the [g]overnment’s benefit. The contractual performance of the element or sub-element being assessed was accomplished with some minor problems for which corrective actions taken by the contractor were effective.” RFP, attach. 4, Contractor Past Performance Data Sheet at 2.

Performance Evaluation for Al-Tahouna. In assigning the rating, the contracting officer found that Al-Tahouna “demonstrated a positive past performance history providing services similar to the solicited requirement, with the exception of A/C maintenance, light sets, and roadside assistance.” Id. The contracting officer also noted that Al-Tahouna did not “directly state[] that the firm manages parts to a similar extent to the solicited requirement, and there is no information on the maintenance response time for comparison.” Id.

Trade Links’s proposal was assigned an overall substantial confidence rating based on its past performance on the incumbent contract. See AR, Tab 16, Past Performance Evaluation for Trade Links. As relevant here, the contracting officer noted that the scope of work for the solicitation and that of the incumbent contract were “nearly identical” and that Trade Links had received “high ratings” for its performance under that contract. Id.

In his tradeoff between Al-Tahouna and Trade Links, the contracting officer acknowledged that Trade Links was assigned the highest available past performance rating but that its proposal was also the highest-priced one in the competitive range. See AR, Tab 17, SSDD at 4. The contracting officer further noted that Trade Links’s price was 46.8% higher than Al-Tahouna’s. Id. While the contracting officer recognized the solicitation’s provision that past performance was significantly more important than price, the contracting officer did not find Trade Links’s higher past performance rating justified the 46.8% higher price associated with Trade Links’s proposal. Id. As a result, the contracting officer concluded that Al-Tahouna’s proposal offered the best value, and selected it for award. Id.

On March 17, 2016, the agency awarded the contract to Al-Tahouna. Trade Links received a written debriefing on March 28, 2016 and filed a protest challenging the award on March 25, 2016,⁹ followed by a supplemental protest on June 2, 2016.¹⁰

DISCUSSION

Trade Links primarily challenges the evaluation of Al-Tahouna’s past performance, the agency’s conduct of discussions, and the agency’s conclusion that Al-Tahouna’s proposal represented the best value to the agency. Although we do not specifically address all of Trade Links’s arguments, we have fully considered all of them and find that they afford no basis on which to sustain the protest.

⁹ This protest has been docketed as Trade Links General Trading and Contracting, WLL, B-412364.3, Mar. 25, 2016.

¹⁰ This protest has been docketed as Trade Links General Trading and Contracting, WLL, B-412364.5, June 1, 2016.

Evaluation of Trade Links's Past Performance

Trade Links contends that Al-Tahouna has no experience performing any work that is encompassed by the solicitation.¹¹ See Protest at 4-8. In this regard, Trade Links points to the fact that Al-Tahouna neither submitted a proposal in response to the solicitation for the predecessor contract, nor has it otherwise performed the scope of work for this contract. Id. at 7-8.

The evaluation of experience and past performance, by its very nature, is subjective; we will not substitute our judgment for reasonably based evaluation ratings, and an offeror's disagreement with an agency's evaluation judgments, by itself, does not demonstrate that those judgments are unreasonable. J.E. McAmis, Inc., B-412321, B-412321.2, Jan. 14, 2016, 2016 CPD ¶ 40 at 9.

In its response, the agency explains that the solicitation did not require the offerors to have performed identical work (i.e., to be a former or incumbent contractor), but rather, required offerors to have demonstrated experience performing the same or similar type of work. AR, COSF/MOL at 8. The agency also explains that Al-Tahouna's proposal demonstrated that it performed similar work for the maintenance of vehicles, generators, and MHE equipment and that its past performance was rated overall very good. Id. at 8-9. See also AR, Tab 10, Past Performance Evaluation for Al-Tahouna. The agency further explains that, as noted in the evaluation, Al-Tahouna did not demonstrate experience with each type of equipment or service that would be required by the procurement and as such the agency did not find that the work under the reference contract was as complex or "the same as" the work required by the solicitation, and therefore did not assign a higher overall confidence rating. AR, COSF/MOL at 9.

¹¹ Trade Links also disputes Al-Tahouna's eligibility for award because it did not certify that it was a small business under the applicable North American Industry Classification System (NAICS) code for this procurement in the System for Award Management (SAM). See Protest at 7; Comments at 2, 11. The Small Business Administration (SBA) establishes small business size standards--expressed as either a maximum number of employees or annual receipts in millions of dollars--on an industry-by-industry basis. FAR § 19.102(a)(1). SBA identifies the size standards using North American Industry Classification System (NAICS) codes. 13 C.F.R. § 121.201. The FAR provides that size standards are "applied" by classifying the product or service being acquired under the NAICS code that best describes it; identifying the size standard SBA established for that industry; and specifying the size standard in the solicitation so that offerors can appropriately represent themselves as large or small. FAR § 19.102(b). The solicitation here, however, was issued on an unrestricted basis. RFP at 1.

In its comments, Trade Links complains that the agency's evaluation was "vague" and lacking details needed to support the overall survey rating of "very good", or the contracting officer's description of Al-Tahouna's contracts as "large", and fails to quantify the size or scope of the reference contract, or to include a description of the types of equipment on which Al-Tahouna does not have experience. See Comments at 3. The protester, however, does not dispute that Al-Tahouna possesses experience performing work that is encompassed by the solicitation. Further, our review of the record shows that the areas of the evaluation record that Trade Links criticizes as "vague" are supported by the record. For example, the reference submitting the survey response assessed Al-Tahouna's past performance as overall very good, and generally provided positive past performance information. See AR, Tab 9, Past Performance Surveys for Al-Tahouna at 4; AR, Tab 10, Past Performance Evaluation of Al-Tahouna. Similarly, the annual value of Trade Links's reference contract (\$860,198) is larger than that of this contract (approximately \$573,354).¹² Finally, the contracting officer recognized in the evaluation of Al-Tahouna's past performance that Al-Tahouna's proposal did not provide information demonstrating its experience managing parts, performing maintenance on A/C units, providing roadside assistance, or repairing light sets. See AR, Tab 10, Past Performance Evaluation of Al-Tahouna. Trade Links's objections in this regard do not demonstrate that the agency's evaluation was unreasonable. Accordingly, this protest ground is denied.

Discussions

In its supplemental protest, Trade Links argues that the agency improperly excluded Trade Links from discussions.¹³ Supp. Protest at 4.

¹² The total price of this contract is \$1,720,062 for a total three year period of performance.

¹³ In its comments on the agency report, Trade Links also argues that the solicitation contained a latent ambiguity that was not apparent until the agency requested offerors submit FPRs instead of reopening the auction after issuing Amendment 0005. Comments at 10. The protester contends that the agency's decision not to reopen the reverse auction revealed a latent ambiguity in the solicitation's provision that the reverse auction process would be used to establish the final offered prices from each offeror. Id. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id. Here, the solicitation clearly informed offerors that while an offeror's final auction price at the close of the reverse auction would be considered its FPR, the contracting officer could decide that further discussions are needed and request FPRs in accordance with FAR § 15.307 or
(continued...)

Our Bid Protest Regulations require that a protest include a statement of legal and factual grounds for protest that are legally sufficient. 4 C.F.R. §§ 21.1(c)(4) and (f). 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. Info. Ventures, Inc., B-407478.4, July 17, 2013, 2013 CPD ¶ 176 at 9.

Here, while the agency initially made an offer of contract to another offeror and that firm communicated to the contracting officer, the agency subsequently amended the solicitation's requirements and sought revised pricing proposals from all offerors in the competitive range, including Trade Links. In other words, the agency reopened discussions and included Trade Links. As such, the allegation that the agency improperly excluded Trade Links from discussions is belied by the facts and fails to state a valid basis of protest.

Best-Value Tradeoff Decision

Trade Links also argues that the agency's best-value tradeoff was inconsistent with the solicitation's statement that past performance would be significantly more important than price. Protest at 12-13. In the protester's view, since it was assigned a substantial confidence rating for past performance and its price was reasonable, it is entitled to the award. Id. at 13.

Source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of technical and price evaluation results; price/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the evaluation criteria. 2H&V Constr. Servs., B-411959, Nov. 23, 2015, 2015 CPD ¶ 368 at 8.

The record shows that, based on his comparative assessment between Trade Links and Al-Tahouna, the contracting officer recognized that the Trade Links's proposal was assigned the highest past performance rating, but was also the highest-priced proposal in the competitive range. See AR, Tab 17, SSDD at 4. The contracting officer also recognized that the solicitation provided for past performance to be considered significantly more important than price; he did not however, find that the 46.8% price premium associated with Trade Links's proposal was worth the benefits associated with its proposal. Id. In this regard, the contracting officer found that Al-Tahouna had performed similar maintenance work in the past on similar types of equipment and managed contracts of similar size, scope, and complexity. In

(...continued)

reopen the auction. We do not agree that these solicitation terms are susceptible to two different reasonable meanings; in short, we find no ambiguity here.

addition, the contracting officer found that while Trade Links was assigned an adjectival rating that was higher than that of Al-Tahouna's, that difference did not justify a 46.8% price premium. Id. We find nothing unreasonable in the contracting officer's conclusion.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel