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Decision

Matter of: Arch Systems, LLC; KEN Consulting, Inc.

File: B-415262; B-415262.2

Date: December 12, 2017

Andrew J. Mohr, Esq., Catherine K. Kroll, Esq., John J. O'Brien, Esq., and Daniel Strouse, Esq., Cohen Mohr LLP, for Arch Systems, LLC; and Ira E. Hoffman, Esq., Butzel Long, PC, for KEN Consulting, Inc., the protesters.

Christopher R. Shiplett, Esq., Randolph Law, PLLC, for Capitol Bridge, LLC, the intervenor.

Erin V. Podolny, Esq., and Douglas Kornreich, Esq., Department of Health and Human Services, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests challenging the agency's decision not to allow offerors to make oral presentations are denied where the agency reasonably interpreted the solicitation as not requiring such presentations.
 2. Protest challenging the agency's evaluation of the realism of the awardee's proposed price is denied where the agency's realism analysis reasonably assessed whether the awardee's proposed price was consistent with its proposed technical approach and where the solicitation did not require offerors to submit the type of information the protester contends should have been evaluated.
 3. Protest alleging that the difference between the offerors' proposed prices shows that they were not competing on a common basis is denied where the protester does not identify any solicitation provisions which are vague or misleading.
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DECISION

Arch Systems, LLC, of Baltimore, Maryland, and KEN Consulting, Inc., of Silver Spring, Maryland, protest the award of a contract to Capitol Bridge, LLC, of Arlington, Virginia, under request for proposals (RFP) No. CMS-2016-8A-0008, which was issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) for workers' compensation review support services. The protesters

argue that the agency unreasonably failed to permit offerors to make oral presentations and failed to conduct discussions. Additionally, Arch argues that the agency failed to reasonably evaluate the realism of Capitol Bridge's proposed price and that the differences between the offerors' proposed prices shows that they were not competing on a common basis.

We deny the protests.

BACKGROUND

CMS issued the solicitation on December 22, 2016, seeking proposals to evaluate workers' compensation proposals in connection with the Medicare program. Agency Report (AR)¹, Tab 4F-4, RFP, at 5.² The RFP was set aside for participants in the Small Business Administration's 8(a) program, and anticipated the award of a fixed-price contract with a base period of 1 year and four 1-year options. *Id.* at 5, 57. The RFP advised offerors that proposals would be evaluated on the basis of price and the following five evaluation factors, which were listed in descending order of importance: (1) technical approach and understanding, (2) staffing plan and key personnel, (3) past performance, (4) draft project implementation plan, and (5) corporate experience. *Id.* § M.3 at 99.

The price evaluation factor advised that the agency would "evaluate the business/price proposal using the applicable methodologies and techniques of Price Analysis, which may include Price Realism at the Government[s] discretion, as defined by the [Federal Acquisition Regulation (FAR)]." *Id.* § M.4 at 101. As discussed below, the RFP also included FAR provision 52.222-46, which states that the agency will evaluate offerors' proposed professional compensation. *Id.* § L.1 at 79. As also discussed below, the RFP stated that the agency "may establish a competitive range inclusive of the most highly rated proposals in accordance with FAR 15.306(c)(1)," and that the agency "intends to conduct Oral Presentations after establishing the competitive range, if applicable." RFP § L.15 at 97. For purposes of award, the RFP advised that "CMS considers the non-cost evaluation factors (Technical Factors), when combined, to be significantly more important than cost or price." RFP § M.2 at 99.

CMS received proposals from five offerors, including Arch, KEN, and Capitol Bridge, by the closing date of February 15, 2017. AR, Tab 15A, Source Selection Decision Memorandum (SSDM), at 2. The agency did not permit offerors to make oral

¹ CMS provided separate reports responding to Arch's and KEN's protests. Citations to documents in the agency report are to identical documents in each report.

² Citations to the RFP are to the final version in amendment 5.

presentations and the agency did not conduct discussions. The agency evaluated the offerors' proposals as follows:³

	Arch	KEN	Capitol Bridge
Technical Approach and Understanding	Excellent	Unacceptable	Acceptable
Staffing Plan and Key Personnel	Good	Acceptable	Good
Past Performance	Good	Unacceptable	Acceptable
Draft Project Implementation Plan	Excellent	Unacceptable	Good
Corporate Experience	Excellent	Acceptable	Excellent
Price	\$111,998,693	\$85,248,393	\$60,759,236

AR, Tab 15A, SSDM, at 2, 4.

The contracting officer for the procurement was also the source selection authority. Id. at 1. As relevant here, the contracting officer concluded that “[t]he merit of Capitol Bridge’s proposal was deemed superior compared to Ken Consulting’s relative to all evaluation factors,” and further noted that the awardee’s proposed price was lower than KEN’s proposed price. Id. at 31. With regard to Arch, the contracting officer concluded that although “Arch’s technical proposal is superior compared to the merit of Capitol Bridge’s proposal,” the benefits of Arch’s proposal did not outweigh the \$52 million price premium as compared to Capitol Bridge’s proposal. Id. at 32. Based on these conclusions, the contracting officer selected Capitol Bridge’s proposal for award. Id. at 33. The agency advised Arch and KEN of the award Capitol Bridge on September 1, and these protests followed.

DISCUSSION

Arch and KEN argue that the RFP required CMS to allow offerors to make oral presentations and to conduct discussions following the presentations, and that the agency failed to follow the solicitation requirements. Additionally, Arch argues that the agency failed to reasonably evaluate the realism of Capitol Bridge’s proposed price and that the differences between the offerors’ proposed prices shows that they were not competing on a common basis. For the reasons discussed below, we find no basis to sustain the protests.⁴

³ For the non-price evaluation factors, the agency assigned one of the following ratings: excellent, good, acceptable, or unacceptable. AR, Tab 15A, SSDM, at 3-4.

⁴ The protesters each raised and withdrew other grounds of protest. See Email from Arch, Nov. 7, 2017; KEN Supp. Comments, Nov. 8, 2017, at 2. Additionally, Arch raised a number of challenges to the evaluation of Capitol Bridge’s proposal under the non-price evaluation factors. Arch Protest at 18-22. Although the agency responded to

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Oral Presentation and Discussions

Arch and KEN both argue that the RFP required CMS to permit offerors to make oral presentations and that the RFP stated that the agency would conduct discussions following those presentations. CMS contends that the RFP advised offerors that the agency would permit oral presentations only in the event the agency exercised its discretion to establish a competitive range--which, as discussed above, the agency elected not to do. For the reasons discussed below, we find no basis to sustain the protest because the agency's interpretation of the RFP was reasonable and the protesters' interpretations are not reasonable.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. C&S Corp., B-411725, Oct. 7, 2015, 2015 CPD ¶ 311 at 3; Alliance Tech. Servs., Inc., B-410307, B-410307.3, Dec. 1, 2014, 2014 CPD ¶ 345 at 3. Where a dispute exists as to a solicitation's terms, we will first examine the plain language of the solicitation. Point Blank Enters., Inc., B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 3.

The RFP provided the following instructions to offerors regarding oral presentations:

Following the review of the written proposals the Contracting Officer may establish a competitive range inclusive of the most highly rated proposals in accordance with FAR 15.306(c)(1). The competitive range may be reduced further for the purposes of efficiency if the Contracting Officer determines that the number of most highly rated proposals exceeds the number at which an efficient competition can be conducted in accordance with FAR 15.306(c)(2). The Government intends to conduct Oral Presentations after establishing the competitive range, if applicable.

* * * * *

During Oral Presentations, Offerors will have an opportunity to showcase their abilities and expertise by presenting a solution to a sample case which represents a scenario similar to or the same as circumstances expected to be encountered during the performance of the resulting contract. Each Offeror's oral presentation in response to the case/scenario will be evaluated using the Technical Approach and

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these arguments in its report for Arch's protest, Arch did not address these issues in its comments on the agency report; for this reason, we dismiss these arguments as abandoned. See Earth Res. Tech., Inc., B-403043.2, B-403043.3, Oct. 18, 2010, 2010 CPD ¶ 248 at 6.

Understanding and Key Personnel/Staffing Plan evaluation factors stated in Solicitation Section M.

Id. § L.15 at 97 (emphasis added). With regard to discussions, the RFP advised that “[t]he Government intends to evaluate proposals and award a contract without discussions with offerors (except clarifications as described in FAR 15.306(a)).” Id. § L.3 at 83.

The solicitation’s evaluation criteria stated the following regarding oral presentations:

The Government will evaluate the Oral Presentation including any materials provided to augment the presentation using the following technical evaluation criteria:

- Technical Approach and Understanding
- Staffing Plan and Key Personnel

The applicable evaluation criteria listed above are the same as those provided for the written proposal as described in Section M.3 of this solicitation. The Government reserves the right to determine the number of presentations required.

Id. § M.6 at 102.

The protesters primarily argue that the RFP advised that the agency would permit offerors to make oral presentations, and that discussions would follow such presentations. The protesters contend that the RFP evaluation criteria expressly stated that oral presentations “will be evaluated” and that the agency “will evaluate” oral presentations for purposes of the selection decision. Id. §§ L.15 at 97, M.6 at 102.

CMS argues that the RFP provisions cited above plainly stated that the agency would permit offerors to make oral presentations “after establishing the competitive range, if applicable.” Id. § L.15 at 97. The agency contends that as a general matter, the establishment of a competitive range for purposes of discussions is a matter within an agency’s discretion. See FAR § 15.306(c). With regard to the solicitation here, the agency notes that the RFP advised that the “Contracting Officer may establish a competitive range inclusive of the most highly rated proposals in accordance with FAR 15.306(c)(1),” RFP § L.15 at 97, and also advised that “[t]he Government intends to evaluate proposals and award a contract without discussions with offerors (except clarifications as described in FAR 15.306(a)),” id. § L.3 at 83.

CMS also notes that a response to a question submitted by an offeror explained that oral presentations were to be understood in the context of the decision whether to establish a competitive range, as follows:

[Question] What defines the “competitive range” and “efficient competition” in the process of selecting contractors for oral presentations?

[Answer] FAR 15.306(c)(1) explains that a competitive range is a subset of offerors ‘comprised of all of the most highly rated proposals.’ See also FAR 15.306(c)(2) and L.15.

AR, Tab 4B-5, RFP amend. 1, Question and Answer No. 14.

On this record, we conclude that CMS’s interpretation of the RFP is reasonable and that the agency was not required to permit offerors to make oral presentations or conduct discussions. In this regard, the RFP clearly tied the decision whether to permit oral presentations to the agency’s decision to establish a competitive range for the purpose of conducting discussions--a matter which is within the agency’s discretion. See Kiewit Louisiana Co., B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 at 3.

Although the protesters argue that section M of the RFP states that the agency will evaluate oral presentations, the text of the relevant provision states as follows: “The Government will evaluate the Oral Presentation including any materials provided to augment the presentation using the following technical evaluation criteria” RFP § M.6 at 102. Rather than unambiguously committing the agency to permit oral presentations, as the protesters contend, this provision explains the criteria the agency would use for the evaluation of oral presentations. When read in conjunction with the instructions in section L of the RFP, which explain the conditions under which the agency would permit oral presentations (*i.e.*, in the event a competitive range is established), section M.6 is understood to set forth the standards to be used if the agency permitted oral presentations.

We conclude that CMS’s interpretation gives effect to all relevant parts of the solicitation and is reasonable as a whole. See C&S Corp., *supra*. In contrast, the protesters’ interpretations of the RFP ignore the relevant language in the RFP tying oral presentations to the establishment of a competitive range, and unreasonably read the phrase “will evaluate” in section M in isolation. We therefore find that the protesters’ interpretations are not reasonable and therefore provide no basis to sustain the protest.⁵

⁵ Even if the protesters’ interpretation of the RFP were reasonable, it would at best establish a conflict between the RFP’s instructions in section L and the evaluation criteria in section M. Such a conflict would give rise to an ambiguity in the solicitation. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8 (an ambiguity exists where two or more reasonable interpretations of the solicitation are possible). However, we conclude that any such conflict is obvious, and therefore constituted a patent ambiguity that should have been challenged prior to the time for receipt of initial proposals. See Allied Tech. Grp. Inc., B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 9 n.10 (solicitation provisions in direct conflict demonstrate a patent ambiguity).

Price Realism

Next, Arch argues that CMS failed to reasonably evaluate the realism of Capitol Bridge's proposed price. Arch contends that CMS's conclusion that Capitol Bridge's proposed price was realistic for the work required by the RFP was neither reasonable nor adequately documented. The protester also argues that the agency failed to evaluate the realism of the awardee's proposed professional compensation, as required by the RFP. For the reasons discussed below, we find no basis to sustain the protest.

For a solicitation that anticipates the award of a fixed-price contract, an agency may include a requirement to evaluate the realism of proposed prices for the limited purpose of assessing whether an offeror's price reflects a lack of technical understanding or risk. Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6; see FAR § 15.404-1(d)(3). The depth of an agency's price realism is a matter within the sound exercise of the agency's discretion and our review of a price realism analysis is limited to determining whether it was reasonable and consistent with the terms of the solicitation and adequately documented. GiaCare & MedTrust JV, LLC, B-407966.4, Nov. 2, 2016, 2016 CPD ¶ 321, at 7; Smiths Detection, Inc.; Am. Sci. & Eng'g, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 17.

As discussed above, the RFP advised that the agency's evaluation of offerors' price proposals "may include Price Realism at the Government[']s discretion, as defined by the FAR." RFP § M.4 at 101. CMS conducted a price realism evaluation and found that Capitol Bridge's proposed price was realistic. AR, Tab 15A, SSDM, at 28.

Arch argues that Capitol Bridge's proposed price of \$60,759,236 was unrealistic because it was lower than four of the other five offerors' prices and lower than the government estimate of \$69.9 million.⁶ See AR, Tab 5, Independent Government Cost Estimate (IGCE). As our Office has explained, however, the fact that an offeror's price is lower than an IGCE, or that of a competitor, does not require the agency to conclude that the price is unrealistically low. Arrington Dixon & Assocs., Inc., B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 7.

Next, Arch argues that CMS's analysis of the awardee's proposed price was inadequate and was not documented. The record shows that the contracting officer requested that the technical evaluation panel (TEP) address the following question:

Explain if the evaluation of the business proposal (proposed prices) brought to light any weaknesses in the technical proposals that were not

⁶ In addition to the protesters' and awardee's proposed prices, the fourth offeror proposed a price of \$39,423,084 and the fifth offeror proposed a price of \$220,632,134. AR, Tab 15A, SSDM, at 2. The fifth offeror's proposal was not considered in the tradeoff decision because it was found technically unacceptable and because its proposed price was substantially higher than the other offerors. Id. at 27.

apparent prior to seeing the pricing. See bulleted sample responses. If samples do not apply, please respond as applicable ensuring the TEP's opinion is clearly stated.

- The TEP's review of _____'s business proposal (proposed prices) did not bring to light any weaknesses in the technical proposal or give any indication that the offeror does not understand the contract requirements.

Or

- The TEP's review of _____'s business proposal (proposed prices) resulted in the identification of the following weaknesses in the technical proposal that were not apparent prior to seeing the pricing:
 - Weakness

AR, Tab 10A, Email from Contracting Officer to TEP Evaluators, Aug. 28, 2017.

The TEP advised the contracting officer that, with the exception of one offeror other than the protesters and the awardee, none of the offerors proposals contained weaknesses regarding their proposed prices which indicated a lack of understanding of the solicitation requirements.⁷ AR, Tab 10B, Emails from TEP Evaluators to Contracting Officer to Evaluators, Aug. 30, 2017.

Arch argues that CMS's price evaluation was unreasonable because it failed to address a weakness which was assessed for Capitol Bridge's technical proposal with regard to its staffing. Specifically, the agency found that the awardee's technical approach involved an "assembly-line style" of evaluating claims, which is a "very inefficient means of case review" because it involves the use of up to four reviewers per case. AR, Tab 9B, Capitol Bridge Technical Evaluation, at 4-5. The agency concluded that the awardee's proposed approach merited a weakness because it created the risk of backlogs and delayed performance. Id.

Arch does not explain why CMS's assessment of a weakness to Capitol Bridge's technical proposal should have also caused the agency to find the awardee's proposed price unrealistic. In this regard, the agency's concern related to the efficiency of the work, rather than the resources proposed to perform that work. In short, nothing in the agency's evaluation of Capitol Bridge's proposal demonstrates that the awardee's price

⁷ For this offeror, the TEP advised that its "business proposal did not offer any information sufficient to evaluate its understanding of [the] contract requirements." AR, Tab 10B, Emails from TEP Evaluators to Contracting Officer to Evaluators, Aug. 30, 2017.

reflects a lack of understanding of the technical requirements or poses a risk to unsuccessful performance.

We also conclude that the record reflects an adequate contemporaneous evaluation by the agency of the realism of offerors' proposed prices. Although the documentation was brief, it reflected the core of the agency's conclusion, *i.e.*, that there were no areas where the awardee's proposed price reflected a lack of understanding of the technical requirements.

Next, Arch argues that CMS failed to reasonably evaluate the realism of Capitol Bridge's proposed professional compensation, as required by FAR provision 52.222-46, which was incorporated into the RFP. The agency contends that, although the solicitation contained this FAR provision, an evaluation was not required because the agency did not request, and the offerors did not provide, any information upon which such an evaluation could be made. We agree with the agency.

FAR provision 52.222-46 requires an agency to evaluate whether offerors will obtain and keep the quality of professional services needed for adequate contract performance, and to evaluate whether offerors understand the nature of the work to be performed. MicroTechnologies, LLC, B-413091.4, Feb. 3, 2017, 2017 CPD ¶ 48 at 8. In the context of fixed-price contracts, our Office has explained that this FAR provision anticipates an evaluation of whether an awardee understands the contract requirements, and has proposed a compensation plan appropriate for those requirements--in effect, a price realism evaluation regarding an offeror's proposed compensation. Apptis Inc., B-403249, B-403249.3, Sept. 30, 2010, 2010 CPD ¶ 237 at 9.

As the agency notes, the RFP did not require offerors to submit compensation plans, and none of the offerors submitted such plans. Moreover, the RFP required offerors to submit fixed unit prices, and did not, for example, require offerors to submit unburdened labor rates which would have allowed the agency to evaluate compensation.⁸ RFP § B.3, at 5-7; RFP attach. J.2. Because the RFP did not require offerors to submit information concerning professional compensation, we conclude that the protester cannot demonstrate that the agency unreasonably failed to evaluate professional compensation as required by FAR provision 52.222-46.⁹ We therefore find no basis to sustain the protest.

⁸ Our Office has explained that where an agency requests burdened and unburdened labor rates in a solicitation, the agency may not rely upon fully-burdened labor rates to evaluate offerors' compensation because the fully-loaded rates include direct labor as well as indirect costs, and therefore do not provide a basis to evaluate the compensation to be paid to employees. MicroTechnologies, LLC, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 12.

⁹ Any argument that the RFP should have requested information necessary to evaluate professional compensation as required by FAR provision 52.222-46 at this time would

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Common Basis for Competition

Finally, Arch argues that the differences between the offerors' proposed prices demonstrates that the offerors must have had differing understandings of the RFP's requirements, and thus the RFP did not provide for a competition on an equal basis. For the reasons discussed below, we find no basis to sustain the protest.

As a general rule, a solicitation must be drafted in a fashion that enables offerors to intelligently prepare their proposals in a manner that allows offerors to compete on a common basis. Raymond Express Int'l, B-409872.2, Nov. 6, 2014, 2014 CPD ¶ 317 at 9. The agency's description of its needs must be free from ambiguity and describe the agency's minimum needs accurately. Global Tech. Sys., B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335 at 17.

Arch contends that the differences between the offerors' prices show that offerors did not have a common understanding of the solicitation requirements. The protester, however, does not identify any specific parts of the RFP which it contends are vague or ambiguous, or that otherwise prevented offerors from competing on a common basis.¹⁰ On this record we find no basis to conclude that the RFP failed to provide a common basis for offerors to compete or was otherwise defective. See Centerra Grp., LLC, B-414768, B-414768.2, Sept. 11, 2017, 2017 CPD ¶ 284 at 6 (alleged differences in

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be, in effect, an untimely challenge to the terms of the solicitation. See 4 C.F.R. § 21.2(a)(1).

¹⁰ Arch contends that our Office has recognized that disparate prices provide a basis to conclude that offerors did not compete on a common basis. Protest at 23 (citing PCA Aerospace, Inc., B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65; Federal Sec. Sys., Inc., B-281745.2, Apr. 29, 1999, 99-1 CPD ¶ 86). The decisions cited by the protester, however, concern challenges to agencies' decisions to take corrective action in response to a protest. In PCA Aerospace and Federal Security Systems, we concluded that the agencies' decisions to take corrective action based on significant differences in the offerors' proposed prices were reasonable. These decisions relied on the broad discretion afforded to agencies to take corrective action. As we explained, it is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; where the agency has reasonable concern that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action. Federal Sec. Sys., Inc., *supra*, at 4-5. The protester here does not establish that the differences between the proposed prices, alone, demonstrates a lack of common understanding among the offerors.

price, alone, do not establish that offerors had differing understandings of a solicitation or that the solicitation failed to provide a common basis for competition).

The protests are denied.

Thomas H. Armstrong
General Counsel