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Decision

Matter of: PMO Partnership Joint Venture

File: B-403214; B-403214.2

Date: October 12, 2010

William M. Weisberg, Esq., and Joyce L. Tong, Esq., Bryan Cave LLP, for the protester.

Stephen F. Pereira, Esq., Michael L. Culotta, Esq., and Kerry L. Miller, Esq., Department of Transportation, for the agency.

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DIGEST

Agency's decision to exclude the protester from a competition because the protester's cost proposal, which contained other than cost or pricing data as was contemplated by the solicitation, was determined to be inconsistent with the instructions in Federal Acquisition Regulation § 15.408, Table 15-2, was unreasonable where: (1) the instructions at issue are only applicable to cost proposals when cost or pricing data is required, (2) the instructions were neither referenced nor incorporated into the RFP, (3) there is no evidence in the record that offerors were ever given notice that their cost information had to be presented in this unique--and regulatorily-inapplicable--format, and (4) the record strongly suggests that none of the audits of the other offerors' cost proposals were evaluated against this standard.

DECISION

PMO Partnership Joint Venture (PMO-JV), of San Francisco, California, protests the Department of Transportation (DOT), Federal Transit Administration's (FTA) rejection of its proposal for failing to provide adequate cost or pricing data to support its cost proposal under request for proposals (RFP) No. DTFT60-08-R-00010 for program management oversight services.

We sustain the protest.

BACKGROUND

On June 26, 2008, FTA issued an RFP soliciting proposals for program management oversight services to provide support for select capital projects with continuous review and evaluation of grantee and FTA processes to ensure compliance with statutory, administrative, and regulatory requirements, and to monitor the projects to determine whether the projects are progressing on time, within budget, and in accordance with approved grantee plans and specifications. Agency Report (AR) (Aug. 2, 2010) at 2. The solicitation contemplated the award of multiple (approximately 15 to 25) cost-reimbursement, indefinite-delivery/indefinite-quantity task order type contracts. RFP at 2, 94. Award was to be made to responsible offerors offering the best value to FTA, considering the following evaluation criteria, listed in descending order of importance: technical and management, cost/price, and socioeconomic status. *Id.* at 95.

PMO-JV¹ submitted a timely proposal to FTA by the September 4, 2008 deadline for receipt of proposals. The agency evaluated PMO-JV's technical proposal, determined it was among the most "highly rated" technical proposals, and invited PMO-JV to participate in oral presentations on December 15. PMO-JV's oral presentation took place on January 8, 2009. After oral presentations, the agency rated PMO-JV's technical proposal as technically acceptable. AR (Aug. 2, 2010), Tab 4B, Source Selection Decision, at 8-9.

The RFP also requested that offerors complete and submit a cost proposal utilizing Attachment J-6, Contract Pricing Summary, included in the RFP, with appropriate back-up material as follows:

- Managerial, technical and professional labor costs
- Fringe Benefits, if appropriate
- Overhead costs
- Travel and Per Diem costs (plug-in value provided)
- Other Direct Costs (plug-in value provided)
- Consultant/SubContractor costs, appropriately detailed
- G&A Cost and the application thereof
- Facilities Capital Cost of Money, if appropriate
- Fixed Fee

¹ PMO-JV, a newly formed joint venture of The Allen Group, LLC, Brindley Pieters & Associates, Inc., and EAC Consulting, Inc., was formed as a joint venture under the laws of the state of Florida for the purpose of contracting with FTA under the current solicitation. AR (Aug. 2, 2010), Tab 4C, at 6. FTA states that the joint venture is a small business concern. AR (Aug. 2, 2010), Tab 5, Contracting Officer Determination and Findings, at 3.

RFP at 87. The solicitation also informed offerors that:

(1) Adequate price competition is expected to exist, and this action is therefore exempt from the requirement for submission of cost or pricing data. However, all Offerors (prime and subContractors) shall submit a budget summary for the entire contract period of performance. A separate Direct Labor cost is calculated for each labor category (skillset) for each year and is presented in a 5 year summary for the project. Budget summaries shall clearly identify the following:

- Direct labor by labor categories to include the RFP provided hours, and the Contractor provided rates and escalation. . . .
- Fully burdened rates of subcontractors are permitted where an audit has not been performed and approved. . . .
- All applicable indirect rates including their corresponding basis. . . .
- Other Direct Costs and Travel: . . .
- Fixed fee and its basis. . . .

This information is necessary to determine the adequacy of the Offeror's proposal, e.g., information adequate to validate that the proposed costs are consistent with the technical proposal, or cost breakdowns to help identify unrealistically priced proposals.

(2) Any information submitted must support the price proposed. Include sufficient detail or cross-reference to clearly establish the relationship of the information provided to the price proposed. Support any information provided by explanations or supporting rationale as needed to permit the Government to evaluate the documentation . . . Such information is not considered cost or pricing data, and will not require certification in accordance with FAR [§] 15.406-2.

[(3)] If, after receipt of offer, the Contracting Officer concludes there is insufficient information available to determine price reasonableness and none of the exceptions described in FAR [§] 15.403-1 applies, then cost or pricing data shall be obtained. As a minimum, a budget summary shall be submitted for each year of the contract period (reference paragraph 1 above.)

RFP at 88-89. Additionally, all offerors had to "make [their] records available for pre-award or post-award audits." RFP at 89.

The “cost evaluation criteria” included in the RFP stated:

The cost proposal shall be used in determining the best value to the Government. . . . The Government shall evaluate and assess the cost proposal to determine that all items proposed have been included in the cost proposal in accordance with [FAR] Subpart 15.4-Contract Pricing. The Government shall also evaluate and assess all proposal costs for cost reasonableness and realism. An unrealistic cost proposal may be evidence of an Offeror’s lack of, or poor understanding of, the requirements of the solicitation and thus may adversely affect the Offeror’s rating on the Technical and Management Criteria. The Government shall evaluate both price and non-price evaluation factors and award a contract to an Offeror that is perceived to have the best value considering all of the factors.

RFP at 98.

In its proposal, PMO-JV included a completed Attachment J-6 for the joint venture and one of the joint venture partners, which referenced and incorporated supporting J-6 attachments for the other two joint venture partners. The completed attachments identified the various direct labor rates for required personnel, broken down by the joint venture partner from which the employee would be assigned--The Allen Group, LLC, Brindley Pieters & Associates, Inc., or EAC Consulting, Inc.--and calculated a total direct labor cost for each partner. In the “Labor Overhead” section of each Attachment J-6, PMO-JV provided a labor overhead rate that was applied to each of the joint venture partners’ total direct labor costs. Additionally, PMO-JV supplied Attachment J-6 costs for various subcontracted consultant services. A budget summary was provided for each of the JV partners as well as the subcontracted consultant services. PMO-JV’s Proposal J-6 Attachments; AR (Aug. 2, 2010), Tab 2A, PMO-JV Proposal, vol. II.

Agency’s Initial Rejection of PMO’s Proposal

On June 9, 2009, FTA sent PMO-JV’s cost proposal for a pre-award audit to a contractor assisting the agency with this procurement, Booth Management Consulting, LLC, (BMC).² AR (Aug. 2, 2010), Tab 4C, BMC Audit Report (Sept. 24, 2009), at 2. As part of the audit, BMC reviewed PMO-JV’s proposed costs, including proposed indirect rates, to determine if PMO-JV’s proposal provided an acceptable basis for negotiation of a fair and reasonable price. BMC determined that “the cost/pricing data submitted by the offeror are not adequate to negotiate a fair and

² At that time, the Defense Contract Audit Agency (DCAA) was apparently unable to provide FTA with audit support to review PMO/JV’s cost proposal.

reasonable contract price for the direct labor, escalation, and indirect cost rates.” Id. at 3. BMC explained:

The cost proposal should be for the PMO Partnership Joint Venture Entity and should not list the costs for each partner separately. The PMO Partnership Joint Venture is a separate entity in and of itself and that is how the costs should be presented in the cost proposal.

Id. at 5-6.

Based on BMC’s audit, the contracting officer determined that PMO-JV’s proposal was unacceptable. AR (Aug. 2, 2010), Tab 5, Contracting Officer Determination and Findings, at 6. On October 5, the contracting officer advised PMO-JV of the rejection of its proposal for the following reasons:

The cost proposal, submitted by the Joint Venture [JV] does not reflect that the JV is operating as an independent entity, which for Government contracting purposes would list an indirect rate structure that would be unique to the Joint Venture only and . . . was not prepared in all material respects in accordance with the appropriate provisions of the FAR Part 31 and the Transportation Acquisition Regulation. It is also noted that the JV proposal proposed three (3) separate indirect rates that were both unique and specific to each of the 3 JV members.

AR (Aug. 2, 2010), Tab 1B, FTA Letter to PMO-JV (Oct. 5, 2009), at 2.

During the time period between the closing date for receipt of proposals and the agency’s notice to PMO-JV that it was excluded from the competition, the agency awarded 18 contracts to other offerors under the solicitation. Federal Business Opportunities website: fedbizopps.org, Solicitation No. DTFT60-08-R-00010.

PMO’S Initial Protest and GAO Decision

After receipt of FTA’s letter rejecting its proposal, PMO-JV filed its initial protest with our Office, arguing that the joint venture is and operates as an independent legal entity, the rejection of its proposal was improper because its proposed overhead rate structure was appropriate (particularly considering that it is a newly formed joint venture), and the RFP did not contain instructions on how joint venture offeror indirect rates were to be prepared.

In addition, PMO-JV stated in its protest that after the contracting officer requested that PMO-JV submit one overall overhead rate, it did so. The protester explains that, on September 10, it provided a weighted average of the three partner’s individual overhead rates. However, this offered rate was not provided to BMC by the contracting officer. Thereafter, according to PMO-JV, the contracting officer told

PMO-JV that it could not provide clarifications regarding this offered overhead rate because it was “too late.” Protest (Oct. 20, 2009) at 3; AR (Aug. 2, 2010), Tab 4D, BMC Revised Audit Report (Oct. 5, 2009), at 6.

On November 19, the agency submitted its agency report in response to this protest, which stated:

None of the arguments presented in the Protest . . . address the real issue in this case, and that is, PMO-JV’s failure to submit a single overhead rate in their Cost Proposal. The basic failure of [PMO-JV] is its non-compliance with Cost Accounting Standard (“CAS”) 401.”³

AR (Nov. 19, 2009) at 6. The agency did not deny that it had asked PMO-JV for a revised single overhead rate, or that upon receipt of the revised rate, it did not provide this rate to BMC, or otherwise consider the information.

PMO-JV filed comments on the agency report, complaining that FTA had incorrectly applied CAS 401 to a small business, erroneously required that one indirect overhead rate be provided by the joint venture, and failed to consider the single overhead rate it ultimately provided at the request of the contracting officer. In response, our Office conducted an outcome prediction alternate dispute resolution (ADR) conference, during which the GAO attorney handling this case stated that the agency had not provided a reasonable basis for excluding PMO-JV’s proposal from the competition, and had unreasonably failed to consider the single weighted average overhead rate provided to the contracting officer. The agency did not initiate corrective action in response to the outcome prediction ADR, but provided further argument about the applicability of CAS 401. As a result, we proceeded to issue a decision in the case.

In our decision, PMO Partnership Joint Venture, B-401973.3; B-401973.5, Jan. 14, 2010, 2010 CPD ¶ 29, we found that the agency’s rationale for excluding PMO-JV on the basis of CAS 401 compliance was unreasonable because CAS 401 is inapplicable to small business concerns. 48 C.F.R. § 9903.201-1(b)(3) (2009). We further found that neither FTA nor BMC had provided, nor did we find, any analysis or legal authority as to why the PMO-JV indirect rate structure, which adopted the individual overhead rates of the joint venture partners for PMO-JV’s own use and described how the rates would be applied, would lead to an inconsistency in the application of cost accounting practices, or would result in a loss of financial control over costs during contract performance. Finally, we determined that the agency improperly failed to consider the “weighted average” overhead rate provided to the contracting

³ This was the first time that CAS 401 was mentioned by FTA or BMC as the basis for the rejection of PMO-JV’s proposal.

officer a month before the contracting officer rejected PMO-JV's proposal. Accordingly, we sustained the protest.

In sustaining the protest, we recommended that

FTA reevaluate PMO-JV's accounting system to determine whether it is adequate. In so doing, we note that if the agency has problems with PMO-JV's accounting system, it may open a dialogue to resolve these issues without such dialogue necessarily being considered discussions, given that this is a matter relating to PMO-JV's responsibility, so long as PMO-JV does not change its proposed cost or otherwise materially modify its proposal. If PMO-JV's accounting system is found adequate, the agency should determine whether PMO-JV's proposal is otherwise acceptable and in line for award, and if so award should be made to that firm. If PMO-JV's accounting system is found inadequate and its proposal rejected for this reason, the matter, which involves the responsibility of a small business concern, must be referred to the Small Business Administration for a Certificate of Competency (COC) determination.

PMO Partnership Joint Venture, *supra*, at 8-9.

The Agency's Second Rejection of PMO's Proposal

In response to our decision, the contracting officer requested that the DCAA "conduct an adequacy review of PMO-JV's proposal using the applicable regulatory criteria contained within FAR [§] 15.408, Table 15-2–Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required."⁴ AR (Aug. 2, 2010) at 4. The agency limited DCAA's adequacy assessment to "reviewing the cost data information contained in PMO-JV's cost proposal" submitted in response to the solicitation on August 30, 2008. *Id.*

On June 2, 2010, the DCAA submitted its report to the FTA contracting officer. The DCAA noted that its "effort does not constitute an audit or attestation engagement under generally accepted government auditing standards (GAGAS)." Thus, the DCAA did not "express an opinion on the adequacy of the proposal for price

⁴ On the record provided to us, it appears that the agency did not request a reevaluation of the adequacy of PMO-JV's accounting system, which was why the agency previously rejected PMO/JV's proposal. Instead, this new request was focused on evaluating the adequacy of PMO-JV's cost/price proposal using FAR § 15.408, Table 15-2–Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required. AR at 4.

negotiation.” The DCAA also stated that its analysis was not conducted in accordance with its normal procedure, which would

convey in writing any significant proposal inadequacies to the contractor in order to confirm the availability/existence of additional support data, confirm the existence of any inconsistencies or inaccuracies within the proposal and to solicit the contractor’ intent regarding planned corrective action.

AR (Aug. 2, 2010), Tab 4F, DCAA Adequacy Assessment Review, at 1. Instead, in accordance with FTA’s request, the DCAA did “not execute this additional coordination with the contractor as it is generally conducted to obtain a revised proposal that meets the adequacy requirements stipulated by the FAR.” The DCAA further clarified that its “proposal adequacy assessment was limited to reviewing, to the extent possible, the cost data contained in the compact disk [FTA] provided on January 22, 2010, without requesting additional data from PMO.” Id.

The DCAA’s limited review compared PMO-JV’s cost proposal to the requirements set forth in the table at FAR § 15.408, Table 15-2--“Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required.” This table contains detailed instructions for “preparing a contract pricing proposal when cost or pricing data are required.” FAR § 15.408, Table 15-2. The DCAA found various inadequacies relating to PMO-JV’s proposed subcontract (subconsultant) costs. For example, the DCAA reported that PMO-JV failed to provide adequate cost or pricing data, or a cost or price analysis, for any of the [deleted] subcontract consultant services included in the Contract Pricing Summary Sheet (Attachment J-6), and concluded that this failure violated the requirements contained in FAR § 15.408, Table 15-2, II.A.(2).⁵ The DCAA additionally reported six more “cost or pricing data” inadequacies, based on its comparison of PMO-JV’s cost proposal to FAR § 15.408, Table 15-2, that related to its and its subcontractor’s proposed direct labor rates and indirect expense rates. AR (Aug. 2, 2010), Tab 4F, DCAA Adequacy Assessment Review (June 2, 2010), at 2-3.

On June 23, based on the DCAA’s findings, the contracting officer rejected PMO-JV’s proposal because its cost proposal was

inadequate as it does not comply with the documentation requirements of FAR [§] 15.408, Table 15-2, Instructions for Submitting Cost/Price

⁵ This section of the instructions requires, among other things, that covered offerors conduct a price analysis of all subcontractor proposals and a cost analysis for subcontract proposals exceeding the threshold for cost or pricing data (\$650,000). FAR § 15.408, Table 15-2, II.A.(2). DCAA determined that PMO-JV’s cost proposal contained no such analyses. AR (Aug. 2, 2010), Tab 4F, DCAA Adequacy Assessment Review (June 2, 2010), at 2.

Proposals When Cost or Pricing Data are required and also does not provide for an acceptable basis for negotiating a fair and reasonable contract price.

AR (Aug. 2, 2010), Tab 1D, PMO-JV Debriefing Letter (June 23, 2010), at 4.

DISCUSSION

PMO-JV filed the current protest with our Office on July 1 challenging its elimination from the competition. PMO-JV argues that FTA failed to follow the solicitation criteria for evaluation because the RFP did not require the submission of cost or pricing data, and yet, PMO-JV was evaluated against, and excluded for, not meeting the requirements of FAR § 15.408, Table 15-2, which only apply when cost or pricing data are required. See RFP at 88. We agree.

The RFP advised that FTA would evaluate and assess offerors' cost proposals for cost reasonableness and realism, and to determine that all items proposed have been included in accordance with FAR Subpart 15.4-Contract Pricing. RFP at 98. The RFP also expressly advised that because the contracting officer expected adequate price competition, "this action is therefore exempt from the requirement for submission of cost or pricing data."⁶ RFP at 88. Instead of cost or pricing data, the RFP requested information other than cost and pricing data and required, "all Offerors (prime and subcontractors) to submit a budget summary for the entire

⁶ FAR § 15.403-4, Requiring cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b) states:

(a)(1) The contracting officer must obtain cost or pricing data only if the contracting officer concludes that none of the exceptions in [FAR §] 15.403-1(b) applies. . . . The threshold for obtaining cost or pricing data is \$650,000. Unless an exception applies, cost or pricing data are required before accomplishing any of the following actions expected to exceed the current threshold or, for existing contracts, the threshold specified in the contract:

(i) The award of a negotiated contract.

FAR § 15.403-1(b), Exceptions to cost or pricing data requirements, provides, The contracting officer shall not require submission of cost or pricing data to support any action . . .

(1) When the contracting officer determines that prices agreed upon are based on adequate price competition.

contract period of performance.”⁷ Id. The RFP informed offerors that the requested information was necessary to determine the adequacy of the offeror’s proposal, but noted that such information was “not considered cost or pricing data, and will not require certification in accordance with FAR [§] 15.406-2.” RFP at 89. The RFP also stated if the contracting officer concluded there was insufficient information available to determine price reasonableness and none of the exceptions described in FAR § 15.403-1 applies, then cost or pricing data shall be obtained. Id.

In accordance with the terms of the solicitation, PMO-JV did not submit cost or pricing data with its cost proposal, nor did it submit data in the format specified at FAR § 15.408, Table 15-2. PMO-JV instead submitted other than cost or pricing data on Attachment J-6, Contract Pricing Summary, with supporting back-up material, and a budget summary as requested by the RFP.

However, the FTA contracting officer limited DCAA’s review of PMO’s cost proposal to verifying whether the data was presented as required by FAR § 15.408, Table 15-2. This was improper because the use of these requirements are only appropriate where cost or pricing data is required by the solicitation. We also note that this table was neither referenced nor incorporated into the RFP, and there is nothing in the RFP to put offerors on notice that the agency would evaluate cost proposals against FAR 15.408, Table 15-2; to the contrary, the solicitation expressly stated that cost or pricing data was not required.

As indicated, DCAA’s constrained adequacy review found various inadequacies in PMO’s cost proposal because supporting data required by FAR § 15.408, Table 15-2 was not included. For example, DCAA reported that PMO-JV’s Contract Pricing Summary Sheet (Attachment J-6) failed to include a price analyses of all subcontractor proposals and a cost analyses for subcontract proposals exceeding the threshold for cost or pricing data (\$650,000), as required by FAR 15.408, Table 15-2, II.A.(2). However, the RFP’s cost proposal instructions did not indicate that PMO-JV had to conduct and submit such analyses.

An agency may not induce offerors to prepare and submit proposals based on one premise, then make source selection decisions based on another. DynCorp, B-245289, B-245289.2, Dec. 23, 1991, 91-2 CPD ¶ 575 at 6; Hattal & Assocs., B-243357, B-243357.2, July 25, 1991, 91-2 CPD ¶ 90 at 7. The problems found by DCAA were

⁷ FAR § 15.403-5 Instructions for submission of cost or pricing data or information other than cost or pricing data, section (a), provides, “the contracting officer shall specify in the solicitation . . . (1) whether cost or pricing data are required; . . . (3) any information other than cost or pricing data that is required.” FAR § 15.403-5(b)(2) states “Information other than cost or pricing data may be submitted in the offeror’s own format unless the contracting officer decides that use of a specific format is essential and the format has been described in the solicitation.”

based upon FAR requirements that are only applicable when cost or pricing data is required. Because the RFP expressly provided that cost or pricing data was not required, and because the RFP did not otherwise indicate that the data should be presented in this format, the agency's evaluation of PMO-JV's cost proposal was unreasonable.

Moreover, the record, which includes numerous audits of the cost proposals of the other offerors (including the 18 awardees), shows that none of these cost proposals were evaluated for adequacy based on the instructions contained in FAR § 15.408, Table 15-2. It is fundamental that the contracting agency must treat all offerors equally, and therefore it must evaluate offers evenhandedly against common requirements. Tidewater Homes Realty, Inc., B-274689, Dec. 26, 1996, 96-2 CPD ¶ 241 at 3.

Furthermore, the agency's prohibition on DCAA communications with PMO-JV concerning the adequacy of its submitted cost data appears inconsistent not only with DCAA practice, but with FAR § 15.404-2(d), which states:

The [administrative contracting officer] or the auditor, as appropriate, shall notify the contracting officer immediately if the data provided for review is so deficient as to preclude review or audit. . . . The contracting officer immediately shall take appropriate action to obtain the required data. Should the offeror/contractor again refuse to provide adequate data, or provide access to necessary data, the contracting officer shall withhold the award . . .

In this case, we think that questions about the adequacy of the submitted cost data should have been a subject of dialogue between the agency (or DCAA) and PMO-JV before that firm's proposal was rejected for this reason, particularly given that the previous awards under this solicitation were made over a year ago.

The protest is sustained.

We recommend that the agency re-evaluate PMO-JV's cost proposal in accordance with the terms of the solicitation and applicable FAR provisions, and have such dialogue with PMO-JV to ensure either that the company provides adequate information for the agency to negotiate a fair and reasonable price or refuses to provide such information. In the event that PMO-JV provides adequate information for the agency to determine that it offered a fair and reasonable price, the agency should make award to that firm if otherwise appropriate. We also recommend that the agency reimburse the protester for the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2010). The protester's certified claims for cost, detailing the time

expended and costs incurred, must be submitted directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
Acting General Counsel