Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Concepts Building Systems, Inc.

File: B-281995

Date: May 13, 1999

Ralph W. Spurlock for the protester.
George Barclay, Esq., and Jerry Ann Foster, Esq., General Services Administration, for the agency.
Christina Sklarew, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency rejection of offer under multiple-award Federal Supply Schedule solicitation on the basis that the offered prices were not reasonable is unobjectionable where the offeror increased its markup of supplier prices after negotiations were concluded and failed to provide any explanation to support the reasonableness of the increase, which called for a markup almost twice as high as the rate established by the contracting officer as a negotiation objective.

2. Contracting Officer reasonably rejected unacceptable offer without engaging in further negotiations where agency had engaged in discussions with offeror for more than a year in an attempt to bring offer into compliance.

DECISION

Concepts Building Systems, Inc. protests the rejection of its offer submitted in response to request for proposals (RFP) No. 7FXG-P5-97-5406-B, issued by the General Services Administration (GSA) for multiple-award Federal Supply Schedule (FSS) contracts to supply and install prefabricated storage buildings and outdoor storage structures. GSA rejected Concepts' offer because the agency determined that Concepts had failed to establish the reasonableness of its offered prices.

We deny the protest.

The RFP, issued on May 21, 1997, contemplated multiple awards of indefinite-delivery, indefinite-quantity contracts at firm, fixed prices with an economic price adjustment, under GSA's FSS program. This program, as described in Subpart 8.4 of the Federal Acquisition Regulation (FAR), provides federal agencies

with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. Items are typically listed by special item numbers (SINs), which represent groupings of similar products. Contracting Officer's Statement at 1. Indefinite-delivery contracts are established with commercial firms to provide supplies and services at stated prices for given periods of time. FAR § 8.401. Here, the contract duration was 5 years, beginning at the time of award, with multiple contracts to be awarded for similar items. RFP at 55.

The RFP sought offers for three SINs: prefabricated buildings (storage buildings and smoking shelters), ancillary services (assembly, training, consultation and design assistance), and installation and site preparation. RFP at 2-3. The solicitation is open indefinitely and is updated as required to include the most current contract clauses and provisions. The RFP included General Services Administration Acquisition Regulation (GSAR) clause 552.212-73, "Evaluation—Commercial Items (Multiple Award Schedule) (Aug 1997)," advising offerors that multiple awards may be made "to those responsible offerors that offer reasonable pricing, conforming to the solicitation, and will be most advantageous to the Government . . . ." RFP at 59; Agency Report, Tab 29, Letter from the Contracting Officer to Concepts enclosure 2, at 5 (Dec. 15, 1998).[1] It also included several clauses pertaining to the submission of cost or pricing information. FAR Clause 52.215-41, "Requirements for Cost or Pricing Data or Information Other than Cost or Pricing Data (Jan 1997) (Alternative IV—Oct 1995) (Variation I—Aug 1997)," (RFP at 10; Agency Report, Tab 29, supra, enclosure 2, at 3.) advised that offers were to be prepared and submitted in accordance with GSAR clause 552.212-70, "Preparation of Offer (Multiple Award Schedule) (Aug 1997)." GSAR clause 552.212.70 requires offerors to provide two copies of the offeror's current published commercial descriptive catalogs and/or price list(s) from which discounts are offered, for each special item being offered; to identify the offered items in the published catalogs or price lists by the special item number listed in the RFP; to describe the discounts being offered; to describe any concessions being offered which are not granted to other customers; and if the offeror is a dealer/reseller, or will use dealers to perform any aspect of the contract, to describe the functions that the dealer/reseller will perform. RFP at 56; Agency Report, Tab 29, supra, enclosure 2, at 4. In addition, FAR Clause 52.215-41 required offerors to provide "[a]ny additional supporting information requested by the Contracting Officer to determine whether the price(s) offered is fair and reasonable." Agency Report, Tab 29, supra, enclosure 2, at 3.

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[1] Many of the FAR clauses included in the RFP were changed slightly during the course of the procurement; updated versions of the clauses were substituted by change to the solicitation prior to the request for best and final offer. The clauses are cited in this decision in their updated versions as provided at Tab 29 of the Agency Report.

Concepts submitted an offer on December 2, 1997, as a broker for NCI Building Systems, since it had no commercial price list of its own, and had no sales history in supplying or installing the buildings. When a dealer's estimated contract sales will exceed $500,000 or when a dealer does not have substantial commercial sales of its own, the RFP calls for the dealer to present commercial sales practices (CSP) information from its manufacturer and allows the offeror to use the manufacturer's price list as the basis for an offer. RFP at 50. The RFP requested very specific CSP information for each SIN being offered by a dealer, and stated that it could be supplied directly by the manufacturer or submitted in the dealer's offer. Id. Concepts did not provide any of this information in its initial offer, nor did it fulfill other informational requirements, such as providing a commercial warranty or a letter of commitment from its manufacturer.

The record contains a substantial body of correspondence between Concepts and GSA commencing with Concepts' initial offer—December 1997—and extending to the submission of Concepts' final proposal revisions—January 1999—that demonstrates a protracted effort on the part of the agency to obtain this information and to enable Concepts to establish the reasonableness of its offered prices. During this time, the contracting officer sought various types of information, such as clarification of the manufacturer's pricing policies and the manufacturer's commercial price list and freight costs, and requested that written access to the manufacturer's sales records be provided.

In September of 1998 the contracting officer determined that Concepts was nonresponsible and, since Concepts is a small business concern, forwarded the matter to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures. Agency Report, Tab 15, Letter from the Contracting Officer to SBA (Sept. 1, 1998). SBA declined to issue a COC for Concepts. Agency Report, Tab 16, Letter from SBA to the Contracting Officer (Oct. 1, 1998). Because the responsibility determination had been made prior to negotiations, the contracting officer agreed to reconsider the issue of Concepts' responsibility later, based on Concepts' assurances that significant additional information would be provided to establish Concepts' financial responsibility.

Concepts repeatedly sought to postpone the process of negotiations, asserting that it was attempting to gain more favorable terms from its manufacturer. On October 22, the contracting officer prepared a prenegotiation memorandum, consistent with the GSAR requirement to "establish negotiation objectives based on a review of relevant data and determine price reasonableness." GSAR 538.270. In that memorandum, he noted that the initial markup percentage offered by Concepts was 10 percent, which he viewed as the maximum acceptable markup, and established a negotiation objective of obtaining a 7 percent markup, based on commercial markups in this industry generally and the level of effort required under this contract. Agency Report, Tab 18, Prenegotiation Memorandum at 3. Negotiations were finally held on December 15, 1998. During the negotiations, Concepts mentioned that it wanted to

raise its pricing from "[c]ost plus 10 [percent]" to "[c]ost plus 16 [percent],"[2] based on its belief that the Government would not make payments under the contract in a timely manner, thereby incurring interest costs for the dealer. Contracting Officer's Statement at 4. GSA responded by advising Concepts that this increase was not considered reasonable, since the Prompt Payment Act allows contractors to collect interest on any amounts not paid in a timely manner. Agency Report, Tab 29, Letter from the Contracting Officer to Concepts 2 (Dec. 15, 1998). The contracting officer understood that the negotiations, as concluded, would result in Concepts offering "a 10 percent addition to the actual fixed price of the portable buildings and installation costs with allowance for profit and overhead." Agency Report at 5.

When Concepts submitted its final proposal revision on January 14, its pricing had been modified to "cost plus 13 [percent]." Agency Report, Tab 34, Final Proposal Revisions. The proposal did not provide any explanation or basis for the increase from "cost plus 10 [percent]," nor did it provide any additional information (as promised) to demonstrate or support Concepts' claim that it was financially responsible. Finding no other explanation for the increase in price, which now provided for a markup that was almost double the agency's negotiation objective of a 7 percent markup, the contracting officer believed that it was based on Concepts' anticipation that payment delays were likely and that Concepts would thereby incur costs associated with the assignment of purchase orders issued under the contract; he rejected this as unreasonable, since it represented an increase in cost that did not provide any additional value to the Government, and rejected Concepts' offer.[3] Agency Report, Tab 35, Letter from the Contracting Officer to Concepts (Jan. 28, 1999). Concepts requested that its rejection be reconsidered, which request the contracting officer denied. This protest followed.

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[2] Because Concepts as a dealer has no commercial price list on which to base its offer, and has not had substantial sales of the item being offered, it must base its offer on the manufacturer's commercial price list. Here, however, the manufacturer uses a computerized pricing model instead of a printed price list, Agency Report, Tab 18, Prenegotiation Memorandum at 2, and Concepts' offer is based on obtaining the items through the manufacturer's broker. Id. Concepts bases its pricing on its own costs through the broker, plus a markup percentage. Prices are fixed for the length of the contract, as is the amount of markup. CO's statement at 5.

[3] The contracting officer noted that while the solicitation permitted payment to be assigned to third parties on individual orders issued under any resultant contract, it did not require the Government to pay additional costs to facilitate such assignments. Id.

Concepts alleges that GSA's review and rejection of Concept's final offer were improper. In essence, Concept argues that GSA has not shown that the 3 percent increase in markup included in Concepts' final offer was unreasonable.[4]

Before awarding any multiple-award FSS contract, the contracting officer must determine whether offered prices are fair and reasonable. GSAR § 538.271(b). A determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer; therefore, we will question such a determination only where it is clearly unreasonable or there is a showing of bad faith or fraud. See M. S. Ginn Co., B-215579, Dec. 26, 1984, 84-2 CPD ¶ 701 at 3. A contracting agency may reasonably conclude that offered prices are unreasonable under a multiple-award FSS procurement where the vendor provides insufficient data to support the allowance of such costs. American Seating Co., B-230171.36, Aug. 31, 1989, 89-2 CPD ¶ 195 at 5-6.

Here, GSA properly requested pricing and discount information, analyzed the discount/markup arrangement offered by Concepts and established negotiation objectives, including a target markup of 7 percent and a maximum acceptable markup of 10 percent, based on the information submitted and the contracting officer's knowledge of the industry. Agency Report, Tab 18, Prenegotiation Memorandum at 2-3. While the contracting officer concluded that achieving those negotiation objectives would result in prices that were considered fair and reasonable, those objectives were, in fact, not achieved. Concepts alleges that the agency has arbitrarily imposed a limit on the percentage of its markup of the manufacturer's prices when it rejected the unexplained post-negotiation increase in markup. We find no merit to this claim. Rather, the markup amount was analyzed and assessed with respect to the services that the dealer would provide and costs he would incur in supplying the goods he obtained from the manufacturer, and was determined to be excessive. Concepts argues that "[t]he additional 3% [in markup] is not additional profit to be enjoyed by the respondent," Protester's Comments at 5, but fails to provide any reasonable explanation for its increase. The only explanation, offered in Concepts' comments in response to the agency report, is that a clause that was added to the

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[4] Concepts' initial protest submission included a number of other general complaints that do not allege any violation of regulation or statute or otherwise provide any legal basis for protest, such as "[t]otal maximum liability to the Government in awarding a contract to the responder is $100"; and "GSA breaks procurement rules in stated requirements of the solicitation . . . the Government is only entitled to whatever price competition obtains." Protest at 2. Similarly, in its comments to the agency report, Concepts lists a number of general questions as "issues," such as "What is the real intent of Solicitation 7FXG-P5-97-5406-B?" Protester's Comments at 6. These are dismissed for failure to state a legally sufficient basis for protest. Bid Protest Regulations, 4 C.F.R. § 21.5(f) (1998).

RFP, GSAR clause 552.232-70, "Invoice Payments (Jul 1998)," was "considered . . . to be escalatory and [we] adjusted our offer to include what we felt would be additional overhead costs." Protester's Comments at 2.

First, no such explanation was included when the increase was submitted to the contracting officer; more to the point, we do not see how this clause justifies the increase. The clause in question provides a timetable for invoice payments to be made; establishes processes for full cycle electronic commerce (an Internet-based invoice process); and states that "all other provisions of the Prompt Payment Act (31 U.S.C. 3901 et seq.) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment, apply." Agency Report, Tab 29, supra, enclosure 4, at 1-2. Concepts' reference to this clause does not provide a valid justification or reasonable basis for its 3 percent across-the-board increase in markup; to the contrary, Concepts' reliance on this clause appears to support the contracting officer's conclusion that the increase was intended to cover costs associated with an assignment of payments. Although Concepts insists, in its response to the contracting officer's rejection of its offer (Agency Report, Tab 36, Letter from Concepts to the Contracting Officer (Feb. 1, 1999)), and in its response to the agency report (Protester's Comments at 4) that the amended solicitation "plac[ed] yet another new requirement on the respondent in the event of a contract award," Concepts fails to specify what that requirement is, or explain how it could justify any increase in markup. In short, the protester has not provided any basis to call into question the contracting officer's determination that Concepts' offered price was unreasonable because of the excessive proposed markup.[5]

Concepts also alleges that "the length of time that this offer stayed with the GSA without a final decision being rendered was excessive, unnecessary and served to deplete the resources of a small woman owned business . . ." Protester's Comments at 4. While we agree that the agency appears to have spent an extended period of time attempting to obtain a complete offer from the protester, we see no impropriety on the agency's part. The record demonstrates that the protester submitted the requested information in a piecemeal fashion after multiple requests and repeatedly requested extensions of deadlines for negotiations. Agency Report, Tab 26, Letter from Concepts to the Contracting Officer (Dec. 7, 1998); Tab 30, Letter from Concepts to the Contracting Officer (Dec. 17, 1998); Tab 32, Letter from Concepts to the Contracting Officer (Jan. 6, 1999). The record also demonstrates that, even now, there is little likelihood that various remaining informational deficiencies in Concepts'

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[5] The RFP includes GSAR clause 552.216-71, "Economic Price Adjustment (Feb 1996) (Alternate I—Jan 1989)(Deviation)," which provides for increases and decreases in price under certain conditions, such as an increase in catalog price, thus protecting the contractor in the event of escalating costs by preserving its markup percentage. RFP at 18.

offer can be quickly or easily corrected. For example, in its comments on the agency report, Concepts asserts that the solicitation did not include installation and that "[t]hese buildings are not portable and they are not installed," Protester's Comments at 4, and alleges that the agency "applies an active imagination to the misguided assumption that [Concepts] offered to install/erect this product." Protester's Comments at 5. In fact, the RFP clearly requires installation and site preparation, listed as a separate SIN (RFP at 3), and Concepts checked the appropriate box in its proposal to indicate that it was offering this SIN. Protester's proposal at 3. In addition, Concepts expressly informed the contracting officer during the process of clarifications that its proposal included "[a]n offer to provide INSTALLATION AND SITE PREPARATION, required by the solicitation, page 3 of 80." Agency Report, Tab 6, Letter from Concepts to the Contracting Officer 1 (Jan. 30, 1998)(revised 3/5/98).[6] In these circumstances, where more than a year has been spent attempting to arrive at a complete and reasonable offer and where the protester's financial responsibility is seriously in question, we see no basis to object to the contracting officer's decision to terminate the process and reject the offer.

Concepts also alleges that the RFP did not specifically require vendors to demonstrate financial responsibility. This position is untenable. Before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. FAR 9.103(b); Carter Chevrolet Agency, Inc., B-270962, B-270962.2, May 1, 1996, 96-1 CPD ¶ 210 at 5. The RFP included GSAR clause 552.212-73, "Evaluation—Commercial Items (Multiple Award Schedule)," which provides that award would be made to "those responsible offerors that offer reasonable pricing . . ." RFP at 59. Moreover, FAR Part 9, "Contractor Qualifications," provides that "[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility." FAR §9.103(b). While the protester argues that Part 9 was not included in the solicitation, FAR § 9.100 states

[6] The contracting officer explained to the protester by letter of October 28, 1998 (Agency Report, Tab 20), that any contract awarded as a result of the RFP would contain only prices for buildings, with installation to be priced by the contractor on the basis of the statement of work provided by the customer agency (i.e., the agency purchasing off the FSS). The contracting officer further explained that the RFP permitted contractors to subcontract installation. Nevertheless, Concept fails to recognize that its submission did include an offer for this SIN. Since the prime contractor is required to accept full responsibility and liability for all work performed by subcontractors under a resultant contract, GSA reasonably took this into account in assessing Concepts' proposal.

that subpart 9.1 prescribes policies, standards, and procedures for determining whether prospective contractors are responsible, and FAR 9.102 provides that subpart 9.1 "applies to all proposed contracts with any prospective contractor . . . in the United States . . . ." Accordingly, Concepts' complaint in this regard, as with the other matters which it raises, is without merit.

The protest is denied.

Comptroller General
of the United States