

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

REHMA COMMUNITY SERVICES, INC.)
) CAB Nos. P-0765, P-0771
Under Solicitation No. CFSA-06-R-0010)

For the Protester, REHMA Community Services, Inc.: Susan L. Schor, Esq., Jeanne A. Anderson, Esq., McManus, Schor, Asmar & Darden, L.L.P. For the District of Columbia Child and Family Services Agency: Howard Schwartz, Esq., Senior Assistant Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 21566799

REHMA Community Services, Inc., protests the District's Child and Family Services Agency ("CFSA") award of contracts to 14 other offerors for providing mentoring services to children. REHMA claims that the contracting officer and evaluators failed properly to evaluate its proposal. In response to the protest, and after CFSA had replaced the initial contracting officer, the new contracting officer initiated a re-evaluation of the proposals and discovered errors in the technical evaluation and price evaluation. In particular, with regard to the price evaluation, the contracting officer determined that some of the awardees had failed to propose prices for both contract line items and others had only proposed prices for the base year although the amended solicitation required prices for both line items for the base and all option years. In the Agency Report, CFSA stated that the remedy should be to leave the 14 contracts in place for the remaining base year period (expiring September 30, 2008) since CFSA would need the time to reprocur the mentoring services and disrupting the services in the middle of performance would have adverse consequences on the well-being of the children being mentored. After the Agency Report was filed, REHMA filed a supplemental protest (CAB No. P-0771) arguing that the price evaluation was unreasonable and contrary to the terms of the solicitation, that the contracting agency unreasonably evaluated its technical proposal, that it was improperly excluded from the competitive range, and that the agency failed to make a proper best value determination.

The District and CFSA readily admit that the price evaluation was seriously flawed, and, on this basis alone, we must sustain the consolidated protests. Further, we agree with REHMA that it was improperly excluded from the competitive range. Regarding the technical evaluations, the record does not adequately demonstrate that the contracting officer made an independent evaluation of the proposals. We conclude the evaluation and selection was arbitrary and unreasonable such that REHMA is entitled to recover its proposal preparation costs. Regarding the remedy for the 14 contracts, we agree with the District that the proper action is to allow the 14 contracts awarded pursuant to the solicitation to expire on September 30, 2008. In other words, options shall not be exercised. Rather, the District shall award new contracts based on a valid repurchase for the

mentoring services.

BACKGROUND

On November 8, 2006, CFSA's Contracts and Procurement Administration issued Request for Proposals No. CFSA-06-R-0010. (Agency Report ("AR") Ex. 1). The solicitation sought contractors to provide mentoring services in order to improve the functioning and development of children. (AR Ex. 1, § B.1.1). The original solicitation contemplated an indefinite quantity contract with payment based on fixed hourly rates pre-determined by CFSA. (AR Ex. 1, § B.2.1). CFSA intended to award multiple contracts, and received a total of 33 proposals, of which 24 were deemed acceptable and timely received by the December 8, 2006, closing date for proposals. (AR Ex. 1, § B.1.2, and Ex. 8). Prior to the closing date, CFSA issued Addendum No. 1 in order to clarify the date and time offerors' proposals were due to CFSA. (AR Ex. 1, Addendum No. 1).

CFSA initially intended to award contracts for mentoring services based on two evaluation criteria: (1) technical evaluation worth 85 points; and (2) price criteria worth 15 points, for a maximum possible score of 100 points. (AR Ex. 1, § M). The contracting officer selected a technical evaluation panel ("TEP") to score the offerors' technical proposals. (AR Ex. 9, ¶ 3). The TEP evaluated and scored offerors' proposals between March 2007 and June 2007. (AR Ex. 4).

On June 11, 2007, CFSA issued a second amendment to the solicitation clarifying issues surrounding offerors' pricing and LSDBE preference points. (AR Ex. 1, Addendum No. 2). The original solicitation had not required offerors to propose unit prices; instead CFSA had provided pre-determined unit prices based on the prices from previous mentoring services contracts. (AR Ex. 1, § B, Pricing Schedule). In Addendum No. 2, CFSA informed offerors that the unit prices previously included in the Pricing Schedule were merely government estimates. (AR Ex. 1, Addendum No. 2, Pricing Schedule). CFSA included in Addendum No. 2 a Pricing Schedule with two CLINs; CLIN 0001 for Individual Mentoring Services, and CLIN 0002 for Group Mentoring Services. Addendum No. 2 also required offerors to submit pricing for up to a maximum of 50 students, the number of hours the contractor would provide service per month to each student, and the price per hour (unit price) for each student. (AR Ex. 1, Addendum No. 2, Pricing Schedule). Addendum 2 clearly required pricing information for the base and option years for both CLINs: "The Offeror shall use the revised Pricing Schedules, which are included with this Addendum #2, to fill in the minimum and maximum number of hours to be provided for the two categories of students for the base year and option years." However, the Addendum only attached a pricing sheet for the base year. Addendum 2 also clarified that eligible offerors could receive a maximum of 12 LSDBE preference points resulting in a total maximum score 112 points – 85 points for technical, 15 points for price, and 12 LSDBE preference points. (AR Ex. 1, Addendum No. 2 and § M). Offerors were to submit pricing pursuant to the revised pricing instructions by June 19, 2007.

On June 20, 2007, the TEP submitted to the contracting officer its technical evaluations. The contracting officer began reviewing the TEP's recommendations on July 23, 2007. After reviewing the evaluation panel's recommendations, the contracting officer held a meeting with the contracts specialist and contracts manager to discuss the soundness of the evaluation process and quality assurance procedures relating to the TEP's final scores. (AR Ex. 4). Although the Agency Report states that the contracting officer conducted an independent evaluation of the proposals in July 2007,

there is no substantive evidence of his independent evaluation of the proposals in the record. The Agency Report includes a two-page memorandum dated July 31, 2007 (AR Ex. 10), from Jim Moye, Agency Chief Contracting Officer, to the CFSA Agency Director, Dr. Sharlynn E. Bobo. But the contracting officer merely lists in the memorandum the final numerical technical evaluation scores presumably received from the TEP, along with the flawed price evaluation scores, and his recommendation to award to the top 14 offerors. The offerors ranked 9 through 14 had total evaluation scores of 86, 86, 85, 84.5, 84, and 84, respectively. (AR Ex. 10). REHMA had a total score of 82 and was ranked 15th.

The contracting officer determined (incorrectly) that only the top 14 offerors who were intended to be the awardees were within the competitive range and held discussions with these 14 offerors between September 13 and September 30, 2007. (AR Ex. 4). The contracting officer failed to notify REHMA or any of the other lower ranked contractors that they were excluded from the competitive range. The contracting officer recommended awarding 14 contracts with 50 available slots each based on the projected need for the services, the projected budget available to pay for the mentoring services, the need to maintain a manageable number of vendors to ensure proper monitoring by CFSA, and the perceived contractor economies of scale of having a minimum of 50 students to serve. (AR Ex. 10).

On September 20, 2007, by letter sent certified mail, the contracting officer notified REHMA that it was not selected for award of a mentoring contract. (AR Ex. 11). The contracting officer held a debriefing with REHMA on October 3, 2007. (AR Ex. 4). On December 10, 2007, the contracting officer held a second debriefing with REHMA. (AR Exs. 4, 7, 12). REHMA filed its protest on December 12, 2007.

On December 21, 2007, CFSA's Director appointed a new interim chief contracting officer to CFSA, who determined during the course of this protest that in light of concerns about the original evaluation of proposals raised by REHMA, a re-evaluation was necessary. (AR Ex. 5). As noted in the District's Agency Report and exhibits, filed February 19, 2008, the contracting officer determined – after attempting to conduct a re-evaluation and discovering technical evaluation errors – that it was not possible to properly re-evaluate the existing proposals because of the lack of proper pricing data from some of the offerors (including awardees) and also due to the many variables introduced by the revised Pricing Schedules of Addendum 2. Although the revised solicitation indicated that the District would evaluate offers for award purposes “by evaluating the total price for all options as well as the base year”, CFSA did not receive option year pricing from all offerors, nor did all offerors provide pricing for both CLINs.

CFSA originally evaluated offerors' pricing based on the per unit price in the offerors' proposals. However, upon re-evaluation, CFSA determined that averaging CLIN prices was not a viable approach, as this method did not comply with the price evaluation criteria listed in the solicitation. (AR Ex. 5). Due to her concerns about the procurement process, the interim contracting officer stated that she would not exercise the options for any of the 14 awarded contracts. In addition, the contracting officer stated that she was re-soliciting the mentoring services during the period March through September 2008 so that new contracts would be in place when the 14 contracts expire on September 30, 2008. (AR Ex. 5).

In her affidavit submitted with the Agency Report, the contracting officer urged that the contracts not be terminated by the Board but that the contracts be allowed to expire because CFSA is providing mentoring to 356 students, 25 percent of whom are receiving the mentoring services pursuant to court order, and that a disruption to the services would be detrimental to the well-being of the children being served. (AR Ex. 5).

In its supplemental Agency Report, the District recognizes the procurement flaws in the evaluation and award and states that “[i]n order to preserve the integrity of the District procurement system, it is clear the District must resolicit for the required mentoring services.”

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

Our standard of review for proposal evaluations and the selection decision is whether they were reasonable and in accord with the evaluation and selection criteria listed in the solicitation and whether there were material violations of procurement laws or regulations. *Trifax Corp.*, CAB No. P-0539, Sept. 25, 1998, 45 D.C. Reg. 8842, 8847. The District has admitted that the price evaluation and thus the selection decision were seriously flawed. Clearly, the price evaluation was arbitrary and unreasonable when measured against the procurement law and the revised solicitation. We also must conclude that there is inadequate evidence of an independent evaluation of the proposals by the contracting officer, as the record is devoid of supporting documentation of such an evaluation. Finally, we agree with REHMA that the contracting officer unreasonably excluded it from the competitive range. The competitive range “shall be determined on the basis of cost or price and other factors, in accordance with the evaluation criteria that were stated in the solicitation, and shall include all proposals that have a reasonable chance of being selected for award.” 27 DCMR §1620.1. “If there is doubt as to whether a proposal is in the competitive range, the proposal shall be included.” *Id.* §1620.2. “The contracting officer shall notify, in writing, an unsuccessful offeror at the earliest practicable time that its proposal is no longer being considered for award.” *Id.* §1620.3. Here, REHMA’s proposal should have been included in the competitive range as it had a reasonable chance of being selected for award. Its technical evaluation by the TEP was only 2 points below that of the next two higher ranked offerors and within 4 points of the next six higher ranked offerors. Given the discrepancies in the technical scoring by one of the evaluators, the contracting officer should have considered this in his own independent evaluation and invited REHMA for discussions as REHMA had a reasonable prospect of improving its technical evaluation based on meaningful discussions. In the present case, it appears that the contracting officer gave no thought to the possibility that discussions were meant to help improve the offerors’ proposals. Moreover, the contracting officer failed timely to inform REHMA that it had been excluded from the competitive range.

In sum, we sustain the consolidated protests for the serious procurement flaws in the evaluation and selection. We have carefully considered CFSA’s evidence concerning remedies and have decided not to order termination of the contracts but to allow them to expire on September 30, 2008, at which time the District will have in place new awards based on a valid procurement of the mentoring services. Options under the flawed awards shall not be exercised. Because the actions toward REHMA were arbitrary in the evaluation and selection, REHMA is entitled to its proposal

preparation costs pursuant to D.C. Code §2-309.08(f)(2). It shall submit an application for costs and the parties shall attempt to agree on the amount of those costs.

SO ORDERED.

DATED: September 17, 2008

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge