

Man Bites Dog: Low Bidder Not Awarded Federal Contract

Kevin Cosgrove

Most of the time the low bidder will win a government contract. But not always. Sometimes a federal agency will make an award on a best-value trade-off basis. This process can be used “when it may be in the best interest of the Government to consider award to other than the lowest price offeror. . . .” 48 CFR §15.101-1(a). The rationale for accepting the higher priced proposal must be clearly documented. The recent Government Accountability Office’s (“GAO”) bid protest decisions in Worldwide Language Resources Inc., B 420900.3; B 420900.5, (April 26, 2023) and Derivative LLC, B-420687.3; B-420687.4, (May 12, 2023) provide excellent overviews of this process.

Worldwide Language

The United States Army issued a Request for Task Order Proposals (“RTOP”) to provide foreign language interpretation, translation and transmission services. This was to be an indefinite-delivery indefinite-quantity contract (“IDIQ”) pursuant to subpart 16.5 of the Federal Acquisition Regulations (“FAR”). The RTOP explained that the award would be made on a best-value trade-off basis. The two factors that would be considered were technical and cost/price. The technical factor

consisted of five parts and “was significantly more important than cost/price.” Worldwide Language, p. 2. However, the RTOP went on to state that cost/price “may be the controlling factor” if two proposals “are otherwise considered approximately equal under the technical factor.” Id., p. 10.

The Army received proposals from multiple vendors. The two proposals deemed to provide the best value were submitted by Worldwide Language and Valiant Government Services LLC (“Valiant”). Worldwide’s technical proposal was rated as “acceptable” and Valiant’s was rated as “good,” which was a better ranking. On the other hand, Valiant’s price was \$1,405,244,647, while Worldwide’s price was \$1,332,260,386, which was roughly 5% cheaper. The Army awarded the task order to Valiant, finding that it provided the best value and justified “paying a slight premium.” Id., p. 3.¹ After receiving a debriefing, Worldwide filed a protest.

The crux of Worldwide’s protest was that the Army had erred in evaluating its proposal. Worldwide argued that its technical proposal should have been rated as “good,” which would have rendered the competing technical proposals approximately

¹ Only in the Federal procurement world would a price differential of more than \$70 million be considered “slight.”

equal. Once that occurred, Worldwide argued that its lower price should have carried the day. GAO, however, disagreed.

GAO noted that the evaluation of competing proposals “is primarily a matter within the contracting agency’s discretion.” Engility Corp., B-413120.3, et al., Feb. 14, 2017. It is the burden of the protestor to demonstrate that an agency’s evaluation was unreasonable. Protection Strategies, Inc., B-416635, Nov. 1, 2018. Simply disagreeing with an agency’s judgment is not sufficient to demonstrate unreasonableness. Booz Allen Hamilton, Inc., B-417418 et al., July 3, 2019.

Worldwide made a number of arguments in an effort to show that the Army’s evaluation was incorrect. But GAO found that for each allegation of unreasonableness, the Army had proffered reasons for its decisions that were within its discretion. Worldwide also argued that the Army treated its technical proposal differently (and more harshly) than Valiant’s proposal. That is called a “disparate treatment” protest ground. To prevail on a disparate treatment argument, a protestor must show aspects of its proposal were “substantially indistinguishable from, or nearly identical to, other proposals but were treated differently.” Geo Owl, LLC, B-420599, June 13, 2022.

Worldwide was unable to make this showing. GAO found that certain aspects of Valiant’s proposal, while similar to Worldwide’s, were more detailed and robust. These differences were sufficient for the Army to grade Valiant’s technical proposal higher than Worldwide’s. When an agency reasonably determines that technical superiority outweighs a lower price, it is permitted to make an award to the higher priced offeror. Recogniti, LLP, B-410658, Jan. 21, 2015. Worldwide’s protest was therefore denied.

Derivative

In Derivative, the Defense Information Systems Agency (“DISA”) issued a Request for Proposals (“RFP”) seeking systems engineering and technical assistance support services. The RFP contemplated awarding an IDIQ contract using the procedures set forth in FAR 16.5. The contract would be awarded on a best-value tradeoff basis. The three factors that would be considered were technical; past performance; and price. Technical was more important than past performance. Technical and past performance, when combined, were more important than price. Derivative, p. 2. This proposed contract model was very similar to Worldwide Language, which was discussed above.

DISA received 15 proposals and determined that seven of them were in the competitive range. After conducting discussions, DISA awarded the contract to Credence Dynamo Solutions, LLC (“Credence”). Derivative protested this award. After reviewing the allegations in the protest, DISA announced its intent to take corrective action. This rendered Derivative’s protest moot and GAO dismissed it.

DISA’s corrective action involved amending the past performance factor and permitting offerors to revise their past performance submissions. Additional discussions were also held with the offerors in the competitive range. Credence’s proposal was ranked higher than Derivative’s for both the technical and past performance factor, but Derivative’s proposal was roughly 33% cheaper than Credence’s. The contract was again awarded to Credence, and Derivative again protested. Derivative, p. 3.

As in Worldwide Language, GAO explained the relevant legal principles. Determining the relative merits of proposals is “primarily a matter within

the contracting agency's discretion." CSRA LLC, B-417635 et al., Sept. 11, 2019. GAO does not reevaluate proposals, but merely examines the record to determine if the agency was reasonable and followed the evaluation factors and the applicable law. Mission Essential LLC, B-418767, Aug. 31, 2020. A protestor's disagreement with an agency's evaluation does not-by-itself-demonstrate that the agency's decision was unreasonable. CSRA LLC, supra.

DISA identified a possible performance risk in Derivative's proposal. Put simply, DISA was concerned that the salaries Derivative was proposing to pay its staff were not high enough. That could, in turn cause risk of "frequent staff turnover and retention." Derivative, p. 5. The protestor pointed out that its staffing proposal was approved by DISA for the sub-factor of how it would succeed the incumbent contractor. Derivative's argument was this: How can the same staffing plan be deemed acceptable for one part of a contract but unacceptable for another part? Derivative argued this contradiction demonstrated that DISA's evaluation was unreasonable. GAO was not persuaded.

The staffing plan for the phase-in portion of the contract was acceptable. However, the staffing plan for ongoing contract performance was different. It was this part of Derivative's staffing plan with which DISA found fault. These involved different evaluation criteria and different performance requirements. GAO disposed of this argument as follows:

(T)he record shows that DISA reasonably reached different evaluation conclusions based on different portions of Derivative's proposal addressing different RFP requirements.

Derivative, p. 7.

The protestor went on to make the same arguments concerning its cost/price proposal.

DISA's evaluation of Derivative's cost/price proposal concluded that, while the proposal was reasonable, it doubted that Derivative would be able to "retain a qualified, skilled work force." Derivative, p. 8. GAO agreed. "There is nothing inherently unreasonable about an agency determining that proposed costs are realistic, but not without risk to performance." Id. Indeed, an agency may always consider risk as it relates to the stated evaluation factors. Ridoc Enter. Inc., B-292962.4, July 6, 2004. On this record, DISA was found to have acted reasonably.

Derivative's final argument challenged the agency's decisions to assign strengths to certain parts of Credence's proposal and not to assign strengths to its proposal. GAO gave short shrift to this argument. The assignment of strengths and weaknesses in proposals is within the agency's discretion and will not be disturbed by GAO unless that assignment was unreasonable. Protection Strategies, Inc., B-416635, Nov. 1, 2018. GAO found DISA's evaluation of both proposals were supported by the record. Derivative, p. 10-12. This protest was denied.

Taken together, these two matters are instructive for a disappointed offeror contemplating a protest. Once the administrative record is obtained and reviewed by your attorney, ask whether any objective evaluation errors have been found. Remember that mere disagreement with an agency's decision is never enough. You must be able to point to an error committed by the government. If you cannot make that showing, don't throw good money after bad. A lower bid price does not always carry the day.

Kevin Cosgrove
Willcox Savage
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
kcosgrove@wilsav.com
(757) 628-5518