

## **ADVISING OFFEROR 3 TIMES IN DISCUSSIONS THAT ITS PRICE EXCEEDED THE FUNDS AVAILABLE IS NOT MISLEADING**

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The Army's advising an offeror that its proposed price exceeded the amount of funds available for the contract was not misleading, according to the Government Accountability Office ("GAO"). *Zodiac-Poettker HBZ JV, LC*, B-419292, Jan. 15, 2021. Award was made to an offeror whose price was lower than the of funds that were available.

The Army issued a solicitation for the construction of a middle school at Fort Campbell, KY. The procurement included a 10 percent price evaluation preference for HUBZone contractors in accordance with Federal Acquisition Regulation ("FAR") 19.1307. After being advised that the available funding limit for this contract was \$56.2 million, the Contracting Officer ("CO") sent out a discussion letter to correct any weakness in technical proposals, and inviting all offerors to reduce their price (all offers exceeded the amount available).

On three occasions, the CO asked offerors (including Zodiac) to "please take this opportunity to review your proposed price. Please note that the Estimated Contract Cost is \$56.2 million. The Government cannot guarantee funds above this amount will be available for use." In the third letter, the CO also advised that "the Government cannot guarantee funds above this amount will be available for use and may be forced to delay or cancel award of this particular solicitation."

Although Zodiac reduced its price by about \$900,000, its final price was still \$60.942,000—or in excess of the amount available for the contract. The Contracting Officer awarded the contract to A&K, a large business, at a price of \$56,070,000 (below the amount available). It should be noted that the evaluated price, including the HUBZone preference, placed A&K's price at \$61.8 million for evaluation purposes, however the actual award was made at \$56,070,000, the offered price.

Zodiac asserted that although the Army mentioned the funding availability during discussions, it was never advised that submitting a price above the estimate would result in the exclusion of its proposal. The GAO concluded that there had been no misleading discussions. The Army advised Zodiac three times about the available funding limitations and explained the possible outcomes in the last discussion if Zodiac didn't reduce its price. GAO noted that agencies are not required to "spoon feed" offerors during discussions, and the degree of specificity required in discussions is primarily a matter for the CO to determine. In discussions, the Army made clear to Zodiac that affordability and cost constraints were important concerns to the agency, and thereby provided the protester (three times) with sufficient information to give it a fair and reasonable opportunity to address the Army's concerns about its price.

Takeaway. Use caution (particularly in price) when you are advised that your price either exceeds the government's available funds, or is considered too high for the procurement. When you receive such a notification, reduce your offer or withdraw it and seek other opportunities, unless you are likely to have the same outcome that Zodiac had.

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