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Decision

Matter of: Vectronix, Inc.

File: B-407330

Date: December 19, 2012

Kenneth D. Brody, Esq., and Thomas K. David, Esq., David, Brody & Dondershine, LLP, for the protester.

Scott M. McCaleb, Esq., Jon W. Burd, Esq., and Tara L. Ward, Esq., Wiley Rein LLP, and Mark W. Reardon, Esq., The Boeing Company, for the intervenor.

Capt. John Montgomery, Department of the Air Force, for the agency.

Cherie J. Owen, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is denied where agency informed offerors that final proposal revisions (FPR) would supersede any previously submitted revisions and serve as the final executable contract, and protester submitted FPR without incorporating changes proposed during discussions, resulting in a finding of technical unacceptability.

DECISION

Vectronix, Inc., of Ashburn, Virginia, protests the award of a contract to Argon ST, of Orlando, Florida, under request for proposals (RFP) No. FA8629-12-R-2421, issued by the Department of the Air Force to develop a Line of Sight-Short (LOS-S) device. Vectronix contends that the agency improperly determined that the firm's proposal was unacceptable.

We deny the protest.

BACKGROUND

The LOS-S is a targeting device that provides the capability to acquire a target and determine the target's location with greater accuracy and precision. Agency Report (AR) at 1. On February 10, 2012, the agency issued the RFP seeking offerors to provide a lightweight LOS-S device with a single integrated sensor to enhance targeting effectiveness and allow increased situational awareness. Id.

The RFP informed offerors that the agency would select up to two awardees on a best value basis considering the following three factors listed in descending order of importance: technical, past performance and price. AR, Tab 6B, RFP § M, at 2. The technical factor had three subfactors listed in descending order of importance: performance requirements; system engineering and program management; and product support and training. Id. The RFP provided that proposals would be assigned an adjectival rating for each subfactor.¹ The RFP contained an attachment entitled System Requirements Document (SRD) that listed threshold requirements for offerors' systems. See AR, Tab 5, Amended SRD. For example, the SRD required offerors to propose a product that was capable of measuring the range of a target in both "eye-safe" and "non-eye-safe spectrums" within a range of +/- 2 meters. Id. at 14.

As relevant here, under the performance requirements subfactor, § M of the RFP stated:

This subfactor is met when the offeror's proposal . . . [d]efines to the Government a System Specification which meets minimum threshold

¹ The RFP provided the following definitions for the adjectival ratings.

Outstanding--Proposal meet requirements and indicates an exceptional approach and understanding of the requirements. The proposal contains multiple strengths and no deficiencies.

Good--Proposal meets requirements and indicates a thorough approach and understanding of the requirements. Proposal contains at least one strength and no deficiencies.

Acceptable--Proposal meets requirements and indicates an adequate approach and understanding of the requirements. Proposal has no strengths or deficiencies.

Marginal--Proposal does not clearly meet requirements, and has not demonstrated an adequate approach and understanding of the requirements.

Unacceptable--Proposal does not meet requirements and contains one or more deficiencies and is not awardable.

AR, Tab 6B, RFP § M, at 3 (emphasis in original). Because the performance requirements subfactor was the only one under which proposals could be assigned strengths, that subfactor was the only one that could receive ratings of outstanding or good. Id.

requirements [and] which is complete, achievable, and consistent with the SRD.

AR, Tab 6B, RFP § M, at 3.

After receiving the offerors' initial proposals, the source selection evaluation team (SSET) began its evaluation. As a result of the initial evaluation, Vectronix's proposal was rated unacceptable in the performance requirements subfactor, unacceptable under the product support and training subfactor, and marginal under the system engineering and program management subfactor. AR, Tab 15S, SSET Initial Briefing, at 19. The agency noted several aspects of Vectronix's proposal that failed to satisfy the minimum requirements of the RFP. For example, under the performance requirements subfactor, the agency assigned a deficiency because the system specification submitted by Vectronix stated that the accuracy of its "eye safe" laser was +/- 2 meters, but the "non eye safe" range accuracy was within +/- 3 meters. AR, Tab 15S, Evaluation Notice, at 1; AR, Tab 13F, Vectronix Proposal Volume VI, at 47.

After its initial evaluation, the agency opened discussions by issuing evaluation notices to the offerors. For example, with regard to the requirement for products to offer accuracy ranges within +/- 2 meters for both both eye safe and non-eye-safe lasers, the agency asked Vectronix to clarify the range accuracy of its non-eye-safe laser. AR, Tab 15S, Evaluation Notice, at 1-2.

Vectronix responded to each of the discussion questions in the evaluation notices by providing a narrative response and, in some places, proposal change pages.² With regard to the range accuracy of its lasers, Vectronix indicated that its system specifications contained an error, and that the accuracy of both lasers was within +/- 2 meters, as required by the solicitation. AR, Tab 17, SSET Pre-Final Proposal Revision (Pre-FPR) Briefing, at 38.

After several rounds of discussions, involving nearly fifty evaluation notices, Protest at 5, the SSET performed a pre-FPR evaluation. As a result of this evaluation, Vectronix's proposal was rated outstanding in the performance requirements subfactor, acceptable under the system engineering and program management

² Vectronix's response to the discussion questions stated that change pages were included only for those pages of the original proposal that contained information that was now incorrect. To the extent that Vectronix was simply adding additional information, it did not supply proposal change pages, but stated that they could be forwarded upon request if desired. AR, Tab 16A, Vectronix Response to Evaluation Notices, at 2.

subfactor, and acceptable under the product support and training subfactor.³ AR, Tab 17, SSET Pre-FPR Briefing, at 26.

On July 13, the agency sent offerors a request for FPRs. The request provided offerors with their pre-FPR ratings and contained instructions for submitting FPRs. The letter instructed offerors to respond in two phases. AR, Tab 18, Request for FPRs, at 1. First, offerors were required to review and confirm the model contract documents. Specifically, the letter contained the following instructions:

This FPR request package represents the model contract documents, including attachments, as they have evolved through discussions. (Including all change pages.) Before submitting your FPR response, you are advised to review this entire FPR request package and initially respond with either an acknowledgement of acceptability or otherwise written notice identifying any necessary corrections or changes to these documents. . . . If the documents are acceptable, the offeror is required to submit conformed copies of all the final contract attachments (IMP [integrated master plan], SOW [statement of work], Spec [system specification], and CLIN Matrix) in your final proposal revision.

Id. (emphasis omitted). Offerors were to identify any necessary corrections or changes to the documents and acknowledge the acceptability of all documents via e-mail by 4:00 pm on July 17. Id.

In the second phase of submitting FPRs, offerors were to submit their FPRs in physical form, no later than 10:00 am on July 23. Id. at 1-2. As relevant here, the letter stated:

If you desire to submit a FPR, it must be . . . by completion and submittal of the attached model contract documents, and will supersede any previous revision(s) you have submitted. Any part of your previous proposal that is not addressed in your final proposal revision will remain valid unless otherwise stated. . . . You are cautioned that any proposal changes introduced with the FPR are submitted at the offeror's own risk, as all such changes are subject to further evaluation by the SSET, without aid of any further discussion with the offeror.

Id. at 2.

³ As explained above, because the systems engineering and program management subfactor and the product support and training subfactor could not be assigned strengths, these ratings were the highest adjectival ratings possible under the solicitation's evaluation scheme.

The letter further stated that:

The proposed model contract is attached hereto. This model contract document should be completed and submitted as your FPR. . . . This model contract reflects all applicable terms and conditions, and once completed, will serve as the executable contract should you be determined the successful offeror.

Id.

The model contract documents that the agency sent with its request for FPRs appear to be the initial contract documents with proposal change pages inserted where they had been supplied by Vectronix during discussions. Where proposal change pages had not been supplied, the agency did not modify the contract documents to reflect the additional information provided by Vectronix in narrative form. See, e.g., AR, Tab 16B, Vectronix Discussions Responses, at 20-21; AR, Tab 19D, Vectronix FPR, at 36.

On July 17, Vectronix sent a message to the contracting officer stating that it had fully reviewed the contract documents and had identified three items related to price that needed to be changed in the contract documents. AR, Tab 19C, Vectronix Pre-FPR E-mail, at 2-3. For example, Vectronix noted that on page 2 of the model contract, the price had not been updated in accordance with the firm's responses during discussions, and instead contained the initial, pre-discussions price. Id. On July 18, the firm again e-mailed the agency stating that the system specifications did not incorporate one of the changes made during discussions for which the firm had provided a proposal change page. Protest, Exhibit B, E-mail Correspondence, at 1. In response, the agency stated that since Vectronix had already submitted the proposal change page during discussions, it should just provide the conformed final copy when it submitted its FPR, stating, "One of the reasons we sent you the Spec with the change pages is to make sure that everyone caught everything before the FPR." AR, Tab 19C, Vectronix Pre-FPR E-mail, at 1. Once these issues had been addressed, Vectronix sent an e-mail to the agency stating the following:

We do not have any revisions required to the documents forwarded with the FPR Letter.

To confirm our next steps, then since we do not have any revisions, what do you require as our FPR - the Model Contract document with the numbers completed, copies of the other documents sent with the FPR Letter, anything else?

Id. at 2. In response, the contracting officer stated: "Since you have no revisions, what I need are the final/conformed copies of the 4 attachments I sent you (IMP, CLIN Matrix, SOW and Spec) in both electronic and hard copy." Id.

Vectronix submitted its FPR by the July 23 deadline. Its submission included copies of the model contract attachment documents, including the SOW and Spec with changes highlighted in track changes.⁴ See, e.g., AR, Tab 19D at 23, 25, 36, 37. Its submission stated that the documents submitted in its FPR were the “final/conformed versions.” AR, Tab 19D, Vectronix FPR, at 2.

After receiving FPRs, the SSET performed its final evaluation. Under the technical evaluation factor, Vectronix’s proposal was rated unacceptable under the performance requirements subfactor, unacceptable under the product support and training subfactor, and acceptable under the system engineering and program management subfactor. AR, Tab 20, Final Evaluation Briefing, at 20. Specifically, the agency found that Vectronix’s FPR contained many of the same deficiencies noted in the offeror’s initial proposal and was deficient in four areas under the performance requirements subfactor and in two areas under the product support and training subfactor. *Id.* at 92-99, 109-110. For example, under the performance requirements subfactor, the agency found that Vectronix’s system specification, which was to serve as part of the final executable contract, stated that the accuracy of its “eye safe” laser was +/- 2 meters, but the “non eye safe” range accuracy was within +/- 3 meters. AR, Tab 19D, Vectronix FPR, at 44; AR, Tab 20, Final Evaluation Briefing, at 32. The parties agree that each of the deficiencies associated with Vectronix’s final proposal were discussed in Vectronix’s responses to evaluation notices during discussions, but were not incorporated into the FPR. AR at 6; Protest at 5.

Because Vectronix’s proposal was evaluated to be unacceptable overall, it was not considered to be eligible for award. CO Statement at 11. On August 30, the agency informed Vectronix that award had been made to Argon. This protest followed.

DISCUSSION

Vectronix contends that the terms of the RFP, along with the contracting officer’s communications with the firm led it to reasonably conclude that it had satisfied its requirements in responding to the solicitation and request for FPRs. Protest at 8. The protester argues that the agency improperly failed to consider its responses to evaluation notices in conducting the final evaluation, resulting in an improper

⁴ These changes correspond to the proposal change pages supplied by Vectronix during discussions. It appears that after receiving the model contract documents Vectronix did not make any changes to them to reflect the narrative responses supplied during discussions and instead confirmed that they were the correct conformed contract documents after changing only the price-related elements that remained from the initial proposal and inserting one proposal change page that had been supplied during discussions.

technical evaluation. Vectronix also asserts that the agency misled it into not submitting its responses during discussions as part of its FPR.

In reviewing protests challenging the evaluation of proposals, we do not conduct a new evaluation or substitute our judgment for that of the agency, but examine the record to determine whether the agency's judgment was reasonable and in accord with the solicitation's evaluation criteria. Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. Where a protester challenges the agency's evaluation and source selection, we will review the evaluation and award decision to determine if they were reasonable, consistent with the solicitation's evaluation scheme, as well as procurement statutes and regulations, and adequately documented. Integrated Science Solutions, Inc., B-406987, B-406987.2, Oct. 10, 2012, 2012 CPD ¶ 290 at 9.

Here, as set forth above, the instructions accompanying the agency's July 13 request for FPRs instructed offerors to review the entire FPR package, including final, conformed model contract documents and ensure that they were correct and reflected the changes made as the documents had evolved through discussions. AR, Tab 18, Request for FPRs, at 2. The FPR request stated that the model contract must reflect all applicable terms and conditions and, once completed, would serve as the executable contract for the awardee. If an offeror found that the model contract documents contained errors, the offeror was to identify changes or corrections that needed to be made. The request for FPRs also informed offerors that the model contract documents submitted as their FPRs would supersede any previous revisions they had submitted. AR, Tab 18, Request for FPRs, at 2. Since these instructions were disseminated in writing to all offerors and were signed by the contracting officer, they constituted an amendment to the RFP. Humana Military Healthcare Svcs., B-401652.2, et al., Oct. 28, 2009, 2009 CPD ¶ 219 at 11; SelectTech Bering Straits Solutions JV; Croop-LaFrance, Inc., B-400964 et al., Apr. 6, 2009, 2009 CPD ¶ 100 at 5; Proteccion Total/Magnum Sec., S.A., B-278129.4, May 12, 1998, 98-1 CPD ¶ 137 at 3.

On July 22, Vectronix submitted its FPR containing the model contract documents that were to supersede any previous revisions they had submitted and become the final executable contract. However, Vectronix's FPR documents reflected several of the same deficiencies the agency had identified in its initial evaluation. For example, Vectronix's system specification stated that its non-eye-safe range accuracy was within +/- 3 meters, which was less accurate than the solicitation's requirement for an accuracy range of within +/- 2 meters.⁵ AR, Tab 19D, Vectronix FPR, at 44.

⁵ In other examples, Vectronix's system specification failed to address how its product would meet the SRD's physical dimension requirements that size not exceed 9 inches in length and 3.5 inches in diameter; and instead promised a binocular style design that the agency had already determined exceeded the RFP's size limits. AR, Tab 5, SRD, at 12; AR, Tab 19D, Vectronix FPR, at 42, 47. Vectronix's system specification also failed to comply with the RFP's requirement that the product

(continued...)

Vectronix's FPR, which reverted to many of the deficiencies noted in the initial proposal, superceded the protester's statements to the contrary in discussions. Based on this record, we find that the agency's evaluation of Vectronix's proposal as unacceptable for failing to meet the solicitation's technical requirements was reasonable.

Vectronix also contends that the agency misled it into submitting a deficient FPR, resulting in misleading discussions. Specifically, the protester cites an e-mail in which it asked the contracting officer whether anything additional was needed, and the agency responded that nothing further was required.

In negotiated procurements, whenever discussions are conducted by an agency, they are required to be meaningful, equitable, and not misleading. Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 19. Where the manner in which an agency communicates with an offeror during discussions misleads an offeror into responding in a way that does not address the agency's concerns, the discussions are inadequate. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6-7.

The agency argues, and we agree, that when read in context, the agency's statements were not misleading. Specifically, as set forth above, the protester stated that it did not have any revisions to the model contract documents and asked, "since we do not have any revisions, what do you require as our FPR?" AR, Tab 19C, Vectronix Pre-FPR E-mail, at 2. In response, the contracting officer stated that since the firm did not want to make any revisions to the model contract documents, it needed only to submit the "final/conformed copies" of the model contract documents. Id. The contracting officer's statement that Vectronix was not required to make any additional submissions was premised on the protester's statement that it had no revisions to the model contract documents. We find nothing in the contracting officer's statements to be incorrect or misleading. Therefore, this protest ground is denied.

The protest is denied.

Susan A. Poling
General Counsel

(...continued)

display a warning or notice when a coordinate is pulled without using GPS. AR, Tab 5, SRD, at 10; AR, Tab 19D, Vectronix FPR, at 38.