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Decision

Matter of: Industries for the Blind, Inc.

File: B-409528.35; B-409528.36

Date: December 3, 2014

Thomas A. Coulter, Esq., and Nicole Hardin Brakstad, Esq., LeClair Ryan PC, for the protester.

Holly A. Roth, Esq., and Elizabeth C. Johnson, Esq., Kelley Drye & Warren LLP, for Capitol Supply Inc., the intervenor.

Christopher Murphy, Esq., and Kristen Nowadly, Esq., General Services Administration, for the agency.

Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency unreasonably excluded the protester, an other than small business, from award is denied where the agency reasonably limited the award to small businesses based on the language of the solicitation, and where, to the extent the evaluation criteria were ambiguous, the protester failed to timely protest any patent ambiguities.

DECISION

Industries for the Blind, Inc. (IB), of West Allis, Wisconsin, an other than small business, protests the award of contracts to 13 small business firms and two service-disabled, veteran-owned small business (SDVOSB) firms by the General Services Administration (GSA) under request for proposals (RFP) No. GSQ02-14-R-SA0001, contract line item number (CLIN) No. 1, for a full range of office supply items that will be available for order by participating agencies.¹ IB argues that the agency failed to evaluate the proposals in accordance with the evaluation criteria. Specifically, the protester contends that the agency failed to conduct a best-value evaluation that meaningfully considered IB's price.

¹ IB is a 501(c)(3) non-profit entity, dedicated to providing employment opportunities to blind professionals. IB is not related to, or affiliated with, National Industries for the Blind. Protest at 5 n.1.

We deny the protest.

BACKGROUND

GSA issued the solicitation on January 31, 2014. The RFP sought proposals for the award of multiple indefinite-delivery, indefinite-quantity (ID/IQ) contracts for GSA's Office Supplies Third Generation (OS3) program, which will be available for use by the entire federal government. RFP, Statement of Work (SOW), at 3.²

The RFP anticipated separate awards under each of four CLINs. The solicitation stated that for CLIN Nos. 1, 2 and 3, award would be made on a best-value basis. RFP, SOW, at 3. For CLIN No. 4, award was to be made to the offeror that submitted the lowest-priced, technically acceptable offer. Id. The solicitation anticipated the award of approximately 24 contracts with fixed-unit-prices (with economic price adjustments), for a base period of 1 year and four 1-year options. RFP at 2.³ This protest concerns CLIN No. 1, for general office products.

The RFP provided that technical proposals for CLIN No. 1 would be evaluated on a "go/no-go" basis. RFP, SOW, at 36. The evaluation process consisted of three steps: (1) a proposal compliance review⁴, (2) an evaluation of technical proposals, and (3) the price evaluation. Id. at 42. The solicitation stated that only proposals that were found to be acceptable under all seven of the technical evaluation subfactors would proceed to the price evaluation stage. Id. at 36.

As relevant here, the RFP stated in three locations that the agency had a "preference" for awards to small businesses. First, the RFP stated that for CLIN No. 1, the agency anticipated 15 awards, and that the agency had a "significant preference for small businesses over other than small businesses."⁵ RFP, SOW, at 3. For 2 of these 15 awards, there was a "significant preference" for SDVOSB firms over other small businesses. Id. For one of these awards, there was a

² Citations to the RFP and SOW are to the conformed copies provided by the agency.

³ The agency advised that the estimated spending over the 5-year term of this contract is \$1.25 billion. Agency's Request for Dismissal (Sept. 16, 2014) at 1.

⁴ The proposal compliance review was to verify that the proposals provided all the required information and documents in the format and detail specified, and that all required forms and certifications were complete. RFP, SOW, at 42.

⁵ We note that the solicitation and the agency's evaluation appear to use the phrases "strong preference," and "significant preference," interchangeably. See RFP, SOW, at 4.

“significant preference” for a small business which partners with at least 25 other small businesses, over small businesses and other than small businesses. Id. Additionally, the RFP stated that HUBZone firms would receive a “1% price preference” that is “calculated in the form of a price reduction of the evaluated price.” Id.

Second, the RFP stated the following concerning socio-economic objectives:

There is a strong preference for small business participation for CLINS one, two and three. Achievement of socio-economic objectives will be designated as an evaluation factor, which is significantly more important than price and other non-price factors.

Id. at 4.

Third, the RFP repeated the provision above, with an additional explanation concerning the best-value award decision:

There is a strong preference for small business participation for CLINS one, two and three. Achievement of socio-economic objectives will be designated as an evaluation factor, which is significantly more important than price and other non-price factors. This will result in best-value proposals being those from small business contractors.

Id. at 38 (emphasis added).

Our Office received numerous protests from firms prior to the closing date of March 24, each of which argued that GSA’s procurement approach for the OS3 program had not adequately considered the effect of consolidation on small businesses. American Toner & Ink et al., B-409528.7 et al., June 9, 2014, 2014 CPD ¶ 161 at 5. Our Office denied the protests, finding that GSA reasonably considered the potential impact of its procurement approach on small businesses, and also reasonably concluded that the consolidation would result in substantial benefits to the government. Id. at 10.

GSA evaluated the technical merit of each proposal on a go/no-go basis, based on the technical subfactors included for each CLIN. Source Selection Authority Decision at 3. The agency found IB’s proposal for CLIN No. 1 to be responsive and technically acceptable; however, the agency concluded that it was not among the best-value proposals, considering price and socio-economic status, as stated in the

evaluation criteria.⁶ See id. at 12-13; Protest at 10. In this regard, although IB's evaluated price of \$157,917,775 was lower than the evaluated prices of six of the small business offerors selected for award, the award decision did not list the protester's proposal as one of the firms eligible for award. See id. at 12. As GSA explained in its response to the protest, IB's proposal was not selected for award because the solicitation stated that only small business offerors would be considered the best value to the government. See Agency's Request for Dismissal (Sept. 16, 2014) at 3-5.

GSA made awards under CLIN No. 1 to 13 small business and SDVOSB firms, with prices ranging from \$154,183,573 to \$166,983,607. Source Selection Authority Decision at 12. This protest to our Office followed.

DISCUSSION

IB argues that GSA failed to conduct a best-value evaluation consistent with the solicitation's evaluation criteria. Specifically, the protester argues that the agency failed to meaningfully consider IB's evaluated price relative to the prices of other offerors that received a socio-economic preference. Instead, IB asserts that the agency improperly determined that because IB was not a small business, it was ineligible for award.⁷ For the reasons discussed below, we find no basis to sustain the protest.

IB primarily argues that the RFP did not state that the competition was limited to small businesses, or precluded other than small offerors from receiving award. The protester notes that although the RFP stated for CLIN No. 1 that "[t]he government has significant preference for small businesses over other than small businesses," id. at 3, small business size status was not listed as a go/no-go factor in the solicitation. Instead, the protester argues, the RFP provided for a best-value

⁶ The evaluated prices for the CLIN No. 1 small business awardees ranged from \$154.1 million to \$163.7 million; IB's evaluated price was \$157.9 million. Source Selection Authority Decision at 12; Protest at 10.

⁷ IB notes that although its proposal was not cited in GSA's award decision, the agency stated with regard to [DELETED], an other than small firm, that "[DELETED] proposed on CLINs 0001, 0002, and 0003 and had the lowest adjusted market basket prices for CLINs 0001 and 0002, however a best value determination could not be made for them as they are not certified as a small business." Source Selection Authority Decision at 16. The protester contends that this discussion demonstrates that the agency improperly excluded other than small firms, such as IB, from award. For the reasons discussed below, we conclude that the agency's evaluation was consistent with the terms of the solicitation.

decision based on consideration of both price and socio-economic status. In response to the protest, GSA argues that the RFP, read as a whole, informed vendors that the best-value proposals would be from small business contractors. Agency's Request for Dismissal (Sept. 16, 2014) at 3-4; Agency's Supp. Request for Dismissal (Oct. 2, 2014) at 3-4.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2; Fox Dev. Corp., B-287118.2, Aug. 3, 2001, 2001 CPD ¶ 140 at 2.

Here, we agree with IB that the solicitation was not specifically set aside for small businesses, and also agree that an offeror's small business status was not listed as a go/no-go evaluation subfactor. Nonetheless, we agree with GSA that the RFP specifically advised offerors of the agency's intent to award contracts to small businesses. As discussed above, the solicitation stated that there would be a "significant preference for small businesses over other than small businesses" and that there was a "strong preference for small business participation for CLINS one, two and three." RFP, SOW, at 3-4. Moreover, the RFP also advised that "[a]chievement of socio-economic objectives will be designated as an evaluation factor," and further advised that the application of this evaluation factor "will result in best-value proposals being those from small business contractors." Id. at 38.

Although the RFP did not expressly state that other than small business offerors were precluded from award, we cannot ignore the solicitation's statement that the evaluation preference for small businesses would "result in best-value proposals being those from small business contractors." Id. We conclude that the agency's interpretation of the RFP, as reflected in its award decision, was consistent with the terms of the solicitation--which provided for a best-value award decision under circumstances where only small business offerors would be found the best value.⁸

⁸ IB notes that our decision in American Toner & Ink, stated that "[t]he RFP does not state that any awards are expressly reserved for small businesses, or that other than small firms are prohibited from competing." American Toner & Ink et al., supra, at 3. Our decision in American Toner & Ink concerned challenges raised by small businesses concerning GSA's consolidation analysis, and did not involve a specific challenge as to whether other than small firms could compete. See id. at 10. In any event, our decision intended to convey our view that the RFP did not expressly set aside awards for small business or preclude other than small firms from competing. We did not address or intend to address the issue raised by the protester here.

Although we find this solicitation language concerning the best-value selection criteria somewhat unusual, we think that offerors were on notice that the agency would apply the socio-economic preference in a manner that would, effectively, preclude other than small business offerors from receiving an award. For this reason, we conclude that the plain language of the RFP, when read as a whole, and in a manner that gives effect to all its provisions, demonstrates that the agency's award decisions were reasonable and consistent with the terms of the solicitation.⁹

The protest is denied.

Susan A. Poling
General Counsel

⁹ To the extent IB argues that the RFP was ambiguous or unclear concerning the application of the socio-economic objective evaluation preferences, we find that this argument challenges, at best, a patent ambiguity in the solicitation. Under our Bid Protest Regulations, protests of alleged apparent solicitation improprieties must be filed prior to the closing time for receipt of quotations. See 4 C.F.R. § 21.2(a)(1) (2014); Savvee Consulting, Inc., B-408623, B-408623.2, Nov. 8, 2013, 2013 CPD ¶ 265 at 5-6.