



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Montage Inc.

File: B-414772

Date: September 7, 2017

Shiva S. Hamidinia, Esq., Odin Feldman Pittleman PC, for the protester.
John E. McCarthy Jr., Esq., and Hart Wood, Esq., Crowell & Moring LLP, for the intervenor.
Jessica Lane Day, Esq., Department of Justice, for the agency.
Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that proposal was improperly rejected for failure to submit bid bond/offer guarantee is denied where solicitation required offerors to submit the bid bond/offer guarantee with their proposals.

DECISION

Montage, Inc., of Washington, D.C., protests the rejection of the offer it submitted in response to request for task order proposals (RFTOP) No. DJF-16-R-0000016, issued by the Department of Justice, Federal Bureau of Investigation (FBI), for construction work at the FBI Academy in Quantico, Virginia. Montage asserts that the agency improperly rejected its proposal for failing to provide a bid bond and the names of the subcontractors it planned to use.

We deny the protest.

BACKGROUND

The solicitation was issued on February 21, 2017 to all companies holding one of the FBI's small multiple-award indefinite-delivery, indefinite-quantity (IDIQ) construction

contracts.¹ RFTOP at 9. The solicitation stated that award would be made to the offeror that represented the best value to the government, after considering the technical factor and price. Id. at 17-18. The solicitation also stated that the agency would first determine whether an offeror met the payment and performance bonding requirements and that any offeror that did not provide supporting documentation from a bonding company showing it is bondable for the entire proposed amount would be given no further consideration. Id. at 17. The solicitation stated that the agency intended to make an award based on initial offers, without discussions. Id.

With respect to the bonding requirements, the solicitation provided that “an offer guarantee is required” and further stated the offeror shall provide supporting documentation from a bonding company showing the offeror has the ability to obtain a payment and performance bond for at least the full amount of the proposed price. Id. at 1, 14. In addition, the RFTOP overview explained that, in accordance with Federal Acquisition Regulation (FAR) § 28.102-1, “Performance and Payment bonds are [] required” and, in accordance with FAR § 28.101-1, “Bid Bond (Offer Guarantee) is [] required.” RFTOP Overview at 2. Further, before the due date for proposals, an offeror questioned whether the submission of a bid bond was sufficient to meet the requirement to provide supporting documentation from a bonding company showing that the offeror has the ability to obtain a performance and payment bond for the full amount of the contractor’s proposed price. RFTOP amend. 0005, Questions and Answers No. 24. The agency answered no, and explained that the solicitation required offerors to submit three separate bonds for this task order: a performance bond, a payment bond, and a bid bond or offer guarantee. Id.

The agency rated Montage as acceptable under the technical factor and determined its price was complete and reasonable. Notification to Unsuccessful Offeror at 1. However, Montage’s proposal was rejected as unacceptable because Montage failed to submit a bid bond and to name the subcontractors it intended to utilize to perform the task order. Id. Following a debriefing, Montage filed this protest with our Office.

DISCUSSION

Montage argues that the solicitation did not require offerors to provide a bid bond/offer guarantee since the solicitation incorporated FAR clause 52.228-2, Additional Bond Security, which requires performance and payment bond guarantees, but not FAR clause 52.228-1, Bid Guarantee, which requires offerors to post a bid bond. Montage asserts that the agency is required by FAR § 28.101-2 to include FAR clause 52.228-1 in a solicitation when a bid bond/offer guarantee is required. Montage further asserts in this regard, that the solicitation did not include the required amount of the bid bond/offer guarantee which the agency would also be required to provide in accordance with FAR

¹ The awarded value of the task order was \$13,653,599. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under civilian agency multiple-award IDIQ contracts. 41 U.S.C. § 4106(f)(2).

clause 52.228-1, if one was required. Montage asserts that the solicitation was therefore at best ambiguous with respect to the requirement to provide a bid bond/offer guarantee.

In our view, the solicitation clearly required offerors to submit a bid bond/offer guarantee; it was not ambiguous. The solicitation specifically stated that in accordance with FAR § 28.101-1,² “Bid Bond (Offer Guarantee) is []required.” RFTOP Overview at 2. Further, an amendment to the solicitation incorporated questions and answers where the agency explained that the solicitation required offerors to submit three separate bonds for this task order: a performance bond, a payment bond, and a bid bond or offer guarantee, making it clear that providing a bid bond/offer guarantee was a separate requirement from the requirement to provide documentation showing the ability to obtain a performance and payment bond. RFTOP amend. 0005, Questions and Answers No. 24.

However, assuming for the sake of discussion that Montage has identified an ambiguity with respect to the solicitation from the agency’s failure to include the required FAR clauses, the ambiguity was patent, that is, clear from the face of the solicitation. Under our Bid Protest Regulations, a patent ambiguity must be protested prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); Cleveland Telecomms. Corp., B-247964.3, July 23, 1992, 92-2 CPD ¶ 47 at 3-5. An offeror that chooses to compete under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the agency proceeds in a way inconsistent with its interpretation. CardioMetrix, B-274585, Nov. 18, 1996, 96-2 CPD ¶ 190 at 3. Here, since Montage did not file its protest until after the closing date for the receipt of proposals, its complaint that the solicitation is ambiguous is untimely.

Montage also asserts that the agency could only reject proposals for failure to meet the performance and payment bond requirement, not failure to provide a bid bond, and the agency should have opened discussions to allow Montage to submit the bid bond/offer guarantee. Where, as here, award is made on the basis of initial proposals without discussions, noncompliance with a solicitation requirement for a bid guarantee requires rejection of a proposal as unacceptable (except in situations not present here). FAR § 28.101-4(b); Bob Cummins Constr. Co., B-406812.2, Aug. 28, 2012, 2012 CPD ¶ 243 at 4. We will generally not review an agency’s decision not to initiate discussions, where, as here, the solicitation notified offerors that the agency intends to make award on the basis of initial proposals. Kiewit Louisiana Co., B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 at 3. The fact that a protester in its proposal failed to comply with the RFP

² Section 28.101-1 of the FAR states that bid guarantees shall be required whenever a performance bond or performance and payment bond is required, unless the chief of the contracting office waives the requirement.

requirements does not give rise to an obligation on the agency's part to hold discussions, where discussions are not otherwise necessary. Trace Systems, Inc., B-404811.4, B-404811.7, June 2, 2011, 2011 CPD ¶ 116 at 5.

Montage also protests that its proposal was improperly rejected because it submitted a letter from its surety that complied fully with FAR clause 52.228-2, which requires performance and payment bond guarantees, and that this letter should have been viewed by the agency as sufficient to satisfy any "alleged bid guarantee requirements." Protest at 11. However, contrary to Montage's assertions, as discussed above, the solicitation clearly informed offerors that they were also required to provide an offer guarantee/bid bond. Since Montage did not submit the required bond, the agency properly rejected its proposal.³

Finally, Montage challenges the evaluation of its proposal, and the best-value determination. Since Montage's proposal was properly rejected, Montage is not an interested party to raise these issues. Under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1)(2017). A protester is not an interested party where it would not be eligible to receive a contract award were its protest to be sustained. International Training, Inc., B-272699, Oct. 2, 1996, 96-2 CPD ¶ 132 at 2.

The protest is denied.

Susan A. Poling
General Counsel

³ With respect to subcontractors, the solicitation provided that "[t]he offeror shall identify major subcontractors who will be involved with the performance or management of the program work for this solicitation." RFTOP at 15. Montage's offer was rejected because it listed subcontractors by trade, and not by name. Montage protests that the solicitation did not require offerors to list their subcontractors by name. Since Montage's proposal was properly rejected for failing to provide a bid bond/offer guarantee we need not address this issue.