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Decision

Matter of: Sealift, Inc.
File: B-409001
Date: January 6, 2014

Robert E. Korroch, Esq., Anthony H. Anikeef, Esq., and William A. Wozniak, Esq., Williams Mullen, for the protester.

Scott A. Schipma, Esq., and Bryant E. Gardner, Esq., Winston & Strawn LLP, for the intervenor.

Kimberly Foxx, Esq., Kelly E. Rogers, Esq., and Gordon Ivins, Esq., Department of the Navy, for the agency.

Noah B. Bleicher, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's proposal violates solicitation's limitation on subcontracting is denied where the awardee's proposal does not, on its face, indicate that the awardee would not comply with the limitation.
 2. Protest that agency unreasonably relied on awardee's warranties of compliance with various other solicitation requirements is denied where there was no significant countervailing evidence that should have created doubt about whether the offeror would comply with the requirements.
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DECISION

Sealift, Inc., of Oyster Bay, New York, protests the award of a contract to Schuyler Line Navigation Company, LLC, of Annapolis, Maryland, under request for proposals (RFP) No. N00033-13-R-5401, issued by the Department of the Navy for the charter of a shallow draft tanker. Sealift challenges the agency's determination that the awardee's proposal was technically acceptable.

We deny the protest.

BACKGROUND

The RFP, which the Navy's Military Sealift Command issued as a small business set-aside on February 22, 2013, contemplated the award of a fixed-price contract for the charter of a shallow draft tanker for a 12-month base period and three 12-month and one 11-month option periods. Contracting Officer's Statement at 1. The vessel was expected to operate in the Far East to support the movement of petroleum product. RFP § C-2.1.

The solicitation identified numerous specifications and capabilities that the Navy required of the proposed vessels. For example, the vessel was to be a "U.S. flag, clean, approved, epoxy coated, complete double hull product tanker with a maximum age of 15 years throughout [the] life of charter." RFP § C-3.1.1(a). It was to possess the ability to perform cargo operations pier side and at anchorage. RFP §§ C-3.2(b) and (c). Additionally, as relevant here, the vessel was to be party to the Ship Inspection Reporting System (SIRE), as well as meet all Oil Company International Marine Forum (OCIMF) inspection requirements. RFP §§ C-3.1.2, C-3.1.3.

In addition to the vessel requirements, the RFP identified various requirements of the offerors. For example, the RFP required that the "Contractor . . . have a facility clearance at the Secret level with the capability to store classified information up to the secret level. . . ." RFP § C-6. Moreover, the RFP required offerors to submit to the agency various documents and certificates "under the Contractor's name as owner . . . 30 days prior to delivery of the vessel." RFP § C-15.1. As relevant here, the documentation included, for example, a safety management certificate (SMC), international ship security certificate (ISSC), and a document of compliance (DOC). Id.

Additionally, because the procurement was set aside for small businesses, the RFP incorporated by reference the "Limitation on Subcontracting" clause set forth at Federal Acquisition Regulation (FAR) § 52.219-14. RFP at AR00144. This clause requires that "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern." FAR § 52.219-14.

The solicitation advised that award would be made on a lowest-price, technically acceptable basis.¹ RFP § M-1. In this regard, the RFP identified two non-price factors--technical (vessel and deliverables) and past performance--that the agency

¹ Pursuant to the RFP, award would be made "to the offeror with the lowest evaluated price proposal conforming fully to the solicitation requirements and meeting the standards for non-price factors, which means being technically acceptable, having [a]cceptable past performance, and meeting all submission[] requirements pursuant to Section L [of the RFP]." RFP § M-1.

would evaluate to determine technical acceptability. RFP § M-2.1. Of relevance to this protest, under the technical factor, the agency would evaluate proposals to:

determine that the proposed vessel meets the requirements of Section C-3 [of the RFP] and proposal warranty of C-15.1 deliverables. Evaluation will include ensuring contractors provide either documentation demonstrating their compliance with each requirement in Section C-3, or warranty that they will comply with each item in Section C-3. Evaluation will include ensuring contractors have warranted that they will provide the specific documentation listed in Section C-15.1 30 days prior to delivery of the vessel. Evaluation will also include ensuring contractors provided all documentation required in Section L-5(b)(1) through (18). . . . Offerors shall also warrant that they acknowledge and will comply with all terms and conditions of the RFP.

RFP § M-2.2.

The agency received offers from three firms--including proposals from Sealift and Schuyler--prior to the RFP's March 29, 2013 submission deadline. The three offers were included in the competitive range, and the agency held two rounds of discussions with the offerors in May and June. AR, Tab 6, Post-Negotiation Business Clearance Memorandum, at 5, 6. Following submission of final proposal revisions, the agency determined that both Schuyler's and Sealift's proposals were technically acceptable under the two non-price factors.² *Id.* at 8. Schuyler's total evaluated price was \$51,105,780.37; Sealift's total evaluated price was \$52,525,177.73. *Id.* at 7. Based on Schuyler's lowest-priced, technically-acceptable offer, the Navy awarded Schuyler a contract on September 23. AR, Tab 12, Source Selection Decision Document, at 2; AR, Tab 15, Award Notification, at 1. This protest followed.

DISCUSSION

Sealift challenges the agency's determination that Schuyler's proposal was technically acceptable. Specifically, Sealift argues that Schuyler's proposal did not comply with the solicitation's limitation on subcontracting clause and that the agency unreasonably relied on Schuyler's warranties that it would comply with the RFP's documentation and vessel requirements. Protest at 6-8; Comments at 9-10.

First, Sealift contends that Schuyler's proposal did not comply with the solicitation's limitation on subcontracting clause. In this regard, Sealift argues that the majority of

² The third offeror withdrew its proposal after it submitted its final proposal revision. AR, Tab 6, Post-Negotiation Business Clearance Memorandum, at 6.

the crew on Schuyler's vessel would be employed by Schuyler's subcontractor, Patriot Contract Services. Protest at 6. As a result, asserts Sealift, the majority of the cost of performance for personnel would be incurred by Patriot, not Schuyler, and, therefore, the proposal failed to comply with the limitation on subcontracting clause. Id.

As a general matter, an agency's judgment as to whether a small business offeror will be able to comply with a subcontracting limitation presents a question of responsibility not subject to our review. Dorado Services, Inc., B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 11; Spectrum Sec. Servs., Inc., B-297320.2, B-297320.3, Dec. 29, 2005, 2005 CPD ¶ 227 at 6. However, where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal's acceptability. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5.

Of significance here, in its initial proposal, Schuyler stated as follows:

For this project, [Schuyler] has teamed with Patriot Contract Services, LLC / Patriot Maritime Compliance, LLC as vessel management and crewing subcontractor. Since both [Schuyler] and Patriot are small businesses, the Far East Tanker time charter would be wholly performed by small business.

AR, Tab 18, Schuyler Proposal at AR00322. In response to this statement in Schuyler's proposal, the agency during discussions inquired into Schuyler's compliance with the RFP's limitations on subcontracting. Contracting Officer's Statement at 3. In its first discussion letter to Schuyler, the Navy contracting officer asked the firm to "[e]xplain how Schuyler will comply with FAR 52.219-14 Limitations [on] Subcontracting for this requirement." AR, Tab 19, Discussion Letters - Schuyler, at AR00620. In response, Schuyler stated as follows:

Both [Schuyler] and Patriot are small business concerns and have established a teaming arrangement under the offeror of [Schuyler]. . . . Crewing of the vessel is the major content of contract performance incurred for personnel. Though the crew is to be provided and managed by our teammate Patriot for operations, if necessitated the crew could be supplied through a split between [Schuyler] and Patriot for adjustment of the percentages between the two small businesses which would result in the same overall small business content of the contract.

AR, Tab 20.A., Schuyler Proposal Revision, at AR00634. The contracting officer explained that he “was satisfied that Schuyler had expressed an intent to comply with the Limitations on Subcontracting during contract performance.”³ Contracting Officer’s Statement at 3; see also AR, Tab 8, Final Business Evaluation Report, at 3 (finding that Schuyler “demonstrat[ed] compliance with FAR § 52.219-14 with no outstanding issues”).

In this instance, Schuyler addressed the firm’s proposed compliance with the limitations on subcontracting in response to the contracting officer’s inquiry during discussions. We have found that an agency can reasonably rely on an offeror’s assurances of compliance with an RFP’s limitation on subcontracting. See, e.g., Delta-21 Resources, Inc., B-403586, Nov. 10, 2010, 2010 CPD ¶ 287 at 4-5 (agency reasonably determined that proposal complied with subcontracting limitation where offeror proposed to augment staff if necessary to ensure compliance with limitation); Ann Riley & Assocs., Ltd., B-271741.2, Aug. 7, 1996, 97-1 CPD ¶ 120 at 7 (agency reasonably determined that awardee complied with limitation on subcontracting clause where awardee indicated that it would take steps to ensure that its performance was compliant); see also Diversified Computer Consultants, B-230313, B-230313.2, July 5, 1988, 88-2 CPD ¶ 5 at 7-8. We conclude that there was, and is, no indication that Schuyler took exception to the RFP’s limitation on subcontracting or indicated an intent not to comply with the requirement. In fact, the record shows that during discussions the Navy sought clarification from Schuyler as to the firm’s compliance with the limitation during contract performance, and the firm provided such assurances. Accordingly, we disagree with the protester that the agency should have deemed Schuyler’s proposal technically unacceptable because it did not comply with the limitation on subcontracting clause.⁴

³ The protester argues that Schuyler’s suggestion to split the crew between Schuyler and Patriot is a “preposterous affront” to the collective bargaining agreements that Schuyler included in its proposal and would be “simply impossible for Schuyler to deliver.” Comments at 6. However, the protester has not pointed to any provision in the collective bargaining agreements that preclude the crew members from switching employers, nor has the protester posited that Schuyler could not or would not honor the crews’ relevant union obligations. Consequently, we find the protester’s arguments in this regard unpersuasive.

⁴ We note that the National Defense Authorization Act for Fiscal Year 2013--passed several months prior to the award in this procurement--amended the Small Business Act to provide that, for purposes of the limitations on subcontracting, costs incurred by a small business prime contractor on its “similarly situated” small business subcontractor shall not be considered subcontracted costs. Pub. L. No. 112-239, § 1651, 126 Stat. 1632, 2080 (Jan. 2, 2013). Accordingly, under this framework, the costs incurred by Schuyler’s small business partner, Patriot, would not be considered subcontracted for purposes of the limitation on subcontracting.

Next, Sealift objects to the evaluation of Schuyler's proposal on the basis that it was unreasonable for the agency to rely on Schuyler's warranties that it would comply with the solicitation requirements. Specifically, Sealift argues that the Navy should have found Schuyler's proposal technically unacceptable because Schuyler was "incapable of producing" some of the required documentation 30 days prior to vessel delivery--specifically the SMC, ISSC, and DOC. Protest at 8; Comments at 10. The protester also complains that Schuyler "may not comply" with certain RFP requirements, including that its vessel be entered into SIRE, that the vessel meet OCIMF inspection requirements, and that the firm have security clearances. Comments at 9-10.

In a negotiated procurement, any proposal that fails to conform to material terms and conditions of the solicitation is unacceptable and may not form the basis for award. Sealift Inc., B-405705, Dec. 8, 2011, 2011 CPD ¶ 271 at 3; Alpha Tech. Servs., B-250878, B-250878.2, Feb. 4, 1993, 93-1 CPD ¶ 104 at 3. The procuring agency has primary responsibility for evaluating the technical information supplied by an offeror and determining the acceptability of the offeror's item; we will not disturb such a determination unless it is shown to be unreasonable. Id. Although an agency generally may rely on information in a proposal to determine compliance, an agency may not accept at face value a proposal's promise to meet a material requirement where there is significant countervailing evidence reasonably known to the agency evaluators that should create doubt whether the offeror will or can comply with that requirement. See Sealift Inc., supra at 3; Maritime Berthing, Inc., B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89 at 6.

Here, although the protester argues that the agency should have doubted that Schuyler could comply with various solicitation requirements, we find that the protester has not demonstrated that the agency's acceptance of and reliance on Schuyler's warranties of compliance was unreasonable. First, as explained above, the RFP required offerors to submit to the agency 30 days prior to vessel delivery various documents and certificates, including an SMC, ISSC, and DOC. RFP § C-15.1. In its proposal, Schuyler warranted that it would provide the documents required under section C-15.1 of the RFP, including those singled out by the protester. AR, Tab 18, Schuyler Proposal, at AR00602. In accordance with the RFP, in its evaluation of Schuyler's proposal, the Navy ensured that the firm warranted that they would provide the required documentation. AR, Tab 7, Final Technical Evaluation Memorandum, at AR00286; see RFP § M-2.2. The agency explains that neither the contracting officer nor the technical evaluation team that reviewed that aspect of the proposal expressed any concern about Schuyler's ability to fulfill its warranted promise to provide the documentation.⁵ AR at 3.

⁵ The protester argues that Schuyler would not be able to provide an SMC, ISSC, and DOC in its name because Schuyler will be operating the vessel under a bareboat charter. Protest at 7. The agency explains that "the bareboat charter is

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Similarly, during discussions with Schuyler, the agency requested that Schuyler warrant that its vessel would meet the solicitation's SIRE and OCIMF inspection requirements. AR, Tab 19, Discussion Letters - Schuyler, at AR00620. In response, Schuyler warranted that "the vessel will be entered into SIRE under the offeror's name [Schuyler] and / or under the manager's name (Patriot) as technical manager / operator. . . ." AR, Tab 20.A., Schuyler Proposal Revision, at AR00631. Schuyler provided a similar assurance with regard to OCIMF inspection requirements. Id.

Although the protester argues that Schuyler's responses "create doubt" that Schuyler would comply with the specified requirements, Comments at 8, the protester has not shown that it was unreasonable for the agency to rely on Schuyler's warranties.⁶ There is simply no significant countervailing evidence in the record to suggest that the Navy should have doubted, prior to award, Schuyler's ability to comply with the various solicitation requirements. In these circumstances, we conclude that the agency had a reasonable basis for finding that Schuyler's proposal met the RFP's documentation requirements.

The protest is denied.

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General Counsel

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considered the owner for all intents and purposes in terms of obtaining insurance and certificates of the type required in Section C-15.1" of the RFP. Contracting Officer's Statement at 3. Sealift has not meaningfully responded to the agency's position; instead, the protester maintains that the Navy "should doubt" Schuyler's ability to provide the required documents. Comments at 10.

⁶ We have reviewed Sealift's similar complaint regarding Schuyler's compliance with the RFP's security clearance requirements, see Comments at 9-10, and find that these allegations provide no basis to sustain the protest.