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Decision

Matter of: Technology Management Company, Inc.

File: B-409976

Date: September 26, 2014

Carolyn Callaway, Esq., Carolyn Callaway, P.C., for the protester.
Bethany Hsu, Esq., Defense Logistics Agency, for the agency.
Noah B. Bleicher, Esq., and Nora K. Adkins, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency's decision to reject protester's proposal is unobjectionable where the solicitation required offerors to provide prices for 100 items; the solicitation advised that failure to provide prices for all items could result in rejection of the proposal; and the protester failed to provide pricing for three of the 100 items.

DECISION

Technology Management Company, Inc. (TMC), of Albuquerque, New Mexico, protests the rejection of its proposal under request for proposals (RFP) No. SPE5B1-14-R-0001, issued by the Department of Defense, Defense Logistics Agency (DLA), for various supplies in support of the agency's maintenance, repair, and operations (MRO) requirements. TMC argues that the agency's rejection was unreasonable because DLA's evaluation was not in accordance with the solicitation's criteria.

We deny the protest.

BACKGROUND

DLA issued the solicitation on March 28, 2014, seeking proposals for DLA's Tailored Logistics Support Prime Vendor Program for the Europe and Africa regions. Under the program, contractors provide a variety of commercial items, such as plumbing and electrical supplies, in support of MRO requirements of military installations and other federal activities. RFP at 4, 36-37. The solicitation here, issued under the commercial item procedures of Federal Acquisition Regulation (FAR) Part 12, contemplated the award of four fixed-price

indefinite-delivery, indefinite-quantity contracts each with a 2-year base period and two 18-month option periods. Id. at 7, 9, 15. The RFP stated that contracts would be awarded for two different “zones” in the European region and two zones in the African region.¹ Id. at 7, 36. The solicitation advised that offerors could submit multiple proposals, but “[t]o ensure the continuous availability of reliable sources of supply,” firms could only be awarded one contract in each region. Id. at 7.

The RFP provided that award would be made on a best-value basis considering past performance, technical merit,² and price. Id. at 7, 69. Past performance was stated to be more important than technical merit, and the non-price factors were “significantly more important” than price. Id. The solicitation further advised that as the non-price ratings of offers became more equivalent, price would become more important. Id.

Of relevance to this protest, the solicitation included a 100-item Price Evaluation List (PEL) that identified a “sampling of the scope of material that the contractor may be required to furnish” under the contract. Id. at 4. Items on the list were illustrative of the types of supplies that had been previously provided to DLA customers. Id. The solicitation instructed offerors to propose acquisition ceiling prices (for the base and option periods) “**for 100% of the items in the PEL**” for each zone for which the offeror was submitting a proposal.³ Id. at 65 (emphasis in solicitation); see also id. at 8, 38, 62, 67, and 74 (advising offerors of the requirement to provide prices for 100 percent of the items on the PEL).

The solicitation also permitted offerors to propose acceptable alternate items instead of the brand name items identified on the PEL.⁴ Id. at 66. To be considered acceptable, alternate items had to be “equal to the item specified in the PEL, have the same form, fit and function, and be compliant with applicable sourcing restrictions.” Id. If an alternate item was proposed, the offeror had to provide information substantiating that the alternate item was equal to the item listed on the

¹ The solicitation identified zone 1 in the European region as “North of the Alps” and zone 2 as “Mediterranean Countries.” RFP at 36. In the African region, zone 1 was southwest Africa and zone 2 was southeast Africa. Id. Because the solicitation, TMC’s proposal submissions, and DLA’s evaluation of TMC’s proposals were the same for all zones, this decision does not distinguish between zones.

² The solicitation identified the following technical merit subfactors: product sourcing, distribution/delivery, customer support, and local sourcing. RFP at 69.

³ Under the price factor, the solicitation also instructed offerors to propose a management fee for 20 pricing tiers, pricing for incidental services (based on a scenario), and pricing for transportation (based on two scenarios). RFP at 8, 65-66.

⁴ Offerors could only offer one alternate item for each item on the PEL. RFP at 66.

PEL and identify in their PEL submission the country of origin for each alternate item. Id. at 65-66. In this respect, the solicitation advised that certain sourcing restrictions including the Berry Amendment⁵ and the Trade Agreements Act (TAA)⁶ applied to the procurement. Id. at 7, 92-93. The solicitation additionally instructed: **“ALTERNATE ITEMS DETERMINED NOT TO BE ACCEPTABLE WILL NOT COUNT TOWARDS THE 100% OF PEL ITEMS REQUIRED TO BE PRICED.”** Id. at 62, 67 (emphasis in solicitation); see also id. at 8 (warning that prices for alternate items deemed unacceptable would not be evaluated).

The solicitation provided that the agency would evaluate price proposals to determine if alternate items were acceptable and if the offeror provided acquisition ceiling prices for all of the items on the PEL—including acceptable alternates. Id. at 74. Several times, the solicitation warned that a proposal that did not include pricing for every item on the PEL may not be considered for award. Id. at 74; see also id. at 8, 38 (warning that “[o]fferors may be excluded from the competition” for failing to price all of the items on the PEL including acceptable alternates), 62 and 67 (“An offeror that does not meet the 100% of acceptable quoted PEL items may have its proposal rejected”).

TMC submitted identical proposals for each of the four zones prior to the May 19 submission deadline. Agency Report (AR) at 5. DLA reviewed TMC’s proposal and determined that three of 28 alternate items proposed by TMC were not acceptable. AR, Tab 9, Agency Letter to TMC, June 5, 2014, at 1. Specifically, the agency concluded that two items were not compliant with the TAA’s sourcing restrictions because they were made in China, and that a third item was unequal in form, fit, and function to the brand name item identified in the PEL. AR at 6; AR, Tab 11, TMC Debriefing Letter, at 2. Thus, the agency did not count these three unacceptable alternate items toward the requirement to price all of the items on the PEL. AR, Tab 9, Agency Letter to TMC, June 5, 2014, at 1; see RFP at 74. Consequently, DLA removed TMC’s proposal from consideration for award because TMC’s proposal failed to provide prices for every item on the PEL. Id.; AR at 6. Following a written debriefing, TMC protested to our Office.

⁵ The Berry Amendment generally restricts the Department of Defense’s expenditure of funds for certain articles to domestically produced products. See 10 U.S.C. § 2533a(b) (2012).

⁶ As applicable here, the Trade Agreements Act contemplates that the government would only consider “offers of end products that are U.S.-made, qualifying country, or designated country end products” unless there were no (or an insufficient number of) offerors of such end products or a waiver was granted. RFP at 93; Defense FAR Supplement § 252.225-7020.

DISCUSSION

TMC challenges the agency's decision to reject its proposal. The protester argues that DLA's rejection was improper because the agency failed to evaluate the firm's proposal in accordance with the solicitation criteria. Specifically, TMC complains that it was "manifestly unreasonable" for the agency not to consider its proposal because the PEL was not a "fixed and essential list of necessary supplies" and the impact of the rejected items on TMC's total price was "vanishingly small." Protest at 8, 9, 11; Comments at 7. Based upon our review of the record, we find no basis to sustain the protest; the agency's decision to reject TMC's proposal was reasonable and in accord with the solicitation.

The evaluation of proposals is a matter within the discretion of the contracting agency. Carson Helicopter Servs., Inc., B-299720, B-299720.2, July 30, 2007, 2007 CPD ¶ 142 at 5. In reviewing an agency's evaluation, we will not reevaluate proposals; instead, we will examine the evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. The Eloret Corp., B-402696, B-402696.2, July 16, 2010, 2010 CPD ¶ 182 at 12. It is the agency's role to define both its underlying needs and the best method of accommodating those needs, and it is within the agency's discretion to reject as unacceptable products not meeting the requirements that it defines. Encompass Group, LLC, B-299092, Dec. 22, 2006, 2007 CPD ¶ 6 at 3. An offeror's disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. The Eloret Corp., supra.

As discussed above, the record shows that TMC included prices for 28 alternate items on its PEL submission. AR, Tab 8, TMC PEL Submission, at 1-3. The agency reviewed TMC's PEL submission and determined that three alternate items--items 28, 50, and 52--were not acceptable. AR, Tab 9, Agency Letter to TMC, June 5, 2014, at 1. Specifically, the agency found that the alternate items that TMC priced for item 28, a plastic toilet seat, and item 52, pipe thread tape, were made in China, and therefore were not compliant with the Trade Agreements Act.⁷ AR, Tab 11, TMC Debriefing Letter, at 2; see AR, Tab 8, TMC PEL Submission, at 1-2. With respect to item 50, a tube of white silicone sealant, the agency found that the alternate sealant proposed by TMC was not equal in "form, fit and function" to the brand name sealant listed in the PEL because TMC's sealant had a "much longer cure rate, 24 hours, than the original PEL item, at 6 hours."⁸ AR, Tab 11,

⁷ In its PEL submission, TMC identified the toilet seat as being made in the United States and identified the thread tape as being made in China. AR, Tab 8, TMC PEL Submission, at 1-2. In its protest filings, TMC "does not dispute" that both of the items priced were of Chinese origin. Comments at 5.

⁸ For the first time in its comments on the agency's report, TMC complains that it was unreasonable for the agency to find TMC's silicone sealant unacceptable
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TMC Debriefing Letter, at 2. Because these three items were deemed unacceptable, in accordance with the solicitation, they were not counted as part of TMC's PEL submission. Id. at 1; see RFP at 62, 67 (advising offerors that unacceptable alternate items would not count toward the requirement to price all items on the PEL or acceptable alternates). Consequently, DLA evaluated TMC's proposal as having failed to provide prices for all PEL items and it was rejected on this basis. See AR at 13-14.

TMC complains that in finding its proposal unacceptable, DLA relied on an unstated pass/fail evaluation criterion and that the solicitation did not put offerors on notice that proposing even one unacceptable alternate PEL item could result in the rejection of a proposal. Protest at 6; Comments at 1. We disagree. As discussed above, the RFP expressly required in several places that offerors were to provide prices for "100% of the line items in the PEL or [a]cceptable [a]lternates" and that an offeror that failed to do so "may have its proposal rejected." RFP at 74; see also id. at 8, 38, 62, 65, 67. Contrary to the protester's assertion, DLA did not evaluate TMC's proposal using an unstated pass/fail evaluation test. Instead, the record shows that the agency determined that three alternate items were unacceptable and, consistent with the discretion afforded the agency under the terms of the solicitation, DLA rejected TMC's proposal for failing to price every item on the PEL. See id. at 74; Encompass Group, LLC, supra.

TMC also argues that it was unreasonable for the agency to reject its proposal for proposing alternate items made in China because four different brand name items on the PEL were of Chinese origin. Protest at 15; Comments at 6. The agency

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because, according to TMC, both DLA's brand name silicone sealant and the alternate silicone proposed by TMC actually "had identical cure times" of 24 hours. Comments at 6. As a general matter, protests other than alleged solicitation improprieties must be filed within 10 calendar days of when the protester knows or should have known its bases for protest. 4 C.F.R. §21.2(a)(2) (2014). Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, since our Regulations do not contemplate the piecemeal presentation or development of protest issues. Planning & Dev. Collaborative Int'l, B-299041, Jan. 24, 2007, 2007 CPD ¶ 28 at 11; Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 12-13. Here, the record reflects that TMC was advised in its June 16, 2014, written debriefing that DLA rejected TMC's alternate silicone due to what it determined to be an unacceptably longer cure time. AR, Tab 11, TMC Debriefing Letter, at 2. However, TMC did not challenge this determination in its initial protest; instead the protester waited until it filed its comments on August 4--almost two months after it received its debriefing--to raise its objection. Consequently, this protest ground represents an untimely and improper piecemeal presentation of arguments and will not be considered.

counters that two of these items identified by TMC were actually manufactured in both China and the United States.⁹ DLA Response to Comments at 1. With respect to the other two items, DLA acknowledges that they were confirmed to be non-TAA compliant. Id. The agency explains that these two items will be removed from the PEL and that no offeror would be rejected from the competition for providing prices for these items. Id.

Here, we find that the protester was not prejudiced by the agency's inadvertent inclusion of the two non-TAA compliant items on the PEL or DLA's subsequent decision to remove these items from the PEL altogether. See, e.g., Paragon TEC, Inc., B-405384, Oct. 25, 2011, 2011 CPD ¶ 240 at 9 (competitive prejudice is an essential element of a viable protest). In this regard, the protester has not demonstrated that its PEL submission was in any way impacted by DLA's inadvertent inclusion of the non-compliant items or that the firm would have proposed different prices had it known that two items would be removed from the PEL. Moreover, as discussed above, the agency's rejection of TMC's proposal was based on the firm having proposed three unacceptable alternates--other than those removed by the agency from the PEL--including one item that was not equal in form, fit, or function. For these reasons, TMC's argument regarding non-TAA compliant items on the PEL provides no basis to sustain the protest.

Ultimately, TMC's complaints that its proposal should not have been rejected because the three unacceptable items were of "exceedingly small dollar value," and because DLA reserved the right to make an award for fewer than the 100 items, reflect its disagreement with the agency's determination but do not provide a basis to sustain the protest. Protest at 9, Comments at 5; see RFP at 75. Moreover, the protester has not demonstrated that it was prejudiced by DLA's inadvertent inclusion of two non-TAA compliant items on the PEL or the subsequent removal of those items from the PEL. In sum, we find that DLA's rejection of TMC's proposal was reasonable and consistent with the solicitation.

The protest is denied.

Susan A. Poling
General Counsel

⁹ According to the agency, all vendors being considered for award indicated that the two items on their PEL submissions were made in the United States. DLA Response to Comments at 1.