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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: US21, Inc.

File: B-411561; B-411561.2

Date: August 21, 2015

Ronald H. Uscher, Esq., and Nick R. Hoogstraten, Esq., Peckar & Abramson, PC, for the protester.

David T. Ralston, Jr., Esq., Frank S. Murray, Esq., and Jennifer Forde, Esq., Foley & Lardner LLP, for Areaka Trading and Logistics Company, the intervenor.

Marit Diana Bank, Esq., Defense Logistics Agency, for the agency.

Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of the awardee's proposal is denied, where the evaluation was reasonable and consistent with solicitation requirements.

DECISION

US21, Inc., of Fairfax, Virginia, protests the Defense Logistics Agency's (DLA) award of a contract to Areaka Trading and Logistics Company, of Amman, Jordan, under amendment 0003 to request for proposals (RFP) No. SP0600-15-R-0210, for fuel for Azraq Air Base, Jordan. US21 asserts that the protester's proposal failed to satisfy a material requirement of the solicitation and was therefore ineligible for award.

We deny the protest.

BACKGROUND

Amendment 0003 to the RFP, issued to contractors holding basic ordering agreements (BOA) for the delivery of fuel to Iraq, Jordan, Turkey, and Kuwait, provided for the award "to the lowest-priced BOA holder" of a fixed-price, two-year contract to supply several types of fuel, including turbine aviation fuel (JP8), to Azraq Air Base, Jordan. RFP, amend. 0003. Amendment 0003 required proposals

to include "Certificates of Analysis [CoA] from all suppliers listed on the offeror's Fuel Source Data Sheet."¹ Id. at 5. Amendment 0003 advised offerors that "[a]ny deviation from the terms and conditions of established BPAs or the terms, conditions, and requirements of this amendment may result in offers being determined ineligible for award." RFP, amend. 0003, at 4-5.

Areaka and US21 were among the firms awarded BOAs.² Areaka, US21, and six other firms submitted proposals in response to the amendment 0003 requirement by the April 29, 2015 closing date. Agency Report (AR) at 2. Areaka proposed a final price of \$2.31 per gallon for JP8, 15 cents lower than US21's fifth-lowest final proposed price of \$2.46 per gallon. AR, Tab 7, Price Abstract. Areaka's proposal included an executed offeror signature page binding the offeror "to all terms and conditions of the solicitation." AR, Tab 3, Areaka Offer, at 6.

Areaka's proposal also included a CoA for JP8 from the Jordan Petroleum Refinery Co., Ltd., which Areaka had identified as its source for JP8. AR, Tab 3, Areaka Offer, attachments. (The contracting officer explains that the government provides no standard CoA for use by refiners/suppliers. See Email from Agency to GAO, Aug. 17, 2015.) According to the contracting officer, she examined the CoA to make certain that it clearly identified the refinery or supplier of the fuel and that the test data indicated compliance with the announced specifications. Id. In this instance, the CoA used by Jordan Petroleum, US21's supplier for JP8, stated that the report "is only valid with the department stamp and signature." AR, Tab 3, Areaka Proposal, CoA. The copy of Jordan Petroleum's JP8 CoA attached to Areaka's emailed proposal did not include a visible stamp. Id.

The contracting officer determined that Areaka was responsible. AR, Tab 9, Responsibility Determination, May 8, 2015. The agency then awarded the JP8 requirement to Areaka as the firm offering the lowest price for that fuel, and this protest followed.

DISCUSSION

US21 asserts that the agency unreasonably found Areaka's proposal eligible for award, where the proposal failed to comply with a definitive responsibility criterion, namely, supplying with its offer for JP8 fuel a valid CoA with a stamp. US21

¹ The BOA solicitation contained the same requirement, and noted that DLA reserved the right to request a pre-award survey as appropriate. BOA RFP at 87. The RFP advised offerors that failure to provide the CoA prior to evaluation of orders issued against the BOA would result in removal of the proposal from further consideration. Id.

² The BOAs had previously been awarded under RFP No. SP0600-15-0210.

Comments, July 30, 2015, at 2. The agency maintains that the awardee complied with the requirement to provide a CoA. AR at 8.

Definitive responsibility criteria are specific and objective standards designed to measure a prospective contractor's ability to perform the contract. Reyna-Capital Joint Venture, B-408541, Nov. 1, 2013, 2013 CPD ¶ 253 at 2. Where an agency includes a definitive responsibility criterion in a solicitation, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criterion has been met; generally, a contracting agency has broad discretion in determining whether offerors meet definitive responsibility criteria, because the agency must bear the burden of any difficulties experienced in obtaining the required performance. Western Alternative Corrections, Inc., B-409315, B-409315.2, Mar. 10, 2014, 2014 CPD ¶ 94 at 7.

Here, the agency reasonably found that the CoA for JP8 included in Areaka's proposal complied with the RFP requirement. In this regard, the CoA was dated February 26, 2015, and thus appeared to be current; the CoA was for JP8 fuel; the tested sample was indicated to be "Conforming;" and the CoA was from the awardee's identified supplier (Jordan Petroleum), and was signed by the laboratory manager. AR, Tab 3, Areaka Proposal, CoA. While the CoA used by Jordan Petroleum stated that the report "is only valid with the department stamp and signature," and the stamp on the copy of the CoA attached to Areaka's emailed proposal was not visible, AR, Tab 3, Areaka Proposal, CoA, we agree with the agency that this did not preclude acceptance of the CoA. In this regard, the requirement for the stamp was not one imposed by the agency. Further, as noted by the agency, the testing data was submitted on Jordan Petroleum letterhead, with a Jordan Petroleum telephone number, facsimile number, and email address. In addition, the agency reports that there had been no technical conformance issues with the JP8 turbine aviation fuel furnished by Areaka in Jordan under a recent 2015 contract (contract No. SPE600-15-D-9507). Supplemental AR at 2; see AR, Tab 3, Areaka Proposal, CoA. In these circumstances, we conclude that the agency reasonably found no basis to question the acceptability of the CoA for JP8 fuel which was submitted with Areaka's proposal.³

³ In any case, we note that in the course of record development for this protest, Areaka provided this Office with what appears to be an enhanced copy of the CoA with a visible stamp. See Email from Areaka to GAO, July 14, 2015, CoA. While the protester challenges the authenticity of the enhanced copy of the CoA, the fact that both copies otherwise are identical tends to support the conclusion that the copy furnished by Areaka during the protest is simply another copy of the CoA that Areaka provided in its proposal, darkened to make the stamp visible. Compare AR, Tab 3, Areaka Proposal, CoA with Email from Areaka to GAO, July 14, 2015, CoA.

US21 asserts that the agency unreasonably determined Areaka to be responsible with respect to this requirement. In this regard, the protester asserts that while Areaka offered a very low, below-cost price, which should have resulted in “searching scrutiny by DLA,” Areaka Comments, July 30, 2015, at 2, the agency, in making the determination that Areaka is responsible, improperly failed to do the following: verify that Areaka had an agreement to purchase JP8 fuel from a legitimate JP8 source; confirm that Areaka had the necessary Jordanian government letter of authorization to purchase JP8; verify any certifications of the fuel to be supplied; investigate or confirm the transport company identified in Areaka’s proposal; investigate Areaka’s ownership and control; and confirm that Areaka was licensed to do business in Jordan. Protest at 5; Supplemental Protest at 6. The underlying basis for this challenge to the agency’s responsibility determination in large measure is US21’s belief that the awardee lacked a relationship with Jordan Petroleum--allegedly the sole authorized provider of JP8 fuel in Jordan--as evidenced by the lack of a valid CoA from Jordan Petroleum for JP8 and Areaka’s low price. Protest at 4; Response to Motion to Dismiss at 4; Supplemental Protest at 5.

Our Office generally does not review an affirmative determination of responsibility absent a showing of a failure to properly apply definitive responsibility criteria, or where the protester identifies evidence raising serious concerns that, in reaching the responsibility determination, the agency unreasonably failed to consider available relevant information or otherwise violated statute or regulation. Bid Protest Regulations, 4 C.F.R. § 21.5(c); Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 4. In this connection, the protester must present specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. The Geo Group, Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153 at 6-7.

As discussed above, we see no merit to the assertion that Areaka failed to satisfy a definitive responsibility requirement. Further, US21 points to nothing in the information known to the contracting officer that called into question either the CoA or the indication in Areaka’s proposal that Jordan Petroleum would furnish the fuel that Areaka was offering. With respect to the allegation that Areaka proposed a below-cost price for the delivery of JP8 fuel, the agency notes that the four lowest prices were in a fairly narrow range (\$2.31 to \$2.38 per gallon). AR at 10; AR, Tab 7, Price Abstract. In addition, the award price was higher than the agency’s target price. AR, Tab 8, Award Memorandum for Record at 3. In sum, considering the record as a whole, we find that US21 has not presented specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found

responsible. Accordingly, we have no basis to question the agency's affirmative determination of Areaka's responsibility.

The protest is denied.

Susan A. Poling
General Counsel