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Decision

Matter of: Penn Parking, Inc.

File: B-412280.2

Date: February 17, 2016

John R. Tolle, Esq., Barton, Baker, Thomas & Tolle, LLP, for the protester.
Richard B. O’Keeffe Jr., Esq., Wiley Rein LLP, for the intervenor.
Jason Blindauer, Esq., Department of Health and Human Services, for the agency.
Laura Eyester, Esq., Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest arguing that the agency was required to reject the awardee’s proposal as unacceptable for failing to use the precise words prescribed by the solicitation to represent that the offeror had sent a past performance questionnaire to its performance reference, is denied where the awardee’s proposal instead represented that the completed questionnaire was received by the contracting officer within the time limits established by the solicitation, which met the purpose of the solicitation requirement.

DECISION

Penn Parking, Inc., of Hanover, Maryland, a small business, protests the Department of Health and Human Services, National Institutes of Health’s (NIH) award of a contract to Mid-Atlantic Services Group, Inc., of Silver Spring, Maryland, a small business, pursuant to request for proposals (RFP) No. NIHOD2015062, for parking services at NIH’s main campus in Bethesda, Maryland. Penn Parking asserts that Mid-Atlantic’s proposal was unacceptable because it failed to comply with a material term of the solicitation.

We deny the protest.

BACKGROUND

The RFP, issued on October 21, 2015 as a small business set-aside, contemplated the award of an indefinite-delivery/indefinite-quantity (ID/IQ) contract, with a 1-year base period and four 1-year options, for parking services at NIH. RFP at 2. The

RFP provided for award on a lowest-priced, technically acceptable basis, considering price and three pass/fail technical evaluation factors: (1) adequate insurance; (2) capability to valet and stack park; and (3) past performance. RFP at 66.

With respect to the past performance factor, offerors were to provide one example of a contract performed within the last three years as a prime contractor that was similar to the work to be performed under the solicitation, submit a past performance questionnaire on this contract, and “request that its past customer e-mail the completed questionnaire to [the NIH contracting officer] no later than the receipt-of-proposal deadline.” RFP at 66-67. In this regard, the RFP also required that offerors include the following certification in their proposals:

“[INSERT COMPANY NAME] certifies that the past performance questionnaire was sent to the past customer for the proposal-provided past performance example no later than three days before the receipt-of-proposal deadline.”

Id. at 67 (emphasis omitted). Further, the RFP stated that “[i]f an offeror’s proposal fails to include the aforementioned certification, the offeror’s proposal shall be discarded as unacceptable for failing to comply with a material term of proposal submission, and the proposal shall be given no further consideration.” Id. (emphasis omitted). In addition, NIH explained in the solicitation that it would not consider information from a past performance questionnaire received “after the receipt-of-proposal deadline,” but could consider direct or other available knowledge on the cited past performance. Id.

Proposals were due not later than 1:00 p.m. on September 1. On August 25, Mid-Atlantic’s past performance reference submitted a completed past performance questionnaire via e-mail to the NIH contracting officer, who acknowledged the e-mail and forwarded the information to another individual at NIH on August 31. Agency Report (AR), Tab 5, Past Performance Questionnaire. On September 1, NIH received four proposals, including proposals from Mid-Atlantic and Penn Parking. Third Contracting Officer Statement (COS), Dec. 21, at 1. Mid-Atlantic’s proposal indicated that the “Past Performance Information Questionnaire from [the customer] was emailed to [the contracting officer] on Friday 8/28/15 [sic].” AR, Tab 6, Mid-Atlantic Proposal, at 9.

NIH initially rejected Mid-Atlantic’s proposal because it did not include the specific certification language set forth in the RFP. AR at 4; Second COS at 2. After the agency made award to Penn Parking, Mid-Atlantic filed a protest with this Office. NIH filed a notice of corrective action and on October 9, GAO dismissed the protest as academic. Mid-Atlantic Services Group, Inc., B-412280, Oct. 9, 2015 (unpublished).

As a result of the corrective action, NIH reevaluated proposals and determined that Mid-Atlantic was the lowest-priced, technically acceptable offeror. AR, Tab 9, Award Decision, at 2. On October 28, NIH made award to Mid-Atlantic (at a price of \$14,439,318). On November 5, NIH notified the unsuccessful offerors and informed Penn Parking that it would be terminating its contract effective November 13. AR, Tab 7, Attachments to Agency's Request for Dismissal, at 20-21. On November 9, Penn Parking filed this protest with our Office.

DISCUSSION

Penn Parking argues that Mid-Atlantic's proposal was unacceptable because it failed to comply with a material term of the solicitation. Specifically, the protester contends that Mid-Atlantic's proposal was unacceptable because it failed to include, verbatim, the certification set forth in the solicitation that the offeror "certifies that the past performance questionnaire was sent to the past customer for the proposal-provided past performance example no later than three days before the receipt-of-proposal deadline." RFP at 67; see Protest at 5-9; Comments at 3-9. The agency contends that Mid-Atlantic satisfied the intent of the certification requirement when it complied with the solicitation's requirements both to send the questionnaire to the customer at least three days prior to the proposal due date, and to ensure that the agency receive the completed questionnaire prior to the proposal due date. Therefore, according to the agency, the deviation from the certification language as set forth in the solicitation was a minor informality that could be waived. AR at 2, 8-9; Second COS at 3. In the alternative, the agency argues that even if this term of the solicitation is considered material, there was no prejudice to the protester. AR at 11-13.¹

¹ The agency also argues that the protest is untimely because, although it was filed within 10 days of Penn Parking learning the results of the reevaluation, Penn Parking was provided a copy of the redacted version of Mid-Atlantic's earlier protest on October 8. Thus, according to the agency, when GAO on October 9 dismissed Mid-Atlantic's protest as academic due to corrective action, Penn Parking knew or should have known that NIH was waiving the certification issue, and it should have diligently pursued the basis for this protest at that time. Motion to Dismiss at 1-5. However, Penn Parking filed its notice of intervention in Mid-Atlantic's protest on October 9, and there is nothing in the record showing that Penn Parking received the agency's October 8 notice of corrective action, that the agency was reevaluating Mid-Atlantic's proposal, or that Mid-Atlantic was the awardee, until November 3, when NIH provided notification to the unsuccessful offerors. Thus, we consider Penn Parking's November 9 protest challenging the agency's award to Mid-Atlantic to be filed in accordance with the timeliness provisions of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).

In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award. ARBEIT, LLC, B-411049, April 27, 2015, 2015 CPD ¶ 146 at 4; Wolverine Servs. LLC, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 3-4. We will not disturb an agency's determination of the acceptability of a proposal absent a showing that the determination was unreasonable, inconsistent with the terms of the solicitation, or in violation of procurement statutes or regulation. Northern Light Prods., B-401182, June 1, 2009, 2009 CPD ¶ 117 at 3; Nordic Air, Inc., B-400540, Nov. 26, 2008, 2008 CPD ¶ 223 at 3. Further, we will read a provision restrictively only where it is clear from the solicitation that such a restrictive interpretation was intended by the agency. Nordic Air, Inc., *supra*.

Here, the RFP required offerors to submit a certification that the past performance questionnaire had been provided to the customer at least three days before the proposal due date. RFP at 67. The agency explains, and the protester has not disputed, that the purpose of the certification was to ensure that an offeror without "significant past performance history" did not fail to send the past performance questionnaire to its previous customer, thereby resulting in the past performance evaluation "becoming hollow." Second COS at 2.

Although the language of Mid-Atlantic's certification deviated from that in the solicitation, Mid-Atlantic represented that the "Past Performance Information Questionnaire from [the customer] was emailed to [the contracting officer] on Friday 8/28/15 [sic]." AR, Tab 6, Mid-Atlantic Proposal, at 9. Mid-Atlantic's representation was tantamount to stating that "the past performance questionnaire was sent to the past customer for the proposal-provided past performance example no later than three days before the receipt-of-proposal deadline [of September 1, 2015]." RFP at 67. Furthermore, the record shows that on August 25, more than three days before the proposal due date, Mid-Atlantic's past performance reference submitted a completed past performance questionnaire to the NIH contracting officer. AR, Tab 5, Past Performance Questionnaire; Second COS at 2. Specifically, the record shows that the questionnaire was sent to the past customer, as required, and that the questionnaire was sent to the contracting officer four days before the closing date, also as required.

In these circumstances, we find that the agency reasonably concluded that Mid-Atlantic's proposal satisfied the purpose and intent of the RFP's certification requirement such that the deviation in the certification language was only a minor informality not requiring rejection of the proposal. See MANCON, B-405663, Feb. 9, 2012, 2012 CPD ¶ 68 at 4 ("the agency's insistence upon the use of the exact wording concerning the provision of DUNS numbers and addresses . . . puts undue emphasis on form over substance"); *cf.*, Zebra Techs. Int'l, LLC, B-296158, June 24, 2005, 2005 CPD ¶ 122 at 3-4 (agency properly rejected proposal where protester did not provide past performance questionnaires to its references in sufficient time for the responses to be provided by the proposal due date).

Moreover, even where an agency arguably may have relaxed a material solicitation requirement, the protester must still show that it was prejudiced by the agency's actions. Competitive prejudice is an essential element of a viable protest and there is no basis for finding prejudice and sustaining a protest where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award. See Lockheed Martin Corp., B-411365.2, Aug. 26, 2015, 2015 CPD ¶ 294 at 14; SunGard Data Systems, Inc., B-410025, Oct. 10, 2014, 2014 CPD ¶ 304 at 7-8. In order to demonstrate unfair competitive prejudice from a waiver or relaxation of the terms and conditions of an RFP, a protester must show that it would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements. Lockheed Martin Corp., *supra*; ExecuTech Strategic Consulting, LLC; TRI-COR Indus., Inc., B-410893 *et al*, March 9, 2015, 2015 CPD ¶ 103 at 12-13; Vocus Inc., B-402391, Mar. 25, 2010, 2010 CPD ¶ 80 at 6.

Here, we have no basis to conclude that Penn Parking was prejudiced by Mid-Atlantic's failure to state, verbatim, the certification set forth in the RFP. Penn Parking has not alleged that it would have changed its proposal to its competitive advantage had it known that the agency would have accepted a differently worded certification.

The protest is denied.

Susan A. Poling
General Counsel