



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Independent Systems, Inc.

File: B-413246

Date: September 15, 2016

Alfredo Flores Jr., for the protester.

Heather M. Self, Esq., Department of Agriculture, for the agency.

Pedro E. Briones, Esq., Noah B. Bleicher, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of rejection of proposal is denied where the agency reasonably found that the proposal took exception to the solicitation's delivery and payment terms.

DECISION

Independent Systems, Inc. (ISI), of Bristow, Virginia, protests the rejection of its proposal under request for proposals (RFP) No. AG-05G2-S-16-0006, issued by the Department of Agriculture, Forest Service, for bulldozers. The protester contends that the Forest Service unreasonably determined that ISI's proposal took exception to the solicitation's delivery and payment terms.

We deny the protest.

BACKGROUND

The Forest Service issued the RFP on March 24, 2016, to firms holding blanket purchase agreements (BPA or agreement) with the agency for heavy equipment. Contracting Officer Statement (COS) ¶¶ 5-6; RFP at 127.¹ The solicitation sought two types of bulldozers with specified options, for delivery F.O.B. destination to the

¹ The agency assigned documents in the record, including the solicitation, sequential page numbers, which we use in our decision.

Coconino National Forest in Flagstaff, Arizona, on or before August 31, 2016.² RFP amend. 2, at 192, 195. The RFP stated that award would be made on a lowest-priced, technically acceptable basis. Id. at 207.

The RFP incorporated the terms of the BPA, which contemplates that solicitations issued under the agreement will specify delivery terms and may include additional requirements, such as technical specifications, instructions for submitting offers, or invoicing and payment terms. See id. at 195; BPA at 94-96, 106-07. The BPA incorporates standard FAR clause 52.212-4, Contract Terms and Conditions-- Commercial Items (Sept. 2013), which, as relevant here, states that payment shall be made for items accepted by the government that have been delivered to the destinations set forth in the contract; the clause does not provide for prepayments or other forms of contract financing.³ See BPA at 97-101. Although the RFP included detailed technical specifications for each bulldozer and required delivery F.O.B. destination to Flagstaff, Arizona, the RFP did not specify additional payment terms, other than those outlined in the BPA. RFP amend. 2, at 188-208; see RFP at 127-42; amend. 1, at 143-44. The BPA advises that offers that reject the terms and conditions of a solicitation may be excluded from consideration, and that the government may reject any or all offers if such action is in the public interest. BPA at 106-07.

The agency received proposals from three BPA holders, including ISI. COS ¶ 12; see Agency Report (AR), Tab 10, Abstract of Offers.⁴ As discussed below, the contracting officer rejected ISI's proposal because he found that it took exception to the RFP's delivery and payment terms, and imposed additional terms that were inconsistent with the solicitation. AR, Tab 13, Decision Mem., at 263; COS ¶¶ 17-19.

² As defined by the Federal Acquisition Regulation (FAR), free on board (F.O.B.) destination means that the seller or consignor delivers the goods on seller's or consignor's conveyance at destination, and that, unless the contract provides otherwise, the seller or consignor is responsible for shipping costs and risk of loss. FAR § 2.101; see BPA at 97 (incorporating FAR definitions), 99 (risk of loss and delivery).

³ The BPA also provides that payment and acceptance may be specified on a call-by-call (or order) basis. See BPA at 96, 105.

⁴ ISI was not represented by counsel who could obtain access to non-public information (such as the abstract of offers) pursuant to the terms of a protective order. Accordingly, our discussion of some aspects of the procurement record is necessarily general in nature in order to avoid reference to non-public information. Our conclusions, however, are based on our review of the entire record, including the non-public information.

Because the other two proposals exceeded the funds available for the procurement, and because ISI's proposal was rejected, the contracting officer cancelled the RFP and solicited the requirement through the General Services Administration's e-Buy system instead.⁵ AR, Tab 13, Decision Mem., at 263; COS ¶¶ 21-22; RFP amend. 3, at 264-65 (cancellation). This protest followed.

DISCUSSION

ISI maintains that its proposal complied with the solicitation and exceeded the government's requirements. ISI argues that the contracting officer rejected the proposal based on his "very subjective" and unfair analysis of the proposal's delivery and payment terms. Comments at 1-2.

As relevant here, ISI submitted its offer electronically as three separate files--a proposal and two manufacturer's brochures (one for each proposed bulldozer). AR, Tab 9, ISI Revised Proposal (Proposal), at 209-57; COS ¶ 15.⁶ The proposal included ISI's pricing and terms for each contract line item number (CLIN),⁷ technical descriptions and detailed tables of specifications for each piece of equipment, and--at issue here--a two-page manufacturer's "terms and warranty" document. AR, Tab 9, ISI Revised Proposal (Proposal), at 210-45. Each brochure provided photographs depicting the respective bulldozer and described its specifications and available options.⁸ Id. at 246-57.

For each CLIN, ISI's proposal stated the manufacturer's model number, the options and accessories that were included, a price quote, and the following:

Price [] ea; delivered FOB destination to Flagstaff, AZ []

Delivery: 60 – 90 days after receipt of order (ARO)

⁵ The Forest Service posted a request for quotations for the bulldozers on e-Buy, but has stayed award pending resolution of the protest. COS ¶¶ 29, 31; Mem. of Law (MOL) at 8 n.1.

⁶ The solicitation was amended to revise the technical specifications and to request revised proposals accordingly. RFP amend. 2, at 1; COS ¶¶ 10-12. The Forest Service did not conduct discussions. See COS ¶ 34.

⁷ The RFP schedule contained two CLINs corresponding to each required bulldozer--CLIN No. 1, Crawler Tractor minimum 205 horsepower (HP), and CLIN No. 2, Crawler Tractor minimum 130 HP. RFP amend. 2, at 190-92.

⁸ The BPA states that offers, at a minimum, must include a technical description of the proposed equipment, including product literature or other documents if necessary. BPA at 106-07.

NOTE: Please refer to the attached file for complete details of the proposed equipment.

Warranty - [specified months/years from delivery date or number of working hours, etc.] Please refer to the following pages for complete details of the warranty.⁹

Id. at 212, 217. Neither CLIN specifies payment terms. Id. at 211-12, 217.

By contrast, the manufacturer's terms and warranty document included in ISI's proposal stated the following:

- All prices are Ex-Factory or FOB (Florida, Texas, or California), according to inventory availability or production plants in other countries and/or continents.[]
- Before shipment, any order must be paid in full, 100%, or backed by letters of credit or title value confirmed by a prime bank in the United States of America, or bank transfer to [the manufacturer] according to business deal agreed upon negotiation.[]
- Prices, discounts, and specifications are subject to change without notice.

Id. at 223. The document also listed warranty conditions, manufacturer equipment responsibilities, user responsibilities, limitations, and a number of other terms that apply to the "user" or "buyer" of the equipment. Id. at 222-23.

The contracting officer rejected ISI's proposal based on the three provisions quoted from the manufacturer's "terms and warranty" document above.¹⁰ COS ¶ 19. With respect to the first provision, the contracting officer found that it conflicted with the RFP's requirement for delivery F.O.B. destination to Flagstaff, Arizona. AR, Tab 13, Decision Mem., at 263; see COS ¶ 17. With respect to the second provision, he noted that the solicitation did not provide for commercial financing, but provided for payment after delivery, while the provision above provided for payment before shipping. AR, Tab 13, Decision Mem., at 263; see COS ¶ 18.a. With respect to the third provision, he questioned whether ISI would be bound to perform the resulting

⁹ Although ISI's protest submissions included a copy of its proposal that identified the manufacturer (not ISI) and prices of ISI's proposed equipment, we omit this information because it is not relevant to our decision and to avoid any competitive harm to the protester.

¹⁰ To be clear, the actual terms of the warranty (whether ISI's or the manufacturer's) are not at issue here. Rather, at issue here are the delivery, payment, and "subject to change without notice" terms contained in the manufacturer's "terms and warranty" document that ISI included in its proposal.

contract if the government accepted ISI's offer, since it stated that the price and specifications were subject to change without notice. AR, Tab 13, Decision Mem., at 263; see COS ¶ 18.b.

ISI disputes these findings, arguing that it should have been very clear to the contracting officer that the manufacturer's terms and warranty document only applied to the manufacturer's authorized distributor/dealer (i.e., ISI), not to the agency. Comments at 3, 12. ISI maintains that the contracting officer conflated the terms offered by ISI to the Forest Service, with the terms offered by the equipment manufacturer to ISI. See id. at 6. According to ISI, it included the manufacturer's terms and warranty document "as an additional item for evaluation, even though it was not required [by] the BPA," to be as thorough, comprehensive, and detailed as possible to "allow for a positive evaluation of our proposal." Id. at 4-6. ISI also claims that the disputed terms "are part of [the manufacturer's] literature," that "proprietary reasons do not allow [ISI] to remove text from [such] literature," that it was thus "unavoidable to exclude these terms[.]" and that the contracting officer refuses to acknowledge "that the brochures provided [] are property of the manufacturer."¹¹ See id. at 4-5, 7.

The Forest Service maintains that the contracting officer reasonably rejected ISI's proposal, because it was ambiguous at best, and inconsistent with the solicitation at worse. MOL at 15. The agency points out that most of the manufacturer's terms include various conditions, limitations, and responsibilities for the equipment "buyer" and "user," but that ISI's proposal did not explain that those terms did not apply to the agency. Id. at 12-13. Without such an explanation, the Forest Service maintains, its contracting officer reasonably read the entire manufacturer's terms and warranty document--including the unacceptable delivery, payment, and subject to change without notice provisions--as applying to the agency, and thus inconsistent with the RFP requirements. Id. at 13.

We agree with the Forest Service. It is an offeror's responsibility to submit a well written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. See, e.g., International Med. Corps, B-403688, Dec. 6, 2010, 2010 CPD ¶ 292 at 7. An offeror that does not affirmatively demonstrate the merits of its proposal risks rejection of its proposal. HDL Research Lab, Inc., B-294959, Dec. 21, 2004, 2005 CPD ¶ 8 at 5. In reviewing protests challenging the rejection of a proposal based on the agency's evaluation, it is not our role to reevaluate proposals; rather our Office examines the record to determine whether the agency's judgment was reasonable and in accordance with the solicitation criteria and

¹¹ ISI also states that it was "not aware that [the manufacturer's delivery and payment] terms to their authorized distributors were on the same document." Comments at 7.

applicable procurement statutes and regulations. Wolverine Servs. LLC, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 3; Orion Tech., Inc., B-405077, Aug. 12, 2011, 2011 CPD ¶ 159 at 4.

Contrary to the protester's arguments, it was not at all clear from ISI's proposal which delivery and payment terms the firm was actually offering to the Forest Service. On the one hand, the proposal's CLIN terms specified delivery F.O.B. to Arizona, consistent with the solicitation, and did not specify any payment terms. On the other hand, the CLIN terms, as the agency points out, explicitly referenced the subsequent warranty pages--which contained conditions expressly applicable to the "buyer" and "user" of the equipment, as well as delivery and payment terms that were facially inconsistent with the solicitation.¹² As a result, instead of making its proposal more thorough by including the manufacturer's terms and warranty document, as the protester urges, that document actually introduced ambiguities and inconsistencies into ISI's offer that the Forest Service was not required to reconcile. Indeed, ISI essentially concedes that including the manufacturer's document resulted in "confusion" and "misinterpretation" of ISI's offer, and "may have caused additional work" for the contracting officer. See Comments at 5-6; AR, Tab 18, ISI Email to Contracting Officer (CO), June 3, 2016; Tab 20, ISI Email to CO, June 3, 2016.¹³

An agency is not required to piece together disparate parts of a protester's proposal to determine the protester's intent. See James Constr., B-402429, Apr. 21, 2010, 2010 CPD ¶ 98 at 5; see also The Louis Berger Group, Inc., B-407715 et al., Jan. 25, 2013, 2013 CPD ¶ 55 at 9 (agency not required to divine protester's approach to specified technical requirement from proposal's check-the-box table). Moreover, agencies are not required to infer information from an inadequately detailed proposal, or to supply information that the protester elected not to provide. Optimization Consulting, Inc., B-407377, B-407377.2, Dec. 28, 2012, 2013 CPD ¶ 16 at 9 n.17. We thus find unavailing ISI's assertion that its proposal clearly met the solicitation's requirements.

Moreover, ISI's claim--that it could not exclude the manufacturer's terms and warranty provisions from the manufacturer's literature--is disingenuous, at best. The record actually shows that the manufacturer's brochures (which did not specify warranty, delivery, or payment terms and conditions) were submitted by ISI

¹² As stated above, the BPA advises firms that offers that reject the terms and conditions of a solicitation may be excluded from consideration. BPA at 106-07.

¹³ After it was notified that its proposal was rejected, ISI sent a number of emails to the contracting officer requesting that he reconsider his decision and explaining, as it does here, that the objectionable delivery and payment terms did not apply to the Forest Service. See, e.g., AR, Tab 22, ISI Email to CO, June 6, 2016.

separately and apart from ISI's proposal. See Proposal at 209-57; COS ¶ 15. In fact, ISI concedes that there was no need to include the manufacturer's warranty terms as part of ISI's proposal. See Comments at 6 ("We included the warranty terms as an additional item for evaluation, even though it was not required by the BPA."), 7 (warranty term document could have been provided after evaluation). Thus, as the contracting officer admonished ISI, if the manufacturer's terms and conditions did not apply to the Forest Service, then ISI should not have included those terms and conditions in its proposal.¹⁴ See AR, Tab 21, CO Email to ISI, June 6, 2016.

In sum, ISI's protest amounts to nothing more than the protester's belated attempt to re-write its proposal and explain what it actually intended to offer the agency. While ISI disagrees with the Forest Service's reasons for rejecting ISI's proposal, the protester has not shown that the agency acted unreasonably. See Emergency Vehicle Installations Corp., B-408682, Nov. 27, 2013, 2013 CPD ¶ 273 at 4-5 (protest of rejection of quotation is denied where agency reasonably questioned whether the quotation was contingent on prepayment by the government, notwithstanding protester's assertion that the inclusion of "informational only" pricing information in its proposal could not have reasonably lead the agency to conclude that the offer was contingent on advance payment); TechStart, LLC, B-403515, Nov. 10, 2010, 2010 CPD ¶ 274 at 2-3 (protest of rejection of quotation is denied where it contained inconsistent delivery terms and explicitly stated that a deposit was required, contrary to FAR provisions for commercial item acquisitions).

The protest is denied.

Susan A. Poling
General Counsel

¹⁴ We dismiss ISI's claim that the contracting officer was "focused [o]n cancelling the solicitation . . . for some unknown reason." See Comments at 12-13. By its terms, this amounts to nothing more than an unsubstantiated allegation of bad faith. Government officials are presumed to act in good faith, and a protester's contention that contracting officials are motivated by bias or bad faith thus must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. The record here does not contain, and the protester has not adduced, any evidence of wrongdoing or bad faith on the part of the agency or its contracting officer.