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Decision

Matter of: CJW-Desbuild JV, LLC

File: B-414219

Date: March 17, 2017

Douglas L. Patin, Esq., Aron C. Beezley, Esq., and Lisa A. Markman, Esq., Bradley Arant Boult Cummings LLP, for the protester.

David A. Hearne, Esq., Outland, Gray, O’Keefe & Hubbard, for Ocean Construction Services, Inc., and Brian Hundertmark, Esq., Douglas A. Knight, Esq., and Eric S. Lammers, Esq., Garson Law LLC, for Edifice, LLC, the intervenors.

Christine Tollefson, Esq., Department of the Navy, for the agency.

Frank Maguire, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the protester failed to provide with its proposal a signed joint venture agreement, specifically required by the solicitation, the agency was not required to engage in clarifications to permit the protester to cure its failure to provide a required document.

DECISION

CJW Desbuild JV, LLC, of McLean, Virginia, protests the failure of the Department of the Navy, Naval Facilities Engineering Command (NAVFAC) to award it a contract under request for proposals (RFP) No. N40080-16-R-0157, for construction services. The protester argues that the agency unreasonably rejected its proposal for failing to include a signed joint venture agreement.

We deny the protest.

BACKGROUND

The RFP, issued on May 11, 2016, as a small business set-aside, provided for the award of up to six indefinite-delivery/indefinite-quantity (IDIQ) contracts for a base period of 12 months and two 1-year options. RFP at 1. Work to be performed under the contracts includes repairs, renovations, new construction and alterations

to shore facilities, and utilities within NAVFAC Washington's area of responsibility. Id. at 20. The RFP provided that award would be made "to the responsible Offeror(s) whose offer conforms to the solicitation and represents the best value to the Government, price and non-price factors considered." Id. at 11. Non-price evaluation factors were construction experience, safety, and past performance. Id. at 10. The RFP provided that the technical factors, when combined, were of equal importance to past performance, and the technical factors and past performance, when combined, were approximately equal to price. Id. The solicitation advised offerors that the agency intended to evaluate proposals and make award without discussions.

Of relevance to the protest here, the RFP instructed offerors as follows under the construction experience factor:

If the Offeror is a Joint Venture (JV), relevant project experience should be submitted for projects completed by the Joint Venture entity. If the Joint Venture does not have shared experience, projects shall be submitted for the Joint Venture members. . . . The Offeror shall submit a signed copy of the Joint Venture agreement indicating the proposed participation of each Joint Venture member. Failure to submit the required Joint Venture Agreement will be considered unacceptable.

Id. at 13 (emphasis added).

Twenty-four proposals were received on July 7, 2016. Contracting Officer's Statement (COS) at 3. The Technical Evaluation Team (TET) found the following deficiency with regard to CJW Desbuild's technical proposal under the construction experience factor:

JV of two SB companies: The JV did not provide the signed copy of the Joint Venture agreement indicating the proposed participation of each Joint Venture member required in the solicitation.

AR, Tab 3, Technical Evaluation Board (TEB) Report, at 106.¹ The TET therefore rated CJW Desbuild "Unacceptable" under the construction experience factor. TEB Report at 106. The Source Selection Evaluation Board (SSEB) concurred. AR, Tab 6, SSEB Report, at 14-15. Because CJW Desbuild's proposal contained a deficiency that rendered it unawardable, it was not further considered. SSEB Report at 24.

¹ The protester clarifies that it did submit a copy of its JV agreement, but that the copy was unsigned. Protest at 4.

On December 8, 2016, awards were made to the following six offerors: Ocean Construction Services, Inc.; Edifice, LLC DBA Edifice Solutions; Pinnacle Construction & Development Group; Tuckman-Barbee Construction Co., Inc.; Hascon, LLC; and Reilly Construction, Inc. COS at 5. After requesting and receiving a debriefing, CJW Desbuild filed a timely protest with our Office.

DISCUSSION

CJW Desbuild contends that its failure to submit a signed copy of its joint venture agreement was “a minor oversight” and that it was “unreasonable” for the agency to downgrade its proposal on this basis. Protest at 4. The protester maintains that it is an “established limited liability company with its own DUNS number” and that it is currently “working with NAVFAC on another multiple award contract,” indicating that “NAVFAC is aware that CJW Desbuild is an established joint venture.” Id. The protester also asserts that it “submitted a proposed price that was over \$300,000 lower than the lowest-priced awardee.” Id. CJW Desbuild further argues that NAVFAC should have used clarifications to permit it to correct its failure to provide a signed joint venture agreement. Id.

We find the protester’s arguments unpersuasive. As indicated above, the RFP specifically required a “signed copy of the joint venture agreement” and warned that failure to submit that agreement would be considered unacceptable. RFP at 13. Since the requirement for a signed JV agreement was specifically linked to technical acceptability, it could not be considered an informality or minor irregularity, subject to waiver. Further, regarding the protester’s argument that the agency was aware of its status as an established joint venture based on information outside its proposal, the agency was under no obligation to consider information not submitted as part of the protester’s proposal to establish the protester’s status as a joint venture. See ABSG Consulting, Inc., B-413155.14, Oct. 12, 2016, 2016 CPD ¶ 287 at 4-5.

We also conclude that CJW Desbuild’s failure to provide a signed joint venture agreement here could not have been remedied through clarifications. The Federal Acquisition Regulation (FAR) describes a spectrum of exchanges that may take place between a contracting agency and an offeror during negotiated procurements. See FAR § 15.306. Clarifications are limited exchanges between the agency and offerors that may occur when contract award without discussions is contemplated; an agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. FAR § 15.306(a); Satellite Servs., Inc., B-295866, B-295866.2, Apr. 20, 2005, 2005 CPD ¶ 84 at 2 n.2. Clarifications cannot be used to cure deficiencies or material omissions in a proposal or otherwise revise a proposal. DataSource, Inc., B-412468, Feb. 16, 2016, 2016 CPD ¶ 59 at 4. Since the protester’s failure to

submit a signed JV agreement was a deficiency that rendered its proposal technically unacceptable, and clarifications do not envision revisions to proposals to cure matters of technical unacceptability, the protester could not have revised its proposal to make it acceptable via clarifications. See Hi-Tec Sys, Inc., B-402590, B-402590.2, June 7, 2010, 2010 CPD ¶ 156 at 4. Also, as noted above, an agency is permitted, but not required, to engage in clarifications; thus, even if CJW Desbuild's failure to submit a signed JV agreement had been a minor clerical error, the agency would not have been required to give it the opportunity to correct it via clarifications.²

The protester further argues that FAR § 15.306 provides that an agency may communicate with offerors regarding “[a]mbiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes (see 14.407)).” According to the protester, this means that the provisions of FAR § 14.407 pertaining to mistakes are effectively incorporated into FAR § 15.306. In this connection, FAR § 14.407-1 provides as follows:

After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder alleges a mistake, the matter shall be processed in accordance with this section 14.407. Such actions shall be taken before award.

² The protester contends, citing two Court of Federal Claims decisions (BCPeabody Constr. Servs., Inc. v. United States, 112 Fed. Cl. 502 (2013) and Level 3 Communications., LLC v. United States 129 Fed. Cl. 487 (2016)), that while the agency's use of clarifications is discretionary, that discretion is not absolute. CJW Desbuild maintains that the agency abused its discretion by failing to engage in clarifications here. The cited decisions are not controlling on our Office. See Alltech Eng'g Corp., B-414002.2, Feb. 6, 2017, 2017 CPD ¶ 49 at 7 n.7. Furthermore, the circumstances in the cited decisions are distinguishable from the circumstances here in that as a pre-condition to finding that the agency abused its discretion by failing to conduct clarifications, the court in effect found that the plaintiffs' proposals contained minor or clerical errors. Here, in contrast, an unsigned JV agreement fails to provide the agency with evidence that the individual entities have agreed to form a JV. As a result, we do not view the protester's failure to submit a signed JV agreement as a minor or clerical error given that the RFP explicitly advised that the failure to furnish a signed agreement would render a proposal unacceptable.

The protester's argument is unavailing. The subsection of FAR § 15.306 cited by the protester--i.e., (b)(3)(i)--pertains to communications with offerors for purposes of determining whether a proposal should be included in the competitive range. Here, the agency did not intend to establish, nor did it establish, a competitive range. Thus, the provisions of FAR § 15.306(b)(3)(i) are inapplicable.

The protest is denied.

Susan A. Poling
General Counsel