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Decision

Matter of: The Arbinger Company--Advisory Opinion

File: B-413156.21

Date: October 14, 2016

David Gallacher, Esq., and Derek R. Mullins, Esq., Sheppard, Mullin, Richter & Hampton LLP, for the protester.

Christopher Murphy, Esq., and Kristen M. Nowadly, Esq., General Services Administration, for the agency.

Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of this advisory opinion.

DIGEST

Where solicitation required offerors to submit a specific version of a document, and warned offerors not to alter the document, the agency reasonably eliminated protester's proposal from consideration when protester submitted a different version of the document.

DECISION

The Arbinger Company, a small business of Farmington, Utah, challenges the elimination of its proposal from consideration for award under request for proposals (RFP) No. GS02Q15CRR0002 (frequently referred to as the Human Capital and Training Solutions Small Business (HCaTS SB) solicitation), issued by the General Services Administration (GSA) to provide training and development services across the federal government. Arbinger submitted a protest to our Office on May 20, 2016, in which it asserted that the agency unreasonably rejected Arbinger's proposal because it submitted the wrong version of an RFP attachment. Arbinger also argued that the agency should have engaged in clarifications to allow Arbinger to submit the correct version of the attachment.

On July 19, we dismissed Arbinger's protest, and several others, when another offeror under the solicitation submitted a protest to the United States Court of Federal Claims.¹ Bid Protest Regulations, 4 C.F.R. § 21.11(b) (2016). On

¹ The Arbinger Co., et al., B-413156.4 et al., July 19, 2016 (unpublished decision).

August 5, the parties (Arbinger and the Department of Justice) filed a joint motion with the court requesting an advisory opinion from our Office. The court granted the motion and requested that our Office provide an advisory opinion regarding the merits of the protest Arbinger filed with our Office. See id. Our opinion here is issued in response to the court's request, and is presented in the same general format as we normally employ to issue decisions responding to bid protests. As explained below, our Office finds the protest without merit, and we would deny this protest.

BACKGROUND

On August 17, 2015, GSA published the HCaTS SB solicitation as a small business set-aside seeking proposals for “customized training and development services, customized human capital strategy services, and customized organizational performance improvement services.” RFP at 15. HCaTS SB comprised two separate, government-wide multiple-award indefinite-delivery/indefinite-quantity (IDIQ) contracts, referred to as “pools,” which covered eight North American Industry Classification System (NAICS) codes.² Id. at 62. Offerors could compete for one or both pools, but would submit only one proposal. Id. at 103. The solicitation contemplated that the agency would award up to 40 IDIQ contracts for each pool.³ Id. at 156. Awards were to be made to the offerors that submitted proposals that were the “Highest Technically Rated with Fair and Reasonable Prices.” Id. At the same time the agency issued this solicitation, it issued a similar, unrestricted solicitation.

The HCaTS SB required offerors to demonstrate their small business eligibility, responsibility, experience, and past performance by submitting various attachments and documentation. RFP at 108-16. As relevant to this protest, offerors were to submit a proposal checklist, referred to as Attachment J.2. Id. at 119. Attachment J.2 required offerors to list all documents required by the solicitation, and state whether the document was included in the proposal. Id. One of the many documents included on the checklist is a self-scoring worksheet, referred to as

² GSA assigned three NAICS codes with corresponding size standards of \$11 million to pool 1, and five NAICS codes with corresponding size standards of \$15 million to pool 2. RFP at 62.

³ For each pool, the agency intended to issue three awards in each of the following socio-economic groups of small businesses: HUBZone, service-disabled veteran-owned, women-owned, economically disadvantaged women-owned, and 8(a) small businesses. RFP at 157. The solicitation stated that the agency would seek to ensure that at least three offerors from each subgroup are present in each pool's top 40, and therefore, would add offerors from each subgroup to the top 40 to the extent necessary and if there were at least three acceptable offerors for the subgroup. Id.

Attachment J.5.1 (small business) for pool 1, or J.5.2 (small business) for pool 2. Id. at 112-13.⁴ Offerors were to submit proposals, including all attachments and documentation, on five separate disks. Id. at 107.

The solicitation stated that the agency “intends to strictly enforce all of the proposal submission requirements” and that failure “to comply with these requirements may result in an Offeror’s proposal being rejected as being non-conforming to solicitation requirements.” RFP at 156. The solicitation also advised that “offerors are prohibited from modifying, in any way, shape or form, any documents, printed or electronic, associated with this solicitation and any amendment(s) thereto, unless specifically authorized to do so.” Id. at 104. Further, offerors were instructed to “adhere to the volume numbers and titles, format and/or templates, file naming convention, and page limitations (if any) provided in the proposal format Table in Section L.4.1.” Id. at 108. The solicitation provided that for Attachments J.5.1 (small business) and J.5.2 (small business), only amendment 03 and 04 would be accepted. Id. at 112-13.

The solicitation explained that the agency would conduct a multi-phased evaluation. First, the agency would identify the top 40 proposals (which included those tied at the 40th position and those included based on the offeror’s socio-economic group) using the offeror’s self-scoring worksheets, Attachments J.5.1 (small business) and J.5.2 (small business). RFP at 157. Next, the agency would perform an initial screening of the top 40 proposals to determine whether the offeror stated that all attachments and documents listed on the Attachment J.2 checklist were included in the proposal. Id. at 158. The agency would then check to make sure that the attachments and documents were in fact submitted, but would not yet evaluate them. Id. at 159. If an offeror submitted all required attachments and documents, the agency would then validate the offeror’s self-reported scores. Id. at 159, 161. The solicitation stated that the agency could allow an offeror to respond to clarifying questions in an effort to validate minimum requirements and scored elements. Id. at 159. Offerors, however, were not allowed to resubmit or revise any documents related to relevant experience or any scored elements to cure proposal deficiencies or material omissions, or to materially alter or revise scored elements of the proposal. Id. The solicitation cautioned offerors that the agency intended to make award without holding discussions. Id. at 156.

The agency received 95 proposals, including one from Arbinger for pools 1 and 2, by the December 3 closing date for the receipt of proposals. Contracting Officer’s Statement (COS) at 2. GSA notified Arbinger on May 16, 2016, that its offer was eliminated from competition. AR, Exh. 6, Arbinger Debriefing. Specifically, in the

⁴ On the self-scoring attachment, offerors claim points in accordance with the RFP’s scoring table for various elements under the relevant experience, past performance, and certifications factors. RFP at 132, 150.

debriefing letter, GSA informed Arbinger that the agency was rejecting the company's proposal because it did not submit the correct self-scoring attachments-- J.5.1 (small business) and J.5.2 (small business)--and instead submitted Attachments J.5.1 and J.5.2 for the unrestricted solicitation. Id.

DISCUSSION

Arbinger argues that the agency unreasonably rejected its proposal for submitting the wrong attachment because it was clear from its proposal that it was submitting its offer as a small business in response to the set-aside solicitation. Arbinger argues that the agency should have considered Arbinger's submission of the unrestricted, rather than the small business attachment, as a minor informality, or allowed Arbinger to correct it through a clarification. Arbinger argues that the attachments for the small business and unrestricted solicitations are almost identical and that its score would not have changed if GSA had allowed Arbinger to submit the correct version of the attachment.

The agency responds that the solicitation was clear that the attachments could not be altered, and that offerors under the small business set-aside solicitation were required to submit attachment J.5.1 (small business) for pool 1, and attachment J.5.2 (small business) for pool 2. COS at 2. The agency further notes that the solicitation specifically advised that offerors would not be permitted to revise or resubmit attachments related to scored elements. Id. at 2-3.

The agency also notes that the attachments are different and asserts that this could have affected an offeror's score. COS at 2. Specifically, Attachments J.5.1 (small business) and J.5.2 (small business) for the set-aside solicitation have a place for offerors to identify socio-economic small business status. In comparison, the attachments for the unrestricted solicitation included a section in which the offeror was to indicate whether, for each of the six relevant experience projects listed, it met or exceeded its small business subcontracting goals and for each project that the offeror checked yes, it received 75 points. Solicitation No. GS02Q15CRR0001, Attachment J.5.1 at 4, Attachment J.5.2 at 4. Thus, according to the agency, an offeror who submitted the unrestricted self-scoring attachment on the HCaTS SB, rather than the small business set-aside attachment, had the opportunity to score extra points.

Proposal Evaluation

In reviewing protests of alleged improper evaluations, it is not our role to reevaluate proposals; rather, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement laws and regulations. IN2 LLC, B-408099 et al., June 18, 2013, 2013 CPD ¶ 149 at 5. In this regard, an offeror has the burden of submitting an adequately written proposal, and runs the risk that its proposal will be evaluated

unfavorably when it fails to do so. Recon Optical, Inc., B-310436, B-310436.2, Dec. 27, 2007, 2008 CPD ¶ 10 at 6. A protester's disagreement with an agency's judgment is not sufficient to establish that an agency acted unreasonably. A&T Systems, Inc., B-410626, Dec. 15, 2014, 2015 CPD ¶ 9 at 3.

Here, the solicitation stated that offerors must submit the self-scoring attachments J.5.1 (small business) for pool 1 and J.5.2 (small business) for pool 2. RFP at 112-13. Offerors were "prohibited from modifying, in any way, shape or form, any documents, printed or electronic, associated with this solicitation and any amendment(s) thereto," id. at 104, and were instructed to "adhere to the volume numbers and titles, format and/or templates, file naming convention, and page limitations (if any) provided in the proposal format Table in Section L.4.1," id. at 108. The solicitation instructed offerors to submit the required attachments, not to alter the attachments, and stated that the agency "intends to strictly enforce all of the proposal submission requirements" and that failure "to comply with these requirements may result in an Offeror's proposal being rejected as being non-conforming to solicitation requirements." Id. at 104, 108, 156. The solicitation further provided that for Attachments J.5.1 (small business) and J.5.2 (small business), only amendment 03 and 04 would be accepted. Id. at 112-13. Arbinger did not submit Attachments J.5.1 (small business) and J.5.2 (small business) and as a result, it was reasonable for the agency to reject Arbinger's proposal. Further, since the attachments Arbinger did submit were different, it would be reasonable for the agency to consider them altered, and reject the proposal.

Arbinger insists that in this case, the failure to submit the correct attachment was a minor error because it did not award itself any extra points for meeting the small business subcontracting goals. However, the agency never reached this stage in the evaluation with Arbinger's proposal. See RFP at 159. Rather, before validating the scores, the agency performed a review to determine whether all required attachments and documents were included in the proposal. As discussed above, GSA determined that Arbinger failed to submit the correct attachment and properly eliminated Arbinger's proposal from the competition.⁵

Clarifications

Arbinger also asserts that the agency should have allowed it to resubmit the correct attachment during clarifications. However, the solicitation specifically advised that failure to comply with the solicitation requirements may result in a proposal being rejected as being non-conforming to solicitation requirements, and that the attachments related to scoring could not be altered or resubmitted. RFP at 104, 108, 156, 159. Attachments J.5.1 (small business) and J.5.2 (small business)

⁵ Moreover, as the agency explains, the opportunity to have a different score was present. Email from GSA, July 8, 2016, at 1.

specifically were used to self-report an offeror's scores, and therefore, the attachments were related to scoring. As such, they could not be altered or resubmitted. See RFP at 159.

Further, it is well-settled that “[a]n 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.” Wolverine Services LLC, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 6; see also, Sawee Consulting, Inc., B-408623, B-408623.2, Nov. 8, 2013, 2013 CPD ¶ 265 at 6. Clarifications cannot be used to cure deficiencies or material omissions in a proposal or otherwise revise a proposal. Sawee Consulting, Inc., supra. Providing an offeror the opportunity to revise its proposal and cure a deficiency would constitute discussions, not clarifications, because that would require the submission of information necessary to make the proposal acceptable. Id.

The solicitation stated that the agency could allow an offeror to respond to clarifying questions but that offerors could not resubmit or revise documents. RFP at 159. Here, Arbinger provided an incorrect attachment, which, according to the solicitation was a material omission or deficiency, and had the agency permitted Arbinger to submit the correct attachment, GSA would have engaged in discussions and not clarifications.⁶

On the record presented to our Office, and in response to the court's request for an advisory opinion, we would deny this protest.

Susan A. Poling
General Counsel

⁶ Arbinger also asserts that the agency opened discussions with Arbinger by requesting it to submit GSA Form 527 (Contractor's Qualifications and Financial Information), three years of corrected financial statements, and a signed corporate guaranty. Thus, according to Arbinger, the agency was required to discuss Arbinger's failure to submit the correct self-scoring attachments. We disagree. The solicitation stated that the agency could request additional information, such as the Form 527 and financial statements, to assist in its determination of the offeror's financial responsibility. RFP at 129-31, 160; see Federal Acquisition Regulation § 9.104-1(a). Exchanges with an offeror that pertain to its responsibility are appropriate attempts to address agency concerns about the offeror's ability to perform and do not constitute discussions. DaeKee Global Co., B-402687.8, Jan. 3, 2012, 2013 CPD ¶ 153 at 6.