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Decision

Matter of: US21, Inc.

File: B-415552.4

Date: August 1, 2018

Christopher R. Shiplett, Esq., Randolph Law, PLLC, for the protester.
Lori Ann Lange, Esq., and Nick R. Hoogstraten, Esq., Peckar & Abramson P.C., for United Capital Investment Group, Inc., the intervenor.
Howard M. Kaufer, Esq., and Matthew Vasquez, Esq., Defense Logistics Agency, for the agency.
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Challenge to the evaluation of the protester's proposal as unacceptable is denied where the agency reasonably found that the protester failed to provide required information during discussions.
 2. The protester's failure to provide required information did not concern a matter of responsibility, and the agency was therefore not required to refer the matter to the Small Business Administration for a Certificate of Competency determination.
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DECISION

US21, Inc., a small business, of Fairfax, Virginia, protests the award of a contract to United Capital Investment Group, Inc. (UCIG) of McLean, Virginia, by the Defense Logistics Agency (DLA) under request for proposals (RFP) No. SP0600-17-R-0211, for delivery of fuels in the Kingdom of Jordan. US21 argues that the agency unreasonably found its proposal unacceptable and that the agency failed to refer the matter to the Small Business Administration (SBA) for a Certificate of Competency (COC) determination.

We deny the protest.

BACKGROUND

DLA issued the solicitation on May 16, 2017, seeking proposals to provide petroleum products, including aviation turbine fuel (JP8), to various locations in the Kingdom of Jordan. Agency Report (AR), Tab 1, RFP, at 7-10.¹ The RFP anticipated the award of a requirements contract with fixed unit prices (subject to economic price adjustment) for a 3-year period of performance.² *Id.* at 7, 36. Offerors were required submit prices for contract line item numbers (CLINs) for fuel products, and the RFP specified that award would be made based on lots consisting of groups of CLINs. RFP at 7-10; Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 3. The RFP advised that award would be made to the offeror that submitted the lowest-priced, technically acceptable proposal for a particular lot of CLINs. AR, Tab 11, RFP amend. 6, at 310-11. US21's protest concerns the award of lot 3 for JP8 fuel, which consisted of CLINs 0005, 0013, and 0016. Protest at 2.

Offerors' proposals were to be evaluated for technical acceptability based on the following three subfactors: (1) supply, (2) transportation, and (3) quality assurance operations. RFP at 104. As relevant here, the RFP instructed offerors to provide certificates of analysis (COAs) for fuel products, as follows: "Offerors shall submit a copy of a certificate of analysis for all products offered from their supplier/refinery with their offer. The certificate of analysis should have test results of a recent batch of the required products." *Id.* at 2. The supply subfactor required offerors to provide certificates of quality (COQ) in their proposals, as follows: "Offerors shall provide certificates of quality for each fuel type from their supplier/refinery or from their storage tanks with their offer. The certificate of quality should have test results of a recent batch of the required products." *Id.* at 104.

DLA received proposals from 17 offerors, including US21. On September 28, 2017, the agency awarded all CLINs to Premier Global Resources. COS/MOL at 3. Another offeror, Intermarkets Global USA, LLC, filed a protest with our Office (B-415552) on October 13, 2017. On November 3, the agency advised our Office that it would take corrective action by revising the solicitation and reopening discussions with offerors. Based on the agency's notice of corrective action, we dismissed the protest as academic. Intermarkets Global USA, LLC, B-415552, Nov. 6, 2017, at 2 (unpublished decision).

The agency issued RFP amendment No. 6 on February 5, 2018, and reopened discussions with offerors. The agency requested a revised proposal from US21, and advised the following regarding COAs/COQs: "All offerors must resubmit a COA's/

¹ Citations are to the page numbers added by the agency to documents in the agency report.

² The competition was limited to firms "with current Basic Ordering Agreements (BOAs) issued under Solicitation SP0600-15-R-0210 issued on April 15, 2015." RFP at 2.

COQ's and Specification Sheet for each product they are offering. Any waivers or deviation requests previously approved are no longer valid and must be resubmitted. All COQ'[s] and COA's must be valid and within the last three months from the date of this letter." AR, Tab 12, Discussions Letter, Feb. 5, 2018, at 312 (emphasis in original). The agency also advised the protester that its quality control plan was unacceptable. Id. at 313.

The protester's revised proposal included a revised quality control plan, but did not include a COA/COQ for JP8 fuel. AR, Tab 15, US21 Revised Proposal, at 322. Based on the lack of a COA/COQ, the agency found the protester's proposal unacceptable for award of the JP8 fuel CLINs under the supply subfactor of the technical evaluation factor. AR, Tab 16, US21 Revised Technical Evaluation, at 425-26. The agency also found that the protester's revised quality control plan was unacceptable. Id. at 425. The agency therefore found its proposal ineligible for award. Id. The awardee's and protester's revised proposals for the lot 3 CLINs for JP8 fuel were evaluated as follows:

	US21	UCIG
Technical Proposal	Unacceptable	Acceptable
Price	\$146,886,300	\$153,447,147

AR, Tab 17, Award Memorandum Addendum, at 430-431.

DLA concluded that although US21 offered the lowest price for the CLINs in lot 3, its proposal was unacceptable. Id. at 430. The agency therefore selected UCIG's lowest-priced, technically acceptable proposal for award. Id. at 431. The agency notified US21 of the award on April 19, and provided a written debriefing on April 23. This protest followed.

DISCUSSION

US21 raises three primary arguments: (1) the agency unreasonably found the protester's proposal unacceptable because it did not resubmit a COA/COQ for JP8 fuel; (2) the agency should have referred US21 to the SBA for a COC review based on the protester's failure to provide the required COA/COQ; and (3) the agency unreasonably found the protester's quality control plan unacceptable. Protest at 3-5. For the reasons discussed below, we conclude that the agency reasonably found the protester's proposal unacceptable based on its failure to resubmit a COA/COQ, and that the agency was not required to refer this matter to the SBA for a COC determination. We therefore find no basis to sustain the protest.

The evaluation of an offeror's proposal is a matter within the agency's discretion. National Gov't Servs., Inc., B-401063.2 et al., Jan. 30, 2012, 2012 CPD ¶ 59 at 5. In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency, but rather examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Id.

COA/COQ Evaluation

First, US21 argues that DLA unreasonably found its revised proposal unacceptable because it did not resubmit a COA/COQ for JP8 fuel. We find no merit to this argument.

As discussed above, the RFP required offerors to provide COAs/COQs for offered fuel products. During the discussions undertaken as part of the agency's corrective action in response to the prior protest (B-415552), the agency provided US21 with a letter stating that "offerors must resubmit a COA's/COQ's and Specification Sheet for each product they are offering." AR, Tab 12, Discussions Letter, Feb. 5, 2018, at 312. The letter further advised that any COQs/COAs "must be valid and within the last three months from the date of this letter." Id.

US21 does not dispute that its revised proposal did not resubmit a COA/COQ for JP8 fuel. See Protest at 2. Instead, the protester argues that the agency unreasonably found its proposal unacceptable because the solicitation did not specifically define the term "recent" with regard to the requirement to provide a COA/COQ for a batch of the offered product, and that the protester was therefore not required to submit a new COA/COQ. See Protester's Comments, June 18, 2018, at 2. The protester argues that, in the absence of a definition of the term "recent," the agency's request for revised proposals "did not invalidate the prior COQ, which was therefore still valid." Id. In this regard, US21 contends that the COA/COQ submitted with its initial proposal was acceptable, and that the protester "merely failed to update the document later in the bid process." Id.

Although the RFP did not define the term "recent" with respect to the requirement to provide a COA/COQ for a batch of the offered product, the agency's request for revised proposals clearly required the protester to submit a COA/COQ that is "valid and within the last three months from the date of this letter." AR, Tab 12, Discussions Letter, Feb. 5, 2018, at 312. To the extent the protester believed that the term "recent" or "recent batch" was ambiguous or unclear in a manner that permitted the protester to rely on the COA/COQ submitted in its initial proposal on May 30, 2017, the agency's February 5, 2018, request for revised proposals specified that the COA/COQ must be within 3 months of that request. See id. Moreover, the agency's request for revised proposals stated that offerors were required to "resubmit" COA/COQs. Id. On this record, we conclude that the protester's view that the COA/COQ submitted with its initial proposal satisfied the requirements of the discussions letter is unreasonable. We therefore find no basis to conclude that the agency unreasonably found the protester's revised proposal unacceptable based on its failure to resubmit a COA/COQ for JP8 fuel, as required in the agency's discussions letter.³

³ US21 also argues that the RFP allowed offerors to request an exception or deviation from the RFP's terms and conditions, and that the agency should therefore have found its revised proposal acceptable notwithstanding the failure to resubmit a COA/COQ for
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COC Referral

Next, US21 argues that, even if DLA reasonably found its proposal unacceptable based on the failure to resubmit a COA/COQ for JP8 fuel, the agency was required to refer the matter to the SBA for a COC determination. We find no merit to this argument.

Agencies must refer a determination that a small business is not responsible to the SBA for a COC review if the nonresponsibility determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; Federal Acquisition Regulation subpart 19.6. The SBA's regulations require a contracting officer to refer a small business concern to SBA for a COC determination when the contracting officer has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (e.g., pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii). The SBA is then empowered to certify the responsibility of the small business concern to the agency. 15 U.S.C. § 637(b)(7)(A). Where an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility, however, referral to the SBA is not required. Tyonek Worldwide Servs., Inc.; DigiFlight, Inc., B-409326 et al., Mar. 11, 2014, 2014 CPD ¶ 97 at 12-13; Light-Pod, Inc., B-401739, B-401739.2, Nov. 12, 2009, 2009 CPD ¶ 238 at 5.

Here, the record shows that offerors were required to resubmit COAs/COQs in their revised proposals, but the protester failed to do so. AR, Tab 12, Discussions Letter, Feb. 5, 2018, at 312; Tab 16, US21 Revised Technical Evaluation, at 425-26; see Protest at 2. The agency concluded the offer was unacceptable under the supply subfactor of the technical evaluation factor. AR, Tab 16, US21 Revised Technical Evaluation, at 425-26. An agency's finding that a proposal is unacceptable based on

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JP8 fuel. Protester's Comments, June 18, 2018, at 2 (citing RFP at 106-07). US21 did not raise this argument in its initial protest, and instead raised it for the first time in its comments on the agency report--which were filed 56 days after receiving notice of the agency's basis for finding its proposal unacceptable. See AR, Tab 20, Debriefing Letter, Apr. 23, 2018, at 1. We therefore find this argument untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (requiring protest issues be filed within 10 days after the basis is known or should have been known); Lanmark Tech., Inc., B-410214.3, Mar. 20, 2015, 2015 CPD ¶ 139 at 5 n.2 (protest grounds raised for the first time in comments are untimely). In any event, we find no merit to this argument because the agency's letter requesting a revised proposal stated that waiver requests must specify the basis for the request, and further advised that "[a]ny waivers or deviation requests previously approved are no longer valid and must be resubmitted." AR, Tab 12, Discussions Letter, Feb. 5, 2018, at 312. The protester does not contend that its revised proposal included a new request for waiver of the COA/COQ requirement for JP8 fuel.

the failure to provide required information on an offered product does not constitute a determination that the offeror is not a responsible prospective contractor. Sea Box, Inc., B-414742, Sept. 6, 2017, 2017 CPD ¶ 279 at 4 (a requirement for documentation that an offeror's product has previously received a particular security accreditation is not responsibility related, since the requirement does not pertain to the offeror's ability to perform). We therefore conclude that DLA was not required to refer US21 to the SBA for a COC determination.

Quality Control Plan Evaluation

Finally, US21 argues that DLA unreasonably found its quality control plan unacceptable. Because we conclude that the agency reasonably found the protester's proposal unacceptable and ineligible for award based on the failure to resubmit COAs/COQs for its offered fuel products, the protester is not an interested party to challenge the evaluation of its quality control plan. See Verisys Corp., B-413204.5 et al., Oct. 2, 2017, 2017 CPD ¶ 338 at 13. In sum, we find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel