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Decision

Matter of: RTW Management

File: B-416786.2

Date: December 17, 2018

William M. Weisberg, Esq., Law Offices of William Weisberg, for the protester.
Donald C. Mobly, Esq., Deborah K. Morrell, Esq., Department of Veterans Affairs, for the agency.

Michael P. Grogan, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of an agency's decision to take corrective action is denied where the agency reasonably concluded that corrective action was necessary to address flaws in the solicitation's evaluation criteria and ensure fair and impartial competition.

DECISION

RTW Management, a small business of Scottsdale, Arizona, protests the corrective action proposed by the Department of Veterans Affairs (VA), in response to a protest by Taylor Made Transportation Services, Inc. (Taylor Made), a small business of Baltimore, Maryland, against the terms of request for proposals (RFP) No. 36C24518R0207, issued by the VA for shuttle transportation services in support of the VA's Maryland Health Care System. RTW argues that the agency's decision to take corrective action is unreasonable.

We deny the protest.

BACKGROUND

The RFP, issued on August 3, 2018, as a small business set-aside, contemplates the award of a fixed-price contract for a 1-year base period and four 1-year option periods. Agency Report (AR), Tab 3, RFP at 1. The solicitation was issued using the commercial item procedures of Federal Acquisition Regulation (FAR) part 12. RFP at 20. The RFP provides two different bases of award. First, section E.10 of the RFP states that award will be made to the offeror whose proposal is most advantageous to the government, considering price, technical capability, and past performance, where

technical capability and past performance, when combined, are approximately equal to price. RFP at 45. Section E.11, on the other hand, provides that “award will be made to the responsible offeror who submits an acceptable proposal, as determined by a technical evaluation, and has [the] lowest price for satisfactory completion of all contract requirements.” RFP at 45. The closing date for the receipt of proposals was August 22. RFP at 1. The agency received timely proposals from [DELETED], including RTW. AR, Tab 2, Contracting Officer’s Statement at 1.

Prior to award, on August 28, Taylor Made filed an agency-level protest with the VA, which the agency denied on August 30. Id. Taylor Made filed a protest with our Office on September 7, challenging the reasonableness of the RFP’s submission deadline, and alleging that the agency failed to timely provide Taylor Made with information about the publication of the RFP. AR, Tab 5, Notice of Corrective Action at 1. On September 13, the agency notified our Office that it intended to take corrective action by amending and re-posting the solicitation. Id. On September 21, our Office dismissed Taylor Made’s protest as academic. Taylor Made Transp. Serv., Inc., B-416786, Sept. 21, 2018 (unpublished decision). On September 14, RTW filed this protest with our Office, challenging the reasonableness of the agency’s proposed corrective action.

DISCUSSION

In its protest, RTW argues that the agency’s proposed corrective action is unreasonable. Protest at 1. The protester contends that given the timing of Taylor Made’s protest—that is, after proposals had been submitted, but before the agency made an award decision—such a protest must have been either untimely or premature. As such, the protester argues, the agency’s proposed corrective action in response to such a protest is unreasonable, and is designed to benefit Taylor Made. Id. The protester also asserts that because no offeror, aside from Taylor Made, objected to the terms of the solicitation, the RFP could not have contained an impropriety that the agency was required to correct. Id. at 3.

In response to the protester’s contention that its proposed corrective action is unreasonable, the agency argues that its decision to amend and re-post the solicitation is reasonable. AR, Tab 1, Memorandum of Law at 2. In this regard, the VA provides that it elected to take corrective action here because the agency identified ambiguities in the evaluation criteria in the solicitation, namely, that the RFP’s method of evaluation included both lowest-price technically acceptable and tradeoff language. Id. at 3. The agency argues that amending and re-posting the solicitation, in this instance, is reasonable and within its broad discretion to ensure fair and impartial competition, as it is designed to ensure that the solicitation includes a clearly defined method of evaluation. Id.

In its comments on the agency report, the protester argues that even if there is ambiguity in the solicitation’s evaluation scheme, the agency’s corrective action is unreasonable because such ambiguity did not prejudice any offerors in this procurement. Comments at 2. As evidence, the protester again points to the fact that

no offeror objected to the ambiguity found in the evaluation scheme. Id. RTW contends that because the agency has not affirmatively demonstrated that the identified ambiguity resulted in actual prejudice to offerors, any corrective action to cure that ambiguity is unreasonable. Id. at 2-3.

As a general rule, agencies have broad discretion to take corrective action where an agency has determined that such action is necessary to ensure fair and impartial competition. MSC Indus. Direct Co., Inc., B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5; Bannum Inc.--Protest and Recon., B-411074.2, B-411074.3, June 12, 2015, 2015 CPD ¶ 231 at 3. The details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3. Moreover, our review is generally limited to whether the agency's corrective action is appropriate to remedy the flaw that the agency believes exists in its procurement process, and not whether the agency's corrective action remedies the flaws alleged in an earlier protest, where no decision on the merits was issued by our Office. XYZ Corp., B-413243.2, Oct. 18, 2016, 2016 CPD ¶ 296 at 3; Sealift, Inc., B-412041.2, Dec. 30, 2015, 2016 CPD ¶ 9 at 4.

Here, we find no basis to conclude that the agency's proposed corrective action is unreasonable. The protester's allegation--that because Taylor Made's protest was either untimely or premature, the agency's decision to take corrective action was designed to benefit only Taylor Made--is not supported by the record. Even if Taylor Made's protest was untimely or premature, such a fact is not indicative of the reasonableness of the agency's proposed corrective action. Indeed, as our Office has explained, it is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; where the agency has reasonable concerns that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action. Sealift, Inc., supra, at 4 n.6; Bannum Inc.--Protest & Recon., supra, at 7; Federal Sec. Sys., Inc., B-281745.2, Apr. 29, 1999, 99-1 CPD ¶ 86 at 4-5. Here, the record reflects that the agency took corrective action after identifying an obvious ambiguity in the evaluation criteria in the RFQ. Moreover, the agency's proposed corrective action applies equally to all potential offerors, allowing all offerors to compete on a common basis.

We further disagree with the protester's contention that the agency has failed to show that any offeror has been prejudiced by the ambiguity and that, without demonstrated prejudice, the agency's proposed corrective action is unreasonable. Comments at 1-2. As previously noted, agencies have broad discretion to take corrective action, and our Office will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. MSC Indus. Direct Co., Inc., supra, at 5. We have, however, recognized a limited exception under which we will object to an agency's corrective action if the record establishes either that there was no impropriety in the original evaluation and award decision, or where there

was an actual impropriety, but it was not prejudicial to any of the offerors. Security Consultants Grp., Inc., B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53 at 2-3. We do not view this limited exception as applicable, here.

We view RTW's protest as factually distinguishable from the above standard, as here, the agency has not yet made award. In any event, the ambiguity identified here--the basis for award--is central to the evaluation of proposals, so there is little doubt that offerors would be prejudiced by this. It is fundamental that offerors should be advised of the basis on which their proposals will be evaluated. The Faxon Co., B-227835.3, B-227835.5, Nov. 2, 1987, 87-2 CPD ¶ 425 at 4. Moreover, we have recognized that a solicitation that does not set forth a common basis for evaluating offers, which ensures that all firms are on notice of the factors for award and can compete on an equal basis, is materially deficient. Id. Here, the VA's proposed corrective action would remedy the RFP's material deficiency by amending the evaluation scheme so to allow all offerors to compete on a common basis. In this regard, we find the VA's corrective action to be unobjectionable.¹

The protest is denied.

Thomas H. Armstrong
General Counsel

¹ While we do not address every argument raised by RTW in its protest, we have reviewed them all and find that none provide a basis to sustain the protest. For example, the protester questions whether the agency evaluated proposals and found that offerors' prices were not fair and reasonable. Comments at 2-3. However, the protester fails to demonstrate why such an evaluation would be relevant to the reasonableness of the agency's proposed corrective action.