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Decision

Matter of: The Lioce Group

File: B-416896

Date: January 7, 2019

Jerome S. Gabig, Esq., Wilmer & Lee, PA, for the protester.
Barry F. Smith, Esq., National Labor Relations Board, for the agency.
Evan C. Williams, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated protester's quotation is sustained where the agency improperly found the protester's quotation technically unacceptable based upon an unreasonable interpretation of the solicitation.

DECISION

The Lioce Group (Lioce), a small business, of Huntsville, Alabama, protests the issuance of a task order to Xerox Corporation (Xerox) of Washington, D.C., under request for quotations (RFQ) No. 1285287, which was issued by the National Labor Relations Board (NLRB) for the lease and maintenance of copier devices. The protester challenges the agency's determination that its quotation was technically unacceptable, contending the agency's evaluation was unreasonable and inconsistent with the terms of the RFQ.

We sustain the protest.

BACKGROUND

On May 3, 2018, the agency posted the RFQ on the General Services Administration's (GSA) e-Buy system, to vendors holding special item number (SIN), 51 58A, operating lease plan for copiers, under GSA Federal Supply Schedule (FSS) No. 36-office, imaging and document solutions. Contracting Officer Statement (COS) at 3; RFQ at 1, 13. The RFQ, issued pursuant to the procedures of Federal Acquisition Regulation (FAR) § 8.405-2, contemplated the issuance of a fixed-price task order for the lease and

maintenance, to include copier supplies, of 98 copier devices to be utilized at NLRB offices nationwide, for a base year and four 1-year option periods.¹ COS at 1; RFQ at 4. Award of the order was to be made on a lowest-priced, technically acceptable basis. RFQ at 13. Quotations were to be evaluated based on the following factors: technical, past performance, and price. Id. at 14-15.

With respect to the technical factor, the RFQ stated “the vendor shall demonstrate its understanding of the requirements and provide a concise, detailed and thorough response of their capability to fulfilling the requirement[s] in the Statement of Work [SOW].” Id. at 14. The RFQ also provided that technical capability “shall be evaluated on a Go/No-Go basis in response to the requirements stated in the SOW of the solicitation.” Id.

Under the price factor, vendors were instructed to submit a fixed price to support the requirement. Id. at 15. Additionally, the RFQ warned that “[q]uotations containing exceptions, qualifications, conditions, assumptions or any other deviations from the solicitation shall be considered non-responsive and will be rejected by the Government and not considered for award.” Id. at 13.

The RFQ’s SOW contained a multiple-page list of specifications describing the functions the copier devices would be required to perform. RFQ, attach. 1, SOW (Apr. 20, 2018) at 2-6. The RFQ was amended twice to incorporate the agency’s answers to questions from vendors (hereinafter, “Q & As”), and also to revise the SOW. COS at 3. As relevant to this protest, the SOW, as amended, stated: “The ability to deliver output, securely and encrypted, to one or more endpoints (such as Blob Storage, File System Storage, OneDrive, SharePoint) in the Microsoft Azure Cloud or Azure Government Cloud is highly desirable.”² RFQ, amendment 2, attach. 1, SOW (May 23, 2018), at 3. Throughout their pleadings, the parties refer to this provision as discussing a “scanning to the cloud” capability.

The agency received eight quotations prior to the June 6, 2018 closing date. COS at 3. Following a preliminary review by the technical evaluation board (TEB), the agency identified areas in which it required additional information and asked clarification questions to all eight vendors. Id. at 4. Following receipt of the vendors’ responses, the TEB completed its technical evaluation, finding four quotations to be technically acceptable. Agency Report (AR), Tab 7, TEB Results, at 1-2. The TEB rated Liocce’s quotation as technically unacceptable, citing Liocce’s failure to provide pricing information for a required capability--i.e., scanning to the cloud. Id. at 2, 3, 6, 9. The

¹ Section 8.405-2 of the FAR provides FSS ordering procedures for services requiring a statement of work (SOW).

² This provision was originally amended to end with the words “highly recommended.” RFQ, amendment 1, attach. 1, SOW (May 18, 2018), at 3. Then, prior to the RFQ closing date, the agency amended the provision again, changing the language back to “highly desirable.” RFQ, amendment 2, attach. 1, SOW (May 23, 2018), at 3.

contracting officer issued an order for \$894,268.32 to Xerox Corporation, the vendor that submitted the lowest-priced, technically acceptable quotation. COS at 5.

On September 19, the agency notified Lioce that it was an unsuccessful vendor. On September 25, Lioce filed an agency-level protest. On September 26, the agency dismissed the agency-level protest. On October 1, Lioce filed this protest with our Office.

DISCUSSION

Lioce contends that the agency's evaluation of its proposal as technically unacceptable was unreasonable and inconsistent with the RFQ's evaluation criteria. In this regard, Lioce argues that the agency found its proposal to be technically unacceptable based upon a failure to provide pricing information related to a capability (i.e., scanning to the cloud), which Lioce asserts was not required by the RFQ.³

In response, the agency first contends the RFQ established a requirement that the vendors' proposed copier devices provide a scanning to the cloud capability. Memorandum of Law (MOL) at 2; COS at 6. The agency further asserts that since Lioce's technical quotation expressly excluded support for this capability in its price, the quotation took exception to an RFQ requirement, rendering it unawardable. Id. Thus, the agency argues that Lioce's quotation was reasonably evaluated as technically unacceptable. The agency also contends that to the extent the solicitation was not clear, the agency clarified the requirement for a scanning to the cloud capability in the Q&As.

Where, as here, an agency issues an RFQ to FSS vendors under FAR subpart 8.4 and conducts a competition for the issuance of an order, we will review the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. Carahsoft Tech. Corp., B-401169; B-401169.2, June 29, 2009, 2009 CPD ¶ 134 at 3. It is well-established that a quotation that fails to conform to a solicitation's material terms and conditions is unacceptable and may not form the basis for an award. See Technology and Telecomms. Consultants, Inc., B-413301, B-413301.2, Sept. 28, 2016, 2016 CPD ¶ 276 at 12. However, applying the fundamental principle that vendors must be treated fairly, we have found that an evaluation based on unstated minimum requirements is improper. See e.g., Omniplex World Servs. Corp., B-290996.2, Jan. 27, 2003, 2003 CPD ¶ 7 at 5. Based upon our review of the record, we sustain the protest because the agency's evaluation of Lioce's quotation was based upon an unreasonable interpretation of the solicitation.

³ Lioce also alleged that if scanning to the cloud is a requirement of the solicitation, this capability is not a part of Xerox's Schedule No. 36 contract, rendering the quotation ineligible for award. Lioce withdrew this protest ground. Protester's Supp. Comments, Nov. 21, 2018, at 3.

At the crux of this protest is the following provision, contained in the RFQ's SOW:

NLRB Information Technology (IT) Requirements for Multi-Functional Devices are as follows:

[. . .]

The ability to deliver output, securely and encrypted, to one or more endpoints (such as Blob Storage, File System Storage, OneDrive, SharePoint) in the Microsoft Azure Cloud or Azure Government Cloud is highly desired.

RFQ amendment 2, attach.1, SOW (May 23, 2018), at 2-3. The parties disagree as to whether this RFQ provision obligates vendors to provide a scanning to the cloud capability--and therefore include support for this capability as a part of the fixed price--in their quotations.

Where a dispute exists as to a solicitation's actual requirements, we begin by examining the plain language of the solicitation. See Bluehorse Corp., B-414809, Aug. 18, 2017, 2017 CPD ¶ 262 at 5. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. Id. Here, we find that the agency's interpretation of the solicitation to be unreasonable based upon the plain language of the RFQ, the context in which the disputed provision appears, and the permissive language used by the agency in the Q&As.

As quoted in full text above, the plain language of the solicitation states that the ability to deliver output in the cloud is highly desirable. We note that the common dictionary definition of "desirable" refers to "having pleasing qualities or properties," or "worth seeking or doing as advantageous, beneficial, or wise." Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/desirable> (last visited Dec. 20, 2018). Thus, on its face, the RFQ's plain language does not impose a requirement to provide a scanning to the cloud capability. Additionally, the agency cites no precedent for its contention that a function described as highly desirable may be interpreted as imposing a mandatory term or condition in this lowest-priced, technically acceptable procurement.

When the disputed RFQ provision is examined in context, the use of the term desirable as opposed to terms such as "shall" or "must," further undercuts the agency's interpretation. A review of the RFQ's SOW reveals that the terms shall or must were used dozens of times to describe functions which neither party dispute are mandatory requirements. In this regard, we believe the agency's recurring use of these clearly compulsory words reasonably indicates that a function described as desirable was merely precatory. See SCS Refrigerated Servs., LLC, B-298790 et al., Nov. 29, 2006, 2006 CPD ¶ 186 at 9 n.7.

Finally, contrary to the agency's contention, we do not find the Q&As clarified, or otherwise stated, that the scanning to the cloud capability was a required term. In support of its argument, the agency identifies the following Q&A, which was incorporated into the RFQ via amendment 1:

Q. What is the application running on the Azure cloud you want to send images to?

A. NLRB is custom developing an imaging solution in Azure that will accept these images as input for processing and delivery. As specified in the text, delivery to Azure Blob Storage, Azure File System Storage, OneDrive, or SharePoint in the Azure Cloud or Azure Government Cloud is recommended. From there, our application can retrieve and process the scanned document. As we are custom developing the solution, we can interface with any of these endpoints and be flexible to accom[m]odate the capabilities of the MFD [multi-functional device]; that being said, our first preference would be to Blob Storage, as that interface has already been developed and tested as part of an internal POC.

AR, Tab 3, Q&As, at 6. In light of the agency's use of the words "recommended" and "preference," we do not believe the permissive language in this Q&A indicated that the scanning to the cloud capability is mandatory. While the agency may have intended to express its interpretation of the RFQ when responding to vendors' questions, the agency simply did not do so. As a result, we find the agency's reliance on the Q&As unavailing.

For these reasons, we find that nothing in the RFQ, as amended, reasonably put vendors on notice that a quotation failing to provide pricing information for a scanning to the cloud capability would be found technically unacceptable. Consequently, we conclude that the agency lacked a reasonable basis for finding Lioce's quotation technically unacceptable, and sustain the protest.⁴

Competitive Prejudice

Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate that, but for the agency's actions, it would have had a

⁴ In its protest, Lioce raises various other challenges to the agency's technical evaluation, which we need not address. For example, the protester attacks the agency's technical evaluation on the basis that it relied on Lioce's failure to provide pricing information. In this regard, Lioce argues that because the RFQ did not require vendors to provide pricing related to scanning to the cloud, the agency improperly considered the matter during its technical evaluation. Because we sustain the protest on the basis that the scanning to the cloud capability itself was not required, we need not reach these issues to resolve the protest.

substantial chance of receiving an award, there is no basis for finding prejudice, and our Office will not sustain the protest. CSR, Inc., B-413973, B-413973.2, Jan. 13, 2017, 2017 CPD ¶ 64 at 12. When performing this analysis, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See Alutiiq-Banner Joint Venture, B-412952 et al., July 15, 2016, 2016 CPD ¶ 205 at 11. Since Lioce submitted a lower price than Xerox, and the agency's flawed evaluation rendered its quotation ineligible for award, we find the protester was prejudiced by the agency's action.

CONCLUSION AND RECOMMENDATION

We recommend that the agency reevaluate quotations consistent with the discussion above, and make a new source selection decision. Alternatively, to the extent the unstated minimum requirement--i.e., the capability to scan documents to the cloud--reflects the agency's actual needs, we recommend the agency amend the solicitation to clearly communicate whether this capability is a mandatory requirement, or merely a desirable function. If the agency amends the solicitation, it should provide all vendors a reasonable opportunity to submit revised quotations, then evaluate the revised quotations in a manner that is reasonable and consistent with the solicitation, prior to making a new award decision. We also recommend that the agency reimburse the protester the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1).

The protester must submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel