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Decision

Matter of: ESAC, Inc.

File: B-413104.34

Date: April 17, 2019

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DIGEST

Protest challenging elimination from competition is denied where agency reasonably found the protester's proposal failed to comply with the solicitation's specific instructions to submit an asset and liability report for one of its contract team arrangement members.

DECISION

ESAC, Inc., an 8(a) small business, of Rockville, Maryland, protests the Department of Health and Human Services, National Institutes of Health (NIH)'s exclusion of its proposal from further consideration under request for proposals (RFP) No. NIHJT2016015, for information technology (IT) supplies and services. The protester argues that the exclusion of ESAC's proposal, for failure to submit an asset and liability report for one of its contract team arrangement (CTA) members, was unreasonable and amounted to a nonresponsibility determination that should have been referred to the Small Business Administration (SBA) under the SBA's certificate of competency (COC) procedures.

We deny the protest.

BACKGROUND

The RFP, issued on March 14, 2016, contemplated the award of additional indefinite-delivery, indefinite-quantity (IDIQ) contracts for NIH's existing Chief

Information Officer-Solutions and Partners 3 (CIO-SP3) small business governmentwide acquisition contract (GWAC), a 10-year IDIQ contract for IT solutions and services.¹ RFP at B-1, M-2;² Memorandum of Law (MOL) at 2. The RFP stated that the agency intended to make up to 35 awards, but also reserved the right to make fewer or more awards. Id. at L-6, M-2. In this regard, the RFP provided that the government would establish contractor groups and projected the number of anticipated awards for each group.³ See id. at M-2, M-3. The solicitation contemplated the issuance of fixed-price, time-and-materials, or cost-reimbursement task orders during the GWAC's period of performance. Id. at B-1, L-6, F-1, G-6-G-8. The maximum order amount established for the contract was \$20 billion with a guaranteed minimum of \$250 per awardee. Id. at B-2.

The solicitation advised that the agency would evaluate proposals in two phases. Id. at M-1. During phase 1, the government would evaluate the proposals based on four go/no-go requirements: compliant proposal; verification of an adequate accounting system; IT services for biomedical research, health sciences, and healthcare; and domain-specific capability in a health-related mission. Id. at M-1, M-3-M-4. The solicitation advised that a proposal determined to be unacceptable for any of these four requirements under phase 1 would be ineligible for further consideration for award. Id. at M-4. Proposals found acceptable under phase 1 would be evaluated under phase 2 using a best-value tradeoff methodology, considering price and the following three factors: technical capability and understanding; management approach; and past performance. The technical capability and management approach factors were of equal importance, and both factors, individually were more important than past performance. Price was the least important of all evaluation factors. Id. at M-1.

The agency received 552 proposals--of which 167 were for the 8(a) contractor group--including a proposal from ESAC. Contracting Officer's Statement (COS) at 1. As relevant here, the agency found ESAC's proposal unacceptable under phase 1, and therefore the proposal was ineligible for further consideration. See AR, Tab 4a, Go/No-Go Assessment Compliant Proposal and Verification of an Adequate Accounting System Socioeconomic Group 8(a) (Go/No-Go Assessment) at 4, 6, 74.

¹ Pursuant to Section 5112(e) of the Clinger-Cohen Act of 1996, 40 U.S.C. § 11302(e), the Office of Management and Budget has designated NIH as an executive agent for government-wide IT acquisitions. Agency Report (AR), Tab 2, RFP at B-1.

² The solicitation was amended four times. All citations to the RFP are to the conformed RFP provided by the agency.

³ The solicitation identified these contractor groups as: historically underutilized business zone, service-disabled veteran-owned small business, section 8(a), and small business. RFP at M-2-M-3.

On December 19, 2018, the agency issued an award notice that did not include ESAC. Protest at 5. After requesting and receiving a debriefing, this protest followed.

DISCUSSION

ESAC argues that the agency's elimination of its proposal from the competition was unreasonable because ESAC's CTA member, [DELETED], satisfied the solicitation's requirements by submitting documentation verifying its financial capacity, however, the agency utilized unstated evaluation criteria in its evaluation of ESAC.⁴ Protest at 6-7; Comments at 2-6. ESAC further argues that its elimination from the competition because of NIH's concerns with the financial capability of [DELETED] amounted to a nonresponsibility determination that should have been referred to the SBA under the SBA's COC procedures. Protest at 7-9; Comments at 6-10. In filing and pursuing this protest, ESAC has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester's arguments and conclude that none furnishes a basis on which to sustain the protest.⁵

In response, NIH states that the solicitation specifically required each offeror and all proposed CTA members to submit an "annual report" or an asset and liability report. COS at 1; MOL at 1. NIH further explains that [DELETED] instead, submitted a worksheet that provided a listing of deductions and changes in certain liabilities and retained earnings to be used in the calculation of federal income taxes. COS at 1. NIH also explains that, during this phase of the evaluation, the agency did not make an assessment with regard to the financial capability of the offerors. Id. at 1-2. As a result, ESAC's proposal was eliminated from the competition for noncompliance, not capability or responsibility. Id. at 2.

Clearly stated RFP requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is unacceptable

⁴ The solicitation stated that offerors were allowed (but not required) to form CTAs, as defined under Federal Acquisition Regulation (FAR) § 9.601, in order to propose on the GWAC. Id. at L-14. ESAC formed a CTA with other contractors. AR, Tab 3, Protester's Proposal, General, L.3.1.a Cover Letter; AR, Tab 3, Protester's Proposal, General, L.3.1.e.1 CTA.

⁵ For example, ESAC argues that its elimination was unreasonable because the agency did not avail itself of other alternative means to obtain information regarding ESAC's CTA member's financial capability, such as a pre-award survey. Protest at 10. The agency explained that because it was not evaluating financial capability during this phase, requesting a pre-award survey would not have been appropriate. MOL at 7. The protester, however, failed to meaningfully rebut or address the agency's arguments in its comments. See Comments at 11. Therefore, we conclude that ESAC abandoned this protest ground and it will not be considered further. IntelliDyne, LLC, B-409107 et al., Jan. 16, 2014, 2014 CPD ¶ 34 at 3 n.3.

and may not form the basis for award. AttainX, Inc.; FreeAlliance.com, LLC, B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 5. It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. See, e.g., International Med. Corps, B-403688, Dec. 6, 2010, 2010 CPD ¶ 292 at 7. An offeror runs the risk that a procuring agency will evaluate its proposal unfavorably where it fails to do so. Recon Optical, Inc., B-310436, B-310436.2, Dec. 27, 2007, 2008 CPD ¶ 10 at 6.

As discussed above, the solicitation advised that during the first phase of proposal evaluation, the agency would evaluate proposals under four go/no-go requirements only one of which is relevant to this decision. RFP at M-1, M-3-M-4. Specifically, under the "compliant proposal" requirement, the solicitation stated that "[i]f the proposal does not contain the required documents, the Government may deem the proposal to be 'Unacceptable' and ineligible for further consideration for award." Id. at M-3. The solicitation also advised that a proposal determined to be unacceptable for any of the four requirements under phase 1 would be ineligible for further consideration for award. Id. at M-4.

Relevant here, the solicitation required offerors and any proposed CTA member to submit with their proposals, a "copy of the organization's [] most recent annual report, or if organized as a non-public corporation, the organization's most recent asset and liability report." The submitted report would be reviewed as part of the agency's responsibility determination of apparent successful offerors, which the solicitation stated would be evaluated on a pass/fail basis. RFP at L-13, L-23, M-11.

ESAC's proposal stated that "[w]e have submitted our audited financial statements for 2015 along with assets and liabilities report[s] for our CTA members." AR, Tab 3, Protester's Proposal, Other, L.4.2, Financial Capacity, at 1. The proposal also explained that [DELETED] had elected to provide its financial documents under the protection of a password [DELETED] would provide directly to the agency. Id. ESAC and all of the other CTA members but [DELETED] submitted documents that identified each company's assets and liabilities on a balance sheet.⁶

The password protected document provided by the [DELETED], however, was not an annual report, a financial statement, a balance sheet, or an asset and liability report. AR, Tab 3, Protester's Proposal, Other, [DELETED]_AL_2016_PW.pdf. This document, instead, contained information to support figures provided in Internal Revenue Service

⁶ See AR, Tab 3, Protester's Proposal, Other, L.4.2.a-Financial-Report-ESAC.pdf at 3; AR, Tab 3, Protester's Proposal, Other, L.4.2.a-Financial-Report-M2-Strategy.pdf; AR, Tab 3, Protester's Proposal, Other, L.4.2.a-Financial-Report-Technuf.pdf (collectively referred to as ESAC and Other CTA Members' Balance Sheets).

(IRS) Form 1120S, none of which included the information that would normally be found in an assets and liabilities report.⁷ Id.

The agency found that ESAC's proposal failed to comply with the solicitation's requirements to submit the most recent annual financial report or asset and liability report for [DELETED]. Tab 4a, Go/No-Go Assessment at 74. Specifically, the agency found that rather than submitting a statement of assets and liabilities, [DELETED] submitted a "Form 1120S" and that the submitted document did not include a "full statement of assets and liabilities." Id. As a result, NIH found ESAC's proposal unacceptable and did not consider it further because ESAC's proposal did not contain the documents required by the solicitation. Id.

On this record, we find the agency's evaluation to be reasonable and consistent with the solicitation. Here, the solicitation clearly required all offerors and all of their CTA members to submit their most recent annual reports or asset and liability reports with their proposals. See RFP at L-17. The agency explains that an annual report is "generally construed in the business world as an organization's financial statements and related footnote data." COS at 1. The agency further explains that an "an asset and [i]liability report or in common parlance, a [b]alance [s]heet, should provide at a minimum[,] a listing of the assets and liabilities of the company." Id.

ESAC claims that [DELETED] submitted a document that the parties have colloquially referred to as a "Form 1120S."⁸ See, e.g., Protest at 1; COS at 1. The document, however, was encrypted, and upon opening the file with the password, the agency concluded that the document submitted by [DELETED] was not actually a Form 1120S. AR, Tab 3, Protester's Proposal, Other, [DELETED]_AL_2016_PW.pdf. Instead, the enclosed document was a worksheet containing descriptions and figures in support of several lines from a Form 1120S for certain deductions and liabilities to be used in the calculation of federal income taxes for [DELETED]. Id.; see also COS at 1. The protester maintains that this document should have been sufficient for the agency because it "provide[d] detailed insight into [DELETED] assets and liabilities, just as required by the [s]olicitation," because it "included information about [DELETED] retained earnings and liabilities." See Protest at 1, 2, 5, 7; Comments at 2-3. We disagree.

⁷ The document provided information for the following sections of Form 1120S: taxes and licenses; other deductions; Schedule K (nondeductible expenses; other items, line 17D); Schedule L (other current liabilities; analysis of total retained earnings per books); Schedule M-1 (expenses recorded on books this year not included on schedule K; deductions on schedule K not charged against book income this year); and Schedule M-2 accumulated adjustments account-other reductions. AR, Tab 3, Protester's Proposal, Other, [DELETED]_AL_2016_PW.pdf.

⁸ A Form 1120S generally refers to a U.S. Income Tax Return for an S Corporation. See Form 1120S, U.S. Income Tax Return for an S Corporation, available at <https://www.irs.gov/pub/irs-pdf/f1120s.pdf> (last visited Apr. 1, 2019).

In our view, nothing in ESAC's proposal, or the document provided by [DELETED], contains any information about the assets of [DELETED]. Similarly, ESAC provides no explanation as to how its proposal, or the document provided by [DELETED], provided detailed insight into [DELETED]'s liabilities. ESAC's assertion that the information provided by [DELETED] provides detailed insight into [DELETED]'s assets and liabilities amounts to nothing more than a disagreement with the agency's judgment, which alone, is not sufficient to show the agency acted unreasonably. Watts-Obayashi, Joint Venture; Black Constr. Corp., B-409391 et al., Apr. 4, 2014, 2014 CPD ¶ 122 at 9.

We also find no merit to the protester's contention that the agency utilized unstated evaluation criteria in its evaluation of ESAC. Comments at 3. The record shows that ESAC and its other CTA members understood the requirement and provided balance sheets listing the assets and liabilities of those entities. Similarly, ESAC's argument that the agency utilized unstated criteria not identified in the RFP, is belied by the record. Protest at 6-7; Comments at 3-5. Most of the examples of information that the agency's evaluation identified as lacking from [DELETED]'s submission were subcategories of asset and liability information identified in the balance sheets of ESAC and its other CTA members. Compare AR, Tab 4a, Go/No-Go Assessment at 74 with ESAC and Other CTA Members' Balance Sheets.

Although agencies are required to identify in a solicitation all major evaluation factors, they are not required to identify all areas of each factor that might be taken into account in an evaluation, provided that the unidentified areas are reasonably related to, or encompassed by, the stated factors. See, e.g., Northrop Grumman Sys. Corp., B-414312 et al., May 1, 2017, 2017 CPD ¶ 128 at 12. Here, the record shows that ESAC and its other CTA members provided the very information that ESAC complains that the solicitation clearly did not communicate should be submitted. The record also shows that the information the agency indicated was lacking was reasonably related to, or encompassed by, the evaluation criterion. Accordingly, this protest ground is denied.

Further, on this record, we do not agree that the agency's evaluation involved a nonresponsibility determination requiring referral to the SBA. Under the SBA's COC program, agencies must refer to the SBA a determination that a small business is not responsible if that determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6. The SBA's regulations specifically require a contracting officer (CO) to refer a small business concern to the SBA for a COC determination when the CO 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).

Here, the record shows that the agency's elimination of ESAC's proposal from further consideration was not based on any evaluated problems with the financial capability of [DELETED] itself. Tab 4a, Go/No-Go Assessment at 74. Instead, NIH found the proposal unacceptable based on the fact that [DELETED] failed to submit the specific

documentation required by the solicitation, i.e., an asset and liability report. Id. Additionally, while inartfully worded, the record demonstrates that, to the extent the agency expressed any concerns with regard to the documentation, those concerns pertained to the adequacy of the documentation submitted, not the financial capability of [DELETED].⁹ Id. We have repeatedly recognized that where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with a material term of the solicitation, the matter is one of the proposal's acceptability, not a matter of responsibility. See, e.g., MT & Assocs., LLC, B-410066, Oct. 17, 2014, 2014 CPD ¶ 326 at 6; TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 6. Accordingly, we find no merit to ESAC's arguments.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁹ Specifically, the agency found:

This form did not include a full statement of [a]ssets and liabilities. No balances were provided for cash, investments, accounts receivable, fixed assets, accounts payable, long term debt or equity. The pages provided included expenses both deductible and non-deductible, payroll liabilities, and an analysis of total retained earnings per books. However, this is insufficient to perform financial analysis as it provides an incomplete picture of the financial position of the entity.

AR, Tab 4a, Go/No-Go Assessment at 74.