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Decision

Matter of: Gulf Civilization General Trading & Contracting Company

File: B-416140.2

Date: July 31, 2019

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GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's technical evaluation is denied, where the agency had a reasonable basis to conclude that the protester's proposal did not provide an adequate food allowance for employees and was therefore technically unacceptable.
2. Protest alleging that the agency conducted misleading discussions is denied, where the agency properly led the protester to the weaknesses in the areas of the proposal.

DECISION

Gulf Civilization General Trading & Contracting Company of Al Salhiya, Kuwait, protests the award of request for quotations (RFQ) No. SKU200-17-Q-0010, which was issued by the Department of State (DoS) for janitorial services at the U.S. embassy in Kuwait. The protester contends that the agency's technical evaluation was inconsistent with the solicitation; Gulf also asserts that DoS engaged in misleading discussions.

We deny the protest.

BACKGROUND

On September 19, 2017, DoS posted the RFQ on the Federal Business Opportunities website and on the embassy's website. Contracting Officer's Statement (COS) at 1.

The RFQ anticipated the award of an indefinite-delivery, indefinite-quantity fixed-priced contract, with a period of one base year and four option years, to the responsible

offeror¹ submitting the lowest-priced, technically acceptable quotation. RFQ at 5-11, 80. The procurement was conducted pursuant to the commercial item provisions of Federal Acquisition Regulation (FAR) part 12.

As relevant to this protest, the RFQ explained that “[t]he Contractor shall perform janitorial work, including furnishing all labor, three (3) meals a day for labor[er]s, material, equipment and services, for the U.S. Embassy Kuwait.” Id. at 5, Performance Work Statement. The RFQ instructed offerors as follows:

It’s the contractor’s responsibility to provide at NO cost to their staff working under this contract, a healthy eating pattern that consists of three (3) meals a day, (breakfast, [l]unch and dinner), to cover working days, holidays and weekends. Each proposed meal to meet as per attachment 4 “Estimated calorie needs per day, by age, sex”

* * * * *

Each interested offeror is required to submit in their proposal the proposed three meals that should be . . . consistent with attachment 3 “Adult Meal Pattern” published by [the U.S. Department of Agriculture], and attachment 4 “Estimated Calorie Needs per Day, by Age, Sex”. The proposed meals will be reviewed and approved by the Embassy [contracting officer’s representative] and Health Unit.

If interested offerors will provide meals/food allowance instead of the proposed three meals, they are required to indicate in their offer the proposed dollar/KWD [Kuwaiti dinar] value of the meals/food allowance per day.

Id. at 23-24.

The RFQ contained a meal pattern requirement to ensure workers’ nutritional diversification.² Id. at 39, attach. 3. For breakfast, offerors were to demonstrate that their meals included minimum quantities of milk, vegetable or fruits, and whole grains such as bread, fortified cereal, or granola. Id. For lunch and dinner, meals were to include minimum quantities of milk; meat or other protein, such as eggs, beans, or soy products; vegetables; fruits; and whole grains such as enriched bread, grains, or pasta. Id. The solicitation also contained a table of caloric needs, ranging from a low of

¹ Although the evaluation record and the agency’s responses here often refer to the receipt of “proposals” from “offerors,” the RFQ in fact solicited quotations. We use the agency’s nomenclature for consistency with the record.

² This meal pattern ensures that each meal include all major food groups; it does not include standard meal items such as salt, spices or condiments.

1,600 kilocalories (kcal) per day for a sedentary woman over age 50, to a high of 3,200 kcal for an active 18-year-old man.³ Id. at 40, attach. 4.

The RFQ also required offerors to indicate whether they were providing employees with housing accommodations. Id. Offerors who did were required to submit a housing plan. Id. at 74. Each housing plan was required to meet certain minimum criteria, such as a “[m]aximum of two employees to share one bedroom” and “secured electrical connections.” Id. at 74-75. Housing plans would be evaluated on a pass/fail basis.⁴ Id. Offerors were advised that the technical evaluation would “include a review of . . . [the] housing and recruitment plan, along with any technical information provided by the offeror with its proposal/quotation.” Id. at 80. The RFQ provided that DoS “may reject as unacceptable proposals/quotations which do not conform to the solicitation.” Id. Proposals were due on October 26. Agency Report (AR), Tab 2a, Gulf Proposal at 3.

Gulf proposed to staff the contract with third-country nationals and provide them with a housing allowance of [DELETED] KWD⁵ per month instead of in-kind housing.⁶ AR, Tab 2d, Gulf Housing & Recruitment Proposal, at 1. Gulf’s proposal did not include a housing plan. As to the RFQ’s nutritional requirements, in its proposal Gulf objected to their inclusion on the basis that “there is no legal requirement, nor ethical obligation, to

³ Janitorial positions appears to fall in the solicitation category of “active.” RFQ at 40, attach. 4. For active workers aged 18-50 years, the RFQ estimated their caloric needs at 2,200-2,400 kcal for women and 2,800-3,000 kcal for men. Id.

⁴ The RFQ provided that “[c]ontracts may only be awarded to contractors submitting acceptable housing plans,” but did not specifically address whether offerors who proposed a housing allowance instead of in-kind accommodations were excused from providing a housing plan. RFQ at 74. Gulf now argues that its housing allowance relieved it from both providing a plan and demonstrating compliance with the housing criteria. In our view, to the extent that the solicitation was ambiguous here, such ambiguity was patent. Under our Bid Protest Regulations, a patent ambiguity must be protested prior to the time set for receipt of initial proposals or quotations, when it is most practicable to take effective action against such defects. 4 C.F.R. § 21.2(a)(1); See Anders Constr., Inc., B-414261, Apr. 11, 2017, 2017 CPD ¶ 121 at 6. An offeror that chooses to compete under a patently ambiguous solicitation does so at its own peril and cannot later complain when the agency proceeds in a way inconsistent with its interpretation. See id. Gulf’s inaction renders untimely its challenges to the RFQ’s terms. 4 C.F.R. § 21.2(a)(1).

⁵ In September 2018, one Kuwati dinar was worth approximately 3.3 U.S. dollars. See www.investing.com/currencies/kwd-usd-historical-data (last visited July 25, 2019).

⁶ Gulf proposed a slightly higher housing allowance for employees who were making more than 100 KWD per month in base salary. AR, Tab 2d, Gulf Housing & Recruitment Proposal, at 1. Only one employee would be eligible to receive the higher amount under Gulf’s proposal. AR, Tab 4e, Gulf Clarification to DoS, Dec. 7, 2018, at 1.

provide food or an allowance, and it is not a commercial practice, as that is the purpose of employees' overall compensation." Id. at 4. The protester stated, however, that its general practice was to provide employees with a [DELETED] KWD monthly food allowance. Id.

On December 4, DoS found Gulf's proposal to be technically unacceptable on the basis that its proposed food and housing allowances did not satisfy the solicitation requirements. AR, Tab 3, Gulf Initial Technical Evaluation, 3-4, 6.

On March 6, 2018, DoS made award to Tanzifco Company W.L.L. Kuwait (Tanzifco). B-416140, Protest, attach. 1, Award Notification, Mar. 6, 2018. On March 15, Gulf filed a protest with our Office, arguing that the agency's discussions were not meaningful and that the evaluation applied unstated criteria. B-416140, Protest. On March 28, Gulf withdrew its protest.

On September 16, DoS requested final proposal revisions (FPRs) and advised Gulf of the following weaknesses in its proposal:

a) Housing allowance to staff at or above [DELETED] KWD per month Offeror is required to elaborate . . . if amount is sufficient to find safe, acceptable living conditions.

* * * * *

b) Meal allowance of KWD [DELETED] per month Is the proposed meal allowance sufficient to be in consistent with meal pattern requirement?

AR, Tab 5a, Request for FPRs, Sept. 16, 2018, at 1. FPRs were due by September 30. Protest, attach. 4, DoS Email to Gulf, Sept. 16, 2018.

In response, Gulf increased its housing allowance to [DELETED] KWD per month and asserted that this was sufficient. AR, Tab 6a, Gulf FPR, Sept. 22, 2018, at 1. The protester defended its food allowance as adequate based on "the dietary preferences and cultural habits of staff," because, "due to cultural differences, the employees are unlikely to spend most of [the food allowance] on food." Id. Gulf nevertheless tripled its food allowance from [DELETED] KWD to [DELETED] KWD, "based on our estimate of the full value of the Embassy's 'meal pattern requirement.'" Id.

The agency, still concerned about the adequacy of the food allowance, requested additional detail about the protester's proposed meal allowance:

Our evaluating team needs more clarification on [the] meal allowance proposed on your Final Proposal Revision received. You are kindly requested to clarify on how your staff member of the janitorial team will be able to purchase three meals per day from the proposed allowance that will meet the calorie and nutrition requirements as per the specifications in

the contract. Based on our solicitation meal allowance should be sufficient to purchase three meals a day that will meet “Estimated calorie needs per day, by age, sex”, nutrient needs within calorie limits, in recommended amounts . . . and as per meal pattern listed.

AR, Tab 7, Meal Allowance Questions, Email from DoS to Gulf, Oct. 18, 2018.

The protester responded to the agency’s inquiry by using the RFQ’s minimum nutritional distribution requirements to create a sample meal plan:⁷

Breakfast	RFQ minimum nutritional distribution quantity	Gulf proposed sample meal plan
Milk	8 ounces	240 ml
Fruit	1/2 cup	60 g
Bread	2 slices	2 slices
Lunch and Dinner		
Egg	1 large	1 large
Vegetables	1/2 cup	25 g
Chicken	2 ounces	59 g
Fruit	1/2 cup	60 g
Bread	2 slices	2 slices

Id., Email from Gulf to DoS, Oct. 18, 2018; RFQ at 39. Gulf asserted that its food allowance would allow its employees to purchase the items in this sample meal plan in a 30-day month, with a surplus of [DELETED] KWD.⁸ AR, Tab 7, Email from Gulf to DoS, Oct. 18, 2018 at 3. The protester did not explain how its food allowance would allow workers to purchase enough food to meet the RFQ’s caloric requirements.

⁷ Gulf converted the RFQ’s U.S.-standard volumes into grams using the website www.cookitsimply.com. AR, Tab 7, Email from Gulf to DoS, Oct. 18, 2018 at 3. We note that Gulf’s proposed sample meal plan amounts do not equate to the RFQ’s minimum quantities. For example, 1/2 cup of fruit is equal to 90 grams, not the 60 grams proposed by Gulf. See <http://www.cookitsimply.com/measurements/cups/mixed-fruit-0070-02511.html> (last visited July 22, 2019). Similarly, 1/2 cup of carrots (Gulf’s sample vegetable) is approximately 111 grams, not 25 grams. See <http://www.cookitsimply.com/measurements/cups/carrots-0060-02f22.html> (last visited July 22, 2019). In contrast, 25 grams of vegetables is approximately equal to four teaspoons. See <https://www.ars.usda.gov/northeast-area/beltsville-md-bhnrc/beltsville-human-nutrition-research-center/nutrient-data-laboratory/docs/measurement-conversion-tables/> (last visited July 25, 2019).

⁸ Gulf’s food allowance provides workers with [DELETED] KWD per day in a 30-day month.

The agency concluded that Gulf's sample meal plan would provide only 1062.66 kcal per day, an amount well below the RFQ's minimum daily caloric requirement for any person of any age and activity level. AR, Tab 8a, Internal DoS Email, Oct. 18, 2018. DoS again found Gulf's proposal to be technically unacceptable.⁹ Protest, attach. 6, DoS Letter to Gulf, Apr. 11, 2019. The agency again made award to Tanzifco, and this protest followed. Protest, attach. 7, DoS Debriefing Letter, Apr. 19, 2019.

DISCUSSION

Gulf contends that it satisfied the solicitation requirements by proposing food and housing allowance of any amount, and that the solicitation's specific requirements do not apply to offerors proposing a cash allowance rather than in-kind services. Comments at 2 (the solicitation "does not require the meeting of any particular threshold or requirement other than what is reasonable to the offeror."). DoS asserts that the solicitation clearly established nutritional minimums that the protester's interpretation of the RFQ seeks to avoid. Supp. Memorandum of Law (MOL) at 10. The agency also argues that any challenge to the solicitation terms is untimely. Id. at 14. The agency also contends that it reasonably concluded that Gulf's proposal failed to satisfy the solicitation requirements.¹⁰ Id. at 15.

Technical Evaluation

We first address the parties' dispute about whether offerors who proposed allowances were required to demonstrate that those allowances would be sufficient for employees to purchase food that met the solicitation's requirements for meal pattern and caloric requirement.

Where a dispute exists as to a solicitation's actual requirements, we begin by examining the plain language of the solicitation. Land Shark Shredding, LLC, B-415908, Mar. 29, 2018, 2018 CPD ¶ 133 at 3. If the solicitation language is unambiguous, our inquiry ceases. Id.; Desbuild Inc., B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 5. We resolve

⁹ The protester does not dispute the agency's calculation of the caloric value of its sample meal plan.

¹⁰ During the pendency of this protest, GAO granted the agency's request to dismiss certain protest grounds. First, we dismissed as legally and factually insufficient the allegation that the agency engaged in unequal discussions. 4 C.F.R. § 21.5(f). Next, we dismissed the argument that DoS's debriefing did not provide adequate detail because our Office does not generally review the adequacy of debriefings. Symlicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 4 n.4. Finally, we dismissed the challenge to other offerors' exclusion from the competition, as the protester is not an interested party to raise protest allegations on behalf of other offerors. 4 C.F.R. § 21.0(a)(1); 2M Res. Servs., B-413993.4, June 19, 2017, 2017 CPD ¶ 203 at 3. To the extent that the protest raises other grounds, we have considered them and find that none provides a basis to sustain the protest.

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. Desbuild, supra, at 5. Here, offerors' meal plans were to be "consistent with" both the meal pattern and the caloric requirement. RFQ at 23-24. Offerors proposing an allowance "instead of" meals were required to indicate the value of the allowance. Id. When reading the solicitation as a whole, these phrases demonstrate that offerors' meal plan and food allowance--because they were substitutable--needed to each satisfy the solicitation's nutritional diversity and caloric requirements. Quite simply, Gulf's argument that the solicitation excused allowance-paying offerors from the general nutritional requirements is not a reasonable interpretation of the solicitation.

Furthermore, the solicitation required offerors to provide three meals per day to employees "at NO cost", i.e. the food allowance alone would allow employees to purchase food that satisfied the solicitation's nutritional and caloric requirements. Id. at 23. Indeed, when Gulf responded to the agency's discussion questions, the protester stated that it had tripled its food allowance "based on [Gulf's] estimate of the full value of the Embassy's 'meal pattern requirement.'" AR, Tab 6a, Gulf FPR, at 1. The protester's statement demonstrates that it too understood that the general nutritional requirements applied to the food allowances. On this basis, we conclude that the solicitation contemplated that any proposed food allowance would allow workers to purchase enough food to meet the RFQ's nutritional requirements. Land Shark Shredding, LLC, supra, at 4.

Next, the protester challenges the agency's conclusion that the protester's proposal is technical unacceptable for failing to satisfy the solicitation's food allowance requirements. As noted above, the RFQ permitted the agency to "reject as unacceptable proposals/quotations which do not conform to the solicitation." RFQ at 80. Gulf contends that it has "shown that [its] proposed [housing and food allowances] each alone cover the reasonable expenses of both food and housing." Supp. Comments at 7. The agency contends that the proposed meal allowance is inadequate, and therefore Gulf's proposal is technically unacceptable. Supp. MOL at 8; AR, Tab 8, Revised Technical Evaluation at 2. We agree.

The evaluation of proposals is primarily a matter within the agency's discretion, since the agency is responsible for defining its needs and identifying the best method for accommodating them. VSE Corp., B-414057.2, Jan. 30, 2017, 2017 CPD ¶ 44 at 8. In reviewing protests challenging an agency's evaluation of proposals, our Office will not reevaluate proposals, but rather will examine the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement statutes and regulations. Id. A protester's disagreement with the agency's judgments, without more, is not sufficient to render the evaluation unreasonable. NCS/EML JV, LLC, B-412277 et al., Jan. 14, 2016, 2016 CPD ¶ 6 at 8. An offeror is responsible for demonstrating affirmatively the merits of its proposal and risks rejection of its proposal if it fails to do so. Biomass Energy Serv., B-412898, July 1, 2016, 2016 CPD ¶ 165 at 4.

The record reflects that Gulf's proposed food allowance not only fails to satisfy the RFQ's caloric requirements, but that its flawed equivalencies--such as four teaspoons of vegetables at lunch and dinner--also fail to meet the nutritional diversity requirements. Gulf has not demonstrated otherwise, but instead, simply defends its proposed allowance as culturally appropriate.¹¹ Accordingly, we agree with DoS that Gulf's proposed food allowance failed to conform to a material solicitation term and that it was properly found technically unacceptable under the terms of the solicitation. This protest ground is denied. Land Shark Shredding, supra, at 3 (agency reasonably found vendor's quotation technically unacceptable for failing to provide information required by the solicitation).

Housing

Gulf also challenges the agency's conclusion that Gulf's proposal is technically unacceptable for failing to provide an adequate housing allowance. Gulf contends that its housing allowance of [DELETED] KWD per month is consistent with local law and practice. Comments at 1. The agency concluded that "the lowest minimum average rental rate for a two bedroom apartment in [the relevant area] is 250 KWD per month. The contractor is offering to provide [DELETED] KWD per month per person, . . . which is no[t] sufficient to cover the cost of housing per the contract specifications." AR, Tab 8, Revised Technical Evaluation at 2. The agency determined that Gulf's proposed housing allowance failed to meet the contract specifications. Id. DoS argues that it is the protester's burden to show that its housing allowance would allow a worker to rent an apartment that conformed to the solicitation requirements for employer-provided housing. Supp. MOL at 5.

Our Bid Protest Regulations define an interested party as an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Pursuant to the RFQ, if DoS concluded that the proposal did not conform to the terms of the solicitation, the agency was permitted to reject the proposal as unacceptable. RFQ at 80. Since we find no basis to question DoS's evaluation of Gulf's proposal as technically unacceptable with

¹¹ When the agency raised concerns that workers who received compensation similar to Gulf's were seen eating food that had been thrown away, the protester responded that the workers may have done so for reasons other than low compensation:

Just because someone is paid the minimum wage does not mean that is why they are eating from the garbage. Even an affluent person might . . . take an unopened (and even open) bag of chips from a coworker's trash can. In extreme cases, it may be indicative of financial problems, ranging from gambling, to family issues back in the home country, to drug habits, and even psychological issues.

Comments at 8.

respect to the food allowance, as discussed above, Gulf is not an interested party to challenge the agency's evaluation of its proposal with respect to the housing allowance.¹² Stone Hill Park, LLC, B-414555.4, July 18, 2017, 2017 CPD ¶ 226 at 4.

Discussions

Finally, Gulf asserts that DoS engaged in misleading discussions and claims that the agency "never communicated that it believed [Gulf's food and housing] allowances were extremely low." Comments at 7. DoS contends that its discussions were adequate because, "[d]uring the final round of discussions, Gulf Civilization was specifically advised that the Department was still concern[ed] with its proposed housing and meal allowances." Supp. MOL at 13.

In a negotiated procurement where the agency conducts discussions, those discussions must be meaningful--that is, they must be sufficiently detailed so as to lead the offeror into the areas of its proposal requiring revision. Raytheon Co., B-403110.3, Apr. 26, 2011, 2011 CPD ¶ 220 at 7. While discussions must address deficiencies and significant weaknesses identified in proposals, the precise content of discussions is largely a matter of the contracting officer's judgment. Olgoonik Logistics, LLC, B-415569, Jan. 23, 2018, 2018 CPD ¶ 235 at 5. This is also true of competitions conducted under FAR part 12. See generally, id. Although discussions must be "meaningful," that is, sufficiently detailed so as to lead an offeror into areas of its proposal requiring amplification or revision, an agency is not required to "spoon feed" an offeror as to each and every item that must be revised to improve their proposal or to hold successive rounds of discussions until all proposal defects have been corrected. Symplicity Corp., supra, at 8.

Here, the record reflects that DoS repeatedly advised Gulf of its concerns about the inadequacy of Gulf's proposed food and housing allowances. As to the food allowance, for example, Gulf was asked whether its "proposed meal allowance [was] sufficient to be . . . consistent with meal pattern requirement." AR, Tab 5a, Request for FPRs at 1. For housing, Gulf was asked to explain how its proposed housing allowance "amount is sufficient to find safe, acceptable living conditions." Id. Indeed, that the areas requiring remediation were made clear is shown by Gulf's response, in which Gulf increased both

¹² Even if Gulf were an interested party to raise this challenge, the record does not show that DoS's evaluation was unreasonable. The RFQ set a maximum of four people per two-bedroom apartment, and the agency found these apartments were available for a minimum of 250 KWD per month. AR, Tab 8, Revised Technical Evaluation at 1. Gulf's proposed housing allowance would place [DELETED] individuals in this two-bedroom apartment (250 KWD rent/[DELETED] KWD allowance per person = [DELETED], or [DELETED] whole persons).

allowances and defended its approach. AR, Tab 5b, Gulf FPR Response at 1. On this record, we have no basis to conclude that the discussions were not meaningful. Symplicity, supra, at 9.

The protest is denied.

Thomas H. Armstrong
General Counsel