



Decision

Matter of: Unico Mechanical Corp.

File: B-419250

Date: October 29, 2020

Randy Potter, Unico Mechanical Corp., for the protester.
Sheryl Rakestraw, Esq., Department of the Interior, for the agency.
Heather Self, Esq. and Peter Tran, Esq., Office of the General Counsel, GAO,
participated in the preparation of this decision.

DIGEST

1. Protest alleging that the awardee's pricing is unrealistically low is dismissed because the solicitation did not provide for a price realism evaluation.
 2. Protest that agency improperly evaluated the protester's proposal as deficient is denied because the evaluation was reasonable and consistent with the solicitation.
 3. Protester is not an interested party to raise additional challenges to the agency's evaluation of proposals or the agency's affirmative responsibility determination when protester would not be in line for award because the agency reasonably determined that the protester's proposal was deficient and, therefore, ineligible for award.
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DECISION

Unico Mechanical Corp., a small business of Benicia, California, protests the award of a contract to Marine Diving Solutions, LLC, of Centennial, Colorado, under request for proposals (RFP) No. 140R3020R0025, issued by the Department of the Interior, Bureau of Reclamation for replacement of the intake tower cylinder gate stem assemblies at Hoover Dam. Unico challenges the agency's evaluation of proposals, the agency's affirmative responsibility determination for the awardee, and contends that it was improper for the agency to make award without establishing a competitive range and conducting discussions.

We dismiss the protest in part and deny the protest in part.

BACKGROUND

On July 17, 2020, the agency issued the solicitation seeking proposals to replace the gate stem assemblies of up to four of the intake towers at Hoover Dam with corrosion-resistant stem assemblies. RFP at Foreword, Standard Form 33. The solicitation contemplated award of a single fixed-price indefinite-delivery, indefinite-quantity type contract to the responsible offeror whose proposal was considered most advantageous to the government based upon consideration of price and non-price factors. *Id.* at Foreword, L-4, M-1.

The solicitation established four non-price evaluation factors that were “relatively equal to each other”: (1) experience; (2) technical capability/facilities; (3) design and/or specification alternative(s) (if applicable); and (4) past performance. RFP at M-1. The solicitation provided that the four non-price factors combined were significantly more important than price. *Id.* The solicitation further provided that proposed prices would be evaluated for reasonableness and to check for “any instances of unbalanced pricing.” *Id.* at M-1, M-2. The solicitation advised offerors that the agency would make its source selection decision in accordance with the procedures of Federal Acquisition Regulation (FAR) part 15. RFP at L-10. Also, as relevant here, for evaluation factor 2, technical capability/facilities, the solicitation established a 15-page limit for offerors to address the required elements. *Id.* at L-15, L-16. Further, the solicitation cautioned that the agency intended to make award on the basis of initial proposals without conducting discussions. *Id.* at Foreword, L-10.

The solicitation closed on August 25, and both Unico and the awardee submitted timely proposals. RFP amend. No. 5. The evaluators assigned a significant weakness to Unico’s proposal because the section of its proposal related to evaluation factor 2, technical capability/facilities, exceeded the 15-page limit set forth in the solicitation, resulting in “portions related to water diversion, gate support, assembly, disassembly, and schedule” not being evaluated. Initial Debriefing Letter at 2. The evaluators concluded that this significant weakness warranted assignment of a deficiency to Unico’s proposal because it “did not address most of the requirements of Factor 2.” *Id.* Unico’s proposal was evaluated as follows:

Factor 1 - Experience	Marginal
Factor 2 - Technical Capability/Facilities	Unacceptable
Factor 3 - Design and/or Specification Alternative(s) (if applicable)	Not Applicable
Factor 4 - Past Performance	Satisfactory
Price	\$48,327,060

Id.

After completing the evaluation of initial proposals, the agency found the awardee’s \$36,264,427 priced proposal to be the highest technically rated and lowest-priced offer.

Initial Debriefing Letter at 2. The agency selected the awardee's proposal for award, and following a debriefing Unico filed this protest with our Office.

DISCUSSION

Unico argues that the awardee's price is too low, and that the agency failed to evaluate it for realism. Protest at 1-2. Unico maintains that the awardee lacks the necessary financial resources to perform and has an unacceptable "Experience Modification" rate. *Id.* Unico also challenges the agency's technical evaluation of the awardee's proposal, contending that the agency failed to take into consideration a recent safety incident at one of the awardee's job sites, and alleges that the awardee "may not have the required craft people" to perform the contract. *Id.* at 2. In addition, Unico challenges the agency's technical evaluation of its own proposal, contesting the evaluators' assignment of a weakness under factor 1, experience, and a deficiency under factor 2, technical capability/facilities. *Id.* at 2-5. Finally, Unico argues that the agency improperly failed to establish a competitive range and conduct discussions. *Id.* at 2. For the reasons discussed below, we dismiss the protest in part and deny the protest in part.

Price Evaluation Challenges Fail to Set Forth a Valid Basis of Protest

Unico represents that it believes the awardee's price is substantially lower than the prices proposed by other offerors, and contends that this is an indication that the awardee's underlying cost estimate is flawed. Protest at 1. Unico also argues that the agency failed to perform a price realism evaluation. *Id.* at 2.

Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds of protest, and that those grounds be legally sufficient. 4 C.F.R. §§ 21.1(c)(4) and (f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here, the solicitation provided that the agency would evaluate proposed prices for reasonableness and balance. RFP at M-1, M-2. An agency's concern in making a price reasonableness determination focuses on whether the offered prices are too high, rather than too low. *Kingfisher Sys., Inc.; Blue Glacier Mgmt. Group, Inc.*, B-417149 *et al.*, Apr. 1, 2019, 2019 CPD ¶ 118 at 11-12. Arguments that the agency did not perform an appropriate analysis to determine whether an awardee's proposed price was too low, such that there may be a risk of poor performance, concern price realism, not reasonableness. *Id.*

Generally, when a solicitation contemplates award of a fixed-price contract, an agency may conduct a price realism analysis for the limited purpose of assessing whether an offeror's low price reflects a lack of technical understanding or risk, but it may do so only when it has advised offerors in the solicitation that such an analysis will be conducted.

IR Techs., B-414430 *et al.*, June 6, 2017, 2017 CPD ¶ 162 at 7. Absent a solicitation provision advising offerors that the agency intends to conduct a price realism analysis, agencies are neither required nor permitted to conduct such an analysis when awarding a fixed-price contract. *Id.* Unico does not argue, nor does the record reflect, that the solicitation required or provided for a price realism analysis. Accordingly, the agency was neither required nor permitted to conduct such an analysis, and Unico's arguments that the agency failed to consider whether the awardee's price was too low fail to provide a valid basis of protest. Thus, Unico's allegation that the awardee's price is too low is dismissed. *Id.*; 4 C.F.R. §§ 21.1(c)(4) and (f).

Agency Reasonably Applied Solicitation's Page Limit

Unico argues that the agency unreasonably assigned a deficiency to its proposal, and improperly concluded the proposal was unacceptable, under evaluation factor 2, technical capability/facilities. Protest at 2-5. Specifically, Unico contends that the agency's evaluation misapplies the page limit applicable to this factor. *Id.* While presented as an evaluation challenge, Unico's argument essentially challenges the agency's interpretation of the terms of the solicitation.

Here, section L of the solicitation instructed offerors to provide a narrative including the following information in the portion of their proposals addressing evaluation factor 2, technical capability/facilities:

- A description of the offeror's capability to perform shop and field work and either prime or subcontractor manufacturing capabilities.
- A description of the methods for fabrication, preparation and installation to include safety precautions. The description at a minimum should include:
 - Methods of tube fabrication and method of fabrication of the lower stem couplings and connectors.
 - Method of water diversion for water leakage past stop logs to include the method dealing with leakage water below the upper cylinder gate[.]
 - Method of propping the gate up[.]
 - Method of disconnecting the stem from the gear box[.]
 - Material properties for stems and connectors[.]
- A proposed work schedule for 1. Fabrication of the stems, and 2. Installation of stems during penstock outage window.
- This section is limited to no more than 15 pages including project charts etc. No font smaller than 10.

RFP at L-15 and L-16.

Unico represents that it interpreted the solicitation's 15-page limit as applying only to the third bullet, requiring a proposed work schedule, rather than to the entire list of information required to be submitted for this factor. Protest at 3-4. Unico contends that

because the solicitation “uses a mismatch of terms (Volume, Section, Factor)” this “created a problem that should not be held against a contractor that had nothing to do with creation of the solicitation.” *Id.* at 3.

When a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. *Planned Sys. Int'l, Inc.*, B-413028.5, Feb. 21, 2018, 2018 CPD ¶ 126 at 6. To be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Id.*; *Patronus Sys., Inc.*, B-418784, B-418784.2, Sept. 3, 2020, 2020 CPD ¶ 291 at 5.

Here, the interpretation of the solicitation advanced by Unico is unreasonable because it fails to take into account the format and structure of the list of required submission elements included in the solicitation. Specifically, the list’s structure set forth the main required elements at the bullet level, and clearly indicated any subcomponents of a required element by using a sub-bullet (as was done for the second bullet requiring offerors to describe various fabrication, preparation, installation, and safety methods). Based on this structure, we conclude that Unico’s interpretation is unreasonable because the 15-page limit was set forth at the bullet level, placing it at the same level as the rest of the list; we see no basis to conclude that this instruction applied only to the bullet immediately above it in the list of requirements.¹

As a general matter, offerors must prepare their proposals within the format limitations set out in an agency’s solicitation, including any applicable page limits. *JJ Global Servs., Inc.*, B-418318, Feb. 7, 2020, 2020 CPD ¶ 70 at 3. Clearly stated solicitation technical requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis of award. *Id.* Offerors bear the burden of submitting well-written proposals containing adequate detail to demonstrate compliance with the solicitation

¹ To the extent that Unico’s alternative interpretation of the 15-page limit might be considered reasonable, the fact that there were two possible interpretations stemming from the solicitation’s use of a “mismatch of terms” was apparent from the face of the RFP. Our regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. Accordingly, Unico was required to protest the solicitation’s allegedly ambiguous 15-page limit prior to the August 25 date set for receipt of proposals. See e.g., *U.S. Facilities, Inc.*, B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10 (dismissing as untimely protest challenging agency’s price evaluation because the conflicting pricing directions were clear from the face of the solicitation). As a result, this allegation is dismissed.

requirements and to allow a meaningful review by the procuring agency. *Red River Sci. & Tech., LLC*, B-417798.2, Oct. 24, 2019, 2019 CPD ¶ 377 at 6.

As discussed above, the solicitation clearly set out a 15-page limit for offerors to address the required elements under evaluation factor 2, technical capability/facilities. The record reflects that the agency's application of the solicitation's page limit resulted in Unico's proposal being assigned a deficiency and assessed as unacceptable because it failed to address multiple required elements related to this factor. Initial Debriefing Letter at 2. Because we find unreasonable Unico's alternative interpretation of the solicitation's page limit, we have no basis to question the agency's application of the page limit in its evaluation of Unico's proposal. See e.g., *VetsTec, LLC*, B-418164, Nov. 7, 2019, 2019 CPD ¶ 384 at 4 (concluding the agency reasonably found the protester's proposal deficient where required elements of work were addressed on pages that exceeded the solicitation's page limit). Accordingly, Unico's challenge of the evaluation of its proposal as deficient and unacceptable under this factor is denied.

Protester Not an Interested Party to Raise Remaining Challenges

Unico's remaining challenges are dismissed. Because we deny Unico's challenge to the agency's application of the solicitation's page limit, Unico is not an interested party to raise its protest arguments challenging additional aspects of its own evaluation, the agency's evaluation of the awardee's technical proposal, or the agency's determination that the awardee is a responsible source.

Our regulations define an interested party as an actual or prospective bidder or 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). A protester is not an interested party where it could not be considered for an award if its protest were sustained. *VetsTec, LLC, supra* at 3.

Here, Unico's initial, deficient proposal could not form the basis of award.² Unico contends that the agency should have created a competitive range and conducted discussions. Protest at 2. While Unico may have been able to make its proposal acceptable for award had the agency engaged in discussions and permitted offerors to submit revised proposals, when, as here, a solicitation advises offerors that the agency intends to make award without discussions, there is no requirement for the agency to conduct them. *Wolverine Servs. LLC*, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 6. Accordingly, Unico is not an interested party to pursue the remainder of its protest arguments. See e.g., *VetsTec, LLC, supra* at 4 (dismissing protest where

² The FAR defines a deficiency as "a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an *unacceptable level*." FAR 15.001 (emphasis added). Moreover, by the terms of the solicitation, a proposal found to be technically unacceptable "may be rejected from further consideration." RFP at M-1(b).

protester's proposal reasonably was found deficient because it failed to address all the required elements of work within the solicitation's page limit and protester was therefore not an interested party to challenge the award).

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel