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Decision

Matter of: Framaco-Bozdemir JV, LLC

File: B-420708.2; B-420708.3; B-420708.4

Date: August 29, 2022

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DIGEST

Protest that the agency unreasonably failed to consider protester's proposal is denied where the protester did not submit its proposal in accordance with the stated submission instructions.

DECISION

Framaco-Bozdemir JV, LLC (FB-JV), of Rye Brook, New York, protests the decision by the United States Agency for International Development (USAID) not to consider its revised proposal prepared pursuant to request for proposals (RFP)

No. 72066821R00014, issued for design and construction services in Juba, South Sudan. The protester contends it timely submitted its revised proposal in accordance with the solicitation's submission instructions, and USAID acted unreasonably in failing to consider the firm's proposal.

We deny the protest.

BACKGROUND

The agency issued the solicitation on March 24, 2021, pursuant to the two-phase design-build procedures in Federal Acquisition Regulation subpart 36.3. Agency Report

(AR) Tab 2, RFP at 1.¹ The RFP contemplated the award of a single fixed-price contract for complete design and construction services related to an electrical upgrade at the U.S. embassy in Juba, South Sudan. *Id.* at 3. In phase one of the competition, USAID would evaluate submitted proposals against four factors, all of which were accorded equal weight: (1) design phase technical approach; (2) technical qualifications; (3) rapid mobilization plan; and (4) past performance. *Id.* at 76. The solicitation explained that following USAID’s phase one evaluation, up to five of the most highly evaluated proposals would be invited to submit phase two proposals. *Id.* In phase two, proposals would be evaluated against three factors: (1) construction phase technical approach; (2) management and staffing plan; and (3) key personnel. *Id.* at 77-78. Price would be evaluated for reasonableness in phase two of the competition. *Id.* at 78. The RFP provided for award on a best-value tradeoff basis. *Id.*

Following the submission and evaluation of phase one proposals, on September 20, USAID invited FB-JV, among other offerors, to submit a phase two proposal. AR, Tab 4, FB-JV Phase Two Request Letter at 1. On January 23, 2022, USAID notified FB-JV that its proposal was included in the agency’s competitive range under phase two of the competition, and entered into discussions with the protester. AR, Tab 10, Discussions Letter at 1. The agency invited FB-JV to submit a final revised proposal, and directed that the protester’s response be submitted to email addresses for Ms. X (a senior contract specialist) and Mr. Y (a contract specialist), with a courtesy copy to Ms. Z (the contracting officer).² *Id.* at 6. The protester submitted its revised phase two proposal to these email addresses on February 8. AR, Tab 11, FB-JV’s Revised Proposal.

On April 19, USAID notified FB-JV that it was not selected for award. AR, Tab 15, FB-JV Notification Letter at 1. Following a debriefing, FB-JV filed a protest with our Office on April 25, challenging the USAID’s evaluation of its proposal. We dismissed FB-JV’s protest as academic based on the agency’s stated corrective action, which included a quality control review of the procurement and the issuance of a new source selection decision. *Framaco-Bozdemir JV, LLC, B-420708, May 12, 2022* (unpublished decision).

On May 17, the agency issued a request to FB-JV for a revised phase two proposal. AR, Tab 18, Req. for Final Revised Phase Two Proposal at 1. This letter explained USAID’s actions following the protest, allowed for the submission of a final revised proposal, and explained the “identified flaws” in FB-JV’s proposal, as described in the earlier agency debriefing. *Id.* at 2. The letter also provided additional submission instructions, to include a revised submission email address. *Id.* (“Please submit your Final Revised technical and price proposal to juba_jceuproject@usaid.gov no later than 12:00 pm Juba time on May 31, 2022.”). The agency’s letter also included two

¹ Our citations to the record correspond to the Adobe PDF document page numbers.

² As GAO does not generally disclose the names of specific individuals involved in a procurement, here, we refer to relevant agency officials by pseudonyms.

attachments: (1) phase two instructions; and (2) amendment 006 to the RFP. See *id.* at 4-7; AR, Tab 19, RFP Amend. 006.

On June 1, the agency issued an updated request for FB-JV to submit a revised phase two proposal. AR, Tab 22, Revised Req. for Final Revised Phase Two Proposal. The letter explained that it “replaces in its entirety the letter sent on May 17, 2022, in order to more clearly clarify USAID’s expectations of what to incorporate in a final revised Phase 2 Proposal.” *Id.* at 1. This letter provided similar (though revised) information as in the May 17 letter, and likewise provided information as to where final revised proposals were to be submitted. *Id.* at 3 (“Please submit your Final Revised technical and price proposal to juba_jceuproject@usaid.gov . . .”). Again, the letter included two attachments--amended phase two instructions and amendment 006 to the RFP. *Id.*

Subsequently, on June 7, approximately two hours before the submission deadline, FB-JV sent its proposal to Mr. Y and Ms. Z, but not to the juba_jceuproject@usaid.gov email address. See AR, Tab 23, FB-JV Phase Two Final Revised Proposal at 1. Approximately one hour after the submission deadline, the contracting officer checked her email and identified that FB-JV sent its proposal to her and the contract specialist, Mr. Y; the contracting officer (Ms. Z) then forwarded FB-JV’s email to the email address identified in the agency’s June 1 letter (juba_jceuproject@usaid.gov). Contracting Officer’s Statement at 3.

On June 8, the agency notified the protester that it was eliminated from consideration for award because it failed to deliver its phase two final revised proposal to the juba_jceuproject@usaid.gov email address as identified in USAID’s June 1 letter. AR, Tab 35, FB-JV Notification and Debriefing Letter at 1. This notice also explained that FB-JV’s proposal failed to include a required draft schedule of values, and failed to meet mandatory formatting requirements. *Id.* at 3-5. On June 10, FB-JV filed this protest challenging the agency’s decision to not consider the firm’s revised proposal.³

DISCUSSION

FB-JV challenges the reasonableness of the agency’s decision not to consider its proposal. Supp. Protest at 5-12; Comments and 2nd Supp. Protest at 1-14. In this regard, FB-JV argues that its delivery of its final revised proposal to Mr. Y and Ms. Z, via email, prior to the established deadline, satisfied the submission requirements

³ FB-JV filed a protest with our Office on May 26, challenging the agency’s implementation of the corrective action. However, after FB-JV filed its initial protest, the agency issued its June 1 letter requesting final revised proposals, and subsequently eliminated FB-JV from the competition on June 8. The protester filed a supplemental protest with our Office on June 10, challenging the agency’s decision not to consider FB-JV’s proposal. The protester withdrew its initial protest allegations, as “FB-JV believes that the protest grounds contained in its [June 10] Supplemental Protest are the operative protest allegations.” Protester’s Withdrawal Notice, June 15, 2022, at 1.

established by the RFP. The protester also challenges the agency's responsiveness review. Supp. Protest at 12-27. The agency principally responds that the protester failed to follow the unambiguous proposal delivery instructions and, therefore, its decision not to consider the revised proposal was reasonable. For the reasons that follow, we find no basis to sustain the protest.⁴

As an initial matter, it is an offeror's responsibility to deliver its proposal to the proper place by the proper time. *Tele-Consultants, Inc.*, B-414135, Feb. 27, 2017, 2017 CPD ¶ 132 at 5. Moreover, the protester has the burden of showing that it timely delivered its proposal to the agency at the specified location. *Latvian Connection Trading & Constr., LLC*, B-402410, Feb. 25, 2010, 2010 CPD ¶ 58 at 2; *Lakeshore Engineering Services*, B-401434, July 24, 2009, 2009 CPD ¶ 155 at 4.

The crux of FB-JV's argument is that because it complied with the solicitation's submission instructions for proposals, USAID acted unreasonably in declining to consider the protester's timely delivered proposal. More specifically, the protester--while acknowledging that the agency's June 1 request for final proposal revisions instructed FB-JV to deliver its proposals to a specific email address--nevertheless argues that those instructions were not binding on the protester because they were not included in a formal amendment to the solicitation's terms. Instead, the protester argues that FB-JV reasonably was required to follow the proposal submission instructions included in the underlying solicitation and the attachment to the June 1 request letter. The protester asserts that because it reasonably followed those instructions, by delivering its proposal to the contracting officer and contract specialist, its failure to comply with the agency's subsequent, allegedly non-binding, instructions to deliver the proposal to the designated USAID email address, is without consequence. Supp. Protest at 5-12; Comments and 2nd Supp. Protest at 1-14. As explained below, we disagree with the protester's characterization of the applicable proposal delivery requirements and its argument that it was free to disregard the agency's unambiguous instructions.

The solicitation explained that proposals would be submitted in two phases, and established two distinct sets of submission instructions for each phase. Indeed, the solicitation stated because "USAID is utilizing the two-phase design-build procedures [. . .] [o]fferors must follow the requirements for submission for each phase." AR, Tab 19, RFP amend. 006 at 102. In this regard, section L.4 (general instructions to offerors) explained that offerors were required to submit their phase one proposals to Ms. Z and Mr. Y by the closing date and time specified in the cover letter. *Id.* at 101; *see also id.* at 102-103 (section L.5 of the RFP providing explicit instructions on how offerors were to prepare their phase one proposals). On the other hand, concerning phase two, the solicitation explained that "[m]ore detailed instructions for submission will be provided for Offerors who proceed to Phase Two." *Id.* at 102; *see also id.* at 103

⁴ FB-JV raises other collateral allegations. Although our decision does not specifically address them all, we have considered each argument and find that none provides a basis on which to sustain the protest.

(“Those Offerors invited to submit Phase Two proposals will receive detailed submission instructions.”). Thus, the solicitation clearly delineates phase one submission instructions (which were expressly provided for in the RFP) and the phase two submission instructions (which were to be provided to offerors who proceeded to phase two of the competition).

Consistent with the solicitation’s instructions, the agency’s request for submissions relating to phase two proposals provided detailed proposal submission instructions. For example, the agency’s January 23 discussions letter to FB-JV directed the protester to submit its revised proposal to two designated contract specialists, with a courtesy copy to the contracting officer. AR, Tab 10, Discussions Letter at 6. This instruction, provided in a discussions letter, differed from the solicitation’s phase one instructions, which, as addressed above, directed the submission of proposals to the contracting officer and one of the contract specialists. Notwithstanding that this instruction was not incorporated into a formal solicitation amendment, the protester complied with the instruction in submitting its initial final revised proposal. AR, Tab 11, FB-JV’s Revised Proposal.

The agency then provided updated phase two submission instructions by letter to FB-JV on June 1.⁵ This letter explained the agency’s undertaken corrective action, identified concerns with FB-JV’s proposal, and invited the protester to submit a final revised phase two proposal. AR, Tab 22, Revised Req. for Final Revised Phase Two Proposal at 1-3. The letter also provided proposal preparation instructions, to include instructions on submitting the technical and price proposals. *Id.* at 3. Concerning submission of proposals, the letter stated, “Please submit your Final Revised technical and price proposal to juba_jceuproject@usaid.gov no later than 12:00 pm Juba time on June 7, 2022.” *Id.* The letter also included two attachments. The first attachment was the amended revised phase two instructions, which, while providing details on the submission of proposals for phase two, did not indicate where proposals were to be submitted. *Id.* The second attachment to the agency’s June 1 letter was amendment 006 to the RFP. *Id.* at 3; *see also* AR, Tab 19, RFP amend. 006.

As an initial matter, we do not agree with FB-JV’s contention that while the amended revised phase two instructions included in attachment one of the agency’s June 1 letter were binding on FB-JV, the actual letter, which included the submission email address, was not. Supp. Comments and 2nd Supp. Protest at 4-6. As previously explained, the solicitation detailed that phase two submission instructions would be provided at a later date. *See* AR, Tab 19, RFP amend. 006 at 102. The June 1 letter, and its attachments, provide those instructions. Indeed, the letter’s intent is to “clarify USAID’s expectations of what to incorporate in a final revised Phase 2 Proposal” and provides instructions for the submission of revised technical and business proposals. AR, Tab 22, Revised Req. for Final Revised Phase Two Proposal at 1. Moreover, the cover letter expressly states

⁵ As noted above, USAID first provided instructions via a letter dated May 17, but then issued the June 1 letter that replaced “in its entirety” the May 17 letter. *See* AR, Tab 22, Revised Req. for Final Revised Phase Two Proposal at 1.

that offerors were required to follow the cover letter's directions in submitting revised proposals. See *e.g.*, *id.* at 3 ("You must submit a revised price proposal in accordance with the revised instructions for the Phase Two Business Proposal and based upon the information provided above."). The June 1 letter is especially relevant given that the attached phase two instructions did not include a submission point for final revised proposals, whereas the letter did contain that information. *Id.* at 3. Accordingly, we conclude that USAID's June 1 letter and the attachments included therein reasonably encompassed the phase two proposal submission instructions referenced in the RFP, to include the requirement that proposals be delivered to the juba_jceuproject@usaid.gov email address.⁶

Even assuming, for the sake of argument, that we accepted FB-JV's argument that the agency's June 1 letter (which included the email address to which phase two proposals should be submitted) was not binding on the protester, the record does not support a conclusion that the protester's submission of its proposal to the contracting officer (Ms. Z) and the contract specialist (Mr. Y) comported with the solicitation's submission requirements. FB-JV contends that the phase two instructions attached to the June 1 letter explained that proposals "must follow the general requirements of Section L.4 of the RFP." *Id.* at 4. Thus, by submitting its proposal to the email addresses provided in that section of the RFP (that is, Ms. Z's and Mr. Y's email addresses) the protester argues FB-JV complied with the phase two submission requirements. See Comments and 2nd Supp. Protest at 5. However, FB-JV's argument has a fatal flaw--the submission instructions found in section L.4 of the solicitation pertain only to the submission of phase one proposals, not phase two. Indeed, the RFP clearly explained there were separate submission instructions for phase one and phase two of the competition; the solicitation provided that "[o]fferors must follow the requirements for submission for each phase." AR, Tab 19, RFP amend. 006 at 102. FB-JV's reliance on the submission instructions for phase one of the competition to demonstrate that it complied with the submission instructions for phase two provides no basis for us to sustain the protest.⁷

⁶ We note the protester's prior course of dealing suggests that it too understood that the agency's provision of submission instructions through a letter to the protester constituted firm requirements. As addressed above, on January 23, USAID issued a discussions letter to FB-JV and requested that the firm submit a final revised phase two proposal. See AR, Tab 10, Discussions Letter at 1. The protester was directed in this letter to submit its proposal to the email addresses associated with Ms. X, Mr. Y, and Ms. Z. *Id.* at 6. The protester complied with this submission requirement. See AR, Tab 11, FB-JV's Proposal Submission, Feb. 8, 2022.

⁷ To the extent that the protester argues it reasonably relied on the phase one instructions because the phase two instructions or solicitation were defective in failing to provide explicit delivery instructions for phase two proposals, such an argument is an untimely challenge to a patent ambiguity. A patent solicitation ambiguity exists where the solicitation contains an obvious, gross, or glaring error. *Sheritech Pharmacy Piedmont, LLC*, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2. An offeror has an

In the alternative, the protester argues that even assuming that it failed to comply with applicable proposal delivery instructions, the agency's rejection of its revised proposal was nevertheless unreasonable. In support of this alternative argument, the protester points to two of our Office's decisions to suggest the agency acted unreasonably in failing to consider FB-JV's proposal, as it was delivered to the contracting officer before the submission deadline. Supp. Protest at 9-12; Comments and 2nd Supp. Protest at 10-14.

First, in *AECOM Tech. Services*, B-411862, Nov. 12, 2015, 2015 CPD ¶ 353, our Office sustained a protest where an agency rejected a firm's proposal because, although it was uploaded to the wrong section within the designated government system for the submission of proposals, it was uploaded to the system--and the agency had actual knowledge of the upload--prior to the submission deadline. There, our Office concluded that the agency's decision not to consider AECOM's proposal was unreasonable based on five specific findings, including that the agency was contemporaneously aware of the proposal's submission, and the agency planned to make multiple awards, so that no other competitor could claim to have been meaningfully harmed by accepting AECOM's mis-delivered proposal. *Id.* at 5. Here, however, the facts are distinguishable; the RFP anticipated the award of a single contract, and USAID was not aware, prior to the submission deadline, that FB-JV's proposal had been submitted to the wrong address. In this regard, the record demonstrates that the contracting officer first had actual knowledge of FB-JV's incorrect delivery after the proposal submission deadline, when she first discovered the email sent to her attention.

Similarly, in *Abt Assocs. Inc.*, B-226063, May 14, 1987, 87-1 CPD ¶ 513, our Office found that the protester's proposal should not have been rejected as late where the solicitation required the filing of the proposal at two locations, but the protester timely filed its proposal at only one location. We reached this conclusion because the agency had timely received a complete copy of the protester's proposal at one location, so the protester's failure to submit a copy of its proposal to the other location was a minor informality, which should have been waived by the agency. Here, however, as noted above, the protester did not submit its proposal in the manner described by the RFP; it instead submitted its proposal to the contracting officer and the contract specialist. Thus, where the protester cannot establish that it properly and timely submitted its proposal to a location specifically designated for the receipt of proposals, the facts of this protest are materially different from those in *Abt Assoc.* to warrant an apt comparison.

affirmative obligation to seek clarification of a patent ambiguity prior to the first due date for submissions responding to a solicitation following introduction of the ambiguity into the solicitation. 4 C.F.R. § 21.2(a)(1); *International Bus. Machines Corp.*, B-417596.10, Mar. 17, 2021, 2021 CPD ¶ 127 at 15.

In summary, because the record demonstrates the agency reasonably established the juba_jceuproject@usaid.gov email address as the designated point for phase two proposal submissions, and FB-JV failed to deliver its proposal to that address, we find no basis to sustain the protester's challenge to the agency's decision to decline to consider the protester's proposal.⁸ *The Ulysses Grp., LLC*, B-420566, June 7, 2022, 2022 CPD ¶ 123.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁸ The protester also challenges the agency's conclusions following USAID's responsiveness review of FB-JV's proposal. Supp. Protest at 12-27. However, because we conclude that the agency did not err in failing to consider FB-JV's revised proposal, we do not reach the merits of the protester's remaining challenges because the protester is not an interested party to contest the agency's preliminary evaluation of its proposal. 4 C.F.R. § 21.0(a)(1).