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United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Nuclear Production Partners, LLC

File: B-407948.9

Date: September 24, 2013

Kenneth B. Weckstein, Esq., Tammy Hopkins, Esq., Pamela A. Reynolds, Esq., and Michael D. Maloney, Esq., for Nuclear Production Partners LLC.
Marcia G. Madsen, Esq., David F. Dowd, Esq., and Polly A. Myers, Esq., Mayer Brown LLP, for Consolidated Nuclear Security LLC, the intervenor.
H. Jack Shearer, Esq., Charmaine A. Howson, Esq., Young H. Cho, Esq., Shelley P. Turner, Esq., JiSan Lopez, Esq., and William L. Mayers, Esq., Department of Energy, for the agency.
Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegations challenging the adequacy of discussions and the limitations on proposal revisions in connection with the agency's ongoing source selection process are dismissed as premature.
 2. Protester's assertion that the agency is required to amend the solicitation to reflect various changes that have occurred due to the passage of time is denied.
 3. Protest that proposed cost savings, which the solicitation stated would be evaluated under the technical/management evaluation factors, should be subject to the Federal Acquisition Regulation's cost realism requirements is not timely filed where terms of the solicitation advised offerors that only offerors' fees would be used as the evaluated cost for purposes of the best value determination.
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DECISION

Nuclear Production Partners LLC (NPP), of Lynchburg, Virginia, protests the Department of Energy (DOE), National Nuclear Security Administration's (NNSA) implementation of corrective action taken in connection with request for proposals (RFP) No. DE-SOL-0001458 to obtain services associated with maintaining and securing the nation's nuclear weapons. The agency's actions are being taken in response to this Office's decision which sustained, in part, NPP's prior protest

challenging the agency's decision to award a contract to Consolidated Nuclear Security LLC (CNS).¹ See Nuclear Production Partners LLC; Integrated Nuclear Production Solutions LLC, B-407948 et al., Apr. 29, 2013, 2013 CPD ¶ 112.²

Here, NPP protests various aspects of the agency's ongoing corrective action, primarily arguing that the agency should conduct broader discussions, permit more extensive proposal revisions, and/or amend the solicitation to reflect changes occurring due to the passage of time. NPP also renews its prior argument that the agency must comply with the Federal Acquisition Regulation's (FAR) requirements for cost realism analysis.

We dismiss as premature NPP's protest allegations regarding discussions and proposal revisions, and we deny NPP's assertion that the agency is required to further amend the solicitation. We dismiss as untimely NPP's arguments regarding application of the FAR's cost realism requirements.

BACKGROUND

In December 2011, the NNSA published the solicitation at issue, seeking proposals for award of a cost-reimbursement contract to consolidate the management and operation (M&O) of NNSA's Y-12 National Security Complex (Y-12) and NNSA's Pantex Plant (Pantex), with an option to subsequently phase in NNSA's Savannah River Tritium Operations (SRTO).

In addition to consolidating the M&O functions, the solicitation provides that the contractor will be responsible for the design and construction of a new uranium processing facility (UPF) at Y-12. At the press conference conducted by NNSA following contract award, the source selection authority (SSA) stated that the total estimated contract value, if all options are exercised, is \$22.8 billion. NPP's Prior Protest, Jan. 17, 2013, exh. 5, at 3.³

¹ NPP is a limited liability corporation (LLC) comprised of resources from: Babcock & Wilcox Technical Services Group, Inc.; URS Energy & Construction, Inc.; Northrop Grumman Technical Services, Inc.; and Honeywell International, Inc. CNS is an LLC comprised of resources from: Bechtel National, Inc.; Lockheed Martin Services, Inc.; ATK Launch Systems, Inc.; and SOC, LLC.

² A third offeror, Integrated Nuclear Production Solutions LLC (INPS), also filed a prior protest which we sustained, in part, in our decision responding to NPP's protest.

³ Our decision cites to the parties' submissions in both NPP's current protest and its prior protest, distinguishing the submissions by reference to the respective protests.

Consistent with the differing functions to be performed, the solicitation was divided into two contract line item numbers (CLINs). CLIN 0001 contained the requirements for M&O services, including merger of operations, at the NNSA sites. CLIN 0002 contained the requirements for construction management and other activities related to construction of the UPF facility. RFP at 332-33.

With regard to the CLIN 0001 requirements, the solicitation established the following technical/management evaluation factors: (A) management approach and cost savings; (B) key personnel and oral presentations; (C) past performance; and (D) corporate experience. RFP at 332. With regard to the evaluated cost for CLIN 0001, the solicitation provided for a “total available fee,”⁴ stating that such fee “will be used as the evaluated cost for purposes of the best value determination.” RFP at 336.

With regard to the CLIN 0002 requirements, the solicitation established the following technical/management evaluation factors: (A) past performance; (B) project management approach; (C) key personnel and oral presentations; and (D) corporate experience. RFP at 334. With regard to the evaluated cost for CLIN 0002, the solicitation provided for a “maximum available UPF fee,”⁵ stating that such fee “will be used as the evaluated cost for purposes of the best value determination.” RFP at 338.

In responding to NPP’s prior protest, the agency stated that “one of the principle purposes of this consolidation [of M&O operations] is to realize cost savings.” Contracting Officer’s Statement of Facts and Agency’s Memorandum of Law (COSF/MOL) for NPP’s Prior Protest, Mar. 5, 2013, at 3. Consistent with this objective, each offeror was required to propose identifiable cost savings associated with its particular approach to performing the CLIN 0001 M&O requirements, and the solicitation provided that offerors’ proposed cost savings would be evaluated under the CLIN 0001 evaluation factor, management approach/cost savings. Specifically, section M of the solicitation stated:

The Government will evaluate and assess the feasibility and quality of the offeror’s proposed management approach, including cost savings approach, while maintaining effective security and mission deliverables, utilizing the information provided for this Criterion in Section L, L-14(a) Criterion A, Management Approach and Cost

⁴ Total available fee was defined to be the sum of an offeror’s proposed fixed fee and its proposed performance incentive fee. RFP at 285, 336.

⁵ The solicitation defined an offeror’s maximum available UPF fee as the offeror’s proposed fee percentage applied to “the Government’s notional cost for UPF of \$5.6B[illion].” RFP at 286, 338.

Savings.[⁶] The Government will also evaluate and assess the feasibility and the size of the proposed cumulative savings to the Government which is equal to the cumulative cost reduction proposal savings minus the contractor's total share in savings over the entire period of performance of the Contract.

RFP at 334.

On or before the March 13, 2012 closing date, initial proposals were submitted by three offerors: CNS, NPP and INPS. Each offeror proposed significant levels of cost savings associated with its particular approach to performing the consolidated M&O requirements. Thereafter, each offeror's proposal was evaluated under the management approach/cost savings evaluation factor, two rounds of discussions were conducted, final proposal revisions were submitted and evaluated, and CNS's proposal was selected for award. Following announcement of the source selection decision, NPP and INPS filed protests challenging the award.

In considering the prior protests, GAO conducted a 4-day hearing, during which testimony was provided by various agency personnel. Thereafter, GAO sustained the protests, concluding that the agency had failed to reasonably evaluate the feasibility and size of the offerors' proposed cost savings, as required by the solicitation. Nuclear Production Partners LLC; Integrated Nuclear Production Solutions LLC, supra, at 14-18. Our decision that the procurement was flawed was based on the source selection authority's (SSA) unsupported determination that all cost savings proposed by every offeror were feasible--despite the fact that the agency's own financial management specialists had found portions of the proposed savings to be "not reasonable," and had expressly stated they were unable to determine whether significant portions of the proposed savings were, or were not, feasible, due in large part to a lack of supporting documentation. Id. We recommended that the agency reopen the procurement, request additional information from the offerors regarding their proposed cost savings initiatives, and evaluate the relative size of the offerors' feasible cost savings, as well as evaluate the feasibility and quality of each offeror's cost savings approach. Id. at 25.

In response to our recommendation, the agency amended the solicitation, seeking additional information from the offerors regarding their proposed cost savings. See RFP amend. 005, June 6, 2013. In connection with the amendment, the agency sent discussion letters to each offeror, identifying various aspects of proposed cost savings initiatives⁶ for which supporting information was sought. The agency limited the scope of offerors' responses to the specific cost savings information requested,

⁶ Section L, L-14(a) of the solicitation required each offeror to describe its particular approach to performing various aspects of the solicitation requirements. RFP at 275.

advising offerors that they were not permitted to revise the amount of cost savings they had previously proposed. Overall, the agency advised offerors that they were not permitted to revise any other aspects of their proposals “unless specifically invited to do so by discussion letter from the Contracting Officer.” RFP amend. 005 at 2.

The agency thereafter provided responses to offeror questions regarding RFP amendment 005. Among other things, the agency advised offerors that they should continue to rely on the historical baseline data the agency had previously provided,⁷ and the agency stated it would “not discredit” proposed cost savings initiatives that were based on that data. Agency Report (AR) for NPP’s Current Protest, Tab A4, Questions & Responses to Third Round of Limited Discussions, June 13, 2013, at 3. Regarding its pending evaluation of proposals under the CLIN 0001 evaluation factor, management approach/cost savings, the agency stated that proposals “will be evaluated in accordance with the RFP,” and it further stated that each offeror’s proposal information “will be considered as a whole in developing an overall rating for the criterion.” *Id.* at 4. Finally, the agency stated that, in performing its reevaluation, it would “conduct its due diligence and consider any new information that has come to light since the Source Selection Decision was made [in December 2012].” AR for NPP’s Current Protest, Tab B-2, Agency Discussion Letter to NPP, June 6, 2013, at 1. With regard to this statement, the agency elaborated that it “may consider any new close-at-hand information consistent with the RFP (e.g., past performance, references, information received from other references, sources or third parties).” AR for NPP’s Current Protest, Tab A-4, at 9.

Thereafter, NPP filed this protest challenging the agency’s ongoing corrective action.

DISCUSSION

NPP’s protest is primarily based on its assertion that offerors should be permitted to revise “all aspects” of their proposals. See AR for Current Protest, Tab B5, Letter from NPP Regarding RFP Amendment, June 10, 2013, at 2. In this regard, NPP complains that the agency’s limited discussions will be less than meaningful; that the agency’s evaluation, based on limited proposal revisions, will fail to properly consider all relevant information and/or will unfairly favor CNS; that changed circumstances due to the passage of time requires the agency to further amend the

⁷ To assist offerors in preparing their initial cost savings proposals, the agency provided compact discs (CDs) with historical data to the offerors. These CDs were again provided to the offerors in connection with RFP amendment 005.

solicitation;⁸ and that the agency is not performing a cost realism analysis as required by the FAR.⁹

In response, the agency maintains that most of NPP's protest is premature. Among other things, the agency states that the agency's discussions will comply with the FAR requirements to identify offerors' evaluated deficiencies, significant weaknesses, and adverse past performance to which they have not yet had an opportunity to respond. COSF/MOL Responding to NPP's Current Protest, July 12, 2013, at 5. In this regard, the agency states that the information submitted by offerors responding to RFP amendment 005 "may result in further communications with Offerors." Id. at 7 n.4.

With regard to NPP's assertion that the agency's evaluation will fail to consider all relevant information and/or will favor CNS, the agency maintains that its limited evaluation of cost savings initiatives will properly comply with the FAR and the solicitation's stated evaluation factors and, further, that its limited corrective action "will avoid undue delay and . . . minimize further costs." Id. at 8. The agency further asserts that NPP's protest alleging favoritism for CNS and/or the agency's failure to consider all relevant information reflects only "an anticipated error in the agency's evaluation" and, as such, is premature. Id. at 22.

Finally, with regard to NPP's assertion that the RFP must be amended to reflect what NPP characterizes as changes to the government's requirements, the agency asserts that neither its substantive requirements, as reflected in the RFP's statement of work, nor its evaluation scheme, have changed in any way. Id. at 1-2, 8. Further, the agency maintains that the RFP was issued with expectations of ongoing budgetary and workforce fluctuations and that any changes that have occurred at the sites since submission of final proposal revisions in September 2012 "are not significant."¹⁰ Id. at 9, 12-14. Accordingly, the agency maintains that neither its requirements nor the ground rules for this procurement have changed, and that further amendment of the solicitation is not required.

⁸ In this regard, NPP's protest refers to budgetary changes, workforce fluctuations, and differing cost/schedule projections for completion of the UPF.

⁹ NPP also initially protested the page limitation contained in RFP amendment 5. During a subsequent conference call conducted by this Office, counsel for NPP withdrew that portion of its protest.

¹⁰ The agency similarly asserts that "the information related to the UPF [uranium processing facility] presently reflected in the statement of work is still an accurate reflection of the agency's needs with respect to the UPF." COSF/MOL for Current NPP Protest at 15.

As a general matter, the details of corrective action are within the sound discretion of the contracting agency, and an agency may reasonably limit the scope of proposal revisions, provided such limitation is appropriate to remedy the procurement impropriety. See, e.g., Honeywell Tech. Solutions, Inc., B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4; Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3. Further, where an agency's proposed corrective action does not alter the ground rules for the competition, we will generally consider a protester's pre-award challenge to be premature. Alliant Techsystems, Inc., B-405129.3, Jan. 23, 2012, 2012 CPD ¶ 50 at 2 n.1.

Here, we conclude that NPP's protest complaints challenging the adequacy of discussions and the limitation on proposal revisions are premature. In reaching this conclusion, we note that the agency has not yet made a new source selection decision, and has stated that it may engage in "further communications with [o]fferors."¹¹ COSF/MOL for Current Protest at 7 n.4. Based on the agency's representation that neither its requirements nor the evaluation scheme have changed, we do not view the ground rules of this procurement to have been changed in a manner that warrants our pre-award review. Cf. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8. Accordingly, based on the record here, we decline to reach any conclusions, at this time, as to the adequacy of discussions or the reasonableness of the agency's limitations on proposal revisions, and we dismiss NPP's protest regarding those matters as premature.¹²

With regard to NPP's assertions that the government's requirements have changed due to the passage of time¹³ and that such changes require an RFP amendment, we are unpersuaded that the agency's decision not to amend the RFP is unreasonable. As the agency points out, this RFP was issued with the expectation of ongoing budgetary and workforce fluctuations, and the agency maintains that the changes on which NPP relies are not significant in the context of this procurement. For example, NPP's protest states that the "headcount reduction" at Y-12 and Pantex combined has been "545 since January 2012"--yet, also acknowledges that the total number of employees for both facilities was more than 8,000 in late 2011. NPP Comments, July 22, 2013, at 24. Based on our review of the record here, NPP

¹¹ Additionally, consistent with the ongoing status of this procurement, the protest record before us does not include the offerors' submissions responding to RFP amendment 005, nor the agency's evaluation of those submissions.

¹² Allegations dismissed as premature may be subsequently raised with this Office, provided they are presented in a manner that is otherwise compliant with our Bid Protest Regulations. See 4 C.F.R. Part 21 (2013).

¹³ As noted above, NPP's protest refers to budgetary changes, workforce fluctuations, and differing cost/schedule projections for completion of the UPF.

has not established that the changes occurring due to the passage of time necessitate an RFP amendment.

Finally, NPP asserts that the offerors' proposed cost savings should properly be viewed as an element of cost in the agency's best value determination and, therefore, the cost savings should be subject to the FAR requirements regarding cost realism analysis. See FAR §§ 15.305(a)(1), 15.404(d)(2).

As we previously stated,¹⁴ the solicitation at issue advised offerors that their evaluated fees "will be used as the evaluated cost for purposes of the best value determination," and that proposed cost savings would be evaluated under the technical/management evaluation factors. RFP at 334-36. That is, the terms of the solicitation reasonably put offerors on notice that the agency would not perform a cost realism analysis with regard to the offerors' proposed cost savings or the total cost to perform the contract requirements. Accordingly, NPP's assertion that the agency was required to perform a cost realism analysis with regard to the proposed cost savings initiatives constitutes a challenge to the terms of the solicitation which NPP was required to raise prior to submitting its proposal. 4 C.F.R. § 21.2(a)(2) (2013). Since we do not view RFP amendment 005 as affecting the timeliness of NPP's argument, nor do we view application of any exception to our timeliness rules as appropriate, the portion of NPP's protest challenging the agency's failure to perform a cost realism analysis is untimely and not for consideration.

The protest is dismissed in part and denied in part.

Susan A. Poling
General Counsel

¹⁴ NPP raised this issue in its prior protest, and we similarly dismissed it as untimely filed. See Nuclear Production Partners LLC; Integrated Nuclear Production Solutions LLC, supra, at 12-13.