



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: MindPoint Group, LLC

File: B-409562

Date: May 8, 2014

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William A. Roberts, III, Esq., Gary S. Ward, Esq., and Richard B. O’Keeffe, Jr., Esq., Wiley Rein LLP, for Management Technology, Inc., the intervenor.
John R. Caterini, Esq., Kristen E. Bucher, Esq., and Barry C. Hansen, Esq., Department of Justice; Laura Mann Eyester, Esq., Small Business Administration, for the agencies.
Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Whenever an agency reasonably determines that an offeror’s proposal has taken exception to a limitation on subcontracting requirement, that proposal is unacceptable and, where there is another acceptable offer, that offeror is not an interested party to challenge the award determination.

DECISION

MindPoint Group, LLC, of Springfield, Virginia, protests the Department of Justice’s (DOJ) award of a contract to Management Technology, Inc. (MTI), of Oxon Hill, Maryland, under request for proposals (RFP) No. DJJI-13-RFP-0819, for information technology infrastructure support. MindPoint asserts that the agency improperly evaluated price, misevaluated the awardee’s technical proposal, and failed to conduct a best-value trade-off.

We dismiss the protest on the grounds that MindPoint is not an interested party to challenge MTI’s award.

The solicitation, set aside for economically-disadvantaged, women-owned small business (EDWOSB) concerns, sought proposals for the award of a fixed-price, time and materials, indefinite-delivery/indefinite-quantity type contract, with a 1-year base period and four 1-year options. RFP at 1, 23, & 58. Award was to be made

on a best-value basis, considering price and technical merit, with technical merit significantly more important than proposed price. RFP at 58.

The solicitation incorporated by reference Federal Acquisition Regulation (FAR) clause FAR § 52.219-29, requiring that the EDWOSB concern “will perform at least 50 percent of the cost of the contract performance incurred for personnel with its own employees.” FAR § 52.219-29(d)(1); RFP at 42. Offerors were required to complete Attachment 1 to the RFP, a chart identified as Table B1. See RFP, Attach. 1. Table B1 contains a list of ten required labor categories and corresponding annual labor hours for each of them. Offerors were to provide the labor cost per labor category for the base year and each option year, with the total cost by labor category for the duration of contract performance, as well as the total cost of all the labor categories by period of performance. Id. In addition, offerors were required to “[p]rovide a staffing chart that identifies each labor category and cross references each category with the corresponding individual(s) who will occupy that position(s).” RFP § L.3.2.3, at 53.

The agency received seven proposals, including that of MindPoint. Agency Report (AR), Tab 22, Best Value Recommendation Report at 1. The agency determined that MTI’s proposal represented the best value to the government, and award was made to that firm. AR, Tab 23, Best Value Determination. This protest followed.

MindPoint challenges the agency’s evaluation of price and the awardee’s technical proposal and asserts that the agency failed to conduct a best-value trade-off. As a threshold matter, the agency asserts that MindPoint is not an interested party to pursue this protest because MindPoint, on the face of its proposal, took exception to the requirement that employees of MindPoint will perform at least 50 percent of the cost of contract performance incurred for personnel. Motion to Dismiss, Mar. 19, 2014 at 2-3. The protester asserts that it properly considered one of its two proposed systems administrators--an independent contractor--to be an employee for the purpose of calculating whether MindPoint would meet the minimum percent cost of performance requirement.

Where a proposal, on its face, should lead an agency to the conclusion that an offeror has not agreed to comply with the subcontracting limitation, the matter is one of the proposal’s acceptability. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5. Such a noncompliant proposal may not form the basis for an award. See KIRA, Inc., B-287573.4, B-287573.5, Aug. 29, 2001, 2001 CPD ¶ 153 at 3.

Here, we agree with the agency that on its face, MindPoint’s proposal takes exception to the 50-percent subcontracting limitation. In this regard, MindPoint’s final proposal revision (FPR) contains the required Table B1, with proposed staff and annual costs, for each of 10 labor categories. See AR, Tab 17, MindPoint FPR at 20. MindPoint represented that it would itself perform 53.3 percent of the

contract effort using 7 individuals, including Systems Administrator MS, all generally designated as “MindPoint Group” in Exhibit 1.3, Team MindPoint Group Support Resources Breakdown. FPR, Exhibit 1.3, at 10. Using those figures, the agency calculates that, without the contribution of Systems Administrator MS, the proposal committed MindPoint to perform only 45 percent of the personnel costs of performance with its own employees. Email from Agency to GAO, Apr. 7, 2014. The protester does not dispute that calculation. In essence, to avoid violating the limitations on subcontracting provision of the solicitation, MindPoint must include the contribution of Systems Administrator MS in its calculation of the percentage of labor cost to be performed by MindPoint employees.

As noted by the agency, however, the protester’s proposal elsewhere indicated that Systems Administrator MS would, in fact, be a MindPoint independent contractor. See Agency’s Reply to Protester’s Opposition to Request for Dismissal at 6-7. In this regard, the systems administrator’s resume indicates that he is currently employed by another firm. AR, Tab 17, MindPoint FPR at 48. Further, the systems administrator’s letter of commitment states that he will be an independent consultant, and not an employee of MindPoint, for the contemplated contract: “I am committed to remaining as a member of Team MindPoint Group in support of the National Security Division and as an independent consultant to MindPoint Group for the duration of the contract.”¹ AR, Tab 8, MindPoint Initial Technical Proposal at 49. Likewise, MindPoint’s price proposal lists the systems administrator as a “1099 Consultant,” referring to the 1099 Internal Revenue Service form used for independent contractors. MindPoint FPR at 20. As such, the agency notes, MindPoint treated the systems administrator the same way that it did all of the other subcontracted employees (and different from the way it treated MindPoint employees) for the purpose of calculating fringe benefit costs, overhead cost, and profit. Id.

The protester’s argument that the agency should have instead considered its Systems Administrator MS to be an employee rests entirely on information not contained in MindPoint’s proposal, purporting to show that the systems administrator “would function more akin to an employee of MindPoint than a subcontractor.” See Protester’s Response to Request for Dismissal at 5-6, citing Exh. A, Decl. of MindPoint President & Exh. B, Teaming Agreement. It is an offeror’s responsibility to submit an adequately written proposal that establishes its capability and the merits of its proposed approach in accordance with the evaluation terms of the solicitation. See Verizon Fed., Inc., B-293527, Mar. 26, 2004, 2004 CPD ¶ 186 at 4. An offeror that does not affirmatively demonstrate the merits of its proposal risks rejection of its proposal. HDL Research Lab, Inc., B-294959, Dec.

¹ In contrast, the RFP required that “[i]f any individual proposed is not presently an employee of your firm, the resume must be accompanied by a signed letter of commitment to join your firm should you be awarded the contract.” RFP at 53.

21, 2004, 2005 CPD ¶ 8 at 5. Here, since the protester's own proposal repeatedly treated the systems administrator as an independent contractor or consultant rather than as an employee, there is no basis to question the agency's conclusion that the individual is not an employee of MindPoint.

As a result, MindPoint's proposal was unacceptable, and, because there is another acceptable offer, MindPoint is not an interested party to pursue the remaining issues in its protest. See Tetra Tech Tesoro, Inc., B-403797, Dec. 14, 2010, 2011 CPD ¶ 7 at 6.

The protest is dismissed.²

Susan A. Poling
General Counsel

² In response to the agency's dismissal request, we sought the views of the Small Business Administration (SBA) on the issue of whether the protester's proposal was responsive to the solicitation's limitation on subcontracting provisions. GAO Email to SBA, Mar. 25, 2014. The SBA did not agree with DOJ's characterization of MindPoint's proposal as taking exception to the subcontracting limitation, although the SBA did acknowledge that MindPoint's proposal identified a key individual as an independent contractor. See SBA Comments at 5. Nonetheless, in our view, DOJ reasonably concluded that MindPoint's proposal, as written, violated the limitations on subcontracting and was therefore unacceptable. See TYBRIN Corp., *supra*, at 6 (noting that whether a bidder or offeror has specifically taken exception to the subcontracting limitation requirement on the face of its bid or proposal is a determination of proposal acceptability, rather than responsibility).