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Decision

Matter of: Bridges System Integration, LLC

File: B-411020

Date: April 23, 2015

Jonathan D. Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for the protester.
Kathleen K. Barksdale, Esq., General Services Administration, for the agency.
Gary R. Allen, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of the rejection of a protester's proposal under a General Services Administration Federal Supply Schedule (GSA FSS) solicitation is denied where the agency reasonably found that the proposal failed to comply with the solicitation's material requirements for information, and the protester refused to provide the information when the agency expressly requested it.
2. Protest challenging the propriety of the terms of an open GSA FSS solicitation as unduly restrictive of competition is untimely as to a proposal already submitted.
3. Protest challenging the prospective application of the terms of a GSA FSS solicitation for future evaluations as unduly restrictive of competition is denied where the challenged terms are reasonably related to ensuring compliance with mandatory statutory requirements.

DECISION

Bridges System Integration, LLC, of Herndon, Virginia, protests the rejection of its proposal submitted in response to solicitation No. 3FNG-RG-020001-B (schedule 58 solicitation), issued by the General Services Administration (GSA) for the award of contracts under multiple award schedule No. 58 for the provision of commercial audio/video products. Bridges argues that the agency's interpretation of the solicitation's terms is unduly restrictive of competition, and that the agency evaluated Bridges' proposal in an unfair and unequal manner.

We deny the protest.

BACKGROUND

The RFP at issue here is “Refresh 22” of the solicitation for schedule No. 58 of the Federal Supply Schedule (FSS), which is a standing solicitation for the provision of professional audio/video, telemetry/tracking, recording, reproducing and signal data solutions,¹ first issued in 2002. Bridges is seeking a schedule 58 contract, so that it can provide commercial audio/video products to federal agencies under the FSS program.² Contracting Officer’s (CO) Statement at 1.

The schedule 58 solicitation contains requirements for all offerors of products seeking GSA FSS contracts, and cautions that any failure to comply with the requirements will result in rejection of the offer. Schedule 58 Solicitation at iv-x, xiv. The requirements include submission of detailed pricing for each of the products offered, to enable the contracting officer to determine if the offered prices are fair and reasonable. Id., § SCP-FSS-001(j)(3)(iv). As part of the price submission, offerors are to provide sufficient supporting documentation to show a “clear and relevant relationship between the supporting document and the proposed price it was meant to substantiate.” Id., § SCP-FSS-001(j)(3)(iii). Offerors are also required to submit manufacturers’ part numbers, and are warned that if they fail to do so, an award will not be made for that part. Id. Furthermore, if an offeror is not the manufacturer of the products being proposed, the offeror must provide a letter of commitment or supply, otherwise the proposal might be rejected. Id., § SCP-FSS-003(d)(1)(iii). Finally, as relevant here, the solicitation requires that all proposed products comply with the Trade Agreements Act of 1979 (TAA) (19 U.S.C. § 2501 et seq.).³ Id., § SCP-FSS-003(d)(1)(ii). Currently, there are approximately 200 schedule 58 contract holders. CO’s Statement at 6.

Bridges submitted a proposal in response to the schedule 58 solicitation on December 22, 2014. CO’s Statement at 1. With respect to the requirements listed above, Bridges’ proposal did not describe any particular products and did not

¹ GSA FSS solicitations for FSS contracts typically do not have a closing date, but are open indefinitely (or “standing”), and are updated as required to include the most current contract clauses or to ensure that the solicitation incorporates changes to law and regulation that have occurred since the previous “refresh” was issued.

² The FSS program, directed and managed by the GSA, gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. Federal Acquisition Regulation (FAR) § 8.402(a).

³ All GSA schedule contracts are subject to the TAA, which means that all products listed on a GSA schedule contract must be manufactured or “substantially transformed” in a designated country. FAR subpart 25.5.

include any price lists, manufacturers' letters of supply, or country of origin for any products that the protester intended to furnish. Agency Report (AR), Tab 4, Bridges' Proposal. Instead, the proposal stated that Bridges bases its sales on market prices, does not use commercial price lists, and, with respect to the requirement for letters of supply from dealers and suppliers, Bridges asserted that the requirement is "not applicable to the solutions and services offered." AR, Tab 6, Summary of Offer, at 1; AR, Tab 4, exh. 3, Statement Regarding Letter of Supply.

After ascertaining that Bridges' proposal did not meet the solicitation's requirements, the contracting officer contacted Bridges to discuss the areas in which Bridges' proposal was noncompliant. AR at 2. The record shows that, despite numerous requests for the required information from the agency, Bridges refused to provide a commercial price list or any information concerning the products it might furnish, aside from past "invoices supporting products and services," and asserted that Bridges' "[business] model provides a functional solution at a fixed price." AR, Tab 3, Jan. 8-12, 2015, E-Mails between CO and Bridges. In this regard, Bridges asserted repeatedly that it should not be required to provide the information specified in the RFP because the protester will instead provide such information in response to specific requests for quotations for delivery orders issued under the Schedule 58 contract, e.g., the components and overall price for a bundled package that the protester intends to quote. Id., Jan. 8, 2015, Bridges E-Mail, at 5; Jan. 9, 2015, Bridges E-Mail at 1. Bridges also offered a general assurance that it would comply with the TAA in the performance of delivery orders. Id. at 2. After multiple e-mails, the CO finally informed Bridges that it appeared Bridges did not intend to provide the requested information, and that the CO would reject the proposal if the CO did not hear from Bridges by January 12. AR, Tab 3, Jan. 9, 2015, CO E-Mail, at 11. Bridges sought an extension to January 14, and then filed this protest on January 13.

DISCUSSION

Bridges argues that GSA's determination to reject Bridges' proposal because it offered a bundled solution without identifying the component parts that would make up that solution was unreasonable. Protest at 12; Comments at 3. The protester also contends that it is competitively disadvantaged by the agency's actions in this regard, claiming that other offerors have been awarded schedule 58 contracts after being allowed to propose non-specific products to meet the "agency's functional requirements." Id. Finally, the protester alleges that the terms of the schedule 58

solicitation are unduly restrictive of competition. We find Bridges' claims to be without merit.⁴

As discussed below, we first address the evaluation of Bridge's proposal. We then address the protest's challenges to the terms of the solicitation, including our conclusions as to the timeliness of those challenges.

Rejection of Bridges' Proposal

As discussed above, GSA found that Bridge's proposal could not be accepted for award because Bridges refused to identify the products it was offering, including the manufacturers' part numbers and country of origin, and also refused to provide a price for each product. AR, Tab 3, Jan. 9, 2015, CO E-Mail, at 4. We conclude that the agency's evaluation was reasonable.

Clearly stated solicitation requirements are considered material to the needs of the government, and a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award. Concept Analysis & Integration, LLC, B-406638.3, Mar. 29, 2013, 2013 CPD ¶ 86 at 6. In a competitive FSS procurement, it is the vendor's burden to submit a quotation or proposal that is adequately written and establishes the merits of the quotation or proposal. The Dixon Group, Inc., B-406201, B-406201.2, Mar. 9, 2012, 2012 CPD ¶ 150 at 6.

As a general matter, FSS procedures provide agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. FAR § 8.402(a). Under the FSS program, indefinite-delivery, indefinite-quantity contracts are established with commercial firms to provide supplies and services at stated prices for given periods of time. Id.

Section 152(3) of title 41 of the United States Code provides that the procedures established for the FSS program, although streamlined, satisfy the requirement for full and open competition in 41 U.S.C. § 3301(a)(1). 41 U.S.C. §153(3); FAR § 6.102(d)(3). Because the FSS program meets the requirements of 41 U.S.C. § 152(3)(A), when an agency places an order under the FSS, is not required to seek further competition, synopsise the requirement, or determine fair and reasonable pricing, since the planning, solicitation, and award phases of the FSS satisfy these requirements. FAR § 8.402(a).

In short, schedule contracts awarded under FSS solicitations contain all of the necessary information for the placement of task orders without further competition.

⁴ We have considered all of the protester's arguments in resolving the protest, and although we only discuss the primary ones, we find none of them warrant sustaining the protest.

Each GSA schedule is composed of “special item numbers” (SIN), which are “a categorization method that groups similar products, services, and solutions together to aid in the acquisition process.” See <http://www.gsa.gov/portal/category/100615>; see also FAR § 8.401. Further, FAR § 8.402(b) states that “GSA schedule contracts require all schedule contractors to publish an ‘Authorized Federal Supply Schedule Pricelist’ (pricelist). The pricelist contains the pricing and the terms and conditions pertaining to each SIN on the schedule. The schedule contractor is required to provide one copy of its pricelist to any ordering activity upon request.” Id.

Bridges does not specifically dispute that its proposal failed to provide information expressly required by the solicitation. Given the express terms of the solicitation, which reflect the stated purposes of the FSS program, we find that the agency reasonably concluded that Bridges’ proposal was unacceptable based on its failure to identify the component manufacturers, part numbers, prices, country of origin, and, in appropriate cases, provide letters of supply.

Unequal Treatment

With respect to Bridges’ assertion that offerors were treated disparately, the protester complains that another vendor, [deleted], was awarded a schedule 58 contract under which it is “making sales of bundled solutions for Professional Audio/Video, Telemetry/Tracking, Recording/Reproducing and Signal Data Solutions exactly as Bridges proposes to do.” Comments at 3. As support for its claim, Bridges refers to pages from the GSAdvantage website, showing what appear to be separate task orders issued to [deleted] under its schedule 58 contract. Id. at 17. The protester contends that the task orders shown on the GSAdvantage pages indicate that the agency improperly allowed [deleted] to use parts not listed on [deleted]’s schedule 58 contract. Protest at 14, citing Tab 3, Jan. 12, 2015, 7:18 a.m., CO E-Mail.

However, the protester has not shown that [deleted] (or any other competitor) was treated differently in the award of its Schedule 58 contract.⁵ The issuance of task

⁵ Bridges argues that the issue can only be resolved by provision of the underlying documents concerning the award of [deleted]’s schedule 58 contract. Comments at 13-16. On two occasions we rejected Bridges’ requests for these documents because Bridges failed to provide any meaningful support for these allegations. See, e.g., Siebe Envtl. Controls, B-275999.2, Feb. 12, 1997, 97-1 CPD ¶ 70 at 2 (protester must provide a sufficient factual basis to establish a reasonable potential that allegations have merit; mere speculation is insufficient to meet this requirement). In this regard, Bridges’ arguments fail to distinguish between the award of a schedule 58 contract and the issuance of an order under a schedule contract.

orders under the FSS contract is not the same thing as awarding the FSS contract under which orders are issued. In this regard, to the extent Bridges is alleging any impropriety in the agency's issuing orders under previously-awarded schedule contracts, this neither demonstrates disparate treatment in the context of the rejection of Bridges' proposal, nor does it raise an argument within the scope of our review. Rather, it is a matter of contract administration, which is not for resolution under our Bid Protest Regulations. 4 C.F.R. § 21.5(a).

In sum, based on the requirements in the solicitation and the information that Bridges refused to provide, we have no reason to conclude that the agency was unreasonable in rejecting the protester's proposal. The protester's disagreement with the agency's judgment does not render the evaluation unreasonable.

Challenges to the Terms of the Solicitation

Finally, to the extent that Bridges challenges the requirements of the schedule 58 solicitation in the context of its already-submitted proposal, we find these bases for protest untimely. To be timely, a challenge to the terms of this solicitation had to be raised prior to submitting a proposal under the terms of that solicitation. 4 C.F.R. § 21.2(a)(1). We recognize that section 21.2(a)(1) of our Bid Protest Regulations refers to the time set for receipt of initial proposals, and that the schedule 58 solicitation is open indefinitely--that is, it does not contain a set time for receipt of proposals. In such cases, in keeping with the purpose of our timeliness rules, we conclude that challenges to the terms of a standing FSS solicitation are untimely, with respect to the application of these terms to the evaluation of an offeror's proposal, if the protest is filed after the protester has submitted a proposal under that solicitation. This view is consistent with the purpose behind our Regulations' timeliness rule for protests alleging solicitation improprieties: *i.e.*, to give the agency notice of the protest before bid opening or receipt of proposals, to provide an opportunity for the agency to take action before bids or proposals are prepared and submitted. Applied Controls Co., Inc.--Recon., B-228568.2, Nov. 30, 1987, 87-2 CPD ¶ 528 at 1; ERA Helicopters, Inc., B-218607, Aug. 1, 1985, 85-2 CPD ¶ 114 at 2. Extending the filing date for challenges to the terms of a standing solicitation to after a proposal has been submitted under that solicitation simply would not be consistent with the purpose of section 21.2(a)(1).

Nonetheless, given that we have found, above, that Bridges' proposal is properly rejected, and therefore no longer being considered, we view Bridges' challenge to the terms of the schedule 58 solicitation as timely insofar as it concerns the prospective application of the RFP's terms to future evaluations. We therefore address Bridges' arguments as to the terms of the standing solicitation.

Turning to Bridges' challenges to the terms of the solicitation, Bridges first argues that the RFP's requirement that vendors identify component products from specific manufacturers is inconsistent with customary commercial practice, and, therefore, violates the terms of FAR part 12. Protest at 11-12.

In procurements involving the acquisition of commercial items, FAR § 12.301(a)(2) requires that contracts “shall, to the maximum extent practicable, include only those clauses . . . [d]etermined to be consistent with customary commercial practice.” FAR sections 12.301 and 12.302 restrict the usage of additional FAR clauses, or terms and conditions beyond those set forth in FAR clause 52.212-4 and FAR clause 52.212-5.⁶ However, FAR clause 52.212-4(q) requires a contractor under a commercial items contract to “comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under [the] contract.” Cf. 41 U.S.C. § 3307(a)(1) (“Unless otherwise specifically provided, all other provisions in [Title 41, Subtitle I, Division C of the U.S. Code] apply to the procurement of commercial items.”).

As noted above, all products offered under GSA schedule contracts must comply with the TAA. FAR subpart 25.5. The FAR requires the CO to determine the origin of each line item in an offer. FAR § 25.501(a).⁷ Therefore, we find that the challenged requirements that all proposed products be identified by manufacturer, part number, and country of origin are reasonably related to ensuring compliance with mandatory statutory requirements, and we deny this portion of the protest.

Next, Bridges argues that the solicitation’s requirement for pricing for individual components of the solutions it seeks to offer is inconsistent with commercial practice.

The statutory provisions governing the FSS underlay the solicitation’s requirement for commercial price lists and other pricing information that Bridges challenges here.

⁶ We note that the U.S. Court of Appeals for the Federal Circuit has held that “FAR Part 12’s proscription against terms inconsistent with customary commercial practice applies” to procurements conducted under the FSS provisions of FAR subpart 8.4. *CGI Fed. Inc. v. United States*, 779 F.3d 1346, 1353 (Fed. Cir. 2015). The procurement here was not conducted under the provisions of FAR subpart 8.4, as those provisions apply to the placement of orders under the FSS, rather than the award of FSS contracts. Nonetheless, GSA does not dispute the protester’s argument that the provisions of FAR § 12.301(a)(2) apply to the award of FSS contracts.

⁷ FAR section 25.501(b) does allow the CO to rely on the offeror’s certification of end product origin when evaluating a foreign offer, unless the agency has reason to believe that the firm will not provide a compliant product, and here, we note that Bridges generally assured the CO that any product it provided would comply with the TAA. Jan. 9, 2015, Bridges’ E-Mail, at 2. However, since Bridges refused to identify any products, there was reason for the CO to question Bridges’ general statement of statutory compliance.

As noted above, FSS contracts satisfy the Competition in Contracting Act's requirements for full and open competition. 41 U.S.C. §153(3); FAR § 6.102(d)(3). With respect to price, the competition requirements are met when a schedule contract is awarded because, before awarding any multiple-award FSS contract, the contracting officer is required to determine that the offered prices are fair and reasonable. 48 C.F.R. § 538.271(b); Affirmative Solutions, LLC, B-402996, Sept. 8, 2010, 2010 CPD ¶ 212 at 2.⁸ We therefore find no basis to object to the solicitation's requirement here that offerors submit detailed pricing for each of the products offered. We deny this basis of protest.

The protest is denied.

Susan A. Poling
General Counsel

⁸ Bridges essentially argues that because the prices are constantly changing in this area, listing the prices of current component parts will not provide the government with the best products. Protest at 12. In FSS buys, as in other procurements, a contracting agency has the discretion to determine its needs and the best method to accommodate them. 41 U.S.C. §§ 3306(a)(1)(A), (2)(B); Boehringer Ingelheim Pharm., Inc., B-294944.3, B-295430, Feb. 2, 2005, 2005 CPD ¶ 32 at 4. Disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Cryo Techs., B-406003, Jan. 18, 2012, 2012 CPD ¶ 29 at 2.