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Decision

Matter of: AttainX, Inc.; FreeAlliance.com, LLC

File: B-413104.5; B-413104.6

Date: November 10, 2016

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DIGEST

Protests challenging elimination from competition are denied where agency reasonably found that the protesters failed to comply with the solicitation's specific instructions for providing verification of an adequate cost accounting system from a third-party certified public accounting firm.

DECISION

AttainX, Inc., of Lynchburg, Virginia, and FreeAlliance.com, LLC, of Washington, DC, protest the Department of Health and Human Services, National Institutes of Health (NIH)'s exclusion of the protesters' proposals from further consideration under request for proposals (RFP) No. NIHJT2016015, for information technology (IT) supplies and services. The protesters argue that the agency's exclusion of their proposals, based on failure to submit specific verification of an adequate cost accounting system for all contractor team arrangement (CTA) members, amounted to a non-responsibility determination that should have been referred to the Small Business Administration (SBA) under SBA's certificate of competency (COC) procedures.

We deny the protests.

BACKGROUND

Pursuant to Section 5112(e) of the Clinger-Cohen Act of 1996, 40 U.S.C. § 11302(e), the Office of Management and Budget has designated NIH as an executive agent for government-wide IT acquisitions. RFP at B-1.¹ The RFP, issued on March 14, 2016, contemplated the award of up to 35 additional indefinite-delivery, indefinite-quantity (IDIQ) contracts for NIH's existing Chief Information Officer-Solutions and Partners small business (CIO-SP3 SB) government-wide acquisition contract (GWAC), a 10-year IDIQ contract for IT solutions and services.² Id. The solicitation contemplated the issuance of fixed-price, time-and-material, or cost-reimbursement task orders during the period of performance, which corresponded with the current GWAC contracts, and will end in 2022. Id. at B-6, F-1. The maximum order amount established for the contract was \$20 billion with a minimum guarantee of \$250 per awardee. Id. at B-2.

The RFP contained detailed instructions regarding the submission of proposals. As relevant here, the solicitation stated that offerors were allowed (but not required) to form contractor team arrangements (CTAs), as defined under Federal Acquisition Regulation (FAR) § 9.601, in order to propose on the GWAC. Id. at L-14. In this regard, the solicitation stated that if the potential offeror forms a CTA and “wants all members of the CTA to be considered for evaluation under the GWAC, the CTA must be a CTA as defined under FAR § 9.601(1) . . . and include with its proposal the information required under subpart (1) of this section, ‘Instructions regarding FAR § 9.601(1) CTAs.’” Id. The specific instructions provided by the solicitation listed a number of items required to be submitted in the CTA document. See id. at L-15 – L-17. Of relevance here is a requirement to submit “verification of an adequate accounting system.” Id. at L-17.

The solicitation explained that because of the need for contractors to respond to cost-reimbursement task orders, in order to be eligible for award under the GWAC, offerors “must have verification . . . of an accounting system that has been audited and determined adequate for determining costs applicable to this contract in accordance with FAR 16.301-3(a)(1).” Id. The solicitation emphasized that, with regard to offerors submitting a proposal in the form of a CTA, each member of the CTA “must show evidence that it has verification of an adequate accounting system. Failure to do so will result in an unacceptable rating.” Id.; see also id. at M-3.

¹ The solicitation was amended four times. All citations to the RFP are to the conformed RFP provided by the agency.

² The solicitation further provided that the government would establish “contractor groups” (historically underutilized business zone (HUBZone), service-disabled veteran-owned small business (SDVOSB), section 8(a), and small business), and projected the number of anticipated awards for each group. See RFP at M-2, M-3.

The solicitation advised that the agency would evaluate proposals in two phases. Id. at M-1. Relevant to the protests here, the RFP stated that during phase 1, the government would evaluate the proposals based on four “Go/No-Go” requirements, one of which was the “verification of an adequate accounting system.” Id. at M-1, M-3. Verification of an offeror’s (and all members of the CTA’s) accounting system could be performed by the Defense Contract Audit Agency (DCAA), the Defense Contract Management Agency (DCMA), any federal civilian audit agency, or “a third-party [c]ertified [p]ublic [a]ccounting (CPA) firm.” Id. at L-17. The solicitation specifically advised that “[i]n the event the verification is from a third-party CPA, the verification letter shall be on the letterhead of the third-party CPA firm, and certified by a certified public accountant.” Id.

The agency received 552 proposals, among which were 70 HUBZone proposals, including those from AttainX and FreeAlliance.com. AttainX Agency Report (AR),³ Contracting Officer Statement of Facts (COS) at 1; AttainX AR, Memorandum of Law (MOL) at 4; FreeAlliance.com AR, MOL at 4. The agency evaluated the protesters’ proposals under the HUBZone grouping. AttainX AR, MOL at 4; FreeAlliance.com AR, MOL at 4.

Each of the protesters formed a FAR § 9.601(a) CTA with two other contractors. Id. See also AttainX AR, Tab 6, AttainX Clarification; FreeAlliance.com AR, Tab 6, FreeAlliance LLC Clarification. As relevant here, both protesters provided documents for all three CTA members regarding the adequacy of their accounting systems, which showed that two of the three team members for each offeror were relying on verification from a third-party CPA firm. AttainX AR, MOL at 5; FreeAlliance.com AR, MOL at 5; AttainX AR, Tab 7.B.1, Adequacy of the Accounting System form ([DELETED]); AttainX AR, Tab 7.B.2 (same form for [DELETED]); FreeAlliance.com AR, Tab 7.B.2; Tab 7.B.3 (same forms for [DELETED] and [DELETED]). Both protesters submitted as their documentation a form entitled “Adequacy of the Accounting System.” See id. As relevant here, section 3 of this form was to be signed, dated, and completed by an auditor if a DCAA audit had not been performed on the accounting system, but a third-party accounting firm review was conducted and the accounting system was found adequate for cost-type federal contracts. See, e.g., AttainX AR, Tab 7.B.1 Adequacy of the Accounting System form ([DELETED]).

The forms submitted by both protesters were signed, dated, and completed by an auditor, partner, or CPA. See AttainX AR, Tab 7.B.1; Tab 7.B.2 (Adequacy of the

³ Our Office did not consolidate the protests during the development of the cases; accordingly, the agency submitted separate reports for each protest. The separate reports used an identical numbering scheme for the exhibits. Accordingly, our citations to the agency report will refer to the respective agency report documents, as necessary.

Accounting System forms for [DELETED] and [DELETED]); FreeAlliance.com AR, Tab 7.B.2; Tab 7.B.3 (same for [DELETED] and [DELETED]). However, the agency found that these forms did not comply with the solicitation's requirement to provide, on letterhead of the third-party CPA firm, verification that the CTA members' accounting systems had been audited and found adequate for determining costs applicable to the contract in accordance with FAR § 16.301-3(a)(1). See AttainX AR and FreeAlliance.com AR, Tab 8, Go/No-Go Assessment: Compliant Proposal and Verification of Accounting System for Socioeconomic Group HUBZone at 18, 38. As a result, the protesters' proposals were found unacceptable and therefore ineligible for further consideration for award. Id.; see also RFP at M-3, M-4.

After being informed of their elimination from the competition on August 3, 2016, AttainX and FreeAlliance.com filed these protests with our Office.

DISCUSSION

Both protesters essentially argue that the agency's exclusion of their proposals based on their failure to submit documentation verifying an adequate cost accounting system for all CTA members amounted to a non-responsibility determination that should have been referred to the SBA for a COC.⁴ We disagree.

We have long held that the evaluation of proposals is a matter within the discretion of the procuring agency; we will question the agency's evaluation only where the record shows that the evaluation does not have a reasonable basis or is inconsistent with the RFP. Hardiman Remediation Servs., Inc., B-402838, Aug. 16, 2010, 2010 CPD ¶ 195 at 3.

Under the SBA's COC program, agencies must refer to SBA a determination that a small business is not responsible if that determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6. SBA's regulations specifically require a contracting officer (CO) to refer a small business concern to SBA for a COC determination when the CO has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (e.g., pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility-type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii).

⁴ In filing and pursuing these protests, AttainX and FreeAlliance.com have made arguments that are in addition to, or variations of, those discussed below. We have considered all of the protesters' assertions and find no basis to sustain their protests.

On this record, we do not agree that the agency's evaluation involved a nonresponsibility determination requiring referral to SBA. While the protesters argue that our Office has found that an agency's rejection of a proposal due to evaluated problems in the offeror's accounting system is a matter of responsibility, not technical acceptability, see PMO Partnership Joint Venture, B-401973.3, B-401973.5, Jan. 14, 2010, 2010 CPD ¶ 29 at 5, we find this argument inapposite here. In this instance, the agency's elimination of these two proposals from further consideration was not based on any evaluated problems with the accounting systems of the respective CTA members. See AttainX Protest at 10; AttainX Comments at 5; FreeAlliance.com Protest at 8, FreeAlliance.com Comments at 2. Rather, the record shows that NIH rated the proposals unacceptable based on the fact that both protesters failed to submit the specific documentation required by the solicitation, given their reliance on a third-party CPA firm to verify their adequacy of accounting systems. In other words, both protesters' proposals were found unacceptable because they did not include the expressly required verification "on the [letterhead] of the third-party CPA firm" attesting to the fact that the CTA members' accounting systems had been "audited and determined adequate for determining costs applicable to [the] contract in accordance with FAR § 16.301-3(a)(1)." See RFP at L-17. Clearly stated RFP requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is unacceptable and may not form the basis for award. TYBRIN Corp., B-298364.6, B-298364.7, Mar. 13, 2007, 2007 CPD ¶ 51 at 5; National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4-5.

It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. See, e.g., International Med. Corps, B-403688, Dec. 6, 2010, 2010 CPD ¶ 292 at 7. An offeror runs the risk that a procuring agency will evaluate its proposal unfavorably where it fails to do so. Recon Optical, Inc., B-310436, B-310436.2, Dec. 27, 2007, 2008 CPD ¶ 10 at 6. Accordingly, we find no merit to the protesters' arguments.

The protests are denied.

Susan A. Poling
General Counsel