



Decision

Matter of: Sea Box, Inc.

File: B-414742

Date: September 6, 2017

Robert A. Farber, Esq., for the protester.
Richard L. Moorhouse, Esq., Greenberg Traurig, LLP, for Tribalco, LLC, the intervenor.
Jennifer Howard, Esq., General Services Administration, for the agency.
K. Nicole Willems, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that the elimination of a proposal that did not demonstrate conformance with the salient characteristics in a brand-name-or-equal procurement was tantamount to a finding of nonresponsibility is denied where the agency reasonably found the proposal unacceptable based on a factor not related to responsibility.

DECISION

Sea Box, Inc., a small business of East Riverton, New Jersey, protests the award of a contract to Tribalco, LLC, of Bethesda, Maryland, under request for proposals (RFP) No. GSQ0017AJ0016, issued by the General Services Administration (GSA) for relocatable simulator shelters (RSS) for the Air Force Life Cycle Management Center Simulators Program Office and Air Force Special Operations Command (AFSOC) to house training devices. The protester argues that the agency was required to refer Sea Box's unacceptable proposal to the Small Business Administration (SBA) because the basis for eliminating Sea Box from the competition related to responsibility. The protester also asserts that the agency failed to provide proper notice of Sea Box's elimination from the competition, and failed to provide a pre-award notice regarding the award to Tribalco.

We deny the protest.

BACKGROUND

AFSOC is responsible for training Air Force Tactical Air Control Parties (TACP), which are teams of airmen with the ability to call and direct close air support and other

offensive operations from a forward position. RFP at § 2.1. TACP undergo training using a high-fidelity, partially immersive simulator designed to support TACP and combat controller squadron level continuation, qualification, and mission rehearsal training, in order to obtain Joint Terminal Attack Controller (JTAC) certification. Id.

The RFP was issued on March 28, 2017, and was set aside for small businesses. The solicitation, which was issued on a brand-name-or-equal basis, contemplated the award of a fixed-price contract for six commercial-off-the-shelf RSS that would be used to house the simulators described above. Award was to be made on a lowest-priced, technically acceptable basis, considering pass/fail elements as well as technical evaluation factors and price. RFP at §§ 12.2, 12.7. As relevant here, the RFP provided:

[a] failure on any single [p]ass/[f]ail criteria will make the proposal ineligible for award, with no further evaluation of the technical and price proposal performed by the [g]overnment.

RFP at § 12.2.

One of two pass/fail criteria established by the RFP provided that the agency would reject any proposal that did not include a statement confirming that the RSS solution provided had been rated to operate at a secret classification level in accordance with the salient characteristics provided in section 2.5.1(a) of the RFP. RFP at § 12.2(b). In order to demonstrate that they met the criterion, offerors were required to submit:

Documentation that demonstrates in writing how the offerors' solution complies with [Department of Defense (DOD)] Manual 5200.01 "[DOD] Information Security Program: Protection of Classified Information," and [DOD] Instruction 8500.01 "Cybersecurity." The offeror shall provide documentation that demonstrates its product has been previously certified/accredited by a [g]overnment [s]ecurity agency such as the [Defense Intelligence Agency, Central Intelligence Agency or Defense Security Service] to a minimum level of SECRET, Open Storage as listed in the salient characteristics in Section 2.5.1 of the solicitation.

RFP § 11.6.8.¹

¹ Section 2.5.1(a), Salient Functional Characteristics, required, in part, that:

[t]he contractor shall provide documentation that demonstrates its product has previous certification/accreditation by a [g]overnment security agency, such as the Defense Intelligence Agency (DIA), Central Intelligence Agency (CIA), or Defense Security Service (DSS), to a minimum level of SECRET, Open Storage.

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The agency received two proposals in response to the RFP, including the proposal submitted by Sea Box. Agency Report (AR), Exhibit 9, Award Notification. As an initial step, the technical evaluation board (TEB) evaluated proposals to determine whether the pass/fail requirements were satisfied. Contracting Officer's Statement of Facts (COSF) at 2. After reviewing Sea Box's proposal, the TEB conducted discussions with Sea Box regarding whether its proposed RSS had been rated to operate at a secret level. AR, Exhibit 7, Technical Evaluation Board Report at 7.

Based on its findings, the TEB recommended that the Contracting Officer (CO) make a determination that Sea Box failed to meet the requirement in RFP section 12.2(b).² Id. The CO agreed and determined that Sea Box's proposal failed to satisfy the pass/fail requirement because Sea Box did not submit a statement that confirmed the RSS solution provided had been rated to operate at a secret classification level in accordance with the salient characteristic set out in RFP section 2.5.1(a). Id. As a result, the agency did not give further consideration to Sea Box's proposal. Id. Sea Box was notified of the award to Tribalco on May 15. COSF at 4. Sea Box received a debriefing, which concluded on May 24. Id. This protest followed.

DISCUSSION

Sea Box argues that the agency eliminated its proposal from the competition based on responsibility-related criteria, such that its unacceptable proposal should have been referred to the SBA. The protester also asserts that it was prejudiced because the agency failed to provide proper notice of Sea Box's elimination from the competition, and failed to provide a pre-award notice regarding the award to Tribalco. While we do not discuss every argument raised by the protester in this decision, we have considered them all and find no basis to sustain the protest.

Sea Box primarily argues that Sea Box's alleged failure to submit documentation indicating that its product had previously been certified or accredited to operate at a minimum security level of secret relates to Sea Box's responsibility. Sea Box further contends that such concerns relating to its responsibility should have been referred to the SBA. The agency, however, argues that the rejection of Sea Box's proposal was not based on Sea Box's responsibility, but was instead based on whether Sea Box's product met the salient characteristics in the RFP. AR at 2. We agree with the agency.

(...continued)
RFP at § 2.5.1(a).

² Our Office did not issue a protective order in connection with this protest. Accordingly, our discussion of the facts of this protest is necessarily general in nature to avoid reference to nonpublic information. Our conclusions, however, are based on our review of the entire record, including nonpublic information provided by the agency to our Office.

As an initial matter, we note that the record provides no basis for us to question the agency's finding that Sea Box failed to provide the required certification/accreditation. While Sea Box provides a number of explanations for the failure to include the required documentation, it does not assert that it provided the documentation. For example, Sea Box argues that such a certification/accreditation could only be obtained after the final installation of the RSS. Comments at 8. Sea Box also argues that stipulations in the proposal asserting that its product would meet the salient characteristics established in the RFP should have been sufficient to satisfy the agency's requirements. Comments at 5-7. Both of these arguments amount to untimely challenges to the terms of the solicitation, and provide no basis to question the agency's determination that Sea Box failed to provide the required certification/accreditation in its proposal.

As for the protester's contention that the agency was required to refer Sea Box's unacceptable proposal to the SBA, we disagree. Where an agency finds the proposal of a small business to be unacceptable under a responsibility-related factor, that is, a factor pertaining to its ability to perform, such as whether it has adequate corporate experience or production equipment and facilities, the determination is essentially one of nonresponsibility, meaning that referral to the SBA, which has the ultimate authority to determine the responsibility of small business concerns, is required. Tyonek Worldwide Servs., Inc.; DigiFlight, Inc., B-409326 et al., Mar. 11, 2014, 2014 CPD ¶ 97 at 12. Where an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility, however, referral to the SBA is not required. Id. Likewise, where an agency rejects a proposal as technically unacceptable on the basis of a factor that is arguably responsibility related, but the finding of unacceptability is based on the offeror's failure to submit specific documentation required by the solicitation, referral to the SBA is not required. AttainX, Inc.; FreeAlliance.com, LLC., B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 5.

Here, we are not persuaded that a requirement for documentation that an offeror's product has previously received a particular security accreditation is responsibility related, since the requirement does not pertain to the offeror's ability to perform. Moreover, the facts here show that the protester's proposal was rejected as technically unacceptable because the protester failed to provide required documentation, meaning that referral to the SBA was not required.

The protester also argues that the agency should have provided Sea Box with notice when its proposal was removed from further consideration, as required by Federal Acquisition Regulation (FAR) §15.503(a)(1). Instead, the protester was notified that its proposal had been found unacceptable after award. According to the protester, such notice would have permitted it to file its protest with our Office earlier. Comments at 14. This protest ground does not provide a basis to sustain the protest because the protester has not demonstrated prejudice.

Prejudice is an essential element of every viable protest, and we will not sustain a protest where it is clear from the record that a protester suffered no prejudice as a result of an agency evaluation error. Investment Mgmt. Enter., B-410762, B-410762.2,

Feb. 9, 2015, 2015 CPD ¶ 77 at 4. Where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice. Id. Here, whether Sea Box challenged the agency's finding that its proposal was unacceptable while evaluations were ongoing or after award, the fact remains that the agency reasonably found Sea Box's proposal to be unacceptable and thus ineligible for award. Accordingly, Sea Box was not prejudiced by the delay.

Additionally, the protester complains that the agency failed to provide pre-award notice of the award to Tribalco under FAR §15.503(a)(2)(i), which prevented Sea Box from challenging Tribalco's small business status prior to award.³ Comments at 13. Because Sea Box had been properly eliminated from the competition, however, Sea Box would not have been an interested party to challenge Tribalco's status even if it had been provided with a pre-award notice. See 13 C.F.R. §121.1001.

The protest is denied.

Susan A. Poling
General Counsel

³ Sea Box filed a post-award challenge to Tribalco's size status, which the SBA dismissed because Sea Box lacked standing as a result of its elimination from the competition. Intervenor's Request for Summary Dismissal at 8.