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Decision

Matter of: Facility Services Management, Inc.--Advisory Opinion

File: B-414857.9

Date: August 23, 2018

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DIGEST

Protest challenging agency's application of page limitation is without merit where the agency properly calculated compliance with applicable page limitation and excluded from consideration proposal pages that exceeded that limitation.

DECISION

Facility Services Management, Inc., (FSI) a woman-owned small business of Clarksville, Tennessee, challenges its exclusion from competition by the Department of the Army under request for proposals (RFP) No. W9124R-15-R-0001 for installation support services at Yuma Proving Ground, Arizona. FSI submitted a protest to our Office on May 15, 2018, in which it argued, among other things, that the agency improperly concluded that it had exceeded the page limitation set forth in the solicitation, and, as a consequence, erred in evaluating its proposal.

On August 16, we dismissed the protest filed by FSI after FSI submitted a protest involving the same procurement with the United States Court of Federal Claims.¹ 4 C.F.R. § 21.11(b). Our Office was preparing a decision to answer FSI's protest by not later than August 23. On August 16, the Department of Justice filed a motion with the court requesting an advisory opinion from our Office. The court granted the motion and

¹ Facility Services Management, Inc., B-414857.5 et al., Aug. 16, 2018 (unpublished decision).

requested that our Office provide an advisory opinion regarding the merits of the protest FSI filed with our Office. See 4 C.F.R. § 21.11(b). Our opinion here is issued in response to the court's request, and is presented in the same general format as we normally employ to issue decisions responding to bid protests. As explained below, our Office finds the protest to be without merit, and we would deny the protest.

BACKGROUND

On March 30, 2017, the agency issued the RFP as a small business set-aside, which contemplated a single-award, indefinite-delivery, indefinite-quantity contract. Agency Report (AR), Tab 3, RFP at 1, 100. On May 26, 2017, FSI submitted a proposal in response to the solicitation, and on June 22, the agency notified FSI that its proposal had been eliminated due to an incomplete and unrealistic price proposal. AR, Tab 1, Memorandum of Law (MOL) at 6. Thereafter, FSI filed a protest with our Office alleging the agency's evaluation was unreasonable, and the agency agreed to take corrective action and revisit its decision. Id. Our Office subsequently dismissed the protest as academic on July 19. Facility Services Management, Inc., B-414857, July 19, 2017 (unpublished decision).

On September 7, 2017, the agency again notified FSI that its proposal had been eliminated because it had failed to provide "a fully complete, reasonable and balanced proposal" with respect to price. MOL at 7. FSI again filed a protest with our Office, challenging the agency's price evaluation, and the agency again agreed to take corrective action, in this instance by amending the solicitation and soliciting new proposals. MOL at 7. That protest was likewise dismissed as academic on October 10. Facility Services Management, Inc., B-414857.2 et al., Oct. 10, 2017 (unpublished decision).

In November of 2017, the agency issued a series of amendments to the RFP, and received revised proposals. MOL at 7-8. The amended RFP provided that award would be made on the basis of three evaluation factors: (1) mission capability; (2) past performance; and (3) price. RFP at 101. The mission capability evaluation factor was, in turn, composed of three subfactors: (1) technical understanding; (2) management and organizational plan; and (3) staffing and workforce management plan. Id. The RFP advised that the mission capability subfactors would be evaluated as either acceptable or unacceptable, and that if any subfactor was rated as unacceptable, it would result in a rating of unacceptable for the mission capability factor as a whole. Id. at 88, 100. Finally, the RFP contemplated a tradeoff between past performance and price among the technically-acceptable offerors. Id. at 100.

Of particular relevance to this protest, the RFP also included page limitations, with detailed instructions concerning how pages would be counted² and which proposal

² For example, the RFP provided that fold-out pages or pages printed on both sides would each count as two pages. RFP at 83-84.

portions would be exempt from those page limitations. RFP at 83, 85-86. Specifically, the RFP provided that an offeror's proposal volume addressing the mission capability evaluation factor was limited to 125 pages, excluding tables of contents, cover pages, tabs, cross-reference matrices, and glossaries. Id. The relevant provisions indicated that if a proposal exceeded the page limit, the excess pages would not be read or considered in the evaluation of the proposal. Id. at 83.

As part of the instructions to offerors for the technical understanding subfactor, RFP section 3.3.3 indicated that offerors should demonstrate their understanding of 16 functional areas by providing an "overarching description of each area," including, among other things, required preventative maintenance plans (PMP) in accordance with performance work statement (PWS) section C.1.5.2.³ RFP at 88. Later in section 3.3.3, in a separate paragraph, the RFP provides:

The Offeror shall provide notional (for evaluation purposes only) Preventive Maintenance Plans [in accordance with] C.1.5.2 of the PWS for the Operation, Maintenance, Repair of Electrical Systems and Equipment, Operation, Maintenance, and Repair of Sanitary Sewage Collection Systems, and Operation, Maintenance, Repair of Structures and Facilities functional areas. The page limit for each plan is five pages. This page limit does not count against the page limit indicated in Table 3.1.1 Volume II.

RFP at 89.

On December 4, the agency convened a new source selection evaluation board (SSEB) composed of entirely new members, although the contracting officer remained the same. MOL at 8. FSI submitted a revised proposal, and the new SSEB concluded that FSI's proposal was technically unacceptable under each of the three mission capability subfactors, and, accordingly, under the mission capability evaluation factor as a whole. Id. at 8-9. Key to several of the underlying findings was the SSEB's conclusion that FSI's proposal had exceeded the page limit for the mission capability volume, and, as a result, had either not adequately addressed or not at all addressed certain requirements within the page limit. Id. The contracting officer concurred in the SSEB's evaluation, and on May 10, 2018, the contracting officer notified FSI that the agency had determined that FSI was unacceptable and had been eliminated from the competition. Id. This protest followed.

³ PWS section C.1.5.2 provides, among other things, that the contractor shall prepare a PMP no later than 30 days after the beginning of performance, and that the PMP must address all relevant safety issues related to work in 14 of the 16 functional areas listed in the RFP. AR, Tab 4, PWS at 23-25.

DISCUSSION

The protester, in its initial and two supplemental protest filings, raised 11 distinct grounds of protest, some of which were dismissed prior to FSI's filing with the Court of Federal Claims.⁴ The surviving protest grounds fall primarily into two groups: (1) allegations that various portions of the RFP, including the provisions describing exemptions from the page limits, were latently ambiguous; and (2) challenges to various aspects of the agency's evaluation of FSI's proposal. We deal with these arguments in turn.

Latent Ambiguity

The meaning and application of the RFP's page limit and the exclusions from that page limit are central to the resolution of this protest. See RFP at 88-89. Specifically, the protester contends that one of the provisions outlining which parts of a proposal may be excluded from the page limit is latently ambiguous, because the protester reasonably read it as excluding all notional PMPs from the page limit, and was not aware of an alternative reading. Comments on Supp. AR at 4-6. In contrast, the agency argues that the solicitation reasonably can only be read to exclude the three specifically enumerated PMPs in RFP section 3.3.3 from the page limit, with all other notional PMPs appropriately counted against the page limit. Supplemental Agency Report at 6.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. Intelsat General Corporation, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Crew Training Int'l, Inc., B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible; a patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id.

Section 3.3.3 of the RFP requires an offeror to demonstrate its understanding of a list of 16 functional areas by providing an overarching description of each area, including, among other things, required PMPs in accordance with PWS C.1.5.2. RFP at 88. Later in RFP section 3.3.3, a separate paragraph provides that offerors should provide

⁴ Specifically, the protester argued that the agency conducted unequal or inadequate discussions, but this protest ground was dismissed for lack of legal sufficiency. Notice of Resolution of Request to Dismiss, June 12, 2018 at 1-2. Similarly, the protester raised certain challenges to another offeror's evaluation, which were dismissed as premature because the agency has not yet finalized its source selection decision or made award. Notice of Resolution of Request for Partial Dismissal, July 3, 2018 at 1.

notional PMPs for 3 of the 16 functional areas. RFP at 89. At the end of that paragraph, the RFP indicates that the page limit for each PMP is five pages, and that this page limit does not count against the general mission capability volume page limit. Id.

The protester contends that it read the provision to require that its proposal include a complete PMP for each functional area, and as exempting all such required PMPs from the page limit. Comments on Supp. AR at 4-6. However, the protester's reading of this provision is neither consistent with the RFP when read as a whole, nor with the protester's own proposal.

First, the page limit exclusion is set forth in a separate paragraph in the solicitation from the language discussing the requirement to demonstrate an understanding by providing an overarching description of each functional area including required PMPs. RFP at 89. Moreover, the page limit exclusion immediately follows the requirement to furnish notional PMPs for three specific functional areas. Id. Thus, a natural reading of the text would apply the exemption to what immediately precedes it.

Second, the portion of RFP section 3.3.3 that requires an overarching description, which includes required PMPs, references a PWS provision that does not require the provision of a PMP until 30 days after award. RFP at 88. The protester appears to construe the overarching description requirement to require complete PMPs in its proposal. Comments on Supp. AR at 4-6. However, this reading appears inconsistent with the relevant PWS provision, which indicates that the PMP should be provided 30 days after performance begins, not in the proposal. PWS at 23-25. The protester appears to reconcile this apparent conflict by arguing that the RFP required the inclusion only of notional PMPs for all functional areas, but, in this connection, the RFP's only reference to notional PMPs is in the sentence that requires notional PMPs for three specific functional areas, not in reference to all of the functional areas. RFP at 88-89.

Third, and most significantly, it is unclear, in the protester's reading, what purpose or effect can be given to the RFP language requiring the provision of notional PMPs for the three specific functional areas. RFP at 89. If the RFP effectively required that proposals include in full all required PMPs (or even notional PMPs for each functional area), the additional statement of a requirement to provide three specific notional PMPs would be rendered, at best, surplusage without independent effect. A reading of the RFP which is inconsistent with other solicitation provisions, and which renders some parts of the document extraneous or meaningless cannot be a reasonable reading. Crew Training Int'l, Inc., supra.

Finally, we note that the protester's proposal includes a total of nine notional PMPs: the three PMPs specifically required by the RFP, and an additional six. See AR, Tab 18,

FSI Proposal - Mission Capability Volume at 3-4.⁵ As noted above, the PWS requires the eventual post-award PMP to, among other things, address safety issues related to work in 14 of the 16 functional areas. In addition, the specific PWS descriptions of the work to be performed in each of those 14 functional areas makes reference to performing maintenance as provided in the PMP. See, e.g., PWS at 24 and 86. If, as the protester contends, the page limit exclusion extends to all PMPs because the RFP instructed offerors to include the required PMPs for each functional area in their proposal, it is unclear how the protester's proposal would be technically acceptable under that reading, because FSI's proposal only included notional PMPs touching on 9 of the 14 functional areas identified in the PWS.⁶ FSI Proposal - Mission Capability Volume at 3-4. Simply put, it is unclear what principle of selection the protester employed in determining whether to include notional PMPs for functional areas. Nonetheless, regardless of the method the protester employed, it does not appear to be founded on the premise that all required functional areas must be addressed.

For those reasons, we conclude that the protester's reading of the RFP's language was not reasonable, and therefore that the RFP was not ambiguous in the way suggested by the protester.⁷ Accordingly, we would deny this protest ground.

Alleged Evaluation Errors

The protester also raises challenges to the agency's evaluation of its proposal alleging that virtually all⁸ of the agency's negative technical judgments were unreasonable, to include the agency's application of the page limit to its proposal. For the reasons described below, we do not reach the protester's evaluation arguments other than its arguments concerning the application of the page limit.

In reviewing a protest challenging an agency's technical evaluation, our Office will not reevaluate the proposals; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the

⁵ All citations to FSI's proposal use the proposal's internal pagination unless otherwise indicated.

⁶ For example, FSI's proposal did not include PMPs for, among other areas, heavy equipment operations and ground maintenance. FSI Proposal - Mission Capability Volume at 3-4.

⁷ The protester advances additional latent ambiguity arguments, for example, concerning the meaning of the term "overarching" as used in RFP section 3.3.3, but we need not reach those arguments for the reasons described below.

⁸ Because, as discussed in detail below, we conclude that the agency's application of the page limit was reasonable, we do not reach the majority of the protester's arguments concerning the agency's technical evaluation.

solicitation and applicable procurement laws and regulations. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 4.

Here, the RFP provided that pages exceeding the 125-page limitation would not be read or considered. RFP at 83. FSI's relevant proposal volume was nominally 162 pages. FSI Proposal - Mission Capability Volume. However, the agency notes that FSI's proposal contains 8 leading pages of tables of contents, indices, cross reference matrices, and glossaries, as well as 15 pages constituting the 3 notional PMPs, for a total of 23 pages which, according to the RFP, do not count towards the page limit. MOL at 12-16. The agency additionally noted that the proposal included four foldout pages, which the RFP provides count as two pages each, resulting in four additional pages. Id. Therefore, the last page of FSI's proposal which the agency considered was page 144,⁹ or page 103 in FSI's internal pagination.¹⁰ Id.

As a general matter, offerors must prepare their proposals within the format limitations set out in an agency's solicitation, including any applicable page limits. Techsys Corp., B-278904.3, Apr. 13, 1998, 98-2 CPD ¶ 64 at 6. As discussed above, the RFP in this case set forth clear, unambiguous page limitations for the mission capability volume, and provided that the agency would not consider any excess pages. RFP at 83, 88-89. The agency's mathematical application of the page limit appears reasonable and consistent with the provisions of the RFP. Accordingly, we have no basis to disturb the agency's refusal to consider any pages beyond page 144, or page 103 in the protester's internal pagination. See IMPRES Technology Solutions, Inc., et al., B-409890, et al., Aug. 5, 2014, 2014 CPD ¶ 234 at 5.

As a result of this application of the page limit, a significant portion of the protester's proposal responding to the third technical subfactor could not be considered, nor could the information in the protester's specific relevant contract references. See FSI Proposal - Mission Capability Volume at 103-121. The protester's proposal, as truncated, did not include significant information required by the solicitation. For example, the RFP required offerors to describe their ability to recruit, hire, retain, and manage personnel with the knowledge, skills, education, experience, and applicable position descriptions, certifications, training, and licenses required to perform in accordance with the PWS. RFP at 90. However, as the protester concedes, significant portions of its proposal addressing its ability to recruit, hire, retain, and manage personnel, and its discussion of its approach to managing licenses and certifications are

⁹ The 125-page limit, added to the 23 exempt pages, less the 4 additional pages from the 4 foldout pages.

¹⁰ While we note that the proposal included one additional page that constituted a table of contents and a glossary, which would have been exempted from the page count, it was on page 110 in the internal pagination, and hence beyond the page limit, so it did not affect the application of the page limit. FSI Proposal - Mission Capability Volume at 110.

on pages 107 and 108 in the protester's internal pagination, which were both beyond the page limit as applied by the agency. FSI Proposal - Mission Capability Volume at 107-108; Supp. Protest, B-414857.7 at 54.

As another example, information responsive to a requirement in PWS section C.1.4.8.1.2 identifying mandatory qualifications for certain key personnel was only included in the protester's specific relevant contract references, which were beyond the page limit and therefore could not be considered. PWS at 12; FSI Proposal - Mission Capability Volume at 112-121.

Clearly stated solicitation technical requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. See, e.g., Stewart Distributors, B-298975, Jan. 17, 2007, 2007 CPD ¶ 27 at 3-4. Here, we see no basis to conclude that the agency was unreasonable¹¹ in concluding that the protester failed to address material terms of the solicitation and was technically unacceptable for that reason. Accordingly, we do not reach the protester's other arguments¹² concerning the

¹¹ The protester raises a collateral argument that, because its proposal was allegedly found technically acceptable twice previously in this procurement, the agency's conclusion that its proposal is now technically unacceptable is unreasonable. Our decisions have been clear that there is nothing per se unreasonable about a new evaluation team or a new source selection authority, convened for a reevaluation pursuant to corrective action, reaching different conclusions from a prior evaluation panel. Construction Servs. Group, Inc., B-412343.3, Feb. 27, 2017, 2017 CPD ¶ 76 at 4-5. The fact that a reevaluation varies, or does not vary, from an original evaluation does not constitute evidence that the reevaluation was unreasonable. AMG Co. Inc., B-415067.2, Jan. 29, 2018, 2018 CPD ¶ 38 at 3. Here, the agency convened an entirely new SSEB for the current evaluation, and, accordingly, we see no basis to object to the new board reaching a different conclusion, especially in light of the fact that the agency revised the solicitation and received revised proposals in between the evaluations in question. MOL at 8. As an aside, we note that the RFP is quite plain both on the application of the page limit and the consequences of exceeding it, so it is not clear that the evaluators exercised any meaningful discretion in applying the page limit in this case. That is to say, if the agency erred in the application of the page limit over the course of this procurement--and it is not clear that they did--it was in the prior evaluations, not in this one.

¹² The protester also alleges that the agency's conclusion that FSI was technically unacceptable was, in effect, a negative responsibility determination, and that the agency, therefore, should have referred FSI to the Small Business Administration for a certificate of competency determination. Supp. Protest, B-414857.7 at 55-59. However, we have concluded in prior decisions that where a proposal is found technically unacceptable because of a failure to include required information, that finding does not constitute a responsibility-type determination necessitating a referral, even if the evaluation factor in question is arguably responsibility-related. See Sea Box, (continued...)

remainder of the agency's evaluation because the protester's proposal would be technically unacceptable in any case, and therefore ineligible for award.

On the record presented to our Office, and in response to the court's request for an advisory opinion, we would deny this protest.

Thomas H. Armstrong
General Counsel

(...continued)

Inc., B-414742, Sept. 6, 2017, 2017 CPD ¶ 279 at 4; MicroTechnologies, LLC, B-414670, B-414670.2, Aug. 1, 2017, 2017 CPD ¶ 236 at 6; AttainX, Inc.; FreeAlliance.com, LLC, B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 5. We view the instant case, in which the agency found FSI technically unacceptable primarily due to a failure to provide required information in the manner prescribed by the solicitation, as directly analogous to those cases, and, accordingly, find this argument to be without merit.