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Decision

Matter of: Nu-Way Security and Investigative Services, Inc.

File: B-414988.2

Date: October 20, 2017

Cynthia Malyszek, Esq., Malyszek & Malyszek, for the protester.
Kasey Podzius, Esq., Department of Homeland Security, for the agency.
Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably found protester's quotation nonresponsive and excluded it from consideration for award is denied, where the record indicates that the protester received an amendment to the solicitation that provided notice of material changes to the pricing attachment, and the protester's quotation failed to incorporate those material changes to the solicitation's terms.

DECISION

Nu-Way Security and Investigative Services, Inc., of Victorville, California, protests the elimination of its quotation from the competition under request for quotations (RFQ) No. HSCEDM-17-Q-00003, issued by the Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), to provide armed and unarmed detention officer services in California. The protester asserts that the agency unreasonably found Nu-Way's quotation nonresponsive for failure to comply with the revised solicitation terms.

We deny the protest.

BACKGROUND

The RFQ, issued through General Services Administration (GSA) eBuy system, sought quotations for the establishment of a blanket purchase agreement under GSA Schedule 84, special item number 246-54, for guard and transportation services. Agency Report (AR), Tab 2, RFQ at 1. The period of performance was for 12 months, with four 1-year options, with the potential for a 6-month extension. Id. at 2-6, 145.

The agency issued three solicitation amendments through GSA eBuy. The first, third, and fourth amendments extended the deadline for quotation submission. See RFQ amends. 1, 3 and 4. Amendment 2 made several changes to the solicitation including, as relevant to this protest, the following three modifications to attachment E, the pricing spreadsheet: added not separately priced language to the transition contract line item number (CLIN) 0001A; added CLIN 1003C for a project manager for San Diego; and increased the mileage reimbursement rate under CLINs 0001J, 1001I, 2001I, 4001I, and 5001I. RFQ amend. 2 at 1, and attach. E, CLINs 0001A, 0003C, 1001I, 2001I, 4001I, and 5001I. All of these changes were summarized on page one of amendment 2. See RFQ amend. 2, at 1. Amendment 2 provided a list of attached documents, which included the pricing spreadsheet attachment, in two parts.¹ Id.

The agency received six quotations in response to the RFQ. Contracting Officer's Statement at 4. The contract specialist evaluated Nu-Way's quotation and found that it lacked a CLIN for the San Diego project manager and failed to update the mileage reimbursement quantities for certain CLINs. AR, Tab 13, Email from Contract Specialist to Contracting Officer, July 17, 2017, at 4; AR, Tab 8, Abstract of Quotations, at 2.² The contracting officer advised Nu-Way that its quotation had been found nonresponsive and "will not be evaluated for award," because the quotation lacked prices for items that were added under amendment 2 for the pricing spreadsheet attachment. AR, Tab 9, Letter from Contracting Officer to Protester, July 18, 2017. The contracting officer noted that amendment 2 revised the pricing spreadsheet attachment and added not separately priced language to the transition CLIN, added a CLIN for a San Diego program manager, and adjusted the mileage reimbursement CLINs. Id.

The protester filed a protest with the agency, arguing that Nu-Way downloaded the revised solicitation and all associated attachments and that the revised pricing spreadsheet was not included in those attachments. AR, Tab 10, Letter to Agency. The agency responded that amendment 2 was posted on the GSA eBuy website, the modification description clearly stated changes were made to the pricing spreadsheet, and other offerors were able to download and submit the revised pricing spreadsheet. Id., Tab 14, Agency Letter to Protester. This protest followed.

DISCUSSION

The protester asserts that although it received amendment 2, it did not receive the revised pricing spreadsheet attachment, and that "[t]he front page of Amendment 2, did not explicitly state that there were changes made to the [pricing spreadsheet] Attachment[] E" such that a new pricing spreadsheet was required. Comments at 3

¹ The pricing spreadsheet attachment contained two parts, for government-owned vehicles and contractor-owned vehicles.

² Nu-Way's quotation also contained a price for the not separately priced transition period, CLIN 0001A. AR, Tab 7, Nu-Way's Proposal at attach. E.

(citing RFQ, amend. 2, attach. E). The protester argues that the requirement for submission of the revised pricing spreadsheet is ambiguous because “[n]o place or statement on the front of Amendment 2 stated that a new Attachment E was required and had to replace the original Attachment E.” Id. The agency argues that amendment 2 clearly stated there were changes to the pricing spreadsheet and that Nu-Way failed to acknowledge amendment 2 because its quotation used the outdated pricing spreadsheet that included transition pricing which should not have been separately priced, failed to include pricing for the project manager, and included incorrect mileage reimbursement. Memorandum of Law at 4-6.

We find that amendment 2 specifically stated that the following changes were made to attachment E, the pricing spreadsheet: added not separately priced language to the transition contract line item number; added a CLIN for a project manager for San Diego; and increased the mileage reimbursement rate for several CLINs. RFQ amend. 2 at 1. All of these changes were summarized on page one of amendment 2. See RFQ amend. 2, at 1. Regardless of whether Nu-Way could download or received the revised pricing spreadsheet, the protester was on notice that the agency revised the spreadsheet. As a result, the protester should have availed itself of every reasonable opportunity to obtain the attachment. See The Creative Mobility Group, LLC, B-410380.2, Dec. 19, 2014, 2014 CPD ¶ 376 at 3 (protest against an agency’s solicitation dissemination is denied where protester failed to avail itself of every reasonable opportunity to obtain the solicitation documents).

Generally, a quotation may be rejected for failure to acknowledge a material amendment. In determining whether an amendment is material, we look at the facts of each case. While no precise rule exists as to whether a change required by an amendment is more than negligible, an amendment is material where it imposes legal obligations on the contractor that were not contained in the original solicitation or subsequent amendments acknowledged by the offeror. See MG Mako, Inc., B-404758, April 28, 2011, 2011 CPD ¶ 88 at 2; Skyline ULTD, Inc., B-297800.3, Aug. 22, 2006, 2006 CPD ¶ 128 at 3. An amendment may be constructively acknowledged where the proposal includes the material items appearing only in the amendment. Kuhana-Spectrum Joint Venture, LLC, B-400803, B-400803.2, Jan. 29, 2009, 2009 CPD ¶ 36 at 9-10.

Here, attachment E to amendment 2 imposed new legal obligations on the contractor that were not contained in the original solicitation or subsequent amendments. Attachment E required the contractor to provide the transition at no cost, a project manager in San Diego, and an increased mileage reimbursement. Attachment E was therefore a material amendment to the solicitation. See RightStar Sys., B-407597, Jan. 16, 2013, 2013 CPD ¶ 35 at 5 (because vendors were required to price specific CLINs, and those prices were to be evaluated for purposes of determining the total evaluated price, the prices for those CLINs were a material solicitation requirement). When an offeror fails to acknowledge a material amendment, the offeror’s proposal must be rejected. ECI Def. Group, B-400177, B-400177.2, July 25, 2008, 2008 CPD ¶ 141

at 4-5 n.7. In this case, the agency acted reasonably when it rejected Nu-Way's proposal because the offer separately priced its transition CLIN, failed to add pricing for the CLIN for a project manager for San Diego, and failed to increase the mileage reimbursement rate for several CLINs. See also RightStar Sys., supra (an agency may reject a quotation that omits required pricing).

The protest is denied.

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General Counsel