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Decision

Matter of: Elevator Service, Inc.

File: B-416258.2; B-416258.3

Date: September 13, 2018

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Kevin Johnson, for JohnsonDanforth, Inc., the intervenor.

Daniel J. McFeely, Esq., and Donald C. Mobly, Esq., Department of Veterans Affairs, for the agency.

Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegation is dismissed where the allegation, even if true, did not constitute a basis to reject the awardee's proposal.

2. Protest allegation is denied where the agency reasonably evaluated the awardee's proposal as satisfying the definitive responsibility criterion.

DECISION

Elevator Service, Inc. (ESI), of Grand Rapids, Michigan, protests the award of a contract to JohnsonDanforth, Inc. (JD), of Little Rock, Arkansas, under request for proposals (RFP) No. 36C26218R0411, issued by the Department of Veterans Affairs (VA) for elevator maintenance services. ESI alleges that the agency should have rejected the awardee's proposal for failing to conform to material solicitation requirements, and that the agency unreasonably evaluated the awardee's proposal as satisfying the definitive responsibility criterion.

We deny the protest.

BACKGROUND

The RFP, issued on March 8, 2018, as a service-disabled veteran-owned small business set-aside, contemplated the award of a fixed-priced contract for elevator maintenance services to be performed over a 1-year base period and four 1-year option

periods. Agency Report (AR), Ex. 1, RFP at 8.¹ Offerors were expected to employ seven elevator maintenance technicians and helpers at six different VA locations throughout California. Id. at 23.

The solicitation stated that offerors would be evaluated on only one factor, price. AR, Ex. 1, RFP at 55. Award would be made to the lowest-priced offeror provided that the agency found the firm to be a responsible contractor. Id. at 56. The solicitation provided that the selected offeror must meet general standards of responsibility, as well as a special standard of responsibility concerning the qualifications of personnel performing on the contract. Id. at 55-56. To satisfy this latter standard, offerors were expected to provide evidence that their proposed mechanics possessed five years of experience, had completed either a registered apprenticeship program or a qualifying examination, and were licensed in the State of California to perform elevator maintenance and repair. Id. at 55.

The solicitation also included submission instructions. In relevant part, the solicitation instructed offerors to provide proof of compliance with a limitation on subcontracting requirement, including a narrative identifying intended subcontractors, the value of any subcontract, the services that any subcontractor would provide, and the socioeconomic status of any subcontractor. AR, Ex. 1, RFP at 55.

Four offerors, including ESI and JD, submitted proposals prior to the close of the solicitation period, March 27. AR, Ex. 2, Contracting Officer's Statement of Facts (COSF) at 81. All four offerors were included in a competitive range. Id. The agency informed the four offerors that their proposed prices were too high, that it had anticipated making an award in the \$11 to \$13 million range, and that revised proposals must be submitted by April 3. Id. All four offerors submitted revised price proposals. Id. The agency made award to JD at a price of \$12,907,584. AR, Ex. 2, COSF at 81-82. The instant protest followed.²

DISCUSSION

ESI first argues that JD's proposal should have been rejected because it did not include the proof of compliance with the limitation on subcontracting requirement as provided for under the solicitation's submission instructions. Protester's Supp. Comments at 2-4. ESI also argues that JD's proposal failed to demonstrate that it could perform all of the duties as outlined in the statement of work (SOW). Supp. Protest at 4-7; Protester's Comments at 6-7. In this regard, ESI also asserts that JD could not rely on its subcontractor to demonstrate compliance with the criterion. Protester's Comments at 7.

¹ The VA used a Bates numbering system in preparing its report. This decision uses the Bates numbers assigned for all citations to the report.

² ESI filed its protest on June 29. Later that day, it filed a supplemental protest providing additional details but including no additional protest allegations.

We have reviewed all of the protester's allegations and find that none provides a valid basis to sustain the protest.³

We dismiss ESI's first argument that JD's proposal did not meet the limitation on subcontracting submission requirements because it fails to state a valid basis for protest. Where a protest allegation does not facially demonstrate unreasonable agency action, we will dismiss it for failing to state a valid basis for protest. 4 C.F.R. § 21.5(f); Excalibur Laundries, Inc., B-405814, B-405814.2, Jan. 3, 2012, 2012 CPD ¶ 1 at 6 (allegation fails to state a valid basis for protest when it facially does not demonstrate unreasonable agency action).

Here, as noted above, the solicitation instructed offerors to provide proof of their compliance with the limitation on subcontracting requirements. AR, Ex. 1, RFP at 55. However, in the evaluation section, the solicitation did not state that any offeror failing to submit this information would be deemed ineligible or rejected. Thus, JD's alleged failure to submit proof of compliance was inconsequential because the solicitation did not inform offerors that failure to provide such information was grounds for proposal rejection. In this regard, we note that requirements provided in an instruction section of a solicitation are not the same as evaluation criteria provided in the evaluation section; rather than providing minimum evaluation standards, the instructions generally provide guidance to assist offerors in preparing and organizing proposals. Al-Razaq Computing Servs., B-410491, B-410491.2, Jan. 7, 2015, 2015 CPD ¶ 28 at 7. Accordingly, we

³ Prior to the instant protest, ESI filed an earlier protest, which we dismissed as academic because the agency stated that it would reevaluate JD's proposal to determine whether it satisfied the special standards of responsibility. Elevator Service, Inc., B-416258, Apr. 30, 2018 (unpublished decision) at 1. In its protest, ESI alleged that the agency did not implement the corrective action because it failed to evaluate JD's compliance with the special standard of responsibility.

In our view, ESI has abandoned that allegation. Where, as here, an agency provides a detailed response to a protester's assertion and the protester fails to respond to the agency's arguments in its comments, the protester abandons its argument because it fails to provide us with a basis to conclude that the agency's position with respect to the issue in question is unreasonable. IntegriGuard, LLC d/b/a HMS Federal--Protest and Recon., B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5; Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 4. The agency responded to the allegation in its legal memorandum. Memorandum of Law (MOL) at 19 (agency requested and received documents from JD showing that JD satisfied the special responsibility standard). In its comments, ESI did not challenge the agency's representation that it had requested and received the documents. Accordingly, ESI abandoned its protest allegation because it did not provide us with a basis to conclude that the agency's position was unreasonable.

dismiss this protest ground because the solicitation did not provide that offerors failing to submit proof of compliance could be found ineligible or rejected.⁴

As to ESI's second argument, we find that the agency reasonably evaluated JD's proposal as meeting the definitive responsibility criterion.⁵ Where, as here, a protester asserts that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the agency reasonably could conclude that the criterion had been met; generally, a contracting agency has broad discretion in determining whether offerors meet definitive responsibility criteria. Vador Ventures, Inc., B-296394, B-296394.2, Aug. 5, 2005, 2005 CPD ¶ 155 at 4. Further, literal compliance with definitive responsibility criteria is not required where there is evidence that an offeror has exhibited a level of achievement equivalent to the specified criteria. Id.

The pertinent solicitation provision provided the following:

Special Standards of Responsibility -- Qualification of Personnel Performing on the Contract. This special standard of responsibility shall be used to determine if the offeror's proposed personnel possess the specialized certification and experience required to maintain and repair equipment as described in the SOW. The offeror shall provide evidence that the proposed Resident Mechanics have five (5) years of elevator maintenance experience, not including an apprenticeship program. In addition, the offeror shall provide evidence that the proposed Resident Mechanics and Mechanic Helpers have completed an examination of a nationally recognized training program for Vertical Transport Equipment

⁴ In any event, we note that in regard to an earlier size protest by the protester, the Small Business Administration (SBA) has already found that JD is a small business for the subject procurement. AR, Ex. 11, SBA Decision at 311. In so finding, the SBA concluded that JD is not unusually reliant on its subcontractor and that JD employees will be performing the primary and vital requirements of the contract. Id. Thus, even if we determined that the agency should have referred JD's proposal to the SBA to determine whether it satisfied the subcontracting limitation, such a recommendation would be meaningless because the SBA's decision has already provided its view on the matter.

⁵ Although the solicitation phrased the pertinent provision as a "special responsibility standard," we note that it constitutes a definitive responsibility criterion. A definitive responsibility criterion is a special and objective standard established by an agency for use in a particular procurement for the measurement of an offeror's ability to perform the contract. Townscot Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313 at 3. Thus, the instant provision constitutes a definitive responsibility criterion because it created a standard by which the agency would measure whether the lowest-priced offeror could provide the requisite mechanics and helpers to perform elevator maintenance.

(National Elevator Industry Education Program (NEIEP) or equivalent), or have a certificate of completion of a registered apprenticeship program from the State of California. Lastly, offerors shall provide evidence that all proposed Resident Mechanics and Helpers are certified by the State of California to perform maintenance and repair on elevator equipment. In response to this special standard of responsibility, offerors shall provide resumes and supporting documentation for all proposed Resident Mechanics and Mechanic Helpers proving this experience, training, and certification.

AR, Ex. 1, RFP at 55. Based on the plain language, we find that the solicitation required offerors to provide evidence that their proposed mechanics possessed five years of experience and were certified by California to perform elevator maintenance, as well as provide evidence that their mechanics and helpers had completed registered apprenticeship programs or qualifying examinations. Contrary to the protester's argument, the solicitation provision did not require offerors to provide detailed experience demonstrating ability to perform each duty as outlined in the SOW. That interpretation of the solicitation provision is unreasonable because it misconstrues the first sentence and completely ignores the operative effect of the remaining sentences. See Anders Constr., Inc., B-414261, Apr. 11, 2017, 2017 CPD ¶ 121 at 3 ("An interpretation is reasonable when it is consistent with the solicitation when read as a whole and gives effect to each of its provisions."). Furthermore, the solicitation did not specify that offerors could not rely on subcontractors to provide the requisite personnel, or rely on their subcontractor's employees' qualifications in order to satisfy the standard. Thus, we decline to analyze the agency's evaluation of JD's compliance with the standard using the interpretation as proffered by the protester; rather, we look to whether JD submitted evidence of its mechanics' and helpers' qualifications consistent with the plain meaning of the provision.

The record shows that JD's proposal contained résumés for each mechanic demonstrating five years of elevator maintenance experience, evidence that each employee had satisfied the educational or test equivalent requirements, and California certificates and certification cards showing that each mechanic was certified by California to perform elevator maintenance. AR, Ex. 7, JD's Special Standard of Responsibility Documents at 174-206. Accordingly, we deny this protest allegation because the record contained adequate evidence from which the agency reasonably could determine that the awardee satisfied the definitive responsibility criterion.

The protest is denied.

Thomas H. Armstrong
General Counsel