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Decision

Matter of: MicroTechnologies, LLC

File: B-417442

Date: May 28, 2019

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Evan C. Williams, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly evaluated prices for reasonableness is dismissed where the solicitation expressly outlined the price reasonableness evaluation undertaken by the agency, rendering a post-award challenge to the price evaluation scheme an untimely challenge to the terms of the solicitation.

DECISION

MicroTechnologies, LLC (MicroTech), a small business located in Vienna, Virginia, protests the issuance of a task order to Favor TechConsulting, LLC, (Favor), by the Department of the Air Force under Fair Opportunity Proposal Request (FOPR) No. FA8771-18-R-0010 for services in support of the Automated Civil Engineer System (ACES). The protester challenges its elimination from the competition, contending the agency's evaluation was unreasonable and inconsistent with the solicitation.

We dismiss the protest.

On August 30, 2018, the Air Force issued the solicitation for phase 1 of a 2-phase procurement for service support for the ACES. Request for Dismissal, Attach. 4, MicroTech Debriefing, at 5. The phase 1 solicitation requested a capabilities statement related to service support from all holders of the General Services Administration's (GSA) Veterans Technology Services 2 (VETS 2) indefinite-delivery, indefinite-quantity (IDIQ) governmentwide acquisition contracts (GWACs). Request for Dismissal, Attach. 1, FOPR, at 1. On November 2, the Air Force issued the phase 2 solicitation to

the VETS 2 GWAC holders that responded to the phase 1 solicitation. Id. The solicitation, issued pursuant to the procedures of Federal Acquisition Regulation (FAR) part 16, contemplated the issuance of a primarily fixed-price task order for a 1-year base period and four 1-year option periods. Id. at 2; Request for Dismissal, Attach. 2, FOPR, Evaluation Criteria, at 1.

The task order was to be issued on a best-value tradeoff basis, considering the following factors: technical, past performance, and price. Request for Dismissal, attach. 2, FOPR, Evaluation Criteria, at 1. The solicitation established a “gate process for evaluation” in which the agency would evaluate and consider proposals, as follows:

Step 1: Rank all proposals by Total Price (TP) (lowest-highest).

[. . .]

Step 2: Establish the competitive price range to determine price reasonableness. (See details outlined below.) Then each proposal will move through step[s] 2 to 5 independently, beginning with the lowest TP. If the lowest TP is not reasonably priced (within the competitive price range), the proposal is eliminated from the competition. If REASONABLY PRICED, proceed to Step 3.

Step 3: Perform a Past Performance Assessment.

[. . .]

Step 4: Perform a Technical Acceptability Assessment.

[. . .]

Step 5: Proposals received at this step will be added into the Trade Space¹ until a proposal which has been evaluated as Reasonably Priced, EXCEPTIONAL Past Performance Quality Rating and SUBSTANTIAL CONFIDENCE Technical Rating is evaluated at which time proposal evaluations will cease. The Fair Opportunity Decision Authority will then make an award selection or perform a tradeoff against the previously evaluated offerors to determine the BEST VALUE to the Government.

Id. at 1-2.

¹ The solicitation defined “Trade Space” as “the space between the minimum standards of acceptability and the Government’s objective.” Request for Dismissal, attach. 2, FOPR, Evaluation Criteria, at 1.

This protest primarily concerns the agency's evaluation of MicroTech's proposal under Step 2. The solicitation further provided that "to prevent unreasonably high or low bidding, the Government will utilize a competitive price range to establish reasonable price determinations" based upon the following calculation scheme:

All TPs for submitted proposals will be totaled together and then divided by the number of proposals received to establish a mean average of all proposals. Then a competitive range will be established by utilizing a +/- 30% around this mean average to create the Competitive Price Range for this [Step 2] gate.

Id. at 3 (emphasis omitted).² The solicitation also stated that "[a]ny TP proposal prices outside of this competitive price range will be eliminated from the competition and will not be considered reasonable."³ Id.

The agency received multiple proposals prior to the December 4 closing date. Request for Dismissal, Attach. 1, FOPR, at 4; Attach. 3, Notice to Unsuccessful Offeror: MicroTech, at 1. During Step 2 of the phase 2 evaluation, the agency calculated the competitive price range to be \$23,742,807.60 to \$44,093,785.53. Request for Dismissal, Attach. 4, MicroTech Debriefing, at 12. Finding MicroTech's proposed price of \$21,363,877.11 to be outside of the competitive price range, the agency eliminated MicroTech's proposal from the competition. Request for Dismissal, Attach. 3, Notice to Unsuccessful Offeror: MicroTech, at 2.

² The FOPR also included examples of the application of the gate evaluation criteria. Request for Dismissal, attach. 2, FOPR, Evaluation Criteria, at 9. As relevant here, the FOPR provided two examples of how the agency would evaluate proposals for purposes of the price gate, including the following example:

TP proposal values received was \$10M, \$23M, \$30M, \$32M, \$38M. The mean would be \$26.6M. A competitive price range would be determined to be \$18.62M to \$34.58M. Those proposals outside of this range would be eliminated and the Government would begin Past Performance evaluations on the offer priced at \$23M.

Id.

³ While the term "[p]rice [r]easonableness" refers to an agency's concern regarding whether offered prices are too high, rather than too low, the solicitation here uses the term "Reasonable Price determination" to encompass both high and low price analysis. Id. at 3 (emphasis omitted); See i4 Now Solutions, Inc., B-412369, Jan. 27, 2016, 2016 CPD ¶ 47 at 9. However, no offeror challenged the terms of the solicitation prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

On March 19, 2019, the Air Force notified MicroTech that a task order was awarded to Favor in the amount of \$29,374,684.51. Id. at 1. After receiving a written debriefing, MicroTech filed this protest with our Office on April 1.⁴

DISCUSSION

MicroTech argues that the agency improperly excluded its proposal from the competition. First, the protester asserts that the agency's price evaluation was unreasonable and inconsistent with the solicitation because it failed to individually assess the reasonableness of each offeror's price proposal before establishing a competitive price range. In addition, MicroTech contends that the price evaluation scheme set forth in the solicitation misled offerors and did not permit offerors to compete on a common basis. Finally, the protester challenges the agency's competitive range determination on the basis that it failed to comply with the requirement in FAR section 15.306(c)(1) to consider "each proposal against all evaluation criteria."

In response, the agency asserts that the solicitation clearly set forth the price evaluation methodology that it used to exclude MicroTech's proposal from the competition. Request for Dismissal at 2-3. In this regard, the agency contends that the various challenges raised by the protester are untimely challenges to the terms of the solicitation that warrant dismissal. Id.

Competitive Price Range

As stated above, the agency determined that MicroTech's proposed price fell outside of the competitive price range, resulting in MicroTech's exclusion from the competition. Request for Dismissal, Attach. 3, Notice to Unsuccessful Offeror: MicroTech, at 2. Notably, the protester does not dispute that the agency established the competitive price range using the calculation scheme set forth in the solicitation when it assessed price reasonableness. Rather, the protester contends the agency erred by not conducting a review of each price proposal to confirm reasonableness before computing the competitive price range. Protest at 10-13. According to the protester, the agency's failure violated the solicitation and resulted in a mechanical price evaluation that unfairly excluded its proposal. Id. at 11. In response, the agency argues that the solicitation clearly set forth the mathematical method of determining the competitive price range, and that the solicitation cannot reasonably be read as requiring a preliminary review, as the protester suggests. Request for Dismissal at 3. For these reasons, the agency contends that the protester's current challenge amounts to an untimely challenge to the terms of the solicitation.

⁴ While the task order awarded will be in support of a Department of Defense organization, the VETS 2 GWAC is a civilian IDIQ awarded by GSA. As such, the protest is within our Office's jurisdiction because the value of the order to be issued exceeds \$10 million. See 41 U.S.C. § 4106 (f); Analytic Strategies LLC; Gemini Indus., Inc., B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

When a dispute arises as to the actual meaning of a solicitation's provisions, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Technica Corp., B-416542, B-416542.2, Oct 5, 2018, 2018 CPD ¶ 348 at 11. As an initial matter, we must determine whether the solicitation was ambiguous, and, if so, whether any ambiguity was patent or latent. A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 7.

Here, we find that the solicitation clearly advised offerors that no price reasonableness evaluation would occur prior to establishment of the competitive price range. First, we note that nothing in the solicitation expressly requires a preliminary price reasonableness review prior to calculating the competitive price range. Second, the protester's argument rests on the premise that the solicitation "indicated that offerors' pricing would be assessed for reasonableness in addition to and in conjunction with the establishment of a competitive price range." Protest at 10. However, the solicitation provision cited by the protester clearly states the price analysis for reasonableness will be conducted by--not in addition to--utilizing the competitive price range.⁵ Moreover, it does not appear that the protester's interpretation can be reconciled with the solicitation's examples regarding the application of the competitive price range determination. For instance, the example from the solicitation quoted above involved five total prices, ranging from \$10 million to \$38 million, and showed that the agency intended to simply apply the mathematical calculation to achieve a competitive price range--without a preliminary evaluation of any of the total prices. Consequently, we agree with the agency that the solicitation clearly and unambiguously established the competitive price range methodology used by the agency in evaluating price reasonableness.

Thus, to the extent to protester believed, based on its reading of the solicitation, that the agency was required to perform a preliminary price reasonableness assessment, such an interpretation clearly conflicted with the solicitation's mathematical method of calculating the competitive price range, which was used to determine price reasonableness. Accordingly, any ambiguity regarding these provisions was patent, i.e., an obvious, gross, or glaring error that is apparent from the face of the solicitation. Democracy Int'l, Inc., B-415243, B-415243.2, Dec. 13, 2017, 2018 CPD ¶ 293 at 4. Where a patent ambiguity in a solicitation is not challenged prior to the submission of

⁵ In support of its argument, the protester cites the following solicitation language:

The government will conduct price analysis for reasonableness and completeness by utilizing the Total Price (TP) and the Competitive Price Range as outlined below.

Protest at 10 citing Request for Dismissal, attach. 2, FOPR, Evaluation Criteria, at 3.

proposals, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); Odyssey Sys. Consulting Grp., Ltd., B-412519, B-412519.2, Mar. 11, 2016, 2016 CPD ¶ 86 at 5. Notwithstanding the protester's characterization of its protest as contesting the agency's evaluation, we dismiss this protest ground because it amounts to an untimely challenge to the solicitation.⁶ See Mission1st Group, Inc., B-413028.4, Nov. 20, 2017, 2017 CPD ¶ 364 at 5 n.3.

Common Basis of Competition

The protester also contends that the solicitation misled offerors and did not provide sufficient information to compete intelligently. Protest at 13-16. In this regard, the protester argues that the plain terms of the solicitation led it to believe that the agency "would do more than simply rank the offerors' total proposed prices." Id. at 14. Instead, MicroTech asserts that it assumed the agency would calculate the competitive price range based on proposals the agency already determined were "complete, realistic, and reasonable." Id. The protester claims that it has now become aware that its assumptions were incorrect, and that offerors were competing on an unequal basis, resulting in an evaluation of proposals on an "apples to oranges" basis. Id. at 15.

In response, the agency again contends that the solicitation clearly described the competitive price determination methodology, effectively putting offerors on notice that price proposals would not be assessed for reasonableness prior to establishment of the competitive price range. Request for Dismissal at 2-3. For this reason, the agency argues that if MicroTech disagreed with the clearly stated evaluation criteria, it was required to file a pre-award protest, and therefore this protest ground should be dismissed.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4,

⁶ MicroTech also argues that the agency had a legal obligation to establish price reasonableness before establishing the competitive price range. Protester Response to Request for Dismissal at 4-8. In this regard, the protester contends that the agency's evaluation was unreasonable because it violated a procurement law or regulation. Id. However, a defect apparent on the face of the solicitation must be protested prior to the time set for receipt of initial proposals, when it is most practicable to take effective action against such defects. 4 C.F.R. § 21.2(a)(1). Therefore, because the solicitation clearly and unambiguously established the competitive price range methodology used by the agency in evaluating price reasonableness, the protester's allegation that this evaluation scheme was legally flawed is dismissed as an untimely challenge to the terms of the solicitation. See MacAulay-Brown, Inc., B-417205 et. al., Mar. 27, 2019, 2019 CPD ¶ 129 at 9.

Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Under these rules, as stated above, a protest based on alleged improprieties in a solicitation that are apparent prior to closing time for receipt of proposals must be filed by that time. 4 C.F.R. § 21.2(a)(1). Such a rule promotes fundamental fairness in the competitive process by preventing an offeror from taking advantage of the government as well as other offerors, by waiting silently only to spring forward with an alleged defect in an effort to restart the procurement process, potentially armed with increased knowledge of its competitors' position or information. Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308, 1313-14 (Fed. Cir. 2007). It also promotes efficiency by ensuring that concerns regarding a solicitation are raised before contractor and government resources are expended in pursuing and awarding the contract, thus avoiding costly and unproductive litigation after the fact. Id. Our Office has found that post-award challenges to an agency's cost or price evaluation scheme are not timely if the challenged scheme was set forth in the solicitation, because a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed before that time. See Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 5.

As discussed above, the solicitation unambiguously set forth the price evaluation scheme used by the agency to exclude MicroTech's proposal. An offeror who chooses to compete under an allegedly flawed solicitation does so at its own peril. PricewaterhouseCoopers Public Sector, LLP, B-413316.2, B-413316.3, Dec. 27, 2016, 2017 CPD ¶ 12 at 5. Accordingly, we dismiss the protester's post-award challenge to the evaluation scheme as untimely.⁷

Competitive Range Determination

Finally, MicroTech contends that the agency's competitive range determination did not comply with applicable procurement laws and regulations. Protest at 16-17. Specifically, the protester contends the agency failed to comply with the requirement in FAR section 15.306(c)(1) to consider "each proposal against all evaluation criteria" when it excluded MicroTech from the competition based solely upon its price proposal. Id. at 17.

As stated above, the solicitation unequivocally stated that "[a]ny TP proposal prices outside of this competitive price range will be eliminated from the competition and will not be considered reasonable." Request for Dismissal, attach. 2, FOPR, Evaluation Criteria, at 3. Our timeliness rules do not allow a protester to wait to raise a fundamental flaw with the procurement process until after an award decision has been made. See Adams and Assocs., Inc., B-417120, B-417125, Jan. 16, 2019, 2019 ¶ 21

⁷ Since we dismiss this protest ground as untimely, we need not and do not resolve--or provide any opinion related to--whether the agency's price evaluation methodology provided a common basis for the offerors to compete intelligently, or a reasonable basis for the agency to evaluate price proposals.

at 3. Instead, such issues must be protested before the closing date for the receipt of proposals. 4 C.F.R. 21.2(a)(1). Consequently, we dismiss this protest ground as untimely.

The protest is dismissed.⁸

Thomas H. Armstrong
General Counsel

⁸ In its protest, MicroTech also argued that the agency improperly failed to perform any individual reasonableness evaluation of the prices included within the competitive price range. Protest at 12. Given our Office's dismissal of MicroTech's challenges to the agency's exclusion of its proposal from the competition, MicroTech is not an interested party eligible to maintain any challenge to the evaluation of any other offerors' proposals. 4 C.F.R. § 21.0(a)(1); Granite State Manufacturing, B-415730, B-415730.3, Feb. 23, 2018, 2018 CPD ¶ 98 at 4.