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Decision

Matter of: Ahtna-RDI JV, Inc.

File: B-418012.6; B-418012.7

Date: January 5, 2021

Ryan C. Bradel, Esq., and Miles McCann, Esq., Ward & Berry PLLC, for the protester.
John R. Tolle, Esq., Baker, Cronogue, Tolle & Werfel, LLP, for IT Objects, LLC, the intervenor.

James Rhodes, Esq., Department of Commerce, for the agency.

Sarah T. Zaffina, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly determined protester's proposal ineligible for award because it failed to comply with solicitation requirements is denied where the record shows that the protester did not submit a complete price schedule that included overtime rates as required by the solicitation.

DECISION

Ahtna RDI, JV, LLC (ARJV), a small business located in Anchorage, Alaska, protests the award of a contract to IT Objects, LLC (ITO), a small business concern located in Herndon, Virginia, under request for proposals (RFP) No. 1305M319RNFFS0008, issued by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for information technology services including software development and systems administration, for the Alaska Region of the National Marine Fisheries Service (NMFS). The protester alleges that the agency improperly determined its proposal ineligible for award based on the protester's failure to include overtime rates in its price schedule. The protester also argues that the agency's evaluation of proposals and best-value tradeoff analysis were unreasonable.

We deny the protest.

BACKGROUND

The agency issued the solicitation on May 23, 2019, as a set-aside for participants in the Small Business Administration's 8(a) Business Development Program. Agency Report (AR), Tab 9, RFP at 1.¹ The solicitation used acquisition procedures under Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Items, in conjunction with FAR part 15, Contracting by Negotiation. RFP at 37; COS at 2. The successful offeror will program new and existing electronic reporting systems, develop fisheries management applications, and provide associated technical support for NMFS's four major programs.² RFP at 43-44. The solicitation contemplated award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract, with the potential for labor hour or fixed-price type orders and an ordering period of three years. The contract was to be awarded on a best-value tradeoff basis, with non-price evaluation factors (technical capability, staffing and management plan, and past performance) significantly more important than price. *Id.* at 18, 69, 72.

The RFP provided that proposals were expected to conform to solicitation provisions and be prepared pursuant to proposal preparation instructions, which required offerors to adhere to a pricing schedule and directed that overtime rates be included in the offer. *Id.* at 66, 68-69. The RFP's evaluation criteria informed firms that the price evaluation would determine whether prices were "complete, fair, and reasonable" and reiterated that overtime rates must be included in the proposal. *Id.* at 70. Offerors were also to provide pricing for a sample task order using an RFP-provided pricing spreadsheet, which included a pre-entered, not-to-exceed, \$17,000 figure for overtime costs for each performance year. *Id.* at 61-62, 69, 70

Five offerors, including ITO and ARJV, submitted proposals. COS at 6. After evaluating the proposals, the agency made award to ARJV on September 13, which ITO protested. *Id.* We sustained the protest on the basis that ARJV's proposal failed to provide a letter of commitment for a proposed key person, which was a material requirement of the solicitation. *IT Objects, LLC*, B-418012, B-418012.2, Jan. 2, 2020, 2020 CPD ¶ 2 at 6-7. We recommended that the agency reevaluate ARJV's proposal and prepare a new source selection decision, "or take such other steps permitted by the applicable procurement laws and regulations." *Id.* at 7.

¹ Although the solicitation was amended twice, amendment 0001 is the latest full version of the solicitation; amendment 0002 is not relevant to this protest. AR, Tab 2, Contracting Officer's Statement (COS) at 2 n.1. References herein are to this document unless otherwise noted.

² The four major NMFS programs are: (1) the Interagency Electronic Reporting System; (2) the Catch Accounting System; (3) the halibut and sablefish Individual Fishery Quota Program; and (4) the ShoreZone Mapping System. RFP at 43-44.

Upon reevaluation, the contracting officer determined a competitive range was in the best interest of the agency, and entered into discussions with the ARJV and ITO, the only two offerors whose proposals were included in the competitive range. COS at 7. NOAA issued discussion letters to ARJV and ITO, which identified all proposal weaknesses, significant weaknesses, and deficiencies; requested new letters of commitment from all proposed key personnel; and permitted offerors to revise any part of their proposals, including price.³ AR, Tab 49, ARJV Discussion Letter at 1-2; AR, Tab 50, ITO Discussion Letter at 1-2.

Both ITO and ARJV timely submitted revised proposals. COS at 7. Technical and price evaluations were conducted concurrently, with the Source Evaluation Board (SEB) evaluating the technical proposals while the contracting officer conducted the price evaluation. *Id.* at 8. The contracting officer determined ARJV's proposal was noncompliant because ARJV failed to use the price schedule found in the solicitation, and did not include any overtime pricing in its proposal. *Id.* The contracting officer found that this was a material omission and deemed ARJV's proposal ineligible for award unless discussions were held. *Id.* Nevertheless, the contracting officer conducted a tradeoff analysis "for the sake of argument" and determined that ITO's proposal offered the best value. *Id.* at 8, 9.

The agency made award to ITO on June 10. After receiving a debriefing, ARJV protested to our Office on June 22. *Id.* at 9. ARJV challenged the agency's evaluation and the award to ITO, and NOAA subsequently decided again to take corrective action. AR, Tab 60, ARJV Protest, June 22, 2020. The agency proposed to reevaluate ARJV's revised proposal and make a new award decision, ensuring that the evaluation was properly documented and conducted in accordance with the solicitation. COS at 9; AR, Tab 62, NOAA Notice of Corrective Action, July 21, 2020, at 1. We dismissed the protest as academic, notwithstanding ARJV's objection to the scope of the corrective action. *Ahtna-RDI JV, Inc.*, B-418012.5, July 23, 2020 (unpublished decision).

During the course of the corrective action, NOAA reviewed its evaluation to ensure its findings were sufficiently explained and documented. COS at 9; AR, Tab 65, Source Selection Document (SSD) at 3. While the SEB prepared a new consensus report, the primary findings and conclusions remained the same as in the earlier evaluation. SSD at 3. The contracting officer's price analysis, determining ARJV ineligible for award because it failed to submit complete pricing when it omitted overtime rates from the price schedule, remained unchanged. *Id.* at 7. The contracting officer determined that ARJV's incomplete pricing was a material omission that could only be remedied through discussions. *Id.* at 9. Again, and notwithstanding the agency's conclusion that ARJV's proposal was ineligible for award, the contracting officer performed a tradeoff analysis "for the sake of argument," and again determined that even if ARJV's proposal were

³ ITO also filed a protest with our Office at this point, arguing that NOAA's corrective action exceeded our recommendation above. We dismissed this protest as failing to state a valid basis of protest. *IT Objects, LLC*, B-418012.3, Apr. 9, 2020, 2020 CPD ¶ 143 at 3.

eligible for award, ITO's proposal represented the best value to the government because it was lower-priced and technically superior. *Id.* at 10, 13, 14. NOAA awarded the contract to ITO on September 18 and this protest followed.

DISCUSSION

ARJV argues that NOAA unreasonably found its proposal ineligible based on ARJV's failure to include overtime rates in the price schedule. Protest at 8-10. ARJV contends that it did not omit overtime rates and that its proposal should be read to indicate that ARJV proposed the same rate for both regular time and overtime. *Id.* at 8. Alternatively, ARJV argues that to the extent its use of a single proposed rate can be viewed as omitting overtime rates, the omission is not material because overtime rates were not a material solicitation requirement. *Id.* at 8-9. ARJV also asserts that NOAA was required to seek clarifications from it because any omission created a minor uncertainty in its proposal that ARJV should have been given an opportunity to resolve. *Id.* at 10. ARJV also challenges the agency's non-price evaluation and best-value tradeoff analysis. *Id.* at 10-20. For the reasons discussed below, we find that the agency reasonably evaluated ARJV's proposal in accordance with the solicitation.⁴

When reviewing a protest challenging the rejection of a proposal, we examine the record to determine whether the agency's judgment was reasonable and in accordance with the solicitation criteria and applicable statutes and regulations. *Distributed Sols., Inc.*, B-416394, Aug. 13, 2018, 2018 CPD ¶ 279 at 4. We have long held that the evaluation of proposals is a matter within the discretion of the procuring agency; we will question the agency's evaluation only where the record shows that the evaluation does not have a reasonable basis or is inconsistent with the RFP. *Hardiman Remediation Servs., Inc.*, B-402838, Aug. 16, 2010, 2010 CPD ¶ 195 at 3. Moreover, an offeror bears the burden of submitting an adequately written proposal that contains all of the information required under a solicitation. *Business Integra, Inc.*, B-407273.22, Feb. 27, 2014, 2014 CPD ¶ 88 at 3. Where a proposal omits, inadequately addresses, or fails to clearly convey required information, the offeror runs the risk of an adverse agency evaluation. *Distributed Sols., Inc.*, *supra*, at 4.

In the original RFP, the price schedule (i.e., section B) did not include columns for overtime rates for the eight labor categories identified in the IDIQ contract. AR, Tab 8, Initial RFP at 3. The agency amended the solicitation prior to the submission of initial proposals to insert columns for overtime rates for the base year and two option periods and to add three labor categories to the price schedule. RFP at 2. The amendment also added language to the proposal preparation instructions and the price evaluation criteria requiring overtime rates to be included in the offer. *Id.* at 69, 70. NOAA used red text to highlight the additions made in the amendment. *Id.* at 1. The proposal

⁴ The protester raised other collateral arguments that are not discussed in this decision. We have reviewed all of the protester's allegations and conclude that they are without merit.

instructions also directed offerors to use the price schedule for their price proposals. *Id.* at 68-69.

The price schedule submitted by ARJV as part of its revised price proposal did not include the columns for overtime rates.⁵ AR, Tab 53, ARJV Price Proposal at 3. The only place overtime is mentioned in the proposal is for the sample task order where ARJV uses the government-provided amount, \$17,000. *Id.* at 3-4. Although the protester argues that by omitting separate overtime rates, the proposal reflects the protester's intent to provide a single rate for regular time and overtime, we see no support for this conclusion. Instead, the record is devoid of any reference to overtime rates except for the government-provided amount, which belies the protester's insistence that it purposely proposed a single rate for regular time and overtime. On this record, we find that the agency reasonably determined that ARJV's pricing was incomplete because it did not include overtime rates in its proposal.

As noted above, the protester asserts that omitting the overtime rates was not a material omission because overtime rates were not a material requirement of the solicitation. The protester also argues that the solicitation was latently ambiguous as to whether overtime rates were required. Comments & Supp. Protest at 5-7.

As an initial matter, we find that the protester did not raise its latent ambiguity argument in a timely manner. A protest based on other than alleged improprieties in a solicitation must be filed no later than 10 days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). In the September 18, 2020, award notice, NOAA informed ARJV that its proposal was deemed ineligible for award because it did not include overtime rates, which was a material omission. AR, Tab 67, Notice of Unsuccessful Offeror at 2. The written debriefing NOAA provided ARJV on September 23 also explained that ARJV's proposal provided incomplete pricing because of the omission of the overtime rates. AR, Tab 69, Written Debriefing at 2. ARJV argues for the first time in its comments filed November 9 that the solicitation was ambiguous as to whether overtime rates were required. As this is more than 10 days after the protester learned that the agency considered overtime rates to be material solicitation requirements, we dismiss this protest argument as untimely.

With respect to the materiality of overtime rates, as noted above, the RFP, as amended, specifically instructed offerors to include overtime rates in their price proposals. RFP at 69. The RFP further advised that the "price evaluation will determine whether the proposed prices are complete, fair, and reasonable in relation to the solicitation requirements. . . .Overtime rates shall be included in the offer." *Id.* at 70. Section B of the RFP, the price schedule, included three columns for overtime rates for all eleven

⁵ ARJV's initial price proposal, in contrast, included columns and prices for overtime rates, as required by the price schedule. AR, Tab 15, ARJV Initial Proposal at 3. It appears that ARJV may have mistakenly used the price schedule in effect prior to amendment 0001, which did not include the columns for overtime rates, as a template for its revised price proposal.

labor categories. *Id.* at 2. Because the RFP, as amended, required offerors to propose overtime rates, the protester's failure to propose overtime rates represented a failure to meet a material requirement of this solicitation. See *Business Integra, Inc., supra*, at 4 (failure to provide rates for all labor categories made proposal unacceptable for award); *Raytheon Tech. Servs. Co. LLC*, B-404655.4 *et al.*, Oct. 11, 2011, 2011 CPD ¶ 236 at 9 (omission of required labor rates, including their corresponding option year rates, on which future task orders would be based was a failure to meet a material solicitation requirement). In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for award. *Raytheon Tech. Servs. Co. LLC, supra*, at 9. Accordingly, the agency's determination that ARJV was ineligible for award was reasonable.

Inasmuch as the protester contends that the agency should have requested a clarification from ARJV, such an action would have been improper. Clarifications are "limited exchanges" between the government and offerors that may occur when award without discussions is contemplated; an agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. FAR 15.306; *Satellite Servs., Inc.*, B-295866, B-295866.2, Apr. 20, 2005, 2005 CPD ¶ 84 at 2 n.2. As we have explained previously, however, clarifications cannot be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of a proposal, or otherwise revise the proposal. *CJW-Desbuild JV, LLC*, B-414219, Mar. 17, 2017, 2017 CPD ¶ 94 at 3. NOAA determined ARJV was ineligible for award based on its omission of overtime rates; consequently, any request that would have permitted ARJV to cure this deficiency would have constituted discussions, not clarifications. Moreover, even if ARJV's failure to submit overtime rates had been a minor clerical error, the agency would not have been required to give ARJV the opportunity to correct its omission through clarifications. We conclude therefore that ARJV has not established the agency's actions were unreasonable and we deny this protest ground.

The protester also raises other various challenges to the agency's non-price evaluations and the best-value tradeoff analysis. Because we conclude that the agency reasonably found that the protester's proposal was ineligible for award without further revision, we need not reach the protester's other arguments concerning the agency's non-price evaluations or the best-value tradeoff. Even if we were to agree with the protester that the agency erred in those respects, the protester was not competitively prejudiced thereby. See *Bashen Corp.*, B-412032.2, Dec. 3, 2015, 2015 CPD ¶ 381 at 4 n.2 (protester cannot show competitive prejudice where agency reasonably found protester otherwise ineligible for award).

In sum, the record shows that NOAA properly found ARJV omitted overtime rates from its price proposal, which was a material requirement of the solicitation, and reasonably determined ARJV's proposal was ineligible for award.

The protest is denied.

Thomas H. Armstrong
General Counsel