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Decision

Matter of: KMK Construction, Inc.

File: B-418639.2

Date: December 29, 2020

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DIGEST

1. Protest challenging agency's evaluation of proposal as technically unacceptable is denied where the record shows that the agency's evaluation was reasonable and consistent with the solicitation's terms.
 2. Protester's challenges regarding ambiguities in the solicitation are untimely because any ambiguity was patent and was not challenged prior to the due date for receipt of proposals.
 3. Protester is not an interested party to challenge other aspects of the evaluation where its proposal was reasonably evaluated as technically unacceptable.
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DECISION

KMK Construction, Inc. (KMK), a small business of Eliot, Maine, protests the evaluation of its proposal under request for proposals (RFP) No. W912WJ20R0002, issued by the Department of the Army, Corps of Engineers (Corps) to provide design-build services in support of the Corps's New England district mission. The protester challenges the agency's evaluation of its proposals in multiple phases of the procurement and argues that the best-value determination was flawed.

We deny the protest.

BACKGROUND

On October 11, 2019, the agency issued the RFP as a total small business set-aside, seeking to establish four multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts for design-build construction services throughout 12 states and the District of Columbia.¹ RFP at 1-3, 30, 60.²

The solicitation established a two-phase process for making award in accordance with the procedures of Federal Acquisition Regulation (FAR) part 15 governing contracting by negotiation. *Id.* at 15. In phase 1, the agency would evaluate proposals considering the following evaluation factors: (1) experience; (2) technical and management approach; and (3) past performance; the agency planned to assign adjectival ratings under each factor.³ *Id.* at 15-19. The RFP provided that, based on the results of the phase 1 evaluation, the agency would invite up to six of the most highly-qualified offerors to submit proposals for phase 2. *Id.* at 16.

In phase 2, the agency would evaluate proposals to complete the “seed task order,” an initial task order to be issued under the multiple-award IDIQ contracts. *Id.* at 3, 13, 19. The scope of the seed task order was to design and build a new operations office for the Otter Brook Dam in Keene, New Hampshire. AR, Exh. 2, Seed Task Order Scope. The agency would evaluate phase 2 proposals considering two factors: (1) technical and management approach, and (2) price. RFP at 16.

With regard to the phase 2 technical and management approach factor, the agency would evaluate each offeror’s “proposed technical approach for accomplishing the requirements of the seed task order.” *Id.* at 19. The RFP provided that the technical design information would be evaluated for “completeness, reasonableness, and level of risk.” *Id.* The RFP specified that the Corps would evaluate each proposal’s “conformance with the solicitation requirements” and “degree to which the plan . . . [i]ncludes all elements described in the solicitation.” *Id.* at 19-20. The agency would

¹ The solicitation contemplated the subsequent issuance of task orders to holders of these multiple-award IDIQ contracts. The task orders would involve work in the Corps’s New England and North Atlantic Division regions, which include the states of Vermont, Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Delaware, and Virginia, as well as the District of Columbia. Agency Report (AR), Exh. 1, RFP at 64.

² The agency used a uniform page numbering system on the exhibits it submitted in the agency report. Unless otherwise noted, citations to the AR in this decision refer to a document’s original pagination.

³ The solicitation provided that, in phase 1, the agency would assign ratings of outstanding, good, acceptable, marginal, or unacceptable to the experience and technical and management approach factors. RFP at 17-18. For the past performance factor, the agency would assign a rating of satisfactory confidence, limited confidence, or neutral confidence. *Id.* at 19.

assign each offeror's technical and management approach a rating of outstanding, good, acceptable, marginal, or unacceptable. *Id.* at 17, 19. Relevant to this protest, the RFP defined an unacceptable rating under the phase 2 technical and management approach factor as:

Proposal does not meet requirements of the solicitation, and thus, contains one or more deficiencies, and/or risk of unsuccessful performance is unacceptable. Proposal is un-awardable.

Id. at 17. Further, the RFP specified that, to be eligible for award, an offeror's phase 2 proposal must achieve a rating of acceptable or higher, *i.e.* not a marginal or unacceptable rating. *Id.* at 19.

As relevant here, the specifications for the seed task order required that "a 12 foot wide gravel driveway shall be provided to the walk out portion of the proposed foundation." AR, Exh. 3, Seed Task Order Specifications at 9-10. Amendment 0008 to the RFP included the following offeror's request for information and agency response:

57. Paragraph D of Section 1.5 Site Work states "a 12-foot-wide gravel driveway shall be provided to the walk out portion of the proposed foundation as described in Paragraph E of this subpart." Paragraph E of Section 1.5 details the start of the 12' wide gravel driveway (originating at the basement access doors), but it does not mention the final location where this gravel driveway ties in to. Please clarify the routing of this 12' wide gravel driveway, and please provide the final tie-in location of the gravel driveway extending from the basement access doors?

Response: It is anticipated that retaining walls will need to be provided to accommodate the basement access doors. The gravel driveway shall be provided from the door to the end of the retaining walls.

AR, Exh. 9, Amendments 0004-0013, Amendment 0008 at 10.⁴

On or before the closing date of November 19, KMK timely submitted its phase 1 proposal. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2. On March 3, 2020, the agency completed its phase 1 evaluation and selected six offerors, including KMK, to advance to phase 2. AR, Exh. 7, Down Selection Memorandum at 7.

The Corps received six phase 2 proposals, including one from KMK. AR, Exh. 13, Source Selection Decision Document (SSDD) at 3-4. In evaluating KMK's phase 2 proposal, the agency assessed a deficiency under the technical and management approach factor for failure to discuss construction of the 12-foot gravel driveway

⁴ In its report, the agency submitted RFP amendments 0004-0013 as a single document labelled exhibit 9.

required by the specifications or to include it in KMK's proposed site plan. AR, Exh. 12, Phase 2 Source Selection Evaluation Board (SSEB) Report at 5. Based on the assessed deficiency, the agency assigned KMK's phase 2 proposal a rating of unacceptable under the technical and management approach factor.⁵ *Id.* The source selection authority (SSA) agreed with the SSEB's evaluation, noting that the protester's "failure to address the gravel driveway. . . demonstrates that [KMK] did not fully understand the requirements of the project before submitting the proposal." AR, Exh. 13, SSDD at 5. The SSA concluded, based on the deficiency and unacceptable rating, that KMK was ineligible for award. *Id.*

The agency subsequently notified KMK that it had not been selected for award. COS/MOL at 4. The agency then provided KMK with a debriefing, and this protest followed. *Id.*

DISCUSSION

The protester challenges the Corps's evaluation of its phase 2 proposal under the technical and management approach factor, arguing that the deficiency, three weaknesses, and two uncertainties were unreasonably assessed by the agency. Protest at 5-15. The protester also contends that the agency's evaluation of its phase 1 proposal was unreasonable and that the agency's best value determination was flawed. *Id.* at 15-22. For the reasons set forth below, we find no basis to sustain the protest.

First, KMK contends that the deficiency assessed to its phase 2 proposal--that it failed to discuss construction of the 12-foot-wide gravel driveway required by the specifications, and failed to include the driveway in its proposed site plan--was unreasonable. Protest at 13-15. Specifically, KMK argues that the agency removed the requirement for the gravel driveway in amendment 0008 to the RFP. *Id.* at 13-14; Comments at 6-8. In this regard, KMK points to the request for information and agency response in amendment 0008, set forth above, in which an offeror asked the agency to clarify the location for the gravel driveway. Comments at 3-4, *citing* AR, Exh. 9, Amendments 0004-0013, Amendment 0008 at 10. The agency responded that "[t]he gravel driveway shall be provided from the [basement] door to the end of the retaining walls." AR, Exh. 9, Amendments 0004-0013, Amendment 0008 at 10.

KMK argues that the agency "essentially eliminated" the requirement for a 12-foot-wide gravel driveway because a driveway, by its plain meaning, must connect a building to a "separate way", such as a road or parking lot, and amendment 0008 only stated the feature needed to go from the basement doors to the end of the retaining walls. Protest at 14; Comments at 5. The protester contends that amendment 0008 converted the requirement from a gravel driveway to a small "gravel pad" or "gravel patio." Comments

⁵ The agency also assessed four weaknesses and two uncertainties to KMK's proposal under the technical approach and management factor. AR, Exh. 12, Phase 2 SSEB Report at 4-5. However, these weaknesses and uncertainties were not referenced as a basis for the unacceptable rating. *Id.* at 5.

at 7. KMK argues that the exclusion of such “inconsequential” features from general site plans is standard practice and KMK therefore reasonably left it out of its proposal. *Id.*

The agency responds that amendment 0008 did not delete the requirement for a gravel driveway and replace it with a gravel pad. COS/MOL at 5. The agency argues that if amendment 0008 had removed the driveway requirement, it would have struck the language from the specifications, which it did not. *Id.* The agency further responds that the gravel driveway is a material and permanent feature of the building and KMK’s failure to include the gravel driveway in its drawings or technical narrative was a significant omission which warranted a deficiency in accordance with the terms of the solicitation’s evaluation criteria. COS/MOL at 5-8. In this regard, the agency notes that KMK proposed retaining walls fewer than 9 feet apart, which could not accommodate a 12-foot-wide gravel feature of any length. *Id.* at 6-7. The agency argues this further demonstrates KMK’s lack of understanding of the requirement, regardless of any intended features omitted from KMK’s drawings. *Id.* at 7.

Where a dispute exists as to a solicitation’s actual requirements, we will first examine the plain language of the solicitation. *Bauer Techs., Inc.*, B-415717.2, B-415717.3, June 22, 2018, 2018 CPD ¶ 217 at 4. Where a protester and an agency disagree over the meaning of solicitation language, we will resolve the matter by assessing whether each posited interpretation is reasonable. *Anders Constr., Inc.*, B-414261, Apr. 11, 2017, 2017 CPD ¶ 121 at 3. To be reasonable, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Planned Sys. Int’l, Inc.*, B-413028.5, Feb. 21, 2018, 2018 CPD ¶ 126 at 6.

We find reasonable the agency’s view that the RFP continued to require offerors to propose a gravel driveway. While we agree that the specification for the driveway was unclear in several material respects, the protester did not timely protest the RFP’s terms, either for lack of clarity or for ambiguity. 4 C.F.R. 21.2(a)(1). To the extent the protester is arguing that the RFP’s description of the driveway requirement was latently ambiguous, and therefore could be timely protested after award and debriefing, we disagree.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solutions are possible. *FEI Systems*, B-414852.2, Nov. 17, 2017, 2017 CPD ¶ 349 at 4. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Id.* Where a patent ambiguity in a solicitation is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); *Simont S.p.A.*, B-400481, Oct. 1, 2008, 2008 CPD ¶ 179 at 4. We do not agree with KMK’s assertions that this aspect of the solicitation was latently ambiguous, and therefore dismiss this protest ground as untimely. In this circumstance, the issue to be decided is whether the evaluation was consistent with the specifications, which were clearly flawed, but unchallenged.

Upon the issuance of amendment 0008, the RFP specifically advised both that “a 12-foot-wide gravel driveway shall be provided . . .” and “[t]he gravel driveway shall be provided from the door to the end of the retaining walls.” AR, Exh. 3, Seed Task Order Specifications at 9-10; AR, Exh. 9, Amendments 0004-0013, Amendment 0008 at 10. Accordingly, we find KMK’s interpretation of amendment 0008--that the amendment had removed the gravel driveway requirement entirely--to be unreasonable and contrary to the terms of the solicitation.

In light of the above, we find nothing improper about the Corps’s decision to assess KMK’s phase 2 proposal a deficiency under the technical and management approach factor. Here, the record demonstrates, and KMK concedes, that KMK did not include any gravel driveway in its proposal. Protest at 14; Comments at 6 (“KMK Construction’s protest does not contend that its proposal included a gravel driveway.”) The RFP provided that the agency would evaluate each offeror’s “proposed technical approach for accomplishing the requirements of the seed task order.” RFP at 19. The specifications for the seed task order required that “a 12-foot-wide gravel driveway shall be provided to the walk-out portion of the proposed foundation.” AR, Exh. 3, Seed Task Order Specifications at 9-10. The agency concluded that KMK’s “failure to address the gravel driveway” demonstrated KMK “did not fully understand the requirements of the project before submitting the proposal” and assessed it a deficiency under the technical and management approach factor.⁶ AR, Exh. 13, SSDD at 5. Accordingly, we find no basis to disturb the agency’s assessment of a deficiency to KMK’s proposal for failing to address the gravel driveway requirement.

Additionally, the record shows that, due to the deficiency, KMK’s proposal was rated unacceptable under the technical and management approach factor in accordance with the criteria described by the solicitation. See AR, Exh. 12, Phase 2 SSEB Report at 5; RFP at 19, 21. 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. See, e.g., *Stewart Distributors*, B-298975, Jan. 17, 2007, 2007 CPD ¶ 27 at 3-4. On this record, given that the RFP provided that an unacceptable rating would render a proposal ineligible for award, we see no basis to object to the agency’s decision not to further consider KMK for award. This ground of protest is denied.

⁶ The agency evaluated proposals in accordance with the procedures of FAR part 15 governing contracting by negotiation. RFP at 15. FAR Part 15 defines a deficiency as “a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.” FAR 15.001.

Remaining Challenges

As noted above, KMK raised additional protest allegations challenging the agency's evaluation of KMK's proposals in both phases of the procurement and its best value determination. See Protest at 5-22. We dismiss these remaining allegations because KMK, having been found unacceptable under the phase 2 technical and management approach factor, is not an interested party to raise them.

Under our Bid Protest Regulations, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party if it would not be in line for award if its protest were sustained. *BANC3, Inc.*, B-416486, B-416486.2, Sept. 10, 2018, 2018 CPD ¶ 316 at 9.

In summary, even if we found that KMK's remaining allegations had merit, KMK's proposal would still be unacceptable under the technical and management approach factor, and we have found no basis to disagree with the agency's decision to eliminate KMK's proposal from the competition. Accordingly, we dismiss the remaining allegations.

The protest is denied.

Thomas H. Armstrong
General Counsel