

Decision

Matter of: High Noon Unlimited Inc.

File: B-419268

Date: January 12, 2021

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GAO, participated in the preparation of the decision.

DIGEST

1. Challenge to the exclusion of the protester's proposal from the competitive range is denied where the agency reasonably found that the proposal failed to comply with the terms of the solicitation.
 2. Protest that the agency should have opened discussions and permitted the protester to revise its unacceptable proposal is denied, where the agency had no obligation to do so.
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DECISION

High Noon Unlimited Inc., a small business of Holiday, Florida, protests the decision by the Department of the Army to exclude High Noon from the competitive range in the competition of request for proposals (RFP) No. W911QY-20-R-0010, which was issued for parachutist flotation devices (PFDs). High Noon argues that to the extent its proposal contained obvious errors or missing information, the agency was required to contact High Noon, ask for the correct or missing information, and allow High Noon to complete or correct its proposal as necessary.

We deny the protest.

BACKGROUND

On May 7, 2020, the Army issued the RFP in accordance with the procedures of Federal Acquisition Regulation (FAR) part 15, Contracting by Negotiation. See RFP

at 86.¹ The RFP sought proposals for PFDs, or inflatable flotation devices which a parachutist would wear, in various configurations, “whenever a flight is conducted over water, a water obstacle is on the Drop Zone (DZ) or the intended DZ is close to a water obstacle.” Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 2.

The RFP anticipated the award of a single fixed-price indefinite-delivery, indefinite-quantity (IDIQ) contract with a 5-year period of performance. Award was to be made to the entity whose proposal represented the best value to the agency, considering the factors of technical, management, price, and past performance, in descending order of importance. RFP at 95, § M.1.1. The Army reserved the right to make award without discussions, and thus offerors were cautioned that their initial proposal submissions should contain their best terms. *Id.* § M.1.2.

The technical factor was divided into two equally-weighted evaluation “areas”: technical approach and demonstrated compliance with performance requirements. *Id.* § M.2.1. Offerors were advised that in the assessment of the technical approach area, proposals would be “evaluated as an indicator of the offeror’s understanding of all technical and operational performance requirements” *Id.* § M.2.1.1. In addition, the offeror’s proposed PFD would be evaluated to assess its potential to “meet[] the performance requirements.” *Id.* Finally, the agency would evaluate “test data provided by the offeror that demonstrates the ability of the proposed system to meet performance requirements” *Id.*

Under the technical factor, the agency would assign a rating of unacceptable to a “[p]roposal [that] does not meet requirements of the solicitation, and thus, contains one or more deficiencies, and/or risk of unsuccessful performance is unacceptable.” *Id.* at 98, § M.4.2. An unacceptable rating would render a proposal ineligible for award. *Id.*

As relevant to the protest, under the header “PFD Requirements,” the solicitation established the following threshold² “(T)” performance standard for the PFDs:

KPP [Key Performance Parameter] 2 - Supporting Weight/Time. Once inflated, the PFD must be capable of supporting the weight of a 98th percentile male, with body armor, in an orientation in which the head is completely above the water line and tilting to the rear for at least one hour (T). [. . .] The PFD by activation must provide a minimum of 80 lbf [pounds force] of lift at the surface of fresh water at standard sea level atmospheric pressure and 72 ° F temperature (T)

Id. at 28, § C-3.1.

¹ Citations to the RFP are to the conformed copy of the solicitation at tab 9 of the agency report (AR).

² “[T]he threshold level is the minimum acceptable performance.” RFP at 27, § C-3.

The Army received seven proposals, including one from High Noon, by the June 22, deadline. As described in the RFP, the Army evaluated proposals under the technical approach area (and other factors), in order to establish a competitive range of the most highly rated proposals prior to the testing and validation evaluation under the demonstrated compliance with performance requirements area. *Id.* at 95, § M.2.1.1.

The technical evaluation team (TET) concluded that High Noon's proposed PFD did not meet the solicitation's threshold requirements under the technical approach area of the technical factor, because its proposed PFD did not provide enough buoyancy. AR, Tab 12, TET Report at 1. Specifically, the TET wrote as follows:

Although [High Noon] states their PFD meets all the threshold requirements, there is little data provided to substantiate. The lack of testing data was evaluated as a significant weakness. Most importantly, there is a deficiency that the stated CO₂ [carbon dioxide] cartridge and the bladder size proposed would provide enough buoyancy to meet the threshold requirement. According to government calculation, the proposed CO₂ gas 29-g[ram] cylinder will not provide enough capability to meet the minimum 80 lbs of flotation. Additionally based upon government calculation, the volume required to meet the threshold is 1.28 [cubic feet]. The offeror only proposed a total volume of 1.07 [cubic feet] with their bladders. With the proposed CO₂ cylinder and the volume of the bladder, only 67 lb of flotation is possible.³

Id. High Noon's proposal received a rating of unacceptable under the technical factor because it failed to satisfy the threshold performance requirements.⁴ AR, Tab 11, Source Selection Evaluation Board (SSEB) Report at 16. According to the agency:

The stated PFD positive buoyancy for this proposal is 96 lbf, 48 lbf per bladder. However each bladder's stated volume expands to only 924 cu[bic]-in[ches] which has the limitation of displacing 33.26 lb, not the 48 lbf of fresh water under the environmental conditions specified in KPP 2. Neither the bladder volume nor the CO₂ cartridges specified in this

³ The protester does not challenge the agency's calculations. In addition, High Noon's proposal states that "[t]he total inflated volume of the bladder is 924 cubic inches [or 1.07 cubic feet (ft³)]." AR, Tab 4a, High Noon Proposal at 12, § 2.5.2; COS/MOL at 8. Thus, the proposal confirms the accuracy of the Army's calculation of the PFD bladder volume.

⁴ While High Noon's proposal received a significant weakness for its failure to include test data supporting its performance claims, the deficiency--and ultimate assignment of a rating of unacceptable--was due to the fact that the proposed design would not satisfy the performance requirements. AR, Tab 11, SSEB Report at 16.

proposal are sufficient to meet the threshold buoyancy requirements of KKP 2 of the PFD solicitation.⁵

Id. at 14.

When the Army established a competitive range, High Noon's proposal was not included as it had received a rating of unacceptable and, as such, was considered unawardable. AR, Tab 13, Competitive Range Determination.

On August 31, 2020, the Army advised High Noon of its exclusion from the competitive range and elimination from the competition. *Id.* The Army completed High Noon's debriefing on September 26, and High Noon timely filed this protest on October 6.

DISCUSSION

High Noon challenges the Army's decision to exclude its proposal from the competition. As an initial matter, High Noon acknowledges that its proposal contained the failing performance specifications and asserts that they were included in error:

In section 2.5.2 [of its proposal], [High Noon] described the bladder with an inflated bladder volume of 924 cubic inches [] or 1.07 cubic feet[]. For [. . .] consistency, we will use cubic feet []. This was a mistake. The correct volume measurement of the [High Noon] bladder is 1.303 [cubic feet]. [. . .]

In section 2.5.3 [of its proposal], [High Noon] described the CO2 Cartridge with a gas weight of 29 grams (g). In this section, [High Noon] also made a mistake. [High Noon] also notes the 29g CO2 cartridge in the Packing Manual and provides a CO2 Cartridge diagram. The correct CO2 Cartridge is 33g.

Protest at 5 (emphasis, citations to protest exhibits, and some technical abbreviations removed). Primarily, the protester argues--explicitly and implicitly--that the agency should have identified these failing design specifications as obvious mistakes, opened discussions, and permitted High Noon to amend its deficient proposal.⁶ *Id.* at 3.

⁵ The protester does not challenge the accuracy of the agency's calculations.

⁶ High Noon raised multiple protest grounds. While not all are discussed here, they have all been considered and none provides a basis to sustain the protest. For example, the protester challenges the agency's assignment of a significant weakness regarding the lack of test data as required in RFP paragraph M.2.1.1 to substantiate its claimed performance specifications of its design. Protest at 2. However, even if this argument were resolved in High Noon's favor, it would not result in competitive prejudice to the protester because its proposal would nevertheless remain technically unacceptable and unawardable due to the deficiency assigned to its proposal based on its failure to satisfy the threshold performance requirements. *Aviation Training*

The Army justifies its adjectival rating of unacceptable on the basis that the proposal was, on its face, technically unacceptable. COS/MOL at 9-10. The agency argues that “the fact that incorrect data was included in multiple locations in the proposal made it reasonable for the Army to conclude that these were, in fact, the numbers that [High Noon] intended to submit[.]” *Id.* at 9. The agency also asserts that “it was reasonable for the Army to conclude that the data provided in multiple sections of [High Noon’s] proposal could be used to calculate the bladder volume without needing to reach out to [High Noon] for clarifications.”⁷ *Id.* Finally, the Army argues that it was not obligated to invite the protester to amend its technically unacceptable proposal. *Id.* at 15.

In reviewing protests challenging the rejection of a proposal for consideration for award, it is not our role to reevaluate proposals; rather our Office examines the record to determine whether the agency’s judgment was reasonable and in accordance with the solicitation criteria and applicable procurement statutes and regulations. *URS Fed. Servs., Inc.*, B-411024.4, Apr. 30, 2015, 2015 CPD ¶ 149 at 4; *Wolverine Servs. LLC*, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 3. In this regard, contracting agencies are not required to retain in the competitive range proposals that are not among the most highly rated or that the agency otherwise reasonably concludes have no realistic prospect of being selected for award. FAR 15.306(c); *Wahkontah Servs., Inc.*, B-292768, Nov. 18, 2003, 2003 CPD ¶ 214 at 4. Where a proposal is technically unacceptable as submitted and would require major revisions to become acceptable, exclusion from the competitive range is generally permissible. *Wahkontah Servs., Inc.*, *supra*; *ABM Gov’t Servs., LLC*, B-410991.2, Apr. 17, 2015, 2015 CPD ¶ 130 at 4-5.

Consulting, LLC, B-417151 *et al.*, Mar. 11, 2019, 2019 CPD ¶ 103 at 7; *LOGMET LLC*, B-405700, Dec. 14, 2011, 2011 CPD ¶ 278 at 3. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *Harmonia Holdings Grp., LLC*, B-414691, B-414691.2, Aug. 17, 2017, 2017 CPD ¶ 272 at 6.

⁷ The Army later notes that, while High Noon would prefer to characterize any such communications as clarifications, the agency would consider such communications to be discussions. COS/MOL at 15 (“Communications between a procuring agency and an offeror that permit the offeror to materially modify its proposal generally constitute discussions....” (citing FAR 15.306(d); *Lockheed Martin Simulation, Training & Support*, B-292836.8 *et al.*, Nov. 24, 2004, 2005 CPD ¶ 27). See also COS/MOL at 16 (“Communications that permit an offeror to correct a mistake constitute discussions unless the mistake is minor and both the existence of the mistake and what was actually intended are clearly apparent from the face of the proposal.” (citing *Matrix Int’l Logistics, Inc.*, B-272388, B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89; *Stacor Corp.*, B-231095, July 5, 1988, 88-2 CPD ¶ 9)).

Here, the record shows that High Noon's proposed performance specifications did not satisfy the material requirements of the solicitation. Specifically, the record demonstrates that the PFD bladders identified in High Noon's proposal did not have enough volume to achieve the target buoyancy, and that the identified carbon dioxide cartridges were similarly insufficient. On this basis, the agency reasonably assigned the proposal a rating of unacceptable and concluded that the proposal was unawardable. Accordingly, the agency reasonably chose not to include High Noon's proposal in the competitive range. *Id.*

Moreover, the agency was not required to permit High Noon to revise its final proposal. An offeror has the obligation to submit a well-written proposal free of ambiguity regarding its merits or compliance with solicitation requirements and fails to do so at its own risk. *Cubic Simulation Sys., Inc.*, B-410006, B-410006.2, Oct. 8, 2014, 2014 CPD ¶ 299 at 6; *see also Innovative Commc'ns Techs., Inc.*, B-291728, B-291728.2, Mar. 5, 2003, 2003 CPD ¶ 58 at 5-7. In a FAR part 15 procurement, an agency may, but is not required to, engage in clarifications and give offerors an opportunity to clarify certain aspects of their proposals or to resolve minor or clerical errors; the agency has broad discretion to decide whether to engage in clarifications with an offeror. *Cubic Simulation Sys., Inc.*, *supra*. Moreover, clarifications cannot be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. *Id.*; FAR 15.306(a).

Here, the fact that High Noon's proposed solution did not meet the minimum solicitation criteria does not, by itself, tell the agency that the proposal contained an error. That is, the fact that the proposal was technically unacceptable is not, by itself, an indication that the specifications proposed were in fact erroneous. Indeed, the protester here did not argue that its specifications were flawed until after its proposal was excluded from the competitive range. Thus, the protester's contention in this regard is not supported by the record. Furthermore, even if it were evident that the protester had erroneously included performance specifications that would render its proposal technically unacceptable, which does not appear to be the case here, the agency was under no obligation to contact the protester, whether as clarifications or discussions, and permit the protester to revise its proposal. Given the record and the broad discretion afforded contracting officers in conducting clarifications, we cannot find unreasonable either the agency's decision to not contact the protester or the agency's decision to exclude the protester's proposal from the competitive range. *Cubic Simulation Sys., Inc.*, *supra* at 7.

The protest is denied.

Thomas H. Armstrong
General Counsel