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Decision

Matter of: Harrington, Moran, Barksdale, Inc.

File: B-401934.2; B-401934.3

Date: September 10, 2010

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Todd P. Maiberger, Esq., Department of Housing and Urban Development, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably determined that an offeror's revised proposal did not meet the solicitation's submittal requirement is dismissed as untimely; any conflict between the requirement as described in the agency's discussions letter (as interpreted by the protester) and the solicitation requirement created a patent ambiguity that should have been filed prior to the submission deadline for revised proposals.

DECISION

Harrington, Moran, Barksdale, Inc. (HMBI), of Arlington, Texas, protests the issuance of Federal Supply Schedule (FSS) task orders to other offerors under request for quotations (RFQ) No. R-OPC-23441, issued by the Department of Housing and Urban Development (HUD) for asset manager services to assist the agency with ensuring lender compliance with property conveyance requirements. The protester asserts that the agency unreasonably determined that the protester's proposal failed to comply with the RFQ's submittal requirements.

We dismiss the protest.

BACKGROUND

HUD issued the RFQ for asset manager services for HUD-owned single family properties throughout the country, which is divided into 10 geographic areas: 1P, 2P, 3P, 1A, 2A, 1D, 2D, 3D, 1S and 2S. Vendors were permitted to submit pricing and technical proposals for any or all of the 10 geographic areas. With respect to the submission of proposals, the RFQ required that

[e]ach proposal submitted in response to this request for proposals^[1] shall consist of two separate packages, placed in separate sealed envelopes/containers identified and appropriately marked as “Technical Proposal” and “Price Proposal” and then place both in one sealed submission container.

RFQ § B.1.

On September 25, 2009, HMBI submitted eight separate proposals to perform services for the eight geographic areas in which it intended to compete, three of which are the subject of this protest.² According to the agency, it had intended for offerors to submit one unified proposal, regardless of the number of geographic areas in which they were competing; however, approximately 30% of offerors (including HMBI) submitted separate, rather than combined, proposals. Agency Response to Supp. Protest, July 9, 2010, at 3. To clarify the solicitation, the agency issued amendment No. 7, which provided as follows:

[i]n its originally issued solicitation, the Government intended that vendors provide a consolidated single quotation, regardless of the number of areas for which quotes were to be provided. Because, however, one or more of the vendors interpreted the relevant

¹ Although the solicitation is an RFQ, the language appropriate for requests for proposals (RFP) is frequently used. We adopt the use of the term “proposal” to refer to the firms’ submissions; the distinction between an RFQ and an RFP is not relevant to our analysis.

² During the course of this protest, another firm, not a party to this protest, filed suit in the Court of Federal Claims challenging the issuance of five of the eight task orders that are the subject of this action. The issues raised in that action were unrelated to the question of whether the agency had unreasonably determined that HMBI’s offer failed to comply with the requirements of the solicitation and challenged task orders for geographic areas 2P, 3P, 1A, 1D and 2D. Because the Court’s disposition of the lawsuit could render a decision by our Office academic, we dismissed the protest with respect to those five areas. See Bid Protest Regulations 4 C.F.R. § 21.11(b) (2010).

solicitation as allowing for the submission of multiple quotes, vendors are instructed to condense multiple quote submissions into one (1) quote specifying the multiple areas for consideration in the executive summary of the quote, among other places. . . . Offerors who do not comply with the just noted clarification are hereby notified that relevant quotes will be deemed nonconforming with the terms and conditions of this RFQ and will not be further evaluated.

RFQ, amendment No. 7 (emphasis in original).³ Proposals were due by October 28.

The protester then timely submitted a proposal that consisted of a single volume containing information on all of the geographic areas HMBI proposed to service. The agency determined that discussions and proposal revisions were necessary. On April 23, 2010, the agency sent the protester a discussions letter and amendment No. 9. The letter indicated that discussions were necessary “to obtain additional information or modification to your proposal” in order for the agency to complete its evaluations and make a selection decision. Agency Dismissal Request, June 22, 2010, Exh. 2, Letter from HUD to Protester, Apr. 23, 2010, at 1. In the discussions letter, the contracting officer advised the protester that the agency had “determined that there is a need to make some important revisions to the solicitation requirements prior to making any award decisions. Therefore, I am also attaching an amendment (#9) to the solicitation.” Id. That amendment dealt exclusively with revisions to the performance work statement. The letter further advised as follows:

You shall ensure the [proposal revision] package:

1. Is completed in the same format as the original proposal. . . .

* * * * *

3. Provides appropriate revisions to your proposal in response to the amendment.

You shall submit your proposal revisions in three distinct parts:

Part 1 shall be a summary page that lists all technical and price revisions and associated proposal page numbers. . . .

³ The agency explained that the consolidated proposal requirement was intended to ease the significant administrative burden of otherwise having to evaluate very many more separate proposals for each geographic region.

Part 2 shall be a revised technical proposal which shall be the original proposal with all revisions. . . .

Part 3 shall be a revised price proposal.

* * * * *

The distinct parts should then be placed in one sealed submission container.

* * * * *

All terms and conditions of the solicitation, unless otherwise amended, remain in effect.

Id. at 1-2.

In response to the request for a revised proposal, HMBI submitted separate volumes for each of the geographic areas that it proposed to service. The contracting officer determined that HMBI's multiple proposals failed to conform to the requirements of amendment No. 7; consequently, the contracting officer instructed the technical evaluation panel not to evaluate HMBI's proposal.

HUD issued task orders under the RFQ,⁴ and this protest followed.

ANALYSIS

HMBI argues that it reasonably understood that it was to submit its final proposal in the form of separate proposals given that the April 23 discussions letter directed it to complete its proposal revisions "in the same format as the original proposal." According to HMBI, because its original proposal contained separate submissions for each geographic region, it was simply following the agency's instructions in submitting its revised proposal as separate proposals, rather than as a single, consolidated one. As explained below, we disagree.

⁴ For each of the areas that are the subject of this protest, another offeror submitted a conforming proposal that received an overall technical rating of at least "fair."

Even assuming that the discussions letter could reasonably be read to require separate proposals,⁵ in direct contradiction of amendment No. 7 to the RFQ, that contradiction created a patent ambiguity. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error (e.g., where the solicitation provisions appear inconsistent on their face). Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 11. When a communication from a contracting officer—even if not designated a solicitation amendment—conflicts with the plain language of the solicitation, the ambiguity created is a patent ambiguity. Input Solutions, Inc., B-294123, Aug. 31, 2004, 2004 CPD ¶ 185 at 3-4. A patent ambiguity must be protested prior to the next closing time for the submission of proposals in order to be considered timely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); Ashe Facility Servs., Inc., supra.

The protester asserts that the ambiguity created by the discussions letter here was latent, not patent, because “nothing in HMBI’s interpretation [of the letter] . . . conflicts with the RFQ.” Supp. Protest at 8. We disagree. As noted above, amendment No. 7, which was in no way revoked by the discussions letter,⁶ required offerors proposing for more than one geographic area to submit a single, consolidated revised proposal—an instruction directly at odds with the protester’s interpretation of the discussions letter. Even if it was reasonable for the protester to have interpreted the discussions letter as requiring separate proposals, the letter nevertheless created a patent ambiguity. Input Solutions, Inc., supra. HMBI was thus required to protest the alleged ambiguity created by the letter’s instructions prior to

⁵ While we need not reach the issue of whether the protester’s interpretation of the discussions letter is reasonable, in short, we agree with the agency. As the agency notes, the protester’s interpretation would have the offerors format their proposals in the way that they initially did. As amendment No. 7 explicitly noted, the agency received some initial offers that consolidated multiple geographic areas, as the agency had intended, and some that separated them out. By issuing amendment No. 7, the agency explicitly clarified its intent—that each offeror submit one consolidated proposal. In our view, it is unreasonable, especially in light of amendment No. 7, to read the discussions letter as returning the procurement to its starting point, where the agency did not receive all offers in the form it intended, and thus did not have a set of offers that it could reasonably compare with one another.

⁶ Typically, a solicitation amendment explicitly modifies its terms by adding, deleting, or revising particular provisions. See, e.g., amendment No. 9 to the RFQ here (noting that “the paragraph titled Asset Allocation is modified as follows,” and another paragraph “is hereby changed to read. . .”).

the next closing time for revised proposals. Having failed to do so, its challenge to the agency's position that a single, consolidated proposal was required is now untimely filed.⁷

The protest is dismissed.

Lynn H. Gibson
Acting General Counsel

⁷ HMBI's allegation that the agency unreasonably determined that HMBI's revised proposal did not meet the solicitation's requirements was raised in a supplemental protest. With respect to HMBI's initial protest, the agency filed a request for dismissal, asserting that the protest did not set forth a detailed statement of the legal and factual grounds for the allegations as required by our Regulations. See 4 C.F.R. § 21.2(c)(4), (f). We agree. In the initial protest, for example, the protester alleged that its proposal "should have rated as high or higher" than the proposals of those firms that were awarded task orders, without knowing how the awardees' proposals had been rated, or why. Protest at 18, 25. Such allegations fail to satisfy the requirements in our Regulations. Medical Serv. Corp. Int'l, B-252801, Apr. 19, 1993, 93-1 CPD ¶ 335 at 2-3 (unsupported allegations which amount to mere speculation are insufficient to form a basis for protest). Accordingly, we dismissed the original protest for failure to state a valid basis of protest. See E-mail from GAO to Parties, June 28, 2010. In any event, because, as discussed above, the agency reasonably determined that the protester's proposal failed to comply with the RFQ's submittal requirement, the protester would not be an interested party to bring its other challenges because it would not be in line for award even if those challenges were sustained. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 3.