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Decision

Matter of: The Matthews Group, Inc. t/a TMG Construction Corporation

File: B-408003.2, B-408004.2

Date: June 17, 2013

Reginald M. Jones, Esq., Nicholas T. Solosky, Esq., and Alexa A. Santora, Esq., Fox Rothschild LLP, for the protester.

Robert M. Moore, Esq. and Casey J. McKinnon, Esq., Moore & Lee, LLP, for Atlantic NICC-JV LLC, an intervenor.

Damon A. Martin, Esq., Department of the Navy, and Kevin R. Harber, Esq., U.S. Small Business Administration, for the agencies.

Glenn G. Wolcott, Esq., Matthew T. Crosby, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests objecting to proposed corrective action taken in response to earlier protests are denied where the agency properly concluded that the solicitations were flawed in a manner that improperly limited the options available to offerors, and the agency intends to reevaluate proposals to consider the substantive issues presented in the earlier protests.

DECISION

The Matthews Group, Inc. t/a TMG Construction Corporation (TMG), of Purcellville, Virginia, protests the corrective action taken by the Department of the Navy, Naval Facilities Engineering Command, in response to the protests filed by Atlantic NICC-JV, LLC (Atlantic), which challenged the Navy's award of two contracts to TMG pursuant to request for proposals (RFP) Nos. N40080-13-R-0001 and N40080-13-R-0002. The solicitations contemplate the construction, alteration, and/or repair of various Department of Defense facilities within Maryland, Virginia, and the District of Columbia.

We deny the protest.

BACKGROUND

In March 2012, the agency published the solicitations at issue, which were restricted to firms participating in the Small Business Administration's (SBA) 8(a) business development program.¹ The solicitations contemplated the award of indefinite-delivery, indefinite-quantity contracts under which task orders would be issued. See Agency Report (AR), Tab 1, RFP at 1, 3. As initially published, the solicitations contained various instructions to offerors, including a provision at section L.3, which stated:

Joint Venture Agreements must be received by the SBA prior to proposal due date and approved before award of a resulting contract. If your firm is contemplating a joint venture on this procurement, advise your firm's assigned Business Opportunity Specialist (BOS) as soon as possible. It is also recommended that the agreement be submitted as soon as practicable to ensure compliance with established regulations. **Joint Venture Agreement after it has been submitted** [sic]. Each agreement shall demonstrate the relationship between the firms and identify contractual relations and authorities of each firm/joint venture.

AR, Tab 1, RFP at 94 (emphasis added).

Following publication of the solicitations, the Navy received various questions from offerors, including a question noting that "Section L.3 contains an incomplete sentence that reads 'Joint Venture Agreement after it has been submitted'." See AR, Tab 2, RFP amend. 0009 at 8. The offeror asked, "do you need evidence that [the joint venture agreement] has been submitted to the SBA?" Id. The Navy responded to this question through issuance of RFP amendment 0009, which stated:

In Section L.3, the second to last sentence reads, "Joint Venture Agreement after it has been submitted" is hereby removed from the solicitations. Offerors in a teaming arrangement shall include

¹ As relevant to the protest issues presented, the terms of the two solicitations were essentially identical.

evidence of such arrangement in their proposal.^[2] If not approved, offerors contemplating a teaming arrangement shall show evidence in their proposal that the agreement has been received by the SBA prior to proposal due date and approved before award of a resulting contract.

Id.

In short, the agency's response provided that all teaming arrangements--not just joint venture agreements--must be approved by the SBA prior to award.

In May 2012, proposals were submitted by several offerors, including TMG and Atlantic, which were evaluated by the agency. Discussions were conducted, and final proposal revisions were submitted. In January 2013, the agency selected TMG for contract award under both solicitations.

On February 11, 2013, Atlantic protested the awards to TMG, arguing that the agency failed to comply with the solicitations' provisions regarding best value determinations. Atlantic also argued that the Navy had improperly evaluated proposals under the solicitations' technical factors, including evaluation of the offerors' relative experience and past performance. Atlantic Protests, Feb. 11, 2013, at 8-13.

On March 18, the Navy advised our Office that it intended to take corrective action, to include "opening discussions with all offerors." The Navy elaborated that it had

² The solicitations separately defined the term "teaming arrangement" to include both joint ventures and subcontractor agreements. Specifically, section L-7 of the solicitations stated:

TEAMING ARRANGEMENTS

Contractor teaming arrangement means an arrangement in which—

- (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
- (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

The Government will recognize the integrity and validity of contractor team arrangements; provided, the arrangements are identified and company relationships are fully disclosed in the proposal.

AR, Tab 2, RFP amend. 5, at 10.

“discovered that there was a solicitation requirement for SBA approval of teaming agreements, with which awardee TMG did not comply,” stating that, during discussions, “Offerors will be allowed the opportunity to comply with all stated SBA pre-award approval requirements: those that apply to either teaming arrangements, or to joint ventures.” Letter from Navy to GAO, Mar. 18, 2013, at 1, 2. The agency further stated that it intended to reevaluate proposals following discussions, and make a new award decision. Navy Letter to GAO, Mar. 20, 2013, at 1. Finally, the agency stated that, in performing its reevaluation, it intended to consider Atlantic’s protest allegations. Email from Navy to GAO, Mar. 21, 2013. Based on the agency’s stated intent to open discussions with all offerors, reevaluate proposals, and make a new award decision, we dismissed Atlantic’s protests. Atlantic NICC-JV, LLC, B-408003, B-408004, Mar. 22, 2013.

Thereafter, the Navy concluded that the solicitations’ provisions requiring the SBA’s approval of all teaming agreements was contrary to the SBA’s procedures, which provide only for review of joint venture agreements. Accordingly, on April 9, the agency amended the solicitations to eliminate the requirement that all teaming arrangements be approved by the SBA. Specifically, as amended, the solicitations provided that proposals submitted by joint ventures were required to have their joint venture agreements submitted to, and approved by, the SBA pre-award; however, proposals with non-joint venture teaming arrangements were no longer required to have their teaming agreements submitted to, or approved by, the SBA. See AR, Tab 2, RFP amend. 0012, at 2.

On April 12, TMG filed this protest challenging the agency’s corrective action.

DISCUSSION

TMG first asserts that the Navy’s corrective action was based on the Navy’s erroneous conclusion that the solicitations were flawed, asserting “there is no defect in the . . . solicitations to correct.” TMG Comments on Agency Report, May 28, 2013, at 2. Based on this assertion, TMG maintains that it is “improper and contrary to the integrity of the procurement system to overturn an award decision and re-solicit new proposals where the winning offeror’s price has already been disclosed.” TMG Protest, Apr. 12, 2013, at 3. We reject TMG’s assertion that the solicitations were not defective.

In considering this matter, we sought input from the SBA--the agency responsible for the 8(a) business development program. The SBA responded that, “we believe the underlying solicitations were flawed and we agree with the Navy’s decision to take corrective action.” Letter from SBA to GAO, May 28, 2013, at 1. More specifically, the SBA states that, pursuant to the SBA’s 8(a) regulations, SBA must approve joint venture agreements prior to the award of an 8(a) contract for a joint venture. Id. at 2; see 13 C.F.R. § 124.513 (2012). However, the SBA continues, “there is no similar prior approval requirement under SBA’s regulations for [other]

teaming arrangements involving 8(a) BD [business development] participants and SBA has no process for, or practice of, reviewing such arrangements.” Letter from SBA to GAO, May 28, 2013, at 2. Accordingly, the SBA concludes, “it would have been impossible for affected offerors³ under the Navy solicitations to comply with this requirement as written.” Id. Further, the SBA maintains that, since 8(a) participants should have “as broad an array of options at their disposal as possible, including the use of teaming arrangements,” the solicitations at issue “were fatally flawed and created requirements that it would have been impossible for certain 8(a) firms to satisfy.” Id.

As noted above, in response to an offeror’s question regarding SBA approval, the Navy issued RFP amendment 0009, deleting the sentence fragment “Joint Venture Agreement after it has been submitted” and revising the solicitation to state:

Offerors in a teaming arrangement [expressly defined by the solicitations as including both joint venture and non-joint venture agreements] shall include evidence of such arrangement in their proposal. If not approved, offerors contemplating a teaming arrangement shall show evidence in their proposal that the agreement has been received by the SBA prior to proposal due date and approved before award of a resulting contract.

RFP amend. 0009, at 8.

In short, following the agency’s issuance of RFP amendment 0009, the solicitations provided that all teaming arrangements--not just joint venture agreements--must be approved by the SBA prior to award. Based on this solicitation language, along with the unambiguous statements of the SBA that it would have been impossible for offerors relying on teaming arrangements other than joint venture agreements to comply with the solicitations as revised by amendment 0009, we reject TMG’s assertion that the solicitations were not defective.

Next, TMG protests that, even if the solicitations were defective, the Navy’s corrective action is improper because disclosure of its price is unduly prejudicial to TMG. TMG Protest, Apr. 12, 2013, at 18.

Contracting officials in negotiated procurements, such as this, have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Infrastructure Def. Techs., B-401860.2, B-401860.3, July 27, 2010, 2010 CPD ¶ 185 at 6. The decision whether to reopen discussions is largely a matter left to the agency’s discretion. King Farm Assocs., LLC; One Largo Metro LLC; Metroview Dev. Holdings, LLC, B-404896.10 et al.,

³ That is, offerors contemplating a non-joint venture teaming arrangement.

Dec. 5, 2011, 2012 CPD ¶ 6 at 11. We have repeatedly observed that the possibility that the contract may not have been awarded based on the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than does the possibility that the original awardee, whose price has been properly disclosed, will be at a disadvantage in the reopened competition. E.g., Jackson Contractor Group, Inc., B-402348.2, May 10, 2010, 2010 CPD ¶ 154 at 3; Partnership for Response and Recovery, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 at 3-4; PCA Aerospace, Inc., B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65 at 4.

Here, consistent with the views expressed by the SBA, we reject TMG's assertion that disclosure of its price and the disadvantage to TMG outweighs the value in reopening the procurement. As noted above, the terms of the solicitations required offerors contemplating use of non-joint venture teaming arrangements to do what the SBA describes as "impossible"--that is, to obtain SBA approval of such arrangements. This improper solicitation provision limited the options available to offerors.⁴ Further, we note that the agency has stated that it intends to consider the substance of the issues presented by Atlantic in its protests, which initially challenged the agency's evaluation of proposals. Based on our review of the record as a whole, we cannot conclude that the Navy's proposed corrective action is unreasonable.

The protest is denied.

Susan A. Poling
General Counsel

⁴ Indeed, in arguing that RFP amendment 0009 should not be interpreted as affecting all teaming arrangements, TMG acknowledges that such an interpretation "would effectively prevent TMG (and likely other offerors) from competing." TMG Response to Agency's Explanation of Corrective Action, Mar. 21, 2013, at 2.