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Decision

Matter of: Contrack International, Inc.

File: B-408945; B-408945.2

Date: December 27, 2013

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Richard B. Oliver, Esq., and J. Matthew Carter, Esq., McKenna Long & Aldridge LLP, for the intervenor.

Nancy J. Williams, Esq., and Robert J. McKenney, Esq., Department of the Army, Corps of Engineers, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected protester's proposal is denied where record shows that the proposal as submitted failed to meet a material requirement of the solicitation, and thus could not properly have formed the basis for the award of a contract.

DECISION

Contrack International, Inc. (CI), of McLean, Virginia, protests the issuance of a task order to ECC CENTCOM Constructors, LLC, of Burlingame, California, under request for proposals (RFP) No. 35 MATOC MED 33 2012, issued by the Department of the Army, Corps of Engineers for the construction of transient quarters, and an enlisted and officer dining facility, in Bahrain. CI maintains that the agency improperly excluded its proposal from consideration for award.

We deny the protest.

BACKGROUND

The RFP was issued to firms that previously had been awarded contracts by the agency under a multiple-award, indefinite-delivery indefinite-quantity solicitation to perform design and construction work in the agency's central command area. The solicitation contemplates the award of a fixed-price contract to design and build a

transient quarters, and an enlisted and officer dining facility, in Bahrain.¹ The RFP contemplates the issuance of a task order on a “best value” basis, considering price and several non-price considerations. The RFP identified three non-price factors: management plan, design concept (deemed approximately equal in importance) and utilization of U.S. small/local foreign business concerns (deemed less important than the other two factors).² RFP at 5. The three non-price factors were deemed significantly more important than price. Id. The RFP contemplated the issuance of the task order without the agency conducting discussions, but nonetheless permitted them in the event the agency deemed them to be in the government’s best interest. Id. at 4.

As is relevant here, the RFP set out a maximum size for the temporary enlisted quarters facility, as follows:

The Design-Building Contractor shall provide actual area in both square feet and square meters in proposals. Space Tabulation provides min[imum] space requirements. Total Gross Area **shall not exceed** the Total DD 1391 square meter provided above

RFP Amendment No. 1, at Chapter 4, at 3 (emphasis added). Elsewhere, the RFP defined the “total DD 1391 square meters” as 12,900 square meters.³ Id. at 2.

In response to the RFP, the agency received several proposals, including those of CI and the awardee. The agency evaluated the proposals and, as is pertinent here, found the protester’s proposal unacceptable for exceeding the RFP’s requirement relating to the size of the temporary enlisted quarters facility. The record shows that CI proposed a facility that was larger than 12,900 square meters. Specifically, the record shows that CI’s facility was comprised of a total proposed area of [deleted]

¹ The RFP divides the requirement into two separate projects, project P-935, for the design and construction of a temporary enlisted quarters facility, and project P-940, for the construction of a combined dining facility. Contracting Officer’s Statement of Facts, at 1. This protest concerns only CI’s proposal for the first project, the temporary enlisted quarters facility.

² The RFP advised that the agency would assign adjectival ratings to the proposals under the non-price factors of either outstanding, good, acceptable, marginal, or unacceptable. RFP at 6. As is pertinent here, the RFP provided that an unacceptable rating would be assigned where the agency determined that the “Proposal does not meet requirements and contains one or more deficiencies. Proposal is un-awardable.” Id.

³ The DD Form 1391 is a document prepared to estimate the costs associated with a given construction project that is submitted to Congress for approval. See generally, Army Facilities Management Regulation 420-1, chapter 4.

square meters excluding what it identified as additional “betterments,” and [deleted] square meters if its proposed “betterments” are included. Agency Report (AR), exh. 8, CI Technical Proposal, at 5-6. The agency then issued a task order to ECC without discussions for \$44,392,372, finding that ECC’s proposal represented the best value to the government.⁴ AR exh. 10, at 45, 50. After being advised of the agency’s award decision and requesting and receiving a debriefing, CI filed the instant protest.

PROTEST

CI maintains that it was improper for the agency to have rejected its proposal for exceeding the solicitation’s area requirement. According to the protester, the RFP contemplated the agency assessing the “degree” of compliance or non-compliance of a proposal with the RFP’s requirements. In support of this assertion, CI directs our attention to two provisions of the RFP that describe the agency’s evaluation of technical proposals. The first is a provision that describes how the agency will evaluate proposals:

The rating of non-pricing proposals reflects the degree to which the proposed approach by an offeror meets or does not meet the minimum performance or capability requirements through an assessment of significant strengths, strengths, significant weaknesses, weaknesses, deficiencies, and risks of a proposal.

RFP at 5. The second is the RFP’s definition of a “deficiency:”

Deficiency is 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.

RFP at 5 (emphasis in original).

According to CI, its proposal only minimally deviates from the RFP’s size requirement, and this minor deviation could not reasonably form a basis to reject its proposal. The protester contends that this minor deviation does not appreciably increase the risk of unsuccessful contract performance in a manner that would warrant the assignment of a deficiency by the agency.

⁴ As the value of this task order is in excess of \$10 million, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award ID/IQ contracts. 10 U.S.C. § 2304c(e)(1)(B) (2006).

The agency responds that the size limitation identified in the solicitation (12,900 meters) is more than an arbitrary figure, and, in fact, represents a statutorily-authorized project scope that the agency cannot exceed without express authorization from Congress. In support of its position, the agency directs our attention to Army Facilities Management Regulation 420-1, which, in pertinent part, provides as follows:

After approval by Congress, each DD Form 1391 scope has a statutory basis that cannot be increased without congressional approval. The scope shown on the DD Form 1391 approved by Congress is the maximum allowable scope for the project, and must be reflected in all phases of project design as well as design-build requests for proposal subsequent to that approval. Once a project is approved by Congress, design reviews and value engineering studies will also include a verification statement to the effect that the project scope conforms to that of the DD Form 1391.

Army Facilities Management Regulation 420-1 § 4-51 (b).⁵ According to the agency, because the CI proposal deviated materially from the maximum scope of the project specified in the DD Form 1391 for this project, it could not form the basis for the award of a contract. The agency therefore contends that it properly rejected the CI proposal because of this deficiency.

We find no merit to CI's protest. It is a fundamental principal of government contracting that an agency may not award a contract on the basis of a proposal that fails to meet one or more of a solicitation's material requirements. Plasma-Therm, Inc., B-280664.2, Dec. 28, 1998, 98-2 CPD ¶ 160 at 3. Here, there is no question that the CI proposal failed to comply with the RFP's maximum size requirement. This deviation from the terms of the solicitation provided a reasonable basis for the agency to reject CI's proposal without further consideration.⁶ In fact, based on both

⁵ The underlying statute provides as follows:

The scope of work for a military construction project or for the construction, improvement, and acquisition of a military family housing project may not be increased above the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement or acquisition.

10 U.S.C. §2853(b)(2) (2006).

⁶ CI suggests alternatively that its proposal was compliant with the scope parameters of the DD Form 1391, even though it offered more space than was authorized by Congress. In this connection, CI notes that the DD Form 1391 includes a 5 percent dollar amount for contingencies. According to the protester, it
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statute and regulation, CI's proposals could not properly have formed the basis for the award of a contract because it was beyond the scope of the project as approved by Congress.⁷

We also are not persuaded by CI's argument that the terms of the RFP required the agency to consider the risk of unsuccessful performance associated with the degree of CI's deviation from the RFP's requirements. The RFP specifically identifies two, mutually exclusive, possible situations where the assignment of a deficiency to a firm's proposal would be appropriate. First, the RFP contemplated that the agency could assign a deficiency where there "is a material failure of a proposal to meet a Government requirement" RFP at 5. Simply stated, there is no dispute that the protester's proposal exceeded the maximum area requirement. As a result, the agency reasonably viewed the proposal as deficient.

The second alternative--not applicable here--contemplated the assignment of a deficiency where the agency found "a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level." Id. This latter situation--under which the agency would assess the risk of unsuccessful performance--would only arise where the proposal included significant weaknesses that would not, in and of themselves, provide a stand-alone basis for eliminating the proposal from consideration.

As a final matter, CI contends that the RFP was latently ambiguous because CI could not reasonably have known that its proposal would be rejected as unacceptable for exceeding the size requirement included in the RFP. CI's argument in this connection essentially is that, because the RFP provided for an assessment of risk based on the degree of a proposal's non-compliance with the

(...continued)

proposed less than [deleted] percent additional space, and, therefore, it meets the scope parameters of the DD Form 1391. An examination of the DD Form 1391, however, shows that the contingency amount specified is not for any increase in the dimensional scope of the project, but is, instead, merely a budgetary contingency included for purposes of calculating the estimated total cost of the project. Protester's Comments, Nov 12, 2013, exh. B, DD Form 1391, at 1.

⁷ CI correctly observes that the agency did not reject its proposal--or the proposals of other offerors--for failing to meet another requirement of the RFP relating to the provision of handicapped-accessible facilities. However, that requirement was not included on the DD Form 1391 as an element of the scope of the project as approved by Congress. The agency therefore did not treat a failure to comply with that requirement as a basis for rejecting CI's proposal, and instead, only identified this as a weakness in the firm's proposal. AR, exh. 9, Source Selection Evaluation Report, at 10.

terms of the solicitation, it was not aware that any non-compliance--however minimal--would provide a basis for rejecting its proposal.

As discussed above, however, we conclude that the RFP provided for two, mutually exclusive, bases for assigning a deficiency to a proposal, only one of which contemplated that the agency would consider the risk associated with a proposal's non-compliance. CI's interpretation of the RFP is not reasonable and, since a latent ambiguity only exists where there are two reasonable interpretations of a solicitation, Assist Consultants Inc., B-408365.2, Aug. 2, 2013, 2013 CPD ¶ 181 at 7, this contention is without merit.⁸

The protest is denied.

Susan A. Poling
General Counsel

⁸ CI makes several additional arguments relating to the propriety of the agency's source selection decision. Since we find above that the agency properly concluded that the CI proposal could not form the basis for the award of a contract, we need not consider these arguments, because CI is not an interested party to challenge the agency's decision to issue a task order to another concern. 4 C.F.R. § 21.0(a)(1) (2013).