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Comptroller General
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United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Environmental Systems Research Institute, Inc.

File: B-408847.2

Date: January 17, 2014

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DIGEST

Protest against rejection of proposal as unacceptable is denied where solicitation required offerors to provide fixed prices for all proposed software, and agency reasonably concluded that protester's submission of partial pricing information and reliance on expiring enterprise license agreement did not meet requirement for submission of fixed prices.

DECISION

Environmental Systems Research Institute, Inc. (Esri), of Redlands, California, protests the Department of the Interior (DOI), Bureau of Land Management's (BLM) award of a contract to URS Group, Inc., of San Antonio, Texas, under request for proposals (RFP) No. 783465, for development and implementation of the Geospatial Publication Module (GPM), a web-based software application. Esri challenges the evaluation of its technical proposal and price.

We deny the protest.

BACKGROUND

The RFP contemplated issuance of a fixed-price, indefinite-delivery/indefinite-quantity (IDIQ) contract for web-based geospatial services related to the GPM, for a base year with four 1-year options, with total task orders not to exceed $15 million

over 5 years. The GPM is a system including hardware and software which will be used for publishing and viewing BLM data, and will replace BLM's existing GeoCommunicator application which was developed by Esri. The required work includes three task areas: GPM (e.g., visualizations, search, reports, web service applications, etc.); facilitation and collaboration professional services; and general geospatial technical support, training, and consulting services. Proposals were to be evaluated under five, equally-weighted technical factors: management approach and technical capabilities; personnel qualifications; business experience and management; past performance; and usability, functionality, security and compliance. All evaluation factors other than price, when combined, were significantly more important than price.

Offerors were required to include a fixed price for each milestone specified for task order No. 1's statement of work (SOW) and for maintenance of the GPM for 4 years following government acceptance. RFP ¶ 5.2.16. The RFP required that the price submission identify charges for labor and other direct costs, including travel. Id. Based on agency responses to offeror questions, which modified the submission requirements, Contracting Officer's Statement at 64, offerors also were required to provide pricing for proposed software (including licenses) and equipment costs needed to accomplish their proposed solutions. Questions in Response to RFP at 2; GPM Questions, No. 15 at 33; GPM Questions, No. 18 at 36.

Seven offerors, including Esri and URS, submitted proposals by the July 5, 2013 closing time. Under the terms of the RFP, in Phase I of the procurement, the evaluation panel was to perform a conformity check to ensure that each offeror had complied with all RFP requirements. RFP ¶ 6.1. Failure to submit any of the required information was to result in the offer being rejected and removed from the competition. Id.

The evaluators and contracting officer concluded that Esri's proposal lacked complete pricing information. However, instead of rejecting the proposal, the agency twice sought additional information from Esri regarding specific, fixed prices for all software to be used in its solution. The agency also allowed Esri to participate in Phase II of the procurement, including oral presentations and clarifications. In this regard, while Esri was asked a number of questions which the agency deemed clarifications, the agency did not formally open discussions with the offerors. Contracting Officer's Statement at 11.

In the final evaluation, URS's proposal was rated good under the technical factor, while all other proposals, including Esri's, were rated acceptable. Based on the General Services Administration (GSA) Federal Supply Schedule (FSS) information Esri submitted in response to agency inquiries (Esri Emails, July 17, 2013 and Aug. 2, 2013), the agency attempted to estimate Esri's complete fixed price. In this regard, in response to the agency's request for additional information, Esri had stated that "specific license specifications, number of licenses required, categories

and exact annual license costs of each of the proposed products for the SOW1 is included in the tables below." Esri Email, Aug. 2, 2013. However, instead of providing any calculated totals of its licensing and maintenance costs, Esri's email only included individual prices and quantities for software and maintenance, along with asterisks under the headings of "purchase price," "annual maintenance," "annual support", and "annual term," to indicate that the "[p]roduct is included in the DOI [enterprise license agreement] ELA." Esri Email, Aug. 2, 2013. In addition, Esri included a table entitled "ELA Based Proposal" which listed the cost of its software and maintenance as "$0." Id.

In seeking to calculate Esri's price, the agency multiplied the various software license and maintenance prices by the number of proposed units and years of performance, arriving at a total of $[deleted] to be added to Esri's basic GPM development price of $[deleted], for an estimated total of $11.4 million. Esri Licensing Analysis. As for the ELA, based on ELA discounts to GSA pricing of [deleted]% for software and [deleted]% for maintenance, the agency calculated an alternative estimate of $8.1 million, including Esri's basic GPM price. The agency analysis, however, noted that there was no price for Esri's proposed [deleted] software. Id. Because Esri's proposal was not in conformity with the RFP's pricing requirements, it was found unacceptable and not considered further.

Based on the evaluation of the remaining proposals, the contracting officer, as source selection authority (SSA), determined that URS's proposal represented the best value and awarded it the contract and first task order.

Upon learning of the award to URS, Computech, Inc. filed a protest with our Office, which led the agency to undertake corrective action in the form of a detailed review of the evaluation record leading to a new source selection. We therefore dismissed Computech's protest as academic (B-408847, Sept. 12, 2013). In making the new award decision, the SSA found Esri's proposal unacceptable. In comparing the technical attributes of the remaining offerors' proposals, the SSA determined that URS's technical superiority, as reflected in its good rating versus the acceptable ratings of the other offerors, warranted payment of its higher, $7 million evaluated price. Upon learning of the renewed selection of URS, Esri filed this protest.

DISCUSSION

Esri asserts that the technical and price evaluations were flawed on various grounds. For example, Esri asserts that the agency unreasonably evaluated its price by adding significant amounts for proposed software. In this regard, Esri maintains that the RFP did not require it to submit additional software license pricing because the agency already had access to the software at no cost (under the ELA), and that, in any case, it provided sufficient pricing information.

The agency, however, requests dismissal of the protest, asserting that Esri's lack of the required fixed price renders its proposal unacceptable. As such, the agency maintains that Esri would not be an interested party to pursue its remaining protest grounds.

In order for a protest to be considered by our Office, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. Bid Protest Regulations, 4 C.F.R. §§ 21.0(a)(1), 21.1(a) (2013); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A protester is an interested party to challenge the agency's evaluation of proposals where there is a reasonable possibility that the protester's proposal would be in line for award if its protest were sustained. Ridoc Enter., Inc., B-292962.4, July 6, 2004, 2004 CPD ¶ 169 at 9. As discussed below, the record here shows that Esri was ineligible for award for failing to provide the required fixed-price proposal, and further, that there are multiple acceptable proposals besides the awardee's eligible for award. Thus, Esri is not an interested party to challenge the award. See Advanced Health Sys.--Recon., B-246793.2, Feb. 21, 1992, 92-1 CPD ¶ 214 at 3.

Requirement for Additional Pricing Information

Esri asserts that it was not required to provide additional pricing for software because an agency response to an offeror's question clearly exempted the protester from submitting the information. In this regard, in response to a question concerning whether the agency expected offerors to obtain software licenses under the contract, the agency responded as follows:

> The agency expects the offeror to indicate what software is recommended and the necessary license that would be required to implement the vendor's proposed solution. If the agency does not already have the proposed software licensed product, the agency would expect the offeror to recommend procurement of the license, the estimated cost, coverage, restrictions term or perpetual including maintenance as indicated for the duration of time in the Task 1 SOW (1) of the requirements.

Response to Question No. 4 (emphasis added). Based on this response, Esri's proposal attached a list of assumptions which stated that its GPM solution would "be deployed within BLM's existing computing infrastructure," and since its existing ELA with the DOI provided for perpetual software licenses, unlimited additional copies of software, maintenance, and access to new software versions, there would be no additional charge to the agency resulting from Esri's use of this software in performing BLM's GPM requirement. See Esri Proposal at 54; Protest at 20.

BLM, however, maintains that the provision on which Esri relies was superseded by the agency's responses to subsequent offeror questions. Specifically, an offeror asked if BLM currently owned software licenses for use by the contractor during GPM development, including Esri ArcGIS Server 10.1 Advanced, Microsoft Windows Server 2012, Oracle Database 11g, and Microsoft SQL Server 2012. GPM Questions, No. 15. The agency responded that "[o]fferors are expected to include all proposed license costs in their submissions." Id. Later, when an offeror asked if the internal servers BLM intended to use possessed the required software licenses for the same software identified in GPM Questions, No. 15, the agency responded as follows: "Offerors are expected to include all proposed software and equipment costs in their submissions." GPM Questions, No.18.

Esri argues that since the later responses did not indicate that the agency was withdrawing its earlier answer, the subsequent responses can be "easily read" as consistent with the prior response. Esri Comments at 30. In Esri's view, if the agency already possessed an offeror's proposed software, there would be no cost for that offeror's software, and thus no need to include such costs.

Esri's argument is without merit. In this regard, Esri is incorrect as to the requirements for pricing information. The later responses to offeror questions clearly and unequivocally required all offerors to provide comprehensive, total pricing information, accounting for any costs to BLM, "to include all proposed software and equipment costs," GPM Questions, No. 18, including "all proposed license costs." GPM Questions, No. 15. Furthermore, to the extent that the reference in the earlier answer to a "proposed software licensed product" that the agency "already ha[s]," Response to Question No. 4, could be read as inconsistent with this requirement, the response created a patent ambiguity in the RFP, apparent on the face of the document itself. In such situations an offeror may not simply make unilateral assumptions regarding the meaning of patently ambiguous terms in the RFP and then expect relief when the agency does not act in the manner assumed. Rather, the offeror must challenge the alleged ambiguity prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); American Connecting Source d/b/a Connections, B-276889, July 1, 1997, 97-2 CPD ¶ 1 at 3. Since Esri did not seek additional clarification prior to the closing time, it may not now timely assert that its interpretation is the correct one. Thus, we find reasonable the agency position that the RFP required all offerors to submit the requested pricing and cost information regarding any software which was included in its proposed approach regardless of the agency's access to the proposed software.

Adequacy of Esri's Pricing Information

Esri argues that the agency could obtain all the required software at no cost under the terms of the ELA. Esri Comments at 28. Contrary to Esri's arguments, however, the record indicates that BLM does not acquire items under the ELA at no cost. Rather, it appears from the record that the ELA is an agreement negotiated by

the DOI, and that BLM must reimburse its parent agency for software furnished under the ELA. Contracting Officer's Statement at 73. Further, at the time Esri submitted its proposal, the existing ELA was due to expire as of September 30, 2013, while the new ELA, which does not become effective until February 1, 2014, includes various price escalators that were unknown at the time of proposal here, making it unclear what the cost to BLM over the life of the contract would be. Id. (Further, even for the first year, BLM's estimated share of the ELA costs will be $1.7 million, an increase of more than $181,000 from the prior ELA.) Id.

Esri argues that, in any case, its responses to the agency's emails provided all of the required pricing/cost information and that the agency simply failed to properly calculate the various prices. In this regard, it asserts that when properly calculated, its proposed price would be lower than that estimated by the agency. Thus, while the agency's evaluated price for Esri's software licenses and maintenance resulted in a total cost of $11.4 million for GSA FSS listed items and $8.1 million for ELA discounted pricing, Esri argues that, when properly calculated, these totals would be $5.7 million and $3.9 million respectively. Esri Comments at 32-34. Since Esri contends that its pricing was complete, and since both adjusted totals are lower than URS's total price, Esri maintains that the agency unreasonably rejected its pricing as unacceptable.

The agency's evaluation of Esri's price was unobjectionable. Esri's proposed approach included the following software--[deleted]. Esri Proposal at 5, 8, 10. When the agency first requested detailed software pricing information from Esri, the firm's initial response included these four items, but relied on Esri's view that there would be no cost for them due to operation of the ELA. Specifically, Esri's response listed the software in question above the notation that it was "[p]rovided under the terms of the ELA with the US DOI." Email, July 17, 2013. The agency then again requested Esri to provide the specific license specifications, number of licenses required, categories of software, exact annual license costs, as well as the expected annual maintenance costs for all 4 years for these identified software items. Agency Email, Aug. 1, 2013.

In response, Esri included a table with GSA FSS part numbers, quantities, and annual schedule prices for three of its proposed software license and maintenance items. Esri Email, Aug. 2, 2013. While it provided this information concerning its GSA-listed software, it failed to include any guidance on Esri's intended pricing for this requirement. For example, instead of providing any extended costs, or total cost information, Esri merely indicated by asterisks that some products had a "purchase price" and some an "annual term," and otherwise only noted that the GSA products were included in the ELA and that an "ELA Based Proposal" had costs of $0. Id. While Esri now asserts that the agency would only be charged once for each license, its email submissions in response to the agency's continued questioning failed to make this clear. Likewise, although Esri now includes specific guidance on how maintenance pricing should be calculated, that is, by multiplying

initial pricing by 4 or 5 years depending upon the item and column in the table (Esri Comments at 30-31, nn. 128-30), its email submissions were silent on these calculations.

In sum, contrary to Esri's claim that the agency had all of the information needed to perform an accurate calculation of the price of its proposed approach, Esri failed to clearly specify the quantities of and price for the required software, and thus did not meet the agency's requirement for fixed prices. Further, regardless of whether the agency might have calculated Esri's intended prices, because Esri failed to provide the detailed fixed prices requested, the agency reasonably concluded that even its own estimates of the protester's costs did not represent acceptable pricing. See Carlson Wagonlit Travel, B-287016, Mar. 6, 2001, 2001 CPD ¶ 49 at 3 (offeror is responsible for the contents of its proposal and ensuring it provides complete information as part of an adequately written proposal).

Apart from the lack of specific cost information, Esri's email responses contributed to further uncertainties associated with its proposal. For example, Esri's technical proposal indicated that the [deleted] software was part of the offeror's approach, leading the agency to request pricing for it. See e.g., Esri Proposal at 5 ("The Geoplatform will leverage a large and growing volume of web services information in [deleted]") and at 10 ("The GPM will include [deleted], Esri's product for the [deleted]"); Agency Email, Aug. 1, 2013. However, in its second email response, Esri stated that:

> [deleted] is not required as part of Esri's proposal for BLM to deploy the GPM. Our understanding is that [deleted] will be available to BLM through the DOI ELA. This may present additional opportunities for sharing, should BLM choose to pursue it.

Esri Email, Aug. 2, 2013. Esri now explains that it included this language to make clear that [deleted] was not part of its proposal and that its use was an option which the parties could pursue at a later date. Esri Supplemental Comments, Declaration of Principal Consultant ¶ 9. However, whether Esri intended to eliminate [deleted] from its proposal or to make clear that it was simply an ELA-covered, non-cost option, both interpretations were at odds with Esri's proposal, which included [deleted]. Nowhere in its emails did Esri explain how it would provide the functionality [deleted] was intended to furnish, or address the implications of replacing [deleted] for complying with the statement of work.[1]

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[1] In addition, we note that Esri's initial email response further indicated a failure to provide fixed pricing. Specifically, it stated that the "final structure and price" "may change as a result of the [project's] requirements and design activities," and "Esri reserves the right to alter these elements based on these meetings with the BLM project team." Esri Email, July 17, 2013, at 4. While Esri maintains that this

(continued...)

Thus, it was impossible for the agency to reasonably determine the impact on Esri's pricing of the possible changes in technical approach. See Nu-Way, Inc., B-296435.5, B-296435.10, Sept. 28, 2005, 2005 CPD ¶ 195 at 5 (an offeror has an obligation to submit a clear and unambiguous proposal, and must bear consequences where proposal does not reflect intended approach). Under these circumstances, the agency reasonably concluded that Esri's price proposal was unacceptable. The requirement to propose fixed prices is a material term or condition of a solicitation requiring such pricing. Solers, Inc., B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD ¶ 83 at 4. In a negotiated procurement, where, as here, a proposal fails to conform to the material terms and conditions of the solicitation, it is considered unacceptable and may not form the basis for award. Cajar Def. Support Co., B-239297, July 24, 1990, 90-2 CPD ¶ 76 at 5. Since Esri did not provide the required fixed prices, its proposal did not conform to the material terms of the RFP, and therefore could not be accepted for award. See Joint Venture Penauillie Italia S.p.A; Cofathec S.p.A; SEB.CO S.a.s.; CO.PEL.S.a.s., B-298865, B-298865.2, Jan. 3, 2007, 2007 CPD ¶ 7 at 6.

Having submitted an unacceptable proposal, and given that there are other acceptable offers, Esri is not an interested party to pursue the remaining issues in its protest concerning the evaluation of its and URS's technical proposals, and whether the agency engaged in meaningful discussions. See Tetra Tech Tesoro, Inc., B-403797, Dec. 14, 2010, 2011 CPD ¶ 7 at 6. [2]

The protest is denied.

Susan A. Poling
General Counsel

(...continued)
statement is just a recognition of its right to an equitable adjustment under Federal Acquisition Regulation § 52.243-1 (Changes-Fixed Price), its email did not make this clear. Thus, we agree with the agency that Esri's statement could reasonably be read as taking exception to the requirement for fixed pricing.

[2] Esri also argues that its proposal cannot be found unacceptable because the agency evaluated its price proposal as overall "good." Esri Comments at 3. While the agency rated Esri's Task 1 price proposal "marginal" and its other task price proposals as "good" and "excellent," resulting in an overall "good" rating, the source selection decision makes clear that due to the lack of required pricing information, Esri's price proposal could not be considered for award; that is, it was unacceptable. Supplemental Contracting Officer's Statement at 23; Source Selection Decision at 6.