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Decision

Matter of: Noble Supply & Logistics, Inc.

File: B-415725.3

Date: December 6, 2019

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DIGEST

Protest challenging the exclusion of the protester's proposal from a competition for the issuance of a blanket purchase agreement against relevant federal supply schedule contracts is denied where the record shows that the protester's price proposal failed to meet material terms of the solicitation, and was reasonably excluded on that basis.

DECISION

Noble Supply & Logistics, Inc., of Boston, Massachusetts, protests its exclusion from consideration under request for proposals (RFP) No. N0018919R0041 issued by the Department of the Navy, Naval Supply Systems Command, to provide maintenance, repair, and operations supplies and materials. The protester argues that its proposal was improperly excluded from further consideration by the agency.

We deny the protest.

BACKGROUND

The RFP, issued on May 2, 2019, sought proposals from holders of General Services Administration (GSA) Federal Supply Schedule (FSS) 51V – Hardware Superstore contracts for the establishment of a blanket purchase agreement (BPA) to provide maintenance, repair, and operations supplies and materials to four installations located in the Naval Facilities Engineering Command's Mid-Atlantic, Northeast Region. Agency Report (AR), Tab 1, RFP, at 13, 27. The procurement was to be conducted in accordance with procedures set forth in Federal Acquisition Regulation (FAR)

section 8.405-3 for the establishment of BPAs under schedule contracts for supplies or services. Id. at 3.

Proposals were to be evaluated in accordance with the requirements of FAR provision 52.212-2, with award to be made on a best-value tradeoff basis, considering price and the following equally-weighted non-price factors: technical, and past performance. Id. at 13-14. The technical factor included two equally-weighted subfactors: performance approach and transition/phase-in plan. Id. at 14. When combined, the non-price factors were to be significantly more important than price. Id. Price was to be evaluated based on total evaluated price, which was calculated by adding the offeror's proposed total discounted service price and proposed total test market basket (TMB) price. Id. at 13, 17.

Three proposals were received by the agency in response to the solicitation, including one from Noble. Contracting Officer's Statement (COS) at 9. Based on an initial evaluation of technical proposals, one of the offerors was found to be technically unacceptable, and was not further evaluated. Id. at 9. While Noble's proposal was found to be technically acceptable, the contracting officer did note discrepancies in the firm's proposal, namely, that Noble's proposal did not separately price services, as required by the solicitation, and various items in the TMB were priced higher than on the protester's authorized FSS pricelist. Id. at 9-10. The contracting officer determined that exchanges with the two remaining offerors were "necessary to allow each offeror to make necessary revisions in order to proceed to award." Id. at 11.

During exchanges with Noble, the contracting officer identified various discussion topics under the non-price evaluation factors, and as relevant to the firm's price proposal, the contracting officer notified Noble of the following: (1) the price proposal must contain separately priced services; (2) the hyperlinks in the catalog were not working and should be updated; and (3) the pricelist submission must be the authorized FSS pricelist as required by the RFP and consistent with prices available on GSA Advantage.¹ Id. at 11; AR, Tab 8, Noble Exchange Letter, at 3. In response, on August 9, Noble submitted a revised price proposal, including a TMB, and the firm's FSS Schedule 51V pricelist. See generally AR, Tab 3, Revised Price Proposal.

The agency evaluated Noble's revised proposal, comparing the firm's proposed TMB prices against both Noble's GSA Advantage prices and Noble's authorized FSS pricelist. AR, Tab 4, Contracting Officer's Memorandum dated August 23, 2019, at 3. The evaluation found that 55 of the items priced in Noble's TMB exceeded the prices listed on GSA Advantage, and 15 items in the TMB exceeded the prices listed on the

¹ As discussed in FAR section 8.402(c), "GSA offers an on-line shopping service called 'GSA Advantage!' through which ordering activities may place orders against Schedules. . . . Ordering activities may access GSA Advantage! through the GSA Federal Supply Service Home Page (<http://www.gsa.gov/fas>) or the GSA Federal Supply Schedule Home Page at <http://www.gsa.gov/schedules>." FAR § 8.402(c)(1).

firm's authorized FSS pricelist. Id. a 3-5. Based on these findings, the contracting officer determined that Noble's price proposal was non-compliant with the terms of the solicitation. Id. at 5.

On August 27, the contracting officer notified Noble of its elimination from further consideration for award. AR, Tab 2, Contracting Officer's Letter dated August 27, 2019, at 1. Noble responded to the notice of elimination on August 30, requesting reinstatement of its proposal into the competition. Protest, Exhibit 2, Request for Reinstatement. The agency evaluated Noble's request, but continued to find the protester's proposal non-compliant with the terms of the solicitation based on 15 items in the TMB that were priced in excess of Noble's authorized FSS pricelist.² See generally AR, Tab 5, Contracting Officer's Memorandum dated September 3, 2019; Tab 6, Contracting Officer's Memorandum dated September 19, 2019. This protest followed on September 6, 2019.

DISCUSSION

Noble argues that its proposal met all of the solicitation's requirements, and that the agency failed to evaluate its proposal in accordance with the terms of the solicitation. Protest at 7-17; Comments at 5-9. The protester also argues that the agency's decision to eliminate the firm's proposal from the competition was irrational because it was based on "an informational discrepancy," and the Navy's misunderstanding of the FAR and GSA Schedule pricing requirements. Id. at 12. Finally, Noble asserts that the exchanges conducted with the agency presented a latent ambiguity, and asks that we recommend the agency clarify its requirement and accept new proposals. Id. at 12-13. Although we do not specifically address every argument made by Noble, we have fully considered all of them and find they provide no other basis on which to sustain the protest.

² The record shows that the contracting officer conducted an analysis of Noble's price proposal based on arguments made by the protester in its request for reinstatement. Specifically, Noble contended that some of the price discrepancies between its TMB prices and prices listed on GSA Advantage were due to temporary price reductions associated with those items on GSA Advantage. Compare Protest, Exhibit 2, Request for Reinstatement, at 3-4 (discussing impact of temporary price reductions on Noble's GSA Advantage prices) with AR, Tab 5, Contracting Officer's Memorandum dated September 3, 2019, 2-3 (contracting officer's analysis of Noble's temporary price reductions). However, Noble's proposal was not reinstated into the competition, and the contracting officer documented her analysis that Noble's proposal continued to have "price discrepancies" resulting from 15 items in the firm's TMB exceeding the prices listed on Noble's authorized FSS pricelist. AR, Tab 6, Contracting Officer's Memorandum dated September 19, 2019, at 1.

Solicitation Requirements

Noble argues that its proposal met all of the solicitation's requirements, and that the agency failed to evaluate its proposal in accordance with the terms of the solicitation. Protest at 7-17; Comments at 5-9. In this regard, the protester asserts that "there was no requirement in the Solicitation for Noble's TMB prices to be at or below Noble's [FSS] 51V Pricelist and/or its GSA Advantage price." Comments at 7.

The agency responds that the solicitation required prices submitted in the TMB to be consistent with the offeror's FSS pricelist.³ Memorandum of Law (MOL) at 21. Moreover, the agency asserts that the requirement to submit the authorized FSS pricelist for all GSA schedules identified in the TMB was for the purpose of validating the offeror's submitted TMB prices. Id. According to the agency, "[i]n the case of fifteen test market basket prices, Noble failed this validation and therefore failed to meet solicitation requirements." Id.

Where an agency conducts a formal competition for the establishment of a BPA, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the solicitation and applicable procurement statutes and regulations. The Clay Group, LLC, B-406647, B-406647.2, July 30, 2012, 2012 CPD ¶ 214 at 8; OfficeMax, Inc., B-299340.2, July 19, 2007, 2007 CPD ¶ 158 at 5. In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. Smiths Detection, Inc.; Am. Sci. and Eng'g, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 6-7. Here, where the parties disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2.

³ While not relevant to the disposition of this protest, the parties discuss, at length, the relationship between a contract-holder's authorized FSS pricelist, and the prices reflected on GSA Advantage. For example, Noble explains that pricing on GSA Advantage reflects not only the authorized price, but may also reflect temporary price reductions (TPR) for finite periods of time offered by schedule holders. Noble also argues that while the TPRs are reflected in GSA Advantage, "they do not change the previously negotiated GSA Schedule Pricelist." Protest at 10-11. The protester also explains that there could be inconsistencies between authorized prices reflected in contract modifications and those reflected on GSA Advantage due to "the lag in time to update GSA Advantage." Id. at 11. However, since the relevant price discrepancy for purposes of this protest is that between Noble's proposed TMB pricing, and the pricing listed on the firm's authorized FSS pricelist submitted with its proposal, we do not address this aspect of Noble's protest further.

The record shows that the TMB price was one of two components in the total evaluated price that was to be evaluated under the price factor.⁴ RFP at 12-13, 17. In support of the TMB price, offerors were instructed to complete a TMB worksheet, which required offerors to provide FSS schedule prices for 300 items, applicable discount rates, and hyperlinks to the items in GSA Advantage and the applicable FSS Schedule. Id.; See also, AR, Tab 3c., Noble's Services and TMB Pricing. Offerors were also required to include with their proposals one copy of the authorized FSS pricelists for all GSA schedules identified in their TMBs. RFP at 12. The RFP advised offerors that "[a]ll items shall be priced using a GSA Schedule." Id. at 13.

While Noble argues that "there was no requirement in the Solicitation for Noble's TMB prices to be at or below Noble's [FSS Schedule] 51V Pricelist," Comments at 7, that assertion is contradicted by a plain reading of the solicitation. Here, the instructions to offerors required all items in the TMB worksheet to be priced using the GSA Schedule; in this case, Noble's FSS Schedule 51V contract pricing. RFP at 13. Moreover, the instructions to offerors and the TMB worksheet identified the prices to be provided for the 300 items as the "GSA schedule price." Id.; AR, Tab 3c., Noble's Services and Test Market Basket Pricing. Thus, a plain reading of the terms of the solicitation required Noble to submit prices for the items in the TMB that were consistent with the relevant GSA schedule price. However, as both parties agree, Noble failed to do so for 15 of the 300 items priced in the TMB. See Comments at 12; MOL at 21. As such, this protest allegation is denied.

Exclusion Decision

In the alternative, Noble argues that the agency's decision to exclude it from the competition was irrational because "the minor informational discrepancies that exist for the 15 items in the TMB do not rise to the level of warranting exclusion given the BPA evaluation scheme and resulting award's price mechanism, which is not rationally related to the TMB or the prices therein." Comments at 10. On the latter point, the protester argues, in essence, that because the TMB prices were for evaluation purposes only, the fact that some of its proposed prices exceeded its GSA Schedule prices did not violate the solicitation or the FAR.⁵ Id. at 7-8.

The agency responds that Noble's proposal failed to meet a critical solicitation requirement in proposing TMB prices higher than those reflected on the firm's FSS pricelist. MOL at 21. The agency asserts that Noble's argument "overlooks fundamental principles underlying GSA FSS competitions, namely, that offerors may not

⁴ The other component of the total evaluated price was the total discounted service price. RFP at 12-13. Since this protest focuses on discrepancies in Noble's TMB price, we do not discuss service price further.

⁵ With respect to ordering, the solicitation states that the "contractor shall provide items available through GSA Schedule incorporated into the Blanket Purchase Agreement. List prices shall be effective on the effective date of the call order." RFP at 28.

propose prices higher than those contractually agreed upon with GSA.” Id. According to the agency, “[a]ny interpretation of the solicitation that would authorize an offeror to quote prices ‘higher than its current FSS contract’ would be ‘inconsistent with the FAR.’” Id. citing Perot Systems Gov’t. Servs, Inc., B-402138, Jan. 21, 2010, 2010 CPD ¶ 64 at 4. The agency also argues that “to the extent that Noble’s discrepancies are attributable to errors in the completion of its [TMB] prices . . . or in the submission of its authorized FSS Pricelist” it is the protester’s burden to submit an adequately written proposal. MOL at 21-22. We are provided no basis to question the agency’s decision.

As discussed, in reviewing a protest challenging an agency’s evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency’s discretion. Smiths Detection, Inc.; Am. Sci. and Eng’g, Inc., supra. In the context of a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award.⁶ See LOGMET LLC, B-405700, Dec. 14, 2011, 2011 CPD ¶ 278 at 3.

Here, the price evaluation factor advised offerors that failure to comply with the instructions to offerors “may render the offeror ineligible for award if award is made on initial offers.” RFP at 17. The solicitation also instructed offerors that proposals that do not comply with the detailed instructions for the format and content of the proposals may be considered unacceptable, which may render the proposal ineligible for award. Id. at 9. Thus, the solicitation notified offerors that compliance with the solicitation’s instructions was a material term of the solicitation, and failure to comply with the instructions could render the offeror ineligible for award. Id. at 17.

The solicitation required offerors to include a complete and detailed price breakdown with all supporting documentation necessary to explain the development of its pricing methodology, including the TMB pricing worksheet, and Noble’s authorized FSS pricelist. Id. at 12. The solicitation also notified offerors that their submitted TMB price was required to be consistent with the offeror’s GSA schedule price. Id. at 12-13. As such, Noble was on notice that the agency would evaluate its price proposal, including the proposed TMB prices and the pricing methodology underlying its proposed prices, and that those prices were to be consistent with the firm’s GSA schedule prices.

Because Noble’s proposal did not comply with the requirement that the firm’s proposed TMB prices be consistent with its GSA schedule prices, the agency could not confidently evaluate Noble’s price proposal. It is an offeror’s responsibility to submit a

⁶ While a negotiated procurement generally refers to those procurements conducted under the requirements set forth in FAR part 15, due to the structure of this procurement, we conclude that our decision relevant to negotiated procurements is instructive in deciding the challenges here. See OMNIPLEX World Servs Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199, at 3 (analyzing an FSS procurement under standards applicable to negotiated procurement).

well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation and allows a meaningful review by the procuring agency. See Herman Constr. Group, Inc., B-408018.2, B-408018.3, May 31, 2013, 2013 CPD ¶ 139 at 2. That Noble's proposal failed to meet a material requirement of the solicitation reasonably supports the agency's decision to exclude the firm's proposal from further consideration. Consequently, this protest allegation is denied.

Latent Ambiguity

Noble's final challenge is that the solicitation was latently ambiguous. The protester contends, "[o] the extent that the agency's requirements articulated during exchanges could be interpreted to conflict with the solicitation instructions, then the exchanges presented a latent ambiguity." Protest at 17. In this regard, the protester argues that it submitted a compliant pricing proposal, and if the agency now asserts that the term "GSA Schedule Price" means something to the agency "other than the price that the GSA Contracting Officer had agreed to . . . then there is a latent ambiguity." Id. According to Noble, "to address a latent ambiguity with respect to the pricing catalog requirements, [the agency] would be required to issue a Solicitation amendment clarifying this requirement and accept new proposals." Id. at 18. The Navy denies that there is an ambiguity in the solicitation, and explains that it and Noble agree that the GSA Schedule price refers to the authorized FSS pricelist. MOL at 26.

An ambiguity exists where two or more reasonable interpretations of the solicitation are possible. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. If the ambiguity is an obvious, gross, or glaring error in the solicitation then it is a patent ambiguity; a latent ambiguity is more subtle. Id.

After receipt of proposals, the record shows that the contracting officer conducted a review of Noble's price proposal. COS at 10. The contracting officer states that part of her review consisted of manually comparing items included in Noble's TMB against the authorized FSS pricelist provided with Noble's proposal, and against the prices Noble listed on GSA Advantage. Id. According to the contracting officer, the review resulted in "inconsistencies found across the three sources in Noble's proposal." Id. at 11. For example, the contracting officer found instances where Noble's TMB prices exceeded the prices on the firm's FSS pricelist provided in Noble's proposal, and its prices on GSA Advantage. Id. Because of these inconsistencies, the contracting officer was unable to validate the submitted prices. Id. Specifically, the contracting officer was concerned "that the 'GSA authorized schedule pricelist' provided in Volume II by Noble appeared to have been adjusted or created for this solicitation as it contained a column titled 'NAVFAC 3PL Price.' This was in addition to a column labelled 'GSA MAS Price,' which the Contracting Officer considered the GSA Schedule price." Id. at 10.

According to the contracting officer, exchanges were necessary "to allow each offeror to make necessary revisions in order to proceed to award." Id. at 11. In the exchange letter to Noble, the contracting officer addressed her concern regarding three pricing inconsistencies with Noble's proposal. Noble was informed that the price proposal must

contain separately priced services, and that the hyperlinks to GSA Advantage--which were required as part of the TMB worksheet--were not working and should be updated. Finally, and of relevance here, the contracting officer advised Noble that “[t]he pricelist submission must be the authorized GSA schedule pricelist as required by the RFP and consistent with prices available on GSA Advantage.” This third exchange matter was apparently raised to address the contracting officer’s concern that Noble’s pricelist had been “adjusted or created for this solicitation.” Id.; see also AR, Tab 8, Noble Exchange Letter, at 3.

Consistent with the parties’ understanding, our review of the record shows that the term “GSA schedule pricelist” used in the exchange letter unambiguously refers to the authorized FSS pricelist. In this regard, the RFP states, in relevant part, “[i]n accordance with FAR 8.402(b), this volume shall also include one copy of the ‘Authorized Federal Supply Schedule Pricelist’ for all GSA Schedules identified in the Attachment 3, Tab 3 Test Market Basket.” RFP at 12. Moreover, this interpretation is consistent with the record, as it correlates to the concern expressed by the contracting officer during her review about the authenticity of Noble’s “GSA authorized schedule pricelist.” COS at 10. Because we conclude that the term is unambiguous, our inquiry ceases, and this protest ground is denied.⁷ See The Severson Group, B-414999, Sept. 26, 2017, 2017 CPD ¶ 297 at 2-3 (denying protest where we found the solicitation language to be unambiguous).

The protest is denied.

Thomas H. Armstrong
General Counsel

⁷ In its comments, Noble now alleges that the agency’s exchanges introduced a latent ambiguity because the agency’s third price related discussion item simply referred to the term “pricelist submission.” The protester asserts that it interpreted the term “pricelist submission” to refer to the firm’s authorized FSS pricelist, whereas Noble now contends the agency must have instead meant the item prices listed on Noble’s TMB worksheet. Comments at 12-13. The protester asserts that by using such “ambiguous request language in the Exchange Letter,” the agency is attempting to “hide the ball with respect to the pricing requirements.” Id. at 12. In our view, the protester’s assertion that it was misled by the exchange is not credible. Noble provides no citation to the record to support its contention about what it claims the agency must have meant, and, as discussed above, our review concludes that both Noble and the agency shared the same interpretation of the phrase, “pricelist submission must be the authorized GSA schedule pricelist.” AR, Tab 8, Noble Exchange Letter, at 3.