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Decision

Matter of: Los Alamos Technical Associates, Inc.

File: B-421034

Date: November 30, 2022

Samuel S. Finnerty, Esq., Katherine B. Burrows, Esq., and Patrick T. Rothwell, Esq., Piliro Mazza PLLC, for the protester.

Cody Corley, Esq., Wendy Bateman, Esq., and Tracy Herrell, Esq., National Aeronautics and Space Administration, for the agency.

Sarah T. Zaffina, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that the agency was required to refer the protester to the U.S. Small Business Administration for possible issuance of a certificate of competency is denied where the agency rejected the protester's proposal for failure to submit required information, which did not constitute a responsibility-type determination.

DECISION

Los Alamos Technical Associates, Inc. (LATA), a small business of Albuquerque, New Mexico, protests the rejection of its proposal under request for proposals (RFP) No. 80JSC022R0011, issued by the National Aeronautics and Space Administration (NASA) for environmental compliance and operation support services. The protester argues that the agency unreasonably found the firm's proposal unacceptable, and that the determination of unacceptability was essentially a determination of nonresponsibility that the agency was required to refer to the U.S. Small Business Administration (SBA) for possible issuance of a certificate of competency.

We deny the protest.

BACKGROUND

On July 12, 2022, NASA issued the RFP as a total small business set-aside pursuant to Federal Acquisition Regulation (FAR) part 15, Contracting by Negotiation, procedures.¹ Agency Report (AR), Tab 2.00, RFP at 0003, 0013, 0015.² The agency sought proposals for a firm to provide “groundwater monitoring, environmental restoration, multi-media environmental compliance, sustainability program services and general environmental operation support services” at the Johnson Space Center, White Sands Test Facility in New Mexico. *Id.* at 0013, 0073.

The solicitation contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract, with cost-plus-fixed-fee and fixed-price task orders to be issued during a 5-year period of performance. *Id.* The solicitation provided for award to be made on a best-value tradeoff basis using streamlined procurement evaluation factors and a limited tradeoff analysis. AR, Tab 2.03, RFP amend. 2 at 1079, 1081. The solicitation provided that the agency would conduct an initial review of proposals “to determine acceptability of the proposals in accordance with [NASA FAR Supplement (NFS)] 1815.305-70, Identification of Unacceptable Proposals” and eliminate all unacceptable proposals from the competition. *Id.* at 1079.

NSF section 1815.305-70 states as follows:

(a) The contracting officer shall not complete the initial evaluation of any proposal when it is determined that the proposal is unacceptable because:

(1) It does not represent a reasonable initial effort to address the essential requirements of the RFP or clearly demonstrates that the offeror does not understand the requirements;

...

(3) It contains major deficiencies or omissions or out-of-line costs which discussions with the offeror could not reasonably be expected to cure.

NSF 1815.305-70(a)(1) & (3); see *also* Contracting Officer’s Statement (COS) at 5-6.

¹ The solicitation was amended twice, neither amendment is relevant to the protest grounds. We cite the final version of the solicitation as it was issued in amendment 2 unless otherwise noted.

² Citations to the record use the Adobe PDF pagination of documents submitted by the parties.

The solicitation provided that the remaining proposals would be evaluated under the technical acceptability factor, and that “[a]ll ‘[a]cceptable’ or ‘[p]otentially [a]cceptable’ proposals” would be further evaluated against past performance and cost/price.³ *Id.* at 1079. The solicitation further provided that tradeoffs would be made between past performance and cost/price for proposals evaluated as acceptable under the technical acceptability factor, with past performance and cost/price considered approximately equal. *Id.* at 1081.

Additionally, the solicitation expressly stated that “[a]t the completion of the evaluation against the [p]ast [p]erformance and [c]ost/[p]rice [f]actors, the [g]overnment may elect to award a contract without discussions to the technically ‘[a]cceptable’ responsible offeror, who represents the best value.” *Id.* at 1079; *see also* AR, Tab 2.00, RFP at 0014 (directing offerors to review FAR provision 52.215-1(f)(4), which was incorporated by reference and which states that the government intends to “award a contract without discussions with offerors”).

The solicitation required offerors to submit the following five volumes electronically: (I) technical approach, (II) past performance, (III) cost and price, (IV) responsibility considerations, and (V) model contract. The RFP supplied specific instructions about the content, page limitations, and format of the volumes. *Id.* at 1005-31. The solicitation further established that the agency would select a proposal that “offers the best overall value to the [g]overnment[,] that meets all solicitation requirements[,] and is determined responsible in accordance with FAR 9.104, Standards, as required in [the volume] for [r]esponsibility [c]onsiderations.” *Id.* at 1081.

As relevant here, the solicitation specifically instructed all offerors “to submit the entire [m]odel [c]ontract inclusive of every section A-J also to include all requested fill-ins” in volume V. *Id.* at 1009. Additionally, the solicitation informed offerors that while the model contract would not be evaluated for selection purposes, the model contract would be

reviewed to ensure that it was signed by a person authorized to commit the [o]fferor, that there is completion of all fill-ins, all pages of the contract are submitted in their entirety, and that it accurately captures the content as set forth in the Offeror’s proposal. *Errors or inconsistencies in the Model Contract may result in an offeror being removed from consideration for award.*

AR, Tab 2.03, RFP amend. 2 at 1089 (emphasis added). The solicitation further informed offerors that

³ A proposal would be rated potentially acceptable where the proposal did not meet the definition for a rating of acceptable and the agency anticipated the proposal could be made acceptable following discussions. *Id.* at 1080.

Model contract deletions or revisions differing from the requirements set forth by the Government will not be considered and may result in an offeror's proposal being unacceptable in accordance with NFS 1815.305-70, Identification of unacceptable proposals.

Id.

LATA submitted its proposal containing nine files by the August 25, 2022, deadline for proposals. COS at 3. Upon receipt of LATA's proposal, the streamlined procurement team conducted an initial review of the proposal to determine compliance with the solicitation instructions in section L and to determine acceptability pursuant to NFS section 1815.305-70. *Id.* at 6; see also AR, Tab 4.01, LATA Proposal Review Checklist at 1392-98. The agency deemed LATA's proposal non-compliant with the RFP because LATA failed to submit volume 5, the model contract, as part of its proposal. AR, Tab 4.01, LATA Proposal Review Checklist at 1392, 1394, 1397-98. Accordingly, the agency found LATA's proposal unacceptable pursuant to NFS section 1815.305-70 "because it contains major omissions and deficiencies," and the agency removed LATA's proposal from the competition. AR, Tab 4.02, Determination of Unacceptable Proposal for LATA at 1401.

On August 29, NASA notified LATA that its proposal was unacceptable and excluded from further evaluation. AR, Tab 5.01, Notice of Unacceptable Proposal at 1409. The same day, after receiving the notification, LATA emailed the contracting officer advising that LATA had not included the correct file for the model contract and submitted a new file with the model contract. AR, Tab 5.02, Email from LATA to NASA dated Aug. 29, 2022, at 1411. The protester also requested that the contracting officer reconsider the decision to eliminate LATA's proposal. *Id.* The contracting officer advised LATA that the decision to eliminate LATA's proposal was necessary to "preserve[]the overall integrity of the procurement process" and treat all offerors equally. AR, Tab 5.03, Email from NASA to LATA dated Aug. 30, 2022 at 1413. On September 8, LATA again requested that its proposal be evaluated and again attached the model contract, as well as attachment L-10, Prime/Subcontractor Responsibility Matrix, which was required and which LATA had also failed to submit in its proposal. AR, Tab 5.04, Email from LATA to NASA dated Sept. 8, 2022 at 1416. The contracting officer did not respond to LATA before LATA filed its protest on September 8.

DISCUSSION

The protester challenges NASA's rejection of the firm's proposal as unacceptable, arguing that the agency's determination of unacceptability was essentially a determination of nonresponsibility that should have been referred to the SBA pursuant to certificate of competency (COC) procedures before the agency eliminated the firm's proposal from consideration for award. Protest at 5-11. The agency responds that it rejected the protester's proposal because the protester failed to comply with the solicitation's explicit instructions to submit volume V, the model contract, which was not

a responsibility determination. Memorandum of Law (MOL) at 5-8, 12-15; *see also* COS at 7-8. For the reasons that follow, we find no basis to sustain the protest.⁴

When reviewing an agency's rejection of a proposal as non-compliant, our Office will examine the record to determine whether the agency's decision was reasonable and in accordance with the solicitation criteria and applicable statutes and regulations. *Global Dimensions, LLC*, B-419672, May 12, 2021, 2021 CPD ¶ 203 at 3. It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information that clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. *ESAC, Inc.*, B-413104.34, Apr. 17, 2019, 2019 CPD ¶ 162 at 4. Where a proposal omits required information, the offeror runs the risk that its proposal will be rejected. *Global Dimensions, LLC, supra*.

As set forth above, the solicitation required offerors to submit the model contract in volume V of their proposals. AR, Tab 2.03, RFP amend. 2 at 1008-09, 1031. The solicitation advised that although the model contract would not be evaluated for selection purposes, it would be reviewed for compliance with the solicitation instructions. *Id.* at 1089. Specifically, the solicitation advised offerors that the model contract would be reviewed "to ensure that it was signed by a person authorized to commit the [o]fferor, that there is completion of all fill-ins, all pages of the contract are submitted in their entirety, and that [the model contract] accurately captures the content as set forth in the [o]fferor's proposal." *Id.* The solicitation further advised that model contract errors, inconsistencies, deletions, or revisions that were different from the solicitation requirements may result in an offeror's proposal being considered unacceptable and removed from consideration for award. *Id.*

It is undisputed that the protester failed to submit the model contract with its proposal by the August 25, 2022, deadline for proposals. Protest at 5 ("On August 29, 2022, shortly after receiving the [unacceptable proposal n]otice, LATA submitted the [m]odel [c]ontract to the [a]gency."). Nonetheless, LATA avers that the model contract did not have any bearing on the technical evaluation and was "an administrative/check-the-box exercise," and that the only information that NASA received from LATA after its initial proposal submission that the agency did not already have was model contract attachment L-10 and section K, both of which the protester contends relate to responsibility matters. Protest at 7-9. Accordingly, the protester argues, its proposal was rejected solely due to its failure to submit responsibility information, which was essentially a determination of nonresponsibility that should have been referred to SBA for a COC determination. *Id.* at 9. In the alternative, the protester argues that the responsibility-related information required under the model contract could have been submitted to the agency at any point prior to award, which the protester maintains it did on August 29 (and again on September 8). *Id.* at 9-10; Comments at 6-7.

⁴ LATA raises other collateral arguments. Although our decision does not specifically address them all, we have considered each argument and find that none provides a basis on which to sustain the protest.

The agency responds that it did not make a responsibility determination when it eliminated LATA from the competition. MOL at 4, 12-15. NASA maintains that it followed the evaluation requirements set forth in the solicitation and properly excluded the protester's proposal from consideration because it was non-compliant with solicitation instructions. *Id.* at 4-8. NASA explains that its evaluation was based on the protester's failure to submit required information--the model contract--in response to the solicitation and asserts the agency was not required to conduct discussions. *Id.* at 4-12. As such, the agency argues, its rejection of the protester's proposal was not a responsibility determination and the agency had no duty to refer the matter to the SBA. *Id.* at 12-15.

Moreover, NASA responds that the protester incorrectly assumed that the model contract requirement would only be evaluated to determine an offeror's responsibility so that LATA could submit the model contract at any time prior to award. *Id.* at 13-14. The agency contends, however, that the solicitation did not indicate that the model contract was a responsibility factor. *Id.* at 14. NASA argues because the model contract was not related to an offeror's responsibility, and the agency did not intend to conduct discussions, LATA could not timely submit the model contract after the deadline for proposals. See *id.* at 9-14.

Under the SBA's COC program, agencies must refer a determination that a small business is not responsible to the SBA, if that determination would preclude the small business from receiving award.⁵ 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6; *Specialty Marine, Inc.*, B-292053, May 19, 2003, 2003 CPD ¶ 106 at 3. The SBA's regulations specifically require a contracting officer to refer a small business concern to SBA for a COC determination when the contracting officer has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (*e.g.*, pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii). When, however, an agency finds a proposal to be unacceptable based on an offeror's failure to submit required information, the finding does not constitute a determination that the offeror is not a responsible prospective contractor. *MicroTechnologies, LLC*, B-414670, B-414670.2, Aug. 1, 2017, 2017 CPD ¶ 236 at 6; *Eagle Aviation Servs. & Tech., Inc.*, B-403341, Oct. 14, 2010, 2010 CPD ¶ 242 at 4-5; see also *Facility Servs. Mgmt., Inc.--Adv. Op.*, B-414857.9, Aug. 23, 2018, 2019 CPD ¶ 35 at 8-9 n.12 ("[W]here a proposal is found technically unacceptable because of a failure to include required information, that finding does not constitute a responsibility-type determination necessitating a referral, even if the evaluation factor in question is arguably responsibility-related.").

⁵ A COC is the certificate the SBA issues to a firm stating that the certificate holder is responsible for the purpose of receiving and performing a specific government contract. FAR 19.601(a).

Here, the record establishes that the agency rejected the protester's proposal because it was non-compliant with the solicitation instructions requiring the model contract to be submitted in the offeror's proposal. Accordingly, we do not agree with the protester that the agency's rejection of LATA's proposal involved a determination of the protester's responsibility that required referral to the SBA.

Furthermore, we disagree with the protester that it could have submitted its model contract at any time prior to the award decision. In this situation, the solicitation provided that the agency would review the model contract as part of an initial review for compliance with the solicitation instructions; the model contract was not evaluated as a responsibility-related factor. Consequently, LATA could not simply submit the model contract after proposals were due and before contract award to cure its non-compliant proposal because the model contract then would be late. See *TriStar Aerospace LLC*, B-419093, Dec. 11, 2020, 2020 CPD ¶ 400 at 4 (denying protest that the agency improperly rejected protester's proposal as late where part of the proposal was received before proposals were due and part was submitted after the deadline for proposals).

In sum, the record reflects that NASA eliminated the protester's proposal from further consideration for award because the firm failed to submit required information in the format prescribed by the solicitation, which the solicitation cautioned would result in an offeror's proposal being deemed unacceptable, and removed from consideration for award. It was therefore unnecessary for NASA to refer the protester to the SBA for the possible issuance of COC determination.

The protest is denied.

Edda Emmanuelli Perez
General Counsel