



Decision

Matter of: Aspen Ridge Construction & Consulting

File: B-422274

Date: March 28, 2024

Jeff Severin, for the protester.

Major James S. Kim, Department of the Army, for the agency.

Heather Self, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably failed to respond to pre-proposal questions is denied where the protester does not demonstrate that the solicitation's terms are otherwise inadequate, unclear, or ambiguous.

DECISION

Aspen Ridge Construction & Consulting (Aspen), a small business of Lilliwaup, Washington, protests the terms of request for proposals (RFP) No. W911SA24R2000, issued by the Department of the Army for construction services. The protester contends that the RFP's evaluation and award methodology are unclear.

We deny the protest.

BACKGROUND

On November 21, 2023, using the procedures of Federal Acquisition Regulation (FAR) part 15, the agency issued the solicitation for construction services to be provided at various U.S. Army Reserve properties in the "Buckeye (Ohio) Region." Agency Report (AR), Tab 3, Initial RFP at 1.¹ The solicitation contemplates award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract under which typical fixed-price orders may include "repair and maintenance of real property, repair and replacement of HVAC [heating, ventilation, and air conditioning], water, and sewer systems, paving, roofing, interior and exterior painting, ceiling repairs or replacements, repair or replacement of floor coverings, renovations, refurbishments, civil works and electrical repairs involving all of the building crafts and trades." AR, Tab 4, RFP amend. 1 at 8 ¶ 8.g, 9 ¶ 13.a.1; Tab 6, RFP attach. 1, Revised Statement of Work (SOW) at 3 ¶ C.1.1. The awarded

¹ Our citations use the Adobe PDF pagination of documents in the record.

IDIQ contract will have a 5-year ordering period, a guaranteed minimum of “one project,” and a maximum value of \$15 million. AR, Tab 3, Initial RFP at 11; Tab 4, RFP amend. 1 at 4 ¶ 3.a-b.

The solicitation includes SOWs of three sample projects for which offerors are required to submit cost proposals that will be used in the technical evaluation, but not included as part of the price evaluation. AR, Tab 4, RFP amend. 1 at 8 ¶ Attachments b.1, 10 ¶ 13.c.3; *see generally* AR, Tabs 11-13, RFP attachs. TE-6 Sample HVAC SOW, TE-7 Sample Exterior & Interior Lighting SOW, and TE-8 Sample Parking Lot & Sidewalk Repairs SOW. The solicitation requires offerors to “demonstrate their ability to produce accurate, fair, and reasonable project line items by submitting three (3) sample projects utilizing RS Means.” AR, Tab 4, RFP amend. 1 at 9 ¶ 12. The agency explains that RS Means is a database that “contains more than 92,000 line-items,” and that the construction costs in the database are composed of “material, labor, and/or equipment prices and can be referenced at the unit, assembly, or square foot level of detail.” Contracting Officer’s Statement (COS) at 3 ¶ 7. The solicitation requires the successful contractor to use this same RS Means database as “[t]he approved UPB [unit price book]” for preparation of future task order cost proposals. AR, Tab 4, RFP amend. 1 at 5 ¶ 6.a, 6 ¶ 8.a-b; *see also* AR, Tab 6, RFP attach. 1 Revised SOW at ¶ C.1.3.a.1.

In addition to the sample project SOWs, the solicitation includes a TE-2 Coefficient Spreadsheet that offerors are required to complete and submit for use in the evaluation of price. AR, Tab 4, RFP amend. 1 at 6 ¶ 8.c; *see also* AR, Tab 7, RFP attach. 2, TE-2 Coefficient Spreadsheet. The solicitation explains that the coefficient is a

location-specific multiplier(s), developed and proposed by the Contractor, to be applied against the published UPB cost line items for the purpose of providing consideration to the Contractor for the following indirect costs: General and administrative and other overhead costs, insurance costs, bonding and alternative payment protection costs, protective clothing, equipment rental, and Contractor’s profit.

Id.

In sum, the solicitation establishes a payment structure for future orders under which the contractor’s direct costs will be fixed at the applicable RS Means unit price and the amount due for the contractor’s indirect costs will be determined by multiplying the direct line item UPB costs by the applicable coefficient. COS at 3 ¶ 10.

Turning to evaluation and award methodology, the solicitation states the procurement “is a best value source selection conducted in accordance with Federal Acquisition Regulation (FAR) 15.101-2, Lowest price technically acceptable source selection process,” that “[a]ward will be made to one offeror” that submits “the Lowest Priced Technically Acceptable [LPTA] offer,” and that “[t]rade-offs between cost/price and non-cost/price factors are not permitted.” AR, Tab 4, RFP amend. 1 at 9 ¶ 13.a.1-2. In addition to price, the solicitation establishes three technical evaluation factors, each of

which will be assessed as acceptable or unacceptable: (1) set-aside percentage; (2) “Inaccurate & Unrealistic Line Items”; and (3) proposed project costs. *Id.* at 9 ¶ 12.

For technical factor 2 “Inaccurate & Unrealistic Line Items,” the solicitation advises:

Estimates shall only include line items that are necessary for the completion of projects, two-line items for the same cost could be found inaccurate. Additionally, line items that do not contribute to the completion of the project are considered to be not fair and reasonable. Estimates that contain inaccurate and unreasonable line items may be found technically unacceptable.

AR, Tab 4, RFP amend. 1 at 10 ¶ 13.c.2. For technical factor 3, proposed project costs, the solicitation provides:

The Government will evaluate the proposed project costs contained in Technical Exhibits 6-8 [sample project] estimates. Project costs are for technical evaluation only and should not be included as part of the price evaluation of the contract. . . . Project costs that the government considers too unreasonably high or low could be found technically unacceptable. Do not apply a coefficient to these projects.

Id. at 10 ¶ 13.c.3.

Regarding assessment of offerors’ pricing, the solicitation states: “The Government will solely utilize the TE-2 Coefficient Spreadsheet as the sole source of price evaluation. Sample projects will not be included in the evaluation. Unreasonable price/coefficients may not be considered.”² AR, Tab 4, RFP amend. 1 at 10 ¶ 13.d.

The agency issued amendment 1 to the RFP which, among other things, provided answers responding to questions received. Relevant here, two questions related to the pricing evaluation methodology. One question and answer (Q&A) exchange provided:

Q5. Please describe how the government intends to evaluate the coefficients to be reasonable? It appears from the solicitation that someone could create a complete and accurate RS Means estimate and still apply a low coefficient. Please give the matrix that will be used to determine what an unrealistic coefficient will be.

A5. Project costs are for technical evaluation only and should not be included as part of the price evaluation of the contract. The sample projects will not have a coefficient applied to them.

² As will be discussed below, the initial solicitation stated: “Unrealistic price/coefficients may not be considered.” AR, Tab 3, Initial RFP at 9 ¶ 13.d. The agency amended the solicitation, however, to change “unrealistic” to “unreasonable.” AR, Tab 4, RFP amend. 1 at 10 ¶ 13.d.

AR, Tab 4, RFP amend. 1 at 2 Q&A No.5.

The second Q&A exchanged covered the following:

Q7. Under evaluation of technical criteria item 'd' it states that the government will utilize only the TE-2 spreadsheet for price evaluation and that unrealistic coefficients may not be considered. Please define how this will be determined?

A7. Please be aware that we are changing unrealistic to fair and reasonable. A price that is fair to both parties, considering the agreed-upon conditions, including the promised quality and time of contract performance.

Id. at 2 Q&A No. 7. In addition to the Q&A responses included in RFP amendment 1, the agency responded directly to some further questions from Aspen on December 26. Specifically, Aspen asked:

Under basis for award item 3 D still states that the TE-2 spreadsheet is the sole source of the price evaluation. (Unreasonable price/coefficients may not be considered). How will the government determine what an unreasonable price/coefficient is? The answer A7 states please be aware we [are] changing unrealistic to fair and reasonable but that does not state how the government will determine if a coefficient is too low.

AR, Tab 14, Email Exchange between Agency and Aspen at 2. The agency responded: "We will use the proposal analysis techniques IAW [in accordance with] [FAR] 15.404-1." *Id.*

Prior to the December 28 time set for receipt of proposals, Aspen filed this protest with our Office challenging the terms of the solicitation.

DISCUSSION

Aspen argues the solicitation is unclear about how the price and technical evaluations will be conducted and how they will relate to one another for award purposes. While we do not discuss in detail every permutation of the protester's arguments, we have considered them all and find none provides a basis to sustain the protest.³

³ Aspen also initially challenged the solicitation as being unclear or inconsistent as to whether award would be made on a best-value or LPTA basis. Protest at 2. In response to a question asking how the solicitation could "be both best value and LPTA," the agency responded only that the querying offeror should "[p]lease familiarize yourself with FAR Part 15, which addresses the processes involved in contracting through negotiations." AR, Tab 4, RFP amend. 1 at 2 Q&A No. 1. In its report responding to the protest, the agency more fulsomely explains that FAR part 15 provides for a best-value
(continued...)

As a general rule, a solicitation must be drafted in a fashion that enables offerors to intelligently prepare their proposals in a manner that allows offerors to compete on a common basis. *Raymond Express Int'l*, B-409872.2, Nov. 6, 2014, 2014 CPD ¶ 317 at 9. A solicitation's evaluation factors and subfactors must be tailored to the acquisition in question. FAR 15.304(a). Agencies are not required, however, to disclose their methodology for evaluating proposals under the stated evaluation criteria. FAR 15.304(d); *360 IT Integrated Solutions*, B-414650.19 *et al.*, Oct. 15, 2018, 2018 CPD ¶ 359 at 12. With respect to price, our decisions generally have not required agencies to disclose their specific methods of price analysis in the solicitation so long as the methods are reasonable. *OBXtek, Inc.*, B-417880 *et al.*, Nov. 25, 2019, 2019 CPD ¶ 410 at 5.

Price Evaluation

First, Aspen takes issue with the agency's responses to offeror questions 5 and 7 of amendment 1 to the solicitation, which asked about the solicitation's pricing evaluation methodology. Aspen contends the agency either failed to answer the questions asked or answered them in a way that does not make sense. Protest at 2. The agency responds that it answered the questions posed and that the protester's disagreement with the Army's answers "is not a valid basis for protest because the Protester fails to state why the Army's answers are unacceptable or prejudiced the Protester." MOL at 2.

Here, the protester's allegations that the agency failed to respond to pre-proposal questions do not provide a basis to sustain the protest. Our Office will only sustain a protest challenging an agency's failure to respond to questions when a protester demonstrates that the solicitation is otherwise inadequate, unclear, or ambiguous. *Pathfinder Consultants, LLC*, B-419509, Mar. 15, 2021, 2021 CPD ¶ 124 at 4. In this regard, a protester complaining that an agency did not respond to pre-proposal

continuum and that both LPTA and tradeoff are permissible best-value award methodologies. Memorandum of Law (MOL) at 10, *citing* FAR 15.101. The protester acknowledges "that technically the solicitation that was issued can be called 'Best Value' however in the truest sense of the words it is just a LPTA solicitation." Resp. to Post-AR Req. for Dismissal at 1. While the protester caveats its acknowledgment that an LPTA award is a type of best-value award, we consider the concession sufficient to constitute a withdrawal of this protest argument.

Moreover, we note that as defined by the FAR, "best value" simply means "the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement." FAR 2.101. In this regard, the FAR specifically identifies the LPTA source selection process as part of the "best value" continuum, describing the process to be appropriate when "best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price." FAR 15.101-2; *see e.g., Platinum Servs., Inc.; WIT Assocs., Inc.*, B-409288.3 *et al.*, Aug. 21, 2014, 2014 CPD ¶ 261 at 6-7 (explaining that both a tradeoff and LPTA source selection process are part of a best value continuum).

questions must show that the solicitation lacked sufficient clarity to permit competition on an intelligent and equal basis. *Id.*; *HG Props. A, L.P.*, B-280652, Nov. 2, 1998, 98-2 CPD ¶ 104 at 7.

Our review finds that the crux of both questions 5 and 7 ask for an explanation of how the agency will evaluate offerors' proposed coefficients--*i.e.*, asking the agency (1) to "describe how the government intends to evaluate the coefficients to be reasonable"; (2) to provide "the matrix that will be used to determine what an unrealistic coefficient will be"; and (3) to explain how unrealistic coefficients "will be determined." AR, Tab 4, RFP amend. 1 at 2 Q&A Nos. 5 and 7.

The agency's response to question 5 is non-responsive to the question posed by the offeror. In other words, the agency's response--that "[p]roject costs are for technical evaluation only and should not be included as part of the price evaluation of the contract"--does not answer the question of "describe how the government intends to evaluate the coefficients to be reasonable . . . [and] [p]lease give the matrix that will be used to determine what an unrealistic coefficient will be." *Id.* at 2 Q&A No. 5. While the agency's response to question 7 did clarify that the price evaluation was amended from being an assessment of whether an offeror's coefficient was unrealistic (*i.e.*, too low) to being an assessment of whether an offeror's coefficient was reasonable (*i.e.*, not too high), the response, similarly, did not answer the crux of the question--which was how the reasonableness (vice realism) of proposed coefficients will be determined. *Id.* at Q&A No. 7.⁴

Notwithstanding the agency's responses to questions 5 and 7, the protester has not shown that the solicitation lacks sufficient clarity to permit competition on an intelligent and equal basis. Rather, the solicitation here is clear that the agency will evaluate price based solely on an offeror's proposed coefficient, and that coefficients will be evaluated only for reasonableness. AR, Tab 4, RFP amend. 1 at 10 ¶ 13.d. Thus, we deny the protesters challenge that the agency's failure to respond to pre-proposal questions resulted in an unfair or unequal competition. See *e.g.*, *Pathfinder Consultants, LLC*, *supra* at 5 (finding that agency's failure to respond to pre-proposal questions did not result in an unfair or unequal competition where the solicitation was not otherwise

⁴ As noted above, in communication directly with Aspen, the agency did provide an answer more responsive to the crux of questions 5 and 7, stating that the assessment of offerors coefficients would be done in accordance with the price evaluation methodologies set forth in FAR section 15.404-1. AR, Tab 14, Email Exchange between Agency and Aspen at 2. Aspen takes issue with the agency's provision of an answer "directly to us without issuing a formal amendment or any kind of Q&A's, for all offerors to see," contending that had other offerors been privy to this response it "probably would have affected other offeror's pricing." Comments at 1. Here, the agency's response to Aspen simply cited FAR section 15.404-1 as providing the basis for the Army's price evaluation. Accordingly, the agency's direct response to Aspen did not provide the protester with any information about the evaluation methodology not known to other offerors.

inadequate, unclear, or ambiguous); *360 IT Integrated Solutions, supra* at 12 (denying challenge to agency's failure to respond to pre-quotation questions, noting that "[a]lthough it might help [protester] to know the precise formula [the agency] uses to calculate its overall adjectival rating, for example, being ignorant of this formula will not prevent the vendor from providing a quotation that fully meets the requirements of the solicitation.").

Next, in its comments responding to the agency report, the protester asserts that, in the past, contracts for similar work "have always used the TE-2 coefficient spreadsheet," and that "[o]ver the years the coefficients . . . have gotten lower and lower." Comments at 1. The protester maintains that "[i]f FAR 15.404-1 is used to evaluate the coefficients the historical data that would be available will be skewed as the agency has allowed the coefficients to go lower and lower over the years when we all know that costs have risen not declined." *Id.* at 2. Thus, the essence of the protester's comments is an argument that the agency should be evaluating whether offerors' proposed coefficients--and therefore the resulting prices--are too low.

Our Office has explained that price reasonableness concerns whether a price is unreasonably high, while price realism relates to whether a price is too low. See *Systems Plus, Inc.*, B-415559, B-415559.2, Jan. 12, 2018, 2018 CPD ¶ 27 at 6; FAR 15.404-1(b), 15.404-1(d). As a general matter, when, as here, an agency seeks to award a fixed-price contract, it is only required to determine whether proposed prices are fair and reasonable. FAR 15.402(a). Price realism need not be considered in evaluating proposals for the award of a fixed-price contract, because such contracts place the risk of loss on the contractor rather than the government. *Patronus Systems, Inc.*, B-418784, B-418784.2, Sept. 3, 2020, 2020 CPD ¶ 291 at 4. An agency, however, may include in a solicitation, a provision that provides for a price realism evaluation, for the purpose of assessing whether an offeror's low price reflects a lack of understanding of the contract requirements or the risk inherent in the offeror's proposal. *Id.*

As discussed above, the solicitation initially provided that "unrealistic price/coefficients may not be considered," but the agency later amended this language to remove "unrealistic" and replace it with "unreasonable." *Compare* AR, Tab 3, Initial RFP at 9 ¶ 13.d. *with* AR, Tab 4, RFP amend. 1 at 10 ¶ 13.d. The Army called attention to this change in its response to question 7, stating: "Please be aware that we are changing unrealistic to fair and reasonable." AR, Tab 4, RFP amend. 1 at 2 Q&A No. 7. Despite being aware that the agency was specifically changing its price evaluation from assessing realism (whether a coefficient is too low) to reasonableness (whether a coefficient is too high), Aspen's initial protest did not raise the firm's concern that the agency should be assessing the realism of offerors' coefficients.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to represent their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Logistics Mgmt. Inst.*, B-417601 *et al.*, Aug. 30, 2019, 2019 CPD ¶ 311 at 14. Under these rules, protests based on alleged improprieties in a

solicitation must be filed prior to “the time set for receipt of initial proposals.” 4 C.F.R. § 21.2(a)(1). Additionally, when a protester initially files a timely protest, and later supplements it with independent grounds of protest, these later-raised allegations must independently satisfy our timeliness requirements. *Savvee Consulting, Inc.*, B-408416.3, Mar. 5, 2014, 2014 CPD ¶ 92 at 5. Our Office will dismiss a protester’s piecemeal presentation of arguments that could have been raised earlier in the protest process. *American Roll-On Roll-Off Carrier Group, Inc.*, B-418266.9 *et al.*, Mar. 3, 2022, 2022 CPD ¶ 72 at 11 n.12.

Here, with the issuance of amendment 1, the agency’s intent--to evaluate pricing to assess only whether offerors’ coefficients were too high without regard to whether the coefficients were too low--was apparent from the face of the solicitation. AR, Tab 4, RFP amend. 1 at 2 Q&A No. 7, 10 ¶ 13.d. Thus, to the extent that Aspen considers the solicitation’s price evaluation methodology flawed because the RFP did not provide for the consideration of the realism of offerors’ coefficients, Aspen was required to raise this argument in its initial protest, which was timely filed prior to due date for receipt of initial proposals.

As noted, our regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific legal arguments missing from earlier general allegations of impropriety. *CapRock Gov’t Solutions, Inc. et al.*, B-402490 *et al.*, May 11, 2010, 2010 CPD ¶ 124 at 24. Here, the protester knew the operative facts underlying this allegation prior to its initial protest. Thus, the information upon which the new argument made by the protester in its comments was known or should have been known prior to the filing of Aspen’s initial protest. Because the protester waited until its comments to raise this new argument, which could have been raised in its initial protest, it is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1); *The Writing Co.*, B-284622.2, May 19, 2000, 2000 CPD ¶ 100 at 6 (dismissing challenge to the type of contract contemplated by the solicitation when this argument was not raised until submission of the protester’s comments on the agency report but could, and should, have been raised in the initial protest challenging other terms of the solicitation); *see also Spatial Front, Inc.*, B-417985, B-417985.2, Dec. 18, 2019, 2019 CPD ¶ 8 at 11 n.13 (dismissing as untimely piecemeal presentation, arguments that could have been raised in initial protest).

Technical Evaluation

Aspen also challenges the agency’s proposed method of technical evaluation for the three sample project SOWs. The solicitation sets forth that the agency will evaluate whether an offeror’s proposed costs for the sample projects are “unreasonably high or low.” AR, Tab 4, RFP amend. 1 at 10 ¶ 13.c.3. Aspen makes the following assertion: “It is not possible to show whether costs are unreasonably high or low using RS MEANS. You either have accurate line items or you don’t. RS MEANS determines the pricing.” Protest at 2.

The agency responded to this argument in its report, explaining that the assessment of offerors' sample project costs "under technical criteria 2 and 3 was to ensure only accurate and necessary line items are included." COS at 8. According to the Army, while "RS Means determines the pricing of individual line items, the contractor determines which line items are used, the quantity of those line items, and therefore, the total price of the project." *Id.* The agency explains that the solicitation's evaluation methodology for these sample project costs will not assess the reasonableness of the price of individual line items--which is set by RS Means--but the accuracy of the "RS Means selections" made by an offeror to determine technical acceptability. *Id.* The agency notes that "[u]nless inaccurate line items and quantities are selected, all offers should result in proposed project costs being relatively close" for the three sample projects. *Id.*

The protester did not rebut or otherwise respond to this issue in its comments on the agency report. Therefore, we dismiss this allegation as abandoned. See *e.g.*, *The Writing Co.*, *supra* at 3 n.2 (dismissing as abandoned protester's initial objection to certain evaluation criteria where the agency responded to the issue in its report and the protester did not rebut the issue in its comments).

The protest is denied.

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General Counsel