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Decision

Matter of: Arkel International, LLC

File: B-422014.2

Date: May 22, 2024

Adam Briscoe, Esq., and Todd R. Overman, Esq. Bass Berry & Sims, PLC, for the protester.

Owen E. Salyers, Esq., and Douglas L. Patin, Esq., Bradley Arant Boult Cummings LLP, for East Coast Technologies, LLC, the intervenor.

Tudo N. Pham, Esq., Department of State, for the agency.

Emily R. O'Hara, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging evaluation of awardee's technical proposal is denied where the solicitation did not require proof of authorization to do business in country of performance at time of proposal submission, and agency reasonably evaluated awardee's proposal in accordance with the terms of the solicitation.
 2. Protest challenging awardee's responsibility is dismissed where protester fails to meet GAO's threshold for reviewing an agency's affirmative responsibility determination.
 3. Protest challenging evaluation of awardee's price is denied, where agency's price realism analysis was reasonable.
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DECISION

Arkel International, LLC, of Baton Rouge, Louisiana, protests the award of a contract to East Coast Technologies, LLC (ECT), of Gaithersburg, Maryland, under request for proposals (RFP) No. 19GE50-23-R-0042, issued by the Department of State (DOS) for construction services to renovate the chief of missions residence in Suva, Fiji. The protester contends that the agency's evaluation of the awardee's technical and price proposals was unreasonable.

We deny the protest.

BACKGROUND

On May 8, 2023, the agency issued the solicitation, seeking proposals for construction services for the renovation of the chief of missions residence in Suva, Fiji. Agency Report (AR), Tab 69, RFP at 12.¹ The agency contemplated awarding a fixed-price contract to the lowest-priced, technically acceptable (LPTA) offeror with a fair, reasonable, and realistic price. *Id.* at 133.

The solicitation provided for the evaluation of proposals in stages. At the initial stage, the agency would review proposals to ensure each proposal was “complete in terms of submission of each required volume.” *Id.* Proposals remaining after the initial review would be evaluated for technical acceptability. *Id.* Technical acceptability would include a review of each element of the technical proposal identified in section L.5.5.3. of the RFP, which included: (1) performance schedule; (2) key personnel; (3) management information; (4) experience and past performance; (5) preliminary quality management program; (6) subcontracting; and (7) recruitment of third country nationals. *Id.* Finally, prices of all technically acceptable offers would be reviewed, and award would be made to the lowest-priced, technically acceptable responsible offeror. *Id.* at 135.

Two proposals were received by the July 31, 2023, deadline. *Id.* at 142; AR, Tab 2, Contracting Officer’s Statement (COS) at 3. The agency found both proposals to be complete, and evaluated the proposals as follows:

	Arkel	ECT
TECHNICAL	Acceptable	Acceptable
Performance Schedule	Acceptable	Acceptable
Key Personnel	Acceptable	Acceptable
Management Information	Acceptable	Acceptable
Experience and Past Performance	Acceptable	Acceptable
Preliminary Quality Management Program	Acceptable	Acceptable
Subcontracting	Acceptable	Acceptable
Recruitment of Third Country Nationals	Not Applicable	Not Applicable
PRICE	\$7,220,271.00	\$4,678,793.20

¹ Citations are to the Adobe PDF pagination of documents. References to the RFP are to the conformed version of the solicitation produced by the agency at tab 69 of its report.

COS at 5; AR, Tab 64, Final Technical Evaluation Panel (TEP) Consensus Memo at 1-3; AR, Tab 66, Recommendation for Award at 4.

On September 20, 2023, the agency made award to ECT as the lowest-priced, technically acceptable offeror. COS at 4. Arkel submitted a protest to our Office on September 26, challenging DOS's evaluation of the awardee's technical and price proposals. *Id.* In response, the agency notified our Office that it would take corrective action, and we dismissed the protest as academic on October 27. *Arkel Int'l, LLC, B-422014.1, Oct. 27, 2023* (unpublished decision).

As part of the corrective action, the agency reevaluated both offerors' technical proposals as well as ECT's price proposal. COS at 4. The agency again selected ECT for award, finding that ECT offered the lowest-priced, technically acceptable proposal. AR, Tab 66, Recommendation for Award at 5. Arkel was notified of the award decision on February 6, 2024. AR, Tab 67, Notice of Unsuccessful Offeror at 1. This protest followed on February 14.

DISCUSSION

Arkel challenges the evaluation of the awardee's proposal. Specifically, the protester contends that ECT was not able to show that it would be authorized to do business in Fiji, as required by the solicitation. Protest at 10. Additionally, the protester alleges the evaluation of ECT's price was flawed. *Id.* at 14; Comments at 6. Although we do not specifically address all of Arkel's arguments, we have fully considered them all and conclude none furnishes a basis to sustain the protest.

Technical Proposal

The protester's principal challenge to the agency's evaluation of ECT's technical proposal is premised on the contention that the awardee was not authorized to do business in Fiji. According to Arkel, ECT should have been found ineligible for award because ECT did not have the authorization at the time of proposal submission or otherwise did not demonstrate the ability to timely obtain one. Protest at 10.

Relevant here, the RFP required offerors to address the status of their authorization to do business in Fiji. RFP at 126-127. The solicitation instructions state:

In accordance with DOSAR [Department of State Acquisition Regulation] 652.242-73 AUTHORIZATION AND PERFORMANCE (AUG 1999), Contractor shall be required to have obtained necessary authorization to do business and operate in the country of performance.

If the offeror has obtained such authorization, provide a copy of the permit, or registration, documentation.

If offeror has not obtained such authorization, . . . the offeror shall provide:

- a) A thorough description as to what steps you have taken to investigate all requirements to obtain authorization to perform in the country of performance
- b) Details of your findings and a description of what your organization will actually be required to undertake to obtain licensing and requisite permit(s)
- c) Any impact such authorization may have on the contractor's operating name and address
- d) Specific information concerning the period of time you anticipate it will take to obtain appropriate authorization. Any plan reflecting a protracted period (i.e. more than 15 calendar days after award) in obtaining license(s) and/or permit(s) shall be rejected at the discretion of the Contracting Officer since further delay would otherwise harm the Government.

Id. at 127 (section L.5.5.3.3 (C)).

Initial Review

The protester argues that the agency should not have allowed the awardee's proposal to pass the initial review stage, because ECT could not have submitted an authorization to do business in Fiji with its proposal. Protest at 12. Arkel adds that "[i]f ECT failed to include its plan to achieve the requisite authorizations and registrations, or omitted how long it would actually take to obtain them, then the Agency should have found ECT's proposal to be incomplete . . . and therefore eliminate its proposal from consideration." *Id.* The agency asserts that ECT's proposal contained the requisite information at the initial review stage, and as such, DOS had no basis to eliminate the awardee's proposal from the competition. Memorandum of Law (MOL) at 11.

As noted, the solicitation advised that, at the initial stage, proposals would be reviewed to ensure they are "complete in terms of submission of each required volume, as specified in [section] L.5," and that proposals "missing a significant amount of the required information may be eliminated from consideration at the Government's discretion." RFP at 133. Section L.5 indicated that an offeror's proposal should consist of a price proposal (Volume 1) and a technical proposal (Volume 2), which was required to address all the submission elements identified in section L.5.5.3 of the RFP. RFP at 123. One of the identified elements (management information) required offerors to identify whether the firm had authorization to do business in Fiji. *Id.* at 126-127.

To satisfy this element, the RFP clearly provided that an offeror either (1) submit documentation of authorization to do business, *or* (2) include an explanation of steps the offeror has taken or will take to obtain the authorization within a reasonable

timeframe. *Id.* Here, the record shows--and the agency acknowledges--that ECT did not have its authorization to do business in Fiji at the time of proposal submission. MOL at 12; AR, Tab 57, ECT Technical Proposal at 33. Consistent with the solicitation, however, the awardee's proposal did include an explanation of the steps ECT had taken to apply for such authorization. See, e.g., AR, Tab 57, ECT Technical Proposal at 33 ("ECT has engaged [specific firms in Fiji] for the provision of services associated with opening a branch, secretarial services, accounting, and taxation in the event of an award of the project in the country."). Thus, at the initial review stage, the agency found the awardee's proposal to be sufficiently complete in order to move to the next stage of evaluation.² COS at 5-6; MOL at 13.

In reviewing protests of an agency's evaluation of proposals, our Office will not reevaluate proposals or substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. *Davos Francois*, B-419973, Oct. 14, 2021, 2021 CPD ¶ 349 at 5. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria as well as applicable procurement statutes and regulations. *Id.*

Here, the record demonstrates that DOS evaluated ECT's proposal in accordance with the solicitation. We find nothing objectionable with the agency's conclusion at the initial review stage, that the awardee's proposal sufficiently addressed the submission requirements and was not missing any "significant amount of the required information" such that it would warrant "eliminat[ion] from consideration at the Government's discretion." RFP at 133. Moreover, even if the agency had identified a "significant amount" of information was missing from ECT's proposal, the RFP did not mandate elimination of the proposal but left it to the discretion of the agency. Truly, the gravamen of the argument here is that the awardee's proposal should have been found unacceptable because ECT did not have authorization to do business in Fiji and could not obtain authorization to do so within a reasonable timeframe--which, essentially is a

² In its comments, the protester takes issue with the fact that this initial review stage is undocumented. Comments at 2. Although an agency must document its evaluation judgments in sufficient detail to show that they are not arbitrary, the necessary amount and level of detail varies from one procurement to another. See *Government Acquisitions, Inc.*, B-401048 *et al.*, May 4, 2009, 2009 CPD ¶ 137 at 8. Additionally, agencies are not required to document determinations of adequacy. *Konica Minolta Bus. Sols. USA, Inc.*, B-418800, B-418800.2, Sept. 4, 2020, 2020 CPD ¶ 292 at 6 n.4 ("[T]hat the agency did not additionally document all determinations of adequacy does not render the evaluation unreasonable or inadequately documented.").

Here, the agency states, and the record confirms, that ECT submitted a complete proposal, and the agency was able to evaluate, document, and find ECT's proposal to be technically acceptable. See COS at 5 ("[ECT] submitted a complete Volume 1 – Price Proposal and Volume 2 – Technical Proposal in accordance with Section L.5."); AR, Tab 56, ECT Price Proposal; AR, Tab 57, ECT Technical Proposal. On this record, we find no basis to sustain the protest.

challenge to the agency's evaluation of ECT's technical proposal; a challenge we address more fully below.

Technical Evaluation

Arkel contends that the evaluation of ECT's proposal was unreasonable because ECT was not authorized to do business in Fiji at the time it submitted its proposal, which Arkel argues violates the terms of the solicitation. Protest at 12. The agency responds, asserting that the solicitation did not mandate offerors be authorized to do business in Fiji at the time of proposal submission, and that the agency evaluated ECT's technical proposal in accordance with the solicitation. MOL at 14.

Our Office will not disturb an agency's evaluation of technical proposals unless it is shown to be unreasonable or inconsistent with the solicitation's evaluation criteria. *Desbuild Inc.; Framaco-Bozdemir JV, LLC, B-421742 et al.*, Sept. 19, 2023, 2023 CPD ¶ 218 at 6. An offeror's disagreement with the agency's evaluation, without more, does not render the evaluation unreasonable. *Automation Precision Tech., LLC, B-416078*, June 5, 2018, 2018 CPD ¶ 203 at 4.

After the initial review, the solicitation explained that proposals would be evaluated for technical acceptability, which involved "a review of each element . . . identified in Section L.5.5.3." RFP at 133. With respect to the management information element, the RFP advised:

The Government will evaluate the offeror's proposal to verify that the offeror is in possession of authorization to operate and do business in the country in which this contract will be performed in accordance with DOSAR 652.242-73 AUTHORIZATION AND PERFORMANCE (AUG 1999) or has undertaken all necessary steps to ensure that the offeror, should he be awarded the resulting contract, will be able to timely obtain all required local licenses and authorizations, as required by Section L.5.5.3.

RFP at 134. As discussed above, the RFP's proposal submission instructions explained that, to meet this requirement, offerors were required, at the time of proposal submission, to either submit a copy of its authorization or describe its plans to obtain authorization. RFP at 127 ("If offeror has not obtained such authorization . . . the offeror shall provide . . .").

The record reveals that ECT's proposal included information detailing the steps the firm had taken to timely obtain the necessary authorizations to do business in Fiji. For instance, the awardee's proposal informed the agency that: "ECT has engaged [DELETED] [firms], for the provision of services associated with opening a branch, secretarial services, accounting, and taxation in the event of an award of the project in the country." AR, Tab 57, ECT Technical Proposal at 33. ECT elaborated that the advisory and accounting firm will handle the actions required for ECT to be authorized

to do business in Fiji, including: reserving the company name, applying for registration as a foreign company, registering for taxes, and creating a local bank account. *Id.* Further, ECT notes that registration “will not affect the project performance or the nature of our business” and that “legal steps can be fulfilled in less than 45 days.” *Id.* at 34.

To determine the technical acceptability of proposals, the evaluators individually assessed each identified element of the offeror’s technical proposal. With respect to this element (management information), the agency found ECT’s proposal to be technically acceptable. AR, Tab 64, Final TEP Consensus Memo at 3. The evaluators found, among other things, that ECT had “provided a detailed plan on how to register a business in Fiji.” *Id.* at 3. The solicitation did not--as the protester advocates--require offerors to be authorized to do business in Fiji at the time of proposal submission. Rather, the solicitation afforded offerors the opportunity to either provide proof of authorization *or* explain how they would obtain authorization within a reasonable timeframe. RFP at 134. As such, we find nothing unreasonable with the agency’s determination that ECT’s proposal complied with the solicitation in providing the necessary information regarding the steps undertaken to ensure the firm would be able to timely obtain the requisite business authorization.

Next, the protester argues that ECT’s proposal should not have been found technically acceptable because ECT’s plan to obtain authorization would have led to “delayed contract performance.” Protest at 13. Here, the record shows that ECT proposed to obtain the requisite authorization to do business within 45 days of award. AR, Tab 57, ECT Technical Proposal at 34. Although the solicitation indicated DOS would disfavor a proposed business authorization timeline with a “protracted period (i.e. more than 15 calendar days after award),” rejection of a proposal based on its estimated timeframe was ultimately “at the discretion of the Contracting Officer.” RFP at 127.

In reviewing ECT’s plan to obtain the business authorization, the evaluators found ECT’s proposed timeframe to be reasonable and indicated that the timeframe would not impact the construction schedule. AR, Tab 64, Final TEP Consensus Memo at 3 (“The proposed procedure and time frame on the company registration is acceptable to the TEP.”). The agency noted that pre-construction activities were scheduled to run concurrently with the business authorization process. *Id.* For example, after the award of the contract, the awardee would be required to submit pre-performance information--such as proof of insurance and irrevocable letters of credit--for the agency’s review within 30 days of award. MOL at 14. The agency estimated that review and acceptance of those documents would take another 30 days. *Id.* According to the agency, because DOS would only allow mobilization and performance to begin after this 60-day review period, the agency concluded that a 45-day timeframe for ECT to obtain its business authorization--which would happen before completion of the 60-day review --would not negatively impact or significantly delay performance of the contract. *Id.* at 14-15. Thus, we find nothing objectionable with the agency’s conclusion that the 45-day timeframe would not delay contract performance. The solicitation plainly allowed for the exercise of the agency’s discretion in this regard. See RFP at 127

(stating that plans “reflecting a protracted period [would be] . . . rejected *at the discretion* of the Contracting Officer”). Therefore, this allegation is denied.³

Responsibility

Employing the same operative facts underlying its technical acceptability challenge to ECT’s proposal, Arkel also argues the agency “failed to render ECT non-responsible due to its inability to be qualified and eligible for award.” Protest at 13. According to the protester, “ECT’s failure to obtain authorization to operate and do business in Fiji should have rendered it unqualified and ineligible to receive this award.” *Id.*

The Federal Acquisition Regulation (FAR) provides that a contract may not be awarded unless the contracting officer makes an affirmative determination of responsibility. FAR 9.103(b). As our Office has explained, the affirmative determination that an offeror is capable of performing a contract is largely committed to the contracting officer’s discretion. 4 C.F.R. § 21.5(c); *ARI Phoenix, Inc.*, B-416878, Oct. 24, 2018, 2018 CPD ¶ 363 at 2. Our Office generally will not consider a protest challenging such a determination, except under certain limited exceptions. *Id.* Those exceptions are protests that allege definitive responsibility criteria in the solicitation were not met and those protests that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. *Id.*; *Desbuild Inc.*; *Framaco-Bozdemir JV, LLC, supra* at 5.

Other than the protester’s bare declaration above, this contention lacks any supporting information or specific allegation. See *Protest* at 13. Arkel has not asserted, for example, that the solicitation contained any definitive responsibility criteria that the awardee failed to meet, or that the contracting officer failed to consider relevant

³ In a related argument, the protester alleges “ECT could not warrant . . . [compliance with] DOSAR 652.242-73 at the time of proposal submission in violation of the terms of the Solicitation.” Protest at 13. The solicitation incorporates section 652.242-73 of the DOSAR, which, in relevant part, states: “The contractor warrants the following: (1) That it has obtained authorization to operate and do business in the country or countries in which this contract will be performed.” DOSAR 652.242-73(a)(1); RFP at 102 (section I.19). We have explained that a general solicitation provision mandating that the contractor obtain all necessary authorizations needed to perform work does not necessarily require that an offeror demonstrate compliance prior to award. *Pernix-Serka LP*, B-407656, B-407656.2, Jan. 18, 2013, 2013 CPD ¶ 70 at 4-5 (finding that the provision at issue, which “by its own terms states that the ‘contractor warrants’ that it has various licenses to do business in the relevant country,” showed that the requirement did not serve as a pre-award requirement). Here, we do not find that the solicitation’s incorporation of the standard DOSAR contract clause required an offeror to warrant that it was authorized to do business in Fiji at time of proposal submission, in light of the more specific provision allowing an offeror to propose its plan to obtain authorization.

information or otherwise violated statute or regulation. Here, because the protester has not alleged either exception to our rules, we have no basis to review the agency's affirmative responsibility determination, and this allegation is dismissed.⁴ 4 C.F.R. § 21.5(c); *URS Fed. Servs., Inc.*, B-417643.2, B-417643.3, Feb. 24, 2020, 2020 CPD ¶ 75 at 3 n.5; *ARI Phoenix, Inc.*, *supra*.

Price Evaluation

Finally, the protester alleges the evaluation of the awardee's price proposal was flawed. According to Arkel, because the awardee's proposed price was much lower than the protester's price, the agency must have either failed to conduct a price realism analysis, or the agency's price realism analysis was flawed. Protest at 14-15; Comments at 7. The agency asserts that its price evaluation was reasonable and consistent with the evaluation criteria. MOL at 18. We agree.

Relevant here, the RFP advised offerors that the agency would conduct a limited price realism analysis. Specifically, the solicitation provided:

The Government will also perform a limited price realism analysis and may reject an offer if such analysis demonstrates that the total price offered is so low as to present an unacceptable risk of failure to perform. In establishing whether or not a price proposed has been understated, a comparison may be made between the proposed price and that of (1) the independent government estimate; (2) to current price information from manufactures and independently obtained cost and price data; (3) fabrication, transportation, and installation costs, and (4) current labor rates.

RFP at 135.

⁴ We note that even if Arkel had argued that the requirement for an offeror to show authorization to do business in Fiji was a definitive responsibility criterion, we would still have no basis to sustain the protest. To be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving the award. *Pernix-Serka, supra* at 4. As applied to a requirement for licensing (or similar authorizations), if the solicitation does not obligate an offeror to possess or show the ability to obtain a particular license or authorization before award, it is not a definitive responsibility criterion; rather, it is a contract performance requirement that does not affect a decision to award a contract. *Id.* Here, the solicitation specifically provided that an offeror could either submit its authorization or explain how it would obtain the authorization if it was awarded the contract. Such evaluation instruction put firms on notice that offerors were not obligated to possess the requisite authorization prior to award. Thus, the term was not a definitive responsibility criterion, and would not have provided a basis to review the contracting officer's affirmative responsibility determination.

Where, as here, a solicitation provides for the award of a fixed-price contract, an agency may provide for the use of a price realism analysis for the limited purpose of measuring an offeror's understanding of the requirements or to assess the risk inherent in an offeror's proposal. FAR 15.404-1(d)(3); *ValidaTek, Inc.*, B-407623, Jan. 17, 2013, 2013 CPD ¶ 38 at 3. The nature and extent of an agency's evaluation in this regard is a matter within the sound exercise of the agency's discretion. *SRA Int'l, Inc.; Vistronix, LLC*, B-413000.1, B-413000.2, July 25, 2016, 2016 CPD ¶ 208 at 10. Our review of a price realism analysis is limited to determining whether it was reasonable and consistent with the terms of the solicitation. *ValidaTek, Inc., supra*.

Here, as permitted by the solicitation, the agency compared offerors' prices to the independent government cost estimate (IGCE) to determine whether prices were understated. AR, Tab 65, Price Evaluation at 1-2. The agency found that ECT's proposed price was 34.16 percent above the IGCE. *Id.* at 2. Based on that comparison, and the agency's conclusion that ECT was aware of the breadth of the project, DOS found ECT's price to be realistic.⁵ *Id.* at 2-3. We find that the agency conducted its limited price realism analysis in accordance with the terms of the solicitation and that the agency's finding was reasonable.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁵ Specifically, the evaluators noted that the awardee's final proposal revisions responding to discussions "have demonstrated that ECT is fully aware of the project's gamut" and that the "information provided by ECT satisfied the Technical Evaluation Panel (TEP) that the offeror has a clear understanding of the required work . . . addressing TEP's concerns in terms of inherent performance risk." AR, Tab 65, Price Evaluation at 2-3; AR, Tab 63, ECT Final Proposal Revision at 1-2.