



Decision

Matter of: Smokeys Helping Hand, LLC

File: B-422957; B-422957.2; B-422957.3

Date: December 3, 2024

Taten Petersian, for the protester.

William B. Blake, Esq., Department of the Interior, for the agency.

Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency unreasonably rejected protester's quotation for failing to demonstrate compliance with the solicitation's terms and conditions is denied where the record shows that the protester quoted an alternate payment schedule.
 2. Protest that the agency unequally conducted discussions is denied where the record shows that the agency did not conduct discussions with any vendor.
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DECISION

Smokeys Helping Hand, LLC (SHH), of Denver, Colorado, protests the issuance of a purchase order to RGZ Forestry, LLC, of Medford, Oregon, under request for quotations (RFQ) No. 140L3724Q0131, issued by the Department of the Interior, Bureau of Land Management (BLM), for vegetation control services. SHH argues that the agency unreasonably evaluated its quotation as offering an alternative payment schedule.

We deny the protest.

BACKGROUND

BLM issued the RFQ to procure commercial vegetation control services over 350 acres in Cibola County, New Mexico. Agency Report (AR), Tab 2, RFQ at 1.¹ Piñon and juniper trees within and adjacent to the project area have encroached on grasslands and meadows decreasing overall watershed capabilities, wildlife habitat, and forage

¹ Citations to the record utilize the Adobe PDF page numbers.

production. *Id.* The selected contractor will cut, lop, and scatter these trees to increase the effectiveness of a subsequent fire spread operation. *Id.*

The RFQ advised that the acquisition would be conducted in accordance with the procedures set forth in Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Products and Commercial Services, and part 13, Simplified Acquisition Procedures. RFQ at 2. The RFQ provided that the agency would issue a fixed-price contract, and that services would be completed within 60 days. *Id.* at 1, 4.

Award would be made on a lowest-priced, technically acceptable basis considering experience, past performance, and price factors. RFQ at 4, 23. When demonstrating experience and past performance, the RFQ instructed vendors to identify three completed contracts that are similar in size and scope. *Id.* at 23.

Prior to the July 30, 2024, close of the solicitation period, six vendors, including SHH and RGZ, submitted quotations. AR, Tab 5, Price Negotiation Memorandum (PNM) at 1. Agency evaluators ranked quotations from lowest-to-highest by price. Contracting Officer's Statement (COS) at 2. SHH submitted the second-lowest priced quotation, and RGZ submitted the third-lowest priced quotation. AR, Tab 5, PNM at 1.

BLM initially evaluated the lowest-priced quotation submitted by "Vendor A." COS at 2. The contracting officer (CO) determined that Vendor A's quoted price was much lower than its competitors', and contacted the firm to clarify whether the quoted price was accurate. *Id.*; AR, Tab 7, Email from BLM to Vendor A at 1. In response, Vendor A attempted to submit a revised quotation, but the agency did not accept the revised quotation. COS at 2. Ultimately, the agency's evaluators determined that Vendor A's quoted past performance was technically unacceptable, and rejected the firm's quotation on this basis. AR, Tab 4, Memorandum to File at 1.

BLM then proceeded to evaluate SHH's quotation. The evaluators determined that SHH quoted a progress-based payment schedule and, as result, they determined that the quotation did not comply with the RFQ's terms and conditions. AR, Tab 4, Memorandum to File at 1. The evaluators also noted that, based on prior experience, SHH lacked financial stability to support a lump sum payment project. *Id.*

BLM next evaluated RGZ's quotation and determined that it was technically acceptable. COS at 3. On September 13, 2024, BLM issued the purchase order to RGZ in the amount of \$137,200. *Id.* This protest followed.

DISCUSSION

SHH raises multiple allegations challenging the agency's conduct of the acquisition.² Principally, the firm contends that the agency unreasonably rejected its quotation because it merely suggested the performance-based payments schedule. Supp. Protest at 1-2. In this regard, SHH explains that it included the progress-based payments schedule to enhance fiscal accountability and ensure that payments are tied to measurable project progress. *Id.* at 1 ("Our proposed invoicing structure also aimed to enhance project transparency and fiscal accountability by ensuring that payments were closely tied to measurable project progress."). While SHH argues that it included the progress-based payments term as a suggestion for better government, SHH explains that its quotation also demonstrated the firm's willingness to perform under the general payment terms provided in the solicitation. Comments at 2 ("Our proposal unequivocally stated that we would adhere to the performance requirements outlined in the solicitation, and the inclusion of progress payments does not detract from that commitment.").

As an alternative protest allegation, SHH argues that the agency unequally conducted discussions because the agency contacted another vendor for clarification regarding its quoted price without also providing SHH an opportunity to address the agency's concerns about its price. Supp. Comments at 3.

On the first argument, BLM responds that SHH's quotation did not merely suggest or request the performance-based payments schedule; rather, the firm's quotation provided for an incremental payment method with a request that the agency make payments in 50-acre increments. Memorandum of Law (MOL) at 4-5.

As to the second argument, BLM responds that the allegation is factually inaccurate. BLM explains that it did not conduct discussions with any other vendor because, while it clarified that the low-vendor's quoted price was inaccurate, the agency did not solicit a revised quotation. MOL at 2. Although the vendor attempted to submit a revised quotation with a higher quoted price, the agency did not accept or consider the submission; rather, the agency simply evaluated the vendor's quotation as unacceptable due to an issue involving that firm's quoted past performance. Supp. COS at 1-2.

After reviewing the record, we do not find either allegation persuasive. As an initial matter, this procurement was conducted under simplified acquisition procedures. When using these procedures, an agency must conduct the procurement consistent with a concern for a fair and equitable competition and must evaluate quotations in accordance with the terms of the solicitation. *Emergency Vehicle Installations Corp.*, B-408682, Nov. 27, 2013, 2013 CPD ¶ 273 at 4. In reviewing protests of an allegedly improper simplified acquisition evaluation, we examine the record to determine whether the agency met this standard and exercised its discretion reasonably. *Id.*

² To the extent we do not discuss any particular allegation it is denied.

Further, it is an agency's role to define both its underlying needs and the best method of accommodating them, and it is within the agency's discretion to reject as unacceptable quotations that do not meet the requirements that it defines. *Eagle Investigative Servs., Inc.*, B-420849, Sept. 23, 2022, 2022 CPD ¶ 243 at 3. In this regard, it is a vendor's responsibility to submit a well-written quotation, with adequately detailed information, which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. *Id.*

On the first allegation, we do not object to BLM's conclusion that SHH's quotation did not comply with the solicitation requirements. First, the record confirms that the RFQ incorporated FAR clause 52.212-4, Contract Terms and Conditions--Commercial Products and Commercial Services. RFQ at 4. This clause provides that "[p]ayment shall be made for items accepted by the Government that have been delivered[.]" and has been interpreted as meaning that the agency must accept goods or services prior to making any payment under the contract. *Emergency Vehicle Installations Corp., supra* at 5 ("Pursuant to [FAR clause 52.212-4], the agency must accept goods or services prior to making payment under the contract--it does not provide for prepayments or other forms of contractor financing."). Additionally, the RFQ contemplates a single requirement for vegetation control of 350 acres to conduct a controlled burn, rather than multiple, smaller requirements. RFQ at 3-4; COS at 1. Thus, we agree with the agency that any quotation must have agreed to payment upon completion of vegetation control for all 350 acres to comply with the RFQ's terms.³ See COS at 1-3.

After examining SHH's quotation, we agree with the agency's conclusion that the firm quoted a noncompliant payment schedule. In relevant part, SHH's quotation provided the following:

5. *Measurement and Payment*

5.1. SHH is committed to a structured invoicing process utilizing the Invoice Processing Platform (IPP) throughout the project's duration. In adherence to this, invoices will be generated following the completion of specific benchmarks. SHH respectfully requests that the [CO] allow the submission of a preliminary invoice upon the completion of 50 acres. Subsequent invoices will be submitted in increments of 50 acres until the project is fully completed. This method ensures timely and accurate

³ SHH argues that the RFQ incorporated FAR clause 52.232-30, Installment Payments for Commercial Products and Commercial Services, and that, therefore, the RFQ permitted the quoted payment scheme. Comments at 2. We disagree because, when mentioning this clause, the RFQ did not include an "X" or otherwise indicate that the clause was incorporated. See RFQ at 9 ("The Contractor *shall* comply with the FAR clauses in this paragraph (b) that the *Contracting Officer* has indicated as being incorporated in this contract by reference to implement provisions of law[.]"), 11 (showing that FAR clause 52.232-30 was not selected for incorporation).

invoicing aligned with project milestones and deliverables. These incremental payments are fundamental to sustaining seamless project operations. SHH will collaborate closely with the [CO] to accurately evaluate the progress achieved, ensuring that payment requests align with the terms established in the agreed-upon purchase order. This meticulous approach to invoicing underscores our commitment to transparency and financial accountability throughout the project lifecycle.

AR, Tab 3, SHH's Quotation at 12. We interpret this paragraph as consistent with the agency's position because the firm explained that it would generate and submit invoices for payment at intervals of 50 acres.⁴ See *id.* While we recognize that the paragraph includes the word "requests," the request appears to be limited to the frequency of the requests for payment rather than a single broader request for simply using the progress-based payment schedule. See *id.*

Further, the quotation specifically explains that "incremental payments are fundamental to sustaining seamless project operations," which communicates that the firm viewed progress-based payments as essential. AR, Tab 3, SHH's Quotation at 12. Finally, SHH explained that it would collaborate with the agency to "ensur[e] that payment requests align with the terms established in the agreed-upon purchase order," which indicates that the firm did not agree to the terms included in the RFQ but would only agree to a purchase order including different terms. *Id.* Thus, we agree with the agency that SHH quoted an alternate payment schedule that was inconsistent with the terms of the solicitation, and therefore the firm's quotation was reasonably rejected on this basis.⁵

Moreover, even if SHH intended only to request an alternate payment schedule, see Comments at 7, we note that the firm had a duty to submit a well-written quotation and avoid any confusion as to whether the firm would perform under the standard payment schedule. Indeed, as referenced above, it is a vendor's responsibility to submit a well-written quotation, with adequately detailed information, which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. *Eagle Investigative Servs., Inc., supra* at 4. Here, by submitting a quotation that, at minimum, introduced ambiguity as to the payment schedule, SHH failed to unequivocally demonstrate compliance with FAR clause 52.212-4, and

⁴ The FAR defines an invoice as "a contractor's bill or written request for payment under the contract for supplies delivered or services performed." FAR 2.101.

⁵ As referenced earlier, GAO notes that the protester does not dispute that its quotation sought progress payments. Supp. Comments at 1 ("SHH's request for progress payments was presented as a suggestion aimed at enhancing project efficiency and not as a demand or condition of contract performance."). Further, we note that the FAR defines an "invoice" as a

therefore ran the risk that its quotation would be evaluated unfavorably.⁶ *Cf. L.S. Womack, Inc.*, B-244245, Sept. 30, 1991, 91-2 CPD ¶ 309 at 4 (firm offering noncompliant product ran the risk that its proposal would be rejected). Accordingly, we deny the protest allegation.⁷

⁶ SHH argues that its quotation demonstrated blanket compliance with all terms of the solicitation when it explained the following:

In full compliance with the Cultural Considerations clause, SHH acknowledges and commits to upholding all stipulations concerning the preservation of cultural and prehistoric landmarks, archeological sites, sanitation practices, wildlife habitats, sensitive vegetation and riparian areas, prevention of oil spills, protection of improvements and land survey monuments, prevention of noxious weeds and invasive plants, fire control, damage of Government property, Drug free workplace, insurance, and all other requirements outlined in the [Statement of Work].

Comments at 8 (quoting AR, Tab 3, SHH's Quotation at 8-9). While this demonstrates that the firm intended to perform the requirement in accordance with the statement of work, we note that the payment schedule was a contract term. Further, this statement does not reference the payment schedule as it comes within a section addressing SHH's intent to minimize the environmental impact of its vegetation control efforts. AR, Tab 3, SHH's Quotation at 8-9.

⁷ SHH also argues that FAR section 12.213 permits vendors to make commercial offers as part of their quotations, including the ability to negotiate flexible progress payments. Supp. Protest at 3-4. FAR section 12.213 provides as follows:

It is a common practice in the commercial marketplace for both the buyer and seller to propose terms and conditions from their particular perspectives. The terms and conditions prescribed in this part seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other commercial practices that are appropriate for the acquisition of a particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive order.

FAR 12.213.

We read this regulation as providing that the contracting officer has discretion to consider incorporating any commercial practice into the solicitation or contract. *Accord NLB Corp.*, B-286846, Feb. 26, 2001, 2001 CPD ¶ 67 at 4-5. The fact of the matter is that, by including its stated preference for the alternate schedule without definitively explaining that it would otherwise perform under the solicitation's terms, SHH created ambiguity in its quotation that the agency was free to reject as noncompliant.

As to the agency's allegedly unequal conduct of discussions, we find no basis to sustain the protest. Simply put, the record does not show that the agency, in fact, conducted discussions with any vendor. Our decisions explain that it is the action of parties that determine whether discussions have been held and not the characterization of the communication by the agency. See, e.g., *Erie Strayer Co.*, B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 5. In situations where there is a dispute regarding whether communications between an agency constituted discussions, the acid test is whether a vendor has been afforded an opportunity to revise or modify its quotation. *Id.*; *CW Gov't Travel, Inc.*, B-416091, B-416091.2, June 13, 2018, 2018 CPD ¶ 225 at 4, n.4. Communication exchanges that do not permit a vendor to revise or modify its quotation, but rather request that the vendor confirm what it has already committed to do in its quotation, are clarifications and not discussions. *Erie Strayer Co.*, *supra* at 5.

Here, the record shows that the agency contacted Vendor A to clarify whether its price was accurate; this action was taken because Vendor A's price was significantly lower than SHH's quoted price. AR, Tab 7, Email from Agency to Vendor A at 1; see also Supp. COS at 1 ("In addition to the general concern that there may be a pricing mistake, the CO thought the contractor may have intended to respond to another solicitation."). While Vendor A attempted to submit a revised quotation, the agency neither accepted nor reviewed the revised quotation. Supp. COS at 2. Thus, we deny SHH's allegation because the agency did not conduct discussions as part of this acquisition, and therefore, did not fail to give SHH an opportunity to submit a revised quotation.

To the extent SHH argues that the agency should have permitted the firm to clarify that its alternative payment schedule was merely a request or suggestion, we disagree. As BLM points out, agencies are not required to conduct clarifications with every vendor. *Future Techs. Consulting Grp., Inc.*, B-409867, Aug. 13, 2014, 2014 CPD ¶ 240 at 5 ("An agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of their proposals or to resolve minor or clerical errors."). Further, we are not persuaded that the agency's conduct was unfair because the defects in Vendor A's and SHH's quotations were different. Accordingly, we deny the protest allegation.⁸

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁸ SHH also alleges that the agency unreasonably considered the firm's financial stability as part of the evaluation. Comments at 4-5. The agency responds, and our review confirms, that the agency did not reject SHH's quotation because the firm lacked sufficient financial resources; rather, as noted above, SHH's quotation was deemed noncompliant with the terms of the RFQ for quoting a progress-based payment schedule. See Supp. MOL at 4.