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Decision

Matter of: Tope Technology, LLC

File: B-416663.6

Date: October 16, 2019

John C. Dulske, Esq., and Bryan L. Kost, Esq., Dykema Gossett PLLC, for the protester.
Scott N. Flesch, Esq., Robert Neill, Esq., Robert Nelson, Esq., and Eugene M. Gray, Esq., Department of the Army, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of the protester's proposal as noncompliant with the solicitation's formatting requirements and thus ineligible for award is denied where the agency reasonably conducted an initial assessment of proposals for compliance with the solicitation's published formatting requirements in accordance with the amended solicitation terms.

DECISION

Tope Technology, LLC, an 8(a) small business concern located in Clearfield, Utah, protests the award of a contract to ML-TKL Construction JV, an 8(a) small business concern, of Springville, Utah, under request for proposals (RFP) No. W91151-17-R-0064, issued by the Department of the Army, for construction services. Tope challenges the Army's evaluation of its proposal as noncompliant with the solicitation's formatting requirements and thus ineligible for award.

We deny the protest.

BACKGROUND

The Army issued the solicitation on August 21, 2017, as a set-aside for participants in the Small Business Administration's (SBA) 8(a) program. The RFP sought construction services for a broad variety of minor construction projects at the U.S. Army Dugway Proving Ground in Utah. RFP at 1. The solicitation contemplated the award of a single,

fixed-price indefinite-delivery, indefinite-quantity (IDIQ) contract for a base year with four 12-month options. RFP at 1, 18, 23.

The solicitation provided for award on a best-value tradeoff basis considering the following three factors: (1) technical, (2) past performance, and (3) price. Specifically, the solicitation provided that first proposals would be evaluated for technical acceptability, followed by a tradeoff analysis conducted between the past performance and price factors. Id. at 25.

The solicitation provided that offerors should submit their proposals in four separate volumes, to include, as relevant here, a price proposal. With regard to the format of the price proposal, the initial solicitation provided that “[a]ll Excel formulas, lookup tables, and links shall be intact, and no links shall exist to files not included with the submission.” Id. at 24. It also provided that “[e]xcel workbooks should not contain hidden spreadsheets.” Id. In addition, the RFP explained that “PDF or flat files will not be considered adequate” and that “[f]ailure to comply with these formatting requirements may result in rejection of the proposal.” Id.

On October 6, 2017, Tope submitted a proposal in response to the RFP that included its price proposal in PDF format. Protest at 3. In April 2018, the agency provided evaluation notices (ENs) to Tope that identified several deficiencies with Tope’s technical proposal. None of the ENs mentioned an issue with the PDF format of Tope’s price proposal. Agency Report (AR), Tab 12, Tope ENs, at 1-19. Tope responded to the ENs. Id.

On August 7, the Army notified Tope that its proposal had been excluded from the competition because it had been found noncompliant under the mission capability factor, and therefore, was technically unacceptable and would not be considered for award. AR, Tab 13, Notice of Elimination, at 1. After receiving a pre-award debriefing, Tope filed a protest with our Office. In response, the agency took corrective action and our Office dismissed the protest as academic. Tope Technology, LLC, B-416663.2, B-416663.3, Sept. 4, 2018 (unpublished decision).

The agency amended the solicitation and received revised proposals from offerors, including Tope. In submitting its revised proposal, Tope again submitted its price proposal in PDF format. Protest at 4. On March 18, 2019, the agency notified Tope that its proposal had not been selected for award. The agency advised Tope that, although its proposal had received an acceptable technical rating, it had received a neutral confidence past performance rating. AR, Tab 21, Unsuccessful Offeror Letter, at 1. The notice also stated that Tope’s proposed price was nearly 30 percent lower than the independent government estimate. Id. Tope received a debriefing, which further advised, with regard to price, that the agency had found Tope’s proposed prices to be unreasonably low. AR, Tab 22, Debriefing, at 2.

On March 22, 2019, Tope filed another protest with our Office challenging the agency’s past performance evaluation and arguing that the agency improperly conducted a price

realism evaluation. In response, the agency again decided to take corrective action “to minimize any ambiguity in the solicitation regarding how the Army will evaluate past performance and price realism.” AR, Tab 25, Corrective Action Notice, at 1. Our Office dismissed the protest as academic. Tope Technology, LLC, B-416663.4, B-416663.5, May 7, 2019 (unpublished decision).

Thereafter, the Army issued amendments 0005 and 0006 to the solicitation (collectively referred to as “amendment 0006”). Amendment 0006 amended the instructions to offerors and basis for award language, and revised the price evaluation factor to specify that “[a] price realism analysis will be performed to determine whether the estimated proposed price is realistic for the work to be performed.” RFP, amend. 0006, at 14. Amendment 0006 also requested that offerors submit revised price proposals. Id. at 1.

With regard to the format for the price proposal, amendment 0006 inserted express language requiring that price proposals be submitted in Excel format only, and that PDF files would “not be acceptable.” Id. at 9. Amendment 0006 also revised the “Evaluation Factors for Award” section of the RFP by providing for an initial review for compliance with the solicitation’s formatting requirements, and advising that the agency would eliminate noncompliant proposals. Id. at 10.

On June 24, 2019, the Army received revised proposals. Tope once again submitted its revised price proposal in PDF format. AR, Tab 30, Tope’s Revised Price Proposal; Protest at 5. On July 2, the Army notified Tope that its proposal had been found noncompliant with the solicitation requirements because Tope failed to provide its price proposal in the correct MS Office Excel format, and therefore, its proposal would not be considered for award. AR, Tab 21, Unsuccessful Offeror Notice, at 1. Thereafter, Tope received a debriefing. This protest followed.

DISCUSSION

Tope contends that the Army unreasonably rejected its offer for failing to provide its price proposal in the Excel format required by the solicitation. Tope acknowledges that the RFP included a requirement that price proposals be submitted in Excel format. Tope asserts, however, that this requirement remained unchanged throughout the procurement, and therefore, the agency should have raised any concerns regarding the format of Tope’s price proposal with Tope during discussions or informed Tope about the purported deficiency with its price proposal format during Tope’s debriefing. Tope argues that the agency’s failure to conduct meaningful discussions with Tope or raise the issue during Tope’s debriefing misled Tope into believing the agency did not have any concerns with Tope’s price proposal format and deprived Tope of the ability to address the agency’s concerns.

The Army disagrees with Tope that the price proposal requirement remained unchanged throughout the procurement and thus was an issue that should have been raised during discussions. The agency asserts that amendment 0006 clarified the price proposal format requirement, notified offerors that the Army would conduct an initial

screening of proposals for compliance with the published formatting requirements, and advised that the Army would eliminate noncompliant proposals. Accordingly, the agency contends that it properly eliminated Tope's proposal for failing to comply with a material proposal formatting requirement in amendment 0006. For the reasons discussed below, we agree with the agency.¹

As noted above, amendment 0006 explained that it was being issued to "amend the instructions to offerors and the basis for award language as a result of corrective action," and requested, as relevant here, that offerors submit revised price proposals. RFP, amend. 0006, at 1.

In addition, under Section M, Evaluation Factors for Award (Basis for Contract Award), amendment 0006 added the following new language:

The Government will perform an initial assessment of the Offerors' proposals against the submittal requirements of Section L. Failure to submit the required documentation and/or in the format specified in Section L of this solicitation may render the Offeror's proposal un-evaluatable and the proposal will be eliminated from the competition without further consideration.

Id. at 10.

Further, under section L, "Proposal Preparation Instructions," amendment 0006 added the following language:

IMPORTANT: Failure to follow the below proposal preparation instructions may cause a proposal to be deemed unacceptable by the Government and thus eliminated from the competition without further consideration.

Id. at 3.

Specific to the format for the price proposal, amendment 0006 added language to clarify that "[e]lectronic versions of the Cost/Price proposal shall be submitted in MS Office Excel format only" and that "PDF or flat files will not be acceptable." Id. at 9. Amendment 0006 also added language stating that: "Failure to provide the price information as requested may result in a proposal being determined to be noncompliant and may be eliminated from further consideration." Id. at 10.

Tope argues that amendment 0006 did not change the instruction to offerors regarding the format of price proposals. In support of this position, Tope asserts that none of the

¹ Although we do not address every argument raised by the protester, we have reviewed them all and find that none provides a basis to sustain the protest.

new language in amendment 0006 notified offerors of mandatory exclusion from the competition for failing to follow the formatting requirements. Comments at 8. Tope contends that amendment 0006 “unambiguously states that the failure to follow the format requirements *may* (not “must” or “shall”) result in the rejection of the proposal, *may* cause the proposal to be deemed unacceptable, and *may* result in the proposal being noncompliant.” Id. The protester argues that this critical language remained the same throughout the entire procurement, and therefore, because the agency always could use improper format to disqualify a proposal (but never did), Tope’s reliance on the agency’s prior exchanges with Tope—which did not raise any concerns regarding Tope’s price proposal format—provided a reasonable basis for Tope to believe that the format of its price proposal was not a material concern for the agency.

The agency does not agree with the protester that amendment 0006 did not change the instruction to offerors regarding the format of price proposals. The agency argues that amendment 0006 expressly advised offerors that price proposals were to be submitted in Excel format only. Prior to amendment 0006, the solicitation provided only that “[a]ll Excel formulas, lookup tables and links should be intact” and that “Excel workbooks should not contain hidden spreadsheets.” RFP, amend. 0004, at 15. Amendment 0006 also changed language providing that “PDF or flat files will not be considered adequate” to “PDF or flat files will not be acceptable.” Compare RFP, amend. 0004, at 15, with RFP, amend. 0006, at 9.

The agency also points to the language inserted in section M of the RFP informing offerors that the government would perform an initial assessment of the offerors’ proposals against the submittal requirements of Section L, and that the “[f]ailure to submit . . . in the format specified in Section L . . . may render the Offeror’s proposal un-evaluatable and the proposal will be eliminated from the competition without further consideration.” RFP, amend. 0006, at 10. The agency asserts that, by linking the formatting requirement to the evaluation factors, the Army put all potential offerors on notice that the formatting of price proposals was a material requirement and necessary for meaningful evaluation of a proposal. AR at 10.

Where a protester and agency 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; Fox Dev. Corp., B-287118.2, Aug. 3, 2001, 2001 CPD ¶ 140 at 2.

We agree with the agency that amendment 0006 materially revised the solicitation requirement pertaining to the acceptable price proposal format. As discussed above, amendment 0006 added language instructing offerors that electronic versions of their cost/price proposals were to be submitted in MS Office Excel format only, and that PDF or flat files would not be acceptable. RFP, amend. 0006, at 9. Further, amendment 0006 inserted as part of the evaluation an initial screening of proposals for compliance with the published formatting requirements, and advised that the agency would

eliminate noncompliant proposals. Accordingly, amendment 0006 put all offerors, including Tope, on notice of the revised formatting requirements.

We also find no merit to the protester's arguments that it was misled because the agency failed to raise concerns regarding Tope's price proposal format during earlier exchanges with the protester. As the agency explains, the revised price proposal formatting requirement was tied to the agency's decision, in amendment 0006, to revise the price evaluation to include a price realism analysis. As noted above, amendment 0006 revised the price evaluation to provide for a price realism analysis. RFP, amend. 0006, at 14. The contracting officer explains that she determined that it would be a challenge to conduct an adequate price realism analysis unless offerors submitted their price proposals in Excel format. Contracting Officer Statement at 3. Accordingly, in issuing amendment 0006, the agency expressly advised that offerors must submit their price proposals in Excel format, provided for an initial review of proposals for compliance with the solicitation's formatting requirements, and warned that the agency would eliminate noncompliant proposals.

Although the protester argues that the agency should have raised any issues regarding the format of Tope's price proposal with the protester at the time it provided Tope with ENs (in April 2018), or during one of Tope's debriefings, the agency's concern with the format of Tope's final price proposal stemmed from a revision to the price evaluation criteria (i.e., the inclusion of a price realism analysis) that did not exist prior to amendment 0006. Given the foregoing, and the fact that the formatting requirements that resulted in rejection of the protester's proposal as noncompliant were not part of the solicitation at the time the agency conducted exchanges with the protester, we see no basis for the protester's argument that the agency misled the protester by failing to raise concerns regarding Tope's price format during these exchanges.

The protest is denied.

Thomas H. Armstrong
General Counsel