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Decision

Matter of: ProTech Services USA, LLC

File: B-417484

Date: July 19, 2019

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Eric C. Crane, Esq., and Beth Sturgess, Esq., Department of Homeland Security, for the agency.

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DIGEST

Protest is denied where protester failed to comply with a material solicitation requirement regarding facility clearances.

DECISION

Pro Tech Services USA, LLC, a service-disabled veteran-owned small business of McLean, Virginia, protests its elimination from the competition for request for proposals (RFP) No. 70SBUR19R00000002 by the Department of Homeland Security (DHS), U.S. Citizen and Immigration Services (USCIS), a decision DHS made because ProTech failed to provide evidence of a facility clearance.¹ The agency issued the RFP in order to acquire service center operations support, including correspondence management, data collection, and fee collection services. Because the correspondence management function includes the processing of mail classified at the secret level, the RFP required offerors to provide evidence of facility clearance. The protester contends that the agency's evaluation of the facilities clearance requirement was properly a responsibility determination that the agency was required to refer to the Small Business Administration (SBA) for adjudication.

We deny the protest.

¹ ProTech is a four-member joint venture. According to ProTech, each member company holds a facility clearance, but the joint venture itself does not. Protest at 1, 5.

BACKGROUND

On October 24, 2018, DHS issued the solicitation under the agency's Program Management, Administration, Operation (Clerical), and Technical Services II indefinite-delivery, indefinite-quantity (IDIQ) contract in accordance with the procedures of Federal Acquisition Regulation subpart 16.505. Contracting Officer's Statement (COS) at 1; RFP, amend. 0004, at 2. The agency intended to issue two fixed-price task orders, one supporting the California and Vermont service centers, and one supporting the Nebraska and Texas service centers, with total durations, including all options, of 46 and 44 months, respectively. COS at 1, RFP at 27. DHS intended to make award to the two offerors whose proposals presented the best value to the agency, considering the following five factors: technical approach, management approach, staffing approach, past performance, and price.² RFP at 27, 33. The first three factors were of equal importance, and past performance was the least important of the non-price factors. Id. at 33. All non-price factors, when combined, were slightly more important than price. Id. The agency amended the RFP four times prior to the November 26 due date. COS at 1-2; RFP at cover page.

As relevant to this protest, the RFP contained a facilities clearance requirement, which was amended several times. Amendment 0004 revised the evaluation criteria with regard to the facility clearance requirement as follows:

Offerors whose initial proposals do not include a statement asserting that prime offeror has (1) at least a SECRET final facility clearance level, or (2) at least an interim SECRET facility clearance, or (3) an existing facility clearance sponsorship letter and documentation that reasonably demonstrates that the process is in the final stages and likely to be completed no later than January 31, 2019, and have received an interim clearance to demonstrate that the facility clearance is in the final stages of obtaining one will not be evaluated further and will be ineligible for award [sic].

If an offeror's initial proposal only includes a statement that the prime offeror has a facility clearance sponsorship letter and documentation that reasonably demonstrates that the process is in the final stages, proof that the interim or final facility clearance has been received must be provided to the Contracting Officer by 5:00 PM [Eastern Time] on January 31, 2019 or they will be deemed ineligible for award.

RFP, amend. 0004, at 8.

In its proposal, ProTech provided the confirmations under scenario 3 of the facility clearance provision above, namely, that it possessed a facility clearance sponsorship

² The task order awardees were to be selected sequentially, with the first awardee ineligible for award of the second task order. RFP at 7.

letter, its application was in the final stages of review, and its sponsorship was anticipated to be completed no later than January 31, 2019. Agency Report (AR), Tab 6, ProTech Technical Proposal at i.

On January 31, 2019, DHS reminded ProTech of the January 31 deadline to provide evidence of an interim or final facility clearance. AR, Tab 8, USCIS and ProTech Emails at 2-3. ProTech responded that its application was “in the final stages [of approval] at the Defense Security Service (DSS),” id. at 2, but the protester did not provide the agency with evidence of an interim or final facility clearance by the January 31 deadline. COS at 2; Comments at 2. Instead, the protester provided the agency with copies of the facility clearances for each of the four members of the ProTech joint venture. AR, Tab 8, USCIS and ProTech Emails at 2. ProTech also argued that it remained “fully compliant for award,” in accordance with the version of the facilities clearance language provided in amendment 0003. Id. at 1-2 (email dated Feb. 2, 2019, 10:19 p.m.).

On February 4, the agency responded that it was applying the criteria described in amendment 0004, which was issued, in part, to amend the clearance language previously added to the RFP. Id. at 1. The protester confirmed that its facilities clearance application remained “in the final stages” and it expected to receive the clearance “any day now.” Id. (email dated Feb. 4, 2019, 9:33 a.m.).

On April 5, 2019, DHS eliminated ProTech from the competition. AR, Tab 9, ProTech Elimination Letter. The agency explained the basis for the elimination as follows:

Your company’s initial proposal stated that an existing facility clearance sponsorship letter existed and asserted that you could confirm that your application was in the final stages of review based on exchanges with DSS, and should be completed by January 31, 2019. An existing facility clearance sponsorship letter was not included with the proposal, and ProTech did not submit any proof that a clearance had been received by January 31, 2019. In addition, USCIS confirmed on February 1, 2019 with DSS that your clearance had not been received. Because of this, your offer was found to be non-compliant with the solicitation and therefore ineligible for award.

Id. This protest followed.³

³ The anticipated awarded value of the task order at issue exceeds \$10 million. See AR, Tab 7, ProTech Business Proposal at 10-35. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts that were awarded under the authority of Title 41 of the U.S. Code. 41 U.S.C. § 4106(f)(1)(B).

DISCUSSION

ProTech contends that DHS' decision to exclude it from the competition was an improper responsibility decision, which was properly reserved for the SBA.⁴ Protest at 7; Comments at 3. The protester's argument relies principally on our decision in Waterfront Techs., Inc.--Protest & Costs, B-401948.16, B-401948.18, June 24, 2011, 2011 CPD ¶ 123, in which our Office sustained a protest on the grounds that the solicitation language regarding a facility clearance was not a solicitation requirement but a matter of responsibility for SBA review. Protest at 7.

In the agency's view, the facility clearance provision was a material solicitation requirement, and ProTech's corresponding exclusion is a matter of proposal acceptability rather than corporate responsibility reserved for SBA review. Memorandum of Law (MOL) Id. at 6-7 (citing MT & Assocs., LLC, B-410066, Oct. 17, 2014, 2014 CPD ¶ 326). In response, ProTech argues that if our Office concludes that the facility clearance provision here was a material solicitation requirement, "then [the clearance] must be evaluated on a comparative basis with other offerors." Comments at 4.

Our Office has explained that the ability to obtain a security clearance is generally a matter of responsibility, absent an express requirement in the solicitation to demonstrate the ability prior to award. Waterfront Techs., supra, at 6; see also MT & Assocs., LLC, supra, at 5. However, where the solicitation requires offerors to submit evidence of a facility clearance at proposal submission, depending on its terms, such provision may be a material solicitation requirement. See ProActive Techs., Inc.; CymSTAR Servs., LLC, B-412957.5 et al., Aug. 23, 2016, 2016 CPD ¶ 244 at 11-12 (evidence of facility clearance was a not material solicitation requirement because lack of a clearance did not render offeror ineligible for award); Prism Maritime, LLC, B-409267.2, B-409267.3, Apr. 7, 2014, 2014 CPD ¶ 124 at 7-8 (facility clearance was a material solicitation requirement and without it, proposal was ineligible for award).

We find that the facility clearance provision here was a material solicitation requirement. In this regard, the solicitation required offerors to provide evidence of an interim or final secret-level facility clearance no later than January 31. RFP, amend. 0004, at 8. The RFP also unambiguously provided that lack of a clearance would render an offeror "ineligible for award." RFP at 34. Furthermore, the RFP provides that evidence of the clearance is not optional or subject to the agency's discretion. Accordingly, we

⁴ Under the Small Business Act, 15 U.S.C. § 637(b)(7), the SBA has conclusive authority to determine the responsibility of small business concerns. Thus, when a procuring agency finds that a small business is not eligible for award based on a nonresponsibility determination or a failure to satisfy definitive responsibility criteria, the agency is required to refer the matter to the SBA for a final determination under its certificate of competency procedures. Specialty Marine, Inc., B-292053, May 19, 2003, 2003 CPD ¶ 106 at 3.

conclude that the RFP provision obligating ProTech to provide DHS with evidence of an interim or final secret-level facility clearance by January 31 was a material solicitation requirement and not a matter of responsibility. See ProActive Techs., Inc.; CymSTAR Servs., LLC, supra, at 11-12.

Our prior decisions provide that a proposal that fails to conform to a material term or condition of the solicitation is unacceptable and may not form the basis for an award. See MT & Assocs., LLC, supra, at 6. The record here reflects no claim by ProTech of evidence of an interim or final security clearance. Because the facility clearance provision was a material solicitation requirement that ProTech did not satisfy, we conclude that DHS had a reasonable basis to exclude ProTech from further competition. This protest ground is denied.⁵ Id.

Additional Protest Grounds

ProTech raised several other protest grounds, none of which provides a basis to sustain the protest. For example, the protester alleged that the solicitation terms created an “uneven” playing field “for joint ventures like ProTech.” Protest at 9. To the extent that this argument raises challenges to the terms of the solicitation, those claims are untimely under our Bid Protest Regulations, which require protests based on alleged solicitation improprieties to be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

The protester also argues that the agency should have waived the facilities clearance requirement, as all of the work will be performed by its joint venture partners, each of whom has a facility clearance. Protest at 9 (citing Management & Tech. Servs. Alliance

⁵ ProTech also contends that it diligently pursued a facility clearance and therefore should not be penalized for various delays. Protest at 3-6, 8-9. The record casts doubt on the protester’s characterization of its application history. According to ProTech, its June 2018 application was rejected on August 24 “for administrative filing issues,” and “a corrected filing was made on September 26, 2018.” Id. at 3. On November 6, the application was again denied for lack of a document reflecting specific government support, which was a new requirement according to the protester. Id. On an unknown date, ProTech obtained the document, which it included in a January 7, 2019, refiling. Id. at 4. On February 1, ProTech’s application was again rejected for lacking the signature of the government representative on the government-support document. Id. at 5. In late March, 2019, the protester reached out to the contracting officer on the underlying IDIQ contract. Id. at 8. ProTech does not provide the contracting officer’s response. This history shows that some delays were attributable to ProTech’s refilings, and others to confusion regarding the application documents.

Joint Venture, B-416239, June 25, 2018, 2018 CPD ¶ 218 at 4 n.3). Absent further legal or factual support, we find no requirement for the agency to waive the facility clearance requirement here.

The protest is denied.

Thomas H. Armstrong
General Counsel