

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Source Diversified, Inc.

File: B-403437.2

Date: December 16, 2010

Alfred Ortiz for the protester.

Neil Stroud, Esq., Environmental Protection Agency, for the agency.

Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's post-award complaint that the agency did not respond to protester's concerns regarding the terms of the solicitation constitutes a protest challenging the terms of the solicitation, and is not timely filed.
2. There is no requirement for an agency to engage in post-closing-date communications with vendors responding to a request for quotations; accordingly, protest that agency failed to communicate with protester during the evaluation process fails to state a valid basis.
3. Where solicitation provided that price would be evaluated on the basis of the total price submitted for all services, for all contract periods, protester's assertion that the agency should have subtracted a portion of the its total quoted price fails to state a valid basis.
4. In procurement conducted pursuant to Federal Acquisition Regulation subpart 8.4, agency's evaluation of the protester's past performance was reasonable, and agency was not required to discuss adverse past performance information with the protester.

DECISION

Source Diversified, Inc. (SDI), of San Clemente, California, protests the Environmental Protection Agency's (EPA) award of a purchase order to ARH, LLC, of Woodland Park, Colorado, pursuant to request for quotations (RFQ) No. RFQ-PR-DC-10-00129 to provide a software system to assist EPA in responding to customer inquiries sent through Internet web sites, e-mails, and call centers. SDI, the

incumbent contractor, protests that the agency failed to respond to all of SDI's questions prior to the solicitation closing date; improperly evaluated price proposals; failed to exchange information with SDI during the evaluation process; and failed to provide SDI an opportunity to discuss adverse past performance information.

We dismiss the protest in part and deny it in part.

BACKGROUND

On April 2, 2010, the agency released the RFQ at issue, seeking quotations for a commercial-off-the-shelf software system to assist EPA in responding to customer inquiries. The solicitation contemplated award of a purchase order for a base period and four option periods, and stated that the procurement was being conducted as a federal supply schedule purchase pursuant to the provisions of the Federal Acquisition Regulation (FAR), subpart 8.4. The solicitation further provided that award would be based on the agency's "best value" determination, which would consider the following evaluation factors: product description and acceptance requirement; corporate experience; past performance; and price.¹ RFQ at 18.

The solicitation established various capabilities and characteristics that the software system must possess, and identified particular tasks to be performed by the awardee, including: pre-planning, planning, build site, team training, end-user configuration, administration configuration, reporting, staff training, testing, and launch. Id. at 15-16. The solicitation further identified various FAR clauses that it stated "will apply to this requirement," including FAR § 52.227-14, Rights in Data--General; FAR § 52.227-14 Rights in Data--Alternate III; and FAR § 52.227-17, Rights in Data--Special Works." Id. at 19. Finally, as amended, the solicitation contained 24 contract line item numbers (CLINs) for which vendors were to submit prices with their quotations, specifically advising vendors that "the Government will evaluate the total price offered which includes all of the services listed for the Base Year, Option Period 1, Option Period 2, Option Period 3 and Option Period 4." RFQ amend. at 8.

¹ The RFQ stated that the evaluation factors, as listed above, were in descending order of importance, and that all evaluation factors other than price, when combined, were significantly more important than price. RFQ at 18.

On April 23, quotations were submitted by three vendors, including SDI² and ARH.³ Thereafter, the quotations were evaluated and, on July 22, the agency awarded a purchase order to ARH.

On July 30, SDI filed its first protest with this Office, challenging the agency's award to ARH on the basis that ARH's quotation contemplated delivery of a "non-FSS product."⁴ Protest, July 30, 2010, at 6. On August 18, the agency advised our Office that it was taking corrective action by revising the solicitation's statement of work to clarify its requirements, and that it would request revised quotations from the vendors, reevaluate those revised quotations, and make a new source selection decision. Based on the agency's corrective action, we dismissed SDI's July 30 protest. Source Diversified, Inc., B-403437, Aug. 24, 2010.

On August 18, the agency issued the amended solicitation, providing various clarifications to the vendors. On August 20, SDI sent an e-mail to the agency asking various questions; the agency responded to those questions in e-mails dated August 20 and August 23. Protest, Sept. 10, 2010, app. D, E-mails Between SDI and EPA, at 1-4. On August 24, SDI submitted another e-mail with additional and/or repeated questions and concerns,⁵ id. at 5; the agency did not further respond to SDI.

Thereafter, both ARH and SDI submitted revised quotations prior to the established closing time on August 25. Among other things, SDI's proposal stated:

² SDI performed the prior contract, and submitted its current quotation, pursuant to a teaming arrangement with RightNow Technologies, Inc., its software provider; throughout this decision, we refer to the SDI/RightNow team as SDI.

³ The third vendor's quotation is not relevant to this protest and is not further discussed.

⁴ Among other things, SDI alleged that ARH intended to provide "an enterprise edition of software for unlimited users," and that none of ARH's software products listed on the applicable FSS contract were offered with an "unlimited enterprise license." Protest, July 30, 2010, at 5-6. Accordingly, SDI argued that, because each new user brings new warranty and support costs, an "unlimited enterprise license is . . . a new product" and, therefore, award had been improperly made to ARH on the basis of a "non-FSS product." Id. at 6. Alternatively, SDI complained that the solicitation had not required an unlimited license and that the agency "should have amended the RFQ if it sought such a license." Id.

⁵ Among other things, SDI's August 24 e-mail requested that the agency restructure various CLINs. Protest, Sept. 10, 2010, app. D, E-mails Between SDI and EPA, at 5.

[SDI] takes exception to the inclusion of the following clauses:

- FAR 52.227-14 Rights in Data – General
Please replace this clause with FAR 12.212
- FAR 52.227-14 Rights in Data – Alternate III
Please replace this clause with FAR 12.211
- FAR 52.227-17 Rights in Data – Special Works
Please remove this clause. . . .

Agency Report (AR), SDI Proposal, at 53.

The revised quotations were thereafter evaluated by the agency without conducting any post-closing-date communications with the vendors. ARH's quotation was evaluated as technically superior to SDI's.⁶ Additionally, ARH's quotation offered a lower price.⁷ On August 30, the agency selected ARH's quotation for award. This protest followed.

DISCUSSION

SDI first protests that the agency "failed to respond to [SDI's] requests to clarify RFQ requirements prior to the deadline for submission of bids." Protest, Sept. 10, 2010, at 5. This portion of the protest is based on the fact that the agency did not respond to SDI's August 24 e-mail, in which SDI attempted to further engage the agency regarding the terms of the solicitation.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. A protest regarding the terms of the solicitation must be filed prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2010). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. See, e.g., Dominion Aviation, Inc.–Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

⁶ Among other things, the agency's source selection official noted that SDI had "declined to accept the rights in data clause as specified in the RFQ." AR, Award Decision Memorandum, Aug. 30, 2010, at 2.

⁷ The prices were evaluated by totaling the prices quoted for all 24 CLINs for the base period and all option periods. ARH's total evaluated price was \$1,135,800; SDI's total evaluated price was \$2,114,361. Id.

Here, SDI's protest challenging the agency's failure to respond to its August 24 e-mail, which reflected SDI's alleged belief that the solicitation should be revised or restructured, was not filed prior to established closing time; indeed, rather than filing a protest challenging the terms of the solicitation, SDI submitted its quotation to compete for the purchase order. Since SDI failed to file a protest with this Office, or the agency, prior to the time set for submission of proposals, its protest regarding this matter is untimely and will not be considered.

SDI next protests that the agency "failed, during the course of the source selection process, to exchange information with SDI." Protest, Sept. 10, 2010, at 5. In this regard, SDI maintains that the agency was required to "use communications during the evaluation process to address open issues," and refers to various provisions in FAR part 15 to support its assertion.⁸ Id. SDI is mistaken.

As a general rule, even in negotiated procurements conducted under FAR part 15, agencies may properly make award without engaging in discussions, provided the solicitation states that this is the agency's intent. Bannum, Inc., B-298281.2, Oct. 16, 2006, 2006 CPD ¶ 163 at 7. Where, as here, vendor quotations are sought in connection with a procurement conducted as an FSS purchase pursuant to FAR subpart 8.4, there is no requirement that an agency conduct discussions with vendors regarding the content of those quotations, even where the solicitation does not expressly advise vendors of that possibility. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 9; Avalon Integrated Servs. Corp., B-290185, July 1, 2002, 2002 CPD ¶ 118 at 4.

Here, SDI's protest that the agency failed to "exchange information with SDI," following submission of quotations, is based on the premise that such information exchange was required and reflects SDI's fundamental misunderstanding of the applicable legal requirements. As discussed above, the agency was not obligated to conduct discussions with SDI regarding its quotation. Accordingly, this portion of SDI's protest fails to state a legally sufficient basis and will not be further considered. See 4 C.F.R. §§ 21.1(f), 21.5(f).

⁸ Although the solicitation expressly stated that this procurement was being conducted as a competition between FSS contractors under FAR subpart 8.4, SDI's protest relies, in large part, on the provisions of FAR part 15. The provisions of FAR part 15, governing contracting by negotiation, do not govern competitive procurements under the FSS program. See FAR § 8.404(a); USGC Inc., B-400184.2 et al., Dec. 24, 2008, 2009 CPD ¶ 9 at 3. Rather, where an agency handles the selection of a vendor for an FSS order like a competition, and a protest is filed challenging the award decision, we will review the agency's actions to ensure that they were reasonable and consistent with the terms of the solicitation. Id.; see also Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4-5.

Next, SDI asserts that the agency failed to properly evaluate SDI's price proposal. In this regard, SDI complains that, due to its incumbency status, it was improper for the agency to "consider[] the total price of each of the 24 CLINS listed in the Revised Pricing Proposal submitted in the [SDI] bid, without subtracting the CLINS that would not be charged during the Base Year and Option Years for services already rendered by [SDI]." Protest, Sept. 10, 2010, at 6. SDI elaborates that the services for which a portion of SDI's quoted price should have been subtracted "include[d] the pre-planning, planning build site, team training, end-user configuration, administration configuration, reporting, staff training, testing, launch, site tuning, and transition costs."⁹ Id. In summary, SDI asserts that the agency was required to subtract various portions of the total price that SDI submitted. We disagree.

It is a fundamental principle of federal procurement law that a contracting agency must evaluate all offerors' proposals against the solicitation's stated evaluation criteria. See, e.g., Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4-5. In reviewing protests against allegedly improper evaluations, our Office examines the record to determine whether the agency's evaluation was, in fact, in accord with the stated evaluation factors. Id.; Computer Assocs. Int'l, Inc., B-292077.3 et al., Jan. 22, 2004, 2004 CPD ¶ 163 at 6.

Here, as discussed above, the solicitation expressly provided that: "[i]n determining Best Value . . . the Government will evaluate the total price offered which includes all of the services listed for the Base Year, Option Period 1, Option Period 2, Option Period 3 and Option Period 4." RFQ amend., at 8. SDI's assertion that the agency was required to subtract a portion of SDI's total price constitutes an assertion that the agency should have evaluated proposals in a manner that was directly contrary to the express terms of the solicitation. SDI's protest regarding the agency's evaluation of price is without merit.¹⁰

Finally, SDI asserts that the agency "failed to provide [SDI] with an opportunity to comment on the allegedly deficient past performance information," as required by FAR §15.306 in situations where an agency engages in communications or conducts discussions with offerors. Protest, Sept. 10, 2010, at 5. SDI maintains that the agency's "failure" to provide SDI an opportunity to comment on its past performance "renders the procurement invalid." Id. at 6. SDI is mistaken.

⁹ As noted above, the solicitation expressly identified each of these services as tasks that the contractor was required to perform.

¹⁰ To the extent SDI's complaints regarding the agency's evaluation of price reflect its ongoing dissatisfaction with the terms of the solicitation, its post-closing-date protest, as discussed above, is not timely filed. 4 C.F.R. 21.2(a)(1).

As noted above, the record is clear that the agency did not conduct any post-closing-date communications or discussions with the vendors. Accordingly, even if this procurement were governed by the provisions of FAR part 15—which it is not—the agency would have been permitted, but not required, to discuss adverse past performance information with offerors. See A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5. Where there is no basis to question the validity of the past performance information provided, it is reasonable for a contracting officer to opt not to seek further information from the offeror. Id.

Here, we have reviewed the record and find no basis to question the agency’s past performance evaluation, or the contracting officer’s determination not to seek further information from SDI regarding its performance history. In this regard, the record shows that vendors were required to identify three past performance references. One of SDI’s three such references identified EPA personnel associated with SDI’s performance of the incumbent contract; accordingly, the contracting officer sought, and documented, information from such EPA personnel. The cognizant EPA personnel rated SDI’s performance only “fair” overall, stated that “service has been poor in the past 18 months,” and that SDI “ha[s] not been responsive to EPA issues and concerns.” AR, Past Performance Evaluation, at 1. In response to the past performance questionnaire’s inquiry—“Would you do business with [SDI] again?”—the EPA personnel responded “no.” Id. at 2.

In considering whether the contracting officer reasonably relied on the past performance information that was provided, we reviewed various e-mails between EPA personnel and SDI personnel that were sent during the course of SDI’s performance of the incumbent contract. The e-mails from the agency to SDI discuss various “incident” reports; include the agency’s statements that SDI “ha[s] completely disregarded our upgrade timeline” and that “[w]e [the agency] need an immediate improvement in our customer experience”; and request that SDI expedite resolution of pending issues. AR, E-mails Between SDI and EPA, at 1-8. The e-mails also contain SDI’s acknowledgement that “we are causing a bad experience” and that “[w]e made the mistake of not escalating [the issue] within our customer care department.” Id. at 1.

In pursuing this protest, SDI has not asserted that the e-mails contain factual inaccuracies, nor has SDI provided any other basis to question the validity of the agency’s stated concerns. On this record, we find no basis to question the reliability of the past performance information provided or the reasonableness of the contracting officer’s decision not to seek further input or information from SDI.

Accordingly, SDI's protest that the agency was required to provide SDI an opportunity to comment on adverse past performance information is without merit.¹¹

The protest is denied in part and dismissed in part.

Lynn H. Gibson
Acting General Counsel

¹¹ SDI also argues that the negative past performance information constituted a nonresponsibility determination that was required to be referred to the Small Business Administration. SDI is mistaken. Where, as here, a vendor's past performance is downgraded pursuant to a best value evaluation scheme, the matter is one of relative technical merit, not responsibility, and does not require referral to the SBA. See, e.g., John Blood, B-290593, Aug. 26, 2002, 2002 CPD ¶ 151 at 4 n.2; T. Head and Co., Inc., B-275783, Mar. 27, 1997, 97-1 CPD ¶ 169 at 3-4.