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Decision

Matter of: Konica Minolta Business Solutions U.S.A., Inc.

File: B-411888

Date: November 10, 2015

Mark R. Berry, Esq., Lori A. Lange, Esq., and Benjamin L. Williams, Esq., Peckar & Abramson, P.C., for the protester.

Kenneth D. Brody, Esq., and Thomas K. David, Esq., David, Brody & Dondershine, LLP, for Lexmark International, Inc., the intervenor.

Debra J. Talley, Esq., and Kenneth Gilliland, Esq., Department of the Army, for the agency.

Noah B. Bleicher, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's determination that the protester submitted an unacceptable proposal is denied where the record confirms that the protester failed to describe its approach to transition during the phase-out period, as required by the solicitation.

2. In a competition conducted among firms holding General Services Administration (GSA) Federal Supply Schedule (FSS) contracts, agency's request for confirmation regarding whether proposed items and prices were included on offerors' schedules constituted clarifications; agency was not required to conduct discussions where the solicitation contemplated making the award without discussions.

DECISION

Konica Minolta Business Solutions U.S.A., Inc. (KMBS), of Vienna, Virginia, protests the issuance of a delivery order to Lexmark International, Inc., of Lexington, Kentucky, pursuant to request for delivery order proposals (RFP) No. W15QKN-15-R-1032, issued by the Department of the Army, U.S. Army Contracting Command, for the lease of multi-functional devices. KMBS challenges the agency's determination that its proposal was technically unacceptable and contends that the agency engaged in misleading discussions.

We deny the protest.

BACKGROUND

The Army issued the RFP on May 1, 2015, to contract holders of GSA FSS 36, pursuant to the procedures set forth at Federal Acquisition Regulation (FAR) subpart 8.4.¹ RFP at 1. The RFP sought proposals for the lease of 700 multi-functional devices (MFD) (with fax, scan, print, and copy functionality) in support of the 99th Regional Support Command. Id. The RFP contemplated the issuance of a single, fixed-price delivery order with a 12-month base period and four 12-month option periods. Id. Pursuant to the RFP, the delivery order would be issued on a lowest-priced, technically acceptable basis, considering technical, past performance, and price. RFP, attach. 4, Basis for Award, at 1. To be considered for award, a proposal must be rated acceptable under the technical and past performance factors. Id.

With respect to the technical factor, the RFP instructed offerors to provide a “detailed discussion” of the offeror’s approach to meeting the solicitation requirements. Id. at 8. The RFP specifically identified eight areas that firms were to address in their proposals. Of relevance to this protest, the program management approach required the offeror to “describe its approach for successful transition during the Phase[-]in/Phase[-]out (SOW [Statement of Work] sections C.13 and C.14) of the [order].” Id. The RFP provided that the agency would evaluate technical proposals for “[a]dequacy of [r]esponse” and “[f]easibility of [a]pproach.” Id. at 2. Further, the RFP warned that “[m]arginal levels of detail could indicate a lack of understanding concerning requirements” and that “[o]fferors are responsible for including sufficient details to permit a complete and accurate evaluation of each proposal.” Id. In this respect, the RFP cautioned that “[u]nsupported promises to comply with contractual requirements will not be sufficient.” Id.

The Army received four proposals, including KMBS’s, prior to the submission deadline. Combined Contracting Officer’s Statement of Facts/Legal Memorandum (COSF/LM) at 4. First, the agency sought clarifications from the offerors as to whether the proposed MFD models and prices were within each offeror’s GSA schedule.² Id. at 5. The agency then evaluated proposals, rating KMBS’s proposal acceptable under the past performance factor but unacceptable under the technical factor. Id.; Agency Report (AR), Tab E(1), KMBS Technical Evaluation, at 1. In finding KMBS’s \$8,763,290 proposal unacceptable, the evaluators identified as a deficiency that KMBS “did not propose a phase[-]out strategy,” as required by the RFP. AR, Tab E(1), KMBS Technical Evaluation, at 1.

¹ FSS 36 offers office imaging and document solutions. Combined Contracting Officer’s Statement of Facts/Legal Memorandum at 1.

² Offerors were not permitted to revise or modify their proposals. Agency Report, Tab F, Request for Clarifications to KMBS, at 1.

Ultimately, Lexmark's proposal was the only proposal rated acceptable under both of the non-price factors. COSF/LM at 5. Accordingly, as the lowest-priced, technically acceptable offeror, the delivery order was issued to Lexmark for \$9,540,080 on July 29, 2015. AR, Tab G, Delivery Order Decision Document, at 6. Following a brief explanation of the award decision, KMBS protested to our Office. See AR, Tab J, Explanation to KMBS, at 1.

DISCUSSION

KMBS challenges the evaluation of its proposal. The protester argues that it sufficiently described its approach to phase-out. KMBS also asserts that the Army should have discussed the issue with KMBS if it had any concerns. As discussed below, we find reasonable the agency's evaluation of KMBS's proposal.

Where, as here, an agency issues a solicitation to FSS contractors under FAR subpart 8.4 and conducts a competition, we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation. SRM Group, Inc., B-410571, B-410571.2, Jan. 5, 2015, 2015 CPD ¶ 25 at 4. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. See DEI Consulting, B-401258, July 13, 2009, 2009 CPD ¶ 151 at 2. In a competitive FSS procurement, it is the offeror's burden to submit a proposal that is adequately written and establishes the merits of the proposal. See Bridges Sys. Integration, LLC, B-411020, Apr. 23, 2015, 2015 CPD ¶ 144 at 4.

Here, the agency's evaluation of KMBS's technical proposal was unobjectionable. As discussed above, the RFP required offerors to discuss their approach for successful transition during the phase-in and phase-out periods of the delivery order. RFP, attach. 4, Basis for Award, at 8. The evaluation criterion referenced relevant provisions in the SOW that identified requirements related to the phase-in and phase-out periods. With respect to phase-out specifically, the SOW required the following of contractors:

The vendor shall provide all resources required to ensure a smooth transition period, in accordance with contract requirements. The government intends to sustain a maximum level of customer support during this period. The incumbent vendor will be required to cooperate fully with the new vendor to assure a smooth transition period. This cooperation includes, but [is] not limited to, tasks associated with the prompt removal of MFD equipment from all locations as requested by [the] COR.

RFP, attach. 1, SOW, § C.14.1. Thus, the record is clear that the solicitation included requirements applicable to the phase-out period and that the agency would evaluate the offeror's proposed approach to phase-out.

In its proposal, KMBS included a one-page “Program Management Approach” in response to the phase-in/phase-out RFP requirement. See AR, Tab D, KMBS Technical Proposal, at 18. The record reflects that while KMBS described its strategy and plans for the phase-in period, the discussion did not include any information regarding the firm’s approach for successful phase-out. See id. For instance, KMBS’s program management approach described the creation of an implementation plan and identified [deleted], none of which addressed a phase-out period. Id. The firm also discussed providing [deleted] and providing [deleted]. Id. However, nowhere in its proposal did KMBS discuss the SOW requirements related to phase-out or otherwise reference any transition off the contract.³

Thus, based upon our review of the record, we find that the Army’s evaluation of KMBS’s proposal was reasonable and consistent with the terms of the RFP. Despite the protester’s assertion otherwise, the record is clear that KMBS neglected to include any discussion of the phase-out period. It is an offeror’s responsibility to submit an adequately written proposal. See Bridges System Integration, LLC, supra. Because KMBS failed to describe its phase-out strategy in response to the solicitation requirement, the evaluators reasonably assigned the proposal a deficiency and, in accordance with the RFP, ultimately concluded that it was unacceptable. The protester’s objections to the agency’s evaluation reflect nothing more than its disagreement with the Army’s reasonable conclusions and do not provide a basis to sustain the protest.

Next, the protester contends that the agency should have discussed with KMBS any concerns that it had with respect to the firm’s phase-out strategy (or lack thereof). Specifically, KMBS argues that the Army’s exchanges with offerors actually constituted discussions, and that the agency therefore was required to identify other proposal concerns. We disagree.

As a preliminary matter, we note that this competition was limited to FSS vendors. As we have previously noted in our decisions, the procedures of FAR part 15 governing contracting by negotiation—including those concerning exchanges with offerors after receipt of proposals—do not govern competitive procurements under the FSS program. FAR § 8.404(a); USGC Inc., B-400184.2 et al., Dec. 24, 2008, 2009 CPD ¶ 9 at 3. There is no requirement in FAR subpart 8.4 that an agency conduct discussions with vendors or offerors. See USGC Inc., supra. However, exchanges that do occur with vendors in a FAR subpart 8.4 procurement, like all other aspects of such a procurement, must be fair and equitable; our Office has

³ By way of comparison, the record reflects that Lexmark described in its proposal the firm’s strategy during the phase-out period. For instance, Lexmark explained: “[deleted].” AR, Tab D(2), Lexmark Technical Proposal, at 20. The company also discussed [deleted]. Id.

looked to the standards in FAR part 15 for guidance in making this determination. A-Tek, Inc., B-404581.3, Aug. 22, 2011, 2011 CPD ¶ 188; USGC Inc., supra.

In this regard, FAR part 15 defines clarifications as “limited exchanges” that agencies may use to allow offerors to clarify certain aspects of their proposals or to resolve minor or clerical mistakes. See FAR § 15.306(a)(1), (2); Diversified Collection Servs., Inc., B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 11 (using FAR part 15 definitions of post-proposal communications, or exchanges, as guidance in FSS context). Discussions, by contrast, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or quotations, or provides the offeror with an opportunity to revise or modify its proposal. Diversified Collection Servs., Inc., supra, at 11-12; see FAR § 15.306(d).

Here, the protester’s insistence that the communications the agency had with the offerors constituted discussions (and not clarifications) is unavailing. Our review of the record confirms that the exchanges here were limited to clarifying whether the items offered and the respective unit prices were on the offerors’ GSA schedule. More specifically, the record reflects that an Army contract specialist asked all offerors the same two questions via email.⁴ First, the specialist sought verification that “all part numbers and model numbers proposed” were on the offeror’s schedule, and she requested that the offeror provide the “GSA Schedule number, page number[,] modification etc.” to confirm that the item was on the schedule, as well as the specification sheet for the model proposed. AR, Tab F, Request for Clarification to KMBS, at 1. Second, with respect to pricing, she sought the formula and calculation used to arrive at the proposed unit prices, along with the specific portion of the offeror’s schedule that substantiated the calculation. Id. She also requested the GSA Special Item Number under which the proposed prices were authorized. Id. The contract specialist’s email expressly stated, “No changes to your company’s proposal are authorized. Any changes made will not be accepted by the government.” Id. In our view, these exchanges merely sought confirmation and verification to ensure that the items and prices proposed were on the offerors’ GSA schedule--offerors were not given an opportunity to materially change proposals--and fall quintessentially within the nature of clarifications.

On the other hand, had the Army advised KMBS that its proposal was unacceptable for failing to address its approach to phase-out and provided the firm with an opportunity to submit additional information to make its proposal acceptable, the agency’s actions would have been more analogous to discussions, and not additional clarifications as the protester contends. See Allied Tech. Group, Inc., B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 6 (“The ‘acid test’ for

⁴ The contract specialist requested responses from the offerors by the next day. AR, Tab F, Request for Clarification to KMBS, at 1.

deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to modify or revise its proposal.”). To the extent that the protester alternatively asserts that the agency should have engaged in discussions with the firm to remedy any issues, the argument is also without merit. The solicitation expressly warned offerors that the agency contemplated making award on the basis of initial proposals, without discussions. RFP, attach. 4, Basis for Award, at 1. Thus, the agency was not required to contact the protester to obtain information regarding its approach to phase-out. See Verizon Fed., Inc., B-293527, Mar. 26, 2004, 2004 CPD ¶ 186 at 6. Rather, as discussed above, it was incumbent on KMBS to affirmatively demonstrate the merits of its proposal, and it risked rejection by failing to do so. See HDL Research Lab, Inc., B-294959, Dec. 21, 2004, 2005 CPD ¶ 8 at 5.

The protest is denied.

Susan A. Poling
General Counsel