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Decision

Matter of: Top Guard, Inc.

File: B-420719

Date: July 28, 2022

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DIGEST

Protest challenging agency's rejection of protester's proposal because the protester failed to register in the system for award management prior to proposal submission is denied where the solicitation specifically required such compliance.

DECISION

Top Guard, Inc., of Norfolk, Virginia, protests its exclusion from the competition under request for proposals (RFP) No. 19AQMM-22-R-0051, which was issued by the Department of State (DOS) for local security guard services in Athens, Greece. Top Guard contends that the agency improperly concluded that the prime offeror was a joint venture, as opposed to Top Guard itself, and that the joint venture was required to separately register in the system for award management (SAM) database prior to proposal submission.

We deny the protest.

BACKGROUND

On February 16, 2022, DOS issued the RFP pursuant to the procedures of Federal Acquisition Regulation (FAR) part 15, contracting by negotiation for local security guard services at the United States Embassy in Athens, Greece. RFP at 2.¹ The solicitation

¹ The RFP was amended four times. Our citations are to the conformed version of the RFP provided as exhibit 2 of the agency report.

contemplates the award of a single time-and-materials contract with a 1-year base period and four 1-year option periods. *Id.* at 2. Award will be made on a lowest-price technically acceptable basis with proposals evaluated based on two factors: price and technical. *Id.* at 88, 103. The agency intends to make award without holding discussions. *Id.* at 107.

With respect to price, the solicitation includes a 10-percent price evaluation preference for U.S. persons or U.S. joint venture persons, in accordance with the requirements of Section 136 of the Foreign Relations Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-246, as amended, and codified at 22 U.S.C. § 4864. RFP at 82-83. In order to establish that an offeror is entitled to the price evaluation preference, the RFP requires an offeror to complete Department of State Acquisition Regulation §§ 652.237-73, "Statement of Qualifications for Preference as a U.S. Person" (Statement of Qualifications) questionnaire, certifying that the offeror qualifies as a U.S. person or as a U.S. joint venture person if at least 51 percent of its assets are owned by the U.S. joint venture partner. *Id.* at 82; see also, 22 U.S.C. § 4864(c)(3).

As relevant to this protest, section L of the solicitation includes FAR provision 52.204-7, System for Award Management (SAM), which, in relevant part, requires offerors to be registered in SAM when they submit an offer to the government.² In pertinent part, this provision states as follows:

(b)(1) An [o]fferor is required to be registered in SAM when submitting an offer or quotation, and shall continue to be registered until time of award, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement resulting from this solicitation.

(2) The [o]fferor shall enter, in the block with its name and address on the cover page of its offer, the annotation "Unique Entity Identifier" followed by the unique entity identifier that identifies the Offeror's name and address exactly as stated in the offer. . . . The unique entity identifier will be used by the [c]ontracting [o]fficer to verify that the [o]fferor is registered in the SAM.

Id. at 88.

² To be registered in SAM, an offeror must meet four requirements: (1) enter all mandatory information, including the unique entity identifier number in the SAM database; (2) complete the mandatory sections of the SAM registration application; (3) the government must validate all mandatory data fields; and (4) the record must be marked as "Active." RFP at 87-88. An offeror's unique entity identifier number must correspond to the offeror's name and address as stated in the proposal. *Id.* at 88.

The RFP also requires in section L.11.1 that joint ventures have an active SAM registration at the time of proposal submission. Specifically, the RFP provides as follows:

Offerors, including any offeror organized as a joint venture, must have an active SAM registration at the time of proposal submission and throughout the procurement process. Any offeror whose registration is not active in SAM at the time of proposal submission will be excluded from the process and their proposals will not be evaluated.

Id. at 92 (emphasis in original omitted).

Additionally, and at issue here, the solicitation explains that offerors can be a sole proprietorship, a formal joint venture or a *de facto* joint venture. In this regard, the solicitation explained that:

A prospective offeror may be a sole proprietorship, a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a *de facto* joint venture with no written agreement. To be considered a 'qualified joint venture person,' the joint venture must have at least one firm or organization that itself meets all the requirements of a U.S. joint venture person listed in Section 136 [of the Foreign Relations Authorization Act]. By signing this proposal, the U.S. person co-venturer agrees to be individually responsible for performance of the contract, notwithstanding the terms of any joint venture agreement.

Id. at 83. A joint venture is defined by the RFP as:

a formal or *de facto* association of two or more persons or entities to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skills, and knowledge. To be acceptable, all members of a joint venture must be jointly and severally liable for full performance and resolution of matters arising out of the contract.

Id. at 85.

Section M.1 of the solicitation cautions that the agency may reject a proposal if the offeror: (1) fails to submit any of the required proposal documents required by section L; (2) submits a cost/price proposal that cannot be adequately explained or substantiated; or (3) submits an offer that could not be made technically acceptable without a major rewrite. *Id.* at 102-103.

Section M.2 establishes a tiered evaluation process. *Id.* at 89, 103. The first step of the evaluation was a compliance review to determine whether the proposals comply with

the instructions in section L of the solicitation.³ The agency then would evaluate price proposals to determine total proposed prices, including any applicable price evaluation preference for a qualified U. S. person or qualified U. S. joint venture persons. Finally, the agency would evaluate technical proposals to determine technical acceptability. *Id.* at 103.

Top Guard and its joint venture partner Mega Guard submitted a proposal in response to the solicitation by the April 15 closing date. Contracting Officer's Statement at 1. The proposal identified a joint venture called T&M Guard, which was established between Mega Guard Services S.A., and Top Guard, Inc. The joint venture agreement submitted with the proposal included the following statement: "Parties hereto have decided to collaborate and participate [i]n said [procurement] as a Joint Venture (hereinafter called the "JV"), by submitting a joint offer (hereinafter called the "Offer")." AR Exh. 10, Joint Venture Agreement at 1 (emphasis omitted). The joint venture agreement further stated: "Parties shall both contribute to the preparation of the [offer], and submit the [o]ffer to the [agency], on time, on behalf of the JV." *Id.* at 1-2.

The proposal also included a completed Statement of Qualifications questionnaire in order to qualify for the 10-percent price evaluation preference as a U.S. joint venture person. *Id.*, Exh. 3, T&M Guard's Proposal at 126-129. The parties certified that the prospective offer is a joint venture, and that Top Guard is the U.S. joint venturer incorporated in the United States, and Mega Guard is the joint venture partner incorporated in Greece. *Id.* at 129-130. Consistent with the structure described in the proposal, the joint venture agreement identifies a doing business name for the joint venture and establishes that Top Guard will own at least 51 percent of the assets of T&M Guard, the joint venture. *Id.*, Exh. 10, Joint Venture Agreement at 2. The proposal included unique entity identifiers for SAM.gov for Top Guard itself and for Mega Guard. *Id.*, Exh. 3, T&M Guard's Proposal at 5. However, the joint venture partners did not provide a unique entity identifier number for the joint venture itself, T&M Guard. *Id.*

The agency began its evaluation of the proposal with the initial compliance review, as described in the solicitation. As a result of the omission of a unique entity identifier number for the joint venture T&M Guard, the contracting officer sought clarification from the joint venture's designated contract administrator. In an initial email, the contracting officer requested that the offeror provide the unique entity identifier number and cage (commercial and government entity) code "associated with your company/[j]oint [v]enture[s] registration in SAM.gov." Exh. 9, Email from Agency at 2-3. In response, the contract administrator provided the unique entity identifier numbers and cage codes for each of "the two companies" that form the joint venture--Top Guard and Mega Guard. *Id.*

³ To be eligible for evaluation, the RFP again cautions that proposals must meet all the requirements stated in the solicitation and be prepared in accordance with Section L. Failure to furnish current and complete information may cause a proposal to be determined unacceptable. RFP at 107.

In a second email, the contracting officer asked the contract administrator to “provide the information for your Joint Venture – T&M Guard.” *Id.* at 1. Mega Guard responded that “companies Top Guard Inc. from Virginia[,] and Mega Guard Services S.A. from Greece[,] have joined forces for the purposes of this solicitation and created T&M Guard as a Joint Venture” and “we have included our Joint Venture Agreement, fully executed” in the proposal and “any and all signatures by any officer of any company legally bind the JV, and therefore both companies.” *Id.*

Following review of the proposal, and the offeror’s responses to the clarification questions, the contracting officer conducted a search of the SAM database and found no registration for the joint venture, T&M Guard. Contracting Officer’s Statement at 2. The contracting officer determined that the proposal did not conform to the solicitation requirement that an offeror, organized as a joint venture, must have an active SAM registration at the time of proposal submission. *Id.* at 1-2. The contracting officer subsequently informed the protester that its proposal was excluded from the competition and would not be evaluated. *Id.*, Exh. 11, Notification of Exclusion at 1. The contracting officer explained that the joint venture “was not correctly registered as a Joint Venture on SAM.gov prior to closing time” noting that joint ventures “must be registered with their own individual Unique Entity ID number” as required by section L.11.1 of the solicitation. *Id.*

This protest followed.

DISCUSSION

Top Guard alleges that the agency’s exclusion of its proposal from the competition was unreasonable and/or contrary to the terms of the solicitation. More specifically, Top Guard raises two primary challenges to the agency’s decision: (1) the agency unreasonably concluded that Top Guard was required to separately register its *de facto* joint venture in SAM.gov; and (2) the agency impermissibly excluded Top Guard’s proposal based solely on alleged noncompliance with the solicitation’s administrative proposal instructions. While we do not address every argument raised by the protester, we have reviewed all of the allegations presented and find no basis to sustain the protest.

Top Guard asserts that it submitted its proposal as a prime offeror, not as a joint venture, and that Top Guard itself was registered in SAM.gov at the time of proposal submission. Highlighting various sections of its proposal and the joint venture agreement, Top Guard argues that it was readily apparent that Top Guard was the “official offeror,” see Protest at 9, and its proposal included collaboration with Mega Guard as an informal, *de facto* joint venture. See *generally id.* at 7-10; Comments at 3-5. Top Guard claims, for example, that the joint venture agreement “said nothing about an official formation of a separate legal entity or joint venture under the FAR or SBA’s regulations.” Protest at 8. Instead, the protester asserts that the joint venture agreement “explained that the parties had merely decided to “collaborate and

participate” in the [solicited] work.” *Id.* (citing AR Exh. 10, Joint Venture Agreement at 1). Under the “Purpose” section of the joint venture agreement, Top Guard maintains that the stated purpose of the agreement was “to set out the principles and guidelines, which will govern the collaboration of the Parties hereto regarding the Project.” Protest at 8 (citing AR Exh. 10, Joint Venture Agreement at 2) (italics omitted).

In responding to the protest, DOS disputes the protester’s claim that Top Guard submitted its proposal as the actual offeror that planned to collaborate informally with Mega Guard. The agency asserts that the proposal was submitted by the T&M Guard joint venture, and not, as the protester now claims, by Top Guard as the prime offeror. Memorandum of Law at 5-6. Because T&M Guard, the joint venture, was not registered in SAM.gov at the time of proposal submission as required by the solicitation, the agency argues that the contracting officer properly excluded the proposal. *Id.*

In reviewing protests challenging an agency’s evaluation of proposals, we do not independently evaluate proposals. Rather, we review the record to determine whether the agency’s evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *CGS-ASP Security JV LLC*, B-420497, Feb. 18, 2022, 2022 CPD ¶ 39 at 3; *IN2 LLC*, B-408099 *et al.*, June 18, 2013, 2013 CPD ¶ 149 at 5. A protester’s disagreement with an agency’s judgment is not sufficient to establish that an agency acted unreasonably. *CGS-ASP Security JV LLC, supra*; *A&T Sys., Inc.*, B-410626, Dec. 15, 2014, 2015 CPD ¶ 9 at 3.

At the outset, we address--and reject--the protester’s claims that its proposal was clearly submitted by Top Guard itself and not by T&M Guard, the joint venture. The protester’s claim is not readily supported by the record. In this regard, the proposal was submitted on T&M Guard stationary, and the Section L compliance acknowledgement was executed by “TM Guard JV” as the “Offeror (Company Name).” AR Exh. 3, T&M Guard Proposal at 1 and 3. Additionally, the proposal includes an executed “Joint Venture Signature Page” identifying the “joint venture name” as T&M Guard. *Id.* at 9. Thus, these proposal elements strongly suggest that T&M Guard, the joint venture, was the offeror. We further note that no element of the proposal unequivocally states that Top Guard, in its individual capacity, was submitting the proposal as the prime offeror. In this regard, on the “Offer Information and/or Joint Venture Signature Page,” the proposal indicates that the “Legal Business Name of Entity Submitting Offer” is “Top Guard, Inc. (JV with Mega Guard Services S.A.).” *Id.* at 7. Thus, even when considering this additional section of the proposal, the contemporaneous record still supports that the prime offeror was the joint venture.

The identity of the offeror and the relationship of the parties further points to a joint venture by the written joint venture agreement included as part of the proposal. The agreement represents that Top Guard and Mega Guard “decided to collaborate and participate” in the procurement at issue here “as a Joint Venture (hereinafter called the

“JV”), by submitting a joint offer.”⁴ AR Exh. 10, Joint Venture Agreement at 1 (emphasis omitted). The joint venture agreement further states that Top Guard and Mega Guard “shall both contribute to the preparation of the [offer], and submit the [offer] to the [agency], on time, *on behalf of the JV.*” *Id.* at 2 (emphasis added). Additionally, the agreement establishes a doing business as name for the joint venture and delineates the ownership split between the parties. *Id.*

Thus, the contemporaneous proposal indicate that the intended identity of the prime offeror was T&M Guard as a joint venture. Moreover, as addressed above, after the receipt of the proposal, the contracting officer requested that the offeror’s designated contract administrator provide the SAM registration information for T&M Guard, the joint venture. In response to the contracting officer’s request for clarification, the contract administrator did not represent that Top Guard was in fact the prime offeror, but, rather, confirmed that the offeror was in fact the joint venture. Specifically, the contract administrator represented that:

In regards to your clarification question, companies Top Guard Inc. from Virginia and Mega Guard Services S.A. from Greece have joined forces for the purposes of this solicitation and created T&M Guard as a Joint Venture. According to the tender’s requirements, we have included our Joint Venture Agreement . . . Lastly, any and all signatures by any officer of any company legally bind the [joint venture], and therefore both companies.

AR Exh. 9, Email Exchange Between Contract Administrator & Contracting Officer at 1 (emphasis added).

Based on this record, we find that the agency reasonably concluded that the proposal was submitted by T&M Guard, the joint venture. In this regard, as outlined above, the proposal, although inconsistent in its identifications, indicated in several material respects that T&M Guard was the offeror, the joint venture agreement represented that the proposal would be submitted on the joint venture’s behalf, and the protester confirmed in response to the agency’s request for clarification that the parties had “created . . . a joint venture” for “the purposes of this solicitation.” To the extent that the proposal contained any ambiguity as to the identity of the offeror, the protester bears the consequences for failing to submit an adequate proposal or adequately responding to the agency’s request for

⁴ Top Guard also repeatedly characterizes its intended joint venture as a “*de facto*” joint venture. See, e.g., Protest at 5. This argument, however, finds no support in the solicitation’s plain terms or the protester’s response thereto. Specifically, the solicitation recognized that a prospective offeror could either be “a formal joint venture in which the co-venturers have reduced their arrangement to writing,” or “a *de facto* joint venture with no written agreement.” RFP at 83. As the T&M Guard joint venturers reduced their arrangement to writing, the protester’s argument that the arrangement was merely a *de facto* joint venture is inconsistent with the RFP’s definition.

clarification. In this regard, in a negotiated procurement, it is an offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation and allows a meaningful review by the procuring agency. *Applied Visual Tech., Inc.*, B-401804.3, Aug. 21, 2015, 2015 CPD ¶ 261 at 3; *ARBEIT, LLC*, B-411049, Apr. 27, 2015, 2015 CPD ¶ 146 at 4. Alternatively, to the extent that the protester now offers in its post-exclusion protest an attempted clarification as to the true intended identity of the offeror and the intended relationship between the parties, such arguments provide no basis to object to the agency's evaluation of the protester's actual proposal as submitted. *Patriot Def. Grp., LLC*, B-418720.3, Aug. 5, 2020, 2020 CPD ¶ 265 at 9.

In the alternative, the protester argues that, even assuming the joint venture was required to be registered in SAM, it was unreasonable to exclude the proposal because compliance with the SAM registration requirements were not disclosed in the solicitation as a matter of proposal evaluation. Protest at 11-13. We find no merit to this argument.

As discussed above, the solicitation provided detailed instructions to offerors regarding the required content of their proposals and warned that failure to comply would result in exclusion of proposals from the competition. RFP at 102-103. In the context of this procurement, the solicitation established the requirement that an offeror must have an active SAM registration at the time of proposal submission, see *id.* at 88, and that this SAM registration requirement applies to any "offeror organized as a joint venture." *Id.* at 92. The RFP specifically warned that "[a]ny offeror whose registration is not active in SAM at the time of proposal submission *will be excluded from the process and their proposals will not be evaluated.*" *Id.* (emphasis added); see also AR Exh. 3, T&M Proposal at 3 (acknowledging that "proposals that are not received in accordance with Section L instructions may be considered unacceptable and thus rejected by the Government"). Here, as discussed above, the agency determined that the offeror was organized as a joint venture, T&M Guard, and that the joint venture was not registered in SAM.gov at the time of proposal submission.

Our review of the record finds nothing unreasonable in the agency's decision to exclude the proposal from the competition. Indeed, we have previously rejected materially similar arguments raised by another protester objecting to its exclusion from the competition in a procurement conducted by DOS that utilized the identical SAM registration clause at issue in this protest. See *CGS-ASP Security JV LLC, supra* at 2-3.

The protest is denied.

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General Counsel