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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: INDUS Technology, Inc.

File: B-297800.13

Date: June 25, 2007

Ronald K. Henry, Esq., Kaye Scholer LLP, the protester.
Adele Ross Vine, Esq., General Services Administration, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably excluded offeror's proposals from competition where the cover letters accompanying the proposals provided for an acceptance period of 180 days, and the solicitation required a minimum acceptance period of 350 days and specifically stated that proposals providing less than the minimum acceptance period would be rejected.

DECISION

INDUS Technology, Inc. protests its exclusion from consideration for the award of a contract under request for proposals (RFP) No. 6FG2005MYV000001, issued by the General Services Administration (GSA) for information technology services. INDUS argues that its proposal was improperly excluded from the competition for failing to provide the minimum acceptance period established by the RFP.

We deny the protest.

BACKGROUND

GSA issued the RFP on March 31, 2005, as a set-aside for service-disabled veteran-owned small business concerns (SDVOSB) for information technology services. The RFP contemplated the award of a government-wide acquisition contract (GWAC), referred to as the Veterans Technology Services GWAC (VETS GWAC), whereby GSA would select and administer a pool of pre-qualified, SDVOSB firms that would compete for information technology "task orders" from individual agencies across the federal government. More specifically, the RFP provided that the GWAC would consist of approximately 20 indefinite-delivery/indefinite-quantity (ID/IQ) contract

awards in each of two “functional areas,” one covering information systems engineering and the other covering systems operation and maintenance. Contracts were to be for a 5-year base period, plus five 1-year option periods, with a total GWAC ceiling of \$5 billion over the life of all contracts.

The RFP provided that awards were to be made on a best value basis considering two evaluation factors, price and technical merit (which consisted of two subfactors, past performance (a pass/fail evaluation) and contract performance plan). The RFP also provided that prior to evaluating offerors’ prices and technical proposals, GSA would review each proposal for “completeness and adherence to instructions.” RFP at M.2. According to the RFP, proposals that did not pass this “acceptability review” would not be further evaluated. Id.

As it relates to the protest, offerors were instructed to submit their proposals using standard form (SF) 33. Section L of the RFP, entitled “Instructions, Conditions, and Notices to Offerors,” contained the following provision:

L.3. Offer Acceptance Period. The Offeror shall complete Block 12 of each SF33 submitted with full cognizance of the minimum acceptance period established herein.

(a) “Acceptance period,” as used in this provision means the number of calendar days available to the Government for awarding a Contract from the date specified in this solicitation for receipt of offers.

(b) This provision supersedes any language pertaining to the acceptance period that may appear elsewhere in this solicitation.

(c) The Government requires a minimum acceptance period of not less than 365 calendar days.¹

(d) Offerors may specify a longer acceptance period than the Government’s minimum requirement.

(e) An offer allowing less than the Government’s minimum acceptance period will be rejected.

(f) The offeror agrees to execute all that it has undertaken to do, in compliance with its offer, if that offer is accepted in writing within--

¹ The minimum acceptance period was changed from 365 days to 350 days through RFP amendment 7.

- (1) The acceptance period stated in paragraph (c), this provision; or
- (2) Any longer acceptance period as permitted by paragraph (d) of this provision.

RFP at L-11.

As explained by GSA, the lengthy acceptance period was considered necessary due to GSA's expectation that it would receive numerous proposals in response to the solicitation and the resulting time that it would take to evaluate those proposals. Contracting Officer's Statement at 3.

Section L of the RFP also incorporated by reference Federal Acquisition Regulation (FAR) § 52.215-1, Instructions to Offeror--Competitive Acquisition. RFP at L-15. This provision expressly states that "[p]roposals may be withdrawn at any time before award." FAR § 52.215-1(c)(8). The RFP also informed offerors that GSA intended to make awards without discussions; however, GSA reserved the right to conduct discussions if they were determined to be in the government's interest. RFP at L-1.

In response to the RFP, which had a closing date of July 15, 2005, GSA received 414 proposals between the two functional areas, including two timely proposals from INDUS (one for each functional area). As explained by GSA, the agency began its "acceptability review" of proposals in July and completed this aspect of its evaluation on December 5, 2005. During the course of its acceptability review, GSA noted that the proposals of two offerors, including the two proposals submitted by INDUS, provided acceptance periods which were shorter than that required by the RFP. Specifically, while the signed cover letters accompanying each of INDUS's proposals certified that they had been prepared "completely consistent with the terms and conditions of the solicitation," each cover letter stated that the offer was "valid for one hundred and eighty (180) days from date of submission to the Government on June 30, 2005." Since this statement provided for an acceptance period which was shorter than that required by the RFP, the agency determined that INDUS's proposals failed the "acceptability review" and therefore were not further evaluated. See E-mail from GSA Counsel, June 4, 2007.

Ultimately, the agency completed its evaluation of proposals in April 2006, and made its award determinations between the end of April and early May 2006. At that time, GSA received one agency-level protest and three protests were filed with our Office.² The three protests filed with our Office had decision due dates in late August. Since the decision due dates were after the RFP's minimum proposal acceptance period, GSA was concerned that the remaining offerors' proposals would expire prior to

² The three protests filed with our Office were ultimately withdrawn or denied and are not otherwise relevant to this case.

resolution of the protests. As a consequence, GSA sent letters to the remaining offerors, on June 7, 2006, asking them to extend their acceptance periods through October 2, 2006. As indicated by GSA, none of the remaining offerors' proposals had then expired. On August 25, after the agency-level protest and GAO protests were resolved, GSA issued its formal notice identifying the apparently successful offerors. Our Office then received two additional protests. The first protest was filed on September 8 and had a decision due date of December 18. As a consequence of that protest, GSA, on September 14, issued a second request for offerors to extend their acceptance periods through December 26, 2006.

On September 7, INDUS learned that its proposal had not been selected for award and filed a protest with our Office on September 15. We dismissed INDUS's protest on September 21 for failure to state a valid basis of protest since the protest allegations were based on "information and belief" without any supporting explanation or documentation. INDUS filed a new protest on September 28 alleging that the agency had improperly and unfairly excluded its proposals from consideration for award. After receipt of the agency report and comments from INDUS, our Office dismissed this protest as well because another competitor under the solicitation had filed suit in the Court of Federal Claims on November 22, challenging GSA's actions under the solicitation. Thereafter, GSA awarded the VETS GWAC contracts on December 18. GSA made 40 awards for functional area 1 and 35 awards for functional area 2.

On April 9, 2007, INDUS requested that our Office reopen its protest challenging GSA's exclusion of its proposal from consideration for award. INDUS argued that there was no longer a concern that a decision by our Office would be rendered academic by proceedings in the case pending before the Court of Federal Claims since the court had issued a decision indicating that, by stipulation of the parties, the plaintiff would not seek to have any of GSA's awards under the VETS GWAC procurement invalidated. See Knowledge Connections Travel, Inc., No. 06-786C, slip op. at 21 (Fed. Cl. Apr. 3, 2007). We agreed and reopened the earlier protest filed by INDUS.

ANALYSIS

INDUS challenges GSA's decision to remove its proposals from consideration for award based on the conclusion that the proposals failed to provide for the minimum acceptance period required by the RFP. Specifically, INDUS argues that: (1) the solicitation provision upon which GSA relied to exclude its proposals is contrary to regulation and therefore invalid; (2) its proposals did in fact provide for the minimum acceptance period required by the RFP, notwithstanding statements contained in its cover letters indicating a shorter acceptance period, and to the extent the agency had any concerns regarding the acceptance period in its proposals as a consequence of the cover letters, GSA should have resolved the issue through clarifications as provided by FAR § 15.306(a)(2); and (3) GSA acted unfairly by not

affording it the same opportunity to extend the acceptance period of its proposals as it did for other offerors during the course of the procurement.

With regard to the first issue, INDUS contends that the provision in the solicitation specifying rejection of proposals which allowed for less than the minimum acceptance period required by the RFP is invalid because it is in direct conflict with FAR §§ 15.208(e) and 52.215-1 (which was incorporated in the solicitation), both of which provide that an offeror may withdraw its proposal any time before award. INDUS's challenge to GSA's inclusion of the above provision in the solicitation is untimely. Under our Bid Protest Regulations, allegations regarding apparent solicitation improprieties are required to be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2007). Here, since any alleged conflict between the RFP and the FAR clauses was apparent from the face of the RFP, any protest on that ground had to be filed before the time set for receipt of proposals. HMR Tech, LLC, B-295968, B-295968.2, May 19, 2005, 2005 CPD ¶ 101 at 7 n.8. Because the protest was not filed until almost 2 years after proposals were due, this ground of protest is untimely.³

Regarding the second issue, INDUS asserts that because the language limiting its acceptance period to 180 days, which INDUS describes as a "clerical error," only appeared in the cover letters accompanying its proposals, it was extrinsic to its actual proposals. Since it was not part of its proposals, INDUS argues, it did not negate its acceptance of the RFP's required minimum acceptance period as reflected by its signature on the SF 33 for each proposal and the statement in the cover letters themselves indicating that INDUS had prepared its proposals consistent with the terms of the RFP.⁴ INDUS, however, does not cite any cases in support of its

³ INDUS notes that our regulations permit us to consider an untimely protest "for good cause shown" or where we determine that a protest raises issues significant to the protest system. 4 C.F.R. § 21.2(c). The "good cause" exception is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a timely protest. Dontas Painting Co., B-226797, May 6, 1987, 87-1 CPD ¶ 484 at 2. The significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a prior decision. Schleicher Cmty. Corrs. Ctr., Inc., B-270499.3 et al., Apr. 18, 1996, 96-1 CPD ¶ 192 at 7. Here, the "good cause" exception has no application and there is nothing in the record to suggest that the issue is of widespread interest to the procurement community warranting its resolution in the context of an otherwise untimely protest. As a consequence, we decline to address the issue here.

⁴ Block 12 of the SF 33, as issued in the RFP and as completed by INDUS in its proposals, included a reference to section L of the RFP. As a consequence, the parties do not dispute that the RFP was structured such that the SF 33 was tied to
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fundamental premise that the cover letters to its proposals were “extrinsic” and therefore should not have been read as part of its proposals. In fact, this assertion is contrary to the decisions of our Office, which have long held that cover letters submitted with proposals are considered part of the offerors’ proposals. See System Dynamics Int’l, Inc.–Recon., B-253957.4, Apr. 12, 1994, 94-1 CPD ¶ 251 at 3; Sabre Commc’n Corp.–Recon., B-233439.2, June 30, 1989, 89-2 CPD ¶ 14 at 2-3; AEK Aktiengesellschaft, B-221079, Mar. 18, 1986, 86-1 CPD ¶ 267 at 5.

In the alternative, INDUS argues that assuming the 180-day language contained in its cover letters was properly considered part of its proposals, the language created at most an ambiguity regarding the acceptance period; this ambiguity, INDUS asserts, was the result of a clerical error and should have been addressed through clarifications. Even accepting INDUS’s argument that there was an ambiguity in its proposals and that the ambiguity was due to a clerical error—an issue we do not resolve—we see no basis to conclude that the agency was required to seek clarifications with INDUS.

The solicitation expressly provided that the agency intended to make award without discussions and the agency did in fact make award without holding discussions. FAR § 15.306(a)(2), which addresses clarifications and award without discussions, states in relevant part that where an award will be made without conducting discussions, “offerors may be given the opportunity to clarify certain aspects of proposals . . . or to resolve minor or clerical errors.” Pursuant to this provision, an agency has broad discretion to decide whether to engage in clarifications with an offeror. INDUS contends that the agency acted unreasonably by not allowing it to correct this aspect of its proposal through clarifications since it had allowed other offerors to clarify certain aspects of their price proposals. An agency, however, generally has the discretion to decline to seek clarifications from an offeror, even where the agency has engaged in clarifications with other offerors. See General Dynamics–Ordnance & Tactical Sys., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 at 9 n.4; Landoll Corp., B-291381 et al., Dec. 23, 2002, 2003 CPD ¶ 40 at 8.

While we recognize that there may be a rare situation where it would be unfair to request clarification from one offeror but not from another, the mere fact that an agency requests clarification from one offeror and not another, does not constitute unfair treatment. General Dynamics–Ordnance & Tactical Sys., *supra*; *see also*, FAR § 1.102-2(c)(3) (providing that “[a]ll contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same”). As a consequence, INDUS has not established that the agency acted improperly or in

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section L.3 and thereby provided for a default minimum acceptance period of 350 days.

contravention of the FAR by not seeking to clarify the acceptance period of INDUS's proposals.

As a final matter, INDUS contends that GSA acted unfairly by not affording it the opportunity to extend the acceptance periods of its proposals as it had done for other offerors. This argument, however, is misplaced. GSA only sought extensions from those offerors whose proposals had been found to comply with the RFP's requirements, including the provision regarding the minimum acceptance period. As noted above, INDUS's proposals were excluded from the competition under the terms of the RFP for failing to offer the minimum acceptance period. Since its proposals already had failed the agency's initial "acceptability review," and, as a result, had been excluded from the competition as noncompliant, GSA did not engage in unequal treatment of offerors by inviting only those offerors with compliant proposals, and not INDUS, to extend the acceptance period of their proposals.

In sum, given the explicit language in the RFP establishing a required minimum acceptance period of 350 days, and in the absence of a timely challenge to this provision, we have no basis to object to the agency's rejection of protester's proposals given the language in its cover letters limiting the acceptance period of its proposals to 180 days.

The protest is denied.

Gary L. Kepplinger
General Counsel