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Decision

Matter of: TriStar Aerospace LLC

File: B-419093

Date: December 11, 2020

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DIGEST

Protest that the agency unreasonably rejected the protester's proposal as late is denied where the record shows that, although a portion of the proposal was received on time, information necessary for the agency to evaluate the proposal was submitted late; the agency's rejection of the proposal was thus reasonable.

DECISION

TriStar Aerospace LLC, of Brunswick, Maine, protests the determination of the Department of the Navy, Naval Air Warfare Center Aircraft Division, that its proposal was late and therefore ineligible for consideration under request for proposals (RFP) No. N0042120R0094 for air-to-air refueling services. The protester contends that it submitted its proposal on time, and a late filing by its proposed subcontractor should not have rendered TriStar's entire proposal late.

We deny the protest.

BACKGROUND

The Department of the Navy's fleet and other customers require air-to-air refueling services for multiple aircraft types. This acquisition, in support of the Naval Air Systems Command Contracted Air Service Program, was to provide contractor owned, operated, and maintained aerial refueling aircraft, personnel, and equipment to satisfy fleet training, operational, test and evaluation, and foreign military sales requirements.

Agency Report (AR), Tab 12, RFP amend. 0005, Performance Work Statement (PWS) at 1.

The agency previously conducted a competition for these services; that competition, conducted as a small business set-aside, resulted in the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract to TriStar in April 2019. The incumbent contractor filed a protest at GAO challenging TriStar's award. The agency took corrective action, during which it terminated the award to TriStar and changed the procurement from a small business set-aside with the award of a single IDIQ contract to an unrestricted competition for the award of multiple IDIQ contracts. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 5.

This solicitation sought proposals for the award of up to two fixed-price IDIQ contracts with a 4-year, 364 day base ordering period and a 4-year, 364 day option period. AR, Tab 14, Conformed RFP sections A-M at 2, 18. The maximum value over the life of the IDIQ contract is estimated to be \$[DELETED]. COS/MOL at 5. Award would be made to the offeror whose proposal represented the best value to the agency, considering three factors: technical, corporate experience, and cost/price. AR, Tab 14, Conformed RFP sections A-M at 80. The technical factor was more important than the corporate experience factor, both of which are more important than cost/price. *Id.* Together, the technical and corporate experience factors are significantly more important than cost/price. *Id.*

The technical factor contained five elements: performance, capability establishment, airworthiness, aircraft availability, and small business management. *Id.* at 68-74. As relevant to this protest, under the performance element, the RFP required an offeror to demonstrate how its aircraft met the eight performance areas of PWS ¶ 3.1.¹ AR, Tab 14, Conformed RFP Sections A-M at 69.

The RFP informed offerors that the Navy would evaluate each proposal to determine the offeror's understanding of, approach to, and ability to meet the solicitation requirements. The agency would assess a technical proposal's compliance with the solicitation requirements, as well as the risk associated with the offeror's approach. *Id.* at 81. The evaluation would also include an assessment of the offeror's proposal under each of the five technical factor elements, including performance. *Id.*

The RFP advised offerors that the Navy would consider a deficiency any non-compliance with the terms, conditions, or requirements set forth in the solicitation. *Id.* at 80. The RFP further advised that the agency "may consider any exception or deviation to any term or condition of the RFP not expressly authorized by the RFP to be a deficiency, as defined in [Federal Acquisition Regulation (FAR)] 15.001." *Id.* The

¹ Those eight performance areas were: time on station and fuel offload; minimum number of tanker(s) and aerial refueling system type and capability; altitude/airspeed range; lighting; configuration/special equipment; communications suite; navigation suite; and day and night operations. AR, Tab 12, RFP amend. 0005, PWS at 1-2.

solicitation put offerors on notice that “[a] proposal assessed with a deficiency will make the offer ineligible for award.” *Id.*

Proposals were due at 11:00 a.m. Eastern Time on July 30, 2020. *Id.* at 1. The solicitation required that proposals be submitted electronically through the Department of Defense’s (DOD) Secure Access File Exchange (SAFE) site. *Id.* at 64. TriStar submitted proposal documents through DOD SAFE that were received by the agency by 9:02 a.m. Eastern Time. AR, Tab 20, Contracting Officer Memorandum to File at 1. A proposed subcontractor for TriStar submitted additional proposal documents using the SAFE site at 12:00 p.m. Eastern Time, one hour after proposals were due. *Id.*, Ref. F, Automated DOD SAFE Email (advising agency that the subcontractor had dropped off 20 files at 12:00 pm, July 30, via DOD SAFE). The contracting officer considered whether any potential exceptions to the late proposal rule found in FAR provision 52.215-1(c)(3) applied in these circumstances, and he found that none did. *Id.* at 3.

The contracting officer explained that he also considered whether the agency could evaluate the portion of the proposal timely submitted by TriStar, without the subcontractor’s portion of the proposal. *Id.* at 2. The issue, in the contracting officer’s view, was whether the information in the subcontractor’s portion of the proposal was material, such that the agency “could not accurately evaluate” TriStar’s proposal with just the information timely submitted by TriStar. *Id.* The agency’s technical team reviewed the portion of the proposal timely submitted by TriStar and determined that the subcontractor’s portion of TriStar’s proposal was material to multiple elements of the technical factor evaluation. *Id.*, see Attach. 2, Technical Team Lead Memorandum for Record (MFR) at 3. According to the contracting officer, the subcontractor’s submission contained a number of exhibits that were cited in TriStar’s portion of the proposal as substantiating the availability, performance, and airworthiness of TriStar’s proposed aircraft. AR, Tab 20, Contracting Officer Memorandum to File at 2.

The technical team considered the impact of the missing exhibits and concluded that, without the proposed subcontractor’s submission, the team could evaluate only one of eight performance areas listed in PWS ¶ 3.1. *Id.*, Attach. 2, Technical Team Lead MFR at 2-3. The technical team concluded that it “cannot validate that TriStar’s aircraft meets the RFP requirements in seven of the eight performance areas, cannot confirm that the aircraft have sufficient fatigue life to operate throughout the contract performance period, and cannot fully evaluate whether TriStar will be able to maintain its aircraft sufficiently to perform on the solicited contract.” *Id.* at 3.

The contracting officer determined that TriStar’s proposal would not be considered for award, because the agency deemed the proposal late and determined that no exceptions to the late proposal rule applied. AR, Tab 20, Contracting Officer Memorandum to File at 3, *citing* FAR provision 52.215-1(c)(3). The agency notified TriStar that its “full proposal” was received late and would not be evaluated. AR, Tab 21, Letter from Agency to Protester, Aug. 27, 2020. This protest followed.

DISCUSSION

The protester asserts three challenges to the reasonableness of the agency's determination that TriStar's proposal was late and therefore properly excluded from the competition. First, the protester argues that its timely submitted technical proposal volume, without the subcontractor's appendices and exhibits, satisfied the requirements of the solicitation. Second, TriStar asserts that, even if the timely received portion of its proposal did not fully meet the solicitation's requirements, the agency could nevertheless have excluded the subcontractor's filing from consideration and evaluated the timely submission, with adjustments to the evaluation, as appropriate. Lastly, TriStar contends that, under the minor informality rule², the submission of appendices and exhibits should be considered, despite being late.³ We consider each of these assertions and, as discussed below, find that none of them provides a basis on which to sustain the protest.

Under negotiated procurements, the FAR provides generally that a proposal received after the time set for receipt shall not be considered. FAR 15.208(b)(1). It is an offeror's responsibility to deliver its proposal to the proper place at the proper time, and late delivery generally requires rejection of a proposal. *Metters, Inc.*, B-403629, Nov. 10, 2010, 2010 CPD ¶ 273 at 3. The late proposal rule alleviates confusion, ensures equal treatment of offerors, and prevents one offeror from obtaining a competitive advantage as a result of being permitted to submit a proposal later than the deadline set for all competitors. *Id.* Timely delivery of part of a proposal does not constitute the timely submission of the proposal. *Id.* (finding untimely the delivery of a proposal when it did not include the subcontractor's submission).

TriStar offered two reasons for why the agency should have found that TriStar's technical proposal volume, without the subcontractor's appendices and exhibits, nevertheless satisfied the requirements of the solicitation: (1) the agency already had all of the supporting information necessary to evaluate TriStar's proposal; and, (2) even if the agency needed more information, it could have obtained that information through

² As discussed below, FAR provision 52.215-1(f)(3) provides that "[t]he Government may waive informalities and minor irregularities in proposals received."

³ The protester amended its protest to allege that the subcontractor's submission of supporting documents was not made with TriStar's knowledge or consent, and that therefore TriStar should not be held responsible for the consequences of the subcontractor's late filing. Amended Protest at 1-2. In a lengthy and detailed response to the protester's argument, the agency contends that the protester's "assertion is simply not credible." COS/MOL at 13. While the record provides support for the agency's claim, *see id.* at 13-16, we need not resolve this issue. Because, as discussed below, we find reasonable the agency's contention that the missing information was necessary for the agency to evaluate the protester's proposal, the question of whether the subcontractor acted with TriStar's consent is not relevant to our decision that the protest is without merit.

discussions or some other means. As discussed below, we find neither argument sufficient to conclude that the agency acted improperly.

First, TriStar asserts that because it was awarded a contract for these services in 2019--which contract the agency subsequently terminated in response to a protest--the agency already had all of the supporting information necessary to conduct the evaluation of TriStar's proposal. Comments at 11-12. Specifically, the protester argues that "the Navy already had all the supporting information necessary to evaluate the aircraft availability, airworthiness and performance capabilities." *Id.* at 12.

We have recognized that in certain limited circumstances, an agency has an obligation (as opposed to the discretion) to consider information about which the agency is aware bearing on a vendor's or offeror's past performance; however, the agency is correct that we have declined to extend that principle to an agency's evaluation of an offeror's technical proposal. *XTec, Inc., B-418619 et al.*, July 2, 2020, 2020 CPD ¶ 253 at 9; see COS/MOL at 28. An offeror's technical evaluation is dependent on the information furnished, rather than the agency's failure to consider information arguably in the agency's possession regarding the assessment. *Id.* Additionally, 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. *Id.* Accordingly, to the extent the protester is arguing that the agency should have filled in the missing gaps in its proposal with information already known to the agency, its argument is without merit. *Id.*

Alternatively, TriStar asserts that the "proper and reasonable course of action" was for the Navy to have accepted TriStar's timely technical proposal and "obtained through discussions with TriStar, Evaluation Notices, or [the Navy's] own surveys or inspections any additional supporting information that it needed." Comments at 13. The agency issued Evaluation Notices in the prior procurement for that very purpose, the protester argues. *Id.* at 14. The Navy's conduct in this procurement, the protester argues, "is not in compliance with the requirements of a negotiated procurement and is not consistent with the Navy's usual practice." *Id.*

The RFP advised offerors that it was their responsibility to present enough information to allow the agency to evaluate proposals without discussions. AR, Tab 12, RFP amend. 0005 at 4. As the agency argues, the RFP further advised offerors that the agency intended to evaluate proposals and make award without holding discussions. *Id.*; see COS/MOL at 37. In such circumstances, the Navy asserts, and agency is not required to hold discussions. Nothing in the "requirements of a negotiated procurement" mandates that an agency conduct discussions in circumstances such as these. The FAR does not require agencies to hold discussions. See FAR 15.306(a)(3) (stating that "[a]ward may be made without discussions if the solicitation states that the Government intends to evaluate proposals and make award without discussions"). The protester provided no support in case law or regulation for its assertion that an agency's departure from its usual course of action provides a legally sufficient ground of protest. See Comments at 14. It is well settled that each federal procurement stands on its own,

and the fact that an agency makes different determinations in different procurements provides no basis on which to sustain a protest. See *Sabreliner Corp.*, B-275163 *et al.*, Dec. 31, 1996, 96-2 CPD ¶ 244 at 2-3 n.2. The protester's contention that the agency "should have" held discussions or otherwise filled in the missing gaps in TriStar's proposal is without merit, because neither the solicitation nor procurement law and regulation required the agency to do so.

Second, TriStar asserts that the agency could have excluded the subcontractor's filing from consideration and evaluated only TriStar's timely submission. Comments at 15. The protester argues that it timely submitted its technical, corporate experience, and cost/price proposals, and that those proposals were compliant and responsive to the solicitation requirements. *Id.* at 16. It was unreasonable, TriStar contends, for the agency to reject its proposal simply because the proposed subcontractor's appendices and exhibits were filed after the submission deadline. *Id.* Moreover, TriStar asserts that "[s]ection 2.2.2 and Table 2 of the proposal demonstrates how these aircraft meet or exceed the performance requirements of the Solicitation." Protest at 5. The agency disagrees, arguing that the late information was required by the solicitation to substantiate performance of the proposed aircraft. COS/MOL at 24. As explained below, we agree with the agency.

With respect to the substantiation of aircraft performance, the RFP required the following:

The Offeror shall list its proposed aircraft by make, model, series (M/M/S) and serial number and *demonstrate how each proposed aircraft, after any modifications, would meet all the requirements described in Section C, PWS paragraph 3.1. The Offeror shall submit its supporting data (e.g. Airworthiness Certificate, Type Certificate Data Sheet, Supplemental Type Certificates, Flight Manual Supplements, OEM flight manuals, published performance data, etc.) in Annex B to substantiate the aircraft meets the performance requirements.* Statements alone asserting compliance do not substantiate performance without supporting data.

AR, Tab 14, Conformed RFP sections A-M at 69 (emphasis added). The agency argues that the technical team lead reviewed the impact of the late submission on the agency's ability to evaluate TriStar's proposal. The technical team lead found that, while TriStar's proposal stated certain performance characteristics of its proposed aircraft, it did not provide supporting data to substantiate performance in seven of the eight performance areas listed in PWS paragraph 3.1. COS/MOL at 25, *citing* AR, Tab 20, Technical Team Lead Documentation of Missing Information at 2 (noting that "[n]owhere in the Volume 2-Technical package could supporting data on [aircraft] performance be found, with one exception").

The Navy provided an example of a performance area--altitude/airspeed range--for which, the agency argues, TriStar's proposal merely asserted that proposed aircraft exceeded requirements. COS/MOL at 26. The agency noted that the solicitation

required offerors to be able to refuel multiple different platforms. *Id.*, citing AR, Tab 12, RFP amend. 0005 at 4. According to the agency, these unique platforms have distinct performance characteristics, including different speeds at which they are able to refuel. COS/MOL at 26. The solicitation required the offeror to provide at least one tanker aircraft that met the RFP's altitude/airspeed range performance requirements, which would ensure that the offeror was providing a tanker aircraft that could refuel all of the platforms listed in the solicitation. *Id.* at 27. Because the protester's proposal lacked the necessary supporting documentation, the agency contends that it was unable to determine whether the proposed aircraft would be able to refuel all of the platforms that would be used in contract performance. *Id.* For this reason, the agency argues that it could not conduct an evaluation to confirm the proposed aircraft would meet the solicitation's performance requirements. *Id.* at 27-28.

TriStar failed to address the agency's contention that the technical proposal, as timely received, lacked substantiation of the RFP's aircraft performance requirements. See Comments. Instead, the protester asserts, without support, that the timely portion of TriStar's technical proposal was "compliant and responsive to the solicitation requirements." *Id.* at 16. Directly contradicting that claim, the protester further states that the "Agency Report acknowledges that the inability to 'fully evaluate' the [protester's] technical proposal only applied to 3 of 5" technical factor elements. *Id.* at 11, *quoting* COS/MOL at 24 (noting that "the Agency reasonably determined that it [was] unable to fully evaluate three of [the] five elements under the Technical Factor"). Here, the agency provides persuasive, unrebutted evidence that it was unable to evaluate the timely portion of TriStar's technical proposal without the untimely submission from the subcontractor. As such, the protester's allegation that the agency could have excluded the subcontractor's filing from consideration and evaluated the timely submission by the protester is therefore without merit.

Lastly, the protester argues that the agency acted improperly because it did not waive what TriStar terms minor informalities or irregularities in its proposal. TriStar thus asserts that its timely filed proposal should have been considered, and the later submission of material by the subcontractor should have been viewed as a minor waivable informality or omission. Protest at 7. The agency contends that, because the proposed subcontractor's "submission provided the supporting data that would substantiate multiple areas of performance," the failure to timely provide that information was not an informality or minor irregularity that the agency could waive. COS/MOL at 38.

The provision at FAR 52.215-1(f)(3), which was incorporated into the solicitation by reference, provides that "[t]he Government may waive informalities and minor irregularities in proposals received." The protester's reliance on FAR provision 52.215-1(f)(3) is unpersuasive for two reasons. First, the provision is permissive, that is, it provides agencies latitude to waive informalities and minor irregularities, but it does not require such waiver. Further, this FAR provision applies to proposals that have been received. While the agency received one part of the proposal, it did not receive the part of the proposal required to substantiate the performance of TriStar's proposed

aircraft. For those reasons, the alleged failure of the agency to follow FAR provision 52.215-1(f)(3) provides no basis on which to sustain the protest.

TriStar further argues, citing our Office's decisions in *Tishman Construction Corporation* and *Abt Associates Inc.*, that "the policy reasons for strict adherence to the time deadlines for submitting proposals" were not present here. Comments at 9; *Tishman Constr. Corp.*, B-292097, May 29, 2003, 2003 CPD ¶ 94; *Abt Assocs. Inc.*, B-226063, May 14, 1987, 87-1 CPD ¶ 513. In *Tishman Construction Corporation*, we found unreasonable the agency's rejection of the protester's proposal when the agency timely received a complete electronic copy of the proposal, even though the paper copy was received late. *Id.* at 4. Similarly, in *Abt Associates Inc.*, we found unreasonable the agency's rejection of the protester's proposal when the complete proposal was delivered to one of two required locations, but not to the other location. *Abt Assocs. Inc.*, B-226063, May 14, 1987, 87-1 CPD ¶ 513 at 3-4. In both cases, those companies delivered to the agency a complete copy of its proposal by the deadline. In both cases, we found that the failure to deliver the second copy was a minor informality that an agency should waive. See *Tishman Constr. Corp.*, *supra*; *Abt Assocs. Inc.*, *supra*. Because the record provides no evidence that the protester here timely provided the agency with a complete copy of TriStar's proposal, the assertion that the minor informality rule must be invoked to remedy TriStar's failure is without merit.

In summary, the protester asserted three arguments in support of its contention that it was unreasonable for the agency to reject its proposal: the timely portion of the proposal was responsive to the solicitation; the agency could have obtained the missing information; and the agency was permitted to waive informalities and minor irregularities in proposals received. As discussed above, these assertions lack merit; the record in this case provides no basis on which to question the reasonableness of the agency's decision to exclude TriStar's proposal from the competition because a material portion of the proposal was late.

The protest is denied.

Thomas H. Armstrong
General Counsel