U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Done By Native, LLC

File: B-422270

Date: March 29, 2024

Louay Azar for the protester.
John W. Cox, Esq., Department of State, for the agency.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated protester's technical quotation as unacceptable is denied where the record shows the evaluation was reasonable and consistent with the solicitation evaluation criteria.

DECISION

Done By Native, LLC, of Clovis, New Mexico, a small business, protests the award of a contract to Global Training Services/Berlitz, of Rabat, Morocco, under request for quotations (RFQ) No. 19M05523Q0006, issued by the Department of State (DOS) for foreign language instruction in French for adult students at the United States Embassy in Rabat. Agency Report (AR), Tab 2, RFQ at 8. The protester, the incumbent contractor, argues that DOS misevaluated its quotation as unacceptable and improperly awarded the contract to Global at its higher price.

We deny the protest.

BACKGROUND

The RFQ, issued on June 16, 2023, sought quotations to provide both individual and small-group French language classes through virtual and in-person settings for the embassy community. A single indefinite-delivery, indefinite-quantity contract would be awarded to the firm whose quotation was acceptable and offered the lowest price.[1] RFQ at 1 (cover letter).

[1] Prices were to be submitted in Moroccan Dirhams (MAD).

The RFQ incorporated the standard offeror instructions provision for commercial item procurements of Federal Acquisition Regulation (FAR) 52.212-1, and an addendum instructing vendors that "[e]ach offer must consist of the following," followed by a list of required information. The list included the vendor's financial statements for the past three years, the vendor's plan to obtain all licenses and permits required by local law, and a performance plan that identified the types and quantities of equipment, materials, and supplies to be used in performance. RFQ at 37-38.

DOS received quotations from seven vendors. Contracting Officer's Statement (COS) at 1. A technical evaluation panel reviewed all quotations. *Id*. In evaluating Done By Native's quotation, the panel reported that the quotation failed to provide a plan to obtain local permits and licenses, failed to provide three years of financial statements, and failed to identify the types and quantities of equipment, supplies, and materials the firm would use to perform the contract, among other things. AR, Tab 7, Technical Evaluation Panel Report at 1. Ultimately the panel concluded that six of the seven quotations were unacceptable: the exception being the quotation from Global. *Id.* at 1-2.

The contracting officer reviewed the technical evaluation panel's findings in detail, concurred that only Global's quotation was acceptable, and awarded the contract at a total evaluated price of MAD 5,564,160, which equated to $547,653 U.S. dollars using then-current rates. After receiving notice of the award, Done By Native filed this protest, arguing that it should have received the contract because it submitted a technically acceptable and lower-priced quotation, at a total evaluated price of MAD 2,790,207 (or approximately $281,000).[2] Protest at 3.

DISCUSSION

Timing of Protest

As an initial matter, DOS argues that the protest should be dismissed because it was filed before the agency could provide the firm with a required debriefing. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), specify that a protest shall not be filed before a requested debriefing that is a required debriefing. DOS contends that those circumstances apply here--in particular, that the protester requested a debriefing, and one is legally required but has not occurred. Req. for Dismissal at 2. Done By Native disputes that assertion, and argues that a debriefing is not legally required, and therefore it could not wait to file the protest, otherwise its protest would be untimely. Accordingly, we first address our timeliness rules, the legal requirements for a debriefing, and the connections between them.

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[2] The parties disagree about the proper price evaluation of Done By Native's quotation, which DOS calculated as MAD 3,348,248.40 (equivalent to $329,552). AR, Tab 8, Award Determination at 3. For our purposes, the record is sufficient to confirm that the protester's price was lower than Global's, whichever party's calculation is used.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These 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. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our regulations also provide that we will not consider a protest challenging a procurement conducted on the basis of competitive proposals, where a debriefing is required, if the protest is filed before the debriefing date offered to the protester; the protest instead should be filed not later than 10 days after the debriefing. 4 C.F.R. § 21.2(a)(2). This rule is designed to encourage early and meaningful debriefings and to preclude strategic or defensive protests. *Real Estate Ctr.*, B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74 at 2. Consequently, where a debriefing is not legally required, a protester that delays filing of a protest until after that debriefing may be untimely as to any grounds of protest it knew or should have known more than 10 days before filing the protest. 4 C.F.R. § 21.2(a)(1)-(2).

For these reasons, it is essential to determine whether a debriefing is legally required in a specific procurement. After a contract is awarded on the basis of competitive proposals--typically when the procurement is conducted under the regulations governing contracting by negotiation in FAR part 15--there is a legal requirement to provide a debriefing to an unsuccessful offeror if requested promptly. 41 U.S.C. § 3704; FAR 15.506. Additionally, when placing an order with a value exceeding $6 million under a multiple-award contract, a debriefing is also legally required if requested. FAR 16.505(b)(1)(iv)(E). On the other hand, a debriefing may also be offered where not legally required. *E.g.*, *MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 6 (competition for Federal Supply Schedule order under FAR subpart 8.4 was not based on competitive proposals so debriefing was not a required debriefing).

DOS contends that the RFQ applies the requirements of FAR part 15 and, as such, the requirements to provide a required debriefing also apply to this procurement. Specifically, DOS argues the cover letter transmitting the RFQ made reference to the potential that DOS could establish a competitive range. AR Tab 2, Solicitation at 1 (cover letter stating "[w]e intend to award the contract based on initial quotations, without holding discussions, although we may hold discussions with companies in the competitive range if there is a need to do so"). DOS argues that a competitive range is a technique uniquely associated with procurements conducted under FAR part 15, thus the cover letter made the RFQ subject to the procedures of FAR part 15. Supp. Memorandum of Law (MOL) at 1. Additionally, DOS notes that the contracting officer cited FAR section 15.404 while documenting the award, and that in notifying Done By Native of the award, the contracting officer referenced the availability of a "debriefing as allowed by FAR 15.506." AR Tab 8, Award Determination at 1; AR Tab 9, Unsuccessful Offeror Letter at 1. DOS also contends that the contract value "far exceeded the

Simplified Acquisition Threshold," and argues that "nothing in the record supports" the use of the simplified procedures of FAR subpart 13.5.[3] Supp. MOL at 1.

Done By Native opposes dismissal. The protester argues that although DOS has now offered to provide a debriefing, a debriefing is not legally required here. As a result, the protester could not wait until after DOS's offered debriefing to file this protest to be timely under our regulations. Done By Native also notes that in a protest of a similar procurement for language training services as a commercial item under part 12 of the FAR, DOS itself argued that a debriefing was not required and that the protest was therefore untimely. Resp. to Req. for Dismissal at 1-2; *Done By Native, LLC*, B-419844, Aug. 19, 2021, 2021 CPD ¶ 286.

In that decision, we found Done By Native's protest timely notwithstanding the conclusion that the procurement was conducted under part 12 of the FAR which does not contain a separate legally required debriefing requirement. *See id*. That is, we considered the merits of the protest after we determined that Done By Native had raised timely protest issues: it had first learned the necessary facts during a debriefing held within 10 days of filing its protest. *Id.* We also dismissed arguments in that protest that, in effect, challenged the terms of the solicitation because those issues had to be raised before the closing date for submission of quotations to be timely. *Id.* at 3 n.3.

In the protest at hand, our review of the record shows that the RFQ does not specify that it was issued under FAR part 15 despite DOS's arguments. Contrary to DOS's position, the solicitation cover page incorporated by reference FAR provisions 52.212-1 and 52.212-4, which apply to procurements of commercial items under FAR part 12. AR Tab 2, Solicitation at 4 (Standard Form 1449). Even so, a commercial item procurement conducted in accordance with FAR part 12, may also use the negotiated procurement policies and procedures established under FAR part 15, which may include a legally required debriefing. *General Revenue Corp. et al*, B-414220.2 *et al.*, Mar. 27, 2017, 2017 CPD ¶ 106 at 9. Among the factors that point toward FAR part 15 procedures applying in a commercial item procurement under FAR part 12 are that

> (a) the solicitation was issued as a request for proposals, which is provided for under FAR Part 15, as opposed to an invitation for sealed bids, which is used in connection with a FAR Part 14 procurement, and (b) the value of the procurement . . . greatly exceed[s] the dollar thresholds for the use of the simplified acquisition procedures set forth under FAR Part 13.

Id.

Here, rather than use an RFP to obtain the agency's requirements, the solicitation identifies itself as an RFQ, which is a type of solicitation referenced under the simplified

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[3] Subpart 13.5 of the FAR permits the use of simplified procedures for certain commercial products and commercial services generally valued under $7.5 million. FAR 13.500(a).

acquisition procedures of FAR part 13. FAR 13.004. Further, while the procurement is valued over the simplified acquisition threshold of $100,000 (*see* FAR 2.101) applicable to procurements under FAR part 13, it is below the threshold of $7.5 million under the special authority for the acquisition of commercial products and commercial services in FAR subpart 13.5.

As noted above, DOS bases its argument that the procurement was conducted under part 15 (thus on the basis of competitive proposals, making a debriefing legally required) on the use of the term "competitive range" in a cover letter, in a notation by the contracting officer in internal agency documentation to justify the adequacy of competition, and in the agency's letter after award offering a debriefing. However, given the importance to a prospective protester of being able to perform the careful analysis required to assess whether a debriefing is legally required, the legal standard established by our Office employs factors assessing the solicitation itself, not the external documents cited by DOS. *See*, *e.g.*, *IR Techs.*, B-414430 *et al.*, June 6, 2017, 2017 CPD ¶ 162 at 6 (nature of solicitation meant that debriefing was not required, rather than contracting officer's later characterization and offer to conduct debriefing "pursuant to [FAR] 15.506(b)"). The RFQ did not indicate that the procurement was for the award of a contract on the basis of competitive proposals, and the *General Revenue* factors do not make evident that FAR part 15 procedures applied here. *Cf. Done By Native, LLC*, *supra*. Therefore, we conclude a debriefing offered under this RFQ would not be a legally required debriefing. As such, Done By Native properly filed this protest without awaiting the debriefing offered by DOS.

Evaluation of Quotation

Done By Native argues that DOS improperly rejected the firm's quotation as unacceptable. The firm contends that its quotation satisfied all requirements of the RFQ and quoted the lowest price but was unreasonably rejected by the agency. Protest at 2. To the extent that any information in its quotation was considered to be inadequate, the firm argues that DOS should have requested additional information to allow the firm to provide this information to make its proposal technically acceptable. *E.g.*, Reply to Agency Report at 5 (arguing that the protester "stated that it was willing to provide further information upon request" about financial statements); *see also id.* at 6 (objecting that "nothing was communicated with [protester] during the evaluation process" about protester needing to submit more information about local licenses and permits).

Those arguments, in essence, contend that the agency should have engaged in discussions with the protester to allow the firm to revise its proposal to provide missing information. *Id*. Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determining the acceptability of a proposal or provides the offeror with an opportunity to revise or modify its proposal in some material respect. *DevTech Sys., Inc.*, B-418273.3, B-418273.4, Dec. 22, 2020, 2021 CPD ¶ 2 at 8; *see* FAR 15.306(d).

DOS counters that Done By Native's technical quotation was unacceptable because it failed to provide multiple pieces of information required by the RFQ. COS at 2. Among

them, DOS argues that the RFQ expressly required the submission of 3 years of financial statements, information about local licenses and permits, and identification of the equipment, materials, and supplies to be used in performance. In contrast, instead of financial statements, Done By Native's quotation provided only a terse letter from a bank dated in August 2021, stating that the firm's account was in good standing. MOL at 5. Additionally, the evaluation concluded that Done By Native's quotation lacked any information about local licenses and permits, but instead "only provided an agreement with some American company which has no link to local licenses and permits." AR, Tab 7, Technical Evaluation Panel Report at 1. The evaluation also concluded that the quotation "did not specify the types and quantities of equipment, supplies and materials" the firm planned to use to perform. *Id.* DOS argues that the evaluation reasonably found the quotation technically unacceptable.

The evaluation of quotations is a matter within the agency's discretion, so our Office will not reevaluate quotations; rather we examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *HP Enter. Servs., LLC; Aon Nat'l Flood Servs.*, B-413967 *et al.*, Jan. 17, 2017, 2017 CPD ¶ 26 at 6. As explained below, our review of the record provides us no basis to question the evaluation of Done By Native's quotation as technically unacceptable. Additionally, although the agency allowed the protester to submit a clarification addressing its past performance, we disagree with the protester's claim that the agency should have requested that the firm supply additional information it had omitted from its technical quotation. *See* Comments at 2. Allowing the protester to provide additional information to make the proposal technically acceptable is not the correction of a minor clerical error; allowing the protester to provide this type of information would have required the agency to conduct discussions to obtain the missing information, which the agency was not required to do. *Grove St. Investment, LLC*, B-421489, June 7, 2023, 2023 CPD ¶ 137 at 9.

With respect to the requirement for three years of financial statements, the record shows that Done By Native's quotation asserted that the firm had "adequate financial resources" and that it would provide "financial standing upon request." AR, Tab 5, Protester's Technical Quotation at 24. The quotation referred the agency to an attached "[b]ank [f]inancial [s]tatement." *Id.* The attachment was a 1-page letter dated August 2021 from the president of a bank in New Mexico addressed "to whom it may concern," that stated, in two brief sentences, that Done By Native had "a banking relationship with us since 2017," that the accounts had been "handled in an exemplary fashion," and that the firm was "considered a valued customer." *Id.* at 104 (attach. D, Letter from Bank President).

Regarding authority to perform in Morocco and compliance with local laws, the record shows that Done By Native's quotation stated the firm was validly constituted in the United States, and the firm had "entered into an agreement with [a second firm] to provide Employment of Record Services." *Id.* at 23. The quotation referred DOS to a copy of the agreement and asserted that it gave the protester the ability "to hire

contracted employees in Morocco and ensure that it is in compliance with all local labor, tax, and other relevant laws." *Id.*

The attached agreement was between Done By Native and a second firm incorporated in Delaware. The document was labeled a master services agreement but noted that other documents--a reference sheet, a service level agreement, a service order, and an appendix--would take precedence over it. *Id.* at 110 (attach. F, Copy of Master Services Agreement). The agreement outlined three general types of services the Delaware firm could provide pursuant to the terms of future service agreements or orders: "employer of record" services where the Delaware firm would hire employees through unspecified "local entities" on behalf of the protester; "consultancy services" where the Delaware firm would assign its employee to "provide services to [Done By Native] to meet their business needs"; and "contractor payment services" where the "payment of contractor invoices [was] outsourced" to the Delaware firm. *Id.* at 110-111. The agreement then stated that future "service level agreements," that addressed specific requirements of each individual country would be executed in the future. *Id.* at 111. The only two attachments to the agreement were two appendices, but our review shows they only concern European Union data transfer rules, and do not specifically mention Morocco or the provision of services there (or elsewhere). *Id.* at 125-128 (attach. F appendices).

In response to the requirement to list the equipment, materials, and supplies that the vendor would use, the protester's quotation instead states that it "affirms that it currently has all necessary equipment to perform the contracted work, or it has the ability to obtain such equipment." *Id.* at 24. Regarding teaching materials, the quotation asserted that the protester "will provide all necessary instructional material to effectively and efficiently teach French . . ." and that "[c]ourse material will be drawn from the pool of curricula based on student levels." *Id.* at 9. The quotation identified the names of published course materials for beginner, intermediate, and advanced students as part of a "pool of French curricula" that its instructors could use. *Id.* at 7; *see also id.* at 8-9.

In each of these instances, our review of the record confirms the reasonableness of the agency's evaluation of the protester's quotation as failing to provide the minimum information required by the RFQ. The submission of a letter from a bank president and dated 2 years earlier was not responsive to the requirement for three years of financial statements. A master services agreement with a second United States-based firm--an agreement that by its own terms would require the execution of future agreement(s) specifically addressing what services would be provided and the manner of compliance with local laws--was reasonably rejected as failing to address the requirement to show how the protester would comply with local laws.

Finally, the quotation's general assurance that the protester had the necessary equipment and materials was reasonably evaluated as failing to meaningfully address the requirement to identify the types and quantities of equipment, materials, and supplies the vendor planned to use to provide services. Thus, our review of the record for these three technical requirements supports the reasonableness of DOS's

conclusion that Done By Native's quotation was technically unacceptable.[4] We do not reach the protester's other challenges to the evaluation of its quotation because the record, as discussed above, adequately supports DOS's determination that Done By Native's quotation was unacceptable.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

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[4] Done By Native does not argue that its quotation was rejected for reasons tantamount to a finding that it lacked responsibility such that a referral to the Small Business Administration under its certificate of competency process was required. In any event, a referral is not required when an agency finds a proposal to be unacceptable based on a small business offeror's failure to submit required information; that finding does not constitute a determination that the offeror is not responsible. *Los Alamos Tech. Assocs., Inc.*, B-421034, Nov. 30, 2022, 2022 CPD ¶ 306 at 6.