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Decision

Matter of: RELI Group, Inc.

File: B-412380

Date: January 28, 2016

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Gary R. Allen, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's evaluation of offerors' relevant experience submissions is sustained where solicitation language concerning relevant experience evaluation factor created a latent ambiguity that prevented offerors from competing intelligently and on a relatively equal basis.

DECISION

RELI Group, Inc., of Catonsville, Maryland, protests the award of an indefinite-delivery/indefinite-quantity (ID/IQ) contract and an initial task order to DSFederal, Inc., of Rockville, Maryland, under request for proposals (RFP) No. 15-223-SOL-00089, issued by the Department of Health and Human Services, Food and Drug Administration (FDA). The RFP sought operations and maintenance (O&M) and development modernization and enhancement (DME) support for an FDA portal for reporting problems associated with products that are regulated by the FDA. The protester alleges that the FDA evaluated its proposal in a manner that was inconsistent with the RFP.

We sustain the protest.

BACKGROUND

The FDA issued the RFP on July 23, 2015, as a small business set-aside under the Small Business Administration's 8(a) program. RFP at 1.¹ The RFP contemplated the award of a single ID/IQ contract with a \$20 million ceiling over a 5-year ordering period, and the concurrent award of a fixed-price task order. RFP at 5. In general terms, the RFP sought application life cycle management support and continuity of services, including O&M and DME support, for FDA's safety-reporting portal, which allows the FDA to receive reports of adverse events or problems associated with FDA-regulated products. RFP at 58-59.

The RFP provided that award would be made in accordance with Federal Acquisition Regulation (FAR) subpart 16.5, and FAR Parts 12 and 15, on a best-value basis, considering the following technical factors, listed in descending order of importance: technical understanding and approach to the task order, management approach to the ID/IQ, and relevant experience. Id. at 46. The technical factors, when combined, were considered to be significantly more important than price. Id. Past performance was also to be considered in the assessment of risk, but not as a weighted technical evaluation factor.² Id.

As relevant to the protest allegation at issue here, the RFP directed offerors to submit information about their relevant experience as follows:

The offeror shall provide information about three (3) projects
The offeror shall describe its current and past experience . . .
including its degree of involvement (at least 2 out of the 3 projects the
offeror must be the prime)

RFP at 41.

The solicitation also provided a list of instructions concerning the information that

¹ The RFP in the record is a conformed version that includes all of the amendments, the ID/IQ statement of work, and the statement of work for the initial task order. For consistency, the RFP page references will be those listed seriatim in the agency report (AR), rather than the different pages for each section.

² The technical factors were to be given adjectival ratings of excellent, highly satisfactory, acceptable, marginal, or unacceptable, while risk for past performance was to be assessed as low risk, neutral, or high risk. RFP at 46.

was to be submitted for each project, including, as relevant here, the following statement:

The list may include contracts/order on which the offeror served as a subcontractor, provided that the subcontractor was similar in scope, duration, and price to this effort.

Id.

With regard to past performance, offerors were instructed to send a past performance questionnaire (included in the RFP) to the sources identified in the relevant experience section of the offeror's proposal, to be completed and submitted to the agency. RFP at 43.

The agency received various questions from offerors concerning the RFP, which the agency posted, along with its responses, on FedBizOpps, the government procurement website. Among these was a request that the agency "confirm that subcontractor past performance [was] acceptable as part of our submission of 3 projects." AR, Tab 4, Questions & Answers No. 36. In response, the agency amended the RFP in section 5.8, adding the following language:

A maximum of 2 of 3 past performances may be for the sub-contractor. A minimum of 1 past performance shall be for the prime contractor.

Only 3 past performance questionnaires will be accepted by the Government.

RFP at 43.

Six days before proposals were due, RELI took note of this amended instruction concerning the submission of past performance references, and asked the agency to confirm that the RFP's instruction regarding relevant experience submissions "also allows for a maximum 2 of the 3 relevant projects be for the Offeror's subcontractor." AR, Tab 5, August 4, 2015 E-mail from RELI to FDA. The agency did not respond. Protest at 10-11; CO Statement at 3.

The agency received seven timely proposals on August 10, 2015. Contracting Officer's (CO) Statement at 2. RELI's proposal listed, as relevant experience, one contract performed by RELI, as a subcontractor to another firm, and 2 contracts performed by RELI's [deleted] proposed subcontractor, [deleted], in the role of prime contractor, and provided the corresponding past performance questionnaires. AR, Tab 11, RELI's Technical Proposal, at 26-29; Tab 13, RELI Past Performance Questionnaires (PPQs). Both of [deleted]'s relevant experience projects (and their PPQs) referenced [deleted]'s work as a prime contractor for the [deleted] for the

same type of requirements sought by this RFP. AR, Tab 11, RELI's Technical Proposal, at 26-29; Tab 13, [deleted] PPQs, at 4-9. The first [deleted] experience example reflected [deleted]'s work supporting O&M for the federal safety reporting portal, and the second experience example reflected [deleted]'s work supporting DME for the same portal. Id. The corresponding PPQs each rated [deleted]'s overall performance as exceptional. AR, Tab 13, [deleted] PPQs, at 4-9.

During the agency's evaluation of technical proposals, the evaluation team concluded that the instructions for the relevant experience technical factor were so unclear that the team required additional guidance about how to interpret the instructions in order to proceed. CO Statement at 3. Specifically, the evaluation team believed that the instructions were not clear as to whether two of the three relevant experience submissions had to be for the main offeror, without regard for the role in which the main offeror performed the past effort; or for the main offeror, performing in the capacity of prime contractor.³ Id.

Observing that the current O&M and DME contracts were set to expire in the near future, the contracting officer states that she decided not to amend the RFP to clarify this matter, which would have required allowing offerors time to respond to any revised instructions. Id. Instead, the contracting officer determined that the "most generous interpretation" of the instructions was as follows: two of the three relevant experience examples had to be from the main offeror, and, since offerors were instructed to submit no more than three relevant experience examples, only one relevant experience submitted for a subcontractor would be evaluated. Id. The contracting officer instructed the evaluation team to evaluate the proposals in accordance with this determination. Id.

The record reflects that the evaluation team, following the contracting officer's instructions, considered only one of the experience examples submitted for RELI's subcontractor ([deleted]'s contract performing O&M support) and refused to consider [deleted]'s submitted experience performing DME support "because the offeror did not comply with the solicitation instructions." AR, Tab 7, Technical Proposal Evaluation, at 51. Notwithstanding its previous statement that it could not proceed with its evaluation until it received clarification of the instructions for the relevant experience technical factor, the evaluation team stated in its evaluation report that "[t]he instructions clearly state that 2 out of the 3 relevant experiences submitted must be for the offeror (Prime)." AR, Tab 7, Tech. Eval., at 52. The

³ Throughout the record the term "prime" is used in confusing and inconsistent ways, sometimes apparently to mean the offeror that would be performing in the role of prime contractor under the contract awarded under this solicitation, and, other times, apparently to mean an entity that performed as a prime contractor on previous contracts. To avoid this confusion, we are referring to the prime offeror of a proposal under the RFP as the "main offeror."

evaluators identified as a significant weakness in RELI's proposal that "R[ELI] did not comply with the instructions in that only 1 of the 3 submitted [relevant experience references] was from them." Id. Finding on this basis that RELI had not shown "experience as a Prime" on a contract of comparable size and complexity, and that it had not identified experience performing DME work, the evaluation team rated RELI's proposal marginal for relevant experience. Id.

The agency evaluated DSFederal's and RELI's proposals as follows:

Evaluation Factor	DSFederal	RELI
Technical Understanding and Approach / Task Order	Excellent/Medium Risk	Excellent/Low Risk
Management Approach / ID/IQ	Highly Satisfactory/ Low Risk	Acceptable/Low Risk
Relevant Experience/Past Perform. Risk	Acceptable/ Low Risk	Marginal/Medium Risk
Overall Technical Rating	Excellent/Low Risk	Highly Satisfactory/ Low Risk
Price	\$19,519,424	\$19,617,976

AR, Tab 8, Decision for Award, at 7, 12, 19.

The CO performed a trade-off analysis between DSFederal and RELI, as the offerors with the highest technical ratings. Id. at 24-25. The CO acknowledged that RELI's proposal exceeded the government's requirements in several areas, such as in the firm's technical understanding and approach to the task order, which was rated as excellent. However, she took into account RELI's marginal rating for relevant experience, reflecting weaknesses for not having demonstrated DME capabilities, and not having provided past experience for RELI as a prime contractor on a contract of similar size and complexity. The CO concluded on this basis that RELI's proposal, priced approximately .05 percent higher than DSFederal's, did not represent the best value for the government.⁴ Id.

⁴ Among the [deleted] proposals submitted, DSFederal's and RELI's proposals were ranked [deleted] and [deleted] above the lowest-priced proposal with respect to price. The agency's trade-off determination included consideration of DSFederal's, RELI's, and the [deleted] lower-priced proposals. AR, Tab 8, Decision for Award, 22-24. [Deleted] of the [deleted] lowest-priced proposals were technically rated as marginal with high risk, while the other was rated as acceptable with medium risk. Id. at 22-23. With respect to all [deleted] of the lowest-priced proposals, the agency determined that it was in the government's best interest to pay the price premium for a higher technically-rated proposal. Id. at 22-24. Therefore, the agency performed its final trade-off between DSFederal and RELI. Id. at 24-25.

On September 29, 2015, the agency selected DSFederal to receive the ID/IQ contract and the initial task order. After receiving a debriefing, RELI filed this protest with our Office.

DISCUSSION

RELI argues that the evaluation of its proposal under the relevant experience factor was unreasonable and inconsistent with the terms of the RFP.⁵ Protest at 8-11. Specifically, RELI contends that the agency's determination not to consider [deleted]'s experience with DME support was based on a misinterpretation of the RFP's instructions. While FDA construed the instructions to permit only one reference to show a subcontractor's relevant experience, and to require that two of the references be for the prime contractor, RELI contends that the solicitation permitted two of the three required experience submissions to be for contracts performed by the subcontractor(s), and required one to be for the prime contractor. In response, FDA argues that, to the extent the RFP requirement could be read in the manner RELI suggests, it is based on a patent ambiguity and therefore should be dismissed as untimely. Memorandum of Law at 5-8.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. A party's particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provisions is reasonable and susceptible of the understanding that it reached. See Ashe Facility Servs., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 10.

A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id. Assuming an ambiguity exists, then our Office must determine whether the ambiguity is patent or latent in order to determine whether the protest was timely filed. In this regard, a patent ambiguity, which is considered to be apparent from the face of the solicitation, must be protested prior to the closing date for submission of proposals to be considered timely. 4 C.F.R. § 21.2(a)(1).

Here, the lack of guidance in the RFP with respect to the meaning of "prime" and "subcontractor" permitted the solicitation to be interpreted in at least two reasonable ways. In addition to the question set forth above--the number of contracts that were required to show experience by a prime and a subcontractor--there is a question as to whether the terms "prime contractor" and "subcontractor" refer to (1) the position

⁵ Although the protest initially raised additional issues, the protester has withdrawn all but this basis for protest. Comments at 7 n.4.

for which the entity in issue was being proposed in the submitted proposal, or (2) the position in which it performed under the contract identified to show relevant experience or past performance. Below, we discuss how this ambiguity informs the parties' interpretation of the RFP.

The requirement for relevant experience information described in RFP section 5.4.3 (Factor 3: Relevant Experience) reasonably may be understood to require an offeror to submit at least two examples of relevant contracts performed as a prime contractor ("at least 2 out of the 3 projects the offeror must be the prime"). RFP at 41. The requirement for past performance references, in RFP section 5.8 (Past Performance Questionnaire), allowed a maximum of 2 of 3 past performance references to be for the subcontractor, with only one being required for the prime contractor. As stated above, the solicitation required the past performance questionnaires to be from the sources the offeror identified to show relevant experience. Reading the above two RFP sections together, RELI interpreted the language to mean that two of three examples of relevant experience submitted could be ones that were performed (in the role of prime) by an entity now being proposed as a subcontractor on the main offeror's team. AR, Tab 5, August 4, 2015, E-mail from RELI to the agency. We think that RELI's interpretation is reasonable. The agency's interpretation, which arguably is also reasonable, was that the word "prime" in the parenthetical quoted above referred to the main offeror, and not to the role of the entity in performing the prior contract.

While FDA recognizes that the RFP, as amended, included unclear instructions in this regard, the agency argues that the unclear instructions presented a patent ambiguity, and that the protest is therefore untimely. We disagree, as explained below.

Assuming that both the agency's and the protester's interpretations of the experience factor instructions are reasonable, we find the RFP ambiguous with respect to the evaluation of the relevant experience factor and past performance risk assessment. As noted above, despite being advised of RELI's interpretation of these two clauses through a question RELI submitted, FDA only realized that the RFP's instructions were unclear during the course of evaluations that took place more than a month after proposals had been submitted. When the technical evaluation team raised this issue, the contract specialist expressly acknowledged in a memo to the evaluation team that the RFP instruction was ambiguous. See AR, Tab 6, Interpretation of Unclear Instructions in RFP. Since the ambiguity only came to light in the context of the agency's evaluation of relevant experience, we conclude that the ambiguity was not obvious or glaring--in short, it was latent rather than patent and RELI's protest of this issue thus is timely.

Where there is a latent ambiguity, the appropriate course of action for an agency is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. Colt Def., LLC, B-406696. July 24, 2012, 2012

CPD ¶ 302 at 8. When dealing with latent ambiguities, we will sustain a protest where a latent ambiguity prevented the offerors from competing intelligently on a relatively equal basis. Coastal Int'l Security, Inc., B-411756, B-411756.2, Oct. 19, 2015, 2015 CPD ¶ 340 at 8.

Here, as noted above, when the agency discovered that an ambiguity existed, it affirmatively decided not to amend the RFP, but instead chose to continue as if no ambiguity existed, applying one possible interpretation of the RFP's terms. CO Statement at 3. In so doing, the agency refused to consider information RELI had submitted concerning experience performing DME support work--a critical aspect of this requirement.⁶ The agency evaluated RELI's proposal as lacking this experience, and rated the proposal as marginal under the relevant experience factor.

Although RELI's price was slightly higher than that of DSFederal (approximately **one-half of one percent**), RELI did receive a higher technical rating under factor 1--the most important technical factor. As a result of the ambiguity here, and the agency's failure to clarify the requirement, offerors were effectively precluded from competing intelligently and on a relatively equal basis. Under these circumstances, we find RELI was competitively prejudiced by the agency's actions.⁷ Colt Def., LLC, *supra*; Coastal Int'l Security, Inc., *supra*. Accordingly, we sustain the protest.

RECOMMENDATION

We recommend that the agency review its position concerning what is necessary to satisfy its requirement that offerors demonstrate relevant experience; amend the RFP to clearly advise offerors of what type of information the agency will consider in performing its evaluation of relevant experience and past performance risk; and allow the submission of revised proposals. After making a new source selection consistent with this decision, if the agency determines that the proposal of an offeror other than DSFederal represents the best value to the government, we recommend that the agency terminate the previously-awarded contract for the convenience of the government and award a contract to the offeror whose proposal is selected, consistent with this decision.

⁶ As stated above, the experience RELI showed in this regard was performed by its proposed subcontractor, [deleted], in its role as prime contractor under a previous contract. AR, Tab 11, RELI's Technical Proposal, at 29; Tab 13, [deleted] PPQs, at 4.

⁷ In such circumstances, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is sufficient basis for sustaining a protest. See Kellogg, Brown & Root Servs., Inc.--Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5.

We also recommend that the agency reimburse the protester the costs of filing and pursuing this protest issue, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). RELI should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the agency within 60 days after receipt of the decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel