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Decision

Matter of: Jacobs Technology, Inc.

File: B-416314; B-416314.2

Date: July 31, 2018

Brian P. Waagner, Esq., Hal J. Perloff, Esq., and Steven A. Neeley, Esq., Husch Blackwell LLP, for the protester.

Daniel R. Forman, Esq., and Sharmistha Das, Esq., Crowell & Moring LLP, for Serco Inc., the intervenor.

Wade L. Brown, Esq., and Andrew M. Telschow, Esq., Department of the Army, for the agency.

Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision, after award, to reopen discussions, amend the solicitation, and evaluate revised proposals, is denied where the record shows the agency reasonably concluded that the solicitation contained a latent ambiguity.

DECISION

Jacobs Technology, Inc., of Fort Walton Beach, Florida, protests actions taken by the United States Army Contracting Command - Rock Island (Army) after issuance of a task order to Serco Inc., of Reston, Virginia, under request for task order proposals (RFTOP) No. 1237722 for global logistics and staff augmentation services to support the Army Sustainment Command and its subordinate locations in the continental United States and outside the continental United States (OCONUS). Jacobs contends that the Army's decision to reopen the solicitation after award and request revised offers, instead of making award to Jacobs, is inappropriate and unreasonable.

We deny the protest.

BACKGROUND

On December 15, 2017, the agency issued the RFTOP, using Federal Acquisition Regulation (FAR) § 16.505 procedures, to the unrestricted pool of contract holders of General Services Administration's One Acquisition Solution for Integrated Services

contracts. Agency Report (AR), Tab 60, RFTOP, at 1.¹ The RFTOP contemplated issuance of a labor-hour task order, with fixed labor rate contract line item numbers (CLINs) and cost reimbursement CLINs for travel and other direct costs (ODC). Id. The RFTOP period of performance consisted of a 30-day transition period, a 12-month base year, and two 1-year option periods. Id. at 1, 10. Award was to be made to the lowest-priced, technically acceptable offer. Id. The RFTOP stated that the agency “intend[ed] to evaluate proposals and award without discussions,” but “reserve[d] the right to conduct discussions if it determine[d] them to be necessary.” Id. at 1, 11.

The RFTOP stated that offerors’ proposals would be evaluated under the following factors: (1) security; (2) organizational conflicts of interest; (3) description of technical/management approach; and (4) price. Id. at 11-14. Regarding price proposals, the RFTOP instructed as follows:

Offerors shall enter a fully burdened labor rate for all the labor categories listed on the Price Matrix/Attachment 0002 of the RFTOP for the Base Period and each of the Option Years. The fully burdened labor rates shall include all direct, indirect, general and administrative costs and profit associated with the Labor Category. . . . Offerors must propose fully burdened labor rates for each labor category for the Base Period and each of the Option Years. Failure to do so could result in the offer being rejected.

Id. at 8. In addition, the RFTOP stated: “If an Offeror fails to submit fully burdened labor rates for the Base Period and each Option Year, the proposal may be considered unacceptable and the Government may reject the proposal.” Id. at 9. Regarding the evaluation of price, the RFTOP stated: “The Government will evaluate the Total Evaluated Price based on the submitted fully burdened labor rates provided on the [price matrix], and any other price related factors included in the solicitation.” Id. at 14.

On February 5, 2018, the Army received proposals from Jacobs and Serco. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 3. The agency evaluated the non-price factors of proposals and concluded that both offerors were compliant under the security and organizational conflicts of interest factors, and technically acceptable under the description of technical/management approach factor. Id. at 3-4. However, during its evaluation of price proposals, the agency decided it was necessary to conduct discussions. Id. at 4.

¹ The RFTOP is comprised of an RFTOP Summary and multiple attachments and technical exhibits. See AR, Tab 3, RFTOP Summary, at 5 (listing attachments and technical exhibits). RFTOP Attachment 0004, Evaluation Factors for Award/Instructions to Offerors, was revised twice prior to award. AR, Tab 44, RFTOP amend. 5, attach. 0004; Tab 60, RFTOP amend. 11, attach. 0004. Unless otherwise indicated, citations to the RFTOP in this decision refer to RFTOP Attachment 0004, Evaluation Factors for Award/Instructions to Offerors, provided in amendment 11.

The agency engaged in multiple rounds of discussions with both offerors and requested final proposal revisions. Jacobs' final proposed price was \$62,599,818, and Serco's was \$46,809,502. See AR, Tab 131, Price Analysis Memorandum, at 4. Serco's proposed price was found to be fair and reasonable. AR, Tab 133, Contracting Officer's Price Fair and Reasonable Memorandum, at 2. Accordingly, award was made to Serco as the lowest-priced, technically acceptable offer. AR, Tab 177, Final Award Decision Document, at 8.

On March 23, Jacobs was notified of the award to Serco and requested a debriefing. AR, Tab 179, Notice of Award, Mar. 23, 2018. The agency scheduled, but later cancelled, Jacobs' debriefing. AR, Tab 187, Email from Army to Jacobs, Mar. 28, 2018. The agency states that during its post-award conference with Serco on March 28, the agency became concerned that Serco did not include all required costs in its fully burdened rates, and that Serco may have believed that it could be reimbursed for these costs under the ODC CLINs. COS/MOL at 7; see also AR, Tab 191, Agency Memorandum for Review, Apr. 20, 2018, at 4. On March 29, the agency issued a stop work order to Serco. AR, Tab 189, Stop Work Order; see also Tab 190, Stop Work Order Extension. The Army concluded that it was necessary to reopen discussions and revise the solicitation to clarify the pricing instructions for fixed hourly rates, ODCs, and travel, and include FAR clause 52.212-4, Contract Terms and Conditions – Commercial Items Alternate I. COS/MOL at 8; AR, Tab 191, Agency Memorandum for Review, Apr. 20, 2018, at 5.

On April 25, the agency reopened discussions, issued RFTOP amendment 14, and solicited revised proposals. COS/MOL at 8. On April 26, Jacobs filed this protest.²

DISCUSSION

Jacobs argues that the agency's decision to reopen discussions and amend the RFTOP is inappropriate because it is intended to afford Serco an undeserved opportunity to correct errors and misjudgments in its proposal concerning burdened labor rates and ODCs that should have already disqualified Serco from the competition. Protest at 7. Jacobs further argues that the RFTOP was not ambiguous with respect to the costs to be incorporated in the fully burdened labor rates or ODC CLINs, and amendment 14 does not provide any additional information or clarify the instructions in a way that was not specified in the answers to questions provided in the prior RFTOP amendments. Id. at 8-9. Jacobs argues that the agency's initial evaluation should have concluded that Serco's proposal was unacceptable, and the agency should have therefore rejected Serco's proposal and made award to Jacobs as the only offeror to submit an acceptable proposal. Id. at 10-12. In addition, the protester argues that the agency is not required

² The awarded value of the task order at issue exceeds \$25 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts. 10 U.S.C. § 2304c(e)(1)(B).

to engage in discussions with offerors in a task order competition because the requirements regarding discussions in FAR part 15 do not apply, and the agency's discussions are unequal because they spoon-feed to Serco the elements of a compliant proposal.³ Comments & Supp. Protest at 5-7, 16-17.

The agency argues that its corrective action is reasonable and necessary to correct the flaws in the procurement and that the RFTOP contained a latent ambiguity that was not discussed or resolved prior to award. COS/MOL at 10-14. The agency argues that the RFTOP did not detail how offerors were to build their labor rates and the questions and answers (Q&As) provided in previous amendments did not provide the level of specificity as RFTOP amendment 14 to provide necessary clarity regarding what costs offerors should include in their fully burdened labor rates. Supp. COS/MOL at 1. Additionally, the agency argues that RFTOP amendment 14 added FAR clause 52.212-4, which is prescribed for time-and-materials and labor-hour contracts but was erroneously omitted from the RFTOP, and specifically tailored for this acquisition to--for the first time--specify the reimbursable ODCs. COS/MOL at 8, 10. The agency argues that its price evaluation was flawed because it failed to identify these issues, and as a result, the initial discussions were not meaningful, thereby obligating the agency to engage in additional discussions with offerors. Supp. COS/MOL at 5; COS/MOL at 11-13.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. The Matthews Group, Inc. t/a TMG Constr. Corp., B-408003.2, B-408004.2, June 17, 2013, 2013 CPD ¶ 148 at 5. As a general matter, the details of a corrective action are within the sound discretion and judgment of the contracting agency. See Rockwell Elec. Commerce Corp., B-286201.6, Aug. 30, 2001, 2001 CPD ¶ 162 at 4. Where the agency has reasonable concern that there were errors in the procurement, we view it as within the agency's discretion to take corrective action where the agency made the decision in good faith. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3. Where an agency has reasonable concerns that there were errors in the procurement, corrective action may appropriately include

³ To the extent we do not address certain arguments or variations of arguments presented during the course of the protest, we have considered all of the allegations and find that none provides a basis for sustaining the protest. In addition, Jacobs challenges aspects of the agency's initial evaluation of Serco's price proposal, for example, that the agency failed to identify risks associated with Serco's overtime pricing, or assess whether its proposed pricing was unbalanced. See Comments & Supp. Protest at 8-12. We decline to consider these challenges to the price evaluation since the agency's corrective action will result in a new price evaluation of the offerors' revised price proposals. The agency's corrective action renders these issues academic. We do not consider academic protests. See Ferris Optical, B-403012.2, B-403012.3, Oct. 21, 2010, 2010 CPD ¶ 265 at 1-2.

reopening discussions and requesting revised proposals before reevaluating. Hughes Network Sys., LLC, B-409666.3, B-409666.4, Aug. 11, 2014, 2014 CPD ¶ 237 at 3.

As noted, the RFTOP instructed offerors to provide a fully burdened labor rate for all the labor categories listed on the price matrix and stated that the burdened rates “shall include all direct, indirect, general and administrative costs and profit associated with the Labor Category.” RFTOP at 8. In response to multiple questions, the agency repeatedly declined to specify the allowances for OCONUS personnel that offerors should include in their fully burdened labor rates. Specifically, prior to award, the RFTOP was amended 13 times; four of the RFTOP amendments provided Q&As. AR, Tab 45, RFTOP amend. 5 Q&As; Tab 49, RFTOP amend. 7 Q&As; Tab 61, RFTOP amend. 11 Q&As; Tab 71, RFTOP amend. 13 Q&As. All four sets of Q&As included questions that raised concerns about unbalanced pricing--including questions relating to allowances that offerors were to provide for OCONUS personnel--and requested that the agency provide “plug” values for OCONUS allowances, define the specific labor regulations required for compliance in each OCONUS performance location, or define the specific allowances and benefits to be included in the offerors’ fully burdened labor rates.

In response to these questions, the agency repeatedly declined to provide plug values or definitions. For example, in response to the final question on the subject, the agency stated:

The [agency] will not provide plug numbers or additional guidance related to recruitment and retention pay, cost of living adjustments, country specific sponsorship requirements, hardship pay, danger pay, discretionary spending allowances, [housing] allowances, etc.... These costs should be incorporated into the offeror’s loaded labor rates. The Offeror shall comply with any/all applicable labor regulations within the places of performance [in accordance with Department of Defense Federal Acquisition Regulation Supplement (DFARS)] 252.225-7995 and DFARS 252.225-7040.

AR, Tab 71, RFTOP amend. 13 Q&As.

In addition, the RFTOP did not define what costs would be allowable under the ODC CLINs. Initially, the RFTOP stated as follows regarding ODCs:

The Government has provided surrogate numbers for ODCs (CLIN 000X). These values are for evaluation purposes only and are not to be changed. The Government provided surrogate numbers are inclusive of any Offeror’s applicable indirect rate adders. ODCs are defined in Attachment 1, [Performance Work Statement (PWS)].

RFTOP at 9. However, the PWS does not define or otherwise list with any specificity the costs allowable as ODCs under the ODC CLINs, and the only “definition” of ODCs in

the PWS, appears in the PWS' acronym list. AR, Tab 41, RFTOP amend. 5, attach. 0001, PWS, at 25.

When the agency reopened discussions after award, among other revisions, it issued RFTOP amendment 14 and added FAR clause 52.212-4, Contract Terms and Conditions--Commercial Items Alternate I, and tailored it to the acquisition by specifically listing the reimbursable ODCs. AR, Tab 203, RFTOP amend. 14, attach. 0003, Clause Addendum, at 9-10. RFTOP amendment 14 also revised Attachment 0004, Evaluation Factors for Award/Instructions to Offerors, to provide additional instruction regarding the price proposal. As it appeared in tracked changes, RFTOP amendment 14 stated:

6. ~~The Offeror shall enter fully burdened labor rates for the Base Period and each Option Year on the Price Matrix/Attachment 0002.~~ The Offeror shall enter a Fixed Hourly Rate for all the labor categories listed on the Price Matrix/Attachment 0002 of the RFTOP for the Transition Period, Base Period and each of the Option Years. The Fixed Hourly Rates shall include a fully burdened labor rate with all direct, indirect, general and administrative costs, recruitment/retention incentives and profit associated with the Labor Category. The Department of State Standardized Regulations (DSSR) set forth the allowances and benefits available to U.S. Government civilians assigned to foreign areas. Contractor civilians assigned to foreign areas may receive allowances and benefits up to those set forth in the DSSR, but shall not receive allowances and benefits in excess of those identified in the DSSR. The Fixed Hourly Rate shall include any costs the Offeror elects to pay for allowances and benefits identified in the DSSR such as Foreign Travel Per Diem, Cost-of-Living, Living Quarters, Post Hardship Differentials, Rest and Recuperation (R&R) Travel, and Danger Pay for each category of labor listed on the Price Matrix/Attachment 0002. Any costs not specifically identified as an ODC shall be included in the Fixed Hourly Rate.

* * * * *

- 4.2. Other Direct Costs (ODCs) (Cost Reimbursable): The Government has provided surrogate numbers for ODCs (CLIN 000X). These values are for evaluation purposes only and are not to be changed. The Government provided surrogate numbers are inclusive of any Offeror's applicable indirect rate adders. Only the types of Other Direct Costs (ODC) specifically listed in the contract at Attachment 0003 – Clauses, FAR 52.212-4, Alternate I, (i) (1)(ii)(D)(1), Other Direct Costs, shall be determined allowable and reimbursable to the Contractor. ~~ODCs are defined in Attachment 1, PWS.~~

AR, Tab 205, RFTOP amend. 14, attach. 0004, Evaluation Factors for Award/Instructions to Offerors, at 9-11.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. RELI Grp., Inc., B-412380, Jan. 28, 2016, 2016 CPD ¶ 51 at 6. Where there is a latent ambiguity, more than one interpretation of the provision may be reasonable, and the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. Harper Constr. Co. Inc., B-415042, B-415042.2, Nov. 7, 2017, 2018 CPD ¶ 47 at 4.

Amendment 13 provided some guidance about certain costs that should have been included in the offeror's loaded labor rates. However, it was not until amendment 14 that the agency specified in the RFTOP the allowances offerors were to include in their fully burdened labor rates and provided a list of allowable costs to be billed under the ODC CLINs by including FAR clause 52.212-4. Prior to amendment 14, an offeror could have reasonably interpreted the ODC CLINs to allow the inclusion of certain costs based on its standard practice and experience that the agency otherwise intended offerors to include in their fully burdened rates. Accordingly, we agree with the agency that the RFTOP contained a latent ambiguity and find reasonable the agency's decision to amend the RFTOP to provide the missing information to allow offerors to intelligently prepare their proposals.

We also find no merit in the protester's argument that the agency was not required to reopen discussions with Serco because the procurement is a task order competition. When conducting a competition under FAR § 16.505, agencies are required to provide contract holders with a "fair opportunity" to be considered for task or delivery orders. FAR § 16.505(b)(1). While FAR § 16.505 does not establish specific requirements regarding the conduct of discussions under a task or delivery order competition, exchanges occurring with contract holders of multiple award contracts in a FAR § 16.505 procurement, like other aspects of such a procurement, must be fair. Engility Corp., B-413120.3 et al., Feb. 14, 2017, 2017 CPD ¶ 70 at 6. Where, as here, an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness will, in large part, reflect the standards applicable to negotiated procurements. Technatomy Corp., B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 7. In this regard, discussions, when conducted, must be meaningful. SMS Data Prods. Grp., Inc., B-414548 et al., July 12, 2017, 2017 CPD ¶ 222 at 8.

Here, the record shows that Serco's initial (and final) price proposal included statements regarding certain costs for which it expected to be reimbursed under the ODC CLINs that were not included in its fully burdened labor rates. AR, Tab 87, Serco Initial Price Proposal, at 5-8 to 5-9; Tab 122, Serco Final Price Proposal Revisions, at 5-8 to 5-9. Only after its post-award conference with Serco, however, did the agency identify concerns with Serco's initial price proposal, and in its review of the price evaluation concluded that Serco's initial and final price proposals were not compliant with the

RFTOP. See AR, Tab 134, Addendum to Price Analysis Memorandum. None of the agency's prior discussions with Serco related to the ODC CLINs or the nature of the costs Serco included in its fully burdened labor rates. See, e.g., AR, Tab 110, Serco Discussions Letter, Feb. 21, 2018; Tab 116, Serco Discussions Letter, Feb. 26, 2018.

As our Office has explained, the fundamental purpose of discussions is to afford offerors the opportunity to improve their proposals to maximize the government's ability to obtain the best value, based on the requirement and the evaluation factors set forth in the solicitation. AT&T Gov't Solutions, Inc., B-406926 et al., Oct. 2, 2012, 2013 CPD ¶ 88 at 17. Where an agency has reasonable concern that there were errors in the procurement, the agency has discretion to take corrective action, which may include the amendment of a solicitation and the request for and evaluation of another round of final proposals where the agency made the decision in good faith, without the intent to change a particular offeror's technical ranking or to avoid an award to a particular offeror. Imagine One Tech. & Mgmt., Ltd., B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 24. The protester does not demonstrate that the agency's decision to open discussions with offerors during the corrective action was tainted by bad faith, such as a specific intent to direct the award to Serco or avoid award to Jacobs.

Accordingly, we find reasonable the agency's conclusion that to ensure a fair and impartial competition, and that discussions are meaningful, the agency should reopen discussions with offerors, amend the RFTOP, and solicit revised proposals. AR, Tab 191, Agency Memorandum for Record, Apr. 20, 2018; Tab 192, Second Addendum to Price Analysis Memorandum. On this record, we find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel