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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Hart Security Limited

File: B-400796.2

Date: December 16, 2008

Graham Kerr, Hart Security Ltd., for the protester.
Scott N. Flesch, Esq., Department of the Army, for the agency.
Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation amendment provided that a successful offeror must hold a facility security clearance in order to perform the solicitation requirements, and protester submitted a proposal responding to those requirements, protester's post-closing-date protest challenging the agency's amendment of the solicitation is not timely filed.
 2. Even if protest were timely filed, protester's complaint that agency delayed identification of the facility clearance requirement for 6 weeks following initial solicitation publication fails to state a basis for protest.
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DECISION

Hart Security Limited, of Nicosia, Cyprus, protests the actions taken by the Department of the Army, Joint Contracting Command -- Iraq, in connection with the amendment of solicitation No. W91GY0-08-R-0076, which sought security services related to the operation of forward operating base (FOB) Shield in Baghdad, Iraq.¹ Specifically, Hart protests that the agency failed to advise offerors, early in the procurement process, that an offeror must hold a facility security clearance, and that

¹ FOB Shield is located in the Rusafa District of Baghdad. The solicitation states that FOB Shield "is used as the garrison of International Police Trainers, International Police Liaison Officer, Department of State personnel, the Law and Order Task Force, and coalition forces." RFP, Performance Work Statement, at 54.

it improperly delayed identification of this requirement until after Hart had incurred certain proposal preparation costs.

We dismiss the protest.

The solicitation was first published on September 25, 2008 and, thereafter, was amended several times. Among other things, the solicitation provides that the contractor will provide personal security detachment services for the movement of personnel and equipment, elaborating that the contractor will be required to provide transportation for “dignitaries and prisoners,” along with equipment, “between FOB Shield, the courthouse, Rusafa prison, and other locations as required to support missions.” RFP at 54. The solicitation further provides that security services will be required in connection with “travel throughout the greater Baghdad Area,” as well as “travel throughout Iraq (Green area to Red area capability).” Id.

As initially issued, the solicitation did not provide that the successful offeror must hold a facility clearance, and the agency’s responses to questions regarding this matter were ambiguous. However, on November 7, 2008, the agency issued amendment No. 11, explicitly providing that a facility clearance will be required to perform the contract requirements.

On November 11, Hart’s chief administrative officer submitted an e-mail to the agency’s contracting officer, complaining that the agency should have advised parties of this requirement earlier in the procurement process.² Nonetheless, it is clear that Hart’s email did not constitute an agency-level protest since it does not identify any potential basis for concluding that inclusion of the requirement is improper, and merely queried whether the agency would “revoke its position.” Protest, encl. 1;³ see State Mach. Products, B-245427.2, Sept. 24, 1991, 91-2 CPD ¶ 272 at 2 (letter to agency that does not specify basis for protest is insufficient to constitute agency-level protest for purposes of timeliness rules).

Notwithstanding Hart’s clear understanding of the solicitation’s facility clearance requirement, as enunciated in the November 7 amendment, Hart submitted a proposal responding to the solicitation on or before the solicitation’s November 13

² The record indicates that Hart is not a U.S. corporation; accordingly, it may not be able to comply with the facility clearance requirement.

³ By email dated November 13, the agency responded, advising Hart that the agency would not revoke the requirement, explaining that the contract requirements at issue here contemplate that “certain positions [will] have access to classified information,” and further noting that, pursuant to Department of Defense security regulations, “for a contractor to be granted access to classified information or to be awarded a classified contract, it must obtain an FCL [facility clearance].” Id.

closing date. On November 17, Hart filed this protest with our Office, challenging the agency's actions prior to issuance of the solicitation amendment.

Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for submission of initial proposals must be filed before that time. Where alleged improprieties are subsequently incorporated into a solicitation, protests must be filed prior to the time set for the next submission of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (2008).

Here, Hart's protest fails to comply with our timeliness requirements. As noted above, Hart was notified on November 7 of the amended requirement for a facility clearance. Further, at that time, Hart was aware of the agency's prior responses to questions regarding this matter. Finally, although Hart expressed concern regarding the amended solicitation requirement, as well as its dissatisfaction with the agency's prior responses, Hart did not protest those matters prior to the November 13 closing time; rather, Hart submitted its proposal responding to the solicitation. On this record, Hart's November 17 protest to this Office is not timely filed.

Even if Hart's protest were to be considered timely, it fails to state a valid basis for consideration. In this regard, Hart's protest to our Office asserts that the agency "issued a defective solicitation"; complains that, by failing to identify the facility clearance requirement until 6 weeks after the solicitation was first issued, the agency misled potential offerors and/or failed to engage in adequate advance planning; and seeks recovery of the costs Hart incurred in preparing its proposal. Protest, Nov. 17, 2008.

Procuring agencies have an obligation to draft solicitations that reflect their actual needs. Federal Acquisition Regulation (FAR) § 15.203(a). Further, this obligation is ongoing, and a solicitation must be amended where, as initially issued, it fails to reflect the agency's actual requirements. FAR § 15.206(a); Global Solutions Network, Inc., B-298682.2, Dec. 10, 2007, 2007 CPD ¶ 223 at 3.

Here, nothing in Hart's protest suggests that the solicitation's inclusion of a facility clearance requirement is inconsistent with the agency's actual needs, or is otherwise contrary to applicable law or regulation. Accordingly, there is no basis for this Office to conclude that inclusion of this requirement rendered the solicitation "defective." Indeed, Hart's protest is based almost exclusively on the premise that the agency acted improperly in failing to identify the facility clearance requirement at an earlier point in the procurement process--specifically, before Hart had incurred proposal preparation costs.

Although agencies are obligated to engage in reasonable advance planning prior to conducting procurements, our Office has recognized that the specific activities associated with this requirement may vary from procurement to procurement, and that the obligation does not constitute a requirement that procurement planning be

perfect, that is, completely error-free. See, e.g., New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6; Sprint Communciations Co., LP, B-262003.2, Jan. 25, 1996, 96-1 CPD ¶ 24 at 9. Further, we have noted that not every flaw or irregularity in a given procurement process entitles an offeror to recover the expenses incurred in submitting a proposal. See, e.g., New Breed Leasing Corp.-- Recon., B-274201.2, B-274202.2, Apr. 7, 1998, 98-1 CPD ¶ 97 at 2; I.E. Levick and Assocs., B-218294.2, Apr. 12, 1985, 85-1 CPD ¶ 424 at 2.

Here, even if Hart's protest were timely filed, and even if we were to accept Hart's proposition that the agency should have responded more clearly to questions regarding the facility clearance requirement at an earlier point in the procurement process, in these circumstances, we do not view the 6-week delay in identifying this requirement as a valid basis for protest.

The protest is dismissed.

Gary L. Kepplinger
General Counsel